



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

CIVIL APPLICATION (CAS) NO. 948/2021 IN
SECOND APPEAL NO. 417/2018

Vrushali W/o Anil Khedikar and others

Vs.

Smt. Jyoti W/o Subhash Motdhare and others

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

Court's or Judge's orders

Shri S.P. Dharmadhikari, Senior Advocate Assisted by Shri D.V. Chauhan,
Advocate for appellants
Shri M.P. Naidu, Advocate for respondent No.1
Shri U.M. Aurangabadkar, Advocate for respondent Nos. 2 & 3

CORAM : SMT. M.S. JAWALKAR, J.

DATE OF RESERVING THE ORDER : 21/08/2023

DATE OF PRONOUNCING OF ORDER : 06/09/2023

Respondent No.1/Original plaintiff filed present application for grant of permission to amend the plaint. The original plaintiff Jyoti W/o Subhash Motdhare had filed Special Civil Suit No. 57/2005, against original defendants for declaration, partition, separate possession, damages and permanent injunction in the Court of Civil Judge, Senior Division, Bhandara.

2. It is contended that at the time of filing of the suit, original plaintiff was under the bonafide impression that she would only gets right in the property that was under the management of her father i.e. Late Shri Ramkrishna Bapu Khedikar. That there were divergent judgments on the point,

whether daughter becomes coparcener by birth or whether she can claim right when coparcener through whom daughter is claiming, is not alive on the date on which, the amended Act came into operation. However, now by the judgment reported in the case of ***Vineeta Sharma Vs. Rakesh Sharma and others, AIR 2020 SC 3717***, their Lordships held that daughter becomes coparcener by birth and that daughters are entitled to claim partition of the entire co-parcenary property, if the property is not alienated, transferred, partitioned or bequeathed prior to 20/12/2004 by a registered document.

3. In view of the said judgment, it is contended by learned Counsel for respondent No.1 that she is entitled to claim partition of the entire ancestral joint family property. Accordingly, she wants to amend the pleadings in the plaint. By this amendment, the appeal of respondent No.1/plaintiff wants to add paragraph No. 10-A, amend paragraph Nos. 11-13 and add prayer Clause (ii) to that effect.

4. It is contended that in view of the judgment in ***Vineeta Sharma (supra)***, it become necessary to amend the plaint itself including schedule of property to the plaint.

5. Learned Counsel relied on ***Rajendra Ramchoddas Badshah Vs. Deepak Ishwardas and others, 2009 (5) ALL MR 167***, in support of his contention that no prejudice is going to cause to the appellants/defendants, therefore amendment needs to be allowed.

6. Learned Counsel also relied on ***Revajeetu Builders and Developers Vs. Narayanswamy and Sons and others, 2009(6) ALL MR 986***, wherein, Hon'ble Apex Court held that :

“the first condition which must be satisfied before the amendment can be allowed by the Court is whether such amendment is necessary for determination of the real question in controversy. If that condition is not satisfied, the amendment cannot be allowed. This is the basic test which should govern the Courts’ discretion in grant or refusal of the amendment. The other important condition which should govern the discretion of the Court is the potentiality of prejudice or injustice which is likely to be caused to other side..... The Courts have very wide discretion in the matter of amendment of pleadings but court’s powers must be exercised judiciously and with great care. The second test is there should not be any prejudice or injustice to other party.”

It is contended that no prejudice would going to cause to the appellant if pleadings of the plaint are amended as prayed for.

7. Learned Counsel Shri Naidu, also relied on ***B.K.N. Pillai Vs. P. Pillai and another, AIR 2000 SC 614***, wherein, there was application for amendment of written statement. Suit was filed for injunction seeking eviction of defendant on the ground of his being licensee and his

pleading in their defence was not a licensee. Therefore, he filed application for amendment seeking incorporation of plea that in case he is not a lessee, he was entitled to benefit of Section 60(b) of Easements Act, 1882. The Court held that the said plea is neither inconsistent nor repugnant to pleas already raised in defence. Application cannot be rejected merely on ground of prolonged delay in filing application, specifically when plaintiff can be compensated by costs. It is held that it cannot be said that proposed amendment would amount to withdrawal of any admission made by defendant and that such withdrawal was likely to cause irretrievable prejudice to the plaintiff.

8. Learned Counsel also relied on ***Pankaja and another Vs. Yellappa (D) by L.Rs. And others, AIR 2004 SCC 4102***, in support of his contention that even if there is a delay in appropriate cases Court can exercise its discretion. Hon'ble Apex Court held that :

“12. So far as the Court's jurisdiction to allow an amendment of pleadings is concerned there can be no two opinion that the same is wide enough to permit amendments even in case where there has been substantial delay in filing such amendment applications. This Court in numerous cases has held the dominant purpose of allowing the amendment is to minimize the litigation, therefore, if the facts of the case so permits, it is always open

to the court to allow applications in spite of the delay and latches in moving such amendment application.”

9. Hon’ble Apex Court held that there can be no straight jacket formula for allowing or dis-allowing the amendment of pleadings, each case depend on the factual background of that case.

10. Learned Counsel also relied on ***Rajbahaddur Jiyaram Yadav Vs. Prakash @ Pappu Jiyaram Yadav, 2016 (2) Mh.L.J. 639.*** In the said matter the plaintiff sought amendment in suit for partition at the time of final argument. Property which was excluded sought to be included in suit. This Court held that :

“Whether the suit of the petitioner should be permitted to proceed under such legal defects or whether the said defects could be done away with before it is too late.”

11. This Court allowed the amendment application by imposing costs.

12. Reliance is also placed on ***Surajpal Shankarpal Singh and another Vs. Dnyaneshwar Satw Mendke, 2005 (4) Mh.L.J. 907,*** as amendment application was moved seeking declaration that documents relied on be declared as not binding, came to be allowed as same was moved before framing of issues. As such, it is held that there was no inordinate delay in making amendment application. It is held

that power to allow amendment is wide and it can be exercised at any stage of proceeding.

13. Learned Counsel placed reliance on ***Rajesh Kumar Aggarwal and others Vs. K.K. Modi and others, 2006 (4) Mh.L.J. 719***, wherein Hon'ble Apex Court held that :

“15. the object of the rule is that the Courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.”

14. In reply to the contention of the appellant that when partition were effected a status of daughter was not of coparcener. Learned Advocate Shri Naidu relied on ***Shyam Narayan Prasad Vs. Krishna Prasad and others, AIR 2018 SC 3152***, wherein it is held as under :

“the property inherited by a male Hindu from his father, father's father or father's father's father is an ancestral property. The essential features of ancestral property, according to Mitakshara Law, is that the sons, grandsons and great grandsons of the person who inherits it, acquire an interest and the rights attached to such property at the moment of their birth. The share which a coparcener obtains on partition of ancestral property is ancestral property as

regards his male issue. After partition, the property in the hands of the son will continue to be the ancestral property and the natural or adopted son of that son will take interest in it and is entitled to it by survivorship.”

15. Similar view is taken in ***Rohit Chauhan Vs. Surinder Singh and others, AIR 2013 SC 3525***, wherein Hon'ble Apex Court held that coparcenary property means the property which consists of ancestral property, and the coparcener would mean a person who shares equally with others in inheritance in the estate of common ancestral. So long, on partition, an ancestral property remains in the hands of single person it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned. But, the moment a son is born, the property becomes a coparcenary property and the son would acquire interest in that and become a coparcener.

16. It is submitted by learned Counsel for applicant that by virtue of amendment in Section 6 of Hindu Succession Act, daughter become coparcener and in view of judgment of ***Vineeta Sharma (supra)***, she becomes coparcener by her birth.

17. In reply to the contention of appellant that

applicant has waived her right in the share of brothers. Learned Counsel vehemently submitted that there is no question of waiver, as waiver will come into play when a person is having knowledge about his or her right or he or she waives it. There has to be intentional act of waiver. In support of this contention, he relied on ***M/s Motilal Padampat Sugar Mills Co. Ltd Vs. State of U.P and others, AIR 1979 SC 621***, wherein the Honble Apex Court held that :

“Waiver means abandonment of a right and it may be either expressed or implied from conduct, but its basic requirement is that it must be an intentional act with knowledge. There can be no waiver unless the person who is said to have waived is fully informed as to his right and with full knowledge of such right, he intentionally abandons it.”

18. Lastly learned Counsel for applicant/original plaintiff relied on ***Vineeta Sharma Vs. Rakesh Sharma and others, AIR 2020 SC 3717***, wherein Hon’ble Apex Court in answer to reference held as under in Paragraph No. 129 (v) :

“129 (v) In view of the rigour of provisions of Explanation to Section 6(5) of the Act of 1956, a plea of oral partition cannot be accepted as the statutory recognised mode of partition effected by a deed of partition duly registered under the provisions of the Registration Act, 1908 or effected by a decree of a court. However, in exceptional cases where plea of oral partition is supported by public documents

and partition is finally evinced in the same manner as if it had been affected by a decree of a court, it may be accepted. A plea of partition based on oral evidence alone cannot be accepted and to be rejected outrightly.”

19. As against this, learned Counsel for appellant vehemently opposed the application. It is contended that the ground for filing application for amendment that there is divergent judgments on the point, whether daughter become coparcener by birth or whether she can claim right when coparcener through whom daughter is claiming is not alive on the date on which the amended act came into operation is baseless ground. It is pointed out that amendment to Section 6 of Hindu Succession Act, came into force on 09/09/2005 and suit filed on 06/10/2005. There is no judgment between this period taking any view. She could have included claim by way of an abundant precautions in respect of the property. There was no application for amendment moved during the trial of the suit. On the contrary, there was application for amendment moved during the pendency of appeal. By that application permission sought to amend. The plaintiffs specifically restrained her claim to the extent of her share in her father's share and she has admitted that there was partition between her father and two brothers. As such, there was waiver of her rights and also there was admission about partition.

20. Learned Counsel for appellant has further drawn my attention to the deposition of PW.1, in whose evidence memorendum partition came to be exhibited. He was one of the witness/scribe of the said document. He has admitted that partition was effected and possession was taken over by each of the party to the memorandum/family arrangement. It is a matter of record that there was partition between father Pandharinath and Ramkrishna. Pandharinath allotted half of the share to Ramkrishna i.e. father of plaintiff and defendant. There was further partition in the year 1987, which was acted upon whereby one share retained by Ramkrishna and two share retained by his sons.

21. In view of amendment moved in First Appeal, it is clear that plaintiff confined her claim in the share retained by her father. She has in express terms, restricted her claim to the share allotted to her father in partition of 29/12/1987.

22. Learned Counsel relied on judgment in ***K. Arumuga Velaiah Vs. P.R. Ramasamy and another, 2022 SCC OnLine SC 95***, wherein Hon'ble Apex Court relied on citation ***Kale Vs. Deputy Director of Consolidation, (1976) 3 SCC 119***, Wherein it is held by Hon'ble Apex Court that :

“26. Ultimately, this Court held that the family arrangement in the nature of a compromise which was considered in that case did not require registration. It was further held that since the existence of the family arrangement was admitted in that

case, the same was binding on the principle of estoppel. Also, even if the family arrangement could not be registered it could be used for collateral purpose, i.e. to show the nature and character of possession of the parties in pursuance of the family settlement and also for the purpose of applying the rule of estoppel which flowed from the conduct of the parties, who, having taken benefit under the settlement for seven years, later tried to resile from the settlement.”

23. Hon’ble Apex Court also held as under :

“35. Having regard to the fact that in the instant case there has been no challenge to the finding of partition between the parties till date and the same has attained finality we do not think that the appellant can seek to rely on the judgment in Asrar Ahmed (Supra). Hence, the partition of the ancestral/joint family properties having found to have taken place in the 1964 and the same having been acted upon, a fresh suit for partition and separate possession of the suit properties was not at all maintainable. The principle of res judicata squarely applies in the present case.”

24. Learned Counsel also relied on ***M. Revanna Vs. Anjanamma (Dead) BY L.Rs. And others, (2019) 4 SCC 332***, wherein, it is held that :

“7. Leave to amend may be refused if it

introduces a totally different, new and inconsistent case, or challenges the fundamental character of the suit. The proviso to Order VI Rule 17 of the CPC virtually prevents an application for amendment of pleadings from being allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial. The proviso, to an extent, curtails absolute discretion to allow amendment at any stage. Therefore, the burden is on the person who seeks an amendment after commencement of the trial to show that in spite of due diligence, such an amendment could not have been sought earlier. There cannot be any dispute that an amendment cannot be claimed as a matter of right, and under all circumstances. Though normally amendments are allowed in the pleadings to avoid multiplicity of litigation, the Court needs to take into consideration whether the application for amendment is bona fide or mala fide and whether the amendment causes such prejudice to the other side which cannot be compensated adequately in terms of money.”

25. Original suit was filed for declaration, partition, separate possession and damages with a relief of permanent injunction. It was specific prayer in the suit that she be declared as entitled for 1/6th share in the properties left by the

Ramkrishna Bapu Khedikar, fully described in the schedule attached with the plaint. Further declaration was sought that the Will Deed dated 15/05/2005 executed by Ramkrishna Bapu (Father of plaintiff and defendant), is totally bogus and sham document. It is null and void and not binding on the plaintiff. She sought further declaration that defendant Nos. 1 and 2 have no right to dispose of the said properties. Thus, in view of the suit, her claim was restricted in the properties acquired by her father after partition of 1987. This fact is made more clear by filing amendment application in the first appeal preferred by her.

26. Present application is in fact filed after a period of 16 years. Having regard to the facts and circumstances, I am of the considered opinion that application for amendment is nothing but abuse of process of law. As pointed out by learned Counsel for the appellant, the original suit was for partition. Suit filed by respondent No.1/original plaintiff for declaration, partition, separate possession, damages and permanent injunction. In the said suit she has claimed right in the property of her father. Alleged ground of diversity in judgment may not be helpful for applicant/respondent No.1. The Act came into force prior to filing of the suit. The husband of respondent No.1 was one of the attesting person to the family arrangement/partition deed. As such, it is not the case that the plaintiff was not aware about the partition effected. Over and above she has filed application for

amendment in the first appeal i.e. Exh. 21, which is annexed with the reply, wherein it is clearly averred that she is not claiming any rights in the property/share of her brothers. The amendment to the appeal memo as per application reads as under :

“26. The learned lower court failed to consider and consequently failed to apply amended provision of Sec. 6 to Hindu Succession Act as amended by Hindu Succession [Amendment Act].”

“27. The L.L.C. ought to have seen that U/s 6[5] explanation of the Act, the partition, which is recognized by law must be a deed registered under India Registration Act. The alleged partition dtd 29/12/87 was not a registered partition. Hence the property mentioned in Will Exh.103 was not and could never be treated as property of Ramkrushnabapu as self acquired property. Since it was the ancestral property at the hands of Ramkrushnabapu, the same character of property continues till death of Ramkrushnabapu and consequently the plaintiff being co-parcener under amended Act, was entitled to a share therein. Hence, Will of such entire property was totally illegal, ineffective and not binding on share of plaintiff in that property.

28. For clarification the plaintiff/appellant submits that the defdts Anil & Kishor who have already separated

themselves from joint family, she does not want to disturb their ownership in that property and she restricted her claim over the suit property, which was at the hands of deceased Ramkrushnabapu as shown in Schedule of the plaint and, hence, the L.L.C. ought to have held that any Will alleged to have been executed by Ramkrushnabapu, even otherwise does not affect the right of the plaintiff over said property and, hence her claim ought to have been decreed.

It is therefore prayed that, the appellant be allowed to amend the memo of appeal accordingly in the interest of justice.”

27. From this amendment application one can see that the applicant was well aware about provisions of law and amendment in Hindu Succession Act. In spite of this, she has clarified that she is not claiming any right in the brother's property who are separated long back. So, she has admitted factum of partition also.

28. As such she has restricted her claim in the share of her father. After acting upon the partition, at second appellate stage, it would not be open for the applicant/respondent No.1 to change the nature and contest between the parties and claim partition of total land which was partitioned in 1987. Her claim in the suit was that she is entitled to receive share in her father's share and the Will which was executed in favour of defendant is not valid and

legal. Thus, application for amendment of the plaint is not only belated but also not bonafide and if allowed would change the nature and character of the suit. By the said application for amendment, the admissions which are come on record would stand withdrawn if present application for amendment is allowed. If amendment is allowed, it will introduce a different, totally new and inconsistent case. In fact, there is no challenge to the partition arrived at between the father and sons. The challenge was in respect of property in the share of father after his death. Whether the property was validly bequeath by the father by way of Will or the plaintiffs are entitled to have share in the said property of their father, that was the contest between the parties. If amendment is allowed, the admission to the effect that partition was effected and acted upon in 1987 would be allowed to be withdrawn at appellate stage. As stated earlier husband of plaintiff was one of the attesting witness, as plaintiff was aware about partition. She was specifically explained by way of amendment in first appeal that she is not claiming any right in the property of her brothers.

29. If the judgments relied on by learned Counsel for applicant i.e. ***Rajendra Ramchoddas Badshah (supra)***, is perused, it is not applicable in the present set of facts. In fact, it is held in the said judgment that the learned Trial Court illegally allowed the application for amendment specifically when by that application the nature of contest between the

parties was going to change.

30. There is no dispute over the proposition laid down in *Revajeetu Builders and Developers (supra)* and *Rajesh Kumar Aggrawal (supra)*, by the Hon'ble Apex Court that amendment ought to be allotted if necessary for determination of real question in controversy and second test is that there should not be any prejudice or injustice to other party. In the present matter, amendment is not at all necessary for determination of question involved in the matter, moreover if allowed, it will cause great prejudice to the parties who are already separated by a partition which was admitted by plaintiff.

31. So far as reliance on *Pankaja and another (supra)*, is concerned this Court do not find any reason to allow the application. As it is clearly changing the nature and contest between the parties.

32. Similarly in, *B.K.N. Pillai (supra)*, is not applicable in the present set of facts. In the present matter as there is specific admission on the part of plaintiff that there was partition and she is claiming share in their father's share only and not raising any claim over the share of her brothers. If present application is allowed, it will definitely would mean withdrawal of the admission given by the applicant/respondent.

33. The judgment in *Rajbahaddur Jiyaram Yadav (supra)*, *Surajpal Shankarpal Singh (supra)*, the application for amendment was moved during the pendancy of the suit, as such, these are not applicable in the present set of facts. Moreover, Court in said matter specifically observed that proposed amendment do no change the nature of contest between the parties.

34. So far as, *Shyam Narayan Prasad (supra)* and *Rohit Chauhan (supra)*, is concerned, for the reasons stated above is not applicable. So far as proposed amendment is concerned, her claim is for share in the property of father after 1987 partition. Thus, I am satisfied that the applicant was well aware about amended provisions. Still she has waived her rights accepting the partition which was acted upon and her husband was one of the signatory to the said partition. Now she cannot turn around and claim share in the total property before partition.

35. So far as, judgment in *Vineeta Sharma (supra)*, is concerned, it is not at all applicable in the present set of facts as here there is no challenge to the partition in the year 1987 but the plaintiff is claiming share in the share of her father. As per *Vineeta Sharma (supra)*, even oral partition can be accepted in exceptional circumstances, if it is supported by public documents and partition is finally evinced in the same manner as if it had been affected by decree of Court, it may be

accepted. Here that was not the oral partition.

36. As such, plaintiff was having full knowledge about the partition not only this but by way of amendment. She has specifically restricted her claim in the share of her father. She has not claiming in the share of her brothers who had separated long back. As held earlier, if such application is allowed, it will cause great prejudice and loss to the defendants. It would also amount to withdrawal of admission. As such, application is liable to be rejected. Accordingly, application stands rejected.

37. At this juncture, learned Counsel for respondent No.1/applicant prayed for six weeks' time to approach the Hon'ble Apex Court. Accordingly, time is granted.

38. List the matter after six weeks.

(SMT. M.S. JAWALKAR, J.)

Jayashree..