IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO.8637 OF 2018

Mahendrakumar Khushalchand Malviya and others **.Vs.** Amrutlal Narbheram Malviya and others

Office Notes, Office Memoranda of Coram, appearances, Court's Orders or directions and Registrar's order	Court's or Judge's Order

Shri J.B. Gandhi, Advocate for the petitioners.
Shri D.R. Goenka, Advocate for the respondent Nos.1 and 2 (a to d).

CORAM : ANIL S. KILOR, J.
DATED : 28/02/2023

1. The order passed below Exh.36 dated 01.11.2018 by the Ad-hoc District Judge-I, Akola in Regular Civil Appeal No. 66 of 2012 rejecting the application filed under Order VI Rule 17 of the Code of Civil Procedure is under challenge in this writ petition.

The brief facts of the present case are as under:

2. The plaintiff Khushalchand filed a Special Civil Suit for partition and separate possession in respect of house property purchased jointly by the plaintiff and defendant No.1. In the written statement the defendant No.1 has claimed exclusive ownership of defendant No.1 and in alternate claimed ¼th share along with other brothers, in the house property. The suit was decreed vide judgment and decree dated 13.09.2004. Feeling aggrieved by the

same, the first appeal was filed on 01.11.2004, by the defendant No.1.

3. In the said appeal on 13.08.2018 application for amendment of the plaint was filed under Order VI Rule 17. The petitioners in the present petition, are claiming to be the legal heirs of the plaintiff as well as the defendant No.1. The petitioners are claiming to be the son's of plaintiff and as the defendant No.1 was issueless, they are also claiming the legal heirs of defendant No.1.

4. The respondents by filing their respective reply opposed the application for amendment. Thereupon, hearing was conducted on the application and the impugned order dated 01.11.2018 was passed by the learned Ad-hoc District Judge-1, Akola, rejecting the application for the reasons recorded in the order.

5. I have heard the learned counsel for the respective parties.

6. Shri Gandhi, learned counsel for the petitioners submits that the amendment is necessary to avoid multiplicity of proceedings and as the petitioners want to bring on record the subsequent events, and as no prejudice will cause to the respondents if such amendment is allowed, the learned first Appellate Court ought to have

allowed the amendment to the plaint. For this purpose, he has placed reliance the judgment of the Hon'ble Supreme Court of India in the case of *Life Insurance Corporation of India v. Sanjeev Builders Private Limited*[1].

7. On the other hand, the learned counsel for the respondents strongly opposes the application and points out that the amendment is not bonafide. It is pointed out that in the year 2004, the suit was decided and the application for amendment of the suit was filed in the year 2018. The facts which the petitioners want to bring on record were well within the knowledge of the plaintiff as well as defendant No.1.

8. It is further submitted that without making any pleadings as regards due diligence and without pointing out the necessity of such amendment to decide the suit, the application for amendment was moved. It is lastly pointed out that by way of amendment, the petitioners are trying to add the defendants and also a prayer challenging the will deed executed on 28.11.2006. He therefore, submits that the learned first Appellate Court has rightly rejected the application.

9. In reply, Shri Gandhi, learned counsel for the petitioners points out that, the will deed was brought on record during the pendency of the appeal, in the year 2012

1 AIR 2022 SC 4256

and as the petitioners had no knowledge about such will deed, no amendment was sought raising challenge to the will deed prior to the filing of the said will deed on record. He, therefore, submits that the amendment is necessary.

10. In the light of the rival contentions, I have perused the writ petition, the documents filed along with the writ petition, the reply of the respondents and the impugned order.

11. The Hon'ble Supreme Court of India in the case of *Life Insurance Corporation of India v. Sanjeev Builders Private Limited* (Supra), has held thus :

> *"70. Our final conclusions may be summed up thus:*
>
> *(i) Order II Rule 2 CPC operates as a bar against a subsequent suit if the requisite conditions for application thereof are satisfied and the field of amendment of pleadings falls far beyond its purview. The plea of amendment being barred under Order II Rule 2 CPC is, thus, misconceived and hence negatived.*
>
> *(ii) All amendments are to be allowed which are necessary for determining the real question in controversy provided it does not cause injustice or prejudice to the other side. This is mandatory, as is apparent from the use of the word "shall", in the latter part of Order VI Rule 17 of the CPC.*
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> *(iii) The prayer for amendment is to be allowed*
>
> *(i) if the amendment is required for effective and proper adjudication of the controversy between the parties, and*
>
> *(ii) to avoid multiplicity of proceedings, provided (a) the amendment does not result in injustice to the other side,*
>
> *(b) by the amendment, the parties seeking amendment does not seek to withdraw any clear admission made by the party which confers a right on the other side and*

(c) the amendment does not raise a time barred claim, resulting in divesting of the other side of a valuable accrued right (in certain situations).

(iv) A prayer for amendment is generally required to be allowed unless

(i) by the amendment, a time barred claim is sought to be introduced, in which case the fact that the claim would be time barred becomes a relevant factor for consideration,

(ii) the amendment changes the nature of the suit,

(iii) the prayer for amendment is malafide, or

(iv) by the amendment, the other side loses a valid defence.

(v) In dealing with a prayer for amendment of pleadings, the court should avoid a hypertechnical approach, and is ordinarily required to be liberal especially where the opposite party can be compensated by costs.

(vi) Where the amendment would enable the court to pin-pointedly consider the dispute and would aid in rendering a more satisfactory decision, the prayer for amendment should be allowed.

(vii) Where the amendment merely sought to introduce an additional or a new approach without introducing a time barred cause of action, the amendment is liable to be allowed even after expiry of limitation.

(viii) Amendment may be justifiably allowed where it is intended to rectify the absence of material particulars in the plaint.

(ix) Delay in applying for amendment alone is not a ground to disallow the prayer. Where the aspect of delay is arguable, the prayer for amendment could be allowed and the issue of limitation framed separately for decision.

(x) Where the amendment changes the nature of the suit or the cause of action, so as to set up an entirely new case, foreign to the case set up in the plaint, the amendment must be disallowed. Where, however, the amendment sought is only with respect to the relief in the plaint, and is predicated on facts which are already pleaded in the plaint, ordinarily the amendment is required to be allowed.

(xi) Where the amendment is sought before commencement of trial, the court is required to be liberal in its approach. The court is required to bear in

> *mind the fact that the opposite party would have a chance to meet the case set up in amendment. As such, where the amendment does not result in irreparable prejudice to the opposite party, or divest the opposite party of an advantage which it had secured as a result of an admission by the party seeking amendment, the amendment is required to be allowed. Equally, where the amendment is necessary for the court to effectively adjudicate on the main issues in controversy between the parties, the amendment should be allowed. (See Vijay Gupta v. Gagninder Kr. Gandhi & Ors., 2022 SCC OnLine Del 1897)"*

11. After going through the application for amendment undisputedly the petitioners are trying to add defendants to the suit and also trying to add prayer clause raising a challenge to the will deed dated 28.11.2006.

12. The amendment application was moved on 13.08.2018. There are no pleadings made by the petitioners to the effect that the plaintiff or defendant No.1 of whom the petitioners are claiming to be the legal heirs, had no knowledge about the facts stated in the proposed amendment. Even there are no pleadings as regards due diligence on the part of the petitioners or the original plaintiff or defendant No.1. Even there is no justification offered for moving such application belatedly after 14 years of the judgment and decree passed by the learned trial Court. There is no justification is given to raise a challenge to the will deed after six years from the date of knowledge.

13. Most important, the learned first Appellate Court has not found the amendment necessary for a decision in the first appeal which is a continuation of the suit. In that view of the matter, in absence of any perversity and considering the fact that, the amendment is not bonafide, I am of the opinion that the application was rightly rejected.

14. Thus, the law laid down by the Hon'ble Supreme Court of India in the case of *Life Insurance Corporation of India* (Supra) and considering the facts and circumstances of the present case, I am of the opinion that the rejection of the application for amendment is justifiable.

In this circumstances, the writ petition is **dismissed**.

JUDGE

C.L.Dhakate