

Common Order below Exh. 18 and 32 in RCS No.08/2017

1. The defendants no. 4 to 8 have filed application at Exh.18 to dismiss the suit. It is contended that, the defendant no.3 is minor but he is mentioned as major in the suit and on these count, suit is filed in the capacity of major defendants. Hence, the suit be dismissed.

2. The plaintiffs have filed their Say on the back side of the application. It is contended that, one mistake of the plaintiffs is no ground to dismiss the suit. Said mistake can be cured by amending the suit. Hence application be rejected.

3. The plaintiffs have filed application at Exh.32. It is contended that, the plaintiffs have come to know that, the plaintiff no.3 is minor. Hence, the plaintiffs be permitted to amend the suit to show his age as 17 in the place of 19 and to mention that, his guardian is defendant no.4. Further, the plaintiffs be permitted to mention that, defendant no.1 is natural brother of defendant no.2. further, plaintiffs be permitted to add that, they have Farm House and Tin Shed in Block no.116 and 149 in possession of the plaintiff. It is further contended that, said amendment is not going to change nature of the suit, not going to prejudice, rights of the defendants and amendment is necessary. They have decision on merit.

4. The defendants have filed their Say at Exh.42. It is contended that, plaintiff cannot cure their mistake by filing application. Suit is not tenable. The plaintiffs have sought amendment only after the defence is raised by the defendants. The

contentions about possession over the suit property have been raised only after defendants have mentioned about their possession. Hence, application be rejected.

5. Heard learned Advocate Shri.C.P.Kulkarni for defendants no. 4 to 8, learned Advocate Shri.K.D.Bhosale for defendants no. 1 and 2, learned Advocate Shri.Madane for the plaintiffs. They have submitted as per their contentions. After argument of all the parties was over, the plaintiffs have filed their Written Argument at Exh.45. It has caused delay in matter. The contentions made in application have been made in the argument of the Advocates.

6. Learned Advocate Shri. Madane has relied upon judgment of the Hon'ble Supreme Court in the case of **Kuldeep Singh Pathania Vs. Bikram Singh Jaryal in Civil Appeal No. 4080/2014** and judgment of the **Hon'ble Madras High Court in the case of Kolli Venkata Mohan Rao Vs. J.M. Patrica in C.R.P. (P.D.) No. 16/2014 and M.P.No.1/2014**. In Para 8 of first judgment and Para 16 of second judgment it is held that, it is well settled that in so far as the application under Order VII Rule 11 of C.P.C., is concerned the averments made in the plaint as such have to be taken into consideration. Facts projected by defendants cannot be considered. It is necessary to mention that the allegations have been made that, the defendant no.3 is minor, so the application is filed on the basis of contents of plaint and not contents of defence. Hence, by applying said ratios, contentions of the defendants are considerable.

7. It is necessary to see what has to be considered while

deciding application under Order VI Rule 17 of the Code of the Civil Procedure. It provides that the Court may at any stage of the proceedings allow either party to alter or amend his pleadings. There is proviso that, such amendment shall not be allowed, after trial has commenced unless the party has shown due diligence. In this case, trial has not commenced hence, there is no burden on plaintiff to show due diligence. Now question remains as to whether said amendment is necessary for the purpose of determining real question in controversy between the parties. So it is necessary to scan facts in the application.

8. The first amendment is sought is to show defendant no.3 as minor in the place of major. It is not in dispute that, defendant no.3 is minor. Therefore, so as to determine real dispute his correct age is required to be mentioned. It will not cause hardship to the defendants. Hence, application deserves to be allowed on that point.

9. Another points are that, plaintiffs want to mention that, the defendant no. 1 and 2 are natural brothers and there are tin shed and farm house in the suit properties. By way of these amendments, the plaintiff wants to explain facts already mentioned. It is not in controversy with their previous pleadings. Such amendment also will not cause hardship to the defendants. Hence, amendment on this count also deserves to be allowed.

10. Now the application below Exh.18 is required to be considered. This application provides for dismissal of the suit on the count that, the plaintiffs have shown defendant no.3 as minor. But

now that point has been cured by amendment. Therefore, it will not be just to dismiss the suit on that count. Hence, application below Exh.18 is liable to be rejected.

11. It is necessary to mention that, the plaintiffs have caused delay in proceeding of the suit by filing said application. Therefore, it is just to impose cost of Rs.200/- on the plaintiffs. It is necessary to mention that, it is specifically mentioned in the argument of plaintiffs that, the interim applications are required to be decided early. Hence, the matter is kept on tomorrow for compliance of this order at the hands of plaintiff. Therefore, order as under:

ORDER

1. Application below Exh.18 is rejected.
2. Application below Exh.32 is allowed subject to cost of Rs.200/- (Two Hundred only).
3. The plaintiffs to pay cost, carry out amendment and to file amended plaint on tomorrow.

Dahiwadi

Date: 15/03/2017

(S.S.Deshmukh)
Jt.C.J.J.D. Dahiwadi