

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9775 OF 2019

Nivrutti Ramchandra Gengaje and Ors. ... Petitioners
Versus
Sugandhabai Chandrakant Gengaje and Anr. ... Respondents

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Mr. Samir M. Suryawanshi for the Petitioners.
Mr. U.B. Nighot for the Respondent Nos.1 and 2.
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CORAM : SHARMILA U. DESHMUKH, J.

DATE : July 04, 2023.

P. C. :

1. Heard.
2. By this petition, the challenge is to the order dated 11th April, 2019 passed in RCS No.85 of 2012 rejecting the Petitioners' application for amendment of the plaint. The Petitioners-plaintiffs had filed RCS No.85 of 2012 on 20th June, 2012 seeking declaration of ownership and a declaration that the sale deed dated 26th June, 2000 executed by the deceased-Sakhubai Bhagu Gangaje is void, as she had no right in the suit property, which was Survey No.217, Hissa No.1 admeasuring 6 H 26 R i.e. gut No.1008, admeasuring 2 H 69 R, as per the consolidation scheme.

3. The case of the Petitioners was that the Petitioners forefather-Sagaji Khema Gangaje was the original owner of the suit property and upon his death he left behind his two sons Baghu and Sakru as legal heirs. Bhagu expired leaving behind his daughter-Sakhubai whose name is recorded in the 7/12 extract. The case of the Petitioners is that Sakhubai executed sale deed in favour of the defendant. After setting out the said fact it is pleaded that in case it is held that the deceased-Sakhubai had a share in the property then the Petitioners' half share out of the suit property be partitioned and possession be handed over. During the proceedings, an application for amendment came to be preferred by the Petitioners seeking to incorporate a prayer that in event it is adjudicated that Sakhubai has a share in the property then the plaintiffs' half share in the property be partitioned and possession has been handed over. The said application was rejected by the trial Court on the ground that the suit was filed for declaration and the petitioners are now seeking the relief of partition by way of proposed amendment and thereby changing the nature of suit.

4. Heard Mr.Suryawanshi, learned counsel for the Petitioners and Mr.Nighot, learned counsel for the Respondent Nos.1

and 2.

5. Learned counsel appearing for the Petitioners has invited the attention of this Court to the pleadings in the plaint and would contend that the factual foundation has been raised in the plaint seeking partition of the suit property and all that was proposed was to incorporate a relief in the prayer clause, which pleading is also found in the body of the plaint. He would further submit that the amendment being a pretrial amendment, the same ought to be liberally allowed.

6. *Per contra*, learned counsel appearing for the Respondent nos.1 and 2 points out that the suit in question is itself barred by limitation, inasmuch as, the sale deed of the year 2000 is sought to be challenged in the year 2012. He would further contend that as stated in his reply to the application for amendment, there are other properties belonging to the joint family and there are other legal heirs and without including the entire property and without joining other legal heirs partition is sought only in respect of the suit property. He would contend that the specific defence of non-joinder the necessary party has been taken. He would further contend that the proposed

amendment would change the nature of the suit.

7. Considered the submissions of the parties.

8. As indicated above, the Petitioners have come with a case that the suit property in question was the ancestral property and one of the legal heirs i.e. Sakhubai has executed the sale deed dated 26th June, 2000 in favour of the defendants. The case of the plaintiff was that the sale deed was *void* as Sakhubai did not have share in the suit property. A specific pleadings is also incorporated in the plaint that in event it is adjudicated that Sakhubai has a share in the property, then the plaintiff's half share should be partitioned and possession handed over. The plaintiffs do not seek to introduce any fresh cause of action. All that is sought is the relief to the extent of partition and separate possession be incorporated in prayer clause.

9. The necessary foundation being laid in the pleadings itself and the fact that there is no introduction of fresh cause of action, in my opinion, there is no change in the nature of suit which remained a suit for declaration that the deceased Sakhubai does not have any share and as such, the sale deed executed is void. By the proposed amendment, the Petitioners seek to incorporate an alternative relief,

that in event, it is found that Sakhubai has share in the property than the petitioners' half share partition and separate possession should be handed over. It is settled that inconsistent/alternative pleas can be taken in the plaint. In my opinion, the amendment being a pretrial amendment to be liberally allowed. It is settled that at this stage, it is not necessary to go into the merits of the amendment and the issue as regards the limitation as well as the non-joinder of necessary party will be an issue which would be framed during the trial and adjudicated at the relevant time.

10. In view of the above, the writ petition stands allowed.

11. The impugned order dated 11th April, 2019 is hereby quashed and set aside. As the impugned order is quashed and set aside the application filed by the Petitioners dated 23rd August, 2018 seeking to amend the plaint stands allowed.

12. Needless to clarify that after the amendment carried out, the respondent-defendant to be permitted to file their additional written statement to the amended plaint.

(Sharmila U. Deshmukh, J.)