

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 4080 OF 2015

M/s Atithi Builders and
Constructors and Anr

Petitioners

Vs

1A. Kum.Shobha Dadaji
Sarmalkar and Ors.

.. Respondents

Mr. Prasad K. Dhakephalkar, Senior Advocate with Mr. Chirag Mody, Mr. Samit Shukla, Ms. Ketki Kulkarni i/b DSK legal, Advocates for Petitioners.

Ms. Sulbha A. Dhamale, Advocate for respondents no.1A to 8.

CORAM : R.G.KETKAR,J.

DATE : 16/07/2015

PC:

1. Heard Mr. Prasad Dhakephalkar, learned senior counsel for the petitioners and Ms. Sulbha Dhamale, learned counsel for respondents no. 1A to 8 at length. On the oral application made by Mr. Dhakephalkar, respondents no. 9 to 15 are deleted from the present proceedings as no relief is claimed against them. On the Motion made by Mr. Dhakephalkar, respondents no.9 to 15 are deleted. Amendment shall be carried out forthwith.

2. Rule. Ms. Dhamale waives service on behalf of the respondents. At the request and by consent of the parties, Rule is made returnable forthwith and Petition is taken up finally.

3. By this Petition under Article 227 of the Constitution of India, original defendant no.8 has challenged the Judgment and order dated 19.1.2015 passed by the learned Judge, City Civil

Court, Dindoshi, Goregaon, Mumbai in Chamber Summons No.611 of 2013 in S.C. Suit No.412 of 2007. By that order, the learned trial Judge allowed the Chamber Summons taken out by respondents no.1 to 8, hereinafter referred to as 'plaintiffs', and directed them to carry out necessary amendments in the plaint as well as Notice of Motion and to file amended copy of the Plaint as well as Notice of Motion on record within 14 days from the date of the order.

4. In support of this Petition, Mr. Dhakephalkar submitted that the plaintiffs have instituted suit claiming declaration that they are legal occupants of **open land, admeasuring 1707.50 sq.ft**, situate on the plot of land bearing Survey No.161 (Pt), old C.T.S.No.237 of village Pahadi, Goregaon (W), Mumbai -400090 (for short, 'suit property') by virtue of adverse possession and the same may be handed over to the plaintiffs by defendants no.1 and 2, among other reliefs. He submitted that during the pendency of the suit, the plaintiffs took out Chamber Summons No. 74 of 2011 for amending the plaint. As far as controversy in the present petition is concerned, the amendment proposed in Schedule-II is relevant which reads thus:

SCHEDULE II

To delete last two lines of prayer clause (a) in the plaint of the suit and to add prayer clause (a-1)

(a-1) This Hon'ble Court may pass an order directing the defendant no.8 to handover vacant and peaceful possession

of **area, constructed portion admeasuring 1707.50 sq.meters** (18379.97 sq.ft) to the plaintiffs, in lieu of alternate area of the suit plot, forceably taken away by defendant no.1 and 2 from the plaintiff situated at survey No.161 (Part) village Pahadi, Goregaon (West), M.G.Road, Extension, Mumbai which is a suit plot.”

5. He submitted that the learned trial Judge dismissed the Chamber Summons. Aggrieved by that order, the plaintiffs instituted Writ Petition No.5025 of 2011 in this Court. Petition was dismissed on 22.8.2011.

6. Mr. Dhakephalkar submitted that thereafter the petitioners again took out Chamber Summons No 72 of 2013 for amending the Plaint. As far as the controversy in the present petition is concerned, proposed amendment in Schedule II is relevant which reads thus:

“SCHEDULE-II

To be added as prayer clause (b) deleting the original prayer clause (b):

(b) The defendant no.1,2 & 8, 9 be directed to hand over vacant and peaceful possession of **the constructed portion on the suit plot bearing Survey No.161 (Pt), Old CTS No.237 of village Pahadi, Goregaon (W) admeasuring 1707.50 sq.meters to the plaintiffs in lieu open of the suit plot**, forcibly taken away by the defendant no 1 and 2 from the plaintiff.”

The Chamber Summons was rejected by the trial Court on 4.2.2013. Being aggrieved by that order, the plaintiffs instituted Writ Petition No.1760 of 2013. By order dated 13.3.2013, the petition was partly allowed in so far as amendment proposed vide Schedule-I of the Chamber Summons is concerned. In other

words, the amendments proposed in Schedule-II and III of the Chamber Summons were rejected.

7. Mr. Dhakephalkar submitted that the plaintiffs have, thereafter, filed present Chamber Summons No.611 of 2013 and the proposed amendment which is relevant for the purpose of deciding the controversy raised in the present petition is prayer (d) of Schedule II which reads thus:

“(d) The defendant no.8 and 9 be directed to hand over vacant and peaceful possession of **the constructed portion of the suit plot survey no. 161(pt) Old C.T.S. No.237 of village Pahadi, Goregoan (W), admeasuring 1707.50 sq.mtrs** to the plaintiff in lieu of the suit plot, forcibly taken away from the plaintiffs.”

8. Mr. Dhakephalkar submitted that two successive Chamber Summons were rejected by the trial Court. The said orders were confirmed by this Court. Despite that, the plaintiffs took out Chamber Summons praying for the self-same relief. The learned trial Judge, without considering earlier orders passed by the trial Court as also this Court, has allowed the Chamber Summons. He, therefore, submitted that the impugned order is liable to be quashed and set aside as it was not permissible for the plaintiffs to apply on the third occasion for the self-same relief.

9. On the other hand, Ms. Dhamale supported the impugned order. She submitted that earlier when the Chamber Summons were rejected by the trial Court and those orders were confirmed by this Court, defendant no.8 was not impleaded as a party

defendant. After defendant no.8 was impleaded, the plaintiffs took out this Chamber Summons. The learned trial Judge has recorded a categorical finding in paragraph 4 that if the proposed amendment is not allowed, then the very purpose of filing suit will be infructuous and by adding the proposed amendment by the plaintiffs, definitely the controversy between the parties, namely plaintiffs and defendants no.8 and 9, will be resolved. It was further observed that it is well settled law that amendment can be sought by any party at any stage of the suit. Considering the nature of relief sought by the plaintiffs and after considering the provisions of Order 6, Rule 17, the learned trial Judge held that it is necessary to grant the Chamber Summons.

10. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the plaintiffs had earlier filed Chamber Summons No.74 of 2011. I have already extracted prayer clause (a-1) of Schedule II. It is not in dispute that by order dated 7.5.2011, the learned trial Judge dismissed the Chamber Summons. It is also not in dispute and is rather matter of record that the plaintiffs challenged that order by instituting Writ Petition No.5025 of 2011. In paragraph 5 of the order, it was observed thus :-

“5. It is evident that the **suit is presented in 2007 claiming reliefs in respect of the recovery of possession of open plot.** It is also evident on perusal of

the order passed on the notice of motion that the defendants were permitted to proceed with the construction work and they were required to obtain leave of the Court as and when they intend to create third party interest. The defendant no.8 was impleaded as party to the proceeding by virtue of the order passed on 10th March 2008. Since the issuance of order passed on notice of motion by the trial Court permitting the defendant no.8 to proceed with the construction activity on 9th April 2008, it can be taken safely that the plaintiffs were aware that the defendant is likely to commence construction thereafter. In spite of issuance of such order by the Court, the plaintiff waited for about three years for presenting the instant application and moved the court only after the commencement of recording of evidence. It is the contention of the plaintiffs that they came to know in respect of the commencement of construction by defendant no.8 only after securing information under the Right to Information Act does not appear to be convincing."

Perusal of the above extracted portion shows that the learned Single Judge observed that the suit was instituted in 2007 claiming relief in respect of recovery of possession of the open plot. After considering the order passed in the Notice of Motion, it was observed that the defendants were permitted to proceed with the construction work and they were required to obtain leave of the Court as and when they inclined to create third party interest. Defendant no.8 was impleaded as party to the proceedings as per the order dated 10.3.2008. Defendant no.8 was permitted to proceed with the construction activities on 9.4.2008. In that context, learned Single Judge observed that the plaintiffs were aware that the defendants were likely to commence construction thereafter. In spite of passing of the order, the plaintiffs waited about three years for presenting the

Chamber Summons for amendment, that too, after commencement of recording of evidence. The learned Single Judge of this Court, therefore, dismissed the Petition.

11. The plaintiffs thereafter took out Chamber Summons No.72 of 2013. I have already reproduced prayer (b) of Schedule-II of that Chamber Summons. By order dated 4.2.2013, the learned trial Judge dismissed the Chamber Summons. Aggrieved by that order, the plaintiffs instituted Writ Petition No.1760 of 2013 in this Court. By order dated 13.3.2014, Writ Petition was partly allowed. Amendment sought vide Schedule-I of the said Chamber Summons was allowed. As far as amendments proposed in Schedule-II and III are concerned, they were specifically rejected. The learned Single Judge of this Court also adverted to rejection of Chamber Summons No.72 of 2013 and confirmation of that order in Writ Petition No.1706 of 2013. Relevant portion of paragraph 12 reads as under:

“The said Chamber Summons No.74 of 2011 came to be rejected which rejection was confirmed by this Court in Writ Petition No.5025 of 2011. Though it is sought to be contended on behalf of the plaintiffs by the learned counsel Mrs Dhamale that the earlier amendment having been rejected qua the defendant no.8, however, since the amendment sought is now qua the respondent nos. 1 and 2, the same can be allowed. It is not possible to accept the said contention. The said relief has been sought in a suit which has been originally filed claiming title by adverse possession. **Hence, in so far as the said relief is concerned, the same is qua the land in question and, therefore, the entitlement of the plaintiffs to the amendment sought to include the relief of possession of the constructed area cannot be on the basis that**

earlier it was sought against the defendant no.8 and now it is sought against the respondent nos 1 and 2. Apart from the said fact, this Court having confirmed the rejection of the identical amendment sought in the plaint by way of Chamber Summons No.74 of 2011, the instant Chamber Summons in so far as Schedule-II and III thereof cannot be allowed and would accordingly have to be rejected."

12. The plaintiffs have, thereafter, instituted present Chamber Summons. I have already extracted prayer clause (d) of Schedule -II of the proposed amendment. Perusal of that prayer clause clearly shows that the plaintiffs sought direction against defendants no.8 and 9 to hand over **vacant and peaceful possession of the constructed portion of suit property admeasuring 1707.50 sq.meters.**

13. The learned trial Judge, without considering the effect of orders passed by the trial court and the orders passed by this Court, has allowed the Chamber Summons on the ground that the amendment can be allowed at any stage of the suit as also considering the nature of the suit and relief sought by the plaintiffs and after considering Order VI, Rule 17 of C.P.C., it is necessary to grant Chamber Summons. The learned trial Judge also failed to consider that the proposed chamber summons was taken out after commencement of trial and as to whether the plaintiff has satisfied ingredients laid down in proviso to Order VI, Rule 17. The learned trial Judge allowed the Chamber summons on the ground that if it is disallowed, the very purpose of filing

suit will be infructuous. In my opinion, basically third Chamber Summons taken out for the self-same relief is nothing but an abuse of process of the Court and abuse of process of law. In my opinion, the learned trial Judge should have dismissed the Chamber Summons by imposing exemplary costs. Instead of dismissing the Chamber summons, the learned trial Judge allowed the Chamber Summons and, that too, without advertent the earlier orders passed by the trial Court as also this Court.

14. In view thereof, the impugned order cannot be sustained and is liable to be set aside. In the case of Salem Advocate Bar Assn. Vs. Union of India (2005) 6 Supreme Court Cases 344, the Apex Court observed in paragraph 37 as under:-

“37. Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded on the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In large number of cases, such an order is passed despite Section [35\(2\)](#) of the Code. Such a practice also encourages filing of frivolous suits. It also leads to taking up of frivolous defences. Further wherever costs are awarded, ordinarily the same are not realistic and are nominal. When Section [35\(2\)](#) provides for cost to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the Court in its discretion may direct otherwise by recording reasons thereof. The costs have to be actual reasonable costs including the cost of the time spent by the successful party, the transportation and lodging, if any, or any other incidental cost besides the payment of the court fee, lawyer's fee, typing and other cost in relation to the litigation.”

15. In the case of RamRameshwari Devi Vs. Nirmala Devi,

(2011) 8 Supreme Court Cases 249, the Apex Court has observed that time has come for imposing realistic costs for delaying litigation as also for raising frivolous pleas. In paragraphs 52 to 54, it was observed thus:

“52. The main question which arises for our consideration is whether the prevailing delay in civil litigation can be curbed? In our considered opinion the existing system can be drastically changed or improved if the following steps are taken by the trial courts while dealing with the civil trials.

A. Pleadings are foundation of the claims of parties. Civil litigation is largely based on documents. It is the bounden duty and obligation of the trial judge to carefully scrutinize, check and verify the pleadings and the documents filed by the parties. This must be done immediately after civil suits are filed.

B. The Court should resort to discovery and production of documents and interrogatories at the earliest according to the object of the Act. If this exercise is carefully carried out, it would focus the controversies involved in the case and help the court in arriving at truth of the matter and doing substantial justice.

C. Imposition of actual, realistic or proper costs and or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

D. The Court must adopt realistic and pragmatic approach in granting mesne profits. The Court must carefully keep in view the ground realities while granting mesne profits.

E. The courts should be extremely careful and cautious in granting ex-parte ad interim injunctions or stay orders. Ordinarily short notice should be issued to the Defendants or Respondents and only after hearing

concerned parties appropriate orders should be passed.

F. Litigants who obtained ex-parte ad interim injunction on the strength of false pleadings and forged documents should be adequately punished. No one should be allowed to abuse the process of the court.

G. The principle of restitution be fully applied in a pragmatic manner in order to do real and substantial justice.

H. Every case emanates from a human or a commercial problem and the Court must make serious endeavour to resolve the problem within the framework of law and in accordance with the well settled principles of law and justice.

I. If in a given case, ex parte injunction is granted, then the said application for grant of injunction should be disposed of on merits, after hearing both sides as expeditiously as may be possible on a priority basis and undue adjournments should be avoided.

J. At the time of filing of the plaint, the trial court should prepare complete schedule and fix dates for all the stages of the suit, right from filing of the written statement till pronouncement of judgment and the courts should strictly adhere to the said dates and the said time table as far as possible. If any interlocutory application is filed then the same be disposed of in between the said dates of hearings fixed in the said suit itself so that the date fixed for the main suit may not be disturbed.

53. According to us, these aforementioned steps may help the courts to drastically improve the existing system of administration of civil litigation in our Courts. No doubt, it would take some time for the courts, litigants and the advocates to follow the aforesaid steps, but once it is observed across the country, then prevailing system of adjudication of civil courts is bound to improve.

54. While imposing costs we have to take into consideration pragmatic realities and be realistic what the Defendants or the Respondents had to actually incur in contesting the litigation before different courts. We

have to also broadly take into consideration the prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter affidavit, miscellaneous charges towards typing, photocopying, court fee etc.”

In paragraph 55, the Apex Court observed that the other factor which should not be forgotten while imposing costs is for how long the Defendants or Respondents were compelled to contest and defend the litigation in various courts. The Appellants in the instant case have harassed the Respondents to the hilt for four decades in a totally frivolous and dishonest litigation in various courts. The Appellants have also wasted judicial time of the various courts for the last 40 years.

16. In the present case, the plaintiffs have unsuccessfully filed Chamber Summons for amending the plaint successively wasting judicial time of trial court and this court. The plaintiffs made defendants to contest and defend the litigation in the trial Court and this court. In my opinion, the present chamber summons is nothing but abuse of process of the court and also abuse of process of law. The plaintiffs are, therefore, liable to pay costs to defendants no.8 and 9 quantified at Rs.25,000/-.

17. In the light of the above discussion, impugned order is quashed and set aside and Chamber Summons No.611 of 2013 in S.C.Suit No.412 of 2007 is dismissed. Rule is made absolute in the aforesaid terms subject to plaintiffs paying costs of Rs.25,000/- to defendants no.8 and 9 within eight weeks from today.

18. Let this order be sent to Collector, Mumbai Suburban District. In case costs are not paid within eight weeks from today, Collector shall proceed to recover it from the plaintiffs as land revenue. In case the plaintiffs obtain any suitable orders from higher court, they will serve copy of order on Collector, Mumbai Suburban District. It is made clear that payment of costs is a condition precedent and the plaintiffs will not be permitted to proceed with the suit unless the costs are paid. Order accordingly.

(R.G.KETKAR, J.)