

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8492 OF 2024

Vijay Kailas Bhandwalkar and ors. ...Petitioners
Versus
Balaso Bhaguji Kshirsagar ...Respondent

Mr. Sukumar Ghanwat, for the Petitioners.
Mr. Rahul Kadam, for the Respondent.

CORAM: N. J. JAMADAR, J.
DATED: 4th FEBRUARY, 2025

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ORDER:-

1. The petitioners take exception to an order dated 26th April, 2024 passed by the learned Civil Judge, Junior Division, Saswad, whereby an application for amendment in the plaint (Exhibit-43) preferred by the petitioners – plaintiffs came to be rejected.

2. The petitioners instituted a suit for declaration and perpetual injunction. The petitioners claimed to be the owners of the suit property. Defendant No.1 had allegedly obtained a sham and bogus Sale Deed from the predecessor-in-title of the plaintiffs. On the strength of the said Sale Deed, defendant No.1 made an application for mutation of his name to the record of rights of the suit land. Defendant No.1 has been causing obstruction to the possession of the

plaintiffs over the suit land and also created third party rights therein. Hence, the suit.

3. Defendant No.1 resisted the suit by filing written statement it was *inter alia* contended that the predecessor-in-title of the plaintiffs had mortgaged the suit land under deed of mortgage by conditional sale, registered on 8th May, 1998. The mortgage debt was not repaid and sale became absolute. Thus, the defendant No.1 became the absolute owner of the suit land.

4. The written statement was filed on 8th July, 2014.

5. Issues were settled on 13th October, 2022. An affidavit in lieu of examination-in-chief on behalf of the plaintiff was filed on 28th August, 2023.

6. Thereafter, on 7th November, 2023 the plaintiffs preferred the instant application for amendment in the plaint seeking *inter alia* a declaration that the alleged deed of mortgage by conditional sale executed by the predecessor-in-title of the plaintiffs on 8th May, 1998 was not legal and valid and did not bind the interest of the plaintiffs in the suit land.

7. By the impugned order, the learned Civil Judge was persuaded to reject the application observing *inter alia* that the application for amendment was made after the

commencement of the trial; there was huge delay in seeking the amendment as the reference to the deed of mortgage by conditional sale was made in the written statement filed in the year 2014 and the said deed was also produced on record by defendant No.1 and, thus, there was no due diligence.

8. Mr. Ghanawat, the learned Counsel for the petitioner, urged that the proposed amendment is necessary for the determination of real question in controversy. Thus, the learned Civil Judge could not have rejected the application on the ground of delay and commencement of the trial.

9. Mr. Kadam, the learned Counsel for the respondent, supported the impugned order.

10. Evidently, the application for amendment of the plaint has to surmount two impediments. One, the interdict contained in the proviso to Order VI Rule 17 of the Code of Civil Procedure, 1908. Two, the bar of limitation qua the relief of declaration regarding the deed of mortgage by conditional sale.

11. On the first count, indisputably the trial had commenced as post settlement of issues the plaintiffs had filed affidavit in lieu of examination-in-chief of their first witness. Therefore, the element of due diligence was required

to be satisfied. In the face of the hard facts which indicate that defendant No.1 relied upon the said deed of mortgage by conditional sale in the written statement filed in the year 2014 and even the said document was also placed on the record of the Court, it cannot be said that the plaintiffs were unaware of the said contention of defendant No.1. The plaintiffs therefore could not have conceivably asserted that they could not have raised the matter before the commencement of trial despite due diligence.

12. Secondly, the proposed amendment is *ex facie* barred by law of limitation qua the relief in respect of the said deed of mortgage by conditional sale. As noted above, defendant No.1 had specifically pleaded and relied upon the said deed of mortgage by conditional sale in the written statement filed in the year 2014. The application came to be filed in the year 2023. Thus, on both the counts, the application for amendment fails.

13. Consequently, this Court does not find any infirmity in the impugned order.

14. The petition, thus, stands dismissed.

[N. J. JAMADAR, J.]