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

**WRIT PETITION NO. 7452 OF 2022**

Rupali Pravin Mokashi

... Petitioner

vs.

Dagadu Vithoba Kadu and Anr.

... Respondents

Mr. S. R. Page for the Petitioner.

Mr. Kishor S. Patil for Respondent nos. 2 to 5.

**CORAM : SANDEEP V. MARNE, J.**

**DATED : 24 JANUARY, 2023**

**P.C. :-**

1. The petitioner challenges order dated 8 March 2021 passed by the 5<sup>th</sup> Jt. Civil Judge, (S.D.), Pune rejecting the plaintiff's application for amendment of the plaint. By this application at Exhibit 139 the applicant sought amendment of the plaint to seek a declaration that the Gift Deed No. 853 of 1948 is void and not binding on the share to the plaintiff.

2. The application for amendment is rejected by the trial court on the ground that the Gift Deed was executed on 7 April 1948 and existence of such Gift Deed was evidenced by mutation entry. This aspect was sought to be

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countered by the plaintiff on assertion that the mutation entry was never certified. The trial court has brushed aside non-certification of the mutation entry and proceeded to reject the application for amendment.

3. The trial in the suit has apparently not yet commenced, though issues are settled. Thus the amendment is sought to be introduced prior to the commencement of the trial and in that sense it is not necessary for the plaintiff to prove due diligence. The only issue therefore that remains is whether the amendment is necessary for the purpose of determining the real question of controversy between the parties. The trial court has not held that the amendment introduces a new case or that the same is not necessary for determining the real question of controversy between the parties. The only ground on which amendment is denied is on account of delay in introducing the same.

4. In *Life Insurance Corporations vs. Sanjeev Builders Pvt. Ltd.*<sup>1</sup> the Apex Court has summarised the principles relating to amendment of pleadings and it has held in paragraph 70 as under:

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<sup>1</sup> 2022 SCC Online SC 1128

“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 mala fide, 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 pin-pointedly 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.

Thus all amendments which are necessary for the purpose of determining the real question of controversy between the parties, if introduced prior to commencement of the trial, should normally be allowed.

5. True it is that the Apex Court has held that if the amendment which are sought to be introduced are prima facie barred by limitation, the same can be refused. In the present case however the petitioner/plaintiff made specific averment in his application for amendment that he was not aware of the existence of Gift Deed executed on 7 April 1948 and that he acquired knowledge about the same only

when the defendants filed it along with their additional written statement dated 29 April 2017.

6. This aspect will have to be proved by the plaintiff by leading necessary evidence. Thus it is not the case that the plaintiff was aware of existence of the Gift Deed but chose not to incorporate pleadings and reliefs relating to the same in his suit.. Also of relevance is the fact that the defendants sought to defend the suit by filing written statement but did not disclose existence of Gift Deed dated 7 April 1948. The said Gift Deed came to be disclosed for the first time on 29 April 2017 when additional written statement was filed. This leaves the issue of alleged acquisition on knowledge about existence of Gift Deed on the strength of mutation entry. True it is that on the basis of Gift Deed dated 7 April 1948 the mutation entry was sought to be effected and the name of the defendants came to be mutated to the record of rights.

7. Learned Advocate for the respondent however fairly admits that the mutation entry was in pencil and was not finally certified. It is therefore difficult to record a finding as of now whether the plaintiff could have acquired

knowledge of existence of the Gift Deed merely on account of the name of the defendants being mutated to the record of right. All these aspects will have to be considered once evidence is led by the rival parties even on the issue of limitation.

8. Considering the fact that the trial court has not recorded finding that the amendments introduce new case or that the same is not necessary for the purpose of determining the real question of controversy between the parties, I am of the view that the trial court ought not to have rejected the amendment only on the ground of delay. Delay in setting up challenge to the Gift Deed dated 7 April 1948 is something which will have to be decided as a separate issue, after the amendments are allowed. No opinion is expressed in the present order on that issue.

9. Consequently the Writ Petition succeeds. Order dated 8 March 2021 passed by 5<sup>th</sup> Jt. Civil Judge, (S.D.), Pune is set aside and the plaintiff's application for amendment at Exhibit 139 stands allowed in terms of prayers made therein.

10. Needless to say that the defendants in the suit will have opportunity to file additional written statement to the amended plaint.

11. In view of the above Writ Petition is allowed.

**(SANDEEP V. MARNE, J.)**