

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7125 OF 2023

M/s. Samarth Developers

...Petitioner.

Versus

Dr. B.N. Maheshwari & Ors.

..Respondents.

Mr. Nirman Sharma i/b Mehul A. Shah for the petitioner.

Mr. Rupesh Lanjekar for respondent no.1.

Coram : Sharmila U. Deshmukh, J.

Date : July 19, 2023.

P. C. :

1. Heard.

2. The challenge in the petition is to the order dated 20th February 2023 allowing the respondent no.1's application for amendment. By the impugned order, apart from permitting respondent no.1-plaintiff to include the legal heirs of original owner, the trial court has permitted respondent no.1 to challenge the conveyance which was executed in favour of the petitioners by original defendant nos.1 and 2 in the year 2007.

3. Heard Mr. Sharma, learned counsel appearing for the petitioner and Mr. Lanjekar, learned counsel appearing for

respondent no. 1

4. Mr. Sharma learned counsel appearing for the petitioner has invited the attention of this court to the averments made in the plaint. He would contend that Suit no. 84 of 2009 was instituted by the plaintiff seeking a declaration as regards the rights of the plaintiff under an agreement which was executed between the plaintiff and original defendant no. 4 in respect of the suit flat in the proposed project of dependent no.4. He would further point out that the petitioners were party to the proceedings and there is a specific averment made in paragraph no.15 of the plaint as regards the deed of conveyance dated 7th July 2007 executed by defendant nos.1 and 2 in favour of the petitioner. He would urge that being so, the challenge in the year 2014 by the proposed amendment is clearly barred by limitation. He would contend that by the proposed amendment, the original plaintiff seeks a declaration as regards the title of the original owner which is now vested in the petitioners. He would further submit that a suit seeking the specific performance of agreement between the plaintiff and defendant no.4 is now sought to be converted into a suit challenging the title in respect of the suit property which is impermissible. He would further submit that apart from the issue of limitation, the proposed amendment changes the nature of suit and as such is clearly impermissible. In support of his contentions

Mr Sharma relies upon the following decisions:

[1] Wellknown Textile Industries Pvt Ltd v. Neelkamal Realtors Towers Pvt Ltd [rendered by Single Judge of this Court in Interim Application (Ld.) No. 7232/23 (O.S.), dated 26th June 2023.

[2] Kasturi v. Iyyamperumal [(2005) 6 SCC 733]; and

[3] K. Raheja constructions Ltd v. Alliance Ministries [1995 Supp (3) SCC 17].

5. *Per Contra*, Mr. Lanjekar, learned counsel for respondent no.1 submits that it is clear from the averments made in the application that the plaintiff became aware from the reply of defendant no.3 that defendant no.3 has purchased the remaining portion of the suit property under the deed of conveyance dated 3rd July 2007. He would further contend that the amendment being a pre-trial amendment ought to be liberally allowed. As regards the issue of limitation, he would urge that the said question being a mixed question of fact and law, the same is matter of trial. In support of his submission Mr. Lanjekar relies upon the decision of this Court in ***Bharat Petroleum Corporation Ltd v. Precious Finance Investment Pvt. Ltd [2007(1) Mh.L.J. 331]***

6. Considered the submissions of learned counsel appearing for the respective parties.

7. The suit as framed sought the relief of declaration of the rights of the plaintiff in the suit property pursuant to an agreement which was executed between the plaintiff and defendant no.4. The impleadment of defendant nos.1, 2 and 3 in the said proceeding makes it evident that the plaintiff had knowledge about the deed of conveyance dated 3rd July 2007 and in fact there is a specific pleading in paragraph no.15 of the plaint. That being so, suit which was instituted in the year 2009 did not challenge the deed of conveyance of the year 2007 executed between defendant nos. 1 and 2 and defendant no.3.

8. The submission of Mr. Lanjekar, learned counsel for respondent that it is only upon the reply which was filed by defendant no.3 that the plaintiff became aware of the deed of conveyance, is contrary to the material which is on record. If we peruse the application for amendment which has been filed, the said application simpliciter says that the erstwhile owner could not have entered into the subsequent deed / contract dated 7th July 2007 in favour of defendant no.3. The application is completely bereft of any details as to when the knowledge was acquired so as to make it a mixed question of fact and law to be decided at the time of trial. In any event the plaint is specific inasmuch as it contains an averment as regards the deed of conveyance which

was executed on 3rd July 2007. In my opinion, the challenge to deed of conveyance of the year 2007, in the year 2015 is clearly barred by limitation. In such event, relegating the issue to be decided at the time of trial would be an exercise in futility and *ex-facie* time barred claims ought not to be permitted to be raised by way of an amendment.

9. As regards the change in the nature of suit is concerned, the documents on record show that the suit sought declaration of rights of the plaintiff under an agreement executed for the purchase of a flat in the proposed project of defendant no.4. The proposed amendments, namely, Clauses (v) and (vii) which are in the schedule of amendment at page no.70, if permitted would change the suit for a specific performance of contract into a suit for title.

10. The unreported decision of this Court in ***Wellknown Textile Industries Pvt Ltd (supra)*** which is relied upon by the learned counsel for the petitioner is squarely applicable to the facts of the present case. This court while deciding the issue of amendment has observed in paragraph 10 as under :

"10. As regards amendment in the pleadings proposed on behalf of the plaintiff in both the suits, in

order to seek amendment of the prayer clauses, for challenging the aforesaid conveyance deed, this Court finds that looking to the scope of the two suits and the nature of grievance raised therein on behalf of the plaintiff, allowing such amendment to the pleadings and the prayer clauses, would result in changing the very nature of the suit. The real question in controversy in the two suits filed by the plaintiff, concerns grievance of the plaintiff regarding allotment of the two flats and the loss suffered due to the inordinate delay on the part of the original defendant to abide by the timelines for completion of the said project. This being the real question in controversy in the two suits, challenge to the aforesaid conveyance deed is completely foreign to the real controversy and therefore, as per settled law, the proposed amendment to that extent, cannot be granted."

11. As regards the decision which has been relied upon by learned counsel for the respondent, there is no quarrel with the proposition that the amendments which are pre-trial amendments ought to be allowed liberally. However, in the present case by way of proposed amendments, a time barred claim is sought to be raised and further proposed amendment has the effect of changing the nature of suit, which is impermissible even in the case of pre-trial amendment. As such, keeping rest of the amendments as far as the impleadment of legal heirs of original owner and the consequential amendment in that behalf, the amendments detailed in clause (V) and (VII) of the schedule of amendments stand deleted.

12. The trial court while deciding the chamber summons has

not taken into consideration the primary submission of defendant no.3 that the proposed amendment changes the nature of suit. The trial court appears to have swayed by the fact that the issue of limitation being a mixed question of fact and law, is required to be adjudicated at the time of trial. The trial court observed that the proposed amendments which are necessary to decide the real controversy in the suit is required to be permitted. The said observation is correct. However, the same has to be considered in the background of the suit and the reliefs claimed there in viz-a-viz, the proposed amendments. As the issue of title could not have been gone into while deciding the issue of specific performance of agreement to sell executed between the plaintiff and defendant no. 4, the deed of conveyance of the year 2007 is not the real controversy between the parties. As such the proposed amendment changes the nature of suit.

13. In view of above, writ petition stands allowed. The proposed amendments in Clause (v) and (vii) of the schedule of amendment is quashed and set aside.

[Sharmila U. Deshmukh, J.]