



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL WRIT PETITION NO. 1062 OF 2023
ALONGWITH
CIVIL WRIT PETITION NO. 4397 OF 2023

**Sou. Indumati Ramchandra
Punekar**

Age :- 52 Years, Occ.: Household
R/o. at Tandulwadiwes,
Baramati, Dist.: Pune.

...Petitioner

Vs.

1. Nandkumar Vasant Bokan

Age : 48 years, Occ.: Business,
R/o. at M.R. Jewelers, Main Road,
Kedgaon, Tal. Daund,
Dist. Pune

2. Shri Vijaykumar Vasant Bokan

Age : 53 years, Occ.: Business,
R/o. At Tapaleshwar Road,
Tal. Jamkhed, Dist. Ahmednagar

3. Smt. Mathurabai Vasant Bokan

Age : 82 years, Occ.: Household
R/o at M. R. Jewelers, Main Road,
Kedgaon, Tal. Daund, Dist. Pune

4. Mrs. Jyotsna Mukund Shahane

Age : 51 years, Occ.: Household,
R/o Sangramnagar, Akluj,
Tal. Malshiras, Dist. Solapur

5. Sou. Hemlata Vilas Punekar

Age : 49 years, Occ.: Household,
R/o at Patas Road, Baramati, Dist. Pune

...Respondents

Mr. Swaroop M. Karade	Advocate for the Petitioner
Mr. Dormaan J. Dalal	Advocate for the Respondent No. 1 and 2.

CORAM : S. M. MODAK, J.

DATE : 16th OCTOBER 2024

ORAL JUDGMENT :-

1. Heard learned Advocate Shri Karade for the Petitioner/original plaintiff and learned Advocate Shri Dalal for Respondent Nos. 1 and 2/Defendant Nos. 1 and 2. Respondent No. 3/Defendant No. 3 is their mother. The farad sheet mentions that she has expired. This Court feels that her presence is not required for deciding these two writ Petitions. She is no more, then the Petitioner can take an appropriate step before the Appellate Court.

2. Issue involved in Writ Petition No. 4397 of 2023 is whether the Appellate Court was right in refusing the amendment thereby incorporating CTS No. 1092 in suit properties. It was rejected on 04.03.2021 by the Court of the Extra Joint District Judge, Barshi.

3. Whereas issue involved in Writ Petition No. 1062 of 2023 is whether the Appellate Court was justified in rejecting the application filed by the Petitioner for remanding the case to the trial Court for recording of the evidence. It was rejected on 23.06.2022.

4. First appeal is preferred against the judgment of dismissal of the suit for partition. The relationship is admitted. Respondent Nos. 1 and 2 are the brothers. Whereas Petitioner is their sister. After evidence, her suit is dismissed on merits. During the pendency of the appeal, she came to know that still there are two joint family properties which belongs to the HUF, and she has not included them in the suit properties, when the suit was filed.

Averments in amendment application

5. I have read the application filed before the Appellate Court. Para no. 1 says about how she got a knowledge about these two properties. Whereas para no. 2 gives description of CTS No. 1091 and CTS No. 1092. **The case pleaded by the Petitioner is as follows:-**

- a) CTS No. 1091 was allotted to Vasant, who is their father in partition effected by one Kisan Boka.
- b) CTS No. 1092 was purchased by their father Vasant with the

help of Joint Family income in the name of the Defendant No.

1.

6. The Appellate Court as per first order has concluded that “such property has to be included in suit property which is necessary to decide factum of partition”. **That is how only CTS No. 1091 was included.** The Appellate Court observed CTS No. 1092 which was standing in the name of the Defendant No. 1-Nandkumar Bokan cannot be said to be joint family property, that is why prayer is rejected.

7. According to learned Advocate Mr. Dalal, the amendment at an appeal stage needs to be dealt with stricter rules. According to him, the amendment post trial can be allowed only when test of the due diligence is satisfied. He relied upon the observations in case of **Ganpat Bhagoji Kshirsagar and Others Vs. Anjana Krushna Jamdade**, passed by this Court in Civil Writ Petition No. 10831 of 2023, on 09.10.2024. **There are two aspects:-**

- a) The test of the due diligence and
- b) The merits of the amendment cannot be gone into while deciding amendment prayer.

8. If this Court finds that test of due diligence is not satisfied, then

the amendment for CTS No. 1091 even cannot be allowed. But that part of the Order is not challenged by Defendant Nos. 1 and 2. Hence that part of order cannot be interfered. If this Court opines that Appellate Court had gone into the merits of the amendment by opining CTS No. 1092 does not belong to joint family property, then that part of the amendment needs to be allowed.

9. Considering all the factors, this Court feels that amendment for CTS No. 1092 cannot be allowed. Because on reading amendment application, I do not find convincing reason for amending plaint post decision of the trial. This Court is inclined to take a view that the Appellate Court was right in rejecting that part of the amendment. **In view of that Writ Petition No. 4397 of 2023 is dismissed.**

10. I am not agreeable to the Order passed by the Appellate Court in rejecting the application for framing additional issues and sending it to the trial Court. What Appellate Court has held in para no. 7 is the “appeal is of the year 2013, the Respondents had raised legal issue of pecuniary jurisdiction in his additional written statement.” The Appellate Court opined “this issue can be decided at the time of decision of the appeal.” **This reasoning is not sound. It takes away right**

of the Parties to prove amended facts.

11. The question is once the Appellate Court has allowed the amendment, the Parties needs to be given an opportunity to prove their case. If it is so evidence has to be recorded. Now whether it can be done by the Appellate Court or by the trial Court.

12. Learned Advocate Shri Dalal relied upon the observations in case of ***Pralhad Rai Dhand Vs. Smt. Savitri Devi***¹ and more specifically para no. 9. This case deals with contingency wherein there was sufficient evidence adduced before the trial Court and the question was whether the Appellate Court can give findings on the basis of that evidence. It was observed, it can be done by the Appellate Court also. But these facts are different. Pleadings are amended post decision of the suit.

13. **I am inclined to allow the application as per the provisions of the Order 41 Rule 25 of the Civil Procedure Code.**

14. Learned Advocate Mr. Dalal is right in his submission that this power can be exercised when trial Court has omitted to frame issue. In this case this is not the contingency, however second category also permits in case trial Court has omitted to determine any question of

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the facts which is essential of the right decision of the suit. Admittedly CTS No. 1091 was not included when suit was filed. **It has to be presumed in a given situation that the trial Court has omitted to determine whether CTS No. 1091 is part of the joint family property,** so it has to be allowed. Hence, following order is passed:-

ORDER

- (i) Writ Petition No. 4397 of 2023 is dismissed.
- (ii) Writ Petition No. 1062 of 2023 is allowed.
- (iii) The Order passed by the Court of the Extra Joint District Judge Barshi, District Solapur below Exh. 52 in Regular Civil Appeal No. 286 of 2014 on 23.06.2022 is set aside.
- (iv) The Application filed below Exh. 52 by the Applicant is allowed.
- (v) Appellate Court is directed to frame the issues on the basis of the amendment permitted by him.
- (vi) The Appellate Court is directed to frame additional issues within 15 days from the date of receipt of this order.
- (vii) Then the Appellate Court is directed to send the matter to the trial Court for permitting both the Parties to adduce

evidence alongwith direction to give findings on those amendment issues.

- (viii) The trial Court is expected to give findings only on the basis of the evidence that will be adduced before him and without going into findings recorded in the original judgment.
- (ix) The trial Court is directed to complete recording of the evidence by both the Parties within three months once the record is sent to him.
- (x) Appellant is given one month time to complete evidence. Respondent Nos. 1 and 2 are given one month time to complete evidence.
- (xi) The trial Court can regulate the conduct of Parties and even cost of atleast Rs. 10,000/- on Party not adhering time limit.

15. Parties to place this order before the Appellate Court.

[S. M. MODAK, J.]