

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL WRIT PETITION NO. 16350 OF 2023

1. Smt. Nirmala Gundu Yamgekar

Age 55 years, Occ : Household and
Agriculture residing at Hebbal – Jalddyal,
Taluka Gadhinglaj,
Dist. Kolhapur

2. Smt. Kavita Vivek Jadhav

Age 32 years, Occ: Household
Residing at Hebbal – Jalddyal,
Taluka Gadhinglaj, Dist. Kolhapur

3. Kum. Seema Gundu Yamgekar

Age 22 years, Occ: Education
Residing at Hebbal – Jalddyal,
Taluka Gadhinglaj, Dist. Kolhapur

4. Shri Santosh Gundu Yamgekar

Age 24 years, Occ. Service
Residing at Hebbal-Jalddyal,
Taluka Gadhinglaj, Dist. Kolhapur,
Through their Power of Attorney Holder
Amrut Rama Patil,
Age 63 years, Occ. Agriculture
R/at Batkanangale, Tal. Gadhinglaj
District Kolhapur

...Petitioners

Vs.

1. Shri Sharad Ganesh Joshi

Age 41 years, Occ. Agriculture
Residing at Shivaji Chowk,
Gadhinglaj, Tal. Gadhinglaj,
Dist. Kolhapur

2. Shri Shivram Yellappa Yamgekar

Age 45 years, Occ. Agriculture

Residing at Hebbal – Jalddyal

Taluka Gadhinglaj, Dist. Kolhapur.

...Respondents

Mr. Chetan Patil i/by Mr. Mandar G. Bagkar	Advocate for the Petitioners
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CORAM : S. M. MODAK, J.

DATE : 16th DECEMBER 2024**ORAL JUDGMENT :-**

1. Mentioned out of turn. In view of the urgency quoted (now the suit is fixed before the trial Court on 18.12.2024 for recording further evidence of the Plaintiff), I have heard learned Advocate Mr. Chetan Patil.

2. The petition is filed on behalf of the Plaintiffs. Whereas Respondent Nos. 1 and 2 are the Defendant Nos. 1 and 2. Respondent Nos. 1 and 2 are duly served but they are not appeared.

3. Considering the urgency, the petition is taken up for final hearing. Rule. Rule made returnable forthwith.

4. The only issue arisen in this petition is whether “*Defendant no.*

1 is justified in seeking the amendment in Written statement after commencement of the trial and that too without fulfilling the test of due diligence”.

5. Admittedly, issues are framed. The Plaintiffs have filed affidavit of examination-in-chief. This is recorded by the trial Court in para no. 7 of the order dated 12.07.2023, at page no. 71. Issues are framed on 08.12.2017 and affidavit is filed on 23.09.2019, as such trial has commenced. So if any of the Party wants to amend their pleadings, it can be done only after satisfying the test of due diligence.

6. When I have read the application for amendment, on page no. 58 and order passed there on, it cannot be said that the Defendant No. 1 has satisfied the test of due diligence. The Plaintiff has filed a suit for cancellation of the sale deed dated 13.06.2013 executed by the Defendant No. 1 as vendor and Defendant No. 2 as purchaser.

7. Whereas Plaintiffs contend their predecessor in title have purchased the suit property vide sale deed dated 12.06.1995. The Plaintiffs have sought for declaration of the 2013 sale deed as illegal. There is further prayer for injuncting Defendant No. 2 from disturbing their possession.

8. Defendant No. 1 has filed written statement and reply to the Exh. 5. It is on page no. 26. In para no. 6, the Defendant No. 1 has pleaded that he is enjoying the property as sole owner. He has also pleaded how the suit land was allotted to him. On this background, issues were framed on 08/12/2017, page no. 57.

9. After filing of the evidence affidavit by the Plaintiff on 23.09.2019, the Defendant No. 1 moved an application for amendment in written statement. The proposed amendment is para nos. 2-A, 2-B and 2-C. It is on page no. 59. The Defendant No. 1 has sought permission “*to incorporate the details about happening of the events in respect of the agricultural tenants, one Balu Rama Yamgekar and Yallappa Rama Yamgekar*”. On internal page no. 3, at the bottom, in para no. 2A, the Defendant No. 1 has pleaded “*One Gundu Samatu Yamgekar (as pleaded by the plaintiff) there predecessor in title have never cultivated land survey no. 8 but names of Balu Rama Yamgekar and Yallappa Rama Yamgekar have been entered as protected tenants*”. There are also other details in other paragraphs sought to be incorporated. This was opposed by the Plaintiffs.

10. As per impugned order dated 12.07.2023, the amendment is

allowed. The reasoning finds place in para no. 6. The trial Court allowed the amendment for the reason it will not change the nature of the suit. It was allowed because Defendant No. 1 has tried to explain the facts and yet the trial is to be conducted.

11. In the application defendant No. 1 has pleaded when written statement-cum-reply was filed at the beginning due to oversight those facts were not pleaded. The trial Court has committed wrong for two reasons:-

(a) Trial Court has never given observations about satisfaction of test of due diligence.

(b) The trial Court has overlooked one fact about averment in the original written statement and portion sought to be incorporated by way of amendment. It is in respect of the possession of the suit land. Originally, defendant No. 1 has pleaded

“तेव्हापसून प्रतिवादी क्रमांक १ हा सदरची जमीन एकटाच मालक नात्याने वहिवाटून उपभोगत होता. सबब वादी सदरहू दावा अर्जी कलम २ यात कथन करतात ते खोटे व लबाडीचे आहे. सबब वादीचा दावा रद्ध होणेस पात्र आहे”.

Whereas by way of an amendment, defendant No. 1 has pleaded,

‘it is not Gundu Samatu Yamgekar who was in possession but

names of Balu Rama Yamgekar and Yallappa Rama Yamgekar were entered as protected tenants’.

12. The possession is an important issue in the suit. The issues are on page no. 57. It casts burden on Plaintiff to show whether he is possession of the suit property. They claim that they were put in possession as per sale deed.

13. It is settled law that a party can amend the plaint for the purpose of the explaining earlier pleadings. At the same time such amendment which is contradictory to the earlier amendment cannot be allowed. Earlier Defendant No. 1 has said that he was in possession. Now he is saying that agricultural tenant is in possession. No doubt the defendant can take inconsistent pleas in the written statement but it should not be such a nature so as to amount to withdrawing the earlier admission.

14. In such an eventuality, the amendment cannot be sustained in the eyes of law. Hence writ petition deserves to be allowed.

15. Hence order :-

ORDER

(i) Writ Petition is allowed.

(ii) The order dated 12th July 2023 passed by 2nd Joint Civil Judge,

Junior Division, Gadhinglaj, in Reg. Civil Suit No. 13 of 2014 is set aside.

(iii) The Application filed for amendment of the written statement by Defendant No. 1 is dismissed.

16. Writ petition is disposed of.

17. Rule is made absolute accordingly.

[S. M. MODAK, J.]