

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

WRIT PETITION NO. 3204 OF 2020

M/s N.C. Banerjee and Company,
Chartered Accountants, Special Officer of
Sanchayani Savings & Investment (I) Ltd,
(SSIL), 2, Ganesh Chandra Avenue,
Commerce House, Room no.9, 1st Floor,
Kolkata-13, (WB), through its Partner
Prasanta Kumar Sarker, S/o Late Shri
Kalipada Sarker, aged about 68, Resident
of Kolkata.

.... PETITIONER
(Original Def. no.3)

// VERSUS //

1. Shri Manoj Balkrishna Shah, now aged 58 years, Occu : Business. (Original Plaintiff)
2. M/s ARTEFACT PROJECTS Ltd., A company registered under the Companies Act, 1956, having its registered office at 1st Floor, Bhivapurkar Chambers, Opposite Yashwant Stadium, Dhantoli, Nagpur, Through its Managing Director Shri Manoj Balkrishna Shah, now aged 58 years, Occu: Business
3. Shri Pankaj Balkrishna Shah, now aged 56 years, Occu : Business
4. Shri Chetan Balkrishna Shah, now aged 54 years, Occu : Business
5. Shri Balkrishna Shah, now aged 83 years Occu : Business
6. Smt. Sushilaben Balkrishna Shah, now aged 58 years, Occu : Business.
All- 1, 3 to 6 resident of Plot No. 102,

Dharampeth Expansion, Scheme Shivaji Nagar, Nagpur. Plaintiff no. 2 to 6 represented through their nominated Power of Attorney Holder Shri Manoj Balkrishna Shah (Plaintiff no.1).

7. M/s Sanchayani Savings and Investments (India) Ltd., (SSIL), DN-33, Sector-5, Salt Lake City, Kolkata - 700091, West Bengal (Ori. def. no.1)
8. Mr. Sudipta Sen, Director of Sanchayani Savings and Investments (India) Ltd., (SSIL), DN-33, Sector-5, Salt Lake City, Kolkata - 700091, West Bengal (Ori. def. no.2)
9. Shri Ramakant Dashrath Pohankar, Business, R/o Chhatrapati Nagar, Nagpur. (Dead) Through its legal heir Mrs. Pohankar Wd/o Ramakant Pohankar, R/o Plot no. 3, Modern Housing Society, Chhatrapati Square, Nagpur (Ori. def. no.4)
10. Shri Subhash Ukharda Patil, now aged about 60 years, Occu : Business, R/o 230, Gajananprasad, Surendra Nagar, Nagpur (Ori. def. no.5)

.... RESPONDENTS

Shri A.C. Dharmadhikari, Advocate for the petitioner
 Shri R.T. Anthony, Advocate for respondent Nos. 1 to 6
 Shri A.S. Joshi, Advocate for respondent No.9

CORAM : N.B. SURYAWANSHI, J.

RESERVED ON : 05/08/2021

PRONOUNCED ON : 28/09/2021

JUDGMENT

Rule. Rule made returnable forthwith. Heard finally with the consent of the learned Advocates for the parties.

2. This petition under Articles 226 and 227 of the Constitution of India, takes exception to order passed by 10th Civil Judge, Senior Division, Nagpur, Below Exh. 154 (Annexure- A) in Special Civil Suit No. 1396/2010, thereby rejecting the prayer of the defendant no.3 to amend the counter claim.

3. The facts in nutshell are as follows:

The petitioner-original defendant no.3 was appointed as Special Officer by the Hon'ble Supreme Court to enlist the properties of Sanchyani Saving Investment India Limited (for short 'SSIL') and to take proper steps in the interest of depositors vide order dated 22/07/2003. During the pendency of the said proceedings before the Apex Court, respondent no.1-original plaintiff claimed ownership right in respect of property being plot No. 56, out of lay-out of the Central Excise Employees Housing Society Ltd., bearing Khasra No. 53/1-2 and 54/2, admeasuring 521.18 sq. meters. The Apex Court, therefore, directed respondent no.1 to 5 to file a suit for declaration of his ownership in respect of said property, as the SSIL had claimed right in the said property. Accordingly, respondent nos. 1 to 6 filed Special Civil Suit No.1396 of 2010

against SSIL and its director being defendant nos. 1 and 2, the present petitioner/Special Officer being defendant no.3 and present respondent no.9 as defendant no.4 and respondent no.10 as defendant no.5.

4. Respondent nos. 7, 8 and 11 being original defendant nos. 1, 2 and 5 filed written statement and opposed the claim. The suit proceeded ex parte against original defendant no.4/respondent no.9.

5. The petitioner appeared and by filing written statement opposed the plaint. The petitioner with a view to protect interest of the depositors, filed a counter claim for possession, declaration and mandatory injunction in the year, 2011.

6. Thereafter, the petitioner filed an application Exh-46 for amendment, which came to be rejected. The petitioner challenged the rejection order by filing Writ Petition No. 3187 of 2011. This Court allowed the said writ petition and permitted the petitioner to amend the counter claim. Accordingly, the petitioner has carried out the amendment.

7. The proceedings of the suit commenced and reached up to the stage of cross-examination of the plaintiff. In the

meanwhile, defendant no.4 expired and his legal heir was brought on record, who filed a written statement raising various objections including preliminary objection to the maintainability of the suit for non-joinder of parties and sought rejection of the plaint under Order VII Rule 11 of CPC.

8. The petitioner thereafter, moved an application Exh-154 seeking amendment in the counter claim in order to specify the claim of the petitioner in relation to the cancellation deed dated 26/05/1999 and adding a prayer for declaration that cancellation deed is null and void. It is averred in the application that in the counter claim of the defendant no.3 / petitioner though necessary averments are there, certain claims in the nature of declaration remained to be included. The proposed amendment, according to the petitioner, was necessary for proper adjudication of the suit and as the petitioner has been directed to be impleaded by the Hon'ble Supreme Court to protect the interests of defendant no.1 Company, the proposed directions and amendments were in the interest of the depositors. He therefore prayed that the application seeking amendments be allowed.

9. The application was opposed by the respondents contending that the prayers proposed by the defendant no.3 are beyond limitation. The defendant was well aware of cancellation deed as well as the sale-deed at the time of filing of the counter claim. Still, it has not incorporated the same in the counter claim. Therefore, the amendment application be rejected.

10. The Trial Court rejected the application on the ground that it is barred by limitation by holding that proposed defendants are not necessary as the subsequent purchasers i.e. plaintiffs are already on record. It is this order which is challenged in this petition.

11. Heard the learned Advocate for the petitioner and the learned Advocate for the respondents.

12. The learned Advocate for the petitioner by placing reliance on the order passed by this Court in Writ Petition No.3187/2011, submitted that the earlier amendment application rejected by the Trial Court was allowed by this Court. Taking into consideration the fact that the petitioner is appointed as Special Officer by the Apex Court and the

contention as regards subject matter of amendment being barred by the limitation, need not be gone into unless it can be ex facie seen that it is barred by limitation. He further submitted that since the cancellation deed is vitiated on the ground of fraud, the burden is on the petitioner to prove that fraud was played while executing that document. In that view of the matter, the Trial Court ought to have allowed the amendment of the petitioner. The amendment was sought due to change in the circumstances after the death of defendant No.4. The Trial Court while rejecting the application has failed to consider the observations of this Court in Writ Petition No. 3187/2011. The learned Advocate did not seriously press for the prayer of addition of defendants – i.e. Darda family and he fairly conceded that since the respondent No.1 original applicant is on record, who is the subsequent purchaser of the suit property, the proposed defendants are not necessary parties. He therefore submitted that the Trial Court has erred in rejecting the application and the impugned order is unsustainable. The same may be quashed and set aside by allowing petition.

13. Per contra the learned Advocate for the respondent Nos. 1 to 6 submitted that the agreement between Shri Pohandar

and Shri S U. Patil was in individual capacity and the petitioner was well aware of the same since beginning. So also the petitioner knew about the cancellation deed in the year 2006 itself. By pointing out to a letter dated 06/11/2006 sent by the Advocate, to the petitioner in respect of suit plot, he submitted that the said letter specifically informs that cancellation deed was executed on 26/05/1999. Therefore, the petitioner had knowledge about the cancellation deed since beginning. The petitioner filed counter claim in the year 2011. At that time also or thereafter when the amendment application Exh.46 was filed by the petitioner which was allowed by this Court, the petitioner failed to incorporate this amendment and hence the Trial Court was justified in rejecting the amendment application. In the Supreme Court order in IA No. 77-78 and 106 also, a reference of the cancellation deed is there and at that time also the petitioner had claimed that the cancellation deed was forged. In that view also, the claim of the petitioner was barred by limitation. He, therefore, prayed that the petition is devoid of merit and the same is dismissed.

14. The learned Advocate for the respondent No.9 adopted the arguments of learned Advocate for the respondent Nos. 1 to 6.

15. Admittedly, the petitioner is appointed as Special Officer to protect the interests of the depositors and investors and steps taken by the petitioner are for protecting the interests of depositors and investors. The burden of proving that the cancellation agreement is vitiated by fraud is on the petitioner which the petitioner has to prove by leading evidence. If the petitioner succeeds in proving that the document is executed by playing fraud, the document itself would be void.

16. This Court in Writ Petition No. 3187/2011 allowed the earlier amendment application of the petitioner taking into consideration the fact that the petitioner is appointed by Hon'ble Supreme Court to protect the interests of the depositors and investors. This Court further observed that the contentions as regard subject matter of the amendment being barred by limitation etc. need not be gone into and it can be ex facie seen that it is barred by limitation.

17. In the counter claim, the petitioner has pleaded as follows.

47. The defendant No.3 further submits that the plaintiffs have also stated that the defendant No.4 had allegedly cancelled the Agreement of Development & State dated 02/11/1994 by executing an alleged Deed of

Cancellation. The defendant No.5 has denied the alleged Deed of Cancellation and also filed his Written Statement stating that the signature appearing on the alleged Deed of Cancellation is **forged one**. A bare perusal of the alleged Deed of Cancellation dated 26/05/1999, it would reveal that the same has not been executed before any Authority nor it has been stamped document. On the first page of the alleged document, Court Fee Stamps of Rs.4/- are affixed thereon. Similarly the defendant No.5 has denied the receipt of payment stated in the alleged Deed of Cancellation. From all these facts, it reveals that the alleged document is false, bogus, forged and fabricated document and created after thought. Therefore, the same is neither binding either on the defendant No.3 or SSII nor it extinguishes the rights that are created under the Agreement dated 02/11/1994 between defendant No.4 & 5.

18. The relevant averments about the cancellation deed being forged one are already there in the counter claim filed by the petitioner. Thus the petitioner has already laid necessary foundation in the counter claim. Now by way of amendment the petitioner is claiming to incorporate the prayer seeking declaration in respect of cancellation deed being forged one which is vitiated by fraud. Further declaration sought that sale deed dated 27/04/2001 is not

binding on the defendants. The said amendment was necessitated due to changed situation as the legal heir of defendant No.4 raised various objections, including the denial of cause of action. In that view of the matter, the Trial Court ought to have allowed the amendment keeping the point of limitation open to be considered at the time of final decision of the suit.

19. The amendment so allowed is not likely to cause prejudice to the other party and the same appears to be necessary for determining the real question of controversy between the parties. Taking into consideration the aspect that foundation is already laid by defendant in the counter claim, I am of the view that the amendment deserves to be allowed.

20. Since the suit property is purchased by the respondent from Darda family, he has stepped into the shoes of of Darda family, therefore, Darda family is not necessary party in the suit. The prayer of the petitioner seeking to add members of Darda family is therefore not acceptable.

21. The trial Court has rejected the amendment on the ground that the relief of declaration in respect of cancellation

deed appears to be time barred and the petitioner has nowhere mentioned as to how and when he came to know about the existence of the cancellation deed. It is further observed that new relief which is sought by the petitioner is admittedly barred by limitation. While passing the impugned order, the trial Court has failed to take into consideration the observations by this Court in W. P. No. 3187/2011. The trial Court ought to have allowed the prayer seeking declaration in respect of cancellation deed by keeping the point of limitation open. The trial Court has further failed to consider that the burden is on the petitioner to prove that the cancellation deed is vitiated by fraud and unless he proves that he would not be entitled for relief of declaration in that behalf. In that view of the matter the impugned order is unsustainable to the extent it denies amendment in respect of prayer seeking declaration that the cancellation deed is vitiated by fraud.

1. 22. The learned advocate for the respondents placed reliance in the ratio in ***I.S. Sikandar (Dead) by LRS .vs. K. Subramani and others, (2013) 15 SCC 27***, wherein it is held that “in absence of plaintiff’s prayer seeking declaratory relief that termination of

agreement was bad in law, the suit for specific performance was not maintainable". The said decision is rendered in different facts of the case and therefore it does not help the case of the respondents.

23. The relevant pleadings are already there in the counter claim of the petitioner. The petitioner sought to add prayer clauses E-1 and E-2 by way of proposed amendment thereby seeking declaration. Prayer clause E-1 seeks declaration that the cancellation deed dated 26/05/1999 relied upon by the plaintiffs is a forged document executed by fraud and hence, is void and nullity in law. The said amendment is necessary for proper adjudication of the counter claim. It is settled legal position that liberal approach needs to be adopted while allowing the amendment. The amendment was necessitated due to subsequent change in the circumstances i.e. death of defendant no.4 and filing of written statement by the legal representative of defendant no.4. The trial court to permit the said amendment and consider the question of limitation on its own merit at the time of final decision of the suit and counter claim.

24. Prayer clause E-2 need not be considered because it was not pressed seriously by the learned advocate for the petitioner during his arguments.

25. In the result, Writ Petition No. 3204 of 2020 is allowed.

26. The impugned order passed by the learned 10th Jt. Civil Judge Senior Division, Nagpur, below Exh.154 is hereby quashed and set aside and the application Exh.154 is allowed to the extent of permitting the petitioner to incorporate proposed prayer clause (E-1) by way of amendment in the counter claim. The question of limitation is kept open to be decided by the trial Court at the time of decision of the suit.

JUDGE

J.Pethe..