

MHKO130001712014



Order below Exh. 44 in R.C.S. No. 43/2014.

(Laxmibai Patil and others Vs. Ganpati Patil and others)

1. This is an application filed by heirs of defendant No. 1 and defendant Nos. 2 and 3 under Order 6 Rule 17 of the Code of Civil Procedure for getting permission to add Para No. 17-A in written statement by way of proposed amendment.

2. It is submitted by present defendants that the matter is fixed for cross-examination of plaintiff. Some information have not been got to them, therefore, facts in respect of same remained to be mentioned in the written statement. They further contended that the adoption deed was not filed at the time of filing suit. It was filed along with evidence affidavit of plaintiff. Therefore, facts and defence in respect of same is remained to be mentioned in the written statement. Hence, by way of present application, present defendants have to insert Para No. 17-A in the written statement. Therefore, they prayed for getting permission to carry out proposed amendment.

3. On the other hand, plaintiff filed her say and resisted the contents of this application. She submitted that application is not maintainable as per proviso of Order 6 Rule 17 of C.P.C. Plaintiff has filed adoption deed along with list Exh. 3 and also filed with her evidence affidavit. Therefore, she prayed for rejection of present application and alternatively prayed for

imposing cost of Rs. 1500/-.

4. Perused the application and say filed thereon. Heard learned Advocates for both the sides. Studied Order 6 Rule 17 of the Code of Civil Procedure. Learned Advocate for plaintiff submitted that the trial is commenced, so it is obligatory for defendants to show due diligence for their failure before commencement of trial. In support of submission, he relied upon the case of ***Prabhakar Sadashiv Gokhale and others vs. Ramesh Shankar Ladkat and others***, reported in AIR 2017(4) Mh.L.J. 634, wherein, the Hon'ble Bombay High Court observed that :-

“Order VI, Rue 17 clearly stipulates that the Court may at any stage of the proceeding allow either party to alter or amend these pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. In 2002, a proviso was added to Rule 17 which clearly states that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party seeking amendment could not have raised the matter before the commencement of trial. What the proviso clearly stipulates and what the Legislature clearly intended was to curtail the discretion that was granted to the Court to grant the amendment in the main part of the Rule. The effect of the proviso is clearly mandatory. It clearly stipulates that no application for amendment “shall” be allowed after the trial and commenced unless the condition as set out in the said proviso is fulfilled. In other words, what the proviso

stipulates is that the Court is barred from the allowing any amendment after the trial has commenced unless the condition set out in Order VI, Rule 17 is satisfied”.

In view of aforesaid observations, it becomes clear that after commencement of trial, it is obligatory upon applicant to show due diligence for his failure before commencement of trial. Now, it is necessary to see whether present defendants succeed to show that in spite of due diligence, defendants failed to carry out proposed amendment before commencement of trial.

5. By way of proposed amendment, defendants have to add the recitals in respect of adoption deed dtd. 17/08/1953 as well as the defence of adverse possession in their written statement. By way of present application, they submitted that the adoption deed in question was filed with evidence affidavit, so they failed to mention necessary recital in respects of same in the original written statement. Here, it is necessary to see when the alleged adoption deed is brought on record and when written statement of defendants was filed. Upon perusal of application (Exh. 16), it is seen that the alleged adoption deed dtd. 17/08/1953 was filed on 20/11/2014 in the present proceeding. It is seen from the written statement Exh. 36 that defendants filed their written statement on 10/02/2016. It means written statement was filed after 15 months of filing of alleged adoption deed on record. Further, they also put forth the reason of old age of defendants. But, there are three defendants. Some of them are of the middle age. Therefore, the reason mentioned for explain due diligence for their failure to mention the recitals in respect of alleged adoption deed is not seen

proper.

6. So far as, the recitals in respect of defence of adverse possession is concerned, there is no reason for the failure of defendants to add said recitals before commencement of trial. Therefore, there is no reason came on record to explain due diligence to that effect. Further, it is also new plea which would change the nature of defence.

7. Furthermore, so far as, recitals in respect of adoption deed dtd. 17/08/1953, the defendants in their original written statement already contended that Gangubai, who alleged to be adopted by way of said deed, has no sole owner of suit property at any point of time. They also contended that Gangubai has not adopted Dattu or anyone as a son. They also contended that adoption deed as alleged was not executed. They also contended that Dattu has not got any right by way of alleged adoption deed. This pleading is seen sufficient to deny the execution of alleged adoption deed. Therefore also, the proposed amendment in respect of adoption deed is not seen necessary for adjudication the real question in controversy. With these observations, the application deserves to be rejected. Hence, following order is passed.

ORDER

1. The application is rejected.
2. Cost on applicants.

Date-23/10/2019.
Place- Kagal

(V. H. Khedkar)
Jt. Civil Judge Jr.Dn., Kagal