

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.4736 OF 2014

M/s. D. J. Builders and Developers through its
Partners Jayantilal D. Shah ... Petitioner
Vs.
Sunil Pandurang Jethe and others ... Respondents

Mr. Usair Z. Kazi for Petitioner.
Mr. Harshad E. Palwe for Respondents No.1 and 2.

CORAM : R. G. KETKAR, J.
DATE : 30TH JULY, 2015

P.C. :

Heard Mr. Kazi, learned Counsel for petitioner and Mr. Palwe, learned Counsel for respondents No.1 and 2 at length.

2. By this Petition under Article 227 of the Constitution of India, original defendant No.2 has challenged the judgment and order dated 26.11.2013 passed by the learned Joint Civil Judge, Junior Division, Kalyan below exhibit-35 in Regular Civil Suit No.533 of 2007. By that order, the learned trial Judge allowed the application filed by the respondent No.1, hereinafter be referred to as the plaintiff, under Order VI, Rule 17 read with Order I, Rule 10 and Section 151 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for amending the plaint and for impleading respondents No.3 to 5 as defendants No.3 to 5 in the Suit.

3. In support of this Petition, Mr. Kazi strenuously contended that the proposed amendment is clearly barred by limitation. Plaintiff was aware of the registration of Deed of Declaration dated 14.12.2007 as also Power of Attorney executed in favour of defendant No.2. Under that Power of Attorney, defendant No.2 was authorized to create third party interest. In pursuance of this, defendant No.2 executed

Conveyance Deed on 31.07.2009 in favour of respondents No.3 to 5. However, the present application for amendment is filed on 12.11.2013. Thus, the proposed amendment is clearly barred by limitation.

4. Mr. Kazi further submitted that in any case, the amendment sought exceeds the pecuniary jurisdiction of the Court of Civil Judge, Junior Division. Even on that ground, amendment could not have been allowed. Lastly, he submitted that the plaintiff was completely negligent in taking out the application for amendment. He submitted that the three suit properties were owned by defendant No.1 and one Vishnu Mhatre. On 06.01.1992, defendant No.1 and Vishnu Mhatre executed registered agreement of sale in favour of M/s. Bharwani Brothers and also handed over possession to M/s. Bharwani Brothers. M/s. Bharwani Brothers had paid part consideration to the defendant No.1 and Vishnu Mhatre. On 25.03.1994, defendant No.2 entered into tripartite agreement with defendant No.1, Vishnu Mhatre and M/s. Bharwani Brothers. Power of Attorney was also executed in favour of defendant No.2. He submitted that defendant No.2 had paid Rs.7,01,000/- to M/s. Bharwani Brothers. On 14.12.2007, Deed of Declaration and Power of Attorney were registered. Defendant No.2 is authorized to create third party interest. He submitted that defendant No.1 deleted name of Vishnu Mhatre from revenue records. On 19.11.2007, defendant No.1 executed the Development Agreement in favour of the plaintiff. He submitted that on the basis of the Power of Attorney authorizing defendant No.2 to create third party interest, defendant No.2 had executed Conveyance Deed in favour of respondents No.3 to 5 herein on 31.07.2009. Though the plaintiff was aware of this transaction, he filed application for amendment on 12.11.2013, which is clearly barred by limitation. He, therefore, submitted that the learned trial Judge committed error in allowing the application for amendment which is barred by limitation as

also the proposed amendment exceeds the pecuniary jurisdiction of the Court of the Civil Judge, Junior Division.

5. On the other hand Mr. Palwe supported the impugned order. He submitted that defendant No.2 has filed application under Section 9-A on the ground that Civil Court has no pecuniary jurisdiction. That application was rejected. Apart from that, defendant No.2 also took out application under Order VII, Rule 11 C.P.C. on the ground that Civil Court has no jurisdiction to entertain and try the Suit and that the Suit is barred by limitation. That application was also dismissed. He submitted that the learned trial Judge allowed the application for injunction on 26.12.2007. Notwithstanding the fact that the injunction order was operating against the defendant No.2, defendant No.2 created third party interest by executing Conveyance Deed in favour of respondents No.3 to 5 herein on 31.07.2009. Mr. Kazi submitted that aggrieved by the order dated 26.12.2007 passed by the trial court, defendant No.2 preferred Miscellaneous Civil Appeal No.151 of 2007. By order dated 03.01.2008, the learned District Judge suspended the impugned order till 07.01.2008 below exhibit-19. He submitted that the stay order was extended by the District Court from time to time till disposal of the Miscellaneous Civil Appeal. In other words, the order dated 26.12.2007 was stayed during the pendency of the Miscellaneous Civil Appeal. He further submitted that appeal preferred by the defendant No.2 is pending till date.

6. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, plaintiff has instituted Suit for perpetual injunction restraining the defendants from interfering with the possession of the plaintiff in respect of the suit property in any manner

as also for injunction restraining defendants from creating third party interest in respect of the suit property till disposal of the Suit. Plaintiff claims to have entered into registered Development Agreement on 19.11.2007 with defendant No.1. As against this, defendant No.2 claims to have entered into Tripartite Development Agreement on 25.03.1994 with defendant No.1, Vishnu Mhatre and M/s. Bharwani Brothers. It is not in dispute that the said agreement was not registered at the relevant time. On 14.12.2007, Deed of Declaration and Power of Attorney were registered. Prima facie, at this stage, it cannot be said that any interest is accrued in favour of the defendant No.2 in respect of the suit property on the basis of the unregistered agreement dated 25.03.1994. It is also relevant to note that after instituting the Suit, plaintiff filed application exhibit-5 and by order dated 26.12.2007, the learned trial Judge issued injunction restraining defendants from creating third party interest.

7. It is no doubt true that defendant No.2 preferred Miscellaneous Civil Appeal in the District Court and during the pendency of the Appeal, order dated 26.02.2007 was suspended. It is also relevant to note that pending the Suit, defendant No.2 has executed Conveyance Deed in favour of respondents No.3 to 5 on 31.07.2009. This development took place during the pendency of the Suit. It is in that context, plaintiff took out application for amending the plaint as also for impleading respondents No.3 to 5 as defendants No.3 to 5 in the Suit.

8. Mr. Kazi submitted that the amendment is barred by limitation as also it exceeds pecuniary jurisdiction of the Court of Civil Judge, Junior Division. Mr. Palwe submitted that the said objections were considered by the trial Court in applications taken out by the defendant No.2 under Section 9-A as also under Order VII, Rule 11 C.P.C. and those objections were turned down. In view thereof, I do not find any merit in

the submission of Mr. Kazi that the Suit is barred by limitation as also the proposed amendment exceeds pecuniary jurisdiction of the Court of the Civil Judge, Junior Division. In any case, the Conveyance Deed is executed by defendant No.2 on 31.07.2009 pending the Suit. It will be open to the defendants to file amended written statement and raise contention about the limitation. If such contention is raised, the learned trial Judge will consider framing issue of limitation / re-casting of issues, if already framed.

9. By the impugned order, the learned trial Judge has allowed the application by observing that trial is yet to commence. As the Conveyance Deed was executed pending the Suit, it cannot be said that the plaintiff was not diligent. The learned trial Judge accordingly allowed the application. I do not find that the learned trial Judge has committed any error in allowing the application. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Hence, the Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) C.P.C.

(R. G. KETKAR, J.)