

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.2365 OF 2021

Hazianwar Abbahussain Poptiya And Others Petitioners

Versus

Firoz Habib Poptiya And Others Respondents

Mr. R.R. Karpe, Advocate for petitioners.

Mr. S.S. Kulkarni, Advocate for respondent Nos. 1 to 5.

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 10th OCTOBER, 2023

ORDER :

1. Petitioner is aggrieved by the order passed by learned Civil Judge, Senior Division, Shrirampur, below Exhibit-52 in Special Civil Suit No. 7/2017, thereby allowing the application filed by plaintiffs, under Order 6 Rule 17 of CPC.

2. Plaintiffs filed suit for partition and separate possession of ancestral suit properties, claiming that, they belong to Cutchi-Memon community and they are governed by Mohammedan law. In respect of inheritance they are governed by the provisions applicable to Sunni Muslim sect. Petitioners/defendants appeared and opposed the claim by filing written statement. Issues were framed by the Trial Court on

15.04.2019. Plaintiffs, thereafter filed application Exhibit-52 for amendment of plaint contending that they and defendants are Mohammedans. In fact, they belong to Cutchi- Memon community, which was converted into Muslim community prior to about 500 years. Though, they are Mohammedans their inheritance was decided as per provisions of Hindu law. They are residents of Maharashtra since many years and accordingly, they are governed by Hindu Succession Act. They therefore, want to incorporate pleadings mentioning applicability of Hindu Succession Act. This application was opposed by defendants by filing a detail say. Trial Court has allowed the application. This order is impugned in the present petition.

3. Heard the learned advocate for petitioners and learned advocate for respondents. Perused the memo of writ petition, annexures thereto, impugned order and the citations relied upon by petitioners.

4. Learned advocate for petitioners assailed the impugned order by relying on Vidyabai & Ors. vs. Padmlatha & Anr., 2009 (1) All.M.R. 471 and Bayabai vs. Bayabai, AIR 1942 Bom 328. He submits that application for amendment is not *bona fide* and it was filed after commencement of trial. The

impugned order passed by the Trial Court thereby allowing the amendment is without jurisdiction. He submits that entire nature of suit will change by the proposed amendment, therefore, impugned order is liable to be quashed and set aside.

5. Learned advocate for respondent Nos. 1 to 5 on the other hand supported the impugned order.

6. It is evident from the record that within three months from the date of framing of issues, amendment application is filed. Parties are yet to lead evidence. It is well settled that merits of the amendment cannot be gone into while considering the amendment application. By allowing the amendment, nature of the suit is not likely to be changed, the suit still remains the suit for partition and separate possession. The issue as to whether while effecting partition parties can be governed by Mohammedan law or by Hindu Succession Act, will have to be adjudicated by the Trial Court, on the basis of evidence led by the parties. No prejudice is likely to be caused to defendants by allowing the amendment. For belatedly filing amendment application and lack of due diligence Trial Court has imposed cost on plaintiffs.

7. In the light of ratio in Revajeetu Builders And Developers Versus Narayanaswamy And Sons And Others, 2009 SCC OnLine SC 1709, and Life Insurance Corporation of India vs. Sanjeev Builders Private Limited and Another, 2022 SCC OnLine SC 1128, it is well settled that Court must be extremely liberal in granting the prayer for amendment, if the Court is of the view that amendment is imperative for proper and effective adjudication of the case. In the present case, amendment is not causing prejudice to the other side, which cannot be adequately compensated in terms of money. Amendment permitted by the Trial Court, therefore cannot be faulted with.

8. There is no illegality or perversity in the order impugned in the present petition. Trial Court has not committed any jurisdictional error or error of law while passing the impugned order. Writ petition being devoid of merit is dismissed.

9. All the contentions of respective parties on merits are kept open.

[NITIN B. SURYAWANSHI, J.]