

IN THE HIGH COURT OF JUDICATURE AT BOMBAY:
NAGPUR BENCH : NAGPUR
Second Appeal No.330 of 2016
[Sukhdeorao Ramdas Katkar Vs. Satish Uttamrao Rekawar & nine others]

**Office Notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.**

Court's or Judge's orders

Mr. S. D. Khati, Adv., for the appellant.
 Mr. Anil Mardikar, Senior Adv., with Ms. Asha Ghiya, Adv., for the
 respondent nos. 1 to 7.

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CORAM : A. S. CHANDURKAR, J.

DATE : 24th July, 2017

01. In view of notice for final disposal issued on 18th July, 2016 on the following substantial question of law, the learned counsel for the parties have been heard at length:-

“Whether the Courts below should have dismissed the application for amendment incorporating the prayer for passing a decree for possession of the suit property and dismissing the suit filed by the plaintiff?”

02. The appellant is the original plaintiff who is

aggrieved by the dismissal of his suit seeking a declaration of his ownership along with cancellation of sale-deed dated 20th September, 1999. This decree has been affirmed by the appellate Court.

03. It is the case of the plaintiff that he had purchased 0.41 Are land for a consideration of Rs. 1,50,000-00 on 12th August, 1998. There was an oral agreement between the plaintiff and the defendant no.1, by which the defendant no.1 was to prepare plots and construct houses in area admeasuring 0.39 Are land. The plaintiff executed a nominal sale-deed on 20th September, 1999 without receiving any consideration. It was agreed that if the plots were not sold within thirty months, the plaintiff would have a right to have the sale-deed cancelled. On account of disputes between the parties, the plaintiff on 26th July, 2002 filed the aforesaid suit.

04. The defendant no.1 denied the claim of the plaintiff and took the stand that the sale-deed dated 20th September, 1999 was a valid document. He claimed title in himself on the basis of said sale-deed.

05. The trial Court on consideration of the evidence on record held that the document of sale dated 20th September, 1999 was a nominal document. However, it was the defendant no.1 who was in possession and as there was no relief sought for delivery of possession, the

suit was barred in view of provisions of Section 34 of the Specific Relief Act, 1963 [for short, “the said Act”]. The first appellate Court re-affirmed the judgment of the trial Court. Hence this Second Appeal.

06. Shri S. D. Khati, learned counsel for the plaintiff, submitted that the trial Court held the sale-deed dated 20th September, 1999 to be null and void. He submitted that the relief was refused to the plaintiff only on the ground that there was no prayer for possession of the suit property. He submitted that application for amendment was moved before the trial Court to incorporate the prayer for possession. The trial Court had initially rejected that application and this Court in Writ Petition No. 3971 of 2010 had granted liberty to the plaintiff to challenge said order in further proceedings. According to him, the appellate Court did not record any finding on the voidness of sale-deed dated 20th September, 1999. Without referring to the documents at Exhs. 104 and 105, the trial Court upheld dismissal of the suit by observing that the amendment was not liable to be granted. He submitted that the prayer for possession was made within twelve years of execution of the sale-deed and, therefore, as per Article 64 of the Limitation Act, 1963, it was within limitation. Both the Courts failed to consider this aspect and refused the amendment. According to him, had the amendment been allowed, the decree would have been passed in favour of the plaintiff. In support of his submissions, he

placed reliance upon the decisions in **[1] Bharat Petroleum Corporation Ltd. Vs. Precious Finance Investment Pvt. Ltd.** [2007 (1) Mh. L.J. 331], **[2] Ramaiah Vs. N. Narayana Reddy (dead) by L.Rs.** [AIR 2004 SC 4261] and **[3] Pankaja & another Vs. Yellappa (dead) by LRs. & others** [2004 (4) Mh. L.J. 488]. He, therefore, submitted that after allowing the amendment, the matter deserves to be remanded to the appellate Court for fresh consideration.

07. Shri A. S. Mardikar, learned Senior Counsel for the original defendants, supported the impugned judgments. He submitted that during pendency of the suit, an application for temporary injunction was moved by the plaintiff which came to be rejected on 16th December, 2004. The defendant was held to be in possession. The defendant was held to be in possession. The application for amendment was moved at a belated stage in the year 2010. That application was extremely vague and was not liable to be granted in absence of due diligence being shown. He submitted that only liberty was granted to the plaintiff and both the Courts rightly considered the prayer for amendment. He, therefore, submitted that the suit was rightly dismissed and the same did not call for any interference. He placed reliance upon the judgment in **Vidyabai & others Vs. Padmalatha & another** [2009 (4) Mh. L.J. 30].

08. I have heard the learned counsel for the parties at length.

09. In the suit, the prayer that was made was for declaration of title of 0.39 Are land and cancellation of sale-deed dated 20th September, 1999. The suit was filed on 26th July, 2002. During the course of final arguments, the plaintiff moved application below Exh.180. As per this application, it was prayed that the plaint be permitted to be amended to add the relief of possession. It was merely stated that during pendency of the suit, some defendants had started construction of their respective houses. The trial Court refused to grant the amendment and said order was challenged in Writ Petition No. 3771 of 2010. The plaintiff was granted liberty to challenge said order if the occasion arose in future. The trial Court after recording a finding that the sale-deed dated 20th September, 1999 was null and void refused to grant relief of possession in absence of any prayer made therein. The suit was accordingly dismissed. The appellate Court has taken into consideration provisions of Order-VI, Rule 17 of the Code and has thereafter upheld the order passed below Exh.180. As per proviso to Order-VI, Rule 17 of the Code, grant of any amendment sought after commencement of the trial can be considered if due diligence has been exercised by the party seeking such amendment. The legal position in that regard has been referred to in the judgment in *Vidyabai and others*

[supra]. Only after fulfilling said pre-condition of exercise of due diligence can the aspect of grant of amendment be considered. In the present case, suit was filed on 26th July, 2002 and on 16th December, 2004, it was prima facie held that the plaintiff was not in possession. The application for amendment is dated 12th July, 2010. There are no averments made therein on the aspect of due diligence. In absence of this mandatory requirement, the order refusing amendment deserves to be upheld.

10. In so far as the submission made on behalf of the appellant that prayer for possession was made within limitation in accordance with Article 64 of the Limitation Act, the question of going into applicability of Article 64 would arise if the pre-condition for considering the prayer for amendment is satisfied. Merely because the amendment was sought within limitation as prescribed by Article 64 as contended, that by itself would not be a reason to allow the same. The requirements of the proviso to Order-VI, Rule 17 of the Code cannot be dispensed with on that count. The decisions relied upon by the learned counsel for the appellant on that count cannot be made applicable to the facts of the present case.

11. In so far as non-consideration of documents at Exhs.104 and 105 is concerned, I find that in the present facts, that aspect cannot make much difference when it

is found that relief has been refused to the plaintiff in view of bar of Section 34 of the Specific Relief Act.

12. In view of aforesaid, the substantial question of law as framed is answered by holding that the Courts were justified in dismissing the application for amendment.

13. Considering the above position, no interference is called for. Second Appeal is dismissed. No costs.

Judge

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