

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO.1830/2017

Shri Navenet Bhojraj Lakhotiya and others.

Vs.

Indumati Nilkanth Athalya(deceased) through her legal heir Yashwant s/o Nilkanth Athalye & ors.

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

Court's or Judge's Orders.

Shri S.A.Mohta, counsel for the petitioners.

Shri A.D.Bhate, counsel for the respondent sole.

CORAM : A.S.CHANDURKAR, J.

DATED : September 24, 2019

In view of notice for final disposal issued earlier, the learned counsel for the parties have been heard at length.

The challenge raised in the present writ petition is to the order dated 18.12.2015 passed by the trial Court below Exhibit 50 allowing the application for amendment of the plaint as moved by the respondent herein. A challenge is also raised to the order dated 22.12.2016 passed below Exhibit 53 rejecting the review application preferred by the petitioner.

The respondent is the original plaintiff who has filed a suit for permanent injunction seeking to restrain the original defendants from dealing with Plot No.36/3 admeasuring about 10700 square feet. It is the case of the plaintiff that she is the owner of the said property and that on 25.08.2004 an agreement of sale was purported to be signed in favour of the defendants. It is further case that an agreement of development was

also entered into. However subsequently by issuing a notice to the defendants, it was stated that the contract had come to an end. As it was noticed that the defendants were undertaking construction on the suit property, the plaintiff filed the aforesaid suit on 03.07.2006. The written statement was filed by defendants along with an application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (for short, 'the Code'). On 07.10.2015 the original plaintiff moved an application for amendment seeking to add a relief as to declaration of the voidness of the sale deed dated 18.04.2006 executed in favour of the defendants. Further relief with regard to damages was also sought. The trial Court allowed the application on 18.12.2015. The defendants then moved an application for review of that order which application was also rejected on 22.12.2016. Being aggrieved, the said orders have been challenged by the original defendants in the present writ petition.

Shri S.A.Mohta, learned counsel for the petitioners submits that when the suit was filed on 03.07.2006 it was open for the plaintiff to have sought a declaration as to the voidness of sale deed dated 18.04.2006. Reference to the same was also made in the plaint as filed in paragraph 9 thereof. Despite that no relief in that regard was sought when the suit was filed. It was therefore not permissible to seek relief by amending the plaint in the light of the provisions of Order II Rule 2 of the Code. It was further submitted that the relief with regard to the declaration was also barred by limitation as the application for amendment was moved on 07.10.2015. When it was clear from these

dates that the claim was barred by limitation the amendment was not liable to be allowed. Further there was absence of due diligence on the part of the plaintiff in seeking the amendment. In support of his submissions the learned counsel placed reliance on the decisions in *VanVibhag Karmachari Griha Nirmal Sahakari Sanstha Maryadit (Regd.) Vs. Ramesh Chander and Ors AIR 2011 SC 41*, *MV. X-press Annapurana and Anr, etc. V. Gitanjali Woolens Pvt. Ltd and Ors. AIR 2011 Bom 105* and *Writ Petition No.7079/2018 (Mangesh Madhukar Giri Vs. Lata Ganpatrao Korde and anor) decided on 23.01.2019*. It was submitted that the impugned orders were therefore liable to be set aside.

Shri A.D.Bhate, learned counsel for the respondent supported the impugned orders. According to him, the question of limitation was a mixed question of law and fact and the amendment was not liable to be refused on that count. If the defendants intended to raise a defence based on bar of limitation an issue in that regard could be framed. He referred to the application for amendment to indicate the nature of the same. He further submitted that as the defendants had filed an application under the provisions of Order VII Rule 11 of the Code, the trial Court had adjudicated the same and the matter had reached this Court in Second Appeal No.179/2015 which was disposed of on 29.02.2016. Since the proceedings were stayed for a considerable period, the application for amendment could not be moved earlier. In any event it was submitted that the trial was yet to commence and therefore the trial Court did not commit any error while exercising discretion in allowing the amendment.

He relied upon the decisions in *Ramesh B.Desai and others Vs. Bipin Vadilal Mehta and others*, (2006) 5 SCC 638, *Pankaja and another Vs. Yellappa (dead) by LRs. and others* (2004) 6 SCC 415, *Mohinder Kumar Mehra Vs. Roop Rani Mehra and others*, (2018) 2 Supreme Court Cases 132 in support of his submissions.

I have heard the learned counsel for the parties and I have perused the respective pleadings. It is not in dispute that the trial of the suit is yet to commence. The aspect of due diligence finds place in the proviso to the provisions of Order VI Rule 17 of the Code and exercise of due diligence of the party seeking amendment has to be shown once the trial commences. The said stage in the present suit is yet to arrive.

Be that as it may, perusal of the application for amendment indicates that the plaintiff intends to seek a declaration as regards voidness of the sale deed dated 18.04.2006. According to the defendants such relief ought to have been claimed while filing the suit itself especially as there were pleadings in that regard in paragraph 9 of the plaint. The cause of action according to the plaintiff is sought to be based on the illegal entry of the defendants in the suit property and making construction thereafter. It is stated by the plaintiff that the cause of action is continuous in nature. It is seen that the aspect of limitation is a mixed question of law and fact and the same has to be considered at the trial. At this stage, the trial Court has merely permitted the plaint to be amended. In the light of the fact that the trial of the suit was yet to commence and no reply whatsoever was filed by the defendants to the application for

amendment, it is found that the trial Court did not commit any error in permitting the amendment especially as it was a pre-trial amendment.

Insofar as the decisions relied by the learned counsel for the petitioners are concerned, there could be no quarrel with the legal propositions therein. In the facts of the present case, however, it is seen that the defence sought to be raised by the defendants as regards bar under Order II Rule 2 of the Code as well as relief of declaration being barred by limitation require evidence to be led for their proper adjudication. That defence can be kept open so that if the written statement is accordingly amended, issues in that regard can be framed.

Hence at this stage, I do not find any reason to interfere in writ jurisdiction. It is clarified that if by way of consequential amendment, the defendants raise proper defence, the trial Court shall frame necessary issues and adjudicate the same in accordance with law. All points on merits are kept open.

With the aforesaid directions, the writ petition is disposed of.
No costs.

JUDGE

Andurkar.