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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2466 OF 2022**

Mr. Navrang Shankarlal Kumawat and Anr. Petitioners.

V/s

Shri Dilip Ramchandra Salunkhe Respondent.

Mr. Ajay A. Joshi for the Petitioners.

Mr. J.S. Kini i/b Ms. Sapna Krishnappa for the Respondent.

CORAM: NITIN W. SAMBRE, J.

DATE: MARCH 09, 2022

P.C.:-

1] This Petition is by the Defendants to the Special Civil Suit No.119 of 2012 pending on the file of Joint Civil Judge, Senior Division, Pune, questioning the order passed below Exhibit-128, whereby prayer of the Respondent/Plaintiff for amendment of the plaint moved under Order VI Rule 17 came to be allowed.

2] The facts necessary for deciding the Petition are as under:-

3] Respondent/Plaintiff claims to be the owner of the suit property mentioned in para 1 of the Plaint. According to him, he had no intention to transfer the property in favour of the present

Petitioners/Defendants. However, the Petitioners/Defendants by virtue of Development Agreement dated 5/5/2006 and Power of Attorney dated 5/5/2006 got executed Sale Deed of 27/07/2010 by practicing fraud. As such, Respondent/Plaintiff initiated suit for declaration that all the aforesaid three documents are null and void and also sought possession of the suit property. An injunction is sought, restraining the Petitioners/Defendants from permanently alienating the suit property or creating third party interest. Also injunction in the nature of order of restraint against the Petitioners/Defendants is sought from carrying out further construction on the suit property and, in default, it is claimed that the Respondent/Plaintiff be permitted to demolish the alleged construction and recover the said amount from the Petitioners/Defendants.

4] The claim was denied by the Petitioners/Defendants and as such, issues were casted on 20/07/2015 vide Exhibit-16 and were subsequently recasted on 18/4/2018.

5] Trial in the suit is already commenced. Respondent/Plaintiff has filed his affidavit of evidence at Exhibit-93. At the aforesaid stage,

Application-Exhibit-111 came to be moved by the Respondent/Plaintiff, seeking amendment of the Plaint which was allowed on 17/04//2019. However in Writ Petition No.8906 of 2019 before this Court, said Application-Exhibit-111 was not pressed. That being so, order allowing the amendment was quashed and set aside. Prior to Application-Exhibit-111, Application-Exhibit-95 for amendment of the Plaint was allowed by the Trial Court on 5/12/2017.

6] Respondent/Plaintiff took out Application-Exhibit-128 based on certain subsequent development. According to him, based on incorrect affidavit, sanction was obtained from local Planning Authority for carrying out construction and as such the said amendment application came to be moved. Respondent/Plaintiff sought addition of paras 28 and 29 of the aforesaid Exhibit-128 in Plaint as para Nos. 20A and 20B. The Respondent/Plaintiff then sought to add prayer clause (ggg) after prayer clause (gg) of suit para No.27 seeking declaration that the alleged construction of building referred to in suit para No.20A and 20B is illegal, void ab-initio and not binding upon Plaintiff and Defendants be restrained from carrying out further construction over

the suit property. In addition to above, amendment by way of prayer clauses (bb), (cc) and (dd) was sought, thereby seeking declaration of cancellation of all the above three documents viz Development Agreement dated 5/5/2006, Power of Attorney dated 5/5/2006 and Sale Deed dated 27/7/2010. The said prayer is allowed vide impugned order. As such, this Petition.

7] Contention of Mr. Ajay Joshi, learned Counsel appearing for the Petitioners/Defendants are, amendment which is sought to be inserted by the Respondent/Plaintiff is with an intention to bring time barred claim of declaration of cancellation of documents within limitation. He would further claim that an eye wash is sought to be created so as to insert pleadings in relation to cancellation of permission for construction and demolition of the constructed portion, though already relief to that extent is sought in the original Plaint. According to him, there is complete absence of due diligence on the part of the Respondent/Plaintiff, which court below has failed to appreciate. He would then claim that since the trial in the suit is already commenced, the Court below ought not to have granted amendment by which nature of the claim in the suit is entirely changed. As such, he has

sought quashing of the order impugned. So as to substantiate his contentions, he has drawn support from the judgment of the Apex Court in the matter of *Vidyabai and Others vs. Padmalatha and Another* reported in (2009) 2 SCC 409, particularly paras 10, 11 and 19 of the said judgment and in the matter of *Pandit Malhari Mahale vs. Monika Pandit Mahale and Others* reported in (2020) 11 SCC 549.

8] While countering the aforesaid submissions, Mr. Kini, learned Counsel for Respondent/Plaintiff would support the order impugned. He would claim that amendment is necessary for proper adjudication of the suit claim. He would urge that already foundation in support of the amendment is laid in the Complaint and the Petitioners/Defendants are not taken by surprise. According to him, whether prayers inserted by seeking addition to the existing prayer clause (b), (c) and (d) are within limitation or not can be looked into at the time of deciding the suit, as the issue of limitation is mixed question of fact and law. So as to substantiate his contentions, he has drawn support from the judgments of this Court in the matter of *Shaikh Elias s/o Shaikh Dada and another* reported in 2016(1) Mh.L.J. page 124, *Bhimrao Laxman Kamble (since deceased) through his L.Rs Sharada Bhimrao*

Kamble and others vs. Annaso Dhondiram Manole and another reported in **2018(2) Mh.L.J. page 276**, *M/s Sheth Builders Pvt. Ltd. vs. Michael Gabriel and Ors* in **Interim Application (L) No.5083 of 2020 in Suit No.3540 of 2005 decided on 5/11/2020** and that of the Apex Court in *Abdul Rehman and Another vs. Mohd. Ruldu and Others* reported in **(2012) 11 SC 341**. He has relied on aforesaid judgments so as to claim that this Court should be sensitive to the fact that, whether to grant amendment or not is a procedural requirement and procedural impediment will always be considered on lower pedestal over the issue of interest of justice. He has sought support from the judgment in the matter of *Bhimrao Laxman Kamble* cited supra, so as to claim that for resolving the controversy effectively, even if amendment is sought at belated stage, same needs to be granted, ignoring the issue of limitation, as the same can be looked into at the time of deciding the case on merit. He has also relied on paras 9 and 11 of the judgment in the matter of *M/s Sheth Builders Pvt. Ltd* cited supra, so as to support his contention that once the foundation is laid in the Plaint subsequent amendment amplifying the same can be granted. He has drawn support from the judgment in the matter of *Abdul Rehman* cited supra, so as to claim that for minimizing litigation

and to avoid multiplicity of proceedings, amendment needs to be granted even on pleadings which are time barred, as the said issue can be looked into at the time of deciding the suit.

9] I have considered aforesaid submissions.

10] At the outset, it is required to be noted that the suit in question was initiated in 2012 with specific prayer in relation to declaration of the Development Agreement, Power of Attorney and Sale Deed as null and void. By way of amendment, insertion is sought in the prayer clause that all the the three documents mentioned in above prayers be declared as cancelled by adding prayer clauses (bb), (cc) and (dd).

11] Apart from above, by insertion of pleadings in para No.20 i.e. para Nos. 20A and 20B, it is prayed that further permission for construction and the construction carried out thereunder are illegal and void ab-initio and not binding on the Plaintiff and Defendants be restrained from carrying out construction or be directed to demolish the same at their expenses. As far as insertion of prayer clause (ggg) based on pleadings in para Nos.20A and 20B is concerned, same is

sought to be inserted so as to create illusion of certain subsequent development of granting permission in 2017 based on notarized affidavit dated 24/7/2017 and inspection report dated 15/5/2017 are taken shelter of. The commencement certificate dated 22/03/2018 is also sought to be relied on, so as to substantiate the claim that amendment is based on subsequent development. As far as amendment is concerned, original prayer clause (gg) in the Plaint is required to be considered, which reads as under:-

“gg. “Defendant be restrained from carrying out further construction on the suit property and in default the plaintiff be allowed to demolished the alleged construction and plaintiff be permitted to recover the amount of the costs so incurred from the Defendants”.”

12] As such, already there exists a prayer for injunction, restraining Defendants from carrying out further construction and, in default, construction be allowed to be demolished and cost be permitted to be recovered.

13] The Respondent/Plaintiff has every intention to bring belated claim of declaration of cancellation of Development Agreement, Power of Attorney and Sale Deed within the claim in the suit, though prayer

for such declaration is time barred. Fact remains that for seeking relief of declaration, limitation is three years and the suit is initiated in 2012 based on the cause of action mentioned therein of 2012. As such, at the face value, relief of declaration which is sought to be inserted by way of amendment is time barred.

14] Apart from above, fact remains that Application-Exhibit-111 which was not pressed before this Court, whereby amendment was granted, was on the same line on which present Application-Exhibit-118 was moved. Once the Application-Exhibit-111 was not pressed, it was expected of the Petitioners to seek liberty from this Court to take out fresh proceedings for moving present amendment application i.e. Exhibit-128. If pleadings in Exhibit-111 and Exhibit-128 are verified, same appear to be in tune with each other.

15] In the aforesaid backdrop, Court is required to consider as to whether there was due diligence on the part of the Respondent/Plaintiff. Fact remains that suit was initiated way back in 2012 and thereafter suit was amended twice. Not only this, fact about last amended was allowed on 5/12/2017 which has led to

recasting of the issues is required to be appreciated.

16] Trial in the suit is already commenced as the Plaintiff's evidence is placed on record. By way of amendment, prayer for declaration of cancellation of documents could have been made well within the prescribed time i.e. when the suit itself was lodged or within three years from the date of lodging of the suit. No plausible explanation is coming forth but for claiming that there was already foundation laid and the Petitioners/Defendants are not taken by surprise by way of such amendment.

17] Though Mr. Kini was justified in claiming that the issue of limitation is mixed question of fact and law and can be gone into at the time of deciding the suit on its merit, this Court is required to be sensitive to the fact that claim for declaration by way of additional prayers through amendment is time barred on the face of record, as the limitation prescribed for seeking relief of declaration is three years and after unexplained delay of period of more than eight years, said declaration is sought in the suit.

18] As such, there is complete absence of due diligence on the part of the Respondent/Plaintiff in moving amendment application. By moving such amendment application, Respondent/Plaintiff is seeking insertion of time barred claim. For the aforesaid reasons, judgment relied upon by the Counsel for Respondent/Plaintiff in the matters of *Shaikh Elias* (supra), *Annaso Dhondiram Manole* (supra), *M/s Sheth Builders Pvt. Ltd* (supra) will be hardly of any significance. There is complete absence of due diligence on the part of the Petitioners. As such even the law laid down in *Abdul Rehman* (supra) will not be of any assistance. Rather judgments relied on by the Counsel for the Petitioners in the matters of *Vidyabai* (supra) and *Pandit Malhari Mahale* (supra) squarely covers the issue.

19] In the backdrop of aforesaid reasons, Petition stands allowed. The order impugned passed below Exhibit-128 on 01/10/2021 is quashed and set aside. Application-Exhibit-128 stands rejected.

(NITIN W. SAMBRE, J.)