

Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8183 OF 2024

Dashrath Shiva Korlekar

.. Petitioner

Versus

Devendra Murari Korlekar & Ors.

.. Respondents

.....

- Mr. Sanskar Marathe for Petitioner
- Mr. Vishwanath Patil alongwith Ms. Nidhi Chauhan for Respondent No. 1

.....

CORAM : MILIND N. JADHAV, J.

DATE : AUGUST 07, 2024

JUDGMENT:

1. This Writ Petition is filed to challenge the order dated 22.02.2024, passed by the Learned Trial Court in Application filed below Exhibit '77' in RCS No. 7 of 2014. The Application below Exhibit '77' was filed by the Plaintiff under Order VI Rule 17 of the Code of Civil Procedure, 1908 (for short '**CPC**') nine (9) years after the filing of suit proceedings.

2. Petitioner before me is the legal heir of original Defendant No. 1 nomenclatured as Defendant No. 1C, Respondent No. 1 is the original Plaintiff, Respondent Nos. 2 to 13 are original Defendants whereas Defendant Nos. 14 to 16 are Defendant Nos. 1A, 1B and 1C i.e. other legal heirs of original Defendant No. 1. Parties shall be referred to as Plaintiffs and Defendants for convenience.

3. Briefly stated Plaintiff filed a Suit for partition of sixteen (16) properties and also sought injunction against Defendants from carrying out any construction of their house property until the Suit for partition was decided. Suit is filed on 24.01.2014. Suit plaint is at Exhibit 'A' appended at Page No.13, where sixteen (16) immovable properties situated at Village – Dale, Taluka – Rajapur, District – Ratnagiri are described in paragraph No. 1. Name of the Plaintiff is Devendra Murari Korlekar. He is one of the grandsons of his ancestor / grandfather called Shiva. Suit is filed by Devendra – Plaintiff against his uncles who are the sons and legal heirs of Shiva.

4. It is averred in paragraph No. 4 of the Suit plaint by the Plaintiff that the ancestral property in paragraph No.1 of Suit plaint is divided proportionately among the branches of the family and therefore the Suit is filed for partition of the property by metes and bounds. It is also stated that Plaintiff and Defendants are also cultivating rice on some of the agricultural land as per the said division. It appears that there is an old house bearing house No. 237, *inter alia*, belonging to Plaintiff and original Defendant Nos. 1 to 4 and dispute has arisen for the division of the house due to its dilapidated condition, it requires repairs and renovation since original Defendant Nos. 1 to 4, has resisted the claim of Plaintiff in the house and the said suit is filed, admittedly the

sixteen (16) Suit properties are joint Hindu Undivided Family (HUF) properties belonging to Shiva.

5. The evidence and witness action of Plaintiff and Defendants has entirely concluded as far back as in the year 2020 and the Suit is kept for final arguments as far back as on 23.03.2021. It is seen that Plaintiff's final arguments are also completed before the Trial Court but when the time came for arguing the Defendants' case on 09.10.2023, Plaintiff filed Application below Exhibit '77'. By this Application Plaintiff has sought to add twelve (12) more immovable properties which are stated in paragraph No. 2 of the Application to the Suit proceedings and while doing so Plaintiff has also enhanced the original family tree which was the subject matter of the Suit proceedings thus requiring impleadment of nineteen (19) additional Defendants to the Suit proceedings. The ground given by the Plaintiff in the Application is that Plaintiff desires to place on record additional evidence and documents and also seeks appointment of Court Commissioner in order to have division of the house property.

6. This Application is hence resisted by the Defendants on several grounds namely, that it is filed to improve the Plaintiff's case pursuant to witness action, that it is filed to fill in the lacunae in the evidence and most importantly there is no due diligence performed on the part of Plaintiff and the Application suffers from gross delay and laches.

7. By virtue of the Impugned Order dated 24.02.2024, the said Application is allowed by the learned Trial Court by awarding costs of Rs. 2000/- to be paid by Plaintiff to thirteen (13) contesting Defendants proportionately and Plaintiff is permitted to carry out the amendment and file a consequential amended plaint on record.

8. Being aggrieved, Defendant No. 1-C has filed the present Writ Petition under Article 227 of the Constitution of India.

9. I have heard Mr. Marathe, learned Advocate for Defendant No. 1-C and Mr. Patil alongwith Ms. Chauhan, learned Advocate appearing for Plaintiff and with their able assistance, I have perused the pleadings and record of the case which is appended to the Petition.

10. Mr. Marathe, referred to and relied upon the following judgments of the Supreme Court to contend that, amendment to pleading under Order VI Rule 17 sought after commencement of trial or at the stage of final hearing, necessitates the person seeking amendment to show due diligence on his part as contemplated under its proviso. That amendment cannot be claimed as a matter of right nor the Court has absolute discretion to allow the amendment as the amendment at the said stage would cause serious prejudice to the other party :-

(i) *M. Revanna Vs. Anjanamma (dead) by lrs. and others*¹ ;

¹ (2019) 4 SCC 332

(ii) *Mahadevi Annasaheb Jagtap Vs. Shilabai Popat Lambe and Others*²;

(iii) *Falcon Tyres Employees House Building Co-operative Society Ltd. Mysuru Vs. Ashwin Pai and Others*³ and

(iv) *Narinder Singh and Others Vs. Swaran Singh and Others*⁴

10.1. Mr. Patil, has further referred to and relied upon the following judgments of the High Courts and the Supreme Court in support of his the case :- (i) *Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and 2 Others*⁵ to contend that Courts may allow amendment if nature of proceeding is not changed and no disadvantage is caused to the other party. (ii) *Rajabhadur Vs. Prakash @ Papu Jiyaram Yadav & Others*⁶ to contend that inclusion of properties in a partition Suit can be allowed at the stage of final arguments. (iii) *Egidio Braganza and Another Vs. Lino Agnelo Fernandes and Others*⁷ to support the proposition that an amendment to include properties can be allowed to facilitate proper identification and (iv) *Bulla Peda Lakshmamma and Others Vs. Kattepogu Tatabbayi*

2 AIR (Online) 2020 Bom 2122

3 AIR (Online) 2020 Kar 1238

4 AIR (Online) 2020 P & H 234

5 AIR 1957 SC 363

6 2016 2 Mah LJ 639

7 2016 SCC OnLine Bom 3962

*and Others*⁸ to support his argument that, delay is not a ground to reject an amendment if the properties were not in knowledge of the Petitioners before the commencement of trial.

11. At the outset, it is seen that admittedly the entire witness action in the present case was completed / concluded and final arguments had already commenced in the Suit proceedings before the Trial Court. It is only at this stage the Plaintiff filed Application below Exhibit '77', and the reasons stated by Plaintiff are that Plaintiff and his family members are illiterate persons and therefore he forgot to add some immovable properties and some of the parties as Defendants to the Suit proceedings. The Application as filed is in the most casual manner and it clearly suffers from delay and laches.

12. If the Suit plaint is seen, Plaintiff is the son of Murari who is the brother of original Defendant Nos. 1 to 4. Plaintiff conveniently ignored impleading the three sisters of his father Murari while filing the Suit proceedings, he also conveniently ignored deceased Tukaram. He proceeded with the Suit proceedings until final arguments commenced. If the Suit plaint is seen carefully it is Plaintiff's own case that all the immovable properties have been clearly demarcated, partitioned and apportioned between the parties. Such is the averment in paragraph Nos. 2, 3 and 7 of the Suit plaint, the only grievance

8 2024 SCC OnLine AP 1758

made by the Plaintiff is that the house property nomenclatured as house No. 237 belongs to Plaintiff and original Defendant Nos. 1 to 4 and the same is being reconstructed.

13. Plaintiff's own averments are to the effect that each branch of the family is peacefully and simultaneously cultivating their agricultural properties. Plaintiff's only grievance in the Suit plaint is with respect to house No. 237, wherein Plaintiff and original Defendant Nos. 1 to 4 are residing. The said house appears to be in a dilapidated condition and is being repaired. It appears that Plaintiff is opposed to Defendants repairing the said house. However, at the same time it is Plaintiff's case in the Suit plaint that the vahivat and right of way in respect of all Suit properties has been demarcated and is mutually used by each of the branches of the family, independently having their respective possession.

14. In the above background, Plaintiff after leading witness action with respect to the cause of action in the Suit plaint, filed an Application below Exhibit '77' to add further twelve (12) immovable properties and also join / implead the other legal heirs including those deriving from the sisters of his father Murari, who have virtually nothing to do with house No. 237.

15. The learned Trial Court has allowed the Application on the premise that considering the nature of dispute, in order to avoid multifarious Suit proceedings and to determine the real controversy between the parties such an amendment should be allowed. What is crucial to be noted is that twelve (12) immovable properties sought to be added, and also sixteen (16) legal heirs / parties ought to be impleaded were clearly known to Plaintiff and were to the knowledge of Plaintiff when a Suit for partition was filed in the year 2014. The Plaintiff did not forget to implead them.

16. It is further seen that, this is not a new development in the last ten (10) years and most importantly Plaintiff conducted the Suit proceedings and his witness action on the basis of the original Suit plaint and cause of action stated therein. If that is the case, then impleading other legal heirs i.e. the sisters of Murari and their properties is nothing but an attempt to expand and change the nature and cause of action in the Suit proceedings, when it is Plaintiff's own case that all descendants and successors-in-title of his grandfather Shiva are enjoying their respective Suit properties apportioned to them as stated in paragraph Nos. 2 and 3 of Suit plaint, and if it is Plaintiff's only grievance about house No. 237 of the Suit plaint, then after evidence is completed / concluded the amendment sought below Exhibit "77" is not at all necessary.

17. For the last ten (10) years, Plaintiff has been litigating with the Defendants, Plaintiff is the son of Murari, original Defendant Nos. 1 to 4 are the brothers of Murari and Shiva is the grandfather of Plaintiff. Once Plaintiff admits in the Suit plaint that parties are enjoying their respective vahivat / demarcated properties and are also cultivating their respective agricultural properties, there is no reason for Plaintiff to implead the three (3) daughters of his grandfather Shiva in the Suit plaint, who have been living separately. Plaintiff could have very well done that at the inception stage itself. He chose not to do so this is for the simple reason that Plaintiff's principal case and cause of action in the present Suit pertains to house No. 237 and the substantive rights of the five (5) sons of Shiva in the said house and the consequential action of repairing / renovating / reconstruction of the said house.

18. In view of the above observation and findings, impleadment of the three (3) daughters of Shiva after the entire witness action of Plaintiff is completed / concluded is not at all necessary in the facts and cause of action in this case. The Plaintiff has consciously not impleaded them at the outset in the year 2014, when he filed the partition Suit. Their impleadment is not necessary to determine the real controversy between Plaintiff and original Defendant Nos. 1 to 4 and their substantive right in house No. 237. The learned Trial Court has not applied its mind to the aforesaid issues and has simplicitor

allowed the amendment on the ground of avoiding multifarious proceedings.

19. In the facts of the present case delineated herein above, the amendment sought ought not to have been allowed as it is not germane to the real controversy in the Suit. The learned Trial Court has applied the test of costs in the present case. It needs to be considered that in the facts of the present case, allowing costs is not an appropriate remedy so as to increase the scope and ambit of the Suit proceedings, as the real controversy between the parties is not considered by the Trial Court at all pleaded in the Suit. Merely because partition is sought by metes and bounds does not mean it is a partition Suit filed by Plaintiff. His own case is that each branch is enjoying their respective share holding.

20. Application below Exhibit '77' therefore clearly suffers from delay and laches as also due diligence on the part of Plaintiff at the stage of the Suit proceedings, such an Application cannot be allowed.

21. In view of the above reasons, Impugned Order dated 22.02.2024 is not sustainable and is therefore quashed and set aside. Resultantly, Application below Exhibit '77' stands dismissed.

22. Considering the age of the Suit, the learned Trial Court is directed by this Court to hear the final arguments as expeditiously as

possible and decide the Suit strictly in accordance with law, within a period of three (3) months from the date of uploading of this judgment. Needless to state the all contentions of the parties are expressly kept open including of the Plaintiff and Defendants in the suit proceedings.

23. Writ Petition stands allowed in the above terms, Writ Petition is disposed.

Amberkar

[MILIND N. JADHAV, J.]

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HANUMANT
SAWANT

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by HARSHADA
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