

ORDER BELOW EXH.45 IN REG. CIVIL APPEAL NO.314/2019

Perused application, affidavit and say Exh.50. Heard Adv. Bartake for appellants and Adv. Oak for respondent Nos.1 and 2. By this application under Order I R 10 and under Order VI R 17 of C.P.C appellants are praying amendment in appeal. It is contention of appellants that in view of reply notice dated 28/09/2011 issued by advocate of respondent No.1 and 2, they had filed Regular Civil Suit No.573/2012 praying partition of their 1/3rd share in the suit properties. The suit was filed on the available information from CIDCO by reserving right to refer and rely on tripartite agreement dated 19/01/2014 executed between CIDCO, respondent No.1 and 3 in respect of plot No.1 admesuring 5700 sq. mtrs, with leave to amend the plaint by inducting third party as and when discovery of the name and identity of such party in whose favour entire part of plot No.3 illegally transferred by respondent No.1.

2. It is further contention of appellants that, by judgment and decree dated 14/02/2014, the Trial Court rejected the plaint under Order VII R 11(d) of CPC on ground of non issuance of notice to respondent No.3 under Sec.164 of the Maharashtra Co-operative Societies Act, 1960 and limitation. Being aggrieved by said judgment and decree appeal was filed in which an application under Order XXXIX R 1 and 2 of CPC was filed, but it was rejected on 09/06/2016 against which appellants approached the Hon'ble High Court. The Hon'ble High Court by order dated 04/01/2018 directed CIDCO not to pass any order in respect of suit property.

After inquiry with CIDCO it revealed that, respondent No.1 in collusion and connivance with Sushila Deshmukh (deceased) and others caused CIDCO to transfer plot No.3 in favour of M/s. Krishna Developers by executing tripartite agreement dated 21/04/2008. Pending the appeal before Hon'ble High Court, Krishna Developers transferred plot No.3 in favour of M/s Progressive Home by tripartite agreement dated 07/04/2015 and commencement certificate was issued by CIDCO in favour of Progressive Home for development of plot No.3. Even CIDCO allotted plot No.270 to respondent No.1 and 2 by executing lease agreement on 25/07/2017 and also executed tripartite agreement of said plot in favour of Navdip Reality.

3. It is further contended that, appeal is continuation of suit and the illegal act committed by the respondent in connivance with CIDCO by executing several tripartite agreement which caused serious prejudice to the appellants right in suit property. The presence of Krishna Developers, Progressive Home and Navdip Reality is necessary in order to adjudicate and settle all question involved in the suit, therefore, are necessary parties and are necessary to be impleaded.

4. By filing say Exh.50 respondent No.1 and 2 objected the application. Respondent No.3 by pursis dated 04/12/2020 adopted say Exh.50. The application is challenged on the ground that, the same is illegal and not tenable in the eyes of law and is hit by limitation and doctrine of delay and latches. If amendment is allowed, it will change the nature of original suit. Appellants

are claiming altogether different reliefs then the one claimed in the original suit. The proposed amendment in respect of the tripartite agreement dated 25/04/2008 and 07/04/2015 are beyond the period of limitation hence cannot be allowed. Appellants are claiming that, they came to know about the tripartite agreement firstly in the month of August 2018, but respondent-defendant No.2 in his written statement Exh.42 dated 29/06/2012 in para 16-17 categorically stated that, the plot received in lieu of the acquisition was transferred on 21/04/2008 in favour of Krishna Developers. Even respondent-defendant No.3 in his written statement Exh.37 dated 21/06/2012 in para 18 to 20 had categorically stated that, the plots were received in lieu of acquisition. Already limitation period expired many years back. Appellants wants to deny the rights accrued in favour of proposed defendant No.6 to 8. The cause of action to file suit was in the month of August 2011 and suit was filed on 03/03/2012, hence proposed amendment is not within limitation and the declaration relief is sought after 3 years which is beyond the period of limitation. Accordingly rejection of application is prayed.

5. Adv. Bartake submitted that, plaintiffs are claiming 1/3rd share through Mirabai who was the daughter of common ancestor Sakharam. The suit lands were joint family properties and were acquired by CIDCO for New Bombay project. As per the 12.5 GES scheme CIDCO agreed to allot plots to project affected persons. Land admeasuring 8500 sq. mtrs. was to be received in 12.5 scheme. Respondents transferred both the plots in favour of the proposed defendants in connivance with each other and

CIDCO. Therefore, proposed defendants in whose favour tripartite agreements are executed are necessary party to the present appeal in order to settle the dispute in between the parties for once and all. Adv. Bartake further submitted that, application under Order VII R 11 was filed by respondents before the Trial Court which was allowed and the appeal against it is pending in this Court and against rejection of stay application matter is subjudice before the Hon'ble Court. Appellants have undivided share in the suit properties, therefore, there will be no any bar of limitation. Plot No.270 was not in the existence when suit was filed. If amendment is not allowed respondent may take objection of non joinder of purchaser as necessary parties. To buttress his submission reliance is placed on following authorities:

1	Chandrakant Rambhau Khachane and ors. V/s. Nandlal Govardhandas Chandak 2018(3) Mh. L.J.
2.	Sumer Builders pvt. Ltd. V/s. Sadhana Textiles Mills Pvt. Ltd. & ors. 2015(1) ALL MR 795.
3.	Smt. Sharayu Yadavrao Barde & Ors. V/s. Smt. Sindhubai w/o Manohar Chakre & Ors. 1997(2) ALL MR 46.
4.	Rajbahaddur Jiyaram Yadav V/s. Prakash @ Pappu Jiyaram Yadav & Ors. 2016(1)ALL MR 550.
5.	Chakreshwari Construction Pvt. Ltd. V/s. Manohar Lal 2017(5)Mh.L.J.195
6.	Shivanand Ashok Hiremath & ors. V/s. Deepak Ashok Hiremath 2018(2) Mh.L.J.66

6. Whereas, Adv. Oak opposed the submissions on the ground that, appellants who were plaintiffs before the trial Court were negligent and careless and their conduct is necessary to be considered while deciding the present application. As per para

11(j) of the plaint when they claimed that, the plot was transferred to third party then they ought to have obtained the documents from revenue office and as documents were registered were in public domain. He further submitted that, suit was filed on 05/03/2012 on which defendant No.1 to 3 filed their respective written statement vide Exh.40, 37 and 42. On 29/06/2012 and 20/06/2012.

7. Adv. Oak further submitted that, in written statement para 16 defendant No.1 took specific defence that, plot admeasuring 3298.64 sq. mtr., was transferred to Sunil R. Israni, proprietor of M/s. Krishna Developers vide tripartite agreement dt.21/04/2008, whereas, in para 17 specific contention of non joinder of necessary parties that Sunil R. Israni proprietor of M/s. Krishna Developers was taken inspite of it no any amendment application was moved before the Trial Court nor before this Court at the earliest. Amendment application is made after 8 years. Therefore the reasons for amendment is not for proper one and there is lack of due diligence. Suit is not within limitation as regards tripartite agreement. To buttress his submission reliance is placed on following authorities:

1	Gauri Shanker V/s. M/s. Hindustan Trust (Pvt.)Ltd., and ors. (1973)2 S.C.C. 127.
2.	Mashyak Grihnirman Sahakari Sanstha Maryadit V/s. Usman Habib Dhuka and Ors. (2013) 9 S.C.C.485.
3.	Voltas Limited V/s. Rolta India Limited (2014) 4 S.C.C. 516.

8. Perusal of the paper book reveals that, suit was filed on 05/03/2012 by appellants and defendant No.1 filed his written statement on 29/06/2012. In para 16, defendant No.1 took specific defence that, plot adms. 3298 sq.mtr., was transferred in the name of Sunil R. Israni proprietor of M/s. Krishna Developers vide tripartite agreement dated 21/04/2008. Even in para 17, defendant No.1 took specific defence that, suit was not maintainable for want of non joinder of necessary parties i.e Sunil R. Israni, proprietor of Krishna Developers. Thus from the documentary evidence, it goes to show that, appellants were aware of tripartite agreement executed in favour of proposed defendant M/s. Krishna Developers. On 29/06/2012 itself when defendant No.1 filed his written statement wherein specific averment in clear terms were made about tripartite agreement in favour of M/s. Krishna Developers.

9. It is claimed by the appellant that in their plaint they had reserved their right of amendment as and when they will discover the name and identity of the third party. However, the said benefit of reserving the rights would have been available to them when they were not aware of the third party in whose favour the tripartite agreement was executed. On the contrary as discussed above, defendant No.1 in para 16 in clear and unequivocal terms had disclosed the name of the third party as M/s. Krishna Developers and also the specific date on which the agreement was executed.

10. It is also claimed by appellants that, Hon'ble High Court in Appeal No.36350/2017 by order dated 04/01/2018 had directed CIDCO-respondent No.4 not to pass any order in respect of suit property, inspite of it CIDCO executed tripartite agreement. However, it is pertinent to note that, first tripartite agreement between respondent No.1 and M/s. Krishna Developers was executed on 21/04/2008, whereas the second tripartite agreement was executed on 07/04/2015 and plot No.270 was allotted by CIDCO on 25/07/2017 which is prior to order passed by the Hon'ble High Court dated 04/01/2018. Therefore, the pleadings in respect of stay by Hon'ble High Court against CIDCO is misleading.

11. Nowhere in the entire application, it is pleaded as to why there was delay in filing the application and inspite of due diligence appellant could not raise the same before the trial Court at the earliest though he was aware of the same in view of clear pleading by defendant No.1 in his written statement. Therefore, at this stage there seems to be lack of due diligence on the part of appellant. In spite of having clear cut knowledge about the tripartite agreement in the year 2012 itself, no any amendment application was made at the earliest nor any proper reason is given for delay, except, pleading in the original plaint that the rights were reserved to amend the plaint. As discussed above reserving right of amendment could have been considered if appellants were not aware about execution of tripartite agreement. On the contrary defendant No.1 in his written statement had categorically pleaded about it.

12. As regards reliance is placed on the authorities by appellant, in the case of **Chandrakant (supra)** suit was filed for perpetual injunction which was dismissed by the trial Court and during pendency of appeal, plaintiff moved application for amendment seeking declaration that, sale-deed was not binding upon him. Whereas in the case of **Suman Builders (supra)**, the issue of amendment was on the premises of limitation. Whereas, in the case of **Sharyu (supra)**, the dispute was about validity of the will executed and suit was filed beyond 3 years of knowledge of execution of will was held not barred by limitation. In the case of **Rajbahadur (supra)** issue before the Hon'ble High Court was about amendment to partition suit were plaintiff though aware of non inclusion of properties from the written statement and also from cross examination, sought amendment at the time of final argument without promptitude, was allowed subject to costs on issuance of notices to all defendants. In the case of **Chakreshwar (supra)** issue before the Hon'ble Apex Court was whether Rent Tribunal or High Court was justified in rejecting application filed by appellant in their pending main eviction petition seeking to maintain their eviction petition.

13. Whereas in the case of **Shivanand (supra)** the properties were situated outside Maharashtra and plaintiff was unaware of provisions of law and Advocate did not take necessary steps. In all the case laws cited, nowhere the issue of due diligence was discussed or referred nor pleaded. Whereas, the reliance placed by respondent No.1 and 2 in the case of **Gauri Shanker (supra)**, wherein the Hon'ble Apex Court in para 9 held;

The respondent waited for 8 years before seeking amendment to include a plea on the absence of such a notice. The trial Court did not allow the amendment but in our opinion no such amendment should have been allowed on account of gross delay and laches on the part of the respondent in raising such a plea. In such matter it must be remembered that, if a technical plea of the nature sought to be raised had been raised at an earlier stage the appellant could have withdrawn the petition with eviction with liberty to file another petition after serving the requisite notice. By not raising that plea for nearly 8 years a great deal of prejudice was caused to the appellant.

14. Whereas in the case of **Mashyak (supra)** the Hon'ble Apex Court in para 8 held;

Indisputably, respondent 1-plaintiff was the office bearer of the society at the relevant time and by the resolution taken by the society the said plaintiff was authorized to complete the transaction. Hence, it is incorrect to allege that, respondent 1-plaintiff was not aware about the transaction of 1989. Moreover, before the institution of the suit in the year 2010, the plaintiffs alleged came to know about the convince-deed dt.08/02/1989, sometime in the year 2009, but relief was not sought for in the plaint which was filed much latter i.e. 14/10/2010. The High Court has not considered these undisputed facts and passed impugned order on the general principles of amendment as contains in O 6 R 17 of C.P.C. There is no ground for allowing the amendment sought for by the plaintiffs which was not only deleted one but was clearly and afterthought for the obvious purpose to avert the inevitable consequence. The High Court committed serious error of law in setting aside the order passed by the trial Court whereby the amendment sought for was dismissed.

15. Whereas, in the case of **Voltas (supra)** the Hon'ble Apex Court in para 29 and 30 held;

Para 29: *In this context, we may referred with profit to the ruling in K Raheja Construction Ltd. v/s. Alliance Ministres wherein the plaintiff ha filed a suit for permanent injunction and sought an amendment for grant of relief of specific performance. The said prayer was rejected by the learned trial court. A contention was canvassed that the appellant had not*

come forward with new plea and, in fact, there were material allegations in the plaint to sustain the amendment of the plaint. The Court observed that having allowed the period of seven years to elapse from the date of filing the suit, and the period of limitation being three years under Article 54 of the Schedule to the Limitation Act, 1963 any amendment on the grounds set out, would defeat the valuable right of limitation accruing to the respondent. The said principle has been reiterated in South Konkan Distilleries v. Prabhakar Gajanan Naik and Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit v. Ramesh Chander.

Para30: *In Revajeetu Builders and Developers v. Narayanaswamy and Sons while laying down some basic principles for considering the amendment, the Court has stated that as a general rule the court should decline amendments if a fresh suit on the amend claims would be barred by limitation on the date of application.*

16. Therefore, considering the long delay of about 12 years in moving the application for amendment without pleading of due diligence is devoid of any merit. Hence I don't find any merit any application. Accordingly, I proceed to pass following order.

ORDER

1. Application Exh.45 stands rejected.
2. Costs in cause.

Panvel,
Date :- 08/02/2021

(N.B.Lavte)
Ad-hoc District Judge-1,
Panvel-Raigad