

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Writ Petition NO. 8087 OF 2013

Vinayak Nagnath Malvadkar
(deceased), through LRs.

Shri. Mohan Vinayak Malvadkar

...Petitioners

Versus

Mrs. Kshama Shrinivas Vaidya

And Anr

...Respondents

....

Mr.Surel S. Shah, Advocate for the Petitioners.

Mr. P.M. Arjunwadkar, Advocate for Respondent No.1.

....

CORAM : R. G. KETKAR, J.

DATE : 05th August, 2016

P.C.

1. Heard Mr. Surel Shah, learned Counsel for the petitioners and Mr.P.M.Arjunwadkar, learned Counsel for respondent No.1, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'defendant No.1', has challenged the judgment and order dated 11.7.2013 passed by the learned 4th Jt. Civil Judge, Junior Division, Solapur below Exhibit-116 in Regular Civil Suit No.897/1996. By that order, the learned trial Judge partly allowed the application Exhibit-116 made by respondent No.1, hereinafter referred to as the plaintiff, under Order VI Rule 17 of C.P.C. for amending the plaint. Learned

trial Judge allowed the proposed amendment at Sr. Nos.1 and 3 (as allowed in paragraph-6 of the order in Exhibit-116) subject to payment of costs of Rs.1500/-.

3. In support of this Petition, Mr. Shah submitted that the plaintiff has instituted the suit in capacity as a General Power of Attorney of M/s.Veni Madhav Construction Firm. During pendency of the suit,, the plaintiff had purchased the suit premises on 24.12.1998. However, application Exhibit-116 is taken out on 23.10.2012. In the application, the plaintiff asserted that she had purchased the suit property on 24.12.1998. She has prayed for striking out her capacity as general power of attorney and also has prayed for substituting first sentence of paragraph-1 where she has described herself as Partner of M/s.Veni Madhav Construction Firm. In its place, she has prayed for substituting it by the sentence "The plaintiff is owner of the suit premises". He submitted that the plaintiff should have withdrawn the suit after purchaseing the suit property and filed fresh suit. Having not done so, the amendment application is moved in the year 2012. Under Article 66 and Article 67 of the Limitation Act, the period of 12 years is prescribed. The suit, therefore, is clearly barred by law of limitation. He also relied upon the decision of the Apex Court in

the case of **Smt.Shakuntala S. Tiwari v. Hem Chand M. singhania, (1987) 3 SCC 211**. In that case, Apex Court has held that in the suit for recovery of possession under Section 13 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, the limitation period would be 12 years under Article 66 or Article 67 and not three years under Article 113 of the Limitation Act, 1963.

4. On the other hand, Mr. Arjunwadkar supported the impugned order. He submitted that along with the suit, the plaintiff had filed development agreement, irrevocable power of attorney as also agreement of sale executed in her favour by the owners Purushottam Gundo Jatkari and others. He submitted that pending the suit, the defendants were fully aware of the plaintiff purchasing the suit property in 1998. However, no objection was taken about her locus to maintain the suit. He submitted that the application for amendment cannot be dismissed only on the ground of delay. He relied upon the decision of Apex Court in the case of **Alkapuri Cooperative Housing Society Ltd. vs. Jayantibhai Naginbhai (deceased) through L.Rs., (2009) 3 SCC 467** and in particular paragraphs-15 and 16 thereof.

5. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. Perusal of the plaint shows that the plaintiff had described herself as General Power of Attorney. In paragraph-1 of the plaint, the plaintiff has asserted that she is Partner of M/s.Veni Madhav Construction Firm. It is further asserted that the plaintiff has agreed to purchase the suit premises from owners Purushottam Gundo Jatkar and brothers and accordingly the owners have executed Power of Attorney as also agreement of sale. Along with the suit, the plaintiff has filed (i) development agreement executed by owners, (ii) irrevocable power of attorney executed by the owners and (iii) agreement of sale in her favour. The fact that the plaintiff agreed to purchase the suit premises from the owners is specifically averred in paragraph-1 of the plaint. In view thereof, it cannot be said that by the proposed amendment, nature of the suit changes or that any prejudice is caused to the defendant. Merely because there is delay in filing the application for amendment is no ground for rejecting the application for amendment. In the present case, the suit was already instituted in the year 1996 and pending suit, the plaintiff had purchased the suit premises on 24.12.1998. By the proposed

amendment, the plaintiff has sought to change her capacity. Instead of prosecuting the Suit as General Power of Attorney holder, she is now prosecuting the suit as owner of the suit premises. In the case of ***Abdul Rehman and another v. Mohd. Ruldu and others, (2012) 11 SCC 341***, Apex Court has held that it is settled law that if necessary factual basis for amendment is already contained in the plaint, the relief sought on the said basis would not change the nature of the suit. In view thereof, reliance placed by Mr.Shah on the decision referred in paragraph-3 above, does not advance the case of defendant No.1. In view thereof, it cannot be said that if the amendment is allowed, the Suit will be barred by law of limitation. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

6. It is made clear that where a decree is challenged by the petitioner, 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 C.P.C.

(R. G. KETKAR, J.)