

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 1116 of 2016

Anandrao Sambhaji Raskar .. Petitioner.

Vs.

Rajkumar Dattatray Shedge & Anr.. Respondents.

Mr Sushant S. Prabhune, Advocate for the petitioner.

Mr. Manoj M. Badgujar for Respondent No. 1 and 2.

CORAM: R.D. DHANUKA, J.
4th October, 2018

P.C:-

1) By this petition filed under Article 227 of the Constitution of India, the petitioner (legal representative of original defendant No.16) has impugned the order dated 5th August, 2013 passed by the learned Civil Judge, Senior Division, Baramati, whereby application below Exh.126 under Order VI Rule 17 of the Code of Civil Procedure, 1908 inter-alia praying for amendment of the plaint by way of adding relief of declaration of the sale deed as illegal and not binding on the plaintiff has been allowed in Special Civil Suit No. 123 of 2007.

2) Special Civil Suit was filed in the year 2007,

inter-alia praying for specific performance of agreement. The application for amendment was moved on 4/2/2013 alleging that inadvertently prayer for declaration of the agreement which was allegedly entered into remained to be included in the prayer clause (b) for specific performance of agreement. The said application was opposed by the petitioner (defendant No.16) on various grounds including the ground of change of cause of action. The learned trial Judge allowed the said application for amendment on 5/8/2013 which order is impugned by the petitioner in this writ petition.

3) The learned counsel appearing for the petitioner submits that the suit was filed in the year 2007 whereas application for amendment was made in the year 2013 after commencement of the trial. He submits that the plaintiff had not made out a case for amendment after commencement of the trial. It is submitted that the prayer for seeking declaration sought by way of amendment was barred by law of limitation on the date of filing of application by the plaintiff under Order VI Rule 17 of C.P.C., 1908.

4) It is submitted by the learned counsel for the petitioner that the learned Trial Judge did not consider as to whether the amendment allowed by the learned Trial Judge would relate back to the date of the filing of application for amendment or not. The learned counsel placed reliance on the judgment of the Hon'ble Supreme Court in the case of Vidyabai & Ors Vs. Padmalatha & Anr, (2009) 2 SCC 409 and another judgment of the Hon'ble Supreme Court in the case of Hanumanthappa (since dead) represented by his L.Rs. Vs. H.B. Shivakumar, (2016) 1 SCC 332. He submits that since the prayer for declaration was already barred by law of limitation on the date of grant of amendment, the doctrine of relation back would not be applicable, even if such amendment is granted.

5) The learned counsel for the respondent (original plaintiff) on the other hand, submits that the plaintiff had already disputed the subsequent documents, however, inadvertently, prayer for declaration was not included in the original plaint. He submits that the learned Trial Judge has rightly allowed the application for amendment by order dated 5/8/2013. The petitioner has already commenced

cross-examination of the plaintiff. He submits that though the impugned order was passed on 5/8/2013 this writ petition was filed on 18/12/2015. He invited my attention to the order dated 10th June, 2016 passed by this Court refusing ad-interim relief in favour of the petitioner.

6) It is submitted that the trial has proceeded further and at this stage, this Court cannot set aside the impugned order passed by the learned Trial Judge allowing the amendment application filed by the petitioner. He placed reliance on the judgment of the Hon'ble Supreme Court in the case of Pankaja & Anr Vs. Yellappa (dead) by L.Rs. & Ors, (2004) 6 SCC 415 and submits that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. Whether to allow or not to allow an amendment even where the relief sought to be is added by the amendment is allegedly barred by law of limitation is discretionary. He submits that there is no question of raising any issue of limitation in this case since the plaintiff had already laid foundation impugning the subsequent transaction in the original plaint itself.

7) A perusal of the plaint filed by the respondent (original plaintiff) indicates that the plaintiff had prayed for specific performance of the agreement. It was the case of the plaintiff that after entering into an agreement with the plaintiff by the defendant, the defendant entered into another two agreements with the third party. The other two agreements are in respect of the same property which was subject matter of the suit. No sooner he realized an inadvertent mistake in drafting the plaint, an application for amendment was filed.

8) The learned trial Judge has considered the submissions made by both the parties and has passed a reasoned order allowing amendment. The learned trial Judge has held that the plaintiff has already raised contention in the body of the plaint. However, due to oversight, prayer for declaration has not been included in the plaint. The learned trial Judge has rightly adverted to the judgment of the Hon'ble Supreme Court in the case of Pankaja and Anr Vs. Yellappa (dead) by L.Rs. & Ors (supra) and has rightly allowed amendment.

9) It is not in dispute that this writ petition was

filed almost after two years. Ad-interim relief was refused to the petitioner. The petitioner has already started cross-examination of the original plaintiff. In these circumstances, no case is made out by the petitioner to interfere with the impugned order dated 5/8/2013.

10) In so far as the issue of limitation is concerned, a perusal of the order dated 5/8/2013 passed by the learned trial Judge indicates that the learned trial Judge has not made it clear that the order dated 5/8/2013 would relate back to the date of application filed by the plaintiff on 4/8/2013. In so far as judgment of the Hon'ble Supreme Court in the case of Hanumanthappa (supra) relied upon by the learned counsel for the petitioner is concerned, the Hon'ble Supreme Court in the said judgment considered the fact that where the title of the plaintiff was disputed by the defendant in the written statement at first instance and in spite of such pleading raised by the defendant, the plaintiff did not apply for declaration within the period of limitation amendment could not be permitted.

11) There cannot be any dispute about the proposition of law laid down by the Hon'ble Supreme Court

in the case of Haumanthappa (supra). The facts, however, being different are clearly distinguishable. The said judgment would not support the case of the petitioner.

12) In so far as judgment of the Hon'ble Supreme Court in the case of Vidyabai and Ors vs. Padmalatha and Anr relied upon by the learned counsel for the petitioner is concerned, the Supreme Court has considered the amended provisions of Order VI Rule 17 of C.P.C. inserted by Amended Civil Procedure Code, Act, 2002. The plain reading of said amendment would indicate that an application for amendment can be permitted even after commencement of trial if a case is made out that application for amendment could not be made inspite of due diligence. A perusal of the plaint filed by the plaintiff clearly indicates that the plaintiff has already disputed subsequent agreement, however inadvertently did not pray for declaration of two agreements as null and void. Judgment of the Hon'ble Supreme Court in Vidyabai & Ors (supra) would assist the case of the respondent. It is not in dispute that two subsequent transactions which were sought to be impugned in the application for amendment were in respect of the

same property and thus the plaintiff was justified in making an application for amendment to impugn these transactions also to avoid any multiplicity of proceedings.

13) In view of the subsequent development after 3/4/2018, I am not inclined to interfere with the impugned order passed by the learned trial Judge. Writ petition is devoid of merit and is accordingly dismissed. It is however made clear that so far as issue of limitation if any raised by the defendants in respect of the additional prayer allowed by the learned trial Judge, the said issue is kept open.

(R.D. DHANUKA, J.)