

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

APPEAL AGAINST ORDER NO.02 OF 2021

1. Pushpabai Panjabrao Uike
Age about 69 years, Occ Service,
R/o Plot No.132, Nagpur Pardi Behind
Ganga Ghat, Near Mahakal Road, Nagpur,
Tq& Dist. Nagpur.
2. Sangita Madhukarrao Dhurve
Aged about 37 years, Occ: Service,
R/o Haterna, Tq. Warud,
Dist. Amravati.
3. Anita Panjabrao Uike,
Aged about 44 years, Occ: Service
4. Dinesh Panjabrao Uike
Aged about 42 years, Occ: Service
5. Sunita Panjabrao Uike
Aged about 40 years, Occ: Not known

Nos.3 to 5 R/o Plot No.132, Nagpur Pardi
Behind Ganga Ghat, Near Mahakal Road,
Nagpur, Tq. & Dist. Nagpur

...APPELLANTS

---VERSUS---

Ramdas s/o Ukandrao Younate
Aged about 69 years, Occ: Agriculturist,
R/o Pimpalkhuta, Tq. Morshi, Dist.
Amravati.

...RESPONDENT

Shri P.R. Agrawal, Advocate for the appellants.
Shri A.M. Sudame, Advocate for respondent.

CORAM : AMIT B. BORKAR, J.
DATED : 21st JUNE, 2022.

ORAL JUDGMENT :

1. Heard.
2. **Admit.**
3. The following substantial question of law arise in the present matter:

“Whether Lower Appellate Court was justified in remanding the matter holding that the trial Court erred in rejecting the application for amendment filed by the plaintiff in view of the fact that as per agreement the date fixed was 30.01.1997 and application for amendment was filed on 19.12.2017?”

4. The facts giving rise to the present appeal are as under.
 - (a) The respondent original plaintiff filed suit for perpetual injunction in respect of agricultural land based on Section 53A of the Transfer of Properties Act. The appellant herein appeared in the suit, filed written statement and contested the said suit. The defendant after filing of written statement filed counter claim seeking possession of the suit.
 - (b) During pendency of suit, plaintiff on 19.12.2017 filed an application for amendment of plaint. The said application was rejected by trial court as barred by limitation.

(c) The learned Trial Court by the judgment and order dated 13.06.2018 dismissed the suit but allowed the counter claim of the defendant directing the plaintiff to deliver the possession. Aggrieved by the decree in suit and order of counter claim, the plaintiff filed Regular Civil Appeal No.111 of 2018.

(d) The Appellate Court, at the time of final hearing, recorded a finding that the trial Court was not justified in rejecting the application for amendment. The learned Appellate Court was also of the opinion that it was necessary for the trial Court to frame issue of limitation in relation to counter claim filed by the defendant. The learned lower Appellate Court therefore by judgment and order dated 24.11.2020 allowed the appeal and remanded the appeal back to the trial Court.

(e) Defendants being aggrieved by the said judgment and decree filed present appeal.

5. The learned Advocate for the appellants submitted that since agreement to sale itself fixes date of execution of sale-deed , suit would be governed by first part of Article 54 of the Limitation Act. He also submitted that insofar as the issue of limitation as directed to be framed by the learned lower Appellate Court, the same would not be relevant for adjudication of the appeal.

According to him, the parameters which are considered by the learned lower Appellate Court are not as contemplated by Order XLI Rule 23 of Code of Civil Procedure. He, therefore, submitted that it was duty of the learned Lower Appellate Court to decide the appeal on merits.

6. Learned Advocate for the respondent relied on the judgment of this in the case of **Vitthalrao Vs.Damaji Kokate**¹ submitted that the course adopted by the learned Lower Appellate Court is permissible as the issue of limitation could have been considered by the trial Court and the amendment could have been allowed subject to objection of limitation. He also placed reliance upon judgment of Hon'ble Apex Court in the case reported in the case of **L J Leach and Co Vs Jardine Skinner**². He, therefore, prayed for dismissal of appeal.

7. The rival submissions fall for my consideration.

8. For the purpose of the adjudication of the present appeal following undisputed facts are relevant:

- i. According to agreement of sale, date fixed for execution of sale-deed was 30.01.1997.
- ii. Suit seeking injunction based on Section 53A was filed on 07.09.2017.

1 2008 (2) MhLJ 52

2 AIR 1957 SC 357

iii. The application to amend a prayer to incorporate prayer of specific performance was filed on 19.12.2017.

9. On basis of aforesaid undisputed facts, cause of action to seek relevant specific performance accrued on 30.01.1997 which is the date fixed as per agreement. If this be so, as per first part of Article 54 of Limitation Act, the suit or prayer to incorporate relief of specific performance ought to have been filed on or before 30.01.2000. Undisputedly, the application having been filed on 19.12.2017, the same was *ex facie* barred by limitation. Therefore, the learned Lower Appellate Court was not justified in granting amendment which was *ex facie* time barred.

10. In the case of **L.C. Hanumanthappa Vs. H.B. Shivakumar**¹, the Apex Court held when the amendment *ex facie* barred by limitation, the Court has no discretion to allow the amendment and the prayer to incorporate such relief ought to be filed within the period prescribed under Article 54 of the Limitation Act.

11. The next ground to remand the matter is for framing the issue of limitation of counter claim. Undisputed facts reveal that the cause of action for filing the counter claim accrued after delivery of defence by the defendant. If this be so, only issue

¹ 2016 (1) SCC 332

which the learned Lower Court was required to be consider is, whether counter claim is maintainable or not. For the said purpose, it is not necessary to remand Appeal.

12. Even otherwise, it is well settled that unless the suit is decided on preliminary issue or the Appellate Court thinks that remand is necessary in the interest of justice, the exercise of power under Order XLI Rule 23 of the Code of Civil Procedure is not permissible.

13. In view of aforesaid settled principles of law, in my opinion, the learned Lower Appellate Court was not justified in passing the decree of remand under Order XLI Rule 23. The decree is therefore liable to be set aside. I, therefore, pass the following order:

14. The judgment and decree dated 13.06.2018 passed in Regular Civil Appeal No.111 of 2018 passed by the learned District Judge-2, Amravati is quashed and set aside.

15. Proceedings of the Regular Civil Appeal No.111 of 2018 is restored to the file of District Judge-2, Amravati, who shall decide it on merits.

16. It is expected from the learned Lower Appellate Court to decide the maintainability of the counter claim filed by the

plaintiff according to law.

17. Rule is made absolute in the above terms. Pending civil application (s), if any, stand disposed of.

JUDGE

Wagh