



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 2736 OF 2023

SARASWATIBAI BHIKA TAMBOLI DIED THROUGH LRS SUSHILA ALIAS
SHASHIKALA CHUNILAL TAMBOLI

VERSUS

PARVATIBAI TUKARAM TAMBOLI DIED THROUGH LRS SURESH TUKARAM
TAMBOLI AND OTHERS

Mr. V. P. Latange, Advocate for the petitioner

Mr. S. V. Kanetkar a/w Mr. S. R. Tamboli, Advocate for respondent Nos.1
to 6 and 7A to 7C

WITH

WRIT PETITION NO. 9838 OF 2023

PARVATABAI TUKARAM TAMBOLI DIED THROUGH LRS SURESH TUKARAM
TAMBOLI AND OTHERS

VERSUS

DAIBAI ALIAS SARASWATIBAI BHIKA TAMBOLI SINCE DECEASED
THROUGH LRS SUSHILA CHUNILAL TAMBOLI

Mr. S. V. Kanetkar a/w Mr. S. R. Tamboli, Advocate for petitioners

Mr. V. P. Latange, Advocate for the respondent

CORAM : R. M. JOSHI, J.

DATE : 8th JULY, 2024

PER COURT :-

1. By consent of both sides, heard finally at the stage of admission.
2. Writ Petition No. 2736/2023 is fled by the original defendant in RCS No. 32/2016 being aggrieved by the rejection of her application Exhibit 74 for amendment to the written statement to the extent of proposed amendment in paragraph 11B. Whereas Writ Petition No.

9838/2023 came to be filed by the plaintiff being aggrieved by the Trial Court allowing the amendment in paragraph 11A.

3. Parties are referred to as plaintiff and defendant for the sake of convenience.

4. The facts which led to filing of these petitions appearing from the record can be narrated in brief as under:

(i) The plaintiff filed suit for possession and injunction in respect of two rooms situated on the ground floor in the premises known as Maganlal Smruti/ Saptabandu Sadan. It is the case of the plaintiff that the suit property was one of the ancestral properties of joint family of plaintiffs and defendants. It is specifically contended that the agricultural lands were partitioned on 22/12/1956 and the house properties were partitioned on 19/05/1957. It is claimed that since July, 1957 all concerned sharers of the joint family properties have started occupying their respective premises. It is further case of the plaintiff that in the year 2004 they have inducted defendant as a gratuitous licensee. Now the suit is filed for seeking possession of the suit property from the defendant. Defendants filed written statement denying the contentions of the plaintiffs including the contentions with regard to the previous partition. It is claimed by the defendants that they are owner of the suit property.

5. In this backdrop an application came to be filed under Order 6 Rule 17 of the Code of Civil Procedure (for short 'CPC') by the defendant to amend the written statement to incorporate paragraphs 11A and 11B therein which read thus;

“११.अ) वादीने सदरहु दाव्यात दिनांक १९/०५/१९५७ रोजीचे तथाकथीत वाटणी पत्राची दाव्यात दाखल केलेली प्रत खरी व कायदेशिर नसुन प्रतिवादीस कबुल नाही. दिनांक १९/०५/१९५७ रोजी वाटणी झाल्याचे व वाटणीपत्र लिहून दिल्याचे वादीचे म्हणणे खरे नाही. जर असा लेखी वाटणीपत्राचा दिनांक १९/०५/१९५७ चा तथाकथीत दस्त पार्टीमध्ये झाले असते तर स्पे.मु.नं. २/१९६९ चे दाव्यात व त्यावर झालेल्या अपीलात सदर तथाकथीत वाटणी दस्ताचा उल्लेख जरूर आला असता. सबब वादीने या दाव्यात खोटा व बनावट पुरावा आणण्याचा असदहेतुने प्रयत्न केला आहे.

११.ब) प्रतिवादीचे वडील भिका बंडु १९६९ सालाचा आधी पासुन दाव्यातील घरात त्यांचा कुटुंबीयांसह रहात होते व दावा मिळकतीत त्यांचाच कब्जा व वहिवाट होती. कारण दाव्यातील घरांत स्वतंत्र विजमिटर भिका बंडु यांचे नावावर दिनांक १६/११/१९६७ सालापासुन घेतलेले आहे व म्हणून तेव्हापासुन सदर दावा मिळकतीचा मिटरचे विजबील भिका बंडु व त्यांचे हयातीनंतर त्यांचे वारस आजतागायत भरतात. त्याच प्रमाणे रनाळे ग्रामपंचायत रेकॉर्डवरून घर नंबर ५६७ चे काही भागात म्हणजे दाव्यातील घरात १९६९ सालाचा पुर्वीपासुन भिका बंडु हे भोगवटदार असल्याचे स्पष्ट दिसते. तसेच बऱ्याच वर्षांपुर्वी पासुन रनाळे गावाला सिटीसर्व्ह लागू झाल्यानंतर रनाळे ग्रामपंचायत घर नं. ५६७ चे दोन भाग सिटीसर्व्ह रेकॉर्डनुसार केलेले दिसतात व एका भागाला सिटीसर्व्ह नं. ५०४ लावला असुन त्या भागाचे भोगवटदार भिका बंडु व त्यांचेनंतर त्यांची पत्नी व मुलगी सदरहु प्रतिवादी यांची नावेसुद्धा भोगवटदार म्हणून लावली गेली आहेत. तसेच दुसऱ्या भागाला सि.स.न. ५०५ लावला असुन त्या भागाचे भोगवटदार मगनलाल व त्यांचानंतर त्यांचा वारसांची म्हणजे वादींची नावे लागली आहेत. सबब या सर्व रेकॉर्डवरून प्रतिवादींचा व त्यांचा वडिलांचा कब्जा व वहिवाट दावा मिळकतीत १९६९ साला पुर्वीपासुन असल्याचे स्पष्ट दिसते. त्याचप्रमाणे दावा मिळकतीचा कब्जा व वहिवाट भिका बंडु यांची असतांना त्यांनी मगनलाल व इतर भावांविरुद्ध स्पे.मु.नं. २/१९६९ चा दावा सरस निरस वाटणीसाठी लावल्याचे दिसते. सदर दावा १९७० साली रद्द झाल्यानंतर त्यावर मा. नामदार हायकोर्टात अपील नंबर १९६/१९७१ केले होते व ते दिनांक ३१/१०/१९७९ रोजी फेटाळले गेले असे दिसते. सदर दाव्याचा व अपीलाचा निकालाप्रमाणे ग्रामपंचायत घर नं. ५६७ चा मिळकतीचे मालक वादीचे पुर्वज मगनलाल यांना जरी धरले असले तरी दाव्याचा निकाला आधी किंवा अपीलाचा निकाला नंतर वादी किंवा वादीचे पुर्वज मगनलाल यांनी भिका बंडु व त्यांचा कुटुंबीयांचा ताबेउपभोगात व वहीवादीत असलेली रनाळे येथील ग्रामपंचायत घर नं. ५६७ पैकीचे दोन गाळे राहते घराची म्हणजे दावा मिळकत त्यांचे ताब्यात परत मिळण्यासाठी सदरहु वादी किंवा त्यांचे पुर्वज मगनलाल यांनी कोणताही दावा अथवा प्रतिदावा केला नाही व प्रतिवादी तसेच त्यांचे पुर्वज भिका बंडु यांना दावा मिळकतीतून कधीच प्रत्यक्ष बेकब्जा करण्याचा प्रयत्न केला नाही किंवा बेकब्जा केले

नाही. सबब सदर दावा मिळकत या प्रतिवादीचे वडील भिका बंडु यांनी मगनलाल व त्यांचे वादीवारसांची मालकी नाकारून उघडपणे व अव्याहतपणे वादी व त्यांचे पूर्वजांचे जाणीवेत दिनांक ३१/१०/१९७९ चा अंतीम निकाला नंतर पासून सुध्दा बारावषपेक्षा जास्त काळ मालकी हक्काने ताबेउपभोगात ठेऊन वहीवाट करत असल्याने प्रतिवादीचे वडील भिका बंडु हे विरुद्ध कब्जाने (Adverse Possession) मालक झालेले असल्याने सदरचे प्रतिवादी सुध्दा वारसा हक्काने मालक आहेत. तसेच मगनलाल व त्यांचे वादी वारसांचा वर नमुद संपूर्ण निष्क्रियते (Inaction) मुळे सुध्दा भिका बंडु व प्रतिवादी यांना दाव्याचा मिळकतीची दिनांक ३१/१०/१९७९ रोजीचा अंतीम निकालापासून अँडव्हर्स टायटलने मालकी मिळाली आहे.”

6. Plaintiffs opposed this application. After hearing both sides learned Trial Court partly allowed application by permitting amendment to the extent of paragraph 11A only.

7. Learned counsel for the defendants submits that Trial Court has committed error in not considering the fact that the application for amendment is filed before framing of the issues and at that stage all relevant amendments ought to have been allowed by the Trial Court. It is contended that the amendment sought in clause 11B is to the extent that the defendants have become owners of the suit property by way of adverse possession. It is further argued that the effect of proposed amendment cannot be considered and merits thereof need not be gone into.

8. Learned counsel for the plaintiff has strenuously submitted that it is not open for the defendant to challenge the fact that the plaintiffs have become the owners of the suit property by virtue of decree passed in Spl. Civil Suit No. 2/1969 which came to be confirmed

by the order of Division Bench of this Court. It is thus his contention that once it is held that the suit property is the exclusive property of plaintiffs, in view of Section 40 of Evidence Act the defendants are precluded from raising the said issue and there is embargo for the Court to take cognizance of such issue which has attained finality. In order to support his submission he has placed reliance on the judgment of the Hon'ble Supreme Court in case of ***Karam Kapahi and others Versus Lal Chand Public Charitable Trust and Another, (2010) 4 SCC 753***. It is his further submission that as far as the averments of the plaintiffs with regard to the partition by virtue of deed dated 19/05/1957 is concerned, the said fact was never disputed by Bhika during his life time, through whom the defendants claim their right in the suit property. Thus, it is his submission that it amounts to constructive res judicata and hence not open for it's agitation in this suit. To support his submission he placed reliance on the judgment of Hon'ble Supreme Court in case of ***Ishwar Dutt Versus Land Acquisition Collector and Another, (2005) 7 SCC 190***. It is further argued that a party cannot be permitted to raise plea which is inconsistent with earlier plea and in any case and the same should not be mutually destructive. He drew attention of Court to Section 116 of Evidence Act, to submit that it is not open for a Tenant to denying the title of landlord. To substantiate this submission reference is made to the judgment in case of ***Arundhati Mishra (Smt) Versus Sri Ram Charitra***

Pandey, (1994) 2 SCC 29 and Jaspal Kaur Cheema V. M/s Industrial Trade Links, AIR 2017 SCC 3995.

9. Cardinal test for deciding an application for amendment is that whether it is necessary for determination of real question in controversy and whether injustice would cause to other side by allowing of such amendment. Law on the point of amendment to the written statement is fairly settled to say that as compared to the plaint, amendment to the written statement should be allowed liberally. As far as the principles that govern the issue of amendment to written statement useful reference can be made to the judgment of Hon'ble Supreme Court in case of ***Usha Balashaheb Swami & Ors Vs. Kiran Appaso Swami & Ors, AIR 2007 SC 1663***, wherein it is held that,

"A prayer for amendment of the plaint and written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed to alter materially or substantially cause of action or nature of claim applies to amendments of plaint. Such rigid rule does not apply to amendment to written statement. Keeping it mind above principles of law on subject, factual matrix of the instant case is considered."

10. Reverting back to the factual matrix in present case, as far as the issue of the suit property house No. 567 being already partitioned is concerned, undisputedly the said issue has attained finality. Thus, there is substance in the contention of the learned counsel for the plaintiffs that in view of Section 40 of the Indian Evidence Act the said

issue raising challenge to the title of plaintiffs in respect of the suit property cannot be taken up nor can it be entertained by the Trial Court. Once, it is held that legally such plea was not available for the defendant to raise, question arises as to whether defendant can be prevented from taking up plea that by virtue of continuously in possession of the suit property for more than 12 years adverse to the title of the plaintiff, has acquired ownership by adverse possession. In this regard once the claim of the defendant challenging the title of plaintiff is prohibited by law to have been raised by the provision of law, technically there remains no inconsistency on record in the pleas. Even otherwise careful perusal of written statement shows that there is a claim to be owner of the suit property suit its source has not been specifically pleaded. Now specific plea by way of amendment is sought to be claimed that ownership is acquired by adverse possession.

11. Herein this case amendment is not sought to withdraw any admission given in favour of plaintiff but the proposed amendment aims at providing details/ explanation to the pleading in the written statement. No prejudice much less injustice would cause to the plaintiff by allowing such amendment. It would not be open for him to resist the same, at this stage, as burden would be solely on defendant to prove his this contention/defence.

12. In so far as the proposed amendment by clause 11A is concerned, if the said amendment to the written statement needs to be considered on the basis of the pleadings of the plaintiff. In paragraph 2 of the plaint it is specifically pleaded that house properties were partitioned by meets and bounds on 19/05/1957. This Court has raised specific query to the learned counsel for the plaintiffs to show as to whether this issue of partition on this particular date i.e. on 19/05/1957 was ever occurred for consideration before the Court in Special Civil Suit No. 02/1969. Though the pleadings in the said suit or the judgment of the Trial Court is not available for perusal but the judgment of Division Bench this Court can be referred in this regard.

13. Perusal of the entire judgment of the Division Bench does not disclose there being any issue about the partition effected on 19/05/1957. No doubt it is held that the suit property is already partitioned. However, merely because the same is being accordingly held by this Court, defendant cannot be precluded from disputing the contention of the plaintiff that the said partition was effected on the basis of so called document or on 19/05/1957. In order to apply constructive res judicata or issue estoppel, the said precise issue with regard to a particular document or partition on particular date was never in question in the earlier proceeding.

14. With regard to the judgments cited of Hon'ble Supreme Court in case of ***Karam Kapahi and others*** (supra) lays down law with regard to permissibility of inconsistent plea. Whereas judgment in case of ***Bhanu Kumar Jain Versus Archana Kumar and Another, (2005) 1 SCC 787*** and ***Ishwar Dutt***, deal with issue of estoppel / constructive res judicata/ issue estoppel. The general principles laid down on the issues cannot be disputed but it's application depends upon facts and circumstances involved in each case. The facts as they appear from record, mentioned herein above, make these judgments not coming to the aid of plaintiff in any manner, on both points i.e. inconsistent / mutually destructive plea and estoppel.

15. In case of ***Arundhati Mishra (Smt)*** (supra), defendant had raised specific plea that plaintiff is benamidar and defendant is real owner of suit property and in such circumstance plea of adverse possession is not allowed. There cannot be any dispute made with regard to the proposition sought to be canvassed by the learned counsel for the plaintiff that in appropriate cases principle of the constructive res judicata may apply and that the party who claims right title or interest through the predecessor cannot be permitted to raise such issue. In the instant case however the source of ownership of suit property is not specifically claimed in written statement, which is sought to be explained

by way of claim of adverse possession. In respectful view of this case, said judgment would not apply to the present case.

16. As far as cited on the point as to whether the tenant is permitted to deny title of the landlord is concerned, as the plaintiff has come out with case that the defendant is the gratuitous licensee. There is no doubt that it is within the right of defendant to deny such relationship. Only consequence thereof would be that such plea becomes a ground for eviction of tenant or termination of tenancy. It is pertinent to note that the said relationship has not been claimed on the basis of any document but it is said to be a oral arrangement as claimed by the plaintiff. Similarly, there is nothing on record to show that defendants admitted such relationship of landlord and tenant, at any prior time. In such circumstances, defendant can not be prohibited from raising dispute about the said alleged claim. Section 116 of Evidence Act may not apply in cases where a plaintiff raises claim that defendant is tenant and to support this stand produces no material on record. Merely because plaintiffs have made a claim of defendant being gratuitous licensee of suit premises without placing any material on record to support the same, defendant can not be prohibited to raise plea of ownership by adverse possession. On the face of it embargo created by Section 116 of Evidence Act, does not attract to case in hand.

17. In any case when the plaintiff claims that since December, 2004 the defendant was inducted in the suit premises as gratuitous licensee, the burden would be on the plaintiff to substantiate the said contention. Similarly, on the other hand the burden would be on the defendant to prove that the suit property is held continuously and adverse to the owner for 12 years or more. All these issues could be decided only on evidence at the time of hearing of the suit on merit. In the suit issues are yet to be framed/finalized. Thus even technically there is no impediment to allow amendment to written statement at this stage, as it is relevant for the determination of issues involved in the suit.

18. The upshot of above discussion is that amendment sought by defendant to the written statement deserves to be allowed in entirety. The learned Trial Court has committed error in not allowing amendment in clause 11B. The same is hereby allowed. Amendment be carried out within two weeks. This Court finds no merit in the challenge to the amendment in clause 11A.

19. In view of above discussion, Writ Petition No. 2736/2023 stands allowed. Writ Petition No. 9838/2023 is dismissed.

(R. M. JOSHI, J.)

ssp