

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.6157 OF 2014

Smt.Amrut Prakash Borgaonkar & Anr. ..Petitioners

V/s.

Shri.Arvind Vishwanath Kapote & Ors. .. Respondents

Mr.Sudhir S. Hardikar for the petitioners

CORAM : R.G. KETKAR, J.

DATE : 05TH APRIL, 2016.

P.C.

1. Heard Mr.Sudhir S. Hardikar, learned counsel for the petitioner at length.

2. By this petition under Article 227 of the Constitution of India, the petitioners have challenged the judgment and order dated 09th January 2014 passed by the learned 4th Joint Civil Judge, Senior Division, Kalyan below Exh.85 in Special Civil Suit No.127 of 2005. By that order, the learned Trial Judge allowed the application made by the plaintiffs under order 6 Rule 17 of Code of Civil Procedure, 1908 for amending the plaint so as to incorporate paragraphs

11A to 11E and addition of prayer clauses (i-a) and (i-c).

3. Mr.Sudhir S. Hardikar strenuously contended that though the suit is instituted in the year 2005 and the plaintiff has challenged Memorandum of Understanding dated 11th May 2005 and development agreement dated 14th June 2006, the application for amendment is taken out on 08th November 2013. As on that date challenge to MOU and development agreement is time barred. He therefore submitted that the learned Trial Judge was not justified in allowing the amendment which is on the face of it, is time barred. I have considered this submission of Mr.Hardikar. It is not in dispute that suit is instituted on 24th May 2005. The MOU was entered into by defendants no.1 to 3 with defendant no.8 on 11th May 2005 i.e. just few days before filing the suit in respect of the suit property. Development Agreement was entered into by defendant no.9 with Shindes and Borgaonkars on 14th June 2006 in respect of the suit property. In other words, the development agreement was executed pending the suit and at the time of the instituting the suit, plaintiff could not have

challenged this transaction.

4. In view thereof I do not find that the learned Trial Judge has committed any error in allowing the application for amendment. It is however, necessary to keep issue of limitation open by directing the Trial Court to frame issue of limitation along with the other issues and the same shall be tried together. Subject to this, petition is dismissed.

5. It is made clear that where a decree is challenged by the petitioners, any error, defect or irregularity in impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of the proposed proceedings as contended by section 105(1) of Civil Procedure Code.

(R.G. KETKAR, J.)