



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 2554 OF 2024

Dinkar Vyanka Munde and Ors

...PETITIONERS

Versus

Uttam Rajaram Munde,
Died through Lrs and Anr

...RESPONDENTS

Mr. H. V. Tungar, Advocate for the Petitioners
Mr. A. R. Tapse, Advocate for Respondents

CORAM : R.M. JOSHI, J.

RESERVED ON : JUNE 12, 2024
PRONOUNCED ON : JUNE 20, 2024

ORDER :

1. Heard finally at stage of admission by consent of both sides.
2. Parties are referred to by their nomenclature in the original proceedings.
3. Petitioners are original Defendant Nos. 1 to 5 in RCS No. 79/2009 and being aggrieved by the order dated 14.12.2023 passed below Exh. 29 in RCA No. 14/2020, have preferred this Petition.
4. Petitioners/Plaintiff filed RCS No. 79/2009

seeking possession of Gut No. 313 and cancellation of two sale deed dated 10.08.1988. Defendant Nos. 1 to 5 contested the suit by filing written statement at Exh. 85. The said suit was tried and CJJD, Patoda has decreed the said suit partly and directed to give 1/3rd share each to the Plaintiffs and 1/3rd share jointly to Defendant Nos. 1 to 5 of the suit properties. It was also declared that the said sale deeds in question executed by the Banda Bapu Khote in favour of the deceased Vyaka and Defendant Nos. 1 to 3 are not binding on the Plaintiff. Defendant Nos. 1 to 5, Petitioners herein, being aggrieved by the said judgment and decree filed RCA No. 14/2020 before District Court, Beed. During the pendency of the said Appeal Exh. 29 was filed by Defendant Nos. 1 to 5 under Order VI, Rule 17 of the Code of Civil Procedure (CPC) seeking amendment to the written statement. Said application is rejected by the Principal District Judge, Beed by passing impugned order.

5. Learned Counsel for the Petitioners submit that it is always open for a party to take inconsistent pleas, though election is to be made of an one of them

finally. By relying upon the judgment of this Court in First Appeal No. 39/2015 (Abubakar s/o Jan Mohd. & Ors vs. Mohd. Yahyaa s/o Mohd. Ayub & Ors), it is contended that according to the settled position of law it is open for the Defendants to raise inconsistent pleas and merely because such inconsistent or contrary pleas have been raised, the same would not be a ground to discard the entire defence of the defendants. He also placed reliance on the judgment in case of Dadabhau Shasnkhar Ghodke & Ors vs. Mohanlal Kanhyalal Agrawal & Anr, 2003 (2) ALL MR 121 to canvass that it would be open for the Defendant to elect one of the pleas and hence, there is no justification for rejecting the amendment sought by the Defendants.

6. Learned Counsel for the Respondent/Plaintiff opposed the said contention by submitting that after decree is passed by the trial Court, in First Appeal for the first time, plea now sought to be taken in the written statement cannot be permitted. It is his submission that in view of the provisions of Order VI, Rule 17, even after the commencement of trial the parties are required to show due diligence which is

absent herein. To support this submission, he placed reliance on the judgment in case of Mitra of Archdiocese of Goa and Daman vs. K. Vijayadhara, 2000 (1) Bom.C.R. 857. By relying upon the judgment of this Court in case of Balu Appaji Sangaonkar vs. Rangrao Dattoba Palkar, 2001 (2) All. M.R. 556, it is contended that the proposed amendment seeking to raise alternative plea, which is destructive to the original stand, cannot be allowed to be taken in Appeal. To this submission, reliance is placed on judgment in case of Shiromani Gurudwara Parbandhak Committee vs. Jaswant Singh, 1996 (11) SCC 690.

7. The application Exh. 29 is filed under Order VI, Rule 17 of CPC. The said provision shows that after commencement of trial in order to seek amendment to the pleadings, it is obligatory for the party to show due diligence and in absence thereof, no amendment can be permitted. Perusal of the application filed by the Defendants shows that the plea sought to be raised by the Defendants was well within their knowledge and in spite of the same, it was not raised at the time of the filing of the written statement. Present amendment is

not sought on the basis of any subsequent event which was not within the knowledge of the Defendants at the relevant time. The Defendants, therefore, have failed to show due diligence and having regard to the nature of proviso to Order VI, Rule 17, no amendment can be permitted by the Court after the party is not able to plead and establish due diligence.

8. As far as the permissibility to the party to take inconsistent pleas and to elect any one of them is a general preposition of law which is accepted by this Court in Abubakar Jan Mohd & Dadabhau Ghodke (cited supra). The Hon'ble Supreme Court in Shiromani Gurudwara Parbandhak Committee (supra) has held that though Defendants can raise mutual inconsistent pleas in the written statement may be considered by the Court. However, in no case the amendment mutually destructive can be allowed. As rightly observed by the learned PDJ, Beed that the pleas raised by the Defendants are mutually destructive.

9. Apart from this, judgment of this Court in case of Balu Appaji Sangaonkar (supra) holds that the alternative plea is permissible, but plea totally

destructive to the original stand cannot be allowed. It is further observed therein that there is no foundation laid in the trial Court to permit such new plea and besides that it would take Plaintiff by surprise in the Appeal.

10. In the instant case, Defendants have specifically taken plea with regard to establishment of their right on the basis of sale deeds in question. Whereas, plea sought to be raised of adverse possession for the suit properties is not only inconsistent but mutually destructive to the original plea. In such circumstances, as rightly held by the First Appellate Court no such amendment can be allowed.

11. For the aforestated reasons, this Court finds no reason or justification to cause interference in the impugned order. In the result, Petition stands dismissed.

(R. M. JOSHI, J.)

Malani