

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.11674 OF 2022

Popatlal Motilal Kothari

.. Petitioner

Versus

Rajshree Deepak Jain and Ors.

.. Respondents

-
• Mr. Sagar Kursija, Advocate for Petitioner.
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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 16, 2024

P.C.:

- 1.** Heard Mr. Kursija, learned Advocate for Petitioner.
- 2.** The present Writ Petition takes exception to the order dated 22.08.2022 passed below Exhibit-56 in Special Civil Suit No.201067 of 2014.
- 3.** By virtue of the said order, Application filed by the Plaintiff to amend the suit plaint under Order VI Rule 17 of the Code of Civil Procedure, 1908 (for short '**CPC**') has been allowed by the learned Trial Court.
- 4.** One of the principal submission of Defendant – Writ Petitioner before me is that the said Application has been allowed at a much belated stage after commencement of trial and therefore without Plaintiff having shown any due diligence, the said Application deserved to be rejected.

5. Mr. Kursija would submit that suit being filed in the year 2014 and witness action having commenced on 08.03.2019, before the witness action of the Plaintiff could be completed, Application below Exhibit-56 was filed. He would submit that the amendment sought is not only at a much belated stage but completely with a *malafide* intention after declaration of the defence of the Defendants in their written statement.

6. I have perused the order dated 22.08.2022 which is at Exhibit-I, page No.58 of the Writ Petition as also the suit plaint filed by the Plaintiff.

7. It is seen that the suit has been filed by the Plaintiff for seeking partition of the property belonging to the mother. It is directed against her father and other siblings. It is contended by the Plaintiff that she is entitled to one-seventh share in the suit property. Such a suit though nomenclatured as a suit for partition, each of the parties arrayed therein are in the shoes of a Plaintiff. It is seen that the Defendants have been enjoying the suit property since long. Suit property, according to Plaintiff belongs to her deceased mother.

8. Application filed under Order VI Rule 17 of the CPC by the Plaintiff seeks a specific amendment to the effect that the property enjoyed by the Defendants belongs to the joint family and income derived from the family business carried out from such property /

Hindu Undivided Family (for short ‘HUF’) would also belong to all parties.

9. It is averred by the Plaintiff that Defendant No.1 has continued with carrying on the family business standing in the name of the HUF i.e. M. C. Company and is running the said business from the suit property which is a three storey building.

10. It is averred that Plaintiff sought and requested her share not only in the suit property but also in the family business but Defendant No.1 refused to give her the share. Relief prayed for in the suit plaint is for one-seventh share in the suit property which would undoubtedly include the family HUF business carried out from the suit property itself. The said family business is not the exclusive business of the Defendant No.1.

11. The proposed amendment seeks calculation of one-seventh share of the suit property from the *mesne* profits received by the Defendant No.1 alongwith interest thereon. There can be no impediment whatsoever to allow the Plaintiff to maintain such a relief in the suit plaint as the said relief is clearly a consequential relief. Plaintiff has already sought here 1/7th share in partition.

12. One of the submission advanced by Mr. Kursija is that the suit trial has commenced and allowing such an amendment would be changing and altering the nature of the suit proceedings. I do not

agree with Mr. Kursija since the proposed amendment sought for by the Plaintiff is nothing but clearly a consequential relief which would otherwise enure to the benefit of the Plaintiff on partition.

13. Plaintiff cannot be made to seek the said proposed consequential relief in execution proceedings after obtaining a partition decree and cannot be relegated to the Executing Court. If the said amendment is not allowed, the Plaintiff would be saddled with a mere paper decree and to realise her share in the suit property, she would be at mercy of the Executing Court. Needless to state that the litigation would be further protracted.

14. Though Mr. Kursija would be right in contending that due diligence has not been explained, the averments made in the proposed amendment clearly show that the suit property is being used by the family run HUF Company operated by Defendant No.1. If that be the case, any income that would be derived from use of the suit property which is yet to be partitioned would enure to the benefit of all co-sharers and joint holders of the property in equal proportion. That is precisely what the Plaintiff has prayed for in the suit proceedings itself. This is the case where allowing of such a prayer is a necessity and Court will have to therefore take a liberal approach while allowing the Application under Order VI Rule 17 of the CPC.

15. Mr. Kursija in support of his submissions has referred and

relied upon to the following three decisions:-

- (i) **Vidyabai and Others Versus Padmalatha and Another.**¹
- (ii) **Sai Shradha Developers, Sangamner and Ors Vs. Ravindra Ganpatrao Bharitkar and Others.**²
- (iii) **K. T. Kubal and Company (M/S) vs. Mujibur Rehman Haji Israr Alam Siddiqui.**³

16. In the decision of the Supreme Court in the case of **Vidyabai and Others Versus Padmalatha and Another** (*first supra*) he has drawn my attention to paragraph No.10 to contend that this Court should take into cognizance the mandatory provision that no Application for amendment should be allowed after the trial has commenced unless the Court comes to a conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. Here is case where Plaintiff is admittedly entitled to 1/7th share in the suit property of her mother since her suit is for partition. The suit property is used by Defendant, rather all Defendants to run the family owned business therefrom. Plaintiff sought her share which is denied by the Defendants from the family owned business. Hence it is imperative that Plaintiff seeks her share in the *mesne* profit of the family business. The decision of the Supreme Court is passed in the

1 (2009) 2 Supreme Court Cases 409.

2 2012 (6) Mh.L.J.348

3 2015 (3) Mh.L.J.892

facts of a case of specific performance of the agreement for sale. It is clearly distinguishable from the facts in the present partition suit.

17. In the case of **Sai Shradha Developers, Sangamner and Ors Vs. Ravindra Ganpatrao Bharitkar and Others** (*second supra*), the learned Single Judge of this Court (Coram : S. S. Shinde, J.), Mr. Kursija has drawn my attention to paragraph No.8 of the said decision to drive home the point that the Trial Court ought to be satisfied that there is respect of due diligence and the amendment application is warranted at a particular stage. He would submit that there is no reason stated in the Application to file the said Application after a hiatus of eight years and no due diligence has been shown by the Plaintiff. Once again it is reiterated that this is a partition suit. Suit is not yet determined. In the course of determination of the partition suit, amendment of pleadings is sought by the Plaintiff in respect of a HUF family run business which is run from the suit property itself and therefore the facts of the present case warrant allowing such an amendment in order to avoid multiplicity of proceedings between the parties after the decree of Partition is passed.

18. In the decision of **K. T. Kubal and Company (M/S) vs. Mujibur Rehman Haji Israr Alam Siddiqui** (*third supra*), Mr. Kursija has drawn my attention to paragraph No.19 and would contend that if the Application seeking amendment is completely silent on due

diligence, the Court should not take cognizance of the same and dismiss it outrightly. He would submit that in the present case also, Application is made after a hiatus of eight years and is completely silent on due diligence. He would submit that there is no explanation offered by the Plaintiff and therefore the Application ought to have been rejected. What is important is to be noted is whether the proposed amendment would be necessary in resolving putting an end to the real dispute between the parties. It is only when the Defendants denied giving the Plaintiff's share from the mesne profits of the family run business from the suit property itself, the Plaintiff sought the amendment. The proposed amendment as sought for under paragraph No.13(a) and 13(b), if seen, it is clear that the said amendment is absolutely necessary for arriving at a definite decision in respect of *lis* raised by the Plaintiff.

19. It is clearly seen that in the prayer clause sought in the proposed paragraph No.13(b), the Petitioner has only sought calculation and fixation of *mesne* profit according to her share alongwith interest and Plaintiff has not prayed for any relief which will alter the nature of the suit proceedings. Both the proposed prayer clauses (b) and (c) are *prima facie* on the reading of the said prayers, consequential reliefs.

20. In view of the above, I find no reason as to why the order

dated 22.08.2022 requires any interference of this Court. Though Mr. Kursija would submit that there are no reasons given in the order passed below Exhibit-56. However in paragraph No.6 of the said order dated 22.08.2022, the learned Trial Court has clearly stated that on appreciation of the documents on record, the proposed amendment deserves to be allowed and no prejudice would be caused to the Defendants in order to meet the ends of justice. This is the reason which is amplified by me in my order hereinabove.

21. I reiterate that in the interest of justice, it is necessary that the proposed amendment is allowed so that the Plaintiff in the partition suit gets determination of her share absolutely and decisively.

22. In view of the above observations and findings, I am inclined to uphold the order dated 22.08.2022. Resultantly, Writ Petition is dismissed.

23. Mr. Kursija would submit that the suit is of the year 2014 and therefore seeks expeditious disposal of the suit proceedings. This application made by Mr. Kursija is fair. Hence, learned Trial Court is directed to dispose of Special Civil Suit No.201067 of 2014 within a period of six months from today. Parties are directed not to take any unnecessary adjournments and co-operate with the learned Trial Court. Trial Court is directed to give adjournments only if they are utmost necessary and decide the Special Civil Suit No.201067 of 2014

strictly in accordance with law. All contentions of the parties are expressly kept open.

24. With the above directions, Writ Petition is disposed.

H. H. SAWANT

[MILIND N. JADHAV, J.]

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