

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.8239 OF 2012

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1. Ambadas Macchindra Lande
age 56 years, Occ. Agriculture,
R/o Mahalaxmi Hiwra,
Tq. Newasa, Dist. Ahmednagar.
2. Kamal Ramnath Yelwande,
age 54 years, Occ. Household,
R/o Sonai, Tq. Newasa,
Dist. Ahmednagar.
3. Ranjana Prakash Nipunge
age 52 years, Occ. Household,
R/o Bhanshiwara, Tq. Newasa,
Dist. Ahmednagar.
4. Vimal Kisan Darandale,
age 50 years, Occ. Household,
R/o Sonai, Tq. Newasa,
Dist. Ahmednagar.

Petitioners/
(Orig.Plaintiffs)

VERSUS

1. Badam Punja Chaudhar,
age 40 years, Occ. Agriculture,
R/o Mahalaxmi Hiware,
Tq. Newasa, Dist. Ahmednagar.
2. Nanabhau Keru Khedkar
Since deceased through his L.Rs.
- 2A] Saraswatibai Nanabhau Khedkar,
age 50 years, Occ. Household,
R/o Pargaon, Tq. Patoda,
Dist. Beed.

Since deceased through
L.Rs. 2B and 2C herein :

2B] Raghunath Nanabhau Khedkar,
age 48 years, Occ. Agriculture,
R/o Pargaon, Tq. Patoda, Dist. Beed.

2C] Kamalbai Karbhari Nagargoje,
age 45 years, Occ. Household,
R/o Watali, Tq. Patoda,
Dist. Beed.

Respondents/
(Orig. Defendants)

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Mr. A.K. Gawali, Advocate for petitioners.
Mr. C.K.Shinde, Advocate for Respondent Nos.1, 2B and 2C.

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CORAM : V. K. JADHAV, J.

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DATE OF RESERVING THE JUDGMENT : 23.09.2015
DATE OF PRONOUNCING THE JUDGMENT : 23.10.2015

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JUDGMENT :-

1. Rule. Rule made returnable forthwith. With the consent of the parties, petition is taken up for final hearing at admission stage.

2. By the present writ petition, the petitioners/original plaintiffs are challenging the order dated 16.8.2012 passed by the learned Jt. Civil Judge (J.D.), Newasa below Exh.151 in Regular Civil Suit No.271/1994, thereby rejecting the application filed by the petitioners/plaintiffs under Order 6 Rule 17 of the Code of Civil Procedure for amendment to the pleadings.

3. The petitioners/plaintiffs had instituted a suit for declaration and a decree of perpetual injunction regarding

the suit property situated at Mauje Mahalaxmi Hiware, Tq. Newasa, District Ahmednagar. According to the pleadings of the petitioners/original plaintiffs, the sale deed executed by the original plaintiff Mathabai in favour of the respondents/original defendants No.1 and 2 was a nominal sale deed executed as a security for the loan amount advanced to her. It has further pleaded that the possession of the suit property was never delivered, and on the date of sale deed itself, defendants had executed an agreement on a stamp paper in favour of deceased Mathabai agreeing thereby to reconvey the suit property on repayment of loan. The contesting defendants, on their appearance, denied the allegations made against them by filing written statement. According to them, the sale deed dated 14.7.1988 and 30.10.1990 were not out of the money lending transaction and it was out and out sale.

4. The petitioners/plaintiffs filed an application at Exh.151 under Order 6 Rule 17 of Code of Civil Procedure for amendment in the pleadings for inserting the relief of specific performance of contract in the plaint. The learned Jt. Civil Judge (Jr. Division), Newasa, vide its impugned order dated 16.8.2012, passed below Exh.151 rejected the application. Hence, this writ petition.

5. The learned counsel for the petitioners/plaintiffs submits that, in view of the pleadings of the parties to the suit, the issue No.2 is framed wherein the trial court was to answer the issue as “whether the plaintiff prove that the defendants have executed an agreement for re-conveyance of the deed?”. The learned counsel further submits that in view of the pleadings of the plaintiff and the framing of issue no.2 as aforesaid, no prejudice is likely to be caused to the respondents/defendants by virtue of the proposed amendment. The learned counsel further submits that, the original plaintiff deceased Mathabai was an illiterate lady had disclosed all necessary facts to her counsel for making out a case for specific performance and issue about the re-conveyance of the deed was also framed by the learned judge of the trial court. Thus, the petitioners/plaintiffs had exercised due diligence before filing an application for amendment. The learned counsel further submits that, the amendment sought is formal one and it will not change the nature of the suit. It has also contended that, the respondents/defendants are not taken by surprise due to the proposed amendment and therefore, no prejudice would likely to be caused to the defence raised by the defendants. The learned counsel further submits that, if such amendment is not allowed the petitioners/plaintiffs will

suffer irreparable loss and injury. The learned counsel further submits that, the court must be extremely liberal in granting the prayer of amendment and, it is always open to the Court to allow an amendment if such amendment really sub-serve ultimate cause of justice and avoid further litigation.

6. The learned counsel further submits that there is no absolute rule that in every case where a relief is barred because of limitation, amendment should not be allowed. The learned counsel further submits that the issue of limitation is a mixed question of fact and law and cannot be decided conclusively at the stage while considering the amendment. The learned counsel further submits that, ordinarily the amendment would relate back to the date of the suit and only in exceptional cases the same can be directed to be considered from the date when the amendment sought is permitted. The learned counsel thus submits that, writ petition, therefore, deserves to be allowed by setting aside the impugned order and the application at Exh.151 filed in Regular Civil Suit No.271/1994 may be allowed.

7. The learned counsel for the petitioners/plaintiffs placed reliance on following judgments :-

1. South Konkan Distilleries and another Vs. Prabhakar Gajanan Naik and others reported in AIR 2009 Supreme Court 1177.
2. Puran Ram Vs. Bhaguram reported in AIR 2008 Supreme Court 1960.
3. A.K.Gupta and sons Ltd., Vs. Damodhar Valley Corporation reported in AIR 1967 Supreme Court 96.
4. Dena Bank Vs. Apple Finance Limited and another reported in 2014 (1) Bom.C.R. 227.

8. The learned counsel for respondents/defendants No.1 and 2B and 2C submits that, neither the original plaintiff Mathabai nor her legal representative have diligently persuaded the matter. The suit is instituted in the year 1994 by the original plaintiff Mathabai. Her evidence is recorded at Exh.57 and she was subjected to cross examination on 4.11.2004. Furthermore, the evidence of witness No.2 of the plaintiffs also came to be partly recorded way back in the year 2005. The learned counsel thus submits that, trial of the suit is already commenced and the application Exh.151 filed belatedly seeking amendment of the plaint is not maintainable. The learned counsel further submits that the suit is instituted for declaration and a decree of perpetual injunction. By way of filing the application at Exh.151, the

petitioners/plaintiffs are seeking an amendment for introducing a new claim of specific performance of contract. This would change the nature of the suit and also cause serious prejudice to the defence raised by the defendants. The learned counsel further submits that, a time barred claim is sought to be inserted by way of amendment which is not permissible in law. The learned counsel further submits that amendment cannot be allowed which caused injustice to the other side. The learned counsel submits that if the proposed amendment is allowed, it would take away defendants legal right which has accrued to him by lapse of time. The learned counsel further submits that a fresh suit on the amended claim is barred by limitation on the date of the application seeking amendment and if the proposed amendment is allowed, that would defeat the valuable right of limitation accruing to respondents/defendants. The learned counsel further submits that amendment once incorporated relates back to the date of the suit, however, the doctrine of relation back in the context of the amendment in the pleadings is not one of the universal application in appropriate cases. The court, while permitting an amendment can direct that the amendment, if permitted by it shall not relate back to the date of the suit and it shall be deemed to have been brought before the court on the date on

which the application seeking amendment was filed. The learned counsel thus submits that the learned judge of the trial court has rightly rejected the application at exh.151. Writ Petition is devoid of any merit and thus liable to be dismissed with costs.

9. The learned counsel for the respondents/defendants, in support of his submissions, placed reliance on the following judgments :-

1. Purushottam alias Nana U. Sanyasi Vs. A.N.Jog and others reported in [2005(1) Mh.L.J. 426].
2. Revajeetu Builders & Developers Vs. Narayanaswamy and Sons and others reported in 2009 (6) ALL MR 986 (S.C.).
3. Siddaingamma Vs. Mamtha Shoenoy reported in 2001 AIR (SC) 2896.
4. Sampath Kumar Vs. Ayyakannu and another reported in AIR 2002 Supreme Court 3369.
5. K.Raheja Constructions Ltd., Vs. Alliance Ministries and others reported in AIR 1995 Supreme Court 1768.
6. Muni Lal Vs. The oriental Fire and General Insurance Company Ltd and another reported in AIR 1996 Supreme Court 642.
7. Radhika Devi Vs. Bajrangi Singh reported in 1996 AIR (SC) 2358.
8. Ashutosh Chaturvedi Vs. Prano Devi and others reported in 2008 AIR SCW 3352.
9. L.C.Hanumanthappa (Since Dead) represented by his L.rs Vs. H.B.Shivakumar reported in 2015 AIR SCW 5085.

10. The petitioners/plaintiffs instituted a suit for declaration and a decree of perpetual injunction. The plaintiffs are seeking declaration to the effect that, the sale deeds executed in favour of the defendants are nominal, illegal, bogus and without delivery of possession. The petitioners/plaintiffs have come with a specific pleadings that the respondents/defendants are carrying out the money lending business. According to the petitioners/plaintiffs, the original plaintiff Mathabai was in need of certain amount and therefore, at the instance of the defendants had executed a nominal sale deed as a security to the loan transaction. It has also specifically pleaded that on the day of execution of the sale deed itself, the respondent/defendant no.1 had executed a separate agreement on a stamp paper of Rs.5 (Five) agreeing therein re-conveyance of the suit land. The petitioners/plaintiffs have also come with the pleadings that the original plaintiff Mathabai was an illiterate and simpleton lady, whereas, the defendants are the rich persons having man power at their disposal. Since, she was in need of certain amount, at the instance of the defendants, the original plaintiff Mathabai had executed a nominal sale deed as a security. It is not out of place to mention here that, the defendant No.1 in paragraph No.6 of the written statement had accepted his thumb impression on the said stamp paper

executed on the day of execution of the sale deed itself. However, defendant no.1 has denied the contents of the said agreement. According to respondent/defendant No.1, said stamp paper was blank and he put his thumb impression on it as a pro-note. The remaining defendants have also filed their written statement in the same line as of respondent/defendant no.1.

11. The petitioners/plaintiffs have shown a cause of action in the suit as 2/3 months prior to the institution when the plaintiffs requested the defendants to accept the loan amount and execute the re-conveyance deed. According to the petitioners/plaintiffs, since the defendants had refused for the same, cause of action arose to institute the suit.

12. On the basis of these pleadings, the learned Judge of the trial court has framed following issues.

ISSUES

1. Does plaintiff prove that the transaction dated 30.10.1990 are the loan transaction as a security to the loan?
2. Does plaintiff prove that the defendants executed an agreement for re-conveyance of the deed ?
3. Does plaintiff prove that she is in possession of the suit property ?
4. Does defendant no.1 prove that the transaction of suit property is out and out sale ?

5. Does defendant No.1 prove that he put his thumb impression on an agreement as a pro-note ?
6. Does defendant No.2A to 2C prove that the transaction dated 30.10.1990 is out and out sale ?
7. Is plaintiff entitled for the relief of declaration ?
8. Is plaintiff entitled for the relief of perpetual injunction ?
9. What order and decree ?

13. In the year 2004, the original plaintiff Mathabai has filed her affidavit of evidence at Exh.57 and she was subjected to cross examination at length by the respondents/defendants. In the year 2005, the petitioners/plaintiffs have examined witness no.2 Shri Vasant Palve, who happened to be a bond writer of the said agreement written on the stamp paper of Rs.5/-. Since he has denied his hand writing on the said bond paper, further examination-in-chief was deferred and the plaintiffs have filed an application at Exh.77 for sending hand writing of the said witness alongwith said agreement executed on the stamp paper of Rs.5/- to hand writing expert. The learned judge of the trial court has allowed the said application and accordingly sent the said stamp paper and sample hand writing of the witness Vasant Palve to the hand writing expert.

14. During the pendency of the suit, the report of the hand writing expert was received which is in favour of the petitioners/plaintiffs. Consequently, the plaintiffs filed an application at Exh.151 under Order 6 Rule 17 of the Code of Civil Procedure for amendment in the pleadings.

15. On analyzing the cases relied upon by both the counsel, and particularly the case of Revajeetu Builders & Developers (supra), some basic considerations emerge for allowing or rejecting the application for amendment.

- 1] Whether the amendment sought is imperative for proper and effective adjudication of the case?
- 2] Whether the application for amendment is bonafide or mala fide ?
- 3] Amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms money;
- 4] Refusing amendment would in fact lead to injustice or lead to multiple litigation;
- 5] Whether proposed amendment constitutionally or fundamentally changes the nature and character of the case ? and
- 6] As a general rule, the court should decline the amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are only illustrative and not exhaustive.

16. It is well settled that, the Court must be liberal while granting the prayer for amendment. It is always open to the Court to allow an amendment if the court is of the view that allowing of an amendment would really sub-serve ultimate cause of justice and avoid further litigation. There is no absolute rule that in every case where a relief is barred because of limitation, amendment should not be allowed.

17. In the case in hand, the proposed amendment does not constitute the addition of a new cause of action or raise a different case. It is nothing but a different or an additional approach to the same facts. As per the plaintiffs pleadings, on the day of execution of the sale deed in question, a separate agreement regarding re-conveyance deed was reduced into writing on a stamp paper of Rs.5/-. The respondent/defendant no.1 has also accepted his thumb impression on the said stamp paper though denied the contents thereof. In my considered opinion, the plaintiffs are seeking a bonafide, legitimate, honest and necessary amendment in the pleadings. As per the pleadings of the parties to the suit as stated above, the proposed amendment is necessary for deciding the real question in controversy. I do not find that the proposed amendment, if allowed, would cause prejudice or injustice to the respondents/defendants.

18. The doctrine of relation back generally governs amendment of pleadings unless the court excludes the applicability of the said doctrine. The learned counsel for the respondents by placing reliance on the cases (supra) vehemently contends that, the proposed amendment on the grounds set out would defeat the valuable right of limitation accruing to the respondents/defendants. It is true that the doctrine of relation back in the context of the amendment of the pleadings is not universal application and in appropriate cases the Court while permitting the amendments can direct that the amendment permitted shall not relate back to the date of the suit. In the present case, the petitioners/plaintiffs have not inserted the prayer for specific performance, besides the specific pleadings raised in the plaint and, also the cause of action arose on the said pleadings for institution of the suit. The period of limitation prescribed in Article 54 for filing a suit for specific performance is three years from the date fixed for the performance. I do not think that the plaintiffs have filed an application for amendment in the pleadings with an intention or purpose to defeat the right already accrued in favour of the other side. The petitioners/plaintiffs are not seeking to add any allegations nor to claim any fresh relief.

19. From the averments of the plaint, it appears that all necessary pleadings for setting aside the sale deeds are contained in the plaint and adding specific prayer for performance of the contract is a mere formality. I do not find any exceptional circumstance to exclude the applicability of said doctrine of relation back in this case. On the other hand, the special circumstances which appears from the pleadings of the parties to the suit warrant the applicability of the doctrine of relation back.

20. In view of this, the impugned order passed by the learned Joint Civil Judge (J.D.) Newasa in Regular Civil Suit No.271/1994 below Exh.151 is not sustainable. Hence, following order.

ORDER

- I. The writ petition is hereby allowed.
- II. The impugned order dated 16.8.2012 passed below Exh.151 in Regular Civil Suit No.271/1994 is hereby quashed and set aside.
- III. In view of the discussion and reasons mentioned above, application at Exh.151 in Regular Civil Suit No.271/1994 is hereby allowed.

- IV. The petitioners/plaintiffs shall carry out the amendment within two weeks from the date of receipt of this order by the Trial Court.
- V. Rule is accordingly made absolute in above terms. Writ Petition is disposed.
- VI. In the circumstances, there shall be no order as to costs.

sd/-

(V.K. JADHAV, J.)

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21. At this stage, Mr. Shinde, the learned counsel for respondents requested this Court to stay the effect of this Judgment and order for couple of weeks. Since the suit is of the year 1994, request is not considered and the same is rejected.

sd/-

(V.K. JADHAV, J.)

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