

AGK

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.8689 OF 2022

Minakshi Suresh Gujar & Ors.

... Petitioners

V/s.

Balaji Raju Gujar, since deceased
through heirs & LRs & Ors.

... Respondents

Mr. Shailendra S. Kanetkar for the petitioners.

Mr. Sumit S. Kothari for respondent Nos.1A to 1D, 2, &
2A to 2G.

CORAM : AMIT BORKAR, J.

DATED : AUGUST 30, 2023

PC.:

1. This is a writ petition under Article 227 of the Constitution of India challenging order dated 22 January 2018 allowing amendment to incorporate relief of possession in a suit for injunction.

2. Learned advocate for the petitioners relying on statements made in the writ statement filed on 2 December 1999 submitted that the plaintiff was made aware of denial of his ownership by filing written statement in the year 1999. Therefore, it was obligatory for the plaintiff to amend the suit within twelve years from the date of filing of the written statement; however, the plaintiff filed application for amendment on 16 December 2017

which is *ex facie* barred by limitation. In support of his submissions, he relied on the judgments of the Apex Court in **Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil & Ors.** reported in AIR 1957 SC 363 and **L.C. Hanumanthappa (since deceased) represented by his legal representatives v. H.B. Shivakumar** reported in (2016) 1 SCC 332.

3. Per contra, learned advocate for the plaintiff relying on the judgments in **Raghu Thilak D. John v. S. Rayappan & Ors.**, (2001) 2 SCC 472; **Pankaja & Anr. v. Yallappa & Ors.**, (2004) 6 SCC 415; **Mahila Ramkalidevi & Ors. v. Nandaram & Ors.**, (2015) 13 SCC 132; and **Mohinder Kumar Mehra v. Rooprani Mehra**, (2018) 2 SCC 132 submitted that whether amendment is barred by limitation or not is an arguable question which needs to be decided by the Trial Court at the time of final hearing and, therefore, the Trial Court was within its power to allow the amendment. According to him, the plea raised being alternative plea, the Trial Court has rightly allowed the amendment.

4. I have heard both the sides.

5. Following facts are not in dispute: (i) the respondent (plaintiff) filed Regular Civil Suit No.61 of 1998 in the year 1998; (ii) the petitioner (defendant) filed written statement *inter alia* denying title of the plaintiff on 2 December 1999; (iii) on 16 February 2017, application for amendment of the plaint to incorporate alternative plea of possession was filed; and (iv) the

application for amendment was filed after the evidence of both sides was over and the suit was fixed for final arguments.

6. Five Judges Bench of the Apex Court in **Pirgonda Hongonda Patil** (supra) has laid down following test for allowing the amendment application. It is held that all amendments sought to be allowed which satisfies two conditions: (a) of not causing injustice to other side; and (b) being necessary for the purpose of determining real question in controversy between the parties. It is held that the amendment should be refused where the party cannot be placed in the same position as if the pleadings had been originally occurred but the amendment would cause him an injury which would not be compensated in terms of money. The ultimate test laid down was can the amendment be allowed without injustice to other other side.

7. In the facts of the present case, apart from the fact that on the date of filing of application for amendment, the plaintiff could not have filed suit for possession in view of denial of his ownership in the year 1999, the initial frame of the suit was for suit for injunction restraining defendant from disturbing his possession and for declaration that defendants are not owners of the suit property, the defendant raised plea of denial of title of the plaintiff. It, therefore, appears that there was cloud on the tile of the plaintiff. It is well settled in view of the judgment of the Apex Court in **Anathula Sudhakar v. P. Buchi Reddy (Dead) by LRs & Ors.** reported in (2008) 4 SCC 594. Suit for injunction not to disturb possession without declaration of ownership is not maintainable when title was under cloud.

8. The frame of the present suit appears to be suit for declaration and injunction but the declaration is not declaration of his title but a declaration to hold that the defendant has no right, title and interest in the property. Therefore, in my view on the date of filing of application for amendment, defendant was entitled to raise plea of non-maintainability of suit. However, by introducing relief of possession, the right of defendant to raise plea of maintainability of suit would be taken away and taking away such right cannot be compensated in terms of money. Therefore, in my opinion, apart from the fact that relief claimed was *ex facie* barred by limitation, allowing of such amendment would cause injustice to the defendant. Therefore, the Trial Court was not justified in allowing such amendment.

9. In so far as the judgments relied upon by the respondent in **Raghu Thilak D. John v. S. Rayappan & Ors., Pankaja & Anr. v. Yallappa & Ors., Mahila Ramkalidevi & Ors. v. Nandaram & Ors.,** and **Mohinder Kumar Mehra v. Rooprani Mehra** (supra) are concerned, the proposition of law laid down is that when in a suit where issue of limitation is arguable question, the Trial Court should allow the amendment subject to keeping open the point of limitation. However, it is well settled principle that if on the date of filing of amendment application the person applying for amendment was not in a position to file a suit being barred by limitation, such amendment ought not to be allowed.

10. Learned advocate for the respondents submitted that limitation to seek relief of possession as per Article 65 would begin

only when possession becoming adverse. Mere denial of his title in the written statement would not constitute possession becoming adverse under Article 65 of the Limitation Act.

11. It needs to be noted that the possession becoming adverse under Article 65 of the Limitation Act and the concept of adverse possession operate in different fields. The possession becoming adverse as contemplated by Article 65 of the Limitation Act is the event when the plaintiff has notice of his right being denied by the other side. The Apex Court in paragraph 22 in **Krishna Pillai Rajasekharan Nair (dead) by LRs v. Padmanabha Pillai (dead) by LRs & Ors.** reported in (2004) 12 SCC 754 has observed in relation to the suit for partition that when the plaintiff has notice of his entitlement to partition being denied. In my opinion, therefore, in the present case the plaintiff had notice of his title being denied by way of written statement in the year 1999. The application, therefore, filed in the year 2017 is *ex facie* barred by limitation. Therefore, in my opinion, the order passed by the Trial Court deserves to be set aside. Hence, following order:

- (a) The impugned order dated 22 January 2018 passed by the learned Civil Judge Junior Division, Khed in application below Exhibit 250 in Regular Civil Suit No.651 of 1998 is set aside;
- (b) Application below Exhibit 250 in Regular Civil Suit No.651 of 1998 stands rejected;

12. The writ petition stands disposed of in above terms. No costs.

(AMIT BORKAR, J.)