



Order below Exh.50 in R.C.S.No.110/2013

CNR No. MHST14-000757-2013

(*Ramchandra Bapu Rite Vs. Laxman Bapu Rite*)

This application is filed by plaintiff to permit him to carryout amendment in his pleading under order 6 rule 17 of the Code of Civil Procedure, 1908.

2. It is the contention of plaintiff in short as follows, Plaintiff has filed this suit against defendants for partition and separate possession of the suit property situated at Wakhari Tal.Phaltan, Dist.Satara bearing Gat No.581, 583, 575 by metes and bounds and for declaration. Plaintiff intended to carryout an amendment more particularly described in application para no.2 i.e. plaintiff and his real brother Bhau Laxman Rite, Dattatray Rite had made a partition of ancestral as well as joint family properties bearing Gat No.572, 576, 585, 573, 582, 586, 574, 580 by giving an application before revenue officers in the year 2001. As per alleged partition plaintiff and defendant no.1 and 2 along with there family members have peaceful possession and occupancy over there. Therefore, these properties are not included in this suit as well as plaintiff is not willing to claim partition in these properties.

3. But, suit properties bearing Gat No.581, 583, 575 were excluded from partition by defendant no.1 intentionally in the year 2001 by taking undue advantage of illiteracy of this plaintiff. Defendant No.1 Laxman Bapu Rite while he was in joint family property work like a karta of that family. This plaintiff along with defendant no.1 and 2 carryout agriculture work in the joint family property. While partition was effected in the year 2001 by excluding suit properties defendant No.1 has made a partition of other ancestral and joint family properties. Defendant No.1 intentionally excluded

suit properties from the alleged partition effected in the year 2001.

4. Proposed amendment is explanatory in nature, it will not change the nature of this suit. Proposed amendment is sought before commencement of trial. If in such situation proposed amendment may be allowed no loss would be suffered adverse party on the contrary defendants have an opportunity to file additional written statement. Therefore, in the interest of justice this application may kindly be allowed.

5. Defendants have contested this application by filing their say at Exh.51. The contents of an application below Exh.50 are false and after thought therefore these defendants denied it in toto. This application it self is not maintainable in eyes of law. Plaintiff has filed this suit for partition, possession and for declaration on dated 07/03/2013 in which defendant no.1 to 5 have filed their written statement at Exh.49 of dated 11/03/2014. Plaintiff is intended to amend his pleading in view of written statement of these defendants, basically the contentions upon which plaintiff has preferred this application at Exh.50 were know to him before filing of this suit. Plaintiff has filed this application more than after six years. Issues have been settled in this suit, in such situation as per amendment of the year 2002 in order 6 rule 17 an application to carryout an amendment cannot be filed after commencement of trail. In this circumstances plaintiffs application liable to rejected.

6. Heard Ld Advocate R.V. Borate for plaintiff and Advocate S.S. Jadhav for defendants. In the tune of an application below Exh.50. Ld Advocate for plaintiff submitted that, yet trial of the suit is not commenced, as per order 6 rule 17 of the Code of Civil Procedure Court may at any stage of the proceeding allow either party to alter or amend his pleading, such amendment may be necessary for the purpose of determining real question in controversy between the

parties. Ld Advocate for plaintiff relied on ***Mohinder Kumar Mehra Vs. Roop Rani Mehra 2018 ALL SCR 381*** held that, Amendment of pleadings, permissibility. Issues were framed and case fixed for recording of evidence of plaintiff. However, plaintiff did not produce evidence and took adjournment and in meantime filed amendment application. Thus, technically trial commenced when date was fixed for leading evidence by plaintiff but actually amendment application filed before evidence led by plaintiff. Plaintiff led his evidence even on amended pleadings. Defendant in no manner can be said to be prejudiced by amendment. Therefore, amendment application allowed.

7. On the controversy Ld Advocate for defendants submitted that, the way by which plaintiff prays to carryout proposed amendment is hit by order 2 rule 2 of Code of Civil Procedure, 1908. He relied on ***SNP shipping service pvt. Ltd. And others Vs. World Tanker Carrier Corporation and another. AIR 2000 BOMBAY 34***. Relinquishment of a relief with permission to seek it in subsequent suit. Permission has to be obtained from Court trying earlier suit, it cannot be granted in subsequent suit by accepting statement of plaintiffs counsel that, they have elected to press the relief in subsequent suit rather than earlier suit. Subsequent suit for declaration held on facts, did not disclose cause of action and was liable to be rejected under order 7 Rule 11(a).

8. After considering arguments of both side, plaint, written statement, application below Exh.50 and say thereon at Exh.51 it appears that, admittedly, suit is for partition of suit properties bearing Gat No.581, 583, 575 and for declaration of memorandum of partition executed on 10/07/2012 in respect of Gat No.575. Most of the fact is reiterate in an application below Exh.50 by the plaintiff as per his main pleading in plaint. It is undisputed that, plaintiff and defendant no.1, 2 are real brother. Defendant No.3, 4 are son of defendant no.1, defendant no.5 is son of defendant no.2. It is the contention of

plaintiff since the beginning that, suit properties are purchased by plaintiff and defendant no.1 and 2 when they were in Hindu Joint Family. Jagnnath Bapu Rite was given adoption when he was four or five years of old.

9. Agriculture properties bearing gat no.581, 583 was purchased in the name of defendant no.5 Anil Dattu Rite from Vishnu Mohite on dated 14/05/1991. Gat No.575 was purchased in the name of defendant no.1 Laxman Bapu Rite from Vishnu Mohite on dated 11/05/1972. Though it is undisputed that, suit properties were purchased in the name of defendant no.1 and 5, plaintiff has categorically contended that, suit properties were purchased by plaintiff and defendant no.1 and 2 when they was in Hindu Joint Family. In this circumstances it is matter of evidence that, plaintiff either has to prove that, suit properties were Joint Hindu Family property or defendant no.1 and 2 by deceiving plaintiff made a partition of other ancestral properties by metes and bounds by excluding suit properties. It is further contention of plaintiff him self that, plaintiff and defendant no.1 and 2 have made a partition deed as per section 85 of the Maharashtra Land Revenue Code, 1966. On 10/07/2012 defendants have executed registered partition deed in respect of Gat No.575 and upon which plaintiff has seek for relief of declaration.

10. It is also necessary a consider order 2 rule 2 of the Code of Civil Procedure, 1908 every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action but, a plaintiff relinquish any portion of his plaint in order to bring the suit within the jurisdiction of any Court. It is also not the case of plaintiff that, he has filed any earlier of suit in respect of rest of their ancestral property and in which he seek the same relief. In such situation plaintiff would have to satisfy that, there are sufficient grounds for allowing him to continue with relief sought in present suit as per

order 2 rule 2(2) of the Code of Civil Procedure, 1908. But, such application required to be made in earlier suit and not in present suit. The provision of Order 2 Rule 2 will operate only to a subsequent suit which seeks for a particular relief that must have been taken in the previous suit. It is settled principle that, if the suit is continue with one relief and another relief is sought to be brought through an amendment the question of applying order 2 rule 2 does not arise at all.

11. It is obligation on Courts in order 2 determine whether a suit is barred by order 2 rule 2 must examine the cause of action pleaded by the plaintiff in his plaint. Considering the technicality of the plea of order 2 rule 2 both the plaint as well as documentary evidence must be read as a whole to identify the cause of action.

12. In the backdrop of above discussion it appears that, plaintiff suit is based upon the transaction of dated 10/07/2012 along with prayer of partition of suit properties. Defendants in their say at Exh.51 no specific contentions need in respect of proposed amendment. In absence of specific denial an application for amendment may not be rejected as whole. After settlement of issues on dated 05/04/2019 at Exh.45. Initial Burden is on plaintiff to proves that, suit properties are Joint Family Properties of plaintiff and defendant no.1 and 2. In such situation without going into the roots of matter by oral objection in respect of order 2 rule 2 permission to carryout amendment may not be rejected. If permission to carryout amendment may be allowed defendants have ample opportunity to submit the additional written statement. Both parties may lead their respective oral as well as documentary evidence in respect of their respective contentions.

13. Hon'ble Apex Court in ***B.K. Narayana Pillai Vs Parameswaran Pillai & Anr (2000) 1 SCC 712*** held that, the purpose and object of order 6 rule 17 is to allowed either party to alter or amend his pleadings in such manner and on such

terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interest of Justice. It is true that, the amendment cannot be claimed as a matter of right and under all circumstances but it is equally true that, the Courts while deciding such prayers should not adopt hyper technical approach. Liberal approach should be the general rule practically in cases where the other side can be compensated with the cost. Technicalities of law should not be permitted to hamper the Courts in the administration of Justice between the parties.

14. In the matter of *Lakha Ram Sharma Vs Balar Marketing (P) Ltd. (2008) 17 SCC 671* it was also held that, it is settled law that, while considering whether the amendment is to be granted or not, the Court does not go in to the merits of the matter and decide whether or not the claim made therein is bona fide or not that is a question which can only be decided at the trial of the suit. It is also settled law that, merely because an amendment may take suit out of the jurisdiction of that, Court is also no ground for refusing that amendment.

15. After considering the rival contentions of parties and judgments of Hon'ble Apex Court, if the loss might be suffered by other side can be compensated in terms of money if alleged amendment can be allowed. In these circumstances such amendment is necessary to be allowed for the purpose of determining the real question in controversy between the parties. Section 35 of the Code of Civil Procedure 1908 provides reasonable cost. On perusal of an application below Exh.50 this amendment application is silent about due diligence of plaintiff as he could not have raised this application before commencement of trial. Though plaintiff has not contended about due diligence it is important to note that,

issues have been settled on 05/04/2019 thereafter immediate plaintiff has filed this application to permit him to carryout proposed amendment on dated 10/07/2019. In such situation hyper technical approach need not be adopted, in the interest of justice to conclusively determine the rights of parties. Considering the age of matter suit have been filed on dated 18/03/2013 therefore, it would be just, proper and legal to allowed this application on cost of Rs.1000/- to meet the financial expenses of these defendants which was may be spent by them to defend present matter. Hence, in view of above discussion I proceed to pass following order.

O R D E R

1. An application below Exh.50 is here by allowed subject to cost of Rs.1000/- out of which Rs.750/- be paid to these defendants and Rs.250/- be paid to the Taluka Legal Service Authority, Phatlan.
2. Plaintiff is here by directed to carryout amendment within 14 days from the date of this order and copy of amended plaint shall be produced on record without fail.

Phaltan

Date : 04/10/2019

(Yuvraj C. Patil)
5th Civil Judge Jr. Dn., Phaltan

-: Certificate :-

I affirm that the contents of this order and the P.D.F. file of this order are same, word to word, as per the original order.

Name of Stenographer	Shri. Prashant Sharadkumar Lalage
Name of Court	Shri. Yuvraj Chandrakant Patil 5 th Jt. C.J.J.D.& J.M.F.C., Phatlan
Date of Decision	04/10/2019
Order signed by the P.O. on	04/10/2019
Order uploaded on	04/10/2019