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

WRIT PETITION NO. 9801 OF 2019

Mr Bharat Mulji Khona Proprietor of M/s Payal Enterprises ... Petitioner

vs.

M/s. Fiza Construction Co. through Prop. Shri. G.R. Mujawar and Ors. ... Respondents

Mr. Nishant Tripathi, a/w Mr Somnath Iyer, i/b M. Tripathi and Co., for the Petitioner.

None for the Respondents.

CORAM: GAURI GODSE, J.

DATED: 13th APRIL, 2023

P.C.:-

1. Heard learned counsel for the Petitioner. The Petition challenges the Order dated 23rd November 2018 passed by the Learned Civil Judge Senior Division, Panvel, below Exhibit-40 in Special Civil Suit No. 140 of 2008. By the impugned order, an application filed by Plaintiff for amending the Complaint has been allowed.

2. Learned counsel for the Petitioner submitted that the proposed amendment shows that the reliefs sought by Plaintiff by way of the amendment are barred by limitation. He submitted that there is no explanation given for not seeking these reliefs at an earlier date. In support of this submission, the learned counsel for the Petitioner relied

upon the decision of the Hon'ble Supreme Court in the case of *South Konkan Distilleries and Another v Prabhakar Gajanan Naik and Ors*¹. By relying upon the said decision, he submitted that if an amendment claim is barred by law of limitation on the date of application, the amendment should not be allowed. The learned counsel invited my attention to the proposed amendment, which seeks to challenge the transaction of the year 2008. He, therefore, submitted that the claim made by Plaintiff by way of the amendment is barred on the face of it, and hence amendment application should not have been allowed.

3. He also submitted that the Petitioner is added as party Defendant on an application made by Plaintiff as well as an application made by the Petitioner for adding him as a party Defendant to the suit. He, therefore, submitted that there was no reason to make an application for amendment at a belated stage. Hence, the reasons given by the learned Judge for allowing the amendment application are unacceptable, and hence, the Order needs to be set aside. He also submitted that in the event the Order granting amendment is confirmed, the Petitioner's right to challenge the claim as barred by limitation would be foreclosed.

4. I have considered the submissions made by the learned counsel for the Petitioner. I have perused the record of the Writ Petition. The impugned order itself records that the Petitioner had got himself added as

¹ (2008) 14 SCC 632

a party claiming on the basis of a prior transaction with three persons and compromise decree thereupon. The impugned order records the objections raised by the Petitioner to the proposed amendment. The learned Judge has rightly held that the objections raised by the Petitioner would become a question of fact for being tried on merits, and the same cannot be an impediment in allowing amendment application.

5. It is not in dispute that the Petitioner had made an application for intervention in the suit, and after he was added as a party defendant, an application for amendment of the plaint is made. It is not necessary for this Court to examine the merits of the proposed amendment. The objections raised by the Petitioner are on the merits of the proposed amendment, which would require a trial, and that same cannot be the ground for rejecting the application for amendment. The apprehension expressed by the learned Counsel for the Petitioner that in the event the impugned Order is confirmed the same would affect the Petitioner's right in the suit to raise the issue of limitation is unfounded. By the impugned Order, Plaintiff is allowed only to amend his plaint, and there is no decision on the merit of the proposed amendment. Needless to mention that it will always be open to the Petitioner to raise the issue of limitation at the appropriate stage.

6. Hon'ble Supreme Court, in the case of *South Konkan Distilleries*, relied upon by the Petitioner, has held that whether to decline or allow the

amendment if a fresh suit on the amended claim would be barred by limitation on the date of filing of the application, is to be taken account in the exercise of the discretion as to whether the amendment should be ordered. However, the Hon'ble Supreme Court has also held that the said factor does not affect the power of the court to grant amendment if that is required in the interest of justice. In the present case, the learned trial Judge has allowed amendment by correctly exercising the discretionary power. Hence, the said decision is of no assistance to the Petitioner.

7. I do not find any illegality or perversity in the reasons recorded by the learned Judge. I do not find any reason to interfere with the impugned order. Writ Petition is therefore rejected.

(GAURI GODSE, J.)