

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.802 OF 2012

Shri Dadu Tukaram Dabhole,
Aged 67 years, Occ. Agriculture,
R/o Waghapur, Tal. Bhudargad,
Dist. Kolhapur.

..... **APPELLANT**

...V E R S U S...

- 1] Shri Mahadev Tukaram Dabhole,
Deceased Through Legal Heirs
- A] Hindurao Mahadev Dabhole,
Aged 48 Yrs, Occ. Agriculture,
R/o Waghapur, Tal. Bhudargad,
Dist. Kolhapur.
- 2] Appaji Balu Barkale,
Deceased Through Legal Heirs
- A] Smt. Shewanta Appaji Barkale,
Aged 70 Yrs, Occ. Agriculture,
R/o Waghapur, Tal. Bhudargad,
Dist. Kolhapur.
- B] Mrs. Sangita Vilas Bhosale,
Aged 45 Yrs, Occ. Agriculture,
R/o Gangapur, Tal. Bhudargad,
Dist. Kolhapur.
- C] Vishwajeet Appaji Barkale,
Aged 17 Yrs, Occ. Education
Minor through minor guardian
mother Smt. Shewanta Appaji
Barkale, Aged 70 Yrs,
Occ. Agriculture,
R/o Waghapur, Tal. Bhudargad,
Dist. Kolhapur.

All the Respondents Represented
Through power of Attorney Holder

Mr. Kundlik Dattatraya Patil
Aged 64 Yrs, Occ. Agriculture
R/o Gangapur, Tal. Bhudargad,
Dist. Kolhapur.

..... **RESPONDENTS**

Shri Prashant S. Bhavake, Advocate for Appellant.
Shri Surel S. Shah, Advocate for Respondents.

CORAM: R.K. DESHPANDE, J.
DATE: 10th AUGUST, 2015.

ORAL JUDGMENT

1] It is alleged by the learned counsel for the appellant that the entire reading of the plaint shows that the suit was filed not only for the relief of declaration that the sale-deed dated 18.12.1993 is not binding upon the plaintiff but also for possession of the suit property. He concedes that there was no specific prayer for relief of possession made in the plaint, but by way of an application for amendment of plaint made on 05.02.2009, such relief was introduced and the amendment was allowed by the Trial Court. He submits that such in circumstances, the amendment would relate back to the date of filing of the suit i.e. 18.06.2002 and it would not operate from the date of filing of an application for amendment, resulting in bar of limitation.

2] In view of above, **admit** on the following substantial question of law.

Whether the Lower Appellate Court has committed an error in not remanding the matter back to the Trial Court to consider the question of bar of limitation, in the light of the factual position available on record?

Shri Shah, the learned counsel appears for respondents waives service of notice.

3] Heard finally by consent of the learned counsel appearing for the parties.

4] The copy of the plaint is produced before this Court. The order allowing the application for amendment passed by the Trial Court is not before the Court. The Lower Appellate Court has not considered the finding recorded in the said order, allowing the application for amendment. The amendment application and the reply thereto filed by the respondent is also not before this Court. Shri Shah, the learned counsel appearing for the respondents submits that the Trial Court entertained this application after the matter was closed for judgment, without even providing an opportunity to the respondents, to oppose it.

5] The question of limitation is a mixed question of law and fact. While allowing the application for amendment, the Court has to

specify as to whether the amendment relates back to the filing of the suit or it operates from the date of filing of the application for amendment. The Court is further required to consider the question as to whether the amendment is barred by law of limitation. The lower Appellate Court therefore, ought to have remanded the matter to the Trial Court with a direction to frame an issue of bar of limitation and thereafter to decide the suit. The lower Appellate Court has committed an error in holding that the suit was barred by limitation, without considering the aforesaid factual position on record. The finding is therefore, in breach of the principles of natural justice, without providing an opportunity to the party to substantiate their rival claims. The question of law is therefore, answered accordingly.

6] In the result, the Second Appeal is allowed. The judgment and order dated 29.02.2012 passed by the Lower Appellate Court is questioned and set aside. Similarly, the decree passed by the Trial Court on 03.08.2009, in Regular Civil Suit No.56 of 2002 is also hereby quashed and set aside. The matter is remitted back to the Trial Court, to frame an issue on the question of bar of limitation and to decide the application for amendment afresh after giving an opportunity to the parties to lead evidence and to appear in the matter. The appellant to appear before the Trial Court on 14.09.2015. The Trial Court shall decide the suit within a period of six months thereafter.

7] The parties to act upon the authenticated copy of the order.

JUDGE

NSN