



(1)

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD**

**WRIT PETITION NO.769 OF 2018**

Savitri w/o Digamber More,  
Age: 44 years, Occu.: Household,  
R/o. Dharmabad, Tal. Dharmabad,  
Dist. Nanded

....PETITIONER  
(Orig. Plaintiff)

VERSUS

1. Bapurao s/o Irba Kadam (Dead),  
Through Resp No.2
2. Lakshmibai w/o Bapurao Kadam,  
Age: 65 years, Occu: Nil.  
R/o. Chikna, Tal. Dharmabad,  
Dist. Nanded
3. Kantabai w/o Niwarti Kausale,  
Age: 48 years, Occu: Household,  
R/o Bhawani Nagar, Khandhar,  
Tal. Khandhar, Dist. Nanded

....RESPONDENTS  
(Orig. Def. Nos.1-3)

....

Ms Khushi Varma, Advocate h/f Mr R. R. Kazi, Advocate for  
petitioner

Mr H. I. Pathan, Advocate for respondent No.3

**CORAM : PRAFULLA S. KHUBALKAR, J.**

**RESERVED ON : 23<sup>rd</sup> June, 2025  
PRONOUNCED ON : 07<sup>th</sup> July, 2025**

**JUDGMENT :-**

1. Heard. Rule. Rule made returnable forthwith. Heard  
finally by consent of the parties.

(2)

2. Heard Advocate Ms. Khushi Varma, holding for Advocate Mr R. R. Kazi, learned counsel for the petitioner and Advocate Mr H. I. Pathan, learned counsel for respondent No.3.

3. The petitioner has challenged the order dated 17/08/2017, passed by the District Judge-1, Biloli, Dist. Nanded, in Regular Civil Appeal No.34/2011 on an application under Order VI Rule 17 read with Order I Rule 10 of the Code of Civil Procedure for amendment of the plaint and addition of necessary party.

4. The petitioner is the original plaintiff, who had filed Special Civil Suit No.8/2010 for partition and separate possession, claiming 1/3rd share in the suit property, described in the Schedule 'A' enclosed to the plaint. The petitioner/plaintiff had also sought an injunction for restraining the defendants in the suit from creating any third party interest in the suit property. This suit was filed on 07/04/2010, in which, defendant Nos.1 to 3 appeared and filed their written statement on 20/09/2010. Amongst other contentions, the defendants raised specific contention that defendant Nos.1 and 2 had executed their wills separately on 19/03/2010 and bequeathed their properties to their grand children, namely, Tejaswini Kausale and Digvijay Kausale, who are the daughters of defendant No.3. By

(3)

judgment and order dated 25/07/2011, Regular Civil Suit was dismissed with costs. The plaintiff, thereafter filed Regular Civil Appeal No.34/2011 before the District Judge-1, Biloli, Dist. Nanded. During the pendency of the appeal, the plaintiff filed application under Order VI Rule 17 read with Order I Rule 10 of the Code of Civil Procedure for amendment of plaint and addition of party defendant. By way of proposed amendment, the plaintiff sought to amend the plaint to challenge the will dated 19/03/2010 (Exhibit 76) made in favour of Tejaswini, in respect of suit properties, to be invalid and void, and to array Tejaswini as party defendant. This application came to be rejected, against which, the instant petition has filed.

5. Advocate Ms Khushi Varma, learned counsel appearing for the petitioner submits that the impugned order is erroneous, since the Appellate Court failed to consider that, in view of death of defendant No.1/Baburao Irba Kadam, the will has taken its effect and in view of the controversy involved, the will dated 19/03/2010 (Exhibit 76) needs to be challenged for effective and complete adjudication of the controversy involved in the suit. She submits that the will is executed in favour of Tejaswini and therefore, she is required to be added as party defendant No.4 in the suit. She vehemently submits that the proposed amendment is necessary to avoid multiplicity of

(4)

proceeding and it will resolve the controversy once and for all. She further submits that the position of law is well settled that amendment can be allowed at any stage and in support of her submissions, she relies on the judgments in the matters of **Life Insurance Corporation of India Vs. Sanjeev Builders Private Limited and another**, reported in 2022 SCC OnLine SC 1128; **Mathai Samuel and others Vs. Eapen Eapen (dead) By LRS and others**, reported in (2012) 13 SCC 80 and in unreported judgment of the Hon'ble Supreme Court in the matter of **Dinesh Goyal @ Pappu Vs. Suman Agarwal (Bindal) and others** [Special Leave Petition (Civil) No.30324/2019].

6. As against this, Advocate Mr Pathan, learned counsel for respondent No.3 strenuously submits that the petition is devoid of substance and amendment of plaint cannot at all be allowed during the pendency of the Regular Civil Appeal. He submits that the Regular Civil Suit filed by the plaintiff/petitioner is decided by the Trial Court by recording categorical findings about ownership of defendant No.1 and his status as a full owner of the property. He submits that the suit properties which were allotted to defendant No.1 in the partition became his separate property, and in view of this, defendant No.1 was empowered to execute a will. He also vehemently submits that defendant No.1 has raised a defence based on the registered will in the

(5)

written statement and the plaintiff has failed to raise any challenge at the relevant stage. It is further submitted that, although the petitioner/plaintiff has levelled allegations about the will being executed under some influence, pertinently, she failed to raise challenge to the will during the lifetime of defendant No.1, who could have been examined as a witness to test the allegations of influence. It is, therefore, submitted that the application for amendment after the decision of the suit and during the pendency of Regular Civil Appeal definitely changes the nature of the suit and needed to be rejected. He, thus, supports the impugned order.

7. The rival contentions, thus, fall for my consideration.

8. It has to be noted that the respondents/defendants have filed their written statement on merits, taking a specific stand with respect to the suit property and also disclosing the details of the will (Exhibit 76). The suit was contested and decided on merits and the parties are now contesting before the Appellate Court. The plaintiff/petitioner has proposed to amend the plaint at this stage by raising challenge to the registered document of will based on certain allegations of execution of the will being under influence and misrepresentation of the parties. The plaintiff/petitioner has also proposed to add Tejaswini as party defendant No.4, in whose favour

(6)

the property is bequeathed by the said will (Exhibit 76). The proposed amendment to the plaint raising challenge to the will, in the light of findings of the Trial Court in the decided civil suit, will definitely change the nature of the suit. It has to be noted that, in view of the defence set up by the defendants, parties have laid evidence and the Trial Court has rendered its findings. As such, permitting the plaintiff to amend the suit by way of proposed amendment will cause prejudice to the rights of the defendants.

9. It is crucial to note that the defendant No.1 has already taken a stand in the written statement that he has executed the registered will dated 19/03/2010 (Exhibit 76). In view of this written statement, the plaintiff could have raised challenge to the will by filing appropriate application for amendment during the pendency of the suit. However, the plaintiff has not raised any challenge to the will during the pendency of the suit and the proposed amendment during the pendency of the Regular Civil Appeal, demonstrate that the plaintiff has not acted with due diligence. It is, thus, clear that the plaintiff was aware about registered document of will in favour of Tejaswini, however, the plaintiff chose to allow the suit to be decided on merits, without raising any challenge to the will. The proposed amendment to the plaint cannot be permitted in the peculiar facts of this case. The

(7)

contention of the petitioner that the challenge to the will could be raised only after death of defendant No.1, since the cause of action arose after his death, is not appealing. It has to be noted that the petitioner/plaintiff was aware about existence of a registered document of will and could have raised the challenge during the lifetime of the testator, who could have been examined as witness for testing the genuineness of the document. The application for amendment does not mention any reasons for not seeking amendment of plaint during pendency of the suit. As such, the submissions in this regard are not acceptable.

10. The position of law as laid down in the judgment of **Life Insurance Corporation of India** (supra) that amendment can be allowed at any stage is no more *res integra*, however, it is also reiterated and held that an amendment which changes the nature of the suit or an amendment, by which other side loses the valid defence, cannot be permitted, as laid down in the same judgment. The position of law laid down by the Hon'ble Supreme Court in the matter of **Life Insurance Corporation of India** (supra) and **Dinesh Goyal @ Pappu** (supra) is not disputed, however, in my respectful opinion, these judgments are of no assistance to the petitioner in this case. The reliance placed on the judgment of **Mathai Samuel and others**

(8)

(supra), which deals with the issue of essential conditions of a will is also not disputed. On consideration of the position of law with respect to provisions of Order VI Rule 17 of the Code of Civil Procedure, particularly, the proviso dealing with the aspects of 'due diligence', I am of the considered opinion that amendment to the plaint proposed by the petitioner at the stage of Regular Civil Appeal cannot be permitted.

11. A perusal of the impugned order shows that the Trial Court has given due consideration to the contentions raised by the parties and has passed a well reasoned order. The Trial Court has also duly considered the submission about alleged cause of action to the plaintiff after the death of defendant No.1. It is rightly observed that the application for amendment at the stage of Regular Civil Appeal is without support of any justifiable reasons. The impugned order, thus, appears to be well reasoned and needs no interference.

12. In the light of above mentioned factual and legal aspects, the instant petition is meritless and it deserves to be dismissed, and accordingly, the writ petition is dismissed. No order as to costs.

13. Rule is discharged.

**(PRAFULLA S. KHUBALKAR, J.)**

sjk

**AFTER PRONOUNCEMENT**

14. After the judgment was pronounced, learned counsel for the petitioner requested for continuation of the interim relief, which was granted by order dated 01/10/2018 for a period of eight weeks.

15. Considering the fact that the interim relief was operating during the pendency of the petition, the interim relief is continued for a further period of eight weeks from today.

**(PRAFULLA S. KHUBALKAR, J.)**

sjk