

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6575 OF 2023

Sarita Suryakant Mhaswade and Anr.

.. Petitioners

Versus

Leela Ganesh Kale (since deceased) through
Girish Digambar Kulkarni and Anr.

.. Respondents

.....

- Mr. Jaydeep Deo, Advocate for Petitioners.
- Mr. Rushikesh Kale, Advocate for Respondents.

.....

CORAM : MILIND N. JADHAV, J.

DATE : JANUARY 19, 2024

P.C.:

1. Heard Mr. Deo, learned Advocate for Petitioners and Mr. Kale, learned Advocate for Respondents.

2. The present Writ Petition takes exception to the order dated 01.02.2023 passed in Application filed below Exhibit-96 seeking amendment and intended challenge to the document dated 13.12.2002 on the ground that it was executed by fraud.

3. Three dates are important. Document is dated 13.12.2002. Suit No.2124 of 2011 is filed in the year 2011 for declaration and injunction in respect of suit flat being Flat No.101. During the course of witness action and 11 years after filing of the suit proceedings, the Plaintiff desired and intended to now seek a challenge to the aforementioned document dated 13.12.2002.

4. Both the learned Advocates are *ad idem* and would submit that the Defendant was confronted with the said document during witness action as it was mentioned in the written statement of Defendant filed in the year 2012.

5. Mr. Deo would submit that the document has not been shown to the witness during witness action. It has however been brought on record and has been marked as Exhibit in evidence by the Trial Court.

6. Despite the above and after completing the entire evidence of the Plaintiff, this particular application below Exhibit-96 came to be filed to now maintain a challenge to the said document. This Application was resisted by the Petitioner i.e. Defendant before the Trial Court. The first and foremost question *qua* this document would be the issue of limitation. Though it is always argued and in the present case it is seen that learned Trial Court has also noted that it would be otherwise be a mixed question of law and fact, *prima facie*, to maintain challenge to the document which came to the knowledge of the party after almost 20 years from the date of its execution would undoubtedly invite the hurdle of limitation.

7. That apart, the suit having been instituted in the year 2011 and the Application been made as belatedly as after 11 years thereafter would not entitle such a party to challenge the same and

change the nature of the suit by seeking the amendment as is being done in the present case.

8. With the able assistance of Mr. Deo, I have perused the nature of amendment in the Application filed below Exhibit-96. That amendment is at page No.89 of the Writ Petition. It is nomenclatured as paragraph Nos.51a and 56 e-1. I have perused the same. By virtue of the said amendment, the document in question is sought not only to be challenged but a declaration is also now invited for declaring it as null and void and illegal and for seeking cancellation thereof.

9. Natural consequence of seeking such a relief would be to declare a decision on the issue of 13.63 % undivided share of interest, *inter alia*, pertaining to the common areas and facilities which is sought for. This *prima facie*, shows that the nature of the suit would stand altered. Merely by recording the reason that such an amendment is allowed to avoid multiplicity of proceedings between the parties cannot be a reason to allow such an amendment in the present case. The finding returned by the Trial Court that this amendment does not challenge the nature of the suit is not appreciated. The impugned order dated 01.02.2023 is quashed and set aside.

10. Considering the fact that the said document dated 13.12.2002 has been marked as Exhibit it shall be open for the parties

to make their respective submissions on the said document *qua* the original relief prayed for in the suit proceedings before the learned Trial Court. By this order, this Court has not opined on the merits of the case and the Trial Court shall not be influenced by any observations herein.

11. In view of the above, impugned order dated 01.02.2023 is interfered with and is set aside. Writ Petition is allowed with the above directions. At joint request of both the learned Advocates and in view of the fact that suit is of year 2012, learned Trial Court is directed to finally adjudicate and complete hearing of the Suit within a period of twelve months from today.

12. With the above directions, Writ Petition is disposed.

H. H. SAWANT

[MILIND N. JADHAV, J.]

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