

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.8766 OF 2015

Surekha Hanumantrao Pawar and others ... Petitioners
Vs.
Sakharam Genu Gaikwad and others ... Respondents

Mr. Sudhir Hardikar for Petitioners.

CORAM : R. G. KETKAR, J.
DATE : NOVEMBER 26, 2015

P.C. :

Heard Mr. Hardikar, learned Counsel for petitioners at length.

2. By this Petition under Article 227 of the Constitution of India, original defendants No.11 to 15 have challenged the judgment and order dated 17.07.2015 passed by the learned 2nd Joint Civil Judge, Junior Division, Pune below exhibit-77 in Regular Civil Suit No.3817 of 2012. By that order, the learned trial Judge allowed the application made by respondents No.1 to 3, hereinafter referred to as plaintiffs, under Order 6, Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for amending the plaint.

3. Mr. Hardikar submitted plaintiffs instituted Suit for partition and separate possession of their shares in the suit property as also for declaration that the sale deed executed by defendant No.1 in favour of defendants No.9 to 20 on 31.07.2006 is not binding on the plaintiffs and for perpetual injunction. Defendants No.11 and 15 filed written statement on 18.08.2007. In paragraph 2, it is contended that on 26.08.1997, defendant No.1 and plaintiff No.1 executed agreement of sale in favour of defendants No.11 and 15 for sale of the property in dispute. Defendants No.11 and 15 paid Rs. 8 lacs. Plaintiffs thereafter

filed application on 15.09.2014 under Order 6, Rule 17 for amending the plaint. Plaintiffs proposed to add paragraph 7-A challenging the agreement of sale dated 06.08.1997 (26.08.1997) and also contending that the sale deed executed on 18.07.2006 is forged and fabricated document and the sale deed does not bear signatures of the plaintiffs. Plaintiffs also prayed for correction of the typographical error. By the impugned order, the learned trial Judge allowed the application.

4. Mr. Hardikar submitted that right to amend accrued to the plaintiffs on 18.08.2007 when defendants No.11 and 15 filed written statement. However, the application is filed on 15.09.2014. In view of Article 137 of the Limitation Act, 1963, the learned trial Judge ought to have rejected the application on the ground that it is barred by limitation. He further submitted that in terms of the proposed paragraph 7-A, the plaintiffs intend to challenge agreement of sale dated 26.08.1997. In pursuance thereof, sale deed was executed on 18.07.2006. In view thereof, it is not necessary to challenge the agreement of sale dated 26.08.1997. In short, he submitted that the proposed amendment to this extent is really not necessary for deciding the controversy between the parties. He fairly submitted that trial is yet to commence and only the issues are framed.

5. I have considered the submissions made by Mr. Hardikar. I have also perused the material on record. Perusal of the plaint, as originally instituted, shows that plaintiffs have challenged the sale deed dated 31.07.2006. Plaintiffs have prayed for substituting date of sale deed dated 31.08.2006 by 18.07.2006 and defendants have not objected for correction of the typographical error. Perusal of the plaint and in particular, prayer clause (c) shows that plaintiffs have challenged the sale deed dated 31.07.2006. Mr. Hardikar submitted that as the

defendants No.11 and 15 filed written statement on 18.08.2007, within three years, plaintiffs ought to have applied for amending the plaint. As noted earlier, plaintiffs have already challenged the sale deed in question. It, therefore, does not amount to taking away right of the defendants to contend that the proposed amendment is barred by limitation.

6. It is also material to note that the trial has not commenced. If that be so, I do not find that the learned trial Judge has committed any error in allowing the application that too subject to payment of costs of Rs.750/-.

7. Mr. Hardikar relied upon the decision of this Court in the case of **Harinarayan Vs. Vijay, 2012 (2) Mh.L.J. 106** to contend that application for amendment has to be made within the period prescribed by Article 137 of the Limitation Act. For the reasons already indicated, reliance placed by Mr. Hardikar on **Harinarayan (supra)** does not advance the case of the defendants. Hence, no case is made out for invocation of powers under Article 226 of the Constitution of India. 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.)