

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.403 OF 2021
WITH
INTERIM APPLICATION NO.2960 OF 2020
IN
SECOND APPEAL NO.403 OF 2021

Kamlabai Sidramappa Wale
(since deceased) through LRs
Jagdevi Nagnath Udane & Anr.

....Appellants/Applicants

V/S

Mallinath Vishwanath Kiwade & Anr.

....Respondents

...

Mr. Nilesh M. Wable for the Appellants/Applicants.

Mr. S.H. Katkar i/b Mr. Vishwanath Patil for the Respondents.

...

CORAM: SANDEEP V. MARNE, J.

DATE : FEBRUARY 27, 2024.

P.C.:

1 The challenge in the present Appeal is to the judgment and decree dated 28 November 2019 passed by *Ad-hoc* District Judge-3, Solapur allowing Regular Civil Appeal No.109 of 2015 filed by Respondent Nos.1 and 2 and reversing the judgment and decree dated 17 March 2015 passed by the Civil Judge Senior Division, Solapur in Regular Civil Suit No.857 of 2012.

2 Plaintiffs instituted Regular Civil Suit No.857 of 2012 initially seeking recovery of possession of the suit property. Though the suit is

numbered as Regular Civil Suit No.857 of 2012, the same was filed on 20 December 2005. Plaintiffs' claim for recovery of possession of the suit property was premised on compromise decree executed between the parties which was challenged by Defendant No.1 in Special Civil Suit No.33 of 1998 which came to be dismissed on 5 March 2004. According to Plaintiffs, the suit properties have come to the share of Plaintiffs in accordance with the said compromise decree which came to be upheld in decree passed in Regular Civil Suit No.1339 of 1999. However by the time Plaintiffs filed suit, Defendant No.1 had already executed sale deed dated 3 December 2001 transferring the suit properties in favour of Defendant Nos.2 and 3. Though Plaintiffs sought recovery of suit property based on compromise deed, they failed to set up a challenge to the sale deed date 3 December 2001. The suit was subsequently amended on 8 October 2009 and a prayer for challenge to the sale deeds was added in the plaint.

3 The Trial Court framed the issue of limitation and answered the same in favour of Plaintiffs holding that the cause of action for filing the suit arose on 5 March 2004 when the Regular Civil Suit No.1339 of 1999 challenging the compromise decree came to be dismissed. By recording this finding the Trial Court held the suit to be within limitation.

4 On the other hand the First Appellate Court has held that though the suit was filed on 20 December 2005, it did not include prayer for challenging the sale deeds. That such prayer came to be added in the plaint only on 8 October 2009 by way of amendment.

5 It is well settled law that the amendment does not relate back to the date of filing of the suit. The limitation in respect of amended prayer will have to be counted up to the date on which the appointment is sought. Thus the prayer introduced by the Plaintiffs for challenging sale deed dated 3 December 2001 came to be added in the plaint for the first time on 8 October 2009. The said prayer is clearly barred by limitation.

6 Plaintiffs prayer for recovery of possession of the suit property could not be granted once the challenge to the sale deed fails. Since the Plaintiffs' suit is barred by limitation in respect of prayer challenging the sale deeds, recovery of possession cannot be sought in vacuum.

7 In my view no serious error can be traced in the order passed by the First Appellate Court. Plaintiff ought to have included the prayer for challenging the sale deeds in the suit as was originally filed. Mr. Wable has made strenuous efforts to impress upon me that Plaintiffs could not file suit on account of pendency of Regular Civil Suit No.1339 of 1999. Even if the contention of Mr. Wable is accepted, Plaintiffs ought to have challenged the sale deeds when the suit was filed on 20 December 2005. Therefore even if the period of limitation is computed from 5 March 2004, the added prayer on 8 October 2009 would clearly be barred by limitation.

8 No substantial question of law is involved in the Appeal, the Second Appeal is accordingly rejected.

9 In view of the disposal of the Second Appeal, nothing survives in the Interim Application and the same is accordingly disposed of.

(SANDEEP V. MARNE, J.)