

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 2883 OF 2014

Tarabai Ananda Phatangre

Petitioner.

Versus

Sahebrao Karbhari Phatangre

Respondent.

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Advocate for Petitioners : Mr Kulkarni Sanket S.

Advocate for Respondents : Mr Gore Ravindra Vitthal

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CORAM : N.M. JAMDAR, J.

Dated : 3 December 2018

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ORAL ORDER :-

Heard counsel for the parties.

2. The petitioner has challenged the order passed by the learned Civil Judge dated 25 February 2014, allowing the application filed by the respondent/plaintiff to carry out the amendment in the plaint.

3. The respondent/plaintiff had filed a suit for declaration that the sale deed dated 27 December 2004 be declared as null and

void. The suit was filed on 28 February 2005. The respondent/plaintiff moved an application, for amendment on 3 September 2013 seeking to incorporate the averments and challenge to the sale deed dated 10 June 2003. By the impugned order this application has been allowed. The learned Civil Judge has observed that the amendment is necessary to avoid the multiplicity of proceedings.

4. Learned counsel for the petitioner relying upon the decisions in the case of L. C. *Hanumanthappa (Since dead) represented by his Legal representatives Vs. H B Shivakumar*¹ and Harinarayan G. Bajaj and another Vs. Vijay Agarwal and others² and submitted that not only the application for amendment was beyond the period of limitation, but even the challenge to the sale deed of the year 2003 could not be raised by way of an amendment and, since the relief was barred by limitation on the date of moving the amendment,

1. (2016) 1 SCC

2. 2012 (6) Bom.C.R. 706.

such amendment ought not have been allowed.

5. Learned counsel for respondent relying on a decision in the case of *Dena Bank Vs. Apple Finance Limited and another and Kotak Mahindra Bank Limited and another*¹ and submitted that in the cases of limitation regarding amendment, liberal view be taken and the limitation is a mixed question of law and fact.

6. In the present case, the respondent-plaintiff in the plaint had referred to the sale deed dated 10 June 2003. The suit was filed challenging the sale deed of 27 December 2004. The petitioner could have raised the challenge to the said sale deed dated 10 June 2003. Not only this was not done, but the respondent, thereafter, has given reason for the same. Respondent has stated that this sale deed dated 10 June 2003, was cancelled. Therefore, the respondent specifically and consciously chose not to challenge the sale deed on the ground that it was cancelled. It is not an innocuous mistake to take a liberal view.

This is a specific stand taken in the plaint.

7. Therefore, when the amendment was moved in the year 2013, it was rightly opposed by the petitioner contending that sale deed of 2003 cannot now be challenged by way of an amendment in the year 2013. Learned Civil Judge has committed grave error in allowing such amendment. Relief which respondent sought by way of an amendment, on the face of it was barred by of limitation. There is no mixed question of law and fact. Petitioner had consciously not challenged the sale deed earlier. In these circumstances, grant of amendment was contrary to the settled position of law. The impugned order therefore, will have to be set aside. It is, however, made clear that, whatever contentions that the respondent wants to raise based upon his pleadings, they are obviously open for the respondent to advance.

8. Accordingly, the impugned order dated 25 February 2014 is quashed and set aside.

9. Writ petition is accordingly disposed of in above terms.

(N.M. Jamdar, J.)

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