

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

WRIT PETITION NO.10652 OF 2022

Somnath s/o. Tatyrao Jadhav
Age : 44 years, Occu : Agriculture,
R/o. Mudhalwadi, Tq. Paithan,
Dist. Aurangabad.

.. Petitioner

Versus

Kantabai w/o. Prabhakar Deshpande
Died Through LRs

1. Anant s/o. Prabhakar Deshpande
Age : 62 years, Occu : Agriculture,
R/o. Bhaygaon, Post Bhatkudgaon,
Tal. Shevgaon, Dist. Ahmednagar.
2. Ashok s/o. Prabhakar Deshpande
Age : 59 years, Occu : Agriculture,
R/o. Bhaygaon, Post Bhatkudgaon,
Tal. Shevgaon, Dist. Ahmednagar
3. Manjusha D/o. Prabhakar Deshpande
alias Manjusha w/o. Mahesh Gadekar
Age : 46 years, Occu : Household,
R/o. Erandgaon, Post Bhatkudgaon,
Tal. Shevgaon, Dist. Ahmednagar

.. Respondents

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Mr. Raviprasad K. Ashtekar, Advocate for the Petitioner
Mr. N.D. Sevekar, Advocate for Respondent Nos.1 to 3

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CORAM : SANDEEP V. MARNE, J.

DATE : 19-10-2022

ORAL JUDGMENT :

. Heard. Rule. It is made returnable forthwith.

Mr. N.D. Sevekar, learned advocate waives notice for Respondent

Nos.1 to 3. At the request of the learned counsel for the parties, the matter is heard finally at the admission stage.

2. By way of the present petition, the petitioner has challenged the order dated 29.09.2022 passed by the court of 4th Jt. Civil Judge, Senior Division, Aurangabad on application below Exh.55 thereby allowing plaintiff's (respondent herein) application for amendment of the plaint. The suit has been initially instituted for recovery of amount of Rs.2,96,309/- along with interest. This amount represents failed amount of consideration on account of alleged dishonour of cheque issued by the defendants in favour of the plaintiff. At the time when the suit was filed, the plaintiff sought recovery of that amount and did not seek any other relief concerning the sale-deed. The sale-deed in question was executed on 14.12.2005. By an application filed for amendment on 15.02.2021, she proposed to add new reliefs in the suit for cancellation of the sale deed dated 14.12.2005 and for handing over the possession of the suit land. The amendment application has been allowed by the trial Court.

3. Mr. Ashtekar, the learned counsel for the petitioner submits that the amendment changes the nature of the suit. He submits that the amended relief is otherwise barred by limitation and

the trial Court has not considered this aspect while allowing the application for amendment. Mr. Ashtekar relies upon the judgment of this Court in **Ek Nath Nivrutti Hegadkar Died Thr. LRs Mainabai vs. Aagatrao Dyanu Ghodake**, Writ Petition No. 7436 of 2017 decided on 01.06.2021.

4. Per contra, Mr. Sevekar, the learned counsel for the respondents opposes the petition and supports the order passed by the trial Court. He submits that the original reliefs as well as amended relief flow out of the same transaction i.e. sale deed dated 14.12.2005. In order to avoid multiplicity of proceedings, the trial Court has rightly allowed the amendment, so that the plaintiff is in a position to claim all reliefs relating to that sale deed in one suit.

5. So far as the limitation is concerned, Mr. Sevekar submits that the limitation will have to be counted upto the date of institution of the suit and since the suit is instituted in the year 2008, reliefs introduced by way of amendment to challenge sale deed dated 14.12.2005 would be perfectly within limitation. He further submits that even otherwise, the cause of action in respect of sale deed dated 14.12.2005 is continuous in nature. He therefore prays for dismissal of the petition.

6. There is no doubt that the original relief for recovery of amount of Rs.2,96,309/- as well as the amended relief for cancellation of the sale deed flow out of the same transaction. The plaintiff has executed sale deed dated 14.12.2005 in favour of the defendant and it is her case that the cheque for Rs.2,96,309/- has dishonoured. Therefore in the suit originally instituted, she restricted her relief only for claiming the amount of Rs.2,96,309/-. The suit was decreed *ex parte* in the year 2008 and upon an application being made by the defendants, *ex parte* order was set aside and the suit was restored on 15.10.2016. It appears that the plaintiff has simultaneously sought to prosecute the defendants under provisions of Section 138 of the Negotiable Instruments Act and by judgment and order dated 14.11.2011 defendants are apparently acquitted.

7. Now by an application filed for amendment on 15.02.2021, the plaintiff sought to add the following prayers in the suit:-

‘2. Sale Deed Day Book No.5683 dated 14.12.2005 at Exh. A executed by the pltfs in favour of the deft be declared as cancelled.’

3. “The deft be directed to hand over possession of the suit land of the Sale Deed Day Book No. 5683 dated 14.12.2005 at Exh.A in favour of the pltfs by accepting Rs.1,84,000/-.

4. “The deft or his relatives or agents or persons be directed for not to interfere into peaceful possession of the

suit land in favour of the pltfs.”

5. The pltfs kindly be allowed to prefer separate application for Means Profits in respect of the suit land.’

8. Though it is doubtful whether the amendment would introduce a new case as original relief as well as amended relief flow out of same transaction.

9. On the aspect of limitation, however there appears to be a difficulty for plaintiff. The scope for allowing amendment has been dealt with by the Apex Court in its judgment in **Revajeetu Builders and Developers vs. Narayanswamy and Sons & Ors**, (2009) 10 SCC 84 in which it is held in para nos.39 and 63 as under:

‘39. The rule, however, is not a universal one and under certain circumstances, such an amendment may be allowed by the court notwithstanding the law of limitation. The fact that the claim is barred by law of limitation is but one of the factors to be taken into account by the court in exercising the discretion as to whether the amendment should be allowed or refused, but it does not affect the power of the court if the amendment is required in the interests of justice. (see *Ganga Bai v. Vijay Kumar and Arundhati Mishra v. Ram Charitra Pandey*).

63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

- (1) Whether the amendment sought is imperative for proper and effective adjudication of the case?
- (2) Whether the application for amendment is

bona fide or mala fide?

- (3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
- (4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;
- (5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? and
- (6) **As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.**

These are some of the important factors which may be kept in mind while dealing with application filed under Order VI Rule 17. These are only illustrative and not exhaustive.'

(Emphasis supplied)

10. Thus, the Court is required to reject an application for amendment, if it comes to a conclusion that if a fresh suit is to be filed in respect of amended claim, the same would be barred by limitation. In the present case, the amended relief seeks cancellation of sale deed dated 14.12.2005. The application for amendment is filed on 15.02.2021. If a fresh suit was to be filed on 15.02.2021, the same would have been barred by limitation.

11. The aspect of impermissibility of amendment in respect of claims which are barred by limitation is also dealt with in the judgment of this court in **Eknath Nivrutti Hegadkar** (*supra*). In para -

12 of the judgment it is held as under:

‘The amendment is now sought after more than 8 years from the date of denial of the title. Under the provisions of Article 58 of the Limitation Act, 1963 in such a case, the maximum period of limitation allowed is 3 years and thus, the action on the part of the respondents (plaintiffs) was clearly barred by the law of limitation.’

12. The submission of Mr. Sevekar that the limitation is required to be counted on the date of institution of the original suit is stated only to be rejected. It is trite that for the purpose of computation of period of limitation, the date of seeking amendment is required to be taken into consideration and not the date of institution of the suit. His submission that the cause of action in respect of prayer for cancellation of sale deed is continuous in nature deserves to be rejected. The sale deed is executed and the possession has been handed over. It is incomprehensible as to how the relief for cancellation of the sale deed and claiming possession can be considered as a continuous cause of action. I am therefore of the opinion that all the reliefs sought for by the plaintiff in his application to amendment would clearly be barred by limitation. The objection of limitation was specifically raised in the reply opposing amendment. The trial Court has repelled the objection by one line finding that ‘as such, it would not be hit by the law of limitation’. No reasons are adduced as to why the trial Court arrived at a finding that the

proposed reliefs would not be hit by law of limitation.

13. I am therefore of the view that the impugned order passed by the trial Court allowing amendment is indefensible. Consequently, the order dated 29.09.2022 passed by the 4th Jt. Civil Judge Senior Division, Aurangabad on application below Exh.55 in Special Civil Suit No.368 of 2008 is set aside.

14. Writ petition is allowed. Rule is made absolute.

(SANDEEP V. MARNE, J.)

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