

Anand

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

WRIT PETITION NO.7848 OF 2016

Sadashiv Sidramappa Bolkote (since deceased) .Petitioners
& ors.

Vs.

Mahiboob Jaharoddin Korbu .Respondent

Mr.T.D.Deshmukh, Advocate, for the Petitioners
Mr.I.A.Shaikh i/b. Mr.A.B.Tajane, Advocate, for the Respondent

CORAM : R.G.KETKAR, J.

DATE : 23.03.2017

P.C.

. Heard Mr. Deshmukh, learned counsel for the Petitioners
and Mr. Shaikh, learned counsel for the Respondent No.1.

2. By this Petition under Article 227 of the constitution of India, the Petitioners, hereinafter referred to as 'Defendants' have challenged the Judgment and Order dated 27.04.2016 passed by the learned 5th Jt.C.J.J.D., Solapur below Exh.84 in R.C.S.No.778 of 2009. By that order, the learned trial Judge allowed the Application made by the Respondent, hereinafter referred to as 'Plaintiff' under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (For short "CPC") for

amending the plaint.

3. Rule. Mr. Shaikh waives service on behalf of the Respondent. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

4. In support of this Petition, Mr. Deshmukh submitted that Plaintiff has instituted suit on 16.11.2009 for perpetual injunction restraining Defendants from disturbing his possession and enjoyment over land bearing Old Gat No.192 New Gat No.183/1+2+3/A+1+2+3/B+A+B+4A/4B/75/2B. He submitted that Defendants herein had also instituted R.C.S.No.445 of 2010 against the Respondent/Plaintiff for perpetual injunction restraining him from causing obstruction to the Defendants' possession or carrying out any construction work therein. In paragraph 2 of that suit, Petitioners specifically contended that Sadashiv Bolkote, father of the Defendants herein had purchased the suit property on 25.04.1969 from Mahibooob Jaharoddin Korbu. He submitted that Plaintiff herein had acquired knowledge after service of suit summons and suit in the year 2010. Not only that, in the Application Exh.5 in R.C.S.No.445 of 2010,

Defendants herein had produced Sale Deed in respect of the suit property dated 25.04.1969. Thus, Plaintiff herein had knowledge of the Sale Deed at least on 28.09.2010 when the Application Exh.5 filed in that suit was decided. He further submitted that in fact, Plaintiff's evidence was over and at this stage, Application Exh.84 for amending the plaint was made on 01.01.2016. Learned trial Judge allowed the Application on the ground that in the present suit, for the first time, Defendants produced certified copy of the Sale Deed dated 25.04.1969 alongwith list at Exh.80 and therefore, Plaintiff had no knowledge of the said transaction earlier. He submitted that the learned trial Judge also did not consider whether the Plaintiff has made out case of due diligence.

5. On the other hand, Mr. Shaikh supported the impugned Order. He submitted that Defendants did not produce the Sale Deed in the suit filed by him. He submitted that Defendants did not produce the original Sale Deed and produced certified copy of the Sale Deed alongwith list at Exh.80. Plaintiff acquired knowledge about the said transaction only when certified copy was produced alongwith list at Exh.80 and therefore, it cannot be said that Plaintiff did not make out case of due diligence. He relied on the Judgment of the Apex Court in

the case of *Sampath Kumar Vs. Ayyakannu and another*, AIR 2002 SC 3369 and in particular, paragraphs 9 & 11 thereof.

6. I have considered rival submissions advanced by the learned counsel for the parties. I have also perused the material on record.

7. It is not in dispute that Plaintiff herein instituted suit in the year 2009. Defendants have also instituted suit against the present Plaintiff in the year 2010. In paragraphs 2 & 3 of R.C.S.No.445 of 2010, Defendants have specifically referred to Sale Deed dated 25.04.1969. That apart, in that suit, Application Exh.5 was taken out by the Defendants. On 28.09.2010 that Application was decided. In paragraph 7, the learned trial Judge has referred to the Sale Deed. Mr. Deshmukh submitted that Plaintiff herein had acquired knowledge of Sale Deed in the year 2010 itself. The learned trial Judge has, however, not considered this aspect and proceeded on the footing that Defendants have produced the Sale Deed for the first time in the present suit alongwith Application Exh.80. It is also evident that Plaintiff's evidence is over and at present suit is pending for evidence of Defendants. The learned trial Judge also did not consider whether Plaintiff has satisfied

condition in proviso to Order VI, Rule 17 of CPC. In view thereof, the impugned Order cannot be sustained and as such, liable to be set aside. Application Exh.84 deserves to be restored for deciding afresh. Hence, the following order.

O R D E R

- (i) The impugned Judgment and Order dated 27.04.2016 passed by the learned 5th Jt.C.J.J.D., Solapur below Exh.84 in R.C.S.No.778 of 2009 is quashed & set aside;
- (ii) Application Exh.84 is restored to the file of trial Court for deciding it afresh.

8. Rule is made absolute in aforesaid terms with no order as to costs. Order accordingly.

All contentions of both the parties on merits are expressly kept open.

(R.G.KETKAR, J.)