



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 4311 OF 2003

YASHWANT DASHRATH CHOUDHARY *...PETITIONER*

VERSUS

1. MANUBAI DASHRATH CHOUDHARY

2. NATHA SUKHA BHOI

SINCE DECEASED THROUGH LEGAL HEIRS :

2-A) SMT. SUMANBAI NATHA BHOI

2-B) GOVIND NATHA BHOI

2-C) SOW. YESHODA ANKUSH MORE

2-D) NAKU PRABHAKAR MORE

2-E) SOW. MANGALA DAGADU LAMBODE

2-F) SOW. PRAMILA RAJENDRA SHIVDE

2-G) SHARDA NATHA BHOI

2-H) VIMAL NATHA BHOI *...RESPONDENTS*

...

Advocate for Petitioner : Mr. Bharat R. Warma

Advocate for Respondents : Mr. S.P. Shah h/f
Mr. D.P. Palodkar

...

CORAM : SHAILESH P. BRAHME, J.

DATE : 18th DECEMBER 2023.

ORAL JUDGMENT :

. Rule.

2. Rule is made returnable forthwith. Heard finally with the consent of the parties.

3. The petitioner is challenging rejection of his application for amendment to plaint which was presented at the appellate stage in Civil Appeal No.405/1989 by way of application (Exhibit-17). The petitioner is the original plaintiff in RCS No.140/1979 filed for declaration only against the defendants/respondents.

4. The petitioner has challenged sale deed dated 03.09.1979 executed by the respondent no.1 in favour of the respondent no.2 by registered. He claims to be the adopted son of respondent no.1/Manubai and her husband Dashrath. It is contended that suit land is a joint family property and the respondent no.1 without having any authority alienated it to the respondent no.2. The suit is contested by the respondent by filing their

joint written statement. One of the pleas of the respondents is maintainability of the suit for declaration only.

5. The issues were settled and the evidence was led by the parties. Issue no.4 pertains to the maintainability of suit for solitary relief of declaration. The suit was decreed by judgment and decree dated 31.01.1985. Issue no.4 was answered in affirmative. Being aggrieved, RCA No.405/1989 was preferred by the Respondent No.2/purchaser before the District Court, Jalgaon.

6. At the appellate stage, the petitioner presented an application (Exhibit-17) for amendment to plaint, seeking incorporation of paragraph no.2(a) and prayer no. 1(a) and 2(a). By way of proposed amendment, the petitioner wanted to incorporate pleadings that the sale deed dated 03.09.1979 was held to be void and hence possession of respondents was illegal. In nutshell, the relief of possession is sought for the first time in the Appellate Court.

7. The respondents objected application by filing Say (Exhibit-19). By order dated 09.10.1997, application at Exhibit-17 was rejected, holding that there was inordinate delay in filing application for amendment to plaint and the relief of possession is barred by limitation. It is further held that no explanation has been tendered by the petitioner for seeking amendment belatedly.

8. Learned Counsel for the petitioner has made the following submissions:

(i) That the cause of action for seeking possession arose for the first time, when the status is conferred upon the petitioner after the pronouncement of the decree in present suit.

(ii) The alienation in question is held to be bad in law and not binding and consequently the petitioner is entitled to possession also.

(iii) The application (exhibit-17) has to be tested from the factum that entire alienation has been held to be void.

(iv) It is perversity to record that the relief is barred by

limitation as the limitation would reckon from the decree and therefore it is within limitation. He could not have sought the relief of possession prior to any declaration of his status which is confirmed by the decree.

(v) As the issue no.4 has been answered in affirmative, the clutches of Order 2 Rule 2 of CPC read with Section 34 of the Specific Relief Act would no more applicable. Hence he is entitled to claim possession.

(vi) The learned Judge has failed to appreciate that the issue of possession has been raised as an alternate relief and therefore the nature of the proceedings is not changing.

(vii) It is declared that the petitioner is the adopted son of the respondent no.1 and the alienation by the respondent no.1 in favour of respondent no.2 has been held to be invalid. Hence at the most the petitioner is entitled to possession of half of the suit land.

(viii) In rejoinder it is submitted that there is no question of any plea of adverse possession when the relief of declaration has already been rendered in favour of the petitioner.

9. Learned Counsel for the petitioner relied upon the

judgment in the matter of Hiranman Manga Jangale and Another Vs. Girjabai w/o Manga Jangale.

10. Per contra, learned Counsel for the respondents has made the following submissions :

- (i) Application (exhibit-17) does not spell any explanation for delay. Sale deed was executed on 03.09.1979. Suit was filed on 26.09.1979. It was decreed on 31.01.1985. Hence the proposed plea is hopelessly barred by time.
- (ii) The proposed amendment changes the nature of the proceeding. Originally it was a suit for declaration which is sought to be converted into suit for possession that too after full-fledged trial.
- (iii) The respondents have taken a plea that suit for solitary relief of declaration is not tenable, in the written statement. That was an opportunity to the petitioner, either to amend the plaint or to take appropriate steps to seek the relief of possession, which is lost by the passage of time and at the appellate stage, it is impermissible to claim possession.
- (iv) The sale deed was executed on 03.09.1979. The possession was also handed over on that date to the respondent no.1 that is an adverse possession and the

time reckons from 03.09.1979. Hence the relief of possession is apparently barred by time.

(v) There are no bonafides on the part of the petitioner for claiming the additional relief. In order to escape from the clutches of law, belatedly the proposed amendment is sought relief of possession.

11. Learned Counsel for the respondents seeks reliance upon the judgments in the following matters :

- (i) Shiv Gopal Sah alias Shiv Gopal Sahu Vs. Sita Ram Saraugi and Others
- (ii) Muni Lal Vs. Oriental Fire and General Insurance Co. Ltd. and Another
- (iii) Gangadhar Pandurang Puranik Vs. Dnyanoba Nivrutti Mundhe
- (iv) V. Rajaram V. Ramanujam Iyengar and Others.

12. I have considered rival submissions of the parties. The parties are ad-idem for the following facts :

- (i) The respondent no.1 executed sale deed on 03.09.1979 to the respondent no.2.
- (ii) The suit for solitary relief for declaration was filed

on 26.09.1979. It was decreed on 31.01.1985.

(iii) Issue no.4 was cast which is pertaining to Section 34 of Specific Relief Act read with Order 2 Rule 2 of CPC.

(iv) The suit was tried for a relief of declaration only.

(v) The relief is sought by the proposed amendment is for possession.

13. There is huge difference between relief of declaration and relief of possession. The parties litigated for the suit of declaration led evidence and when the matter reached the appellate forum the plaintiff sought to introduce new relief for possession. In my considered view, the nature of the proceedings is changing. The amendment at the appellate stage for the first time is impermissible.

14. The respondents filed written statement and contested the suit. The sale deed was executed on 03.09.1979. As the issue no.4 was cast it is indicative

of the fact that the plea was raised under Section 34 of Specific Relief Act read with Order 2 Rule 2 of CPC. Though specifically the written statement does not refer to such a plea. However there is paragraph no.4 of the written statement to make the petitioner alert. The petitioner has sufficient notice that his suit for relief of declaration was likely to be barred. Despite of that opportunity no steps were taken by the petitioner to raise additional plea of possession.

15. It is not the case of the petitioner that the sale deed was executed on 03.09.1979 and thereafter he lost possession. When suit was filed for declaration the relief of possession ought to have been claimed by him, but only relief of declaration was sought for. Under these circumstances, the petitioner chose to prosecute suit for declaration only. He is seeking to rectify mistake cannot be rectified by way of amendment under Order 6 Rule 17 of CPC at the appellate stages. That cannot be purport of the provisions.

16. The submissions of the learned Counsel for the petitioner that once there is a declaration that the alienation is invalid then he is entitled to claim possession, cannot be countenanced. The declaration of the status of the petitioner is a different thing than claiming the relief of possession. The petitioner had no possession. But he chose not to claim it for the reasons best known to him.

17. The limitation for the relief of possession reckons from the date of losing sale deed dated 03.09.1979. Therefore apparently the relief of possession is barred by limitation. I do not find any illegality or perversity in the findings recorded by the Lower Appellate Court in that regard.

18. The learned Counsel for the petitioner has submitted that the relief of possession is alternative plea and therefore that can be raised at the appellate stage specially when the relief of declaration was held to be

in his favour. I have already recorded that there is a change in a nature of the proceeding. When the relief in question was available to the petitioner, but not claimed then it is not permissible to claim the same relief. At the appellate stage, I do not approve the submission that relief of possession is an alternate plea.

19. The submission of the learned Counsel that atleast to the extent of half of the share he is entitled to possession is also devoid of any merit. This Court primarily is concerned with the fact whether the petitioner can amend the plaint. Whether the petitioner is entitled to possession of the half share of entire suit land would be the question of merits. However this Court is finding at the threshold that the relief of possession is apparently barred by time and there is a want of bonafide.

20. The reliance placed by the learned Counsel in the matter of Hiranman (supra), may not be enure to his

benefit. It pertains to section 5 and 6 of Hindu Adoption and Maintenance Act, 1956. It does not deal with the amendment at the appellate stage. I have gone through paragraph nos.6 to 10 of the said judgment. The facts in hand are different.

21. Learned Counsel for the respondents sought reliance upon the judgment of Shiv Gopal (supra). In that matter originally suit was filed for eviction against the tenant. An amendment was sought by the landlord to claim the relief of ownership. In that context, the following paragraph no.11 is relevant.

“11. We have gone through the amendment application carefully where we do not find any explanation whatsoever for this towering delay. We would expect some explanation, at least regarding the delay since the delay was very substantial. The whole amendment application, when carefully scanned, does not show any explanation whatsoever. This negligent complacency on the part of the plaintiffs would not permit them to amend the plaint, more particularly when the claim has, apparently, become barred by time.”

22. In the present matter also application (exhibit-17) does not spell out any explanation. It can be held that

present petitioner is negligent and the amendment at this stage is not permissible.

23. The remaining judgments cited by learned Counsel are in respect of the plea that adverse possession starts from the date of sale deed. The observation in paragraph no.11 and 12 in the matter of Gangadhar, paragraph no.6 in the matter of Muni Lal and in page no.741 of V. Rajaram would support the submissions of the respondents.

24. Considering the overall conspectus of the matter, I do not find any perversity and illegality in the impugned orders. The petition is devoid of any merit. Hence it is dismissed. Rule is discharged.

[SHAILESH P. BRAHME, J.]

Najeeb.