

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

WRIT PETITION NO. 13508 OF 2017

Chandrakant S/o Ramdas Jape,
Age : 62 Years, Occu. : Agril.,
R/o Kokamthan, Tq. Kopergaon,
Dist. Ahmednagar.

.. Petitioner

Versus

1. Ashok S/o Ramdas Jape,
Age : 54 Years, Occu. : Agril.,
R/o Kokamthan, Tq. Kopergaon,
Dist. Ahmednagar.
2. Dr. Ravindra S/o Ramdas Jape,
Age : 49 Years, Occu. : Medical Practitioner,
R/o House No. 9, Narhari Garden,
Gadiya Vihar Road, Shahnoorwadi,
Aurangabad, Tq. & Dist. Aurangabad.
3. Sanjay S/o Ramdas Jape,
Age : 44 Years, Occu. : Agril.,
R/o Kokamthan, Tq. Kopergaon,
Dist. Ahmednagar.
4. Sou. Heerabai W/o Subhash Khadke,
Age : 46 Years, Occu. : Household,
R/o Behind Saishradha Housing
Society, Wagh Vasti, Shirdi,
Tq. Rahata, Dist. Ahmednagar.
5. Sou. Parighabai W/o Ramdas Jape,
Age : 64 Years, Occu. : Agril.,
R/o Kokamthan, Tq. Kopergaon,
Dist. Ahmednagar.
6. Ramdas S/o Dashrath Jape,
Since deceased
(Legal heirs respondent Nos. 1 to 4.) .. Respondents

Shri Rahul R. Karpe, Advocate for the Petitioner.
Shri Vikram R. Dhorde, Advocate for the Respondent No. 2.
Shri Rajendra L. Kute, Advocate for the Respondent No.5.

CORAM : SHARMILA U. DESHMUKH, J.
DATE : 24TH JANUARY, 2023.

JUDGMENT :

. Rule. Rule made returnable forthwith. With the consent of parties taken up for final hearing.

2. The challenge in the petition is to the order dated 26th October, 2017 passed below Exhibit 01 and order dated 31st October, 2017 passed below Exhibit 588 in R.C.S. No. 67 of 1998.

3. The facts of the case are required to be set out in detail for consideration of the controversy in issue. For the sake of convenience, the parties are referred to by their status before the Trial Court.

4. The petitioner herein was initially arrayed as the defendant No. 1 in R.C.S. No. 67 of 1998 filed by the original plaintiffs Parigabai and her husband Ramdas against their four sons and a daughter, for partition of the suit property. The suit was contested by defendant No. 1, defendant no 2 and defendant no 5, whereas the defendant Nos. 3 and 4 supported the case of the plaintiffs. During the pendency of the suit the plaintiff No. 2/ Ramdas expired and an application came to be filed below Exhibit 59 by the defendant No. 1 for transposition as plaintiff being the legal representative of the deceased plaintiff No. 2. This application below Exhibit 59 came to be allowed by order of the Trial Court dated 07th August, 2013 with a condition that he

shall not be permitted to amend or take a different stand different from the pleadings in the plaint of R.C.S. No. 67 of 1998 for the reason that the original plaintiffs had claimed partition, whereas the defendant No. 1 had taken exactly opposite stand. The order of the Civil Court dated 07th August, 2013 came to be challenged by the parties by preferring Writ Petition No. 936 of 2014, which came to be filed by the defendant No. 1 and Writ Petition No. 672 of 2014 filed by the defendant Nos. 3, 4 and 5. As far as Writ Petition No. 936 of 2014 is concerned, the petitioner therein i. e. the defendant No. 1 was aggrieved by the conditions which were imposed by the Civil Court while granting the application for transposition, whereas the Writ Petition No. 672 of 2014 was preferred by the defendant Nos. 3 to 5 being aggrieved by the order permitting transposition of the defendant No. 1 as plaintiff No. 3. This Court by order dated 19th January, 2015 in Writ Petition No. 672 of 2014 passed the following order.

. With the consent of the parties, heard finally.

2. Defendant No.1 to Regular Civil Suit No. 67 of 1998, a suit for partition moved an application at Exhibit-59 before learned 2nd Joint Civil Judge, Junior Division, Kopargaon for transposing him as plaintiff after death of plaintiff No.2 Ramdas. The said application is granted by learned trial Judge by an order dated 07/08/2013.

2. Present petitioners have questioned the said order on the count that the provisions of Order 22 Rule 2 and 3 of Civil Procedure Code are not complied with, as right to sue survives in plaintiff No.1 and if defendant No.1 has sought transposition in the capacity of legal heir of father i.e. plaintiff No.2, the provisions of Order 22 Rule 3 of Code of Civil Procedure should have been followed.

3. He submits that in view of non compliance of the said provisions, the impugned order is not sustainable. In addition to above, learned Counsel for the petitioners has invited my attention to the written statement filed by the petitioners. According to

them, respondent No. 2 herein, who has sought transposition has taken contradictory plea thereby destroying the case of present petitioners and as such, transposition sought for by him ought not to have been permitted.

4. Learned Counsel for respondent Nos. 1 and 2, while opposing the said submissions, urged that transposition in a suit for partition is always permissible having regard to the settled position of law that the parties to a suit for partition are always plaintiffs irrespective of their status described in the plaint. He has placed reliance upon the decision of this Court in the matter of Subhaschandra s/o Badrinarayan Lahoti vs. Nandkishor s/o Badrinarayan Lahoti and others (Civil Revision Application No. 152 of 2010) decided on 06/09/2012. According to him, for the purpose of transposition the provisions of Order 22 of Civil Procedure Code are not applicable, hence present proceedings are not sustainable. As such, he submits that present writ petition is liable to be rejected. He further urged that no objection was raised to the said application seeking transposition before the learned trial Court. The grounds sought to be raised are by way of afterthought.

5. Having considered the rival contentions of the parties, it is required to be noted that position of law qua suit for partition as is cited by learned Counsel for respondent Nos. 1 and 2 is not in dispute. The parties to the partition suit could always be termed as applicants-claimants irrespective of their status described in the cause title of the plaint.

6. It is also required to be noted that objection that is sought to be raised in the present proceedings i.e. non compliance of Order 22 Rule 2 and 3 of Code of Civil Procedure is concerned, said objection was not raised before the trial Court by present petitioners. Apart from that, when it comes transposition under Order 1 Rule 10 of Code of Civil Procedure, said provision has hardly any applicability.

7. In that view of the matter, no case for interference in extraordinary writ jurisdiction of this Court, is made out. The writ petition sans merit, hence it fails and stands dismissed.

5. This Court by an order of even date in Writ Petition No. 936 of 2014 passed following order.

. In view of order passed in Writ Petition No. 672 of 2014, the order impugned dated 07/08/2013 to the extent of amendment,

sought by the petitioner is not sustainable. As such, writ petition is allowed. The petitioner is permitted to carry out amendment within four weeks from today.

2. At this stage, joint request is made that Regular Civil Suit No. 67 of 1998 is pending for last more than around 17 years and therefore, hearing of the suit can be expedited.

3. In view of above joint request, learned trial Judge is directed to decide the suit in question, as expeditiously as possible, in any case preferably within a period of one year from receipt of the copy of this order.

6. After transposition as plaintiff No. 3, an application for amendment of plaint below Exhibit 76 was filed by the Plaintiff No 3-(original :defendant No. 1), which came to be rejected by the Trial Court, as against which writ petition bearing Writ Petition No. 10013 of 2014 came to be filed. In Writ Petition No. 10013 of 2014, the defendants filed their affidavit in reply opposing the amendment. By order dated 19th January, 2015, this Court disposed of the petition allowing the amendment sought by the defendant No. 1 vide Exhibit 76, which is reproduced below.

. Transposed plaintiff No.2-legal heir of original plaintiff No. 2 has moved an application Exhibit-76 under Order 6 Rule 17 of Code of Civil Procedure in Regular Civil Suit No. 67 of 1998 for partition and separate possession, which came to be rejected by learned 2nd Joint Civil Judge, Junior Division, Kopagaon, by an order dated 05/12/2013. As such, present writ petition.

2. Learned Counsel for petitioner-plaintiff No.2 submits that the order impugned rejecting the application is liable to be upset on two grounds; (a) that after transposition as plaintiff from defendant in the suit for partition, he has every right not to claim amendment to the plaint and (b) amendment is necessary for the purpose of adjudicating rights of the parties to the suit, more particularly in partition suit. According to him, the trial in the suit is yet to begun though issues are framed, as such application should have been granted. In addition to above, he submits that cause cited for rejection is about merits of the amendment application and merits of the suit.

3. Mr. Shirsath, learned Counsel for respondents-defendants while strongly opposing the said application has invited my attention to the fact that the plaintiff No. 2 has sought to incorporate the entire written statement in the plaint. According to him, if same is granted, it will change the entire nature of the claim in the suit for partition. He has further invited my attention to the nature of pleadings made in the amendment application and submits that those are beyond the scope of Regular Civil Suit No. 67 of 1998 i.e., suit for partition. According to him, the application is rightly rejected by learned trial Court, and as such, prayed for dismissal of the writ petition.

4. After considering the contentions raised by rival parties, it is noticed that the reason cited for rejection of the application for amendment of plaint by learned trial Court is contradictory pleas taken out by present plaintiff in the written statement. Even if presuming that there are contradictory plea set up by plaintiff by virtue of amendment to be carried out in the plaint, in my opinion, same is permissible in view of the settled position of law as it is for learned Court below to decide such contention on its own merits having regard to the evidence and legal position on merit. Just because in the application for amendment, certain alternate pleas are raised, that cannot be ground, in my opinion, for rejection of the application for amendment as contention thereof can be gone into at the time of deciding the suit on merit.

5. One more aspect of which this Court must take note that the nature of claim before the Court is for partition and status of the parties is that of real brothers. There are other matters which are pending before Court, in relation to the suit properties bearing Regular Civil Suit Nos.248 of 1998 and 84 of 1997. Though further proceedings in these suits are stayed under section 10 of Code of Civil Procedure, however cannot lost sight of the fact that the counter claim preferred in Regular Civil Suit No. 247 of 2011 was granted by the Court on 04/04/2013, which has some colour of amendment sought in present suit.

6. In that view of the matter, in my opinion, learned Court below by rejecting the application for amendment has prejudiced the rights of the petitioner-plaintiff. The law on the issue as regards grant of amendment is well settled.

7. In view of above, the impugned order dated 05/12/2013 is not sustainable and as such, same is set aside. Amendment sought by present petitioner vide Exhibit-76 stands allowed subject to payment of costs of Rs.5,000/- (Rs. Five thousand only) to be paid within period of four weeks from today before trial Court. Payment of cost is condition precedent.

8. The writ petition stands disposed of, in above terms.

7. Pursuant to order of this Court, the plaint came to be amended by the Plaintiff No 3. Noticing the difficulty which would be experienced in conducting the trial as the stand of the Plaintiff No 3 is contrary to the stand taken in the original plaint to which there is no consent of Plaintiff No 1 and separate evidence will be adduced by the plaintiff No. 1 and the plaintiff No. 3, the cross examination of the defendants' witness by the plaintiff No. 1 will support her case of partition and by the plaintiff No. 3 will support his case of previous partition, which will result in a conflict and another difficulty that was noticed by the Trial Court was that the plaintiff No. 1 may ask for taking cross examination of the plaintiff No. 3 and vice versa. Anticipating the difficulties that will arise while adjudication, the Trial Court *suo motu* by order dated 26th October, 2017 directed the plaintiff No. 3 to keep the Plaintiff No 1 present Court and to submit an affidavit of the plaintiff No. 1 confirming that the amendment carried out below Exhibit 76 are acceptable to the plaintiff No. 1 and further directed the Plaintiff No 3 to sign the plaint accepting the pleadings in the original plaint and to file an Affidavit in consonance with the pleadings in the original plaint duly verified in accordance with the provisions of Order VI Rule 15 of the Code of Civil Procedure.

8. Review of the order of 26th October, 2017 was sought by the plaintiff No. 2 by preferring review application below Exhibit 588, which came to be rejected by order dated 31st October, 2017, which is also impugned in the present writ petition.

9. Petition has been opposed by the Respondent Nos 1 to 4 through their Affidavit in reply.

10. Heard Mr. R. R. Karpe, learned counsel appearing for the petitioner, Mr. V. R. Dhorde, learned counsel appearing for the respondent No. 2 and Mr. R. L. Kute, learned counsel appearing for the respondent No. 5.

11. Mr. Karpe has taken this Court through the history of the litigation and in particular through the orders of this Court dated 19th January, 2015 passed in Writ Petition No. 672 of 2014, Writ Petition No. 936 of 2014 and Writ Petition No. 10013 of 2014. He would submit that once this Court had permitted the plaintiff No. 3 to carry out the amendment in accordance with his application below Exhibit 76, the Trial Court cannot impose the condition of seeking consent of Plaintiff No 1 or to file the Affidavit accepting the pleadings in the original plaint. He would further submit that this Court has considered the arguments of the defendants in Writ Petition No. 672 of 2014 that the plaintiff No. 3, who had sought transposition, had taken contradictory pleas which destroys the case of the plaintiffs. He would further submit that while considering the amendments below Exhibit 76, this Court in Writ Petition No. 10013 of 2014 has held that even if presuming contradictory pleas are set up by the plaintiff No. 3 by virtue of amendments carried out in the plaint, same is permissible in view of settled position of law as it is for the learned Court below to decide such contention on its own merits having regard to the evidence and legal position on merits. He would further submit that the order of the Trial Court below Exhibit 588 misinterprets the three orders of the

High Court of 19th January, 2015.

12. *Per contra*, learned counsel appearing for respondents submit that by virtue of the plaintiff No. 3 taking a contradictory stand, a deadlock would be created. He would further submit that transposition of the plaintiff No. 3 and the amendments which were permitted to be carried out by the plaintiff No. 3 have resulted in chaotic situation, where plaintiff No. 1 and the plaintiff No. 3 are being represented by different counsel in the Trial Court and different case is being put forward in the plaint by the plaintiff No. 1 and the plaintiff No. 3, which is impermissible in law. He would further submit that, considering the situation, the order passed by the Trial Court directing the plaintiff No. 3 to obtain the consent of the plaintiff No. 1 to the amendments and to file an Affidavit accepting the original pleadings would help in resolving the deadlock and as such cannot be faulted with. Learned counsel appearing for the respondent No. 5 has relied upon the decisions of this Court in the case of **Venkatrao A. Pai and Sons Ltd. Vs. Narayanlal Bansilal and others** reported in ***AIR 1961 Bombay 94*** and in the case of ***Krishnabai C. Kadam and others Vs. Well Worth Developers and others*** reported in ***2000(4) Mh. L. J. 532***.

13. Considered the rival submissions of the parties.

14. The issue that arises for determination is once this Court permitted amendments proposed by the Plaintiff No 3, which were admittedly contrary to the pleadings in the original plaint, the conditions imposed by the Trial Court of obtaining the consent of the Plaintiff No 1 and directing the Plaintiff No 3 to

sign the plaint accepting the pleadings in the original plaint and to file an Affidavit in consonance with the pleadings in the original plaint duly verified in accordance with the provisions of Order VI Rule 15 of the Code of Civil Procedure is legally sustainable or not. For the reasons indicated hereinafter, I am of the opinion, that the conditions imposed by the Trial Court are not legally sustainable. The decisions relied upon by the Learned Counsel for Respondents does not assist the case of the Respondents. As regards the decision in the case of Krishnabai Kadam (supra), the decision is not helpful to the Respondents as the issue as regards inconsistent pleas by the Plaintiffs stood concluded by order of this Court dated 19th January, 2015. The decision in case of Venkatrao Pai(Supra) deals with the issue of representation by one counsel for the co-plaintiffs, which is not relevant for deciding the issue in the present case.

15. To answer the issue, it is necessary to refer to the orders of this Court permitting firstly the transposition of the Defendant No 1 as Plaintiff No 3 and secondly the amendments to the plaint. This Court, after noticing that the stand of the defendant No. 1 is contrary to the case of the original plaintiffs, noted the position in law that in suit for partition the parties to the partition are termed as applicants-claimants irrespective of their status described in the cause title of the plaint and permitted the transposition of Defendant No 1 as Plaintiff No 3 by rejecting Writ Petition No. 672 of 2014 and allowing Writ Petition No. 936 of 2014. Another round of litigation challenging the order below Exhibit 76, wherein a condition was imposed by the Trial Court that contradictory plea cannot be taken by way of an amendment in the plaint was turned down by this Court in Writ Petition No.

10013 of 2014 by holding that even if presuming there are contradictory pleas set up by the plaintiff by virtue of amendment in the plaint, same is permissible in view of the settled position in law. The orders of this Court were not challenged before the Apex Court and have attained finality.

16. The impugned order of 26th October, 2017 imposes conditions on the Plaintiff No 3 in respect of the amendments sought by the Plaintiff No 3. The controversy had arisen by virtue of the condition which was imposed by the Trial Court while deciding the application below Exhibit 59, which was passed on 07th August, 2013 permitting transposition with the condition that the plaintiff No. 3/petitioner shall not be permitted to amend or take different stand other than what is there in the plaint R.C.S. no. 67 of 1998. While deciding the validity of the order below Exhibit 59, this Court in Writ Petition No. 672 of 2014 has specifically considered the rival contentions of the respondent Nos. 2 to 5 that the petitioner is taking a contradictory plea and after considering rival contention had permitted the transposition. In that view of the matter as far as transposition is concerned, the said issue stood concluded. In Writ Petition No. 936 of 2014, which was filed by the petitioner challenging condition imposed while allowing the application for transposition, this Court in view of the order passed in Writ Petition No. 672 of 2014 held that the order impugned dated 07th August, 2013, to the extent of amendment, sought by the petitioner was not sustainable and as such permitted the petitioner to carry out the amendment.

17. In my view, once this Court had set aside the condition

imposed by the Trial Court that the plaintiff No. 3 shall not be permitted to amend or take different stand other than what is there in the plaint R.C.S. no. 67 of 1998, the issue stood concluded and the Trial Court could not impose further conditions of obtaining consent of Plaintiff No 1 to the amendment and filing of Affidavit accepting the pleadings of the original Plaint.

18. In Writ Petition No. 10013 of 2013, this Court in paragraph 3 of the order dated 19.01.2015 noted the contention of the learned counsel for the respondents that the petitioner is seeking to incorporate the entire written statement in the plaint and as such it will change the entire nature of the claim in the suit for partition. This Court after considering the contention has held that even if there are contradictory pleas set up by virtue of the amendment, the same is permissible in view of the settled position of law. What is relevant is to note the subsequent observations of this Court that it is for the trial Court to decide such contention on its own merits having regard to the evidence and legal position and that an application for amendment cannot be rejected on the ground of certain alternate pleas as contention thereof can be gone into at the time of deciding the suit on merits. The Trial Court while passing the *suo motu* order dated 26.10.2017 has relied on the said observations and has held that this Court had observed that it is for the learned Court below to decide such contentions on its own merits having regard to the evidence and legal position and as such passed the impugned order dated 26th October, 2017. In the order passed under review, the Trial Court has held that the orders of this Court did not permit the petitioner to take an

alternate plea by way of amendment without consent of the plaintiff No. 1. I am afraid that the orders of this Court and in particular the order passed in Writ Petition No. 10013 of 2013 did not lay down any such condition of obtaining the consent of the respondent No. 5 i. e. original plaintiff No. 1. The Trial Court has further observed that neither party has raised a grievance that the application for amendment was only signed by the plaintiff No. 3 and plaintiff No. 1 had not consented for it and that this Court in Writ Petition No. 672 of 2014 did not permit the petitioner to deviate from the original contentions of the plaint, but it only granted permission to pray for amending the plaint by taking alternate pleas.

19. Considering the order dated 19.01.2015 passed in Writ Petition No. 10013 of 2013, in my view, the issue was no *longer res-integra* and this Court in categorical terms had permitted the petitioner to take contradictory pleas, which included the plea which was taken by the petitioner in the written statement. This Court held that same was permissible in view of the settled position in law and held that while deciding such contentions on its own merits, the evidence and the legal position on merits can be considered by the Trial Court, meaning thereby that the said contentions have to be decided on the basis of the evidence led in support of the contentions and considering the legal position on merits.

20. The difficulty which the Trial Court anticipates in adjudicating the issues cannot be resolved by directing the petitioner to obtain the consent of the plaintiff No. 1 to the amendment below Exhibit 76, when that issue stood concluded

by order of this Court of 19th January, 2015. Once this Court permitted the amendment, which admittedly were contrary to the stand taken by the Plaintiff No 1 in the original plaint, further conditions cannot be imposed by the Trial which will have the effect of setting at naught the orders of this Court permitting the amendment. For purpose of resolving the deadlock, the Trial Court cannot now seek to impose conditions as regards the amendments permitted below Exhibit 76. It is for the Trial Court to consider the objections, if any, raised to the evidence led by the Plaintiff No 3 and the amendment cannot be subject to conditions as sought to be done in the present case.

21. For the reasons above, the impugned order dated 26th October, 2017 and the order dated 31st October, 2017 are hereby quashed and set aside. The writ petition stands allowed. Rule is made absolute in above terms. There shall be no order as to costs.

[SHARMILA U. DESHMUKH, J.]

bsb/Jan. 23