



**IN THE JUDICATURE OF HIGH COURT AT BOMBAY
BENCH AT AURANGABAD**

913 WRIT PETITION NO. 15051 OF 2019

Mohhamad Suleman Abdul Rashid And Another

VERSUS

Mohammad Usman Abdul Rajjak And Others

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Advocate for the Petitioner : Mr. Kulkarni Sanket S.

Advocate for Respondent No.1 to 14, 28 : Mr. N. C. Garud

Advocate for Respondent No.33 : None present.

Advocate for Respondents No.18 and 19: Mr. Palod L.B. And D L Palod

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CORAM : R. M. JOSHI, J.

Dated : July 18, 2024

PER COURT :-

1. Heard. By consent of both sides heard finally at admission stage.
2. Plaintiff in Regular Civil Suit No.430/2013 being aggrieved by order passed below Exhibit 60 and 70 rejecting application under Order 6 Rule 17 of the Code of Civil Procedure has preferred this petition.
3. The facts as they appear from the prima facie perusal of record indicate that plaintiffs filed suit for partition and separate possession and injunction in respect of suit properties specifically described in paragraph 1A and 1B of the plaint. Plaintiff has sought 1/3rd share in the suit property for plaintiff and defendant No.17. It is also prayed that the transaction of sale effected by the defendants on the basis of mutation entry No.22657 dated 04/07/1996 are not binding on plaintiffs and be given to the share of these defendants.

4. After framing of issues, application Exhibit 60 came to be filed for amendment to the plaint with averment that during the pendency of the suit, defendants have transferred some of the properties to third party and that the suit property was sub-divided in 13 parts. With these averments, the addition of the purchasers is sought. This application came to be rejected by order dated 28/09/2018 wherein it is held that the application is vague and it does not give any particulars. It is thereafter, application Exhibit 70 came to be filed wherein it is claimed that the defendants have sold portion of the suit properties to proposed defendants on the basis of agreement for sale dated 25/03/2013, 07/04/2014, 15/02/2016, 16/03/2017, 26/03/2017 and 20/05/2017. It is claimed that these sale transactions be held to be not binding on the share of the plaintiff. It is further alleged that these sale deeds are without consideration and bogus.

5. This application was opposed by defendants by contending that the application is made only for the purpose of delaying the hearing of the suit. It is also claimed that no details are provided even in this application in respect of description of the properties. Learned Trial Court rejected this application by order dated 07/12/2018.

6. Learned Counsel for the petitioners / plaintiffs submits that both orders passed below Exhibits 60 and 70 are under challenge before this Court, and as such, there is no substance in the contention of the learned Counsel for the respondent about application principle of res-judicata to this case. On merit it is his submission that in the suit for partition, the plaintiffs are seeking to amend the plaint to bring on record the act of the execution of sale deed of part of suit properties by the defendants in favour of the purchasers. According to him, such subsequent events which are relevant for the decision of the suit and are required to be brought on record irrespective of the fact as to whether there is any delay in doing so. To support his submissions, he placed reliance in case of ***Dela Gurudal Vanjari Vs. Uddhal Govardhan Rathod, Writ Petition No.8145 of 2011, decided on 07/02/2012***, to point out the observations made by the Hon'ble Supreme Court in case of ***Revajeetu Builders & Developers Vs. Narayanaswamy & Sons and others, reported in 2009 (6) All M.R. 986***, that unless the proposed amendment constitutionally or fundamentally changes the nature and character of the case or is not bona fide, then only the same can be rejected and not otherwise. It is his submission that in this case though lis pendens is registered by the

plaintiffs, however in view of the change in the position of law post 2020 the lis pendens is no more registered, even if suit is decreed, the proposed purchasers would get an opportunity to claim that the decree has been passed in their absence and the execution of the decree can be opposed which will lead to multiplication of the proceedings.

7. Learned Counsel for respondents/ defendants opposed the said submission on the ground that once application Exhibit 60 was rejected, it was not open for the Court to allow the application Exhibit 70 owing to the principle of res-judicata. On merits it is submitted that once the amendment application is filed after framing of issues, it becomes incumbent for the plaintiff to show due diligence, which is not shown in this case. It is further argued that even though fresh application came to be filed vide Exhibit 70, particulars necessary for allowing amendment were not provided and observation made by the learned Trial Court in this regard, need not be interfered with. He placed reliance on the Judgment of this Court in Writ Petition No.6596/2018 wherein the guidelines are mentioned which are required to be considered for the purpose of allowing or rejecting the application for amendment.

8. Since admittedly plaintiff has filed application for amendment of the plaint after framing of the issues, it is incumbent on the part of the plaintiff to show due diligence. It is observed by the learned Trial Court that in application Exhibit 60 it was not mentioned as to the time when plaintiffs had knowledge of these transaction, however in application Exhibit 70 it is vaguely claimed that plaintiffs came to know about it on 02/07/2018. Considering the applications, to this Court finds no fault in the finding recorded by Trial Court to that effect.

9. It is pertinent to note that the suit is for the partition and separate possession of the suit properties. The plaintiff has already made prayer that transaction of 04/07/1996 is not binding on him. As far as the proposed amendment is concerned, the application shows that there is no specific averment therein to indicate that the defendants without any right or their share in the suit have executed sale deeds in respect of the purchasers. It is settled position of law that even in respect of undivided properties, the third party interest can be created, provided such interest is restricted to the right of vendor therein. In absence of any such specific pleadings, it cannot be said that the nature of suit is not likely to be changed by incorporation of the allegations that the said transactions are hollow and without

consideration. It would be however be open for the plaintiff to challenge the said transaction on this ground independently. It cannot become a ground for amendment of plaint in absence of specific averment about these transaction are executed in excess or without right of the defendants to the extent of their shares in the suit properties.

10. Having regard to the aforestated facts, this Court finds it inappropriate to cause any interference in the finding recorded by the learned Trial Court rejecting both applications in exercise of writ jurisdiction.

11. Hence, petition stands dismissed.

(R. M. JOSHI, J.)

vj gawade/-.