IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 15110 of 2019

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HURSING BHURKA KOLI & ORS.

Versus

SUKLA SAYBABHAI BARIA

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Appearance:
MS SNEHA A JOSHI(2156) for the Petitioner(s) No. 1,2,3,4,5,6
MR TUSHARKUMAR R UPADHYAY(9812) for the Petitioner(s) No. 1,2,3,4,5,6
MR. VANRAJSINH M DAMORE(3787) for the Respondent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE SANDEEP N. BHATT**

Date : 08/04/2024

ORAL ORDER

1. The present petition is filed under Article 227 of the Constitution of India, by the petitioners – original plaintiffs, challenging the impugned order dated 26.03.2019 passed by the learned Additional Civil Judge, Limkheda, District : Dahod, below Exh.1 in Civil Miscellaneous Application No.5 of 2016 in Regular Civil Suit No.57 of 2008, under Order VI Rule 17 of the Code of Civil Procedure, 1908, (for short, 'the CPC'), rejecting the same.

2. Heard learned advocates.

3.1 Learned advocate Ms. Sneha Joshi for the petitioners has submitted that during the suit proceedings

and especially stay was operating, late Bai Ramtiben sold the joint family property to the present respondent, who has purchased the so-called share of her on 27.02.1997; and that she has passed away on 03.11.1998 during the suit proceedings, without any heirs; and that on 02.07.1994, partition entry was mutated in revenue record vide Mutation Entry No.278, which was behind the consent of the parties and behind the back of the petitioners; and that the same is cancelled by the revenue authorities and it has attained finality; and that therefore, there was no partition in joint family property; and that it is therefore necessary to amend the suit by adding some paragraphs; and that during the suit proceedings, stay was operating in favour of the plaintiffs, then also violating the stay order, original defendant No.1 has transferred the land in dispute to the present respondent / defendant No.2 by way of a registered sale deed on 27.02.1997; and that the application under Order VI Rule 17 was preferred by the petitioners before the learned trial Court.

3.2 In support of her submissions, she has relied upon the following decisions :

(i) (2013) 9 SCC 576 – Prithi Pal Singh versus Amrik Singh

(ii) *2022 (2) GLR 1471 – Bhavnaben Prakashbhai Patel versus L.H. of deceased Jayshukhben D/o. Thakorbhai*

(iii) *2022 (3) GLH (U.J.) 3 – Jayeshbhai Govindbhai Balar versus M/s. Dimple Films Private Limited*

(iv) *(2016) 2 SCC 36 – Prakash versus Phulavati*

(v) *AIR 2020 SC 3717 – Vineeta Sharma versus Rakesh Sharma*

3.3 She has submitted that this petition may be allowed.

4.1 *Per contra,* learned advocate Mr. Vanrajsinh M. Damore for the respondent has submitted that by amending the suit, the scope and nature of the suit would be changed and thereby the petitioners want to change the scope and nature of the suit; and that the father of deceased defendant No.1 viz., Punabhai Bhaijibhai had expired on 17.02.1995 whereas the Hindu Succession Act comes into force in the year 1956; and that the father of Bai Ramtiben has expired in the year 1955, that too before 9.9.2005 (which is the date commencement of amendment Act, 2005), but before the Act comes into force; and that the ratio of the decision of the Hon'ble Apex Court would not be applicable in the facts of the present case; and that by rejecting the revenue entry qua the registered sale deed, there would not be any effect to the

sale transaction and it is on the basis of the technical reasons.

4.2 In support of his submissions, he has relied upon the following decisions :

(i) AIR 2020 SC 3717 – Vineeta Sharma versus Rakesh Sharma

4.3 He has submitted that this petition may be dismissed.

5. I have considered the rival submissions made by the learned advocates for the respective parties. I have also considered the documents available on record. I have perused the impugned order passed by the learned trial Court. From record it transpires that the plaintiffs have prayed amendment at very belated stage, that too after rejection of the suit and during pendency of the appeal. Further, the said cause of action to amend the suit was of the year 1997. The suit was dismissed in the year 2013. Therefore also, there is a huge delay in filing the amendment application. Further, by way of amendment, the petitioners are trying to enlarge the scope of the suit and that they are also trying to change the nature of the suit which is not permissible. The suit is

filed in the year 1997. The cause of action for amendment is arisen in the year 1997 itself. The suit is dismissed in the year 2013. The appeal is preferred in the year 2013 itself by the plaintiffs. The amendment application is made in the year 2016. The father of deceased defendant No.1 viz., Punabhai Bhaijibhai had expired on 17.02.1995. The Hindu Succession Act comes into force in the year 1956. The father of Bai Ramtiben has expired in the year 4.11.1955, that too before the commencement of the amendment Act, 2005 i.e. on 9.9.2005, but before the Act comes into force. The plaintiffs have preferred an application for amendment under Order VI Rule 17 of the CPC in the suit proceedings during the pendency of the appeal, on the basis of the decision of the Hon'ble Apex Court in the case of Prakash (supra). The decision of the Hon'ble Apex Court in the case of Vineeta Sharma (supra) takes care of the situation and holds the field.

6. In view of above, the learned trial Court has rightly rejected the application under Order VI Rule 17 of the CPC. There is no illegality and perversity found in the impugned order passed by the learned trial Court. The impugned order is just and proper. Therefore, no case is made out on merit by the petitioners to exercise the powers by this Court under Article 227 of the Constitution keeping

in mind the observations made by the Hon'ble Apex Court in the case of *M/s. Garment Craft versus Prakash Chand Goel* reported in *(2022) 4 SCC 181.*

7. In view of above, this petition needs to be dismissed and is dismissed accordingly. Notice is discharged. Interim relief, if any, stands vacated.

(SANDEEP N. BHATT,J)

M.H. DAVE