

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

WRIT PETITION NO. 14315 OF 2023

Nandaranibai w/o Harinarayan Jaiswal
Deceased, through her LRs.

1. Padma w/o Shivnarayan Jaiswal
2. Kanchan w/o Badriprasad Jaiswal
3. Nutan w/o Gangaprasad Jaiswal

...Petitioners

Versus

Laxminarayan s/o Mohanlal Jaiswal
Deceased, through his LRs.

1. Kamlabai wd/o Laxminarayan Jaiswal
Deceased, through her LRs.
2. Malati w/o Ramkishan Jaiswal
Deceased, through her LRs.
- 2(i) Manish s/o Ramkishan Jaiswal
- 2(ii) Girish s/o Ramkishan Jaiswal
- 2(iii) Kavita w/o Sunil Modi
- 2(iv) Sneha w/o Dharmesh Jaiswal
3. Mangala Jivan Modi
4. Rekha w/o Ajit Jaiswal
5. Rajendra s/o Laxminarayan Jaiswal
6. Chandrashekhar s/o Laxminarayan Jaiswal
7. Jayshree w/o Mahesh Jaiswal
8. Rajashree w/o Jansevak Jaiswal
9. Vivek s/o Laxminarayan Jaiswal
10. Sushma w/o Ashok Jaiswal

...Respondents

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Advocate for Petitioners : Mr. Ruchir Subodh Wani
Advocate for the Respondents : Mr. S. V. Adwant

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CORAM : SHAILESH P. BRAHME, J.**DATE : 9th NOVEMBER 2023****PER COURT :**

. Heard the learned Counsel for both the sides finally at the admission stage.

1. The petitioners are aggrieved by the order dated 02.03.2023 passed below Exhibit-34 in Regular Civil Appeal No.269/2019. The petitioners are the original plaintiffs and the respondents are original defendants. The impugned order is passed in Regular Civil Appeal No.269/2019.

2. The respondents have filed RCS No.58/2009 for possession. After contest, it was dismissed on 03.09.2019. Being aggrieved, they preferred RCA No.269/2019. At the appellate stage, different applications are filed by the parties and they are decided.

3. The application at Exhibit-25 is filed under Order 41 Rule 27 of the Civil Procedure Code by the respondents. The application at Exhibit-27 is filed for amendment to plaint under Order 6 Rule 17 of CPC by the respondents. The petitioners orally and thereafter by application at Exhibit-34 prayed that above applications be decided alongwith final hearing of appeal. Instead of deciding application at Exhibit-34 either way, the learned Judge rejected application (Exhibit – 25 and 27) of the respondents.

4. The mistake which is apparent on record is brought to the notice of the Court by the petitioners by filing application at Exhibit-42. By order dated 21.10.2023, application at Exhibit-42 was allowed and the operative part clause no.1 is rectified by rejecting application (Exhibit-34). Thus the application (Exhibit-34) of the petitioners stood rejected.

5. The learned Counsel for the petitioners submits that due to rejection of application (Exhibit-34), there is apprehension that application (Exhibit-27) would be decided at interlocutory stage. The decision of application Exhibit-25 and 27 are interdependent. It is urged by the learned Counsel for the petitioners that both the applications need to be decided alongwith main appeal. He submits that the things which are not permissible directly cannot be done indirectly.

6. The learned Counsel for the petitioners submits that the Lower Appellate Court committed perversity in commenting upon the deprivation of the right of the parties to challenge before higher forum. The findings recorded by the learned Judge in paragraph no.16 is stated to be unwarranted. He would further draw my attention to paragraph nos. 3, 9, 15 of the application (Exhibit-25) which are self-contradictory. He apprehends prolonging of the appeal if application (Exhibit-27) is decided prior to final hearing of the appeal. He further submits that he did not pray for decision of application at Exhibit-25 and 27 together.

7. Per contra, learned Counsel for the respondents supports impugned order. He submits that the Order 6 Rule 17 of CPC empowers the Court to permit the amendment at any stage of the proceeding. According to him, there is no inhibition that application for amendment submitted in the Appellate Court be decided at the time of final hearing. He further submits that the petitioners are presenting imaginary apprehension. He further submits that if the prayer of the petitioners is granted then the respondents will be deprived of valuable right. As the impugned order is in the interest of the litigating parties, no interference is called for.

8. I have considered the rival submissions of the parties. The respondents have submitted application (Exhibit-25) under Order 41 Rule 27 of CPC. As per the dictum of the Supreme Court laid down in the matter of Union of India (UOI) Vs. Ibrahim Uddin and Another, AIR (SCW) 2752, the application for additional evidence has to be decided alongwith the main appeal. Neither the litigating parties, nor the Court has any choice in that regard. The Lower Appellate Court has rightly observed in paragraph no.11 of the impugned order.

9. Unlike that of application under Order 41 Rule 27 of CPC, there is no dictum of any Court or inhibition in the Code of Civil Procedure that application under Order 6 Rule 17 be decided at the time of final hearing. It is the discretion of the Appellate Court when to decide such application. At interlocutory stage in appeal, the application can be considered and decided. In view of this legal position, a party

cannot insist to decide the application at Exhibit-27 with the final hearing of appeal. The apprehension expressed by the petitioners appears to be axiomatic and imaginary.

10. The Lower Appellate Court is justified in passing order dated 21.10.2023 below Exhibit-42. The apparent inconsistency in the operative part of the order dated 02.03.2023 has been removed by order dated 21.10.2023. The inferences which the petitioners are drawing and put-forth before this Court in the form of submission are unacceptable.

11. The learned Appellate Judge has rightly dealt with the parameters of Order 41 Rule 27 and Order 6 Rule 17 of CPC in paragraph no.14 of the impugned order. Further finding recorded in paragraph no.15 and 16 are not detrimental to the litigating parties. The learned Judge has rightly safeguarded the remedies of the parties. The impugned order is thus legal and appropriate. I find that no case is made out by the petitioners to upset impugned order.

12. The writ petition is disposed of with a clarification that application at Exhibit-27 be decided at the time of final hearing of appeal and the consideration of application at Exhibit-25 is left to the discretion of the Lower Appellate Court.

[SHAILESH P. BRAHME, J.]