

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION No. 6947 OF 2022**

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Ganpat Baburao Boraste**...Petitioner****Vs.****Vinayak Pandurang Waghmare and Ors.****...Respondents***** * * *****Mr. Girish R. Agarwal for Petitioner****Mr. Amey Deshpande for Respondent****Coram : Sandeep K. Shinde, J.****Reserved on : 24th August, 2022****Pronounced on : 5th September, 2022****[J U D G M E N T]:**

1. Heard Mr. Girish Agarwal, learned counsel for the Petitioner and Mr. Amey Deshpande for the Respondents.

2. Respondent Nos. 1, 2 and 3 (hereinafter called Plaintiffs) instituted a Special Civil Suit No. 162/2012, in the Court of Civil Judge, Senior Division, Nasik for the reliefs; (i) to declare that their title to the suit property has matured by adverse possession; and, (ii) that, sale deeds dated 9th January, 2012 and 12th April, 2012 executed by the defendants, in respect of suit property, were not binding on them. Nearly seven years after instituting the suit, on 18th January, 2021, Plaintiffs moved an application under Order VII Rule 17 of the Civil Procedure Code, for amendment of the plaint.

Learned Trial Court vide order dated 13th February, 2020, granted the amendment. That order is challenged in this petition.

3. Facts relevant for the decision of this petition are like this;

Gat No. 1075 is agricultural land. Plaintiffs' father, Pandurang Trambak Waghmare, instituted Regular Civil Suit No. 74/1994 (First Suit) in respect of the said Agricultural Land. Pandurang (Plaintiffs' father) pleaded, in the first suit that, Ramchandra Kashinath Joshi was owner of land Gat No. 1075. He died in the year 1946. Pandurang's uncle, Govind was cultivating the said land as protected tenant. Govind died in 1962, survived by Pandurang Trambak - (father of the Plaintiffs) Shankar and Baburao. Pandurang, pleaded that Baburao, died issueless in 1960, survived by wife, Parvatibai Baburao. Parvatibai, executed a Will deed dated 12th August, 1986 and bequeathed 1/3rd area of the suit property to Balkrishna Shankar Gurav (Waghmare), Defendant No.1, in the first suit. Pandurang, had claimed and asserted his exclusive possession over the suit land and denied Parvatibai's right to bequeathed part of the suit land by a Will. On these assertions, Pandurang, sought a decree to declare his exclusive ownership over the suit property. The another relief in the first suit was, that a Will executed by Parvatibai on 12th August, 1986 bequeathing 1/3rd area of the suit property to Balkrishna Gurav

(Defendant No.1 therein) and two others, was illegal. The first suit was dismissed on 9th April, 2010 and the decree was confirmed in second appeal by this Court on 31st January, 2018.

4. Be that as it may, after dismissing the first suit and pending first appeal, sons of Pandurang, Respondent Nos. 1,2 and 3 herein, instituted the Special Civil Suit No. 162/2012, (hereinafter called 'second suit' for short).

5. In the second suit, which is in question, Balasaheb Shankar Gurav is Defendant No.1, to whom, Parvatabai bequeathed part of the suit land. Be it noted, Balasaheb was also defendant in the first suit.

6. Pending suit in question, Plaintiffs sought amendment of the plaint. Briefly stated the amendment sought was to the effect that, a Will executed by Parvatibai on 12th August, 1986, bequeathing 1/3rd share in the suit land to Defendant Nos.1(Balasaheb Gurav) and his sisters Sushila Govind Jadhav and Suman Devidas Pande was illegal. For the reason that Parvatibai being tenant, she had no right to bequeath tenancy and thus the Will and all further alienations by Defendant No.1 (legatee), part of the suit lands to defendant No.10, were unlawful and not binding on Plaintiffs. Trial Court vide order dated 13th February, 2020 granted the amendment subject to cost

Rs.1,000/-. Feeling aggrieved by that order, Defendant No.10 has preferred this petition.

7. Having heard the learned counsel for the parties and upon perusing the judgments in the first suit, pleadings in the second suit, application seeking amendment to the plaint and the reply thereto, in my view, the Trial Court could not have allowed to amend the plaint for two reasons; First, that the amendment introducing the cause of action, that, Parvatibai could not have bequeathed tenancy over part of suit land (i.e. 1/3rd) under Will deed dated 12th August, 1986, was barred by limitation. Undoubtedly, this fact was within the knowledge of the Plaintiffs, when the first suit was instituted by their father Pandurang, in 1984 and further in the first suit, a specific issue was framed that; to the effect; "whether Plaintiffs proved that the Will deed dated 12th August, 1986 executed by deceased, Parvatibai was false and illegal". This issue was answered in negative and the findings on this issue were confirmed in first appeal as well as the second appeal. Therefore, cause of action and claim introduced and set-up by way of proposed amendment was clearly barred by limitation. Even otherwise, Plaintiffs were precluded from raising the same issued which was already decided in the first suit. The Hon'ble Apex Court in the case of **Revajeetu Builders & Developers Vs.**

Narayanswamy & Sons [(2009) 10 SCC 84] has held that if an amendment introducing a cause of action is such that the cause of action is otherwise not barred by limitation or if an independent suit would not be barred by limitation, such an amendment could be allowed. Yet in the decision of **Radhika Devi vs. bajrangi Singh and Ors. [(1996) 7 SCC 486]**, the Hon'ble Supreme Court has held that the claim set up by way of proposed amendment ought not to be permitted if it is barred by limitation. The ratio in the above decisions are squarely applicable, to the facts of the case at hand. Secondly, it is settled law that all amendment ought to be allowed being necessary for the purpose of determining the real question in controversy between the parties. In the case at hand, the suit claim is for declaration of ownership by adverse possession. If that be so, the amendment sought to the effect that, Parvatibai had no right to bequeath her tenancy to the Defendants would not in any manner assist or necessary for determining controversy between the parties. For these reasons amendment sought by the Plaintiffs could not have been allowed.

8. Be that as it may, Mr. Deshpande, learned counsel for the Respondents -Plaintiffs, would contend that even assuming that cause of action, set up by proposed amendment was barred by limitation,

yet Parvatibai then a tenant in the suit land had no right to assign interest in the land as held by the Apex Court in the case of **Vinodchandra Sakarlal Kapadia Vs State of Gujarat and Ors. [(2020) 18 SCC 144]**. Mr. Deshpande has rightly argued that in, Vinodchandra Sakarlal Kapadia [Supra.], the Hon'ble Supreme Court has held that a tenancy governed by a statute which prohibits assignment, cannot be willed away to a total stranger. However, Plaintiffs do not dispute that Parvatibai had 1/3rd tenancy in suit land. Rather Plaintiffs in the amended application Exhibit 79, in paragraph No.1 admit this fact. Therefore, law laid down in the Vinodchandra, does not further the Plaintiffs' case. For all these reasons, the impugned order dated 13/2/2020 below Exhibit '79' in SCS No. 162/2012 passed by the 12th Jt. Civil Judge, Senior Division, Nashik is quashed and set aside. Petition is allowed in the aforesaid terms and disposed of.

(Sandeep K. Shinde, J.)