

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.9061 OF 2014

Yesubai Pandurang Patil (decd) and others ... Petitioners
Vs.
Dinanath Ganpat Patil (decd) through
Arun Dinanath Patil and others ... Respondents

WITH
WRIT PETITION NO.9683 OF 2016

Shyamsunder Radheyshyam Agrarwal ... Petitioner
Vs.
Yesubai Pandurang Patil (decd) and others ... Respondents

Mr. P. C. Kansara i/b. Kansara & Thanekar for Petitioners in Writ Petition No.9061 of 2014 and for Respondents No.1 to 6 in Writ Petition No.9683 of 2016.

Mr. Clifford Martis for Respondents No.1(a) to 12, 14, 16 in Writ Petition No.9061 of 2014 and Respondents No.2 to 22 in Writ Petition No.9683 of 2016.

Mr. A. R. Shaikh for Respondents No.26 to 29 in Writ Petition No.9061 of 2014 and Respondents No.32 to 35 in Writ Petition No.9683 of 2016.

Mr. Sandesh D. Patil for Respondent No.31 in Writ Petition No.9061 of 2014 and Petitioner in Writ Petition No.9683 of 2016.

CORAM : R. G. KETKAR, J.

DATE : JANUARY 24, 2017

P.C. :

Heard Mr. Kansara, learned Counsel for petitioners in Writ Petition No.9061 of 2014 and respondents No.1 to 6 in Writ Petition No.9683 of 2016, Mr. Martis, learned Counsel for respondents No.1(a) to 12, 14 and 16 in Writ Petition No.9061 of 2014 and for respondents No.2 to 22 in Writ Petition No.9683 of 2016, Mr. Shaikh, learned Counsel for respondents No.26 to 29 in Writ Petition No.9061 of 2014 and for respondents No.32 to 35 in Writ Petition No.9683 of 2016 and Mr. Patil, learned Counsel for respondent No.31 in Writ Petition No.9061 of 2014 and for petitioner in Writ Petition No.9683 of 2016 at length.

2. Writ Petition No.9061 of 2014 is filed by the plaintiffs challenging the judgment and order dated 11.08.2014 passed by the learned 2nd Joint Civil Judge, Junior Division, Thane below exhibit-245 in Regular Civil Suit No.960 of 2012. By that order, the learned trial Judge rejected the application made by the plaintiffs under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for amending the plaint so as to incorporate paragraph 27A and adding prayer clauses (c-i) to (c-vii).

3. Writ Petition No.9683 of 2016 is filed by the defendant No.31 challenging the judgment and order dated 07.10.2014 passed by the learned Civil Judge, Junior Division, Thane below exhibit-252 in Regular Civil Suit No.960 of 2012. By that order, the learned trial Judge rejected the application exhibit-252 filed on behalf of defendants No.30 and 31 for setting aside No W.S. order passed on 04.03.2014.

4. Plaintiffs have instituted Suit inter alia for declaration that they have half share in properties described in Schedules I to V in paragraph 1 of the plaint (for short 'suit properties') and for partition by metes and bounds. Pending the Suit, plaintiffs have also claimed injunction restraining defendants from creating third party interest over the suit properties. It appears that on 21.01.2006, the learned trial Judge issued injunction restraining defendants No.1 to 29 from creating third party interest.

5. It appears that in respect of the following properties, deceased defendant No.1, defendants No.9, 10, late Jagannath Kashinath Patil and their respective family members executed Agreement for Development on 06.01.2006 in favour of defendant No.30:

S. No.		Hissa No.	Area Sq.mts.	Assessment
Old	New			Rs. P.
644	223	1	15810	47.51
643	198	4	3310	1.94
601	168	3	2530	1.65

(hereinafter referred to as '**these properties**').

6. It is the case of the plaintiffs that to frustrate their rights, deceased defendant No.1, defendants No.9, 10, late Jagannath Kashinath Patil and their respective family members (for short '**these persons**') executed Development Agreement on 06.01.2006 in respect of these properties in favour of defendant No.30. Defendant No.30 in the capacity of Constituted Attorney of **these persons** had executed Development Agreement on 27.12.2007 in favour of defendant No.31 in respect of **these properties**. Defendant No.30 in the capacity of Constituted Attorney of **these persons** executed registered Deed of Conveyance dated 26.12.2011 in favour of defendant No.31 in respect of these properties. Defendants No.30 and 31 therefore, filed application under Order 1, Rule 10 read with Section 151 of C.P.C. for impleading them as defendants in the Suit. By order dated 05.09.2012, application was allowed and they were ordered to be impleaded as defendants No.30 and 31. It is not in dispute that plaintiffs have amended the plaint by impleading them as defendants No.30 and 31.

7. It is the case of defendants No.30 and 31 that though the application for their impleadment was allowed on 05.09.2012, they were served with the amended plaint on 23.09.2013. On 14.10.2013, application exhibit-241 was made by defendants No.30 and 31 seeking time to file written statement. That application was allowed. On 13.02.2014, defendants No.30 and 31 filed application exhibit-242 again

praying for time to file written statement. On the same day, the learned trial Judge granted time as and by way of last chance. On 04.03.2014, defendants No.30 and 31 prayed for time for filing written statement. By order dated 04.03.2014, the learned trial Judge rejected the application. Defendants No.30 and 31, therefore, filed application exhibit-252 on 15.09.2014 for setting aside order dated 04.03.2014 and taking their written statement on record. By the impugned order dated 07.10.2014, the learned trial Judge rejected the application. It is against this order, defendant No.31 only has preferred Writ Petition No.9683 of 2016. In other words, defendant No.30 has accepted the impugned order. In the meantime, plaintiffs have taken out application on 09.04.2014 at exhibit-245 under Order VI, Rule 17 of C.P.C. for amending the plaint for bringing on record subsequent development. By order dated 11.08.2014, the learned trial Judge has rejected the application. It is against this order, plaintiffs have preferred Writ Petition No.9061 of 2014.

8. In support of Writ Petition No.9061 of 2014, Mr. Kansara for plaintiffs submitted that initially application made by defendants No.30 and 31 for their impleadment was allowed on 05.09.2012 and in pursuance thereof, they were impleaded as defendants No.30 and 31 in the Suit. However, save and except their impleadment, no averments were made against defendants No.30 and 31. He has invited my attention to the application at exhibit-245 and in particular paragraph 2 thereof. In paragraph 2, plaintiffs asserted that defendants did not disclose that they agreed to sell property described in the III Schedule to defendants No.30 and 31. In the application made by defendants No.30 and 31 under Order 1, Rule 10, they contended that by an Agreement for Development dated 06.01.2006, **these persons** had agreed to grant development rights of these properties to the defendant No.30. On the

basis of the Power of Attorney executed by **these persons** in favour of defendant No.30, he had assigned development rights in favour of defendant No.31 vide agreement dated 22.12.2007. In the capacity of the Constituted Attorney of **these persons**, defendant No.30 executed Deed of Conveyance dated 26.12.2011 in favour of defendant No.31. As this development took place pending the Suit, it is necessary to amend the plaint so as to bring these facts on record as also challenge the transactions referred in paragraph 2. He, therefore, submitted that the amendment deserves to be allowed.

9. In support of Petition No.9683 of 2016, Mr. Patil appearing on behalf of the defendant No.31 submitted that the Development Agreement was executed on 06.01.2006 and the injunction was issued on 21.01.2006, and therefore, it cannot be said that the Development Agreement was executed in breach of the injunction order. He further submitted that the amended plaint was served on defendants No.30 and 31 on 23.09.2013 and the applications dated 14.10.2013 and 13.02.2014 at exhibits-241 and 242 praying for time to file written statement were allowed. There was delay of 70 days in filing the written statement. He submitted that along with the application dated 15.09.2014 at exhibit-252, defendants No.30 and 31 also kept the written statement ready. The learned trial Judge should have, therefore, allowed the application after condoning the delay and set aside No W.S. Order.

10. On the other hand, Mr. Martis submitted that defendants No.1 to 16 have already instituted Regular Civil Suit No.499 of 2015 against defendants No.30 and 31 challenging the Development Agreement dated 06.01.2006 as also the Development Agreement dated 22.12.2007 and Conveyance Deed dated 26.12.2011. During the pendency of that Suit, plaintiffs herein have filed application for their impleadment and the

said application is pending. He submitted that he will not object to the application filed by the plaintiffs for their impleadment in Regular Civil Suit No.499 of 2015 and the proposed amendment can also be gone into in that Suit. Mr. Shaikh has adopted submissions of Mr. Martis.

11. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, defendant No.30 has not challenged the order dated 07.10.2014 rejecting the application dated 15.09.2014 for setting aside No. W.S. Order passed on 04.03.2014. In other words, defendant No.30 has accepted the correctness of the order dated 07.10.2014.

12. During the course of the argument, it was not disputed that the Development Agreement was executed on 06.01.2006 in favour of defendant No.30 and it is not a registered instrument. It was also not disputed that the Development Agreement dated 27.12.2007 in favour of defendant No.31 is also not a registered instrument. I need not deal with this aspect in the present order as that is the subject matter of the Suit namely R.C.S.No.499 of 2015 filed by defendants No.1 to 16. In view thereof, in my opinion, the amendment proposed by plaintiffs herein is not necessary for deciding the controversy between the parties as it is already the subject matter of R.C.S.No.499 of 2015, which is filed against defendants No.30 and 31. The controversy raised herein is already subject matter of R.C.S. No.499 of 2015. As Mr. Marties has stated that plaintiffs are not objecting to the application made by plaintiffs therein for their impleadment in that Suit, I do not find that the amendment proposed by the plaintiffs herein is necessary for deciding the controversy. As noted earlier, save and except impleadment of defendants No.30 and 31 in the Suit, no averments are made in the plaint. Hence, Petitions are disposed of by following order:

- a. The learned trial Judge, seized of Regular Civil Suit No.499 of 2015, shall allow the application for impleadment filed by the plaintiffs herein under Order 1, Rule 10 of C.P.C. Plaintiffs will be at liberty to file their written statement in that Suit. Subject to this, Writ Petition No.9061 of 2014 stands dismissed;
- b. Resultantly, Writ Petition No.9683 of 2016 also stands dismissed;
- c. All contentions of the parties on merits in Regular Civil Suit No.499 of 2015 are expressly kept open;
- d. Order accordingly.

(R. G. KETKAR, J.)

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