

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5635 OF 2019

Ramesh Chunilal Kisani.

...Petitioner.

Versus

Sangeeta Surendra Udeshi and Others.

..Respondents.

Mr. Zaid S. Ansari and Mr. Mangesh R. Kokare i/b Zaid Ansari & Associates for the petitioner.

Coram : Sharmila U. Deshmukh, J.

Date : July 18, 2023.

P. C. :

1. The challenge in the petition is to the order dated 4th March 2019 passed in SC Suit no.1524 of 2012 permitting the plaintiff for joining the proposed respondents as defendants and for carrying out certain amendments.
2. The application in question was filed under the provisions of order 6 rule 17 read with order 1 rule 10 of CPC, seeking to implead the son of the petitioner, that is, Mayur Ramesh Kisani and one Sunil Ramesh Khanna and for consequential amendments in the plaint for the purpose of challenging the gift deed of the year 2008 executed in favour of said Sunil Ramesh Khanna and the gift deed executed in favour of Mayur Ramesh Kisani in the year 2011.

3. Heard learned counsel appearing for the petitioner.
4. Learned counsel appearing for the petitioner submits that the suit was filed simpliciter for injunction restraining the petitioner who is defendant no.1 therein from creating any third party rights in respect of the suit premises being a flat situated at Kandivali. He would further contend that in respect of the said flat, an application was taken out by respondent no.1-original plaintiff seeking restraining orders against the petitioner from creating 3rd party rights in which an affidavit-in-reply to oppose the relief was filed by the petitioner and it was stated in the said reply that the suit premises had already been transferred by late Chunnilal Hiranand Kisani in favour of the son of petitioner in the year 2011. He would further contend that after the filing of affidavit-in-reply, Chamber Summons No.551 of 2012 was filed on 3rd September 2012 to implead the proposed respondents. He would contend that the said chamber summons came to be dismissed for default and the second chamber summons giving rise to the impugned order has been filed in the year 2017. He would further submit that by the second chamber summons, the challenge to the gift deeds of the year 2008 and of the year 2011 is hopelessly barred by limitation and as such the amendment ought not to be allowed.

5. Considered the submissions.

6. It is the petitioner's own case that in the reply to the interim application filed by respondent no.1, it was brought to the notice of respondent no. 1 that the suit premises had been transferred by the original owner in favour of the son of petitioner. Subsequently, the chamber summons was taken out in the year 2012 seeking to implead the proposed respondents, as it was disclosed that there was previous gift deed of the year 2008 executed in favour of Sunil Khanna as well as the gift date of the year 2011 executed in favour of Mayur Ramesh Kisani. The trial court has considered the proposed amendment and has held that the same are necessary for deciding the real controversy in issue and has kept open the issue of limitation. As per the relief sought in the plaint, the petitioner claims certain rights in respect of the suit premises. It is stated that in respect of the said flat, the gift deeds have been executed in the year 2008 as well as 2011 in favour of the proposed respondents. That being so, the proposed respondents are necessary parties inasmuch as without their presence no effective decree can be passed. Further as regards the issue of limitation the trial Court while granting the proposed amendment, has kept the issue of limitation open. The apex court in the case of **LIC vs Sanjeev Builders [2022 SCC OnLine SC 1128]** has held that there is

no absolute rule that in all cases if a time barred claim is raised, the same is required to be dismissed. In the present case it is the petitioner's own case that it is only after the reply of petitioner was filed, that respondent no.1-plaintiff acquired the knowledge about the gift deeds. The question of limitation in the present case being a mixed question of fact and law, the proposed amendment could not have been rejected outright on the ground of limitation.

7. As regards the submission that the earlier chamber summons being dismissed for default, the same will not operate as *res judicata*, for the reason that the issue of *res judicata* will not apply in the same suit in which the proposed amendment has been sought.

8. The supervisory jurisdiction of this court has been invoked against the interlocutory order permitting the amendment and this court is not inclined to interfere with said interlocutory order and it is always open for the petitioners to set forth the irregularity of the present order as a ground for objection in event the suit is decreed.

9. In view of the above, the petition fails and is hereby dismissed.

[Sharmila U. Deshmukh, J.]