

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1214 OF 2017

Chandrakant Ganpat Borkar through his
C.A. Mangesh C. Borkar ... Petitioner
Vs.
Govind Ganpat Borkar (decd) through legal heir
Ulhas Govind Borkar ... Respondent

Ms Yogita M. Deshmukh for Petitioner.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 24, 2017

P.C. :

Heard Ms Deshmukh, learned Counsel for petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'defendant', has challenged the judgment and order dated 09.04.2015 passed by the learned Joint Civil Judge, Junior Division, Palghar below exhibit-36 in Regular Civil Suit No.75 of 2011. By that order, the learned trial Judge allowed the application made by the plaintiff under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for amending the plaint.

3. In support of this Petition, Ms Deshmukh submitted that plaintiff has instituted Suit for injunction simplicitor. Plaintiff has sought injunction restraining defendant from creating third party interest in respect of Survey No.56, Hissa No.2 admeasuring 2 Hectares 77 Ares situate at Mauje Bandhane, Talathi Saja Manor, Taluka Palghar, District Thane (for short 'suit land'). She invited my attention to paragraphs 5 to 8 of the plaint. In paragraph 6, plaintiff referred to mutation entry No.101. Plaintiff filed complaint before Tahsildar, Palghar challenging mutation entry No.101. Objection / complaint made by the plaintiff was

decided against the plaintiff on 30.03.2010. She submitted that though cause of action accrued to the plaintiff in the year 2010 and the Suit is instituted on 13.05.2011, plaintiff did not seek any declaration of his title. The relief of declaration is, therefore, clearly time barred. She submitted that the learned trial Judge was, therefore, not justified in allowing the amendment application thereby permitting plaintiff to claim relief which is clearly time barred. In support of her submissions, she relied upon the decisions of the Apex Court in - (i) ***Muni Lal Vs. The Oriental Fire & General Insurance Company Limited*, 1996 SCC (1) 90** and (ii) ***Voltas Limited Vs. Rolta India Limited*, (2014) 4 SCC 516**.

4. I have considered the submissions advanced by Ms Deshmukh. I have also perused the material on record. Plaintiff has instituted Suit for perpetual injunction restraining defendant from creating third party interest in respect of the suit land. In paragraph 3 of the plaint, plaintiff asserted that the suit land was purchased from the income of joint family in the year 1965 from the erstwhile owners Latif Patel and Kadar Patel. Oral partition was effected in the family about 35-40 years back and pursuant to the oral partition suit land among others was allotted to the plaintiff. In other words, on the basis of the ownership over the suit land, plaintiff has instituted Suit for injunction. Defendant filed written statement resisting the Suit. In the written statement, defendant denied ownership of the plaintiff. Plaintiff, therefore, filed application at exhibit-36 inter alia contending that in the written statement, defendant has denied ownership of the plaintiff over the suit land and therefore, he is seeking declaration of his ownership.

5. Ms Deshmukh submitted that cause of action accrued to the plaintiff in the year 2010 itself and he should have claimed declaration

within 3 years from 2010. Application for amendment is made on 10.10.2014 and on that date, his claim was clearly time barred. It is not possible to accept this submission. Merely by recording name of the defendant in the mutation entry will not confer title on the defendant. It is settled position of law that entry made in revenue record neither confers title nor extinguishes title.

6. In the case of ***Anathula Sudhakar Vs. P. Buchi Reddy, (2008) 4 SCC 594***, the Apex Court has laid down general principles as to when a mere Suit for permanent injunction will lie and when it is necessary to file a Suit for declaration and / or possession with injunction as a consequential relief. In paragraphs 13.3 and 14, it was observed thus,

13.3. Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. ...

14. We may however clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to plaintiff's title raises a cloud on the title of plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient. Where the plaintiff, believing that defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious dispute or cloud over plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file the suit for declaration with consequential relief, even after the suit for injunction is dismissed, where the suit raised only the issue of

possession and not any issue of title.”

7. As the defendant denied title of the plaintiff, in the light of the decision of the Apex Court in the case of **Anathula Sudhakar** (*supra*), plaintiff was justified in amending the plaint to claim relief of declaration. By amending the plaint and by incorporating the relief of declaration, nature of the Suit does not change. In the case of **Abdul Rehman Vs. Mohd. Ruldu**, (2012) 11 SCC 341, the Apex Court has held that making clear and explicit what was already implicit in the plaint, nature of Suit is not changed. The Apex court has further held that courts should allow all amendments that are necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.

8. Applying the test laid down in **Abdul Rehman** (*supra*) and as the plaintiff had already laid foundation in the Suit in respect of ownership of the suit land, in my opinion, it does not change the nature of the Suit. While allowing the application, the learned trial Judge has recorded that issues were framed on 22.03.2013. In other words, the trial has not commenced. Ms Deshmukh relied upon decisions of the Apex Court in **Muni Lal** (*supra*) and **Voltas Limited** (*supra*). Having regard to the fact that the mutation entry does not confer any title on the defendant in the year 2010, it cannot be said that the relief of declaration so claimed is time barred. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed. The learned trial Judge will frame additional issue on limitation and will decide the same along with the other issues and on the basis of the evidence on record, uninfluenced by the observations made in the impugned order and this order.

9. It is also 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. Order accordingly.

(R. G. KETKAR, J.)

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