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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.9911 OF 2022

Vaishali Ravindra Arote and Others

PETITIONERS

VERSUS

Kashinath Keshav Auti and Others

RESPONDENTS

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Mr. Vinod Y. Bhide, Advocate for the petitioners

Mr. Shivprasad G. Jadhavar, Advocate for respondent No.1

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 9th MARCH, 2023

ORDER :

1. The petitioners are aggrieved by order dated 6th May, 2022 passed by Learned Civil Judge, Junior Division, Akole, below Exhibit-102 in Regular Civil Suit No. 54 of 2014, thereby allowing the application filed by plaintiff under Order VI, Rule 7 and under Order I, Rule 10 of the Civil Procedure Code.

2. The suit is filed by respondent No.1 – plaintiff, seeking partition of the ancestral properties and claiming one third share in the same and an injunction not to create any third party interest in the suit properties is also sought. The defendants appeared in the suit and resisted the claim of the plaintiff.

3. When evidence of the plaintiff was in progress, application Exhibit-102 is filed by the plaintiff seeking amendment in the plaint, so also in prayer clauses. By way of amendment, the respondent – plaintiff has sought a declaration of setting aside of sale deeds executed in favour of defendants No. 5, 6, 8, 9, 10 and 11, by other defendants and / or their family members. This order is under challenge in this petition.

4. Heard learned advocate for the petitioners and the learned advocate for the respondent. Perused the grounds raised in the petition and the affidavit in reply filed by the respondent so also the citations relied upon by both the sides.

5. In the plaint, the plaintiff has pleaded that those defendants who have sold ancestral properties standing in their names to the third party defendants i.e. defendants No. 5, 6, 8, 9, 10 and 11, those properties be given to the share of their respective vendors / defendants.

6. By way of amendment, the plaintiff seeks to challenge the sale deeds executed in favour of defendants No. 5, 6, 8 to 11. The amendment application is allowed by the Trial Court on the ground that order is passed by the Sub Divisional Officer, Sangamner in RTS Appeal No. 53 of 2018 on 31st December,

2021 and cause of action arose on that date and limitation also starts from that date.

7. Learned advocate for the petitioners assailed the impugned order claiming that the sale deeds are executed in favour of the petitioners in the year 2007 and 2010. By way of proposed amendment, the plaintiff is trying to withdraw the admissions given in favour of the petitioners that the properties purchased by them be given to the share of their respective vendors. He further submits that the prayer sought to be incorporated by way of amendment is beyond limitation and, therefore, the Trial Court ought to have rejected the application for amendment (Exhibit-102). In support of his submissions, he relies on ***"M/s Ravajeetu Builders and Developers V/s M/s Narayanaswamy and Sons and Others"* 2009 AIR SCW 6644** and ***"South Konkan Distilleries and Another V/s Prabhakar Gajanan Naik and Others"* 2008 AIR SCR 2485**.

8. On the other hand, learned advocate for the respondent – plaintiff, by relying on ***"Life Insurance Corporation of India V/s Sanjeev Builders Private Limited and Another"* 2022 SCC Online SC 1128** supports the impugned order. He submits that after decision of the Sub Divisional Officer in the RTS appeal, the plaintiff has filed the application, which is rightly allowed by

reasoned order, by the Trial Court. Hence, no case is made out by the petitioners to interfere in the extraordinary writ jurisdiction.

9. It is not in dispute that the properties were purchased by the petitioners in the year 2007 and 2010. At the time of filing of the suit, the plaintiff has specifically pleaded that the properties, which were purchased by third party defendants, from the defendants, be given to the share of their respective vendors/defendants. By way of amendment, the plaintiff is withdrawing this admission given in favour of the purchasers / third party defendants.

10. Apart from this, prayer for setting aside sale deeds could have been made by the plaintiff at the time of filing of suit, which he has not made, so also the said prayer is beyond limitation and could not have been entertained by the Trial Court. The Trial Court has committed an error in arriving at a conclusion that since the Sub Divisional Officer has passed order on 31st December, 2021, limitation would start from that date. This approach of the Trial Court is erroneous.

11. Learned advocate for the petitioners is right in placing reliance on "*M/s Revajeetu Builders and Developers*" (*supra*),

wherein it is held that proposed amendment if allowed, would affect rights of the respondents adversely and would not only have effect of plaintiff getting rid of the admissions made in the original plaint but defeating provisions of Order 12, Rule 6 of the Civil Procedure Code and such amendment should not be permitted.

12. Applying above ratio to the facts of the present case, amendment sought is not imperative or proper for effective adjudication of the case and the proposed amendment since fundamentally changes nature and character of the suit, the same ought to have been rejected by the Trial Court.

13. In "***South Konkan Distilleries***" (*supra*), it is held "*Also in the matter of allowing amendment of pleadings, the general rule is that a party is not allowed by amendment to set up a new case or new cause of action, particularly when a suit on the new cause of action is barred*".

14. Taking into consideration the fact that the sale deeds were executed in favour of the petitioners in the years 2007 and 2010 and plaintiff was well aware of this fact at the time of filing of the suit, the relief now claimed by the plaintiff, of setting aside the sale deeds executed in favour of the petitioners, can be said to

be time barred.

15. In ***"Life Insurance Corporation of India"*** (*supra*), the Supreme Court has held :

"70. Our final conclusions may be summed up thus:

(I) Order II Rule 2 CPC operates as a bar against a subsequent suit if the requisite conditions for application thereof are satisfied and the field of amendment of pleadings falls far beyond its purview. The plea of amendment being barred under Order II Rule 2 CPC is, thus, misconceived and hence negatived.

(ii) All amendments are to be allowed which are necessary for determining the real question in controversy provided it does not cause injustice or prejudice to the other side. This is mandatory, as is apparent from the use of the word "shall", in the latter part of Order VI Rule 17 of the CPC.

(iii) The prayer for amendment is to be allowed

(i) if the amendment is required for effective and proper adjudication of the controversy between the parties, and

(ii) to avoid multiplicity of proceedings, provided

(a) the amendment does not result in injustice to the other side,

(b) by the amendment, the parties seeking amendment does not seek to withdraw any clear admission made by the party which confers a right on the other side and

(c) the amendment does not raise a time barred claim, resulting in divesting of the other side of a valuable accrued right (in certain situations).

(iv) A prayer for amendment is generally required to be allowed unless

(i) by the amendment, a time barred claim is sought to be introduced, in which case the fact that the claim would be time barred becomes a relevant factor for consideration,

(ii) the amendment changes the nature of the suit,

(iii) the prayer for amendment is malafide, or

(iv) by the amendment, the other side loses a valid defence.

(v) In dealing with a prayer for amendment of pleadings, the court should avoid a hypertechnical approach, and is ordinarily required to be liberal especially where the opposite party can be compensated by costs.

(vi) Where the amendment would enable the court to pinpointedly consider the dispute and would aid in rendering a more satisfactory decision, the prayer for amendment should be allowed.

(vii) Where the amendment merely sought to introduce an additional or a new approach without introducing a time barred cause of action, the amendment is liable to be allowed even after expiry of limitation.

(viii) Amendment may be justifiably allowed where it is intended to rectify the absence of material particulars in the plaint.

(ix) Delay in applying for amendment alone is not a ground to disallow the prayer. Where the aspect of delay is arguable, the prayer for amendment could be allowed and the issue of limitation framed separately for decision.

(x) Where the amendment changes the nature of the suit or the cause of action, so as to set up an entirely new case, foreign to the case set up in the plaint, the amendment must be disallowed. Where, however, the amendment sought is only with respect to the relief in the plaint, and is predicated on facts which are already pleaded in the plaint, ordinarily the amendment is required to be allowed.

(xi) Where the amendment is sought before commencement of trial, the court is required to be liberal in its approach. The court is required to bear in mind the fact that the opposite party would have a chance to meet the case set up in amendment. As such, where the amendment does not result in irreparable prejudice to the opposite party, or divest the opposite party of an advantage which it had secured as a result of an admission by the party seeking amendment, the amendment is required to be allowed. Equally, where the amendment is necessary for the court to effectively adjudicate on the main issues in controversy between the parties, the amendment should be allowed. (See Vijay Gupta v. Gagninder Kr. Gandhi & Ors., 2022 SCC OnLine Del 1897)”

16. Applying above observations to the case in hand, it has to

be held that the amendment since raises a time barred claim resulting in divesting of the petitioners valuable accrued right and since the amendment changes nature of the suit, the amendment cannot be sustained.

17. In the result, the writ petition is partly allowed. Impugned order dated 6th May, 2022 passed by Learned Civil Judge, Junior Division, Akole, below Exhibit-102 in Regular Civil Suit No. 54 of 2014 to the extent it permits proposed pleadings in respect of sale deeds and prayers to set aside those sale deeds, is hereby quashed and set aside. Rest of the order is maintained.

[NITIN B. SURYAWANSHI]
JUDGE