

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

Writ Petition No.342 of 2009

Smt. Kamlabai Namdeo Borikar and others

vs.

Mrs. Shamin Mohamad Ismail and others

*Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.*

Court's or Judge's Orders.

Mr. S.S. Ghate, Counsel for the Petitioners.

None for Respondent No.1.

Mr. Lalji James, Counsel for Respondent Nos.2 & 3.

CORAM : PRASANNA B. VARALE, J.

DATE : MARCH 29, 2010.

Heard learned Counsel for the respective parties.

By the present writ petition, the petitioners are challenging the order passed by the learned 5th Joint Civil Judge Junior, Chandrapur, dated 27/08/2008, below Exh.62 in Regular Civil Suit No.38/2001.

It is the case of the petitioners that Namdeo Ramchandra Borikar, the husband of petitioner no.1 and father of petitioner nos.2 to 4, was gifted the suit property i.e. land Survey No.128 of village Wadgaon, through his father viz. Ramchandrarao Chintaman Borikar. Namdeo Borikar by executing a will-deed transferred his share to the present petitioners. It is submitted that the mutation entries are accordingly taken on record and the petitioners are in possession of the suit property. It is further submitted that respondent no.1 is claiming to be the purchaser of the suit property from

petitioner no.2 and this fact came to know in the knowledge of the petitioners in the year 2000 while respondent no.1 was undertaking the work of measurement of the suit property. The petitioners, therefore, filed Regular Civil Suit No.38/2001 for declaration and permanent injunction against the respondents/defendants. Respondent no.1 filed reply to the application filed by the petitioners for grant of temporary injunction. It seems from the counter claim of respondent nos.2 and 3 that they had purchased the suit property from respondent no.1. It also seems that respondent/defendant nos. 2 and 3 filed an application for adding them as party to the suit on 10/01/2005 under Order I Rule 10 of the Code of Civil Procedure. That application was allowed. The petitioners/applicants then filed an application for amendment under Order VI Rule 17 of the Code of Civil Procedure. The proposed amendment in the application reads thus :

“12(a) The Sale-Deed dated 30/10/2004 executed by Shammin Mohammad Ismail (defendant no.1) in favour of (1) Shri Padmsen S/o. Amritlal Mittal and (2) Shrimati Premlata W/o. Padmsen Mittal is illegal, null and void, the defendant no.1 Shammin Mohamad Ismail has on right to sale a said land to the defendant No.2 and 3 and defendant No. 2 and 3 has no right to purchase it.”

The amendment application was opposed by the respondents. The learned 5th Joint Civil Judge Junior Division,

Chandrapur rejected the application. Being aggrieved by the said order, the petitioners are before this Court.

The learned Counsel for the petitioners submits that the learned Magistrate merely on technical grounds rejected the application. The learned Counsel further submits that the application filed by the petitioners was for seeking amendment resisting to create third party interest by respondent/defendant nos. 2 and 3 and as such that application for amendment cannot be hit by the Limitation Act. He further submits that the learned lower Court has rejected the application mechanically without application of mind and, therefore, prays for allowing the application.

The learned Counsel for respondent nos.2 and 3 opposes the application and supports the order passed by the learned Magistrate. Though respondent no.1 is served by paper publication, none appears for respondent no.1.

Perusal of the order passed by the learned Magistrate shows that the facts are not in dispute that the petitioners are the plaintiffs, who have filed suit for declaration and permanent injunction bearing R.C.S. No.38/2001. Respondent/defendant nos.2 and 3 sought an intervention in the suit. Their application for adding them as party was allowed. The order passed by the learned Magistrate shows that the application was opposed on the ground that it was a time barred application. Reliance was

also placed on the judgment of Madras High Court in the matter of Chinnaswami Nayakar vs. Kankaswami Gaounder and others, reported in AIR Madras 81 (Vol.57 C21). The learned Magistrate found that the earlier application [Exh.55] of the petitioners/applicants for amendment was rejected. The learned Magistrate also observed that the petitioners were well aware of the fact from 10/01/2005 that the sale-deed is executed in the name of respondent nos.2 and 3.

It will be interesting to note here that the sale-deed was executed in the name of respondent nos.2 and 3 on 30/10/2004 and the application for amendment was filed in the year 2008. Considering this fact, the learned Magistrate rejected the application. In the reply filed by respondent nos. 2 and 3, it is submitted that the husband of petitioner no.1 has already sold the land way back in the year 1992. This fact was known to the petitioners as it was revealed from the written statement filed on behalf of the petitioners, who are the party-defendants in R.C.S. No.5/1993. Therefore, it was submitted that the application filed by the petitioners was clearly and hopelessly barred by limitation.

Reliance is placed on the judgment of this Court in the matter of Hari Shankar Singhania and others vs. Dr. Gaur Hari Singhania and others, reported in 2002 (4) Mh.L.J. 938, wherein this Court, by considering the judgment of the Apex

Court, held that if plea of limitation is disputed *bona fide*, it could be made subject matter of issue after allowing the amendment. This Court in the said matter referred to the view of the Apex Court, wherein it was held that it is not in every case wherein the plea of limitation be raised that amendment should be disallowed. The Apex Court further observed that it is only where it is clear on the facts of the case that the plea raised by way of amendment is surely time barred on the date of application for amendment that the Court would refuse the amendment. Thus, there cannot be any dispute on the principle that the application for amendment may not be disallowed casually and in a routine manner.

In the present case, the respondents were right in submitting that the amendment was not sought on *bona fide* grounds. It was then submitted that the petitioners were well aware of the facts that the husband of petitioner no.1 sold the land way back in the year 1992 and as such the amendment sought for cannot be treated as an amendment on *bona fide* grounds and for want of knowledge of the petitioners. In my opinion, no fault can be found with the order passed by the learned Magistrate. The petition is devoid of merits and deserves to be dismissed. Accordingly, the petition is dismissed.

JUDGE