

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2629 OF 2025

Nilkanth Dhondiba Teli @ Kore (since
deceased) through LRs. ...Petitioners

Versus

Chhaya Manohar Kevate and ors. ...Respondents

Mr. A. A. Anturkar, Senior Advocate, a/w Amol Gatne, for the
Petitioners.

Mr. Ashok Tajane, a/w Balaji Shinde, for Respondent No.1.

CORAM: N. J. JAMADAR, J.
DATED: 26th FEBRUARY, 2025

Order:-

1. Defendant Nos.2A to 2D take exception to an order dated 16th January, 2025 passed by the learned Principal District Judge, Solapur, on an application for amendment in the written statement (Exhibit-35) in RCS/64/2021, whereby the said application came to be rejected.

2. Nilkanth Dhondiba Teli @ Kore, the predecessor-in-title of petitioners and defendant Nos.2A to 2D, was the brother of respondent Nos.1 to 4 – the plaintiffs. Respondent nos.1 to 4 instituted a suit for partition, possession, *mesne profits* and perpetual injunction against Nilkanth and the successors in interest of Dilip, another brother. By the judgment and decree dated 28th September, 2021, the said suit was decreed,

inter alia, declaring that plaintiff Nos.1 to 4 and defendant No.1 Kalavati, the mother of the plaintiffs, had 1/7th share each in the suit properties.

3. Aggrieved, the petitioners and the successor in interest of Dilip, preferred appeal.

4. During the pendency of the said appeal, the defendants preferred an application for amendment in the written statement so as to incorporate the contentions to the effect that the plaintiffs were ousted of the joint family properties to their knowledge in the year 1993. Therefore, the suit instituted in the year 2016 was barred by Law of limitation.

5. By the impugned order, the learned Principal District Judge was persuaded to reject the application observing, *inter alia*, that the proviso to Rule 17 of Order VI came into play and there was no due diligence on the part of the defendants. Thus, the defendants were not entitled to amend the written statement at the appellate stage.

6. Mr. Anturkar, the learned Senior Advocate for the petitioners, would urge that the amendment in the written statement was in the nature of amplification of the grounds raised in the original written statement. No new defence was sought to be pleaded by way of the proposed amendment.

Inviting the attention of the Court to the contentions in paragraphs 15 and 17 of the written statement, wherein it was contended that the plaintiffs had voluntarily relinquished their interest in the suit property in the year 1993 and the suit was barred by law of limitation, Mr. Anturkar made an earnest endeavour to persuade the Court to hold that the proviso to Rule 17 of Order VI had no application at all.

7. It was further urged that the said proviso was completely misconstrued and a legitimate defence, which the defendants were in law entitled to raise by way of amendment at any stage of the suit under the main part of Rule 17 of Order VI, has been shut out. That was never the intention of the Parliament in introducing the proviso to Order VI Rule 17, urged Mr. Anturkar.

8. I am afraid to accede to the submissions of Mr. Anturkar. It is fairly well crystallized that the proviso to Rule 17 of Order VI is in the nature of a jurisdictional condition. Before the amendment is allowed, after the commencement of the trial, the Court must be satisfied that the party seeking the amendment could not have raised the matter before the commencement of the trial in spite of due diligence. Such satisfaction is, in a sense, a jurisdictional fact. A profitable

reference in this context can be made to a decision of the Supreme Court in the case of *Vidyabai and others vs. Padmalatha and another*¹

9. Indeed, in the case at hand, the application singularly lacked reasons to satisfy the test of due diligence. Mr. Anturkar would urge that the proviso to Rule 17 of Order VI does not mandate that the due diligence must be pleaded. And *de hors* the contentions with regard to due diligence, the Court can record such satisfaction. Even if this submission is taken at par, no material could be placed on record to arrive at such a satisfaction *de hors* the absence of contentions in the application for amendment.

10. Moreover, the substance of the matter cannot be lost sight of. By way of proposed amendment the defendants seek to plead ouster of the plaintiffs from the joint family properties. Ouster of a co-owner is required to be pleaded and proved with cogent evidence.

11. A Three-Judge Bench of the Supreme Court in the case of *P. Lakshmi Reddy vs. L. Lakshmi Reddy*² expounded the law in the following words:

¹ (2009) 2 Supreme Court Cases 409.

² AIR 1957 SC 314.

“4. Now, the ordinary classical requirement of adverse possession is that it should be nec vi nec clam nec precario. (See *Secretary of State for India v. Debendra Lal Khan* [61 Ind App 78 at p 82]. The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. (See, *Radhamoni Debi v. Collector of Khulna* [27 Ind App 136 at p 140 (PC)]. But it is well-settled that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties. Ouster of the non-possessing co-heir by the co-heir in possession, who claims his possession to be, adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title. The coheir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title. (See *Corea v. Appuhamy* [1912] A.C. 230(C)]. It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster. This does not necessarily mean that there must be an express demand by one and denial by the other. There are cases which have held that adverse possession and ouster can be inferred when one co-heir takes and maintains notorious exclusive possession in assertion of hostile title and continues in such possession for a very considerable time and the excluded heir' takes no steps to vindicate his title. Whether that line of cases is right or wrong we need not pause to consider. It is sufficient to notice that the Privy Council in *N. Varada Pillai v. Jeevarathnammal* A.I.R. 1919 P.C. 44 (D) quotes, apparently with approval, a passage from *Culley v. Deod Taylerson* [(1840) 3 P & D 539: 52 RR 566 (E)] which indicates that such a situation may lead to an inference of ouster "if other circumstances concur".(See also *Govindrao v. Rajabai* [AIR 1931 PC 48 (F)]. It may be further mentioned that it is well-settled that the burden of making out ouster is on the person claiming to displace the lawful title of a co-heir by his adverse possession.”

(emphasis supplied)

12. Following the aforesaid pronouncement, in the case of ***Md. Zainulabudden vs. Sayed Ahmed Mohideen***³, the

3 (1990) 1 SCC 345.

Supreme Court enunciated that it is well settled that where one co-heir pleads adverse possession against another co-heir it is not enough to show that one out of them was in sole possession and enjoyment of the profits of the properties. The possession of one co-heir is considered in law as possession of all the co-heirs. The co-heir in possession cannot render his possession adverse to the other co-heirs not in possession merely by any secret hostile animus on his own part in derogation of the other co-heirs title. It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to construe ouster.

13. In the case of *Vidya Devi @ Vati (dead) by LRs vs. Prem Prakash and Ors.*⁴ the requirements of “ouster” were postulated as under:

“28. “Ouster” does not mean actual driving out of the co-sharer from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. Broadly speaking, three elements are necessary for establishing the plea of ouster in the case of co-owner. They are (i) declaration of hostile animus (ii) long and uninterrupted possession of the person pleading ouster and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owner. Thus, a co-owner, can under law, claim title by adverse possession against another co-owner who can, of course, file appropriate suit including suit for joint possession within time prescribed by law.”

(emphasis supplied)

4 (1995) 4 SCC 496.

14. The aforesaid enunciation of law indicates that when a ouster is pleaded against a co-owner, all the classic requirements of perfection of title by way of adverse possession are required to be established with a higher degree of proof. The first requirement is the date from which the possession of one co-owner became adverse to another. That was a matter which ought to have been pleaded in the original written statement and if it was sought to be introduced by way of amendment, then it should have been done before the commencement of the trial. If not, the defendants were required to satisfy the test of due diligence. By no stretch of imagination, it could be said that the defendants could not have raised the matter of ouster inspite of due diligence.

15. Thus, the learned Principal District Judge cannot be said to have committed any error in declining to permit the defendants to amend the written statement at the appellate stage. No interference is, thus, warranted in exercise of supervisory jurisdiction.

16. The petition stands dismissed.

[N. J. JAMADAR, J.]