

Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10835 OF 2023

Sunanda Sudhakar Thakur & Ors.

Petitioners

•• (Org. Plaintiffs)

Versus

Rajendra Dynaneshwar Khandve

Respondent

•• (Org. Defendant)

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- Mr. Amit Ashok Gharte for Petitioners

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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 16, 2024

ORAL JUDGMENT:

1. Heard Mr. Gharte, learned Advocate for Petitioners.
2. Present Writ Petition takes exception to the order dated 10.06.2023 passed by the learned Trial Court in Application filed below Exh. 37. By the said order, Application for seeking amendment to the Suit plaint under O. VI, R. 17 of the CPC came to be rejected.
3. Originally Special Civil Suit No. 1210/2017 is filed in the year 2017 for cancellation of Sale Deed dated 13.11.2016 in respect of the suit property. By virtue of the amendment Application, Petitioners (Org. Plaintiffs) desired to implead and include two specific documents which according to them are the precursors to the Sale Deed under challenge and these documents are the Development Agreement and Power of Attorney, both dated 26.10.2007 in respect of the Suit property.

4. It is seen that the amendment Application is made for the first time on 03.08.2022 on the ground that it is necessary to formally declare the Development Agreement of 2007 as illegal, null and void in order to have a clarity of judgment in the suit proceedings. By virtue of the amendment Application, a prayer clause is sought to be inserted seeking a declaration that the Development Agreement of 2007 which is a registered document be declared as illegal, null and void and not binding on Plaintiffs. Though it is stated in the Application in not so many words, according to Plaintiffs, such amendment would not change the nature of the Suit. According to Plaintiffs, the proposed amendment is only explanatory and formal in nature.

5. Respondent (Org. Defendant) resisted the Application on the ground that the proposed amendment was nothing but an attempt to fill up the lacunae in the pleadings of Plaintiffs and most importantly, the facts which were well within the knowledge of Plaintiffs at the time of filing of the Suit in the year 2017 and were not included. Due diligence on the part of the Plaintiffs is questioned by Defendant. Defendant has also rightly raised a defence in his written statement filed as far back as on 04.10.2017 that substantive rights between the parties have been crystallized by virtue of the registered Development Agreement and Power of Attorney dated 26.10.2007. It is seen that Plaintiffs filed their affidavit in lieu of evidence below Exh.

34 on 24.02.2022 and only after the Suit had reached the stage of witness action, Plaintiffs have filed the Application for amendment.

6. Learned Trial Court considered the Application and by a well reasoned order dated 10.06.2023 rejected the Application. On the face of the record itself, it is clearly seen that any challenge maintained to a registered Development Agreement of 2007 shall be time barred. Trial of the Suit has already commenced upto the stage of Plaintiffs having filed their affidavit in lieu of evidence of their witness. In such a scenario, Application dated 03.08.2022 is filed by the Plaintiffs in minimal words. The said Application is at page Nos. 56-57 of the Petition. Rightly so, due diligence is completely absent. The ground on which the said Application is filed is innocuous and unsustainable. Suit is filed seeking cancellation of registered Sale Deed dated 13.11.2016. Any right that can be created or crystallized by virtue of the registered Development Agreement and the Power of Attorney of 2007 cannot be allowed to be challenged after a hiatus of 16 years, once substantive rights have crystallized. Considering the fact that the Plaintiffs had absolute knowledge of the Development Agreement as also the Power of Attorney of 2007, nothing prevented the Plaintiffs from challenging the same at the time of filing of the present suit proceedings. The proposed prayer therefore and as rightly held by the learned Trial Court is clearly time barred and cannot be

countenanced or allowed as it would change not only the nature of the suit proceedings but on the face of record, it would be not maintainable.

7. Mr. Gharte has placed reliance on a compilation of 10 identical decisions and has argued that the Court should not take a hyper-technical approach and adopt a liberal approach in such facts since it would cause severe prejudice, injustice and irreparable loss to the Plaintiffs if challenge to the Development Agreement dated 26.10.2007 is not allowed to be maintained. He would submit that as held by the learned Single Judge of this Court in the case of **Bharat Petroleum Corporation Ltd Vs. Precious Finance Investment Pvt Ltd**¹, an Application for amendment of the pleadings should not be disallowed merely because it opposed on the ground that the same is barred by limitation. He would submit that on the contrary, such an Application will have to be considered bearing in mind the discretion that is vested in the Court in allowing or disallowing the amendment in the interest of justice. He would further submit that the plea of limitation being a mixed question of law and facts can be made a subject matter of the issue after allowing the amendment prayed for.

8. In the present case, it is seen that the issues were framed as far back as on 25.07.2018. Affidavit of evidence is filed by Plaintiffs

¹ 2007(1) Mh.L.J. 331

in the year 2022. A substantive amendment Application to challenge substantive rights which were crystallized under the registered Development Agreement and Power of Attorney in the year is made after 16 years. On such facts, discretion of the Court undoubtedly has to be utilized by considering the Application by disallowing such a belated amendment in the interest of justice. A clear case borne out from the pleadings that challenge is maintained to a registered document after 16 years. There is no quarrel with the proposition that the Court can allow amendment or pleadings even at the Appellate stage for the purpose of determination of the real question and controversy between the parties for an effective decision in the case, but this absolute proposition cannot be utilized by a party in each and every case or in each and every manner since any Application for seeking such amendment is determined by the facts and circumstances of that case. I also disagree with the proposition advanced by Mr. Gharte that the other side can be compensated with adequate costs and amendment should be allowed in such facts to avoid uncalled for multiplicity of litigation. Such is the submissions made by Mr. Gharte on the basis of the aforesaid decision in the case of BPCL (*1st supra*).

9. Mr. Gharte has next referred to and relied upon the decision of the Supreme Court in case of **Pankaja & Ors. Vs. Yellappa**

(since deceased) by LRs. & Ors². to contend that as held by the Supreme Court in the three Judges' decision in the case of **T.N. Alloy Foundry Co. Ltd. Vs. T.N. Electricity Board & Ors³**., an Application for amendment of pleadings should not be disallowed merely because it is barred by limitation. I have considered the said decision. Mr. Gharte has referred to and relied upon paragraph Nos. 12 to 18 of the said decision, however in paragraph No. 14, it is clearly stated that the law with respect to allowing amendment is quite clear and consistent that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. However, Supreme Court further holds that discretion in such cases depends on the facts and circumstances of the case and the jurisdiction to allow or not allow an amendment being discretionary, the same will have to be exercised in a judicious evaluation of the facts and circumstances in which the amendment is sought. In the present case such a judicious evaluation of the facts clearly show that the challenge is maintained after a hiatus of 16 years to a registered document. Rights have been crystallized. Defendant in the written statement referred to crystalization of rights under the 2007 registered document. Issues were framed. Affidavit of evidence is filed by Plaintiffs and only thereafter the amendment is sought. Such an action cannot subserve

² AIR 2004 SC 4102

³ (2004) 3 SCC 392

the ultimate cause of justice since it is clearly beyond limitation. Under the garb of amendment, Plaintiffs are in fact attempting to overcome their own delay and mistake in challenging the registered Development Agreement as required to be challenged by following the statutory law of limitation. Such an approach of the Plaintiffs is not permissible. Supreme Court has categorically in a catena of cases referred to and relied upon by Mr. Gharte stated that principles and guidelines carved out are only illustrious and not exhaustive. In the present case, it is clearly seen that Plaintiffs would derive undue advantage unto themselves if such an amendment is now allowed at this stage.

10. In view of the above observations and findings, I do not see any reason to interfere with the findings and reasons returned by the learned Trial Court in its order dated 10.06.2023. I am clearly of the opinion that allowing such an amendment would cause serious injustice and prejudice to the Defendant and hence such an amendment can never be allowed. I do not see any reason to interfere with the reasons given by the learned Trial Court in its order dated 10.06.2023. In that view of the matter, the order dated 10.06.2023 is comprehensively upheld.

11. Mr. Gharte would submit that this Court be pleased to expedite the hearing of Special Civil Suit No. 1210/2017. In view of

the request made, learned Trial Court is requested by this Court to dispose of SCS No. 1210/2017 as expeditiously as possible and in any event within a period of one year from today strictly in accordance with law. Parties shall co-operate with the Trial Court and shall not seek unnecessary adjournments unless absolutely necessary due to certain emergency or exigency. Trial Court shall not be influenced by any of the observations made in this order and decide the Suit after hearing both the sides strictly in accordance with law. All contentions of the parties are expressly kept open.

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

[MILIND N. JADHAV, J.]

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