

ORDER ON APPLICATION BELOW EXH. NO. 106 IN R.C.S.**NO.167/2004 KAUSALYABAI V/S SAKHARAM**

1. Plaintiffs have filed present application for permission to amend the plaint under Order 6 Rule 17 of the Code of Civil Procedure, 1908 (hereinafter called as 'the C.P.C.' in short).

Application in short is as under:-

2. It is contended that plaintiffs have filed present suit for partition. Defendant No. 1 is step brother of plaintiffs No. 1 and 2. Defendant No. 1 has filed his written statement at Exh. No. 82 and issues are framed at Exh. No. 59.

3. It is also contended that 3 to 4 months back they found certain documents in the old bag of their deceased mother. The documents were pertaining to appeals filed by their mother Janabai Khune before the sub-divisional officer, Beed and the Additional Collector, Beed. They are regarding revenue entries in the name of defendants. So, they claimed permission to amend the suit to contend that their mother has challenged mutation entries No. 145 and 146 and its decision before revenue authorities.

4. Plaintiffs have claimed second amendment to show that defendant No. 1 is illegitimate child of their father, because their father had performed illegal second marriage with defendant

No. 1's mother. Therefore, defendants having no right in the suit property. Mutation entries No. 145 and 146 sanctioned in the name of defendants do not give any right to defendant No. 1 and sale-deeds executed by him in favour of defendant Nos. 6 to 8 are not binding on plaintiffs. Mutation entry No. 152 is illegal and defendant No. 5 had no right to make partition of suit property in the name of defendant Nos. 3 to 5.

5. Plaintiffs have claimed third amendment in prayer clause, to show $1/4^{\text{th}}$ share in the place of $1/3^{\text{rd}}$ share.

6. It is also contended that said amendment is claimed on the basis of documents found later on. Such amendment will not cause any prejudice to defendants and it will not change nature of suit. Cross-examination of plaintiff has not yet started. Plaintiffs had filed application Exh. No. 93 claiming same amendments. But it came to their notice that there was no signature of the advocate on that application. Therefore, that application was not pressed. So as to decide the suit on merit it is necessary to bring these amendments on record. Therefore application be allowed.

7. Defendants No. 1 and 3 to 5 have filed their say at Exh. No. 110. Same say has been adopted by defendant No. 2 by filing *pursis* at Exh. No. 118.

8. They have contended that plaintiffs have filed present application only to prolong the trial. Plaintiffs have filed previous application for amendment at Exh. No. 72 which was allowed with costs. Then again application for amendment was filed at Exh. No. 93 which is not pressed. Trial of the suit has commenced, therefore plaintiffs are not entitle for amendment of the suit. Plaintiffs have filed present application 4 years after framing of issues. Plaintiffs have contended in the application below Exh. No. 93 that, they find documents 3 to 4 months back and in present application also said period is mentioned. Plaintiffs have not explained delay caused for filing present application after they found documents. The date of decision of the Additional Collector is 30-10-1996, but they have not mention about same in the suit instituted in the year 2004. Therefore, plaintiffs are claiming present amendment after 8 years of institution of suit. Therefore, present claim is out of limitation. Plaintiffs were fully aware of mutation entry No. 145. Therefore, application is not tenable because plaintiffs have suppressed material facts.

9. It is also contended that plaintiffs cannot amend the suit to show defendant No. 1 is illegitimate child of Karbhari. By this way they are trying to withdraw their admission. The prayer to amend the suit in the prayer clause is not tenable because by this way plaintiffs are trying to withdraw their admission. Therefore application be rejected with costs.

10. Perused application, say and record of the suit. Heard learned advocate Shri. P. S. Rajapurkar for plaintiffs and learned advocate Shri. D.M.Kulkarni for defendants.

11. Learned advocate Shri. P. S. Rajapurkar submitted as per his contentions. He added that amendment can be sought at any stage of the suit. Delay cannot deny right of plaintiffs to amend the suit. On this point he relied upon judgment of the Hon'ble Supreme Court in the case of **Pankaja and another V/s Yellappa (D) by L.Rs. and others reported in AIR 2004 S.C. 4102** It is held that

“So far as the Court's jurisdiction to allow an amendment of pleadings is concerned there can be no two opinion that the same is wide enough to permit amendments even in case where there has been substantial delay in filing such amendment applications. This Court in numerous cases has held the dominant purpose of allowing the amendment is to minimize the litigation, therefore, if the facts of the case so permits, it is always open to the Court to allow applications in spite of the delay and laches in moving such amendment application.”

12. The learned advocate Shri. Rajapurkar further submitted that, the amendment will not cause any prejudice to defendants. Therefore, application deserves to be allowed. To

support his contention he relied upon judgment of the Hon'ble Supreme Court in the case of **Baldev Singh & Ors. Etc. V/s. Manohar Singh & Anr. etc. reported in 2006 (5) Supreme 943** in which it is held that, the Court should be extremely liberal in granting prayer for amendment of pleading unless serious injustice or irreparable loss is caused to the other side.

13. Learned advocate Shri. Rajapurkar further submitted that when pleading is cryptic parties shall not face hardship due fault of their advocate. To support his contention he relied upon the judgment of the Hon'ble Bombay High Court in case of **Vijaykumar Narayanrao Dixit Vs. Uday Griha Nirman Samasya Niwark Sanstha, Nagpur reported in 2006(2) AIR Bom. R. 77** it is laid down in this judgment that, the portion of pleading which has not come on record due to fault of the previous advocate can be taken on record by amendment.

14. Learned advocate Shri. Kulkarni submitted as per his contentions, in addition to that he submitted that, the amendment is changing basic nature of the suit. Hence cannot be allowed. To support his contention he relied upon judgment of the Hon'ble Gujrat High Court in the case of **Mahesh Kumar Balubhai V/s. Pramodbhai Balubhai Patel reported in 2013(2) CCC 273 (Guj.)** it is held that, the Court cannot permit amendment which alters basic nature of the suit.

15. Learned advocate Shri. Kulkarni also submitted that plaintiffs have not contended in their plaint that defendant No.1 is illegitimate child of their father. Therefore, they have admitted that he is their legitimate child, so they cannot withdraw said admission by amendment. To support his contention he relied upon judgment of the Hon'ble Bombay high Court in the case of **Ashok Kumar s/o. Bulchand Kaurani & Ors. V/s. Shri Shankar s/o. Vishnu Reverkar & Ors. reported in 2007(6) ALL MR 909** in which it is held that, rights accrued in favour of defendant cannot be taken away by subsequent amendment. Admissions, secured on behalf of defendants in the evidence of plaintiff, cannot be permitted to be withdrawn or destroyed by subsequent amendment.

16. Learned advocate Shri. Kulkarni further submitted that plaintiffs are delaying the matter. Therefore, application be rejected. To support his contention he relied upon judgment of the Hon'ble Bombay High Court in the case of **Purushottom alias Nana U. Sanyasi V/s. A.N. Jog and others reported in 2005 (2) ALL MR 379** in which it is held that

“An amendment which is necessary to decide question in controversy normally be allowed. However, no party to the litigation has right to prolong the matter. When application is made with intention or purpose to defeat

the right already accrued in favour of the other side, not only the point of limitation but even the justification for delay, if any, disclosed by the applicant ought to be considered and in absence of any such justification, an adverse inference will have to be drawn against the applicant which could even justify the rejection of the application for amendment.”

17. Learned advocate Shri. Kulkarni also relied upon judgment of the Hon'ble Bombay High Court in the case of **Vishnu S/o Pandurang Pawar V/s Smt. Dropadabai W/o. Subhash Pawar & Ors. reported in 2009(5) ALL MR 559** in which it is held in para (7) that,

“The judgment cited by the learned counsel are not helpful in the facts and circumstances of this case, I find considerable substance in the contention of the learned counsel for the respondent that the amendment may change the nature of the suit and also it will prejudice the interest of respondent No.1 since the petitioner has already admitted the relationship of deceased Subhash Pawar and respondent No.1 Shankutala. If the amendment is allowed to be brought on record then that may affect material status of respondent No.1 with deceased Subhash. Apart from this, the trial Court has in many words observed that the application is filed by the

petitioner with an intention to prolong the proceeding of the other suit as well as present suit.”

18. Learned advocate Shri Kulkarni also relied upon the judgment of the Hon'ble Rajasthan High Court in the case of **Vaidhya Shyam Sunder Joshi V/s. Jain Vishwa Bharti Ladnu and others reported in AIR 1998 Rajasthan 227** it is held in this judgment that, the plaintiff cannot be allowed to amend his plaint by withdrawing the admissions made in the plaint so as to displace the defendants completely from the admissions made in the plaint. He also relied upon judgment of the Hon'ble Supreme Court in the case of **Ajendraprasadji N. Pande &Anr. V/s. Swami Keshavprakeshdasji N. Ors. Repoted in AIR 2007 Supreme Court 806** in which it is held that, after filing of affidavit of examination-in-chief of the plaintiff trial commences and party seeking amendment has to show that in spite of due diligence he could not have raised the matter before the commencement of trial.

19. Learned advocate Shri. Kulkarni also relied upon judgment of the Hon'ble Bombay High Court in the case of **Janu Laxman Kumbhar V/s. Pandurang Laxman Kumbhar reported in 2002(1) Bom. C.R. 212** in which it is held that

“I find no reason to interfere with the view taken by the trial Court that if the petitioner is allowed to withdraw

the admission in the written statement it will irretrievable prejudice the respondent-plaintiff in as much as the stands taken in the written statement and the proposed amendment diametrically opposite in the context of the claim for assertion of title with regard to the suit property.”

20. Learned Advocate Shri. Kulkarni also relied upon the judgment of the Hon'ble Supreme Court in case of **Vidyabai & Ors. V/s Padmalatha & Anr. reported in 2009(1) ALL MR 471** in which it is held that, application for amendments cannot be allowed after commencement of trial unless amendment is necessary for deciding real dispute between the parties.

There are three amendments sought by plaintiffs :

- 1) To add certain portion in respect of the decisions given by revenue authorities.
- 2) To add certain portion to show that the defendant No. 1 is illegitimate child of his father as well father of the plaintiffs No.1 and 2.
- 3) Third amendment is sought to amend the prayer clause to show 1/4th share in the place of 1/3rd share.

The sum and substance of the judgments filed by plaintiffs is that :

1. If the facts of the case so permits, it is always open to the

Court to allow amendment applications in spite of the delay and laches in moving amendment application.

2. Court should be extremely liberal in granting prayer for amendment of pleading unless serious injustice or irreparable loss is caused to the other side.
3. The portion of pleading which has not come on record due to fault of the previous advocate can be taken on record by the amendment.

The sum and substance of the judgments filed by the defendants is that :

1. The Court cannot permit amendment which alters basic nature of the suit.
2. Rights accrued in favour of defendant cannot be taken away by subsequent amendment.
3. Admissions, secured on behalf of defendants in the evidence of plaintiff, cannot be permitted to be withdrawn or destroyed by subsequent amendment.
4. Amendments which affects the marital status of the parties is said to change the basic nature of the suit.
5. After filing of affidavit of examination-in-chief of the plaintiff trial commences and party seeking amendment has to show that in spite of due diligence he could not have raised the matter before the commencement of trial.

6. Application for amendment filed only to delay the trial should be rejected.

21. Now it is very clear that the trial has commenced. Considering the nature of the amendments the amendment No. 1 is sought on different stands and it is of different nature than the amendments No. 2 and 3. So the amendment No. 1 is discussed separately than the amendments No.2 and 3.

22. The amendment pertaining to add contents regarding the orders of the revenue authorities has sought at the belated stage. Hence it requires the explanation regarding the due diligence as trial has commenced. The explanation given on this point is that the plaintiffs have found documents in that context in the old bag of their deceased mother. If the facts of the case so permits, it is always open to the Court to allow applications in spite of the delay and laches in moving such amendment application. The facts of the case shows that the documents are found some days before filling the application, reason is given that the documents are found after the death of their mother. So I am of the opinion that, though there is delay in filling application it does not affect the right of the plaintiffs to seek this amendment. Moreover the proposed amendment contents the contentions regarding the orders of the revenue officers in respect of the suit property. The orders issued by the revenue authorities in respect of

the suit property are necessary to have in the pleadings of the parties, so as to decide the suit finally. It is pertinent to note that the contents regarding orders of the revenue authorities will not change the basic nature of the suit. It will not take away any right of the defendants by withdrawing the admission. It does not appear that the amendment is sought only to delay the trial of the suit. Therefore I think that the amendment in respect as prayed in para 4 of the application should be allowed,.

23. Another two amendments are depending upon each other. It is contended that the defendant No.1 is the illegitimate child of the father of the plaintiffs. Hence he has no right in the suit property. Therefore the share of the plaintiffs be increased in the suit property. The plaint shows that it is nowhere contended that the defendant No. 1 is illegitimate child of their father. So it seems that plaintiffs have not raised such plea of illegitimacy in respect of the defendant No.1 in the original plaint. So facts of the case does not permit that the the application can be allowed at such belated stage. Moreover by allowing such amendment it will cause serious injustice and prejudice on the part of the defendants. It is not contentions of the plaintiffs in their application that the contents regarding the illegitimacy of the defendant No.1 are not raised because of the fault of their advocate. But allowing such amendment it will definitely change the nature of the suit, because

it will change the nature of the relations between the parties and accordingly the nature of the suit. Moreover it will also cause the withdrawing of admissions because the plaintiffs have not contended in their original plaint that the defendant No. 1 is illegitimate child of their father. Therefore I think that the amendments sought as per para 5 and 6 of the application can not be allowed.

24. From the above discussion it is clear that the plaintiff is entitled to amend the plaint to add the contents regarding the order of the revenue authorities in respect of the mutation entries. But they are not entitled to add the contents regarding the illegitimacy and the share in the suit property. Hence the order as following :

ORDER

1. The application is partly allowed.
2. Plaintiffs are permitted to amend the plaint to add the contents regarding orders of the revenue authorities as prayed in para (4) of the application subject of costs of Rs. 1000/- (one thousand rupees only).
3. The application is rejected in respect of the amendments regarding illegitimacy of defendant no.1 and the share in the suit property as prayed in the para (5) and (6) of the application.

4. Plaintiffs to carry out amendment and file amendments
plaint after payment of costs within ten days.

Date : 21.02.2014
Place:-Georai

Sd/-
(S.S.Deshmukh)
3rd Jt. Civil Judge (J.D.), Georai