
(2019) 04 BOM CK 0075

In the Bombay High Court

Case No : 916 Writ Petition No. 10317, 10494 Of 2018

Shaikh Nisar Ibrahim

APPELLANT

Vs

State Of Maharashtra And Others

RESPONDENT

Date of Decision : 03-04-2019

Acts Referred:

Maharashtra Village Panchayats Act, 1958 — Section 10A(4), 14B, 14B(1)(b)
Limitation Act, 1963 — Section 5
Bombay Municipal Corporation Act, 1888 — Section 18A(4)
Nagpur Corporation Act, 1948 — Section 9B(4)
Bombay Provincial Municipal Corporations Act, 1949 — Section 14(4)
Maharashtra Municipal Councils, Nagar Panchayats And Industrial Townships Act, 1965 — Section 10A(4)
Constitution Of India, 1950 — Article 243K, 243ZA

Citation : (2019) 04 BOM CK 0075

Hon'ble Judges : Ravindra V. Ghuge, J

Bench : Single Bench

Advocate : Jarare Prasad, Thombre S.S., Shaikh M.H., Yadav (Lonikar) S.R.,
Bodkhe C.V, Gore R.V.

Judgement

Ravindra V. Ghuge, J

1. Heard the learned counsel for the respective parties.
2. Rule.
3. By consent, Rule is made returnable forthwith and the petition is taken up for final hearing.
4. The petitioners / original defendants are aggrieved by the order dated 20.11.2017, by which, the trial Court has allowed application Exhibit 17, filed by the plaintiff seeking amendment to the plaint in RCS No.23 of 2012. Vide the said order, the plaintiff is permitted to challenge the three Gift Deeds, which are dated between 15.12.2008 to 19.12.2008.
5. The petitioners contend that all these Gift Deeds were executed over a span of

four days in December, 2008. The owner of the properties had voluntarily executed the said Gift Deeds in favour of the petitioners. The parties then moved the Revenue Authorities for carrying out necessary entries in the revenue records. The plaintiff submitted a handwritten application dated 19.2.2009 before the Talathi, Dondaicha, Taluka Sindhkheda, District Dhule, raising his objection for carrying out any changes in the revenue records on the basis of the Gift Deeds executed by his father in favour of the defendants. It was contended that though the registered Gift Deeds have been recorded and some of the properties are covered by the Gift Deeds, the plaintiff was raising an objection with the request that the properties should not be transferred to anybody's name and the same position in which the properties stood in the name of his father, be maintained.

6. The plaintiff preferred RCS No. 57 of 2009, which was lodged on 29.3.2009. The new number before the learned Civil Judge S.D. at Dhule is RCS No.23 of 2012. The plaintiff did not challenge the said Gift Deeds and did not press for any relief of declaration, which he could have under Articles 56 and 58 of the Limitation Act, 1963.

7. The plaintiff has already stepped into the witness box as on 2.2.2011. His cross examination commenced on 14.6.2011, with the further cross examination on 4.1.2012, which is still incomplete.

8. Application Exhibit 117 was filed by the plaintiff on 4.12.2015, praying for leave to add three paragraphs to the plaint for challenging the registered Gift Deeds. A prayer is sought to be introduced that the said Gift Deeds be declared as not binding upon the plaintiffs and be declared as being forged and illegal. By the impugned order, the trial Court has allowed Exhibit 117, admittedly on two grounds. Firstly, that the plaintiff got the knowledge of the Gift Deeds executed by his father / defendant No.1 in favour of his brothers and sisters / defendants 4 to 7, in 2010. Secondly, the Gift Deeds have been executed after the filing of the suit and hence an amendment would not be barred.

9. Learned Advocate for the plaintiff has relied upon the judgment of the Honourable Apex Court in the matter of Puran Ram Vs. Bhaguram and another [2008 (4) Mah. L.J. 1], wherein, the Apex Court has ruled that the correction or rectification of the description of the suit property is permissible through an amendment.

10. I find that the trial Court has fallen in a patent error since it has ignored the fact that, (a) the plaintiff had raised an objection to the Gift Deeds before the Talathi, vide his handwritten application dated 19.2.2009 and the suit was filed on 29.3.2009, (b) by concluding that the Gift Deeds, which are admittedly dated in between 15th to 19th of December 2008, have been executed by defendant No.1 after the suit was lodged on 29.3.2009 and (c) that the plaintiff became aware of the gift deeds in 2010, ignoring the fact that he had raised a written objection to the gift deeds on 19.2.2009.

11. Order II Rule 2 of the Code of Civil Procedure (CPC) reads as under:-

"ORDER II : FRAME OF SUIT

1.

2. Suit to include the whole claim

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim- Where a plaintiff omits to sue in respect of, or internationally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs- A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation- For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action."

12. Though Order II Rule 2 of the CPC was not pressed into service before the trial Court, it clearly indicates that every suit shall include the whole of the claim, which the plaintiff is entitled to make in respect of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring his suit within the jurisdiction of any Court. If the challenge to the Gift Deeds had been posed in the suit, the declaration under Article 56 that the instrument is a forged document or the declaration of any other nature under Article 58, would not have been prohibited since the limitation period is of three years from the date the issue becomes known to the plaintiff.

13. However, having filed the suit by excluding his claim against the gift deeds and then filing Exhibit 117 on 4.12.2015, seeking a declaration, which would fall under Article 56 or 58 of the Limitation Act, would then be barred by the law of limitation since the plaintiff has stated in his application on 19.2.2009 that he was aware of the gift deeds, though he may not have stated as to whether he had the knowledge of their registration. The date of knowledge is the flash point.

14. The petitioners / defendants have relied upon the judgment of the Honourable Apex Court in the matter of Van Vibhag Karmachari Griha Nirman Sahkari Sanstha Maryadit Vs. Ramesh Chander and others [(2010) 14 SCC 596], wherein the Apex Court has ruled that an amendment sought after 11 years, which would alter the character of the suit, would be impermissible. While drawing such a conclusion, it was held in paragraph Nos.30, 31 and 32 that as the cause of action was specifically omitted in the said suit, the plaintiff cannot be allowed to include the omitted cause of action in the suit through an

amendment, considering the applicability of Order II Rule 2 of the CPC. Paragraph Nos.30 to 32 read as under:-

"30. This Court is, therefore, of the opinion that the appellant had the cause of action to sue for Specific Performance in 1991 but he omitted to do so. Having done that, he should not be allowed to sue on that cause of action which he omitted to include when he filed his suit. This Court may consider its omission to include the relief of Specific Performance in the suit which it filed when it had cause of action to sue for Specific Performance as relinquishment of that part of its claim. The suit filed by appellant, therefore, is hit by the provisions of Order 2 Rule 2 of the Civil Procedure Code.

31. Though the appellant has not subsequently filed a second suit, as to bring his case squarely within the bar of Order 2 Rule 2, but the broad principles of Order 2 Rule 2, which are also based on public policy, are attracted in the facts of this case.

32. Even though the prayer for amendment to include the relief of specific performance was made about 11 years after the filing the suit, and the same was allowed after 12 years of the filing of the suit, such an amendment in the facts of the case cannot relate back to the date of filing of the original plaint, in view of the clear bar under Article 54 of the Limitation Act. Here in this case, the inclusion of the plea of Specific Performance by way of amendment virtually alters the character of the suit, and its pecuniary jurisdiction had gone up and the plaint had to be transferred to a different court. This Court held in *Vishwambhar and Ors. v. Laxminarayan and Anr.* (2001) 6 SCC 163, if as a result of allowing the amendment, the basis of the suit is changed, such amendment even though allowed, cannot relate back to the date of filing the suit to cure the defect of limitation. (Para 9 at pg. 168-9) Those principles are applicable to the present case."

15. The Honourable Apex Court has concluded in *Revajeetu Builders and Developers Vs. Narayanaswamy and sons* [(2009) 10 SCC 84], that if an amendment introducing a cause of action is such that the cause of action is otherwise not barred by limitation or if an independent suit would not be barred by limitation, such an amendment could be allowed. The trial Court in this case noticed the objections of the defendants on the count of limitation under paragraph No.7, where the cited judgments are reproduced. It has held in paragraph No.8 that an application for amendment cannot be permitted if the cause set out in the amendment would have been barred by the law of limitation. It, however, fell into a patent error in concluding that Order VI Rule 17 of the CPC was an exception to the bar of limitation and concluded that the amendment does not appear to be struck by the limitation bar.

16. In view of the above, I find that the impugned order dated 20.11.2017, which reflects non-application of mind, is patently erroneous. The impugned order is quashed and set aside and application Exhibit 117 stands rejected. Rule

is made absolute.

17. Considering the request of the defendant and keeping in view that defendant No.1 / father is in his early eighties, RCS No.23 of 2012, which is pending from 2009, shall be decided by the trial Court as expeditiously as possible and preferably on/or before 31.3.2020.