

(2018) 08 BOM CK 0147
In the Bombay High Court
Case No : Writ Petition No.364 Of 2017

Amartya S/O S. Deshmukh, Minor Thr. His Grand Father,
Haribhau K. Deshmukh And Another

APPELLANT

Vs

Sau. Sheela W/O Rameshrao Deshmukh And Others

RESPONDENT

Date of Decision : 30-08-2018

Acts Referred:

Code of Civil Procedure, 1908 — Order 6 Rule 17, Order 41, Rule 27

Citation : (2018) 08 BOM CK 0147

Hon'ble Judges : ROHIT B. DEO, J

Bench : Single Bench

Advocate : A.M. Sudame, A.S. Dhore

Final Decision : Disposed Off

Judgement

1. Heard Shri A.M. Sudame, learned Counsel for the petitioners and Shri A.S. Dhore, learned Counsel for respondents 1 to 5.
2. The petitioners are aggrieved by the order dated 07/11/2017 rendered by the learned District Judge, Amravati in Regular Civil Appeal 26/2015, by and under which the plaintiffsrespondents 1 o 5 herein in Regular Civil Suit 608/2012 are permitted to amend the suit plaint.
3. Respondent 1 is the wife of respondent 6 and respondents 2 and 3 are unmarried daughter and son respectively while respondents 4 and 5 are married daughters of respondent 6.
4. The case of the petitioners is that respondent 6 is the sole owner of agricultural land admeasuring 2 H. 6 R., which land was exclusively owned by Late Krushnarao Deshmukh, who died intestate and the property devolved upon respondent 6 as Class I heir. The petitioners contend that by agreement dated 11/11/2010 they agreed to purchase the said agricultural

land admeasuring 2 H. 6 R. (suit property) for a consideration of Rs.22.50

Lakh.Â In view of the payment of Rs.9.30 Lakh to respondent 6, saleÂdeed in respect of 1 H 21 R portion of the suit property was executed in

favour of the petitioners and the possession delivered.Â The petitioners further contend that they were ready and willing to purchase the remaining

portion of the suit property, however, respondents 1 to 5 issued legal notice calling upon the petitioners to cancel the saleÂdeed of the portion of the

suit property contending that the suit property is ancestral and respondent 6 has no right to alienate the same.Â The notice was suitably replied by the

petitioners.

5. Respondents 1 to 5 instituted Regular Civil Suit 608/2012 seeking declaration and permanent injunction against the petitioners and respondent 6,

which came to be dismissed by judgment and decree dated 28Â1Â2015.Â The trial Court held that the suit property was individual property, having

inherited the same from Krushnarao.

6. Respondent 1 to 5 challenged the judgment and decree in Regular Civil Suit 608/2012 in Regular Civil Appeal 26/2015.Â In appeal, respondents 1

to 5 preferred an application under Order VI Rule 17 of the Civil Procedure Code (â??Codeâ? for short) for permission to amend the plaint.Â This

application dated 26Â3Â2015 was allowed by the appellate Court by order dated 07Â4Â2015, which order was challenged by the petitioners before

this Court in Writ Petition 2668/2015.Â The said petition was allowed by order dated 20Â4Â2016 and the operative part reads thus :

â??The order passed by the learned District JudgeÂ3, Amravati dated 07Â04Â2015 in Regular Civil Appeal No.26/2015 impugned in this petition is

quashed and set aside.

The respondents/appellants may file fresh application for amendment, if they are so advised, before the learned District Judge, Amravati.Â Needless

to state that the learned District Judge, before whom the appeal is pending or before whom the application would be moved, shall decide the same on

its own merits and by giving equal opportunity of hearing to the petitioners and contesting respondent/s. Rule is made absolute in the aforesaid

terms.Â No costs.â??

7. Respondents 1 to 5 moved a fresh application under Order VI Rule 17 of the Code and sought to incorporate paragraph 4Â?A, which reads thus :

4. That the father of the defendant No.2 namely Krushnarao was a son of Ramchandra Sonaji Deshmukh and before adoption he was known

as Vishwas. That he was born to Ramchandra and later on when he was about aged 2 years he was given in adoption to Baliramji. That

after the death of Baliramji he was adopted by Umabai wife of Baliramji Deshmukh and the name of Vishwas was changed in adoption as

Krushna and thereafter he was known as Krushna Baliramji Deshmukh. That the said adoption had taken place on 03/08/1922 and

as a adopted son of Baliramji he inherited the suit property being the adopted son. That Umabai the wife of Baliramji Deshmukh expired on 16/09/1931 and Krushna being the adopted son inherited the suit property as son and

used to cultivate the suit property. Thus it is crystal clear that the suit

property inherited by Krushna is the ancestral property and as such all the plaintiffs after their birth become coparceners of the undivided ancestral

joint Hindu family property and thus all the plaintiffs have equal share in the suit property and the defendant No.2 Ramesh alone has no powers to

dispose of the said suit property in any way or to create any encumbrances thereon unless there is a family necessity. That from the income from the

ancestral joint Hindu family property some land was purchased by Krushnarao and, therefore, it is also a joint Hindu coparcenary property. That the

entire original property was belonging to Baliramji.

8. Respondents 1 to 5 averred thus in paragraphs 2 and 3 of the application seeking amendment :

2. That after judgment and decree passed by the Honourable Civil Judge, Senior Division, Amravati in Regular Civil Suit No.308/2012 (old

Special Civil Suit No.158/2011) the appellants had approached to the present counsel along with all record and while perusing the said record the

counsel for the appellants came across the certified copies of the mutation entries from where he noticed that the said material document was not at

all filed on record and was not referred. That the document being material having bearing on the decision on merits and being very material document

to decide the case and the rights of the parties the amendment was proposed and the said amendment was also allowed.

(3) That recently on verification of the revenue record the appellants got knowledge regarding origin of the ownership of the property which clearly

demonstrates that the property described in the plaint was the ancestral coparcenary joint Hindu family " property. That in view of the judgment and order of the Honourable High Court it has become necessary for just decision in the matter to amend the plaint narrating all the facts therein and, therefore, the appellants propose the amendment to the plaint as under:

9. By the order impugned, the appellate Court was pleased to allow the application seeking permission to amend the suit plaint and while considering the objection that in the teeth of proviso to Order VI Rule 17 of the Code, which provides that no application for amendment shall be allowed after the trial has commenced unless the court comes to the conclusion that inspite of due diligence, the party could not have raised the matter before the commencement of trial, the appellate Court observed thus :

3. Having gone through the record and submissions of the parties, I found that there is pleading about the property being ancestral. The appellants as contended by them got the documents recently and from that, it can be seen whether the property is ancestral or not. The appellants have no knowledge about the concerned record and hence they could not get it earlier. When they got such record they came with this application. I found this is sufficient cause that despite due diligence the appellant could not raised such aspect before the commencement of trial. Thus, the application satisfied the proviso to Order VI Rule 17 of the Code of Civil Procedure and in order to have fair, proper and complete adjudication of the matter, the application Ex.22 needs to be allowed. Hence, the following order :

(1) Application Exh.22 is hereby allowed.

(2) The appellant shall carry out the necessary amendment within 14 days from the date of this order.

10. Shri A.M. Sudame, learned Counsel for the petitioners would submit that the order impugned militates against the plain language of Order VI Rule 17 of the Code. Shri A.M. Sudame would submit that perusal of the application seeking permission to amend would reveal that no attempt is made to plead much less demonstrate that the facts pleaded were not within the knowledge of respondents 1 to 5, or that the respondents 1 to 5 could not have raised the matter inspite of due diligence before the commencement of trial. Shri A.M. Sudame relies on the decision of the Hon'ble Apex

Court in *Revajeetu Builders and Developers v. Narayanswamy and Sons and others* reported in (2009) 10 SCC 84 in which some basic principles

which ought to be taken in to consideration while dealing with application for amendment are stated thus :

63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while

allowing or rejecting the application for amendment :

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is bona fide or mala fide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of

application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order VI Rule 17. These are only

illustrative and not exhaustive.

11. Shri A.M. Sudame then invites my attention to the observations of the Hon'ble Apex Court in *J. Samuel and others v. Gattu Mahesh and others*

reported in (2012) 2 SCC 300 in paragraph

19 which read thus :

19. Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a

requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An Advocate representing someone must engage

in due diligence to determine that the representations made are factually accurate and sufficient. The term "due diligence" is specifically used in

the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of

trial.â??

12. The substratum of the submissions canvassed by Shri A.M. Sudame is that it is not pleaded much less demonstrated that the original plaintiffsÂ?

respondents 1 to 5 were not in a position to raise the matter despite due diligence.

13. The submission of the learned Counsel Shri A.M. Sudame that the order impugned militates against the plain language of the statutory provision is

not without substance.Â Paragraph 2 of the application, which is reproduced supra states that the counsel was perusing the record and came across

the certified copies of mutation entires which were not placed on record of the trial Court.Â In paragraph 3, it is averred that recently on verification

of the revenue record respondents 1 to 5 gathered knowledge of the origin of the ownership of the suit property.Â Be it noted, that there is no attempt

made in the said application to demonstrate that inspite of due diligence the documents were not located or the knowledge of the origin of the

ownership of the suit property could not be gathered. The date on which the revenue record was inspected is not disclosed.Â The application is bereft

of necessary particulars.Â The learned Counsel Shri A.M. Sudame is justified in submitting that the order impugned is unsustainable in law.

14. Shri A.S. Dhore, learned Counsel for respondents 1 to 5, who is supporting the order impugned, invites my attention to the decision of the Hon'ble

Apex Court in Chakreshwari Construction Pvt.Ltd v. Manohar Lal reported in 2017(5) Mh.L.J. 195, to buttress the submission that amendment can be

sought at any stage of the proceedings provided the amendment proposed is bona fide, relevant and necessary for deciding the rights of the parties

involved in the suit. The submission, as a proposition of law is unexceptionable.Â But then the entitlement to seek leave to amend is subject to the

rider and rigors of the proviso to Rule 17 of Order VI of the Code.

15. Shri A.S. Dhore invites my attention to an application seeking permission to place on record certain documents, which is allowed by the appellate

Court.Â The submission is, since the appellate Court has allowed the application seeking permission to produce the documents on record, and the said

order is not challenged, this Court ought not to interfere with the order impugned.Â The submission is noted only for rejection.Â The application to

which my attention is invited merely seeks permission to produce on record

certain documents.Â Concededly, no application is preferred under Order XLI Rule 27 of the Code seeking permission to adduce additional evidence. Shri A.S. Dhore then states that respondents 1 to 5 would prefer an application under Order XLI Rule 27 of the Code.Â It is trite law that if such application is preferred, the same shall have to be considered at the time of final hearing of the appeal.Â If such application under Order XLI Rule 27 of the Code is preferred, the same shall undoubtedly be decided by the appellate Court on its own merits uninfluenced by any observation made in this order or in the order impugned and in the event such application under Order XLI Rule 27 of the Code is allowed, respondents 1 to 5 would be at liberty to move an appropriate application seeking permission to amend the suit plaint, which again would have to be considered by the appellate Court on its own merits. However, irrespective of the applications moved, the appellate Court shall finally dispose of the appeal on or before 30Â?11Â?2018.

16. The order impugned is quashed and set aside.

17. Rule is made absolute in the above stated terms.