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IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10298 OF 2015

Shri Mannira Nijappa Muthana-Vasu ... Petitioner

Vs.

Shri Dastagir Ibrahim Madar

(Since deceased thru. Legal heirs)

1A. Bashir Dastagir Madar and others ... Respondents

Mr.Rahul Kate, Advocate for Petitioner.

Mr.Suraj Kudalkar, Advocate for Respondent No.4.

CORAM : R.G.KETKAR, J.

DATE : 13th JANUARY, 2016

P.C. :

. Heard Mr. Rahul Kate, learned Counsel for the petitioner and Mr.Suraj Kudalkar, learned Counsel for respondent No.4 at length.

2. By this Petition under Article 227 of the Constitution of India, original plaintiff has challenged the judgment and order dated 28/07/2015 passed by the learned Civil Judge, Senior Division, Gadhinglaj below Exhibit 94 in Special Civil Suit No. 8 of 2011. By that order, the learned trial Judge rejected application under Order 6 Rule 17 of Code of Civil Procedure, 1908 (for short 'C.P.C.') made by the petitioner, hereinafter referred to as plaintiff, for amending the plaint.

3. Mr.Kate strenuously contended that the learned trial Judge rejected the application mainly on the ground that proposed amendment pertains to the period from September 1994. In other words, the developments which are sought to be brought on record had taken place long before instituting the Suit in the year 2011. That apart, the fact that defendants No. 1 to 3 revoked power of attorney was known to the plaintiff at the time of filing the Suit. Despite that, plaintiff did not aver this fact. It is only after the issues were settled and Suit is for recording of evidence, that time the present application is made as and by way of after thought. Mr. Kate further submitted that defendant No.4 filed reply dated 20/02/2015 opposing application Exhibit 94. In paragraph 3 thereof, it was contended that defendants No.1 to 3 specifically denied the agreement of sale dated 12/10/1994. Though plaintiff was very much aware of this fact in the year 1999 itself or even prior to that, the present Suit is instituted in 2011. He submitted that this is factually incorrect.

4. On the other hand, Mr. Kudalkar supported the impugned order.

5. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. By the proposed amendment, the plaintiff wants to incorporate paragraphs 2A and 6A. In paragraph 2A, it is

contended that defendant No.4 is a middle man in respect of the transaction in dispute. Defendant No.4 fixed the meeting of the plaintiff and defendant No.1 firstly in 1994 and he was instrumental for entering into the transaction between plaintiff and defendants No.1 to 3. Accordingly, agreement was executed between plaintiff and defendants No. 1 to 3 and brother in law of defendant No.4 is a witness to that agreement.

6. In paragraph 6A, the plaintiff contended that in September 1994, there was agreement between plaintiff and defendants No. 1 to 3 in respect of the suit land. Defendants No. 1 to 3 executed irrevocable power of attorney on 13/10/1994. Defendants No. 1 to 3 executed agreement of sale in favour of the plaintiff. Defendants No. 1 to 3 instituted Regular Civil Suit No. 140 of 1999 against the plaintiff.

7. As noted earlier, by the impugned order, the learned trial Judge rejected the application mainly on the ground that plaintiff was aware that defendants No. 1 to 3 had executed power of attorney in his favour on 13/10/1994. Perusal of the plaint in Regular Civil Suit No. 140 of 1999 instituted by defendants No.1 to 3 herein shows that in paragraph 4, defendants No. 1 to 3 specifically asserted that they have cancelled power of attorney dated 13/10/1994 and intimated their intention in that regard to the plaintiff who was defendant therein. Defendants No. 1 to 3 also

published a notice on 23/02/1999 cancelling the power of attorney dated 13/10/1994 with effect from 07/12/1998. Thus, the plaintiff was very much aware of this development right from 1999 and present Suit is instituted in the year 2011. The application for amendment is filed on 10/02/2015. For the reasons recorded in paragraph 3 of the impugned order, I do not find that the learned trial Judge has committed any error in passing the impugned order. Hence, Petition fails and the same is rejected. 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) of C.P.C.

(R.G.KETKAR, J.)