

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.535 OF 2017

WITH

WRIT PETITION NO.534 OF 2017

WITH

WRIT PETITION NO.542 OF 2017

Kusum Jugalmohan Nagar @ Yagnik and another ... Petitioners
Vs.

Shraddha Pramod Kulkarni ... Respondent

Mr. P. S. Dani, Senior Advocate a/w. Mr. Anand C., Ms Sheetal Mehta,
Mr. Jitendra Jain i/b. Mr. Yogesh Adhia for Petitioners in all Petitions.

Mr. Karl Shroff i/b. Mr. Tanvir Shaikh for Respondent No.1 in all Petitions.

Mr. S. A. Jabbar i/b. Mr. G. M. Joshi for Respondents No.2 to 4 in Writ
Petition No.534 of 2017 and for Respondents No.2 and 4 to 9 in Writ Petition
No.542 of 2017.

CORAM : R. G. KETKAR, J.

DATE : JANUARY 27, 2017

P.C. :

Heard Mr. Dani, learned Senior Counsel for petitioners in all
Petitions, Mr. Shroff, learned Counsel for respondent No.1 in all
Petitions and Mr. Jabbar, learned Counsel for respondents No.2 to 4 in
Writ Petition No.534 of 2017 and for respondents No.2 and 4 to 9 in
Writ Petition No.542 of 2017 at length.

2. Writ Petition No.535 of 2017 filed by defendants takes exception
to the judgment and order dated 19.12.2016 passed by the learned Ad-
hoc and Assistant Sessions Judge, City Civil and Sessions Court, Greater
Mumbai in Chamber Summons No.125 of 2016 in Suit No.6306 of
2007. By that order, the learned trial Judge allowed the Chamber
Summons taken out by the respondent No.1, hereinafter referred to as

'plaintiff', under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for amending the plaint. The learned trial Judge allowed the Chamber Summons in terms of prayer clauses (a), (b) and (c) subject to plaintiff's paying costs of Rs.3,000/- to the defendants.

3. Writ Petition No.534 of 2017 filed by defendants takes exception to the judgment and order dated 19.12.2016 passed by the learned Ad-hoc and Assistant Sessions Judge, City Civil and Sessions Court, Greater Mumbai in Chamber Summons No.1955 of 2016 in Suit No.6306 of 2007. By that order, the learned trial Judge allowed the Chamber Summons for bringing on record defendants No.11 to 13 as heirs of Babunath Eknath Khedkar who expired on 26.10.2016.

4. Writ Petition No.542 of 2017 filed by defendants takes exception to the judgment and order dated 19.12.2016 passed by the learned Ad-hoc and Assistant Sessions Judge, City Civil and Sessions Court, Greater Mumbai in Chamber Summons No.1811 of 2016 in Suit No.6306 of 2007. By that order, the learned trial Judge allowed the Chamber Summons for impleading legal representatives of Rukmini Khedkar and Krishna Baburao Khedkar. In order to appreciate controversy raised in these Petitions, the facts from Writ Petition No.535 of 2017 are considered.

5. In support of this Petition, Mr. Dani submitted that respondent No.1- plaintiff has instituted Suit inter alia claiming her 1/8th share among other prayers. He has invited my attention to-

- (i) paragraph 3.1 wherein plaintiff has contended that she has 1/8th undivided share in the suit property;
- (ii) paragraph 3.3 wherein plaintiff contended that she had

never dealt with her 1/8th undivided share in the suit property and that the suit property till date stands in the name of the plaintiff, her three brothers, three sisters and her mother;

(iii) paragraph 4.4 where plaintiff asserts that she has 1/8th undivided share in the area of 724 sq.mtrs. She further contended that she has never dealt with, sold or transferred her 1/8th undivided share in the are of 724 sq.mtrs. from out of the said property;

(iv) paragraph 4.6 where plaintiff refers to the information given about the notice by her brother Divekar Khedkar as also her raising objection on 22.01.2003 by telegraphic notice;

(v) paragraph 4.7 where plaintiff has referred to the notice received by her on 25.01.2003 from City Survey Officer where it appears that defendant No.1 had purportedly bought C.S. No.481;

(vi) paragraphs 4.9 where plaintiff asserted that she had obtained certified copy of the sale deed dated 09.09.1996 and from perusal of the sale deed, it appeared that it was executed on the basis of the agreement of sale dated 11.04.1979 and power of attorney dated 11.04.1979;

(vii) paragraph 4.11 where plaintiff asserted that she held 1/8th share in the suit property.

6. Mr. Dani has also invited my attention to the affidavit of Jugal Mohan Yagnik opposing Chamber Summons No.125 of 2015, and in particular paragraph 2b(i) wherein contention is raised that the amended prayers are hopelessly barred by limitation. He has taken me through the impugned order and in particular, paragraphs 5 and 9. In paragraph 5, the learned trial Judge observed that the Suit is basically for partition and the plaintiff is claiming 1/8th undivided share in the suit property. He submitted that reading of the entire plaint does not show that Suit is for

partition. Reading of the plaint shows that plaintiff claims to be co-owner and has claimed entire property and not her 1/8th share. In paragraph 9, the learned trial Judge has held that the main prayer in the Suit is regarding declaration of 1/8th share in the suit property and the proposed amendment does not fundamentally change the nature of the Suit. The proposed amendment relates to subsequent developments regarding alleged execution of documents namely agreement of sale, power of attorney and letter of attornment. He submitted that this is factually incorrect as by the proposed amendment, plaintiff has challenged agreement of sale and power of attorney both dated 11.04.1979. In any case, till date, plaintiff has not challenged the sale deed dated 09.09.1996 though that is specifically referred in paragraph 4.9 of the plaint. Mere challenge to the agreement of sale and power of attorney both dated 11.04.1979 is not sufficient unless and until plaintiff challenges the sale deed dated 09.09.1996.

7. Mr. Dani further submitted that the learned trial Judge did not keep the issue of limitation open. In any case, if the Court is inclined to allow the amendment, it may be clarified that the amendment will be from the date of filing of the Chamber Summons and will not relate back to the filing of the Suit. He submitted that the Suit is clearly barred by limitation. In support of this proposition, he relied upon the decision of the Apex Court in ***Vishwambhar Vs. Laxminarayana*, 2001 (6) SCC 163.**

8. On the other hand, Mr. Shroff supported the impugned order. He has taken me through paragraphs 3.1, 3.3, 4.11, 4.12, 4.17, 5.4, prayer h)i) calling upon defendants No.1 and 2 to furnish copies of alleged agreement of sale and alleged power of attorney both dated 11.04.1979. He submitted that till date, plaintiff is not furnished with the copy of

these documents. He submitted that reading of the plaint in its entirety will show that plaintiff has claimed $1/8^{\text{th}}$ share in the suit property and the Suit is essentially for partition by one of the co-owners. He submitted that the prayer for partition was, however, not made. By the proposed amendment, the nature of the Suit is not changed. He submitted that at the time of execution of the alleged power of attorney and agreement of sale on 11.04.1979, plaintiff had not completed 18 years and therefore, the said transactions are per se, bad, illegal, null and void, nonest and not binding on the plaintiff.

9. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. Perusal of the plaint shows that plaintiff had asserted that she has $1/8^{\text{th}}$ undivided share in the suit property. In other words, plaintiff has not claimed that entire property belongs to her. Plaintiff has also contended that she had never dealt with her $1/8^{\text{th}}$ undivided share. Plaintiff, as a co-owner, has claimed possession of $1/8^{\text{th}}$ undivided share of the entire property. Plaintiff has not claimed entire property as a co-owner. On the other hand, plaintiff has specifically asserted that she has $1/8^{\text{th}}$ undivided share in the property and that partition of the suit property had never taken place and all the legal heirs including the plaintiff continued to have $1/8^{\text{th}}$ undivided share in the suit property. She has also made reference to the notice dated 14.02.2003 issued by her to the defendant No.1. The notice was received by the defendant No.1 on 19.02.2013. It is her grievance that despite sending notice to the defendant No.1, she was not furnished copies of agreement of sale as also power of attorney. She has further asserted that on the date of execution of the alleged power of attorney as also agreement of sale both dated 11.04.1979, she had not completed 18 years of age.

10. In the case of *Abdul Rehman Vs. Mohd. Ruldu*, (2012) 11 SCC 341, the Apex Court has observed that making clear and explicit what was already implicit in the plaint, does not change the nature of the Suit. All amendments which are necessary for the purpose of determining real questions in controversy between the parties should be allowed if it does not change basic nature of the Suit. Applying the tests laid down to the present case, on facts, prayer for partition was implicit in factual matrix set out in the unamended plaint, and therefore, the relief of partition as sought by the amendment does not change nature of the Suit as alleged by the petitioners. In my opinion, reading of the plaint as a whole clearly shows that Suit is essentially for partition and possession of 1/8th share. The learned trial Judge was, therefore, justified in holding that Suit is basically for partition and separate possession of 1/8th undivided share of the plaintiff as one of the co-owners of the suit property.

11. Mr. Dani submitted that the learned trial Judge while allowing the Chamber Summons held that proposed amendment relates to subsequent developments regarding execution of agreement of sale and power of attorney. These are not the subsequent developments. I find merit in the submission of Mr. Dani that these are not the subsequent developments. Basically, the grievance of the plaintiff is that the signatures on these documents are forged and fabricated and that she had never signed these documents. In fact, she had not even completed 18 years of age on the date of execution of these documents. The learned trial Judge while allowing the Chamber Summons has observed that the proposed amendment does not fundamentally change the nature of the Suit and if the amendment is refused, it will lead to multiple litigation. I do not find that the learned trial Judge has committed any error in that regard.

12. Mr. Dani relied upon the decision of the Apex Court in the case of

Vishwambhar (*supra*). In that case, plaintiff No.2 Digambar had attained majority on 05.08.1975. that apart, plaintiff No.1 attained majority on 20.07.1978. Though the Suit was instituted on 30.11.1980, prayers seeking setting aside the sale deeds was made in December 1985. Article 60 of the Limitation Act prescribes for a period of 3 years for setting aside a transfer of property made by the guardian of a ward, by the ward who has attained majority and the period is to be computed from the date when the ward attains majority. In so far as plaintiff No.2, Digambar is concerned, the period of limitation had already elapsed on the date of presentation of the plaint.

13. In the present case, the Suit is essentially for partition and separate possession as also for cancellation of agreement of sale and power of attorney both dated 11.04.1979. As far as cancellation of these instruments is concerned, having regard to the assertions made in the plaint, *prima facie*, it will be governed by Article 56 of the Limitation Act. As far as Suit for partition is concerned, it will be governed by Article 110. In any case, Mr. Shroff submitted that he has no objection for keeping the issue of limitation open. Hence, Writ Petition No.535 of 2017 is dismissed subject to clarification that the learned trial Judge will frame issue of limitation as one of the issues and the said issue shall be tried along with the other issues. Learned Counsel for the parties submit that as far as Writ Petitions No.534 of 2017 and 542 of 2017 are concerned, the orders impugned therein are the consequential orders and for the reasons recorded while dismissing Writ Petition No.535 of 2017, these Petitions may be disposed of. Hence, for the reasons recorded while dismissing Writ Petition No.535 of 2017, no case is made out for interfering with the orders impugned therein. Hence, Writ Petitions No.534 of 2017 and 542 of 2017 are 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) of C.P.C.

(R. G. KETKAR, J.)

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