

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.4745 OF 2009

**CHAYABAI W/O BIRUDEO SURVASE
VERSUS
SARUBAI W/O DNYANDEO DESHMUKH AND OTHERS**

...
Advocate for Petitioner : Ms. Madheveshwari D. Thube Mhase
Advocate for Respondent Nos. 1 to 3 : Mr. Rajiv B. Deshmukh
...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 24th APRIL, 2023

PER COURT :

1. Being aggrieved by the order dated 06/04/2009, passed by learned Ad-hoc District Judge-2, Latur, below Exhibit-25 in Regular Civil Appeal No.86/2007, petitioner has filed the present petition under Article 226 and 227 of the Constitution of India.
2. Admitted position on record is that Regular Civil Suit No.785/2000 was filed by the petitioner against respondents defendants for declaration and possession. Defendants/respondents appeared in the suit and filed their written statement as well as counter claim. The plaintiff's suit is decreed and the counter claim filed by the defendants is dismissed by a separate decree.
3. Defendants challenged the judgment and decree dated 23/02/2007, passed in favour of plaintiff in R.C.S. No.785/2000, by

filing R.C.A. No.86/2007, before the District Court. Plaintiff opposed the appeal by filing say. The appeal was heard on merits and final arguments of both the parties were concluded. At this stage, application Exhibit-25 is filed by the defendants for amendment claiming that inadvertently challenge to the decree passed in counter claim remained to be mentioned in appeal memo filed by defendants, therefore, they may be allowed to amend the appeal memo and make prayer of challenging the judgment and decree passed in counter claim. Though plaintiff opposed this application, appellate Court has allowed the same by imposing cost. Hence, the present petition.

4. Heard learned advocate for petitioner and learned advocate for respondent Nos. 1 to 3. Perused the memo of writ petition, annexures thereto, impugned order and the citations relied upon by learned advocate for petitioner.

5. Learned advocate for petitioner has strenuously urged that impugned order cannot be sustained as at the fag end of hearing of appeal, time barred claim is allowed to be incorporated in the appeal memo which is contrary to the provisions of law. In support of her submission, she relied on *Banarsi and Others Vs. Ram Phal*, (2003) 9 SCC 606, and *Sri Gangai Vinayagar Temple and Another Vs. Meenakshi Ammal and Others*, (2015) 3 SCC 624.

6. On the other hand, learned advocate for respondent Nos.1 to 3 supports the impugned order.

7. Taking into consideration peculiar facts of the present case and the fact that appeal was finally heard and thereafter it seems that realising the mistake committed by defendants which was pointed out during the course of final arguments by the plaintiff, present application was moved by defendants. The appellate Court has allowed the application holding that, in fact, the defendants wanted to challenge whole verdict of the trial Court relating to the suit and counter claim. Therefore, amendment is justified. While making said observation the appellate Court has ignored the fact that appeal was filed in the year 2007 and the appeal has to be filed in terms of Order 41 Rule 1. The amendment application for incorporating challenge to the decree passed in the year 2007, is filed in the year 2009. In view of settled legal position that amendment is to be liberally allowed, no fault can be found with the order passed by the appellate Court, thereby allowing amendment application. Since appellate Court has exercised discretion in favour of respondents/defendants, this Court is not inclined to interfere in the impugned order in exercise of extraordinary writ jurisdiction.

8. The appellate Court shall decide the appeal

after hearing the parties in respect of prayer of setting aside the decree of counter claim, by taking into consideration all the legal challenges including, whether the said claim is time barred or not, by framing necessary issue in that regard, within two months from the date of receipt of writ of this order.

9. Needless to state that this Court has not expressed any opinion on the merits of the matter and respective contentions of both the sides are kept open, to be decided by the appellate Court. With these directions, writ petition is disposed of.

(NITIN B. SURYAWANSHI, J.)