

## Shishupal S/o Patiram Tarjude And Others Vs Vandana W/o Prabhudas Deshmukh And Others

**Court:** Bombay High Court (Nagpur Bench)

**Date of Decision:** Jan. 10, 2025

**Acts Referred:** Code of Civil Procedure, 1908 " Order 6 Rule 17, Order 17 Rule 6, Order 41 Rule 23, Order 41 Rule 23A, Order 41, Rule 25, Order 41 Rule 27, Order 41 Rule 27(1)(a)

**Hon'ble Judges:** M.S. Jawalkar, J.

**Bench:** Single Bench

**Advocate:** A.M. Chandekar, U.K. Bisen

**Final Decision:** Dismissed

### Judgement

M.S. Jawalkar, J

1. Heard learned Counsel for petitioner and learned Counsel for respondents.

2. Present petition is filed being aggrieved by the order dated 01.08.2024 passed below Exh. 38 in Regular Civil Appeal No. 23/2023 by learned

District Judge-2, Bhandara, on application for amendment in pleading kept in abeyance with a direction to decide the same finally with appeal.

3. It is the case of the plaintiffs that the father and mother of plaintiff purchase the suit land from father of defendant No.1 and one Gendu Kapgate by

registered sale deed and after purchase mutation was effected. After demise of father, plaintiff became the owner of suit property and are in

possession of the suit property. In plaint, agricultural land Gat Nos.190/2, 190/3, 190/4, 190/5, 190/6, 190/8, 191, 192/1, are referred as 'suit

property. Defendants in collusion with Tahsildar effected false mutation, it was, aside by Sub-Divisional Officer. Defendants came on suit

property and try to disposes the plaintiff. Hence, plaintiff filed suit for perpetual injunction.

4. Defendants filed written statement along with counter claim. According to the defendants, previously suit property was numbered as Gat No.159/1,

159/2, and 375, owned by Ramaji. It was joint family property. Only 3 acre land was sold however, mutation effected on entire suit property. It is

submitted that Tulshiram and Shriram sold 3 acre land to Patiram, Maroti and Baliram under the influence of liquor, taking undue advantage of the

same bogus sale deed was executed. Plaintiff tried to disturb possession therefore, filed counter claim.

5. Being aggrieved by the judgment and decree dated 29.07.2017 passed in Regular Civil Suit No.32/2010, plaintiff filed an appeal before the learned

District Judge. During pendency of appeal, plaintiff applied for amendment application Exh. 38. By amendment application, plaintiff want to brought on

record, four boundaries of suit property along with plaint map, order passed by Revenue Authority and declaration that plaintiff is the owner of suit

property and consequential amendment related to Court fee. The learned first Appellate Court heard amendment application and passed order dated

01.08.2024 directing to keep application in abeyance and the same will be decided finally with appeal. The said order is the subject matter of challenge

in the present petition.

6. Learned Counsel for the petitioner contended that learned first Appellate Court ought to have appreciated that the amendment filed by the plaintiff

was to explain four boundaries, to bring on record, events occurred subsequent to filing of suit and to remove objections regarding non-seeking of relief

of declaration. It is further contended that the learned first Appellate Court erred in considering provisions of Order 41 Rule 23 and 23A of the Code

of Civil Procedure while deciding amendment application. It is submitted that learned first Appellate Court has erred in considering the settle principles

regarding amendment in pleadings as contemplated under the provisions of Order 6 Rule 17 of the Code of Civil Procedure. Hence prayed for the

interference by this court in the impugned order.

7. Learned Counsel, for petitioner, relied on, following citations:

1) M.A. Ahamedkutty Vs. Sub Judge and others 1989 SCC OnLine Ker 109

2) Hasanate Taheriyah Fidayyah and anr. Vs. Mahesh Kishor Saran and anr. 2014 (5) Bom.C.R. 231

3) Dinesh Goyal @ Pappu Vs. Suman Agrawal (Bindal) and others 2014 DGLS (SC) 939

4) Ashok Kumar Dureja Vs. Rajendra Kumar Jain thr. LR 2017 (4) M.P.L.J.

5) Khemchand Mulchand Vs. Government of Madhya Pradesh, Bhopal and others 1968 Law Suit (MP) 115

8. Learned Counsel for the Respondent supported the order passed by the learned lower appellate court and submitted that this is not the stage for

filling amendment application, the lis is pending since long and at this stage, the application is filed with a view to prolong the matter. This fact is rightly

appreciated by the learned lower appellate court and passed an appropriate order which needs to be confirmed.

9. Learned Counsel for respondent No. 3 Shri Bisen relied on following citations:

1) Ramesh Singh and others Vs. Vajjanti Bai and others 2003 SCC OnLine MP 402

10. I have heard both the parties at length by consent for final disposal at the stage of admission. The petitioner is challenging the order below Exhibit

13, which is an application for amendment and pleading under Order 6 Rule 17 of the Civil Procedure Code. By way of this amendment, petitioner

was seeking relief of declaration about the ownership and also to place on record certain facts. The learned Appellate Court rightly appreciated the

consequences of the said amendment if allowed. It is necessary consequence if such amendment is allowed and allowed to incorporate the facts as

well as relief of declaration, then Appellate Court may require to remand the matter to the Trial Court with necessary directions regarding permitting

the parties to amend the pleadings, leading evidence and decide the suit afresh.

11. Admittedly, the power of remand back can be exercised by the Appellate Court after final hearing of the appeal if it comes to the conclusion that

order of remand is necessary in the interest of justice. For that, Appellate Court requires order of Trial Court should be set aside and he can do so by

examining the case finally on merit.

12. My attention is also drawn to the fact that the said mutation entries were changed by the Tahsildar on 17.03.2010. The petitioner herein challenged

the said order of Tahsildar before the Sub Divisional Officer. The Sub Divisional Officer reversed the order passed by the Tahsildar. Therefore,

respondent herein filed appeal before the Collector against the order of Sub Divisional Officer. The Collector set aside the order of Sub Divisional

Officer. The revision filed to the Commissioner by the petitioner herein has also dismissed. The writ petition challenging the same is also dismissed and

Special Leave Petition is also dismissed before the Hon'ble Apex Court. As such, the petitioner herein was having knowledge about the challenge

in mutation entries, which were duly upheld up to the Hon'ble Apex Court. The order of the Tahsildar was dated 17.03.2010, whereas suit was

filed on 14.06.2010. However, he has not applied for any such declaration.

13. On perusal of Order 17 Rule 6 of the C.P.C., true it is that the Court may at any stage of the proceedings allow either party to alter or amend his

pleadings, which have been made, be necessary for the purpose of determining the real question in controversy between the parties. Thus, the Court

must satisfy that the amendment is necessary for purpose of determining the real question in controversy between the parties.

14. Learned Counsel for petitioner relied on Hasanate Taheriyah Fidayiha and anr. (supra), however it is in respect of Order 41 Rule 27 of the

C.P.C. It is contended that the similar analogy can be applied in the cases of amendment wherein Bombay High Court held that an application filed

under Clause (a) of (aa) of Order 41 Rule 27 of the C.P.C., the same has to be decided at any stage of the appeal even before the stage of final

hearing of the appeal and it would be prudent if such an application is decided at earlier stage.

However, in the said judgment itself, it is further clarified that powers under Clause (b) of Order 41 Rule 27 of the C.P.C. is to be exercised where

even though the Appellate Court finds that it would be able to pronounce the judgment on the basis of the record of the trial Court as it was, it might

still consider that in the interests of justice sometime which remained obscure should be filled up, so that it can pronounce the judgment in a more

satisfactory manner. The requirement under Clause (a) or (aa) for leading additional evidence is that of a party where for the reasons in Clause (a) or

(aa) could not file evidence at the stage of the trial. However, requirement under Clause (b) is that of the Court where it finds that additional evidence

is required for the purpose of enabling it to pronounce the judgment or for any other substantial cause. We, therefore, find that the application filed

under Order 41, Rule 27(1) (a) or (aa) could be decided at the stage prior to the hearing of the appeal. However, when the Court finds that such an

evidence is necessary for pronouncing the judgment or for any other substantial cause, the same has to be done at the stage of pronouncement of the

judgment.

15. In the present matter, the analogy can be applied, the petitioner was having knowledge about the mutation entries long back before filing of the

suit. As such, the relief he wants to claim, would have raised in the suit itself. However, even after hearing parties finally, if Appellate Court deems it

necessary to do the complete justice, he may allow application, therefore, he has rightly kept the application in abeyance.

16. As against this, learned Counsel for respondent relied on Ramesh Singh and others (supra), wherein Madhya Pradesh High Court held that:

“6. Thus, on due consideration of rival submissions as well as from materials available on record, I am of the view that the Lower Appellate Court

committed error in remanding the matter in toto without going into merits of the case, which appears to be contrary to settled principles of law.

Secondly, the Will in question had already been referred to in the plaint, the statements of witnesses and the written statement of the

defendants. Therefore, it would not have been a new circumstance for allowing the amendment application on that ground. Thirdly, in view of Order

41, Rule 25 of the Code if at all there was any ground for remanding the case, the appellate Court should have framed the issues and then remanded

the case limited to those issues to the trial Court for recording its findings after considering necessary evidence.

17. Learned Counsel also relied on judgment in M.A. Ahamedkutty (supra), wherein Kerala High Court held as under:

“13. Order VI rule 17 or any other provision of the Code does not oblige the appellate court to deal with an application for amendment before the disposal

of the appeal. It is a matter of procedure. As stated earlier, if the amendment is of a purely formal nature, which does not have any impact on the rights of parties,

there will be nothing wrong in the appellate court dealing with the application in the first instance even before dealing with the appeal. But where substantive

rights are sought to be affected and the decision of the trial court is likely to be jeopardised by such amendment, the matters best dealt with along with the appeal.

The first respondent Subordinate Judge was therefore in the right in posting I.A. No.2074 of 1987, for being heard along with the appeal.

18. Similar view is taken in Ashok Kumar Dureja (supra) relied on by respondent. The MP High Court relied on judgment of Khemchand Mulchand

Vs. Government of Madhya Pradesh, Bhopal 1972 M.P.L.J. 524, wherein it is held that it is beyond comprehension how the Appellate Courts are

liable to decide such type of application when they have not idea whatsoever on the merits of the appeal. The question whether the party should or

should not be allowed to amend its pleadings at the appellate stage cannot in its very nature be decided unless the appeal is first heard on merits.

19. Learned Counsel for petitioner relied on Dinesh Goyal @ pappu (supra), in support of his contention that object of Order VI Rule 17 of CPC,

which is aimed at preventing multiplicity or multiple avenues of litigation, subsumed under the umbrella of one dispute.

In the present case, learned Appellate Court rightly kept application in abeyance. In view of the fact that the amendment application is not moved

immediately for declaration that plaintiff is the owner of suit property. Considering the consequences of amendment, if allowed, may affect substantive

right of other party. Moreover, even after hearing the appeal, the learned Appellate Court if find it essential, may allow the application as it is kept in

abeyance. For the reasons stated above, there is no substance in the petition, hence dismissed.