

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2830 OF 2023

Padmanna Devendra Upadhye

Deceased by heirs

Kanchanmala Padmanna Upadhye & Ors.

...Petitioners

Versus

Chandrakant Parisa Upadhye

Deceased by heirs

Surekha Chandrakant Upadhye & Ors.

...Respondents

Mr. V. B. Rajure for the Petitioner.

Mr. Surel S. Shah i/b Mr. Swaroop Kanade for Respondents A to C.

Coram : Sharmila U. Deshmukh, J.

Date : August 1, 2023.

P. C. :

1. Heard.
2. The challenge in the Petition is to the order dated 22nd July, 2022 rejecting the Petitioner's Application for amendment of the plaint on the ground of limitation. For sake of convenience, parties are referred to by their status before the Trial Court.
3. The facts of the case are that in the year 1999 Regular Civil Suit No.

230 of 1999 was instituted by the Petitioners-Plaintiffs for the possession of the suit property which came to be dismissed on 25th September, 2001 for non prosecution and abatement as the legal representative of the Defendant was not brought on record within the prescribed time, as against which the Plaintiff filed Regular Civil Appeal No. 7 of 2002. On 2nd May, 2002 and 9th February, 2004 the legal representative sold the suit property in favour of the Shripal Gangappa Chaugule by registered Sale Deed. Regular Civil Appeal No. 7 of 2002 came to be withdrawn and Misc. Application was filed for restoration of Regular Civil Suit No. 230 of 1999 which was restored in the year 2008, in which counter claim was filed on 3rd September, 2009, in which the said Shripal Gangappa Chaugule was made a party.

4. In the year 2015, the Trial Court decreed the Suit and dismissed the counter claim for specific performance which was challenged by the Defendant by way of Regular Civil Appeal No. 37 of 2015 and Regular Civil Appeal No. 48 of 2016. In this proceeding the Appellate Court remanded the matter as Shripal Gangappa Chaugule was not made a party and *suo moto* directed addition of the Shripal Gangappa Chaugule as a party as against which Writ Petitions were filed and the order of the Appellate Court came to be set aside by this Court wide order dated 9th

March, 2021 and the Appeal was restored to file to decide the same afresh in accordance with law.

5. On 3rd December, 2021 the Application was filed under Order 6 Rule 17 read with Order 1 Rule 10 of CPC by the Plaintiff in Regular Civil Appeal No. 37 of 2015 seeking amendment to implead Shripal Gangappa Chaugule as party and to challenge the sale deed of the year 2002 and 2004 which came to be rejected by the impugned order, given rise to the present Petition.

6. Learned counsel appearing for the Petitioner submits that the Application has been rejected on the ground of limitation and the limitation being a mixed question of fact and law issue in that regard is required to be framed and the amendment ought to be liberally allowed. He would further contend that it is evident from the events which have taken place that during the pendency of Civil Appeal preferred against the dismissal of the suit for non prosecution, the registered sale deeds have been executed. He would further submit that the Appellate Court had held that Shripal Gangappa Chaugule was necessary party and although the said order was set aside by this Court, the fact remains that the property being sold to Shripal Gangappa Chaugule he is a necessary and proper party.

7. Learned counsel appearing for the Respondent submits that the claim is *ex-facie* barred by limitation inasmuch as registered sale deed of the year 2002 and 2004 are sought to be challenged. He would further contend that in the counter claim which was filed in the year 2009 the said fact has been clearly mentioned and the Petitioner was well aware that in the year 2002 and 2004 the suit property has been sold in favour of the said Shripal Gangappa Chaugule and he was also made a party in the counter claim.

8. Learned counsel appearing for the Petitioners have sought to place reliance on the following decisions.

- 1] *Ragu Thilak D. John v. S. Rayappan & Ors.*, [AIR 2001 SCC 699]
- 2] *Pankaja & Anr. v. Yellappa (d) by L.Rs. & Ors.*, [AIR 2004 SCC 4102]
- 3] *Mahila Ramkali Devi & Ors. v. Nandram (dead) Through Legal Representatives & Ors.*, [(2015) 13 SCC 132]
- 4] *Bhimrao Laxman Kamble v. Annaso Dhondiram Manole* [2018(2)Mh.L.J.]
- 5] *N. C. Banerjee & Company v. Manoj Balkrishna Shah & Ors.*, [2011(6) Mh.L.J.]

9. Considered the submissions.

10. The sequence of events which have been narrated above are not in dispute. It is admitted position that the counter claim was filed on 3rd

September, 2009 in which the said Shripal Gangappa Chaugule has been added as Defendant No. 4 and specific assertion has been made that vide registered sale deed dated 2nd May, 2002 and 9th February, 2004 the said suit property has been sold to Shripal Gangappa Chaugule. By the present amendment application of the year 2021, the Plaintiffs seeks to implead Shripal Gangappa Chaugule as a party to the proceeding and seeks to incorporate a challenge to the sale deed of the year 2002 and 2004 as being illegal and not binding on the share of the Plaintiff.

11. Considering that the execution of the sale deeds was within the knowledge of the Plaintiff in the year 2009 itself, it cannot be said that the question of limitation would be a mixed question of fact and law. In event there is a dispute about acquiring of knowledge about the execution of the sale deeds, the same would necessitate leading of evidence to substantiate that the knowledge about the sale deed was acquired at a particular time. It is only when disputed question of fact are raised, it can be said that the question of limitation is a mixed question of fact and law. In the present case, considering that the counter claim has been filed in the year 2009 in which the specific assertion is there about the execution of the sale deed of the year 2002 and 2004 the challenge to the sale deed which is sought to be raised by way of the proposed amendment in the year 2021 is

ex-facie barred by limitation.

12. The Apex Court in the case of ***Life Insurance Corporation of India v. Sanjeev Builders Pvt. Ltd. [2022 SCC OnLine SC 1128]*** has held that it is not an absolute rule that in every case where a time barred claim is raised the same is required to be dismissed and such an application has to be decided in the facts and circumstances of each case. In the present case, considering that the Petitioners had acquired knowledge in the year 2009 itself and no Application was filed seeking to incorporate the challenge of the sale deed of the year 2002 and 2004, the proposed amendment raises a claim which is *ex-facie* barred by limitation.

13. In view of the above, I am not inclined to interfere with the impugned order dated 22nd July, 2022. The Writ Petition being devoid of merit stands dismissed.

[Sharmila U. Deshmukh, J.]