

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

WRIT PETITION NO.3902 OF 2021

**BALU RADHAJI BERAD AND OTHERS
VERSUS
ANUSAYA W/O SHRIDHAR BERAD AND OTHERS**

...
Advocate for Petitioners : Mr. Sandip R. Andhale
Advocate for Respondent No.1 : Mr. Y.V. Kakade
...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 24th MARCH, 2023

PER COURT :

1. Petitioners are aggrieved by the order dated 27/02/2020, passed by 7th Civil Judge, Senior Division, Ahmednagar, below Exhibit-260 in R.C.S. No.766/2012, thereby allowing application filed by the respondents/plaintiffs, under Order 6 Rule 17 of the Code of Civil Procedure.

2. In the suit filed by respondents/plaintiffs for partition, separate possession and declaration, it is claimed that the suit properties are ancestral properties. After the evidence was led in the suit and the matter was argued finally, application Exhibit-260 is filed seeking amendment, thereby correcting the Gut numbers and mentioning share of original person i.e. Radhaji Berad in some of the suit properties. It is further claimed that, after amendment plaintiffs do not want to lead evidence. Plaintiffs also claimed 1/3rd

share by way of amendment. The said application is allowed. Petitioners are aggrieved by the said order.

3. Heard learned advocate for petitioners and learned advocate for respondent No.1. Perused the grounds raised in the petition, annexures thereto and the impugned order, so also, the affidavit-in-reply filed by respondent No.1.

4. Learned advocate for petitioners in support of his submissions has relied on *Vidyabai and Others Vs. Padmalatha and Another, (2009) 2 SCC 409*.

5. From the proposed amendment, it is clear that nature of the suit is not likely to be changed. The amendment is necessary for determining real questions in controversy between the parties. Plaintiffs have already averred in their application for amendment that they do not want to lead evidence after carrying out the amendment. Amendment is not likely to cause prejudice to the other side, which cannot be compensated adequately. On the other hand, refusing the amendment would, in fact, lead to injustice. Since proposed amendment constitutionally or fundamentally does not change nature and character of the suit, in the facts of the present case, this Court is of the considered view that trial Court was justified in allowing the amendment application. For lack of due diligence on the part of plaintiffs, cost of Rs.2,500/- is imposed on

them, while allowing the amendment.

6. In *Vidyabai and Others* (supra), the Hon'ble Apex Court has held that proviso to Order 6 Rule 17 is couched in a mandatory form and the Court's jurisdiction to allow such an application is taken away unless conditions precedent therefor are satisfied viz. it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of trial.

7. The trial Court has rightly allowed the application by placing reliance on *Revajeetu Builders and Developers Vs. Narayanswamy and Sons and Others*, (2009) 10 SCC 84.

8. In that view of the matter, in the peculiar facts of the present case, trial Court has rightly exercised discretion in favour of the respondents/plaintiffs. There is no illegality or perversity in the order impugned in present petition. Writ petition being devoid of merit is dismissed.

9. Taking into consideration the fact that application is filed at the fag end of the trial, impugned order is modified to the effect that plaintiffs shall pay cost of Rs.7,500/-, in addition to the cost of Rs.2,500/- already deposited by the plaintiffs.

(NITIN B. SURYAWANSHI, J.)