

(2013) 03 BOM CK 0269**Bombay High Court****Case No:** Writ Petition No. 12155 of 2012

Smt. Pinky Devi and Mr.
Neerajsingh Sunder Singh
Thakur

APPELLANT

Vs

Mr. Krishnamurthy Santappa
Govilekar

RESPONDENT**Date of Decision:** March 6, 2013**Citation:** (2013) 3 ABR 439 : (2014) 1 ALLMR 714 : (2013) 3 BomCR 550 : (2013) 3 MhLJ 32**Hon'ble Judges:** R.M. Savant, J**Bench:** Single Bench

Judgement

R.M. Savant, J.

Rule in both the Petitions with the consent of the Learned Counsel for the parties made returnable forthwith and heard. The above Petitions filed under Article 227 of the Constitution of India take exception to two identical orders both dated 3-11-2012 passed by the Learned Judge of the Bombay City Civil Court. By the said orders, the Chamber Summons No. 906 of 2013 (in Writ Petition No. 12155 of 2012) and Chamber Summons No. 905 of 2012 (in Writ Petition No. 12156 of 2012) came to be dismissed and resultantly the amendments sought in the plaint in two suits, wherein the Petitioner No. 1 is the Plaintiff, came to be rejected.

2. As indicated above the Petitioner No. 1 herein is the original Plaintiff in S.C.Suit No. 2242 of 2008 and S.C. Suit No. 2072 of 2008 which suits have been filed by her for declaration and injunction. The subject matter of the Suits is the property which the Petitioner claimed that she owned pursuant to a conveyance deed which has been executed in favour of her husband i.e. Sunder Singh Thakur. It appears that prior to the instant applications for amendment by way of the aforesaid two Chamber Summons, the Petitioner No. 1 had earlier also moved the Chamber Summons for amendment of the plaints which came to be allowed pursuant to which the plaints in the two suits came to be amended.

3. The Petitioner No. 1 moved the instant two chamber summons for amendment of the plaint as it was her case that on taking the papers from her earlier Advocate Mr. V. M. Punjabi and on going through the papers it was found that the Petitioner No. 2 being the son of the original owner of the said property was not a party to the Suit. It is also her case that she came across several mistakes in the plaint and the dates and descriptions of the suit property was not matching to the documents which have been annexed to the plaint and therefore she has filed the said two chamber summons which have been referred to herein above. The said chamber summons were opposed by the Defendants to the Suit. The opposition was on the ground that allowing the amendment would change the cause of action as well as the nature of the Suit and that the relief if sought by way of the amendments is allowed to be included, the relief which is barred by limitation would be allowed to be incorporated by the Court. The said Chamber Summons were heard by the Learned Judge of the Bombay City Civil Court who by the identical orders both dated 3-11-2012 has rejected the same. The rejection is inter-alia on the ground that firstly the trial has commenced as the issues have been framed and the suit is set down for the recording of evidence, that the reasons why the amendments could not be carried out earlier though the application for amendment was filed and allowed by the court earlier have not been spelt out and thirdly the incorporation of a prayer for removal of structure admeasuring 8 x 12 sq.ft. on the strip of land adjacent to tenement No. 67 would result in the incorporation of a relief which is barred by limitation. As indicated above, the Trial Court i.e. the Learned Judge of the Bombay City Civil Court has by the impugned order rejected both the applications.

4. At this stage it would be relevant to advert to the amendments which have been sought in the plaint which are contained in the schedule -I to both the Chamber Summons.

By clause (I) the Plaintiff No. 1 sought to join her son Neerajsingh Sundarsingh Thakur as a party to the Suit.

By clause (II) the averments in respect of the said Neerajsingh Takur is sought to be incorporated.

By clause (III) the description of the Suit property i.e. tenement No. 6 Room No. 67 and or tenement No. 6/67 is sought to be deleted and substituted by "tenement No. 67 in RC Barrack No. 6, Chembur Colony Mumbai 400 074".

By clause (IV) Paragraphs 3 and 4 of the Plaintiff along with Exhibit A are sought to be deleted and substituted by paragraphs 3, 3(a), 3(b), 4 and 4(a) which have been shown in the schedule.

By clause (V) paragraph 6 of the plaint is sought to be deleted because the averments in the said paragraph in respect of the conveyance deed are already there. The said document is already exhibited as Exhibit A and G to the plaint.

By clause (VI) the date of the death of Kaushalyabai is sought to be corrected from 11-5-1974 to 11-2-1974.

By clause (VII) paragraph 8 and 8(a) are sought to be deleted.

By clause (VIII) in paragraphs 10(b) and 10(c) a reference is sought to be made in the said paragraphs to the agreement dated 28-1-1971.

By clause (IX) the deletion of paragraph 12(a) and 12(b) is sought because they are repetitive.

By clause (X) deletion of paragraph 13(c) is sought as the averments contained therein already find a place in paragraph 13(a).

By clause (XI) paragraphs 14 and prayer clause (b), (c-i), (c-ii) and (d) of the plaint are sought to be deleted.

By clause (XII) paragraph 23(a) is sought to be added to the effect that the Plaintiffs are ready to pay additional court fees if required by this Court and the prayer clauses (b), (c-i), (c-ii) and (d) are sought to be added.

By clause (XIII) it is prayed that consequential amendments in the plaint be allowed.

In so far as the Writ Petition No. 12156 is concerned, the amendment sought vide clause (VIII) as above is not sought and that is the only distinguishing feature between the two amendment applications.

5. Heard the learned Counsel for the parties.

6. The Learned Counsel for the Petitioners in both the Petitions sought to assail the order passed by the Trial Court on the ground that the Trial Court has erred in rejecting the applications for amendment on the ground that the trial has begun. It is the submission of the Learned Counsel for the Petitioners that though the issues have been framed, the affidavit of evidence is not filed and therefore the trial cannot be said to have begun. In support of the said contention the Learned Counsel relied upon judgment of a Division bench of this Court reported in Mahadeo Bhanje Vs. Balaji Pathade and Rajendra Bhanje, wherein the Division Bench relying upon the Judgment of the Apex Court reported in Vidyabai and Others Vs. Padmalatha and Another, held that the commencement of trial would be from the date of filing of affidavit in lieu of examination in chief and not from the date of framing of issues.

7. The Learned Counsel in support of the applications for amendment would contend that what the Plaintiff No. 1 is seeking to do by way of the amendments is to bring clarity both in the description of the property as well as in the averments so as to render an effectual and complete adjudication of the dispute between the parties. The learned Counsel would contend that the amendment sought by way of clause (III) of the schedule in the description of the property is only technical as the documents in respect of the property have been annexed to the plaint and what the

Plaintiffs are seeking is the correction of the suit property from being tenement No. 6 Room No. 67 to tenement No. 67 in RC barrack No. 6 Chembur Colony. The Learned Counsel would contend that in so far as the other paragraphs are concerned, the deletion and addition is sought to make the averments more cohesive as presently as the plaint stands the averments are not in a chronological order or made in a cohesive manner. In respect of the relief which has been sought by way of prayer clause (b) in clause (XII) the Learned Counsel would contend that the Suit is in respect of the property which has been described in paragraph (3) of the plaint and the same would include the structure over the strip of land outside the tenement No. 67 Barrack No. 6 and therefore it could not be said that a new relief is sought in the Suit so as to change the nature of the suit. In so far as the location map which the Plaintiffs seeks to incorporate which is annexed to the Chamber Summons as Exhibit-A, the Learned Counsel would contend that the map showing the suit property is already annexed to the conveyance which has been annexed to the Plaintiff. The Learned Counsel would therefore contend that allowing the amendment applications would not change the nature of the Suit and therefore can not be said to cause prejudice to the Defendants.

8. Per contra the Learned Counsel Mr. Mehta appearing for the Respondent i.e. the original Defendant would question the amendments moved at the stage after the issues were framed. The Learned Counsel would contend that all along till the filing of the present applications, the Plaintiff No. 1 has proceeded on the basis of tenement No. 67 barrack No. 6 and that is how the application for injunction was prosecuted. The Learned Counsel would contend that allowing a change in the description of property at this stage would prejudice the Defendants in both the Suits. In so far as the other averments which are the paragraphs which are sought to be incorporated by way of substituting i.e. paragraph Nos. 3, 3(a), 3(b), 4 and 4(a), are concerned, the Learned Counsel would contend that paragraphs 3 to 3(b) are relatable to the reliefs sought by way of prayer clause (b) which is sought to be incorporated by way of amendments. The said prayer clause being ex facie barred by limitation, the amendment by way of paragraphs 3 to 3(b) cannot be permitted. In so far as paragraphs 4 and 4(a) are concerned, the Learned Counsel would contend that by averments in the said paragraphs a different story is now sought to be incorporated than what was averred in the original paragraph No. 4 wherein it has been stated that there are two conveyance deeds in favour of the said Kaushalyabai Tharumal where as by the new paragraphs 4 and 4(a) the theory now sought to be propounded is that after the death of Kaushalyabai the plot of land was offered to the deceased Kaushalyabai, however, the husband of the Plaintiff No. 1 accepted the offer and paid the amount. The Learned Counsel would contend that date which is now sought to be incorporated in paragraph 10(b) i.e. agreement dated 28-1-1971 cannot be allowed to be incorporated in view of the fact that the relief sought in respect of the said agreement is barred by limitation at this point of time. The Learned Counsel would further contend that Plaintiffs would not be

entitled to the incorporation of the prayer clauses (b), (c-i), (c-ii) and (d) as the said prayer clauses are based on the averments which are contained in paragraphs 3 to 3(b) which cannot be permitted. The Learned Counsel however, fairly conceded that the amendment sought vide clauses (I), (II), (V), (VI), (VII) and (X) may be allowed as the Defendants have no objection to the said amendments being allowed.

9. I have heard the Learned counsel for the parties and have bestowed my anxious consideration to the rival contentions. However, before I proceed to consider the rival contentions the statement made by the Learned Counsel appearing for the Petitioners i.e. the original Plaintiff and the proposed Plaintiff No. 2 is required to be noted. The Learned Counsel for the Petitioners stated that the Petitioners would not press the amendment sought vide clause (IX). As indicated above one of the grounds on which the amendment applications i.e. the Chamber Summons has been dismissed is the ground that the trial has commenced. In the light of the Judgment of the Division Bench in Bhanje's case the said finding given by the Trial Court is unsustainable and since the Suit is only at the stage where the issues are framed, it cannot be said that the Trial has begun, therefore on the said ground the amendment applications cannot be rejected.

10. It would therefore have to be considered as to which of the amendments can be allowed in view of the statement made by the Learned Counsel for the Petitioners. There is no difficulty in so far as the amendments which are acceptable to the Respondents being allowed. Hence in so far as the amendments sought vide clauses (I), (II), (V), (VI), (VII) and (X) the same are allowed in view of the statement made by the Learned Counsel for the Respondent that the Respondent has no objection to the said amendments being allowed.

11. The amendments sought vide clause 3 is a contentious issue between the parties. Whereas it is the contention of the Learned Counsel for the Petitioners i.e. original Plaintiffs that the suit property has already mentioned in paragraph 3 of the plaint and the description of the suit property already finds a place in the conveyance deed which has been executed in favour of the husband of the Plaintiff No. 1 and what is sought to be done is only correcting the description of the suit property. In my view having regard to the fact that there are already documents on record wherein the property is described as tenement No. 67 RC Barrack No. 6 the amendments sought cannot be said to be an amendment by which a totally new property is sought to be included. In my view therefore the amendments sought vide clause (III) can be allowed as what is sought to be done is merely change the number which has been incorrectly mentioned in the suit as originally filed.

Now coming to the amendments which are sought vide paragraphs 3 to 3(b), the said averments which are sought to be incorporated by the said paragraphs by substituting the old paragraph No. 3 are relatable to the reliefs sought by way of prayer clause (b) which is sought to be incorporated in the plaint. A reading of prayer clause (b) discloses that the said relief can be said to be a different relief than

the relief which was originally sought by way of prayer clause (b) in the plaint. It is not possible to accept the contention of the Learned Counsel for the Petitioner that vide the said prayer clause (b) a more clear relief is sought as in the original prayer clause (b) according to the Learned Counsel the relief sought is in respect of the suit property. If the relief has already been sought in the plaint as contended by the Learned Counsel for the Petitioners, there is no warrant for the Plaintiff to again incorporate prayer clauses (b) and (c-i) in the plaint by way of amendment. The said prayer therefore cannot be allowed to be incorporated. In so far as prayer clause (d) is concerned, by the said prayer a declaration is sought in respect of the agreement dated 15-11-1983 and agreement dated 28-1-1971. The relief sought of cancellation of the said documents at this point of time would be *ex facie* barred by limitation and therefore cannot be allowed. In view thereof none of the prayers which are sought to be incorporated by way of amendment i.e clause (XII) of the Schedule can be permitted. If that be so, the averments relating to the said prayers in the plaint cannot also be permitted therefore the inclusion of paragraphs 3 to 3(b) cannot be allowed. In so far as the inclusion of the new paragraphs 4 and 4(a) are concerned, in my view, the same are factual aspect which the Petitioners seek to bring on record and therefore the same can be allowed. The Learned Counsel for the Petitioners at this stage states that the original paragraphs 3 and 4 be allowed to be retained. The said original paragraphs 3 and 4 are therefore allowed to be retained and paragraphs 4 and 4(a) as contained in clause (IV) of the schedule would be added after the old paragraph 4 and numbered accordingly. In view of the fact that the new prayer clauses are not allowed to be incorporated, the Learned Counsel for the Petitioners seeks retention of the old prayers of which earlier deletion was sought. The prayers as existing in the suits are accordingly allowed to be retained. In so far as clause (VIII) of the schedule is concerned, a reference to the agreement dated 28-1-1971 cannot be allowed to be incorporated in paragraph 10(b) at this point of time, as the Petitioners though aware of the said agreement and though having incorporated it in the companion suit, have not made any such reference in the present suit against the Defendant. Hence the amendment sought vide clause (VIII) is rejected. The plaintiff would also be entitled to incorporate the location plan which is Exhibit A to the schedule in the plaint as the location map though not in the same form is already on record by virtue of the conveyance deed annexed to the plaint. In view of the fact that the prayers by way of prayer clauses (b), (c-i), (c-ii) and (d) are not allowed to be incorporated, the question of Plaintiffs paying additional court fees would not arise and therefore the averments to the said effect would not be necessary to be incorporated.

12. The averments which have been allowed to be incorporated are on the basis of the statement made by the Learned Counsel for the Respondent and such averments which this Court is of the opinion would result in the effectual and complete adjudication of the dispute between the parties. It is the submission of the Learned Counsel for the Petitioners that the strip of land and the structure thereon

is part of the suit property and which finds place in paragraph 3 of the plaint, the same however is disputed by the Learned Counsel for the Respondent herein i.e the Defendant by contending that the said strip of land was not forming part of the suit property and the suit property was described as tenement No. 67 barrack No. 6 and not the strip of land. It is not necessary for this Court to go into the said aspect at the stage of consideration of the applications for amendment of the plaints as it would be open for the parties to assert their respective cases before the Trial Court at the appropriate time. The above Writ Petitions are accordingly allowed to the extent mentioned herein above. The Plaintiff to carry out the amendments in the plaints of the two suits in terms of this order within a period of six weeks from date and serve the amended copy of the plaints on the Respondent within one week thereafter. The Respondent would be entitled to file his Additional Written Statements within the time that will be stipulated by the Trial Court.

13. Needless to state that the Suits in question would be tried on their own merits and in accordance with law uninfluenced by any observations made in the instant order. Rule is accordingly made partly absolute in the above Petitions with parties to bear their respective costs.