

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 5596 OF 2021

Bapurao Namdevrao Kodape __ Vs. __ Laxmi Abhiman Kove and ors

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. K.J.Topale, Advocate for petitioner
Mr. D.U.Thakare, Advocate for respondent Nos. 1 to 7
Mrs.M.A.Barabde, AGP for respondent Nos. 8 & 9

CORAM : AVINASH G. GHAROTE, J.
DATE : 17/03/2023

1] Heard Mr. Topale, learned counsel for the petitioner and Mr. Thakare, learned counsel for respondent nos. 1 to 7.

2] The petition questions the order dated 7.7.2020 passed by the learned trial Court, whereby the application for amendment of the plaint filed at the stage when the evidence of PW-2 was over, has been allowed. (pg.56).

3] Mr. Topale, learned counsel for the petitioner submits that considering the stage, though the proviso to Order VI Rule 17 of the CPC became attracted, the learned trial Court in the impugned order has not taken the same into consideration at all; the amendment, according to him, has been also

filed to nullify the admission given by PW-1 in his cross examination regarding the possession being with the defendant no.4 since last more than 17 to 18 years; that the plea regarding possession was available to the plaintiff even before filing of the suit, which is indicated from an averments in para 7 of the plaint (pg.13) and therefore relying upon **Pandit Malhari Mahale vrs. Monika Pandit Mahale, 2021 (3) ALL MR 702 (SC)**, it is submitted that the amendment ought not to be permitted.

4] Mr. Thakare, learned counsel for the respondent nos. 1 to 7 relies upon **M/s Kanmani Films vrs. G.K.Kutt, AIR 1969 MYSORE 259** to contend that the grant of amendment is the discretion of the Court and the same having been exercised by the learned trial Court, it ought not to be interfered with.

5] The proposed amendment seeks to claim a relief of possession of the suit property. Para 7 of the plaint itself indicates that the plaintiff was aware even before filing of the suit that the property was in possession of the defendant no.4/petitioner, inspite of which the relief of possession was not claimed in the plaint. During his cross examination, the plaintiff

/PW-1 has given a categoric admission that the defendant no.4/petitioner was in possession of the suit property since last more 17-18 years. In **LIC vrs. Sanjeev Builders Pvt. Ltd, 2022 SCC Online SC 1128**, the Hon'ble Apex Court while laying down the law regarding Order VI Rule 17 of the CPC, has categorically held that the amendment should not be allowed in case it seeks to withdraw or nullify a clear cut admission made by the party, which confers right on the otherside, nor a time barred claim should be permitted to be allowed to be raised by the amendment. In view of the said position, since there is a clear cut admission given by the plaintiff in his cross-examination (pg.40) as indicated above, it indicates a position in existence even before the filing of the suit to the knowledge of the plaintiff, which is substantiated by para 7 of the plaint, in view of which the proviso to Order VI Rule 17 of the CPC clearly becomes attracted and unless and until the requirement was satisfied, the amendment could not have been allowed. The application at Exh.83, does not spell out the satisfaction of the requirement of due diligence, nor does the impugned order spell out consideration of the same. **M/s Kanmani Films** (supra) relied upon by the Mr.Thakare, learned

counsel for the respondents is a pre-amendment judgment and therefore would not be attracted.

6] In that view of the matter the impugned order dated 7.7.2020 cannot be sustained and therefore, the same is hereby quashed and set aside and the application below Exh. 83 is dismissed. No costs.

JUDGE

Rvjalit