

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.864 OF 2016

WITH

INTERIM APPLICATION NO.16986 OF 2022

WITH

INTERIM APPLICATION NO.16987 OF 2022

WITH

INTERIM APPLICATION NO.16988 OF 2022

- 1] Kamladevi Raychand Shah]
Of Mumbai, Indian Inhabitant, residing]
At Flat No.1, Chandangiri Building]
Tilak Road, Opp. Asha Parekh Hospital,]
Santacruz (West), Mumbai 400 054]
- 2] Dimple Mahavir Jain]
Residing at Flat Type "C", 1st Floor,]
Ganges Garden, 106, Kiran Chandra]
Sangha Road, Shibpur, Howrah- 711 102]
West Bengal.]
- 3] Narendra Raychand Shah,]
of Mumbai, Indian Inhabitant,]
- 4] Pinky Raychand Shah,]
of Mumbai, Indian Inhabitant,]
- 5] Vidhya Raychand Shah,]
of Mumbai, Indian Inhabitant,]
all Nos. 1 to 5 are residing at Flat]
No.1, Chandangiri Building,]
Tilak Road, Opp. Asha Parekh]
Hospital, Santacruz (West),]
Mumbai 400 054]

: Appellants /
Orig. Plaintiffs

Vs.

- 1] Bhupendra Yashwant Ajinkya]
of Mumbai, Indian Inhabitant,]
residing at 1-2-3, Pratap Mansion,]

- ground floor, Dr. Ambedkar Road,]
Mumbai 400 014]
- 2] Prajakta N. Vijaykar,]
of Mumbai, Indian Inhabitant,]
residing at Khandoba Bhuvan,]
12th Road, Khar, Mumbai 400 052.]
- 3] Aparna U Kirtikar,]
of Mumbai, Indian Inhabitant,]
residing at Bhaveshwar Bhavan,]
Portuguese Church,]
Mumbai 400 028.]
- 4] Urmila D Kirtikar,]
of Mumbai, Indian Inhabitant,]
residing at Kirtikar Bungalow,]
St. Road, Malad,]
Mumbai 400 064.]
- 5] Veena V Kothare,]
of Mumbai, Indian Inhabitant,]
residing at C/o. Shri Bhupendra Y.]
Ajinkya, 1-2-3, Pratap Mansion,]
Ground floor, Dr. Ambedkar Road,]
Mumbai 400 014.]
- 6] M/s. Sonal Enterprises,]
A partnership firm having its,]
Office at Navjivan Society, Building]
No.3 14th Floor, Lamington Road,]
Mumbai 400 008.]
- 7] Nathmal Dalchand Bhandari,]
of Mumbai, Indian Inhabitant,]
Partner of M/s. Sonal Enterprises,]
Having it's office at Navjivan]
Society, Building No.3, 14th Floor,]
Lamington Road, Mumbai 400 008.]
- 8] Kimchand S. Bafna,]
of Mumbai, Indian Inhabitant,]
Partner of M/s. Sonal Enterprises,]

- Residing at Room No.104, 1st floor,]
 'C' Building, Sukh Sagar Apartment]
 Ganjawala Compound, Lamington]
 Road, Mumbai 400 008.]
- 9] M/s. Goyal Properties and]
 Estates Pvt. Ltd. a company]
 Incorporated under the provisions]
 of Companies Act, 1956 and having]
 Its registered office at 408,]
 Pragati Shopping Centre, Daftari]
 Road, Malad (East),]
 Mumbai 400 097.]
- 10] M/s. V6 Enterprises,]
 A partnership firm, duly registered]
 Under the Indian Partnership Act,]
 1932, having it's office at]
 2, Narsinh Niwas, Ground floor,]
 126, Jay Prakash Road,]
 Andheri (West), Mumbai 400 058] : Respondents/
 Orig. Defendants

 Adv. Shailendra Kanetkar a/w Adv. Devashish Godbole i/by Adv. Prasad Nagargoje & Adv. Yash Dewal, for the Appellants.

Adv. Mayur Khandeparkar a/w Adv. Neha M. Shah i/by Adv. Dhiren Shah for the Respondent Nos.1 to 5.

Adv. Vijay Nair a/w Adv. Rachna Mamnani i/by Adv. Prashant P. Kulkarni for the Respondent No.9.

Adv. Jenifer Michel a/w Adv. Som Sinha & Adv. Divya Vishwanath i/by Som Sinha & Associates, for the Respondent No.10.

CORAM : KISHORE C. SANT, J.
RESERVED ON : 8TH MARCH, 2024
PRONOUNCED ON : 3RD MAY, 2024

JUDGMENT :

1. This Appeal is preferred by Original Plaintiffs challenging order dismissing the Suit as infructuous by allowing Notice of Motion

taken out by Original Defendant Nos.1 to 5. The order impugned is dated 19th January, 2016 passed in S.C. Suit No.5823 of 2006 by the learned Judge, City Civil Court, Greater Mumbai. All the Respondents are Original Defendants in the same chronological order as given in the title cause. The Original Plaintiff predecessor of present Appellants/Plaintiffs filed Suit mainly against Defendant No.6 a partnership firm for declaration that Agreement dated 21st September, 1993 executed between Defendant No.6 and the Original Plaintiff is valid and binding upon all the parties. The other prayer clause was to direct the Defendant No.6 to perform its part of the said Agreement by getting the same signed by Defendant Nos.1 to 5. Other were interim prayers seeking directions restraining Defendants from creating third party interest.

2. The facts in short are that the Original Plaintiff entered into an Agreement with the Defendant No.6 a partnership firm for sale of the suit land admeasuring 1711.3 sq. mtrs. that is a part of larger property bearing CTS No.138, 138/1 to 4, Akruli village, Kandivali (East), Mumbai owned by Defendant Nos.1 to 5. On 1st October, 1992 Defendant Nos.1 to 5 had executed five different Agreements in favour of Defendant No.6 and agreed to sale and transfer their undivided right, title and interest in the Suit Property in favour of the Defendant No.6. The Defendant Nos.1 to 5

also executed a Power of Attorney on the same date in favour of Defendant Nos.7 & 8 who happened to be partners in Defendant No.6 firm.

3. Defendant No.7 thereafter executed an Irrevocable Power of Attorney dated 10th March, 1993 in favour of the Original Plaintiff in respect of the said larger property including the Suit Property.

4. On 21st September, 1993, The Defendant No.6 executed an Agreement of Sale in respect of the Suit Property in favour of the Original Plaintiff and on the same day the Defendant No.8 in the capacity of a partner of the Defendant No.6 also executed an Irrevocable Power of Attorney in favour of the Original Plaintiff in respect of the larger portion.

5. It is case of the Plaintiff that on 1st October, 2005 he came across a public notice published by Defendant Nos.1 to 5 calling for objections. On that the Plaintiff approached Defendant No.8 & asked him to lodge the objection on behalf of the Defendant No.6.

6. The Defendant No.9 also filed written statement adopting the contents in the written statement filed by the Defendant No.5. It is the case of the Defendant No.9 that Defendant Nos.1 to 5 have conveyed the Suit Property by a Registered Conveyance dated 1st December, 2006 in favour of Defendant No.10, wherein Defendant No.9 is a confirming party. He also took ground of limitation. That there were five Agreements allegedly

executed by Defendant Nos.1 to 5 all dated 1st October, 1992 which were terminated by them in 1994 itself and the said fact was in the knowledge of the Defendant No.6 and Original Plaintiff since 1994. The Agreement dated 21st September, 1993 is an unregistered Agreement and merely an Agreement for assignment of the said five unregistered Agreements dated 1st October, 1992 etc., and prayed for dismissal of the Suit.

7. As stated the Suit came to be filed on 16th January, 2006 with the prayers as already stated. Original Plaintiff Raychand Shah died during the pendency of the Suit and the present Plaintiffs were joined as legal heirs of deceased Raychand Shah. On 6th September, 2006 a deed came to be executed in respect of Defendant No.6 partnership firm of the retirement and admission. By the said deed Plaintiff No.1(c) joined the Defendant No.6 firm as a partner with effect from on 1st June, 2006. Latter on Defendant No.6 firm came to be dissolved on 1st December, 2006. The Plaintiff 1(c) became proprietor of Defendant No.6 firm on it's dissolution. In view of the same a Chamber Summons was taken out by the Plaintiffs bearing No.1721 of 2014 to amend the Complaint and the Notice of Motion No.3743 of 2009 for transposing Defendant No.6 as Plaintiff No.2 in this Suit. However, the said Chamber Summons No.1721 of 2014 came to be dismissed by order dated 8th October, 2014. The Defendant Nos.1 to 5 by

recording this prayed for dismissal of the Suit. In view of the fact that Defendant No.6 stood dissolved and Plaintiff No.1(c) continued as the sole proprietor of the said firm. The Chamber Summons seeking transposing was filed after 8 years of filing the Suit and therefore the same was rejected. It is stated that since Defendant No.6 and Plaintiff No.1(c) have merged, the Suit became infructuous as the cause of action was eclipsed. No Suit thus can be allowed to proceed as the Plaintiff No.1(c) is seeking reliefs against himself and prayed for dismissal of the Suit with costs.

8. Plaintiff No.1 (f) oppose the Notice of Motion on behalf of all the Plaintiffs. It is stated that the order of dismissal of Chamber Summons No.1721 of 2014 was challenged in the Writ Petition pending before this Court (now withdrawn by the Petitioner on 17th June, 2016 with liberty to file appropriate proceedings). It is contended that other Plaintiffs except Plaintiff No.1(c) still have a right. If the Suit is dismissed that will cause irreparable loss to the rights of other Plaintiffs and opposed the Notice of Motion. The Learned Trial Court after hearing the parties passed an order and allowed the Notice of Motion and dismissed the Suit. Plaintiffs are thus before this Court.

9. Learned Advocate Mr. Kanetkar vehemently argued that the cause of action is stated even against Defendant Nos.1 to 5, 9 and 10 & it

still survives. There are specific averments against Defendant Nos.1 to 5 in the Plaint. Against other Defendants clearly giving idea that the grievance is made against other Defendants as well. In para 38 the cause of action is publication of notice by Defendant Nos.1 to 5 in a newspaper dated 1st October, 2005. The subject matter is a Suit property. The Suit thus can not become infructuous. He submits that if the prayer clause the Suit is seen, it is clear that the conveyance is sought from Defendant No.6 of the Suit property by getting the documents signed by Defendant Nos.1 to 5. Thus, the relief is against all other Defendants also. The Agreement of 93 is between Plaintiff & Defendant No.6 therefore in the prayer though performance is sought only from the Defendant No.6 that will not absolve other Defendants. The Defendant No.6 had got the right in view of documents executed by Defendant Nos.1 to 5 on 1st October, 1992. In the Suit there is specific averments that in December, 2006 Defendant Nos.1 to 5 have executed the conveyance in favour of Defendant No.10. The pleading thus shows that the cause of action still survive.

On legal grounds, he submits that the suit can be dismissed without trial only under Section 9, Order 7 Rule 11 or by framing preliminary issue under Order 14 Rule 2. No any other contingency is provided in the CPC to dismiss the Suit at premature stage. He submits

that the reliance is placed by the Defendants and the Trial Court on the judgment in the case of *Shipping Corporation of India Ltd. Vs. Machado Brothers And Others*¹ is misplaced. The same is considered by this Court in the case of *Sunita Devendra Deshprabhu And Another Vs. Sitadevi Deshprabhu (Represented through Lrs on record) And Ors.*² The further submission is that even Defendant No.6 had cause of action against Defendant Nos.1 to 5. The Writ Petition that was filed was withdrawn as by that time the Suit itself was dismissed. He prays for allowing the Appeal by setting aside the impugned Order.

10. Learned Advocate Mr. Khandeparkar for Defendant Nos.1 to 5 vehemently opposed the Appeal. He submits that by way of five Agreements dated 1st October, 1992, Defendants had agreed to convey the property in favour of the Defendant No.6. It is thereafter in 1993, an Agreement was executed between the Plaintiff and Defendant No.6. So far as prayer in the Suit is concerned, it is specifically against Defendant No.6 and that too in respect of Agreement of 1993. There is no prayer in respect of Agreement dated 1st October, 1992. After the death of Original Plaintiff, Plaintiff No.1(c), subsequent to filing of the Suit, has become sole proprietor of Defendant No.6 after its dissolution as partnership firm.

1 (2004) 11 Supreme Court Cases 168

2 2023 SCC OnLine Bom 525

Thus, now the rights of the Defendant No.6 are assigned to Plaintiff No.1(c). In view of this position the Suit of the Plaintiff is against Plaintiff himself such Suit cannot be maintained. It is submitted that 1992 agreements are the root agreements. Defendant Nos.1 to 5 are not subsequent purchasers and still no prayers are made against these Defendants. On facts he submitted that Defendant No.10 has now constructed a building & Occupation Certificate is also granted. Now the Plaintiffs have filed application to transpose Defendant No.6 as Plaintiff. There are two Applications filed bearing No.16988 of 2022 seeking transposition of Respondent No.6 (Defendant No.6) as Plaintiff and another Application is for amendment bearing No.16986 of 2022 seeking amendment to insert the prayer for declaration and cancellation of sale in favour of Defendant No.10, if this Application is allowed, it will change nature of the Suit in Appeal. Defendant No.10 was not a party till 2007. He opposed the Application No.16987 of 2022 that is for Stay and appointment of a Receiver. He submitted that, as there was no stay and therefore no stay be granted. So far as nature of the Notice of Motion is concerned, he submits that the Notice of Motion was under the provisions of Order 7 Rule 11 as there remains no cause of action in existence. He submits that application under Order 7 Rule 11 can be filed at any stage.

The main object of filing such Application is to avoid frivolous litigation and same is consistent with the public policy. He relied upon the judgment in the case of *Life Insurance Corporation of India Vs. Sanjeev Builders Private Limited And Another*³ He thus prays for rejection of the Appeal.

11. Learned Advocate for the Original Defendant No.10 adopts the arguments of Defendant Nos.1 to 5. She further submits that the Suit was filed seeking specific performance of only one Agreement. Though the Plaintiff No.1(c) became sole proprietor of Defendant No.6 in the year 2006, he did not move Application for transposition till 2014 and for amendment. She submitted that now cause of action against all other Defendants is clearly barred. She opposed the Application for amendment stating that since beginning parties are aware of 92 Agreements between the Defendant Nos.1 to 5 and Defendant No. 6. She submits that now allowing Suit to proceed would be only a futile exercise. She thus opposes the appeal.

12. Learned Advocate for the Respondent No.9 submits that there was already a conveyance in favour of Defendant No.9 on 23rd January, 2006. On 1st December, 2006 Defendant No.9 executed a conveyance in favour of the Defendant No.10. On 1st December, 2006 Plaintiff No.1(c)

3 2022 SCC OnLine SC 1128

took over Defendant No.6. The Plaintiffs suppressed the material facts of acquiring Defendant No.6. For the first time the Plaintiffs filed Application to bring on record the fact that Defendant No.6 is dissolved & that Plaintiff No.1(c) has become sole proprietor. He submits that even otherwise the relief against other Defendants are time barred. Now no amendment can be allowed to the Suit. Conducting this Suit would now be of no Avail and opposes the Appeal.

13. In the Rejoinder the learned Advocates Mr. Kanetkar submitted that the cause of action still survives against Defendant Nos.1 to 5. At this stage the Appeal cannot be considered on merits. The issue involved is the manner in which the Trial Court has exercised the power. No finding is recorded as to cause of action against Defendant Nos.1 to 5 or Defendant No.10. When there are multiple Defendants it is necessary to hold a trial. The Suit is filed in January, 2006 the conveyance in favour of Defendant Nos. 9 to 10 is executed on 1st December, 2006 pending the Suit. The right of Defendant No.10 is thus subject to out come of the Suit and no equity will be claimed by him. He lastly submitted that even assuming the Suit is defective still Suit requires to be tried and there is nothing in law to prevent trial of the Suit merely because it appears to be defective. This Court has to therefore decide the questions as below:-

- (a) Whether the Trial Court was right in entertaining the Notice of Motion at this stage and allowing the said Notice of Motion holding that Suit has become infructuous?
- (b) Whether the Suit can be dismissed without framing preliminary issue and without any Application under Section 9 or under Order 7 Rule 11?
- (c) Whether at this stage the Suit can be directed to be tried?

14. While dealing with the Appeal it needs to be considered as to whether the Court has a power to dismiss the Suit as infructuous in view of subsequent events and without any Application being made either under Section 9, Order 7, Rule 11 or without framing preliminary issue under Order 14, Rule 2 under CPC. In the case of Shipping Corporation of India Ltd. (supra) the Hon'ble Supreme Court has discussed these questions. In that case a contract was given to the Plaintiff by Shipping Corporation of India Ltd. (supra) for the purpose of handling tankers, bulk carriers & Tramp Vessels at port of Tuticorin. After some period Shipping Corporation terminated the contract of agency. This notice of termination came to be challenged by way of filing a Suit. In the said Suit Interim Order was granted. Subsequently, the Shipping Corporation of India Ltd. was intending to issue notice of termination as per the apprehension of the

Plaintiff. The Plaintiff therefore, filed another Suit for production of accounts of the Shipping Corporation and appointment of an Advocate Commissioner to scrutinise the accounts of the parties. While both the Suits were pending, Shipping Corporation again terminated agency on some other ground. On this notice third Suit came to be filed. In this third Suit the Shipping Corporation filed Application under Section 151 of the CPC and prayed for dismissal of the first Suit contending that the said has become infructuous in view of subsequent action of termination. The Trial Court dismissed said Application. The High Court upheld the order of the Trial Court. Challenging the the order of the High Court the Shipping Corporation approached the Apex Court. In the said Appeal the Apex Court held that Court has a power under Section 151 of the CPC to dismiss the Suit for disappearance of cause of action. The order passed by the High Court was set aside and dismissed the Suit. The Apex Court considered the judgment in the case of ***Ram Chand & Sons Sugar Mills (P) Ltd. Vs. Kanhayalal Bhargava***⁴ & reproduced the para from the said judgment which reads as under:-

“The inherent power of a court is in addition to and complementary to the powers expressly conferred under the Code. But that power will not be exercised if its exercise is inconsistent with, or comes into conflict with,

4 AIR 1966 SC 1899

any of the powers expressly or by necessary implication conferred by the other provisions of the Code. If there are express provisions exhaustively covering a particular topic, they give rise to a necessary implication that no power shall be exercised in respect of the said topic otherwise than in the manner prescribed by the said provisions. Whatever limitations are imposed by construction on the provisions of Section 151 of the Code, they do not control the undoubted power of the court conferred under Section 151 of the Code to make a suitable order to prevent the abuse of the process of the court.”

15. Next is the Judgment relied upon by the Appellants in the case of Sunita Devendra Deshpabhu (supra) in that case Application was filed by the Defendants under Order XXIII Rule 1(4) along with Section 151 of CPC contending that the Plaintiffs had abandoned their claim in subsequent Suit. The said Application was rejected. The order was challenged in Civil Revision Application. This Court at Goa held that the remedies provided by way of Section 151 will not be available when there is alternative remedy. Court has to consider whether exercise of such power is expressly prohibited by any other provision of the code. If there is no prohibition then the Court will consider exercising of a power under Section 151. The Court considered the judgment in the case of Shipping Corporation (supra). However, on facts the said was held to be not applicable as in the case the earlier Suit was subsisting when the subsequent Suit was withdrawn. It was held that the claim raised in the

earlier Suit was still subsisting. In that view of the matter the Order of the Trial Court was upheld. This Court finds that this judgment is not helpful to the present Appellant.

16. It is thus clear from the judgment that the Court has a power under Section 151 to dismiss the Suit even in that view of subsequent event whereby cause of action itself disappears. The first question therefore is answered as the Court has a power to dismiss the Suit in such proceedings in view of subsequent events.

17. The Respondents have relied upon the judgment in the case of Shipping Corporation (supra) which is already discussed. The Respondents relied upon another judgment in the case of Life Insurance Corporation of India (supra). The Court drawn conclusions in para 70 of the said judgment Clauses (iv), (v) & (vii) are material which are reproduced as below:-

“70. Our final Conclusions may be summed up thus:

(iv) A prayer for amendment is generally required to be allowed unless

(i) -----

(ii) -----

(iii) -----

(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.

(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.”

18. One more judgment relied upon by the Respondents in the case of ***Munilal Vs. Oriental Fire & General Insurance Co. Ltd. And Another***⁵. The Judgment is on the point of amendment in the pleadings. The Judgment is relied upon while arguing Application filed by the Appellant for amendment. So far as amendment is concerned, by now it is well settled that by way of amendment no time barred claim can be introduced. In the present case an amendment is sought praying for by inserting a prayer against Defendant Nos.1 to 5. It has already come in the discussion that Defendant Nos.1 to 5 had executed five agreements in 1992 with Defendant No.6. The Suit was filed in the year 2006 by that time itself the claim, if at all any against Defendant Nos.1 to 5 had become time barred. In view of discussion this Application needs to be dismissed.

19. One more aspect that needs to be considered while considering whether the Suit has become infructuous when one of the Plaintiffs has acquired interest in Defendant No.6 after filing of suit & has now filed application to transpose Defendant No.6 as a Plaintiff. If this application for transposition is allowed there will be no claim that is

5 (1996) 1 Supreme Court Cases 90

available against any of the Original Defendants. Thus looking from the above angle also now it is clear that prosecution of the Suit is of no use. Court should not allow its time to be wasted when it comes to conclusion that the proceeding even if taken to its logical end would be of no avail except wastage of time and energy of the Court. This Court is not convinced with any of the submissions of the Appellant. This Court finds that allowing the Appeal would practically amount to directing the Trial Court to try a Suit which has become infructuous.

20. For all these reasons this Court is not inclined to interfere with the impugned order. The Trial Court has rightly considered all the aspects which does not call for the interference and the Appeal deserves to be dismissed and the same is disposed of as dismissed. No order as to costs.

21. In view of the disposal of the Appeal, Interim Applications stand disposed of.

(KISHORE C. SANT, J.)

(Corrected pursuant to speaking to minutes of order dated 7th May, 2024.)