

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD  
WRIT PETITION NO.693 OF 2023**

CHANDANMAL RUPCHAND HIRAN DIED THROUGH LRS  
SUSHILABAICHANDANMAL HIRAN  
VERSUS  
NAZAMABEGUM SAYED SIKANDAR AND OTHERS

...  
Mr. Narendra D. Sonawane, Advocate for the Petitioners.  
...

**CORAM : SHARMILA U. DESHMUKH, J.  
DATED : 23<sup>rd</sup> JANUARY, 2023.**

**FINAL ORDER:-**

1. The petition challenges the order dated 05.02.2022 passed by the Adhoc District Judge-1, Vaijapur below Exhibit-49 in R.C.A No.41/2012, whereby petitioners' application for amendment of the plaint at the appellate stage came to be rejected.

2. R.C.A. No.41/2012 was preferred by the petitioners challenging the judgment and decree dated 27.11.2009 dismissing the Regular Civil Suit No.244/1996 instituted by the petitioners herein against the respondents. For the sake of convenience the parties are referred by the status before the Trial Court.

3. The plaintiffs and defendant nos.3 to 7 and defendant nos.9 to 12 are full blood brothers and sisters and defendant no.8 was their mother. Roopchand s/o Mulchand Hiran, who was the father of the plaintiffs and defendant nos.3 to 7 and defendant nos.9 to 12 expired in or about in the year 1971. It is the case of the plaintiffs that, after the death of their father the family and family property continued as a joint family and there was no partition by metes and bounds. An area of 7 acres out of the

agricultural land bearing Gut No.238 situated in Surala, Vaijapur was purchased out of the income of the joint family property in the name of the eldest son i.e. defendant no.3 and mutation entries were also effected in the name of defendant no.3 and taking undue advantage defendant no.3 sold the suit property i.e. Gut No.238 admeasuring 7 acres to defendant nos.1 and 2. The plaintiffs sought cancellation of the sale deed executed by defendant no.3 in favour of defendant nos.1 and 2 dated 13.08.1996 and for an order of perpetual injunction restraining defendant nos.1 and 2 from interfering in actual peaceful and legal possession of the plaintiffs.

4. In R.C.A. No.41/2012 an application came to be filed by the plaintiffs under Order VI Rule 17 of the Code of Civil Procedure seeking amendment of the plaint. By the said amendment the plaintiffs sought to include a pleading that their father Roopchand was the owner and possessor of Gut No.158 admeasuring 15 acres and that the suit land was purchased from the income of the joint family property. By way of an amendment, the plaintiffs also sought alternate prayer of partition and separate possession of their 1/5 share in the suit property and rights of preferential purchase under Section 22 of the Hindu Succession Act. An amendment in the prayer clause was sought seeking alternate prayer of partition and 1/5 share in the suit property. This application filed on 26.11.2019 was opposed by the defendants.

5. Heard the learned counsel appearing for the parties.

6. The suit bearing RCS No.244/1996 sought declaration of cancellation of the sale deed dated 13.08.1996 on the ground

that the suit land was purchased out of the joint family property. By judgment and decree dated 27.11.2009, the suit came to be dismissed and one of the issues in the said suit as to the suit property being an ancestral joint family property came to be answered in negative. After the finding on the specific issue as to the nature of the suit property, the petitioners are now seeking to amend the plaint to raise the same issue of partition and separate possession of the suit property as being ancestral joint family property, which cannot be permitted as the same would amount to reopening of the issues, which have already been concluded by the judgment and decree dated 27.11.2009. As far as the amendment sought regarding the preferential right under Section 22 of the Hindu Succession Act is concerned, the said right also presupposes the nature of the property to be a joint family property and once it is held that, the issue as to the nature of the property is concluded by the Trial Court, the said amendment also cannot be permitted.

7. It is trite that, the merits of the amendment are not required to be gone into, however, in the present case what the petitioners are seeking by way of an amendment is to reopen the issues, which are already been decided by the Trial Court. An amendment has been sought at the appellate stage and therefore, the proviso to Order VI Rule 17 of the Code of Civil Procedure is also applicable to the facts of the case, which has not been satisfied by the petitioners. Various decisions have laid down the proposition that all amendments which are necessary to decide the real question in controversy are to be liberally allowed. In the present case, the petitioners seek cancellation of the sale deed dated 13.08.1996 executed by defendant no.3 in favour of

defendant nos.1 and 2. In a suit for cancellation of the sale deed the petitioners are now seeking amendment to include a claim for partition and separate possession and exercise of a preferential rights. In my opinion, the said amendments are not necessary to decide the real question in controversy.

8. Considering the above, I do not find any reason to interfere with the impugned order dated 05.02.2022. Writ Petition stands dismissed.

**(SHARMILA U. DESHMUKH)**  
**JUDGE**

Devendra/January-2023