

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

WRIT PETITION NO. 1178 OF 2015

1 Nashik Diocesan Council)
PTR D-2, Nashik)
A registered Trust having its office at)
Ajinkya Plot No.1, behind HDFC office)

2 Shri Bhaskar Jacob Salve)
Age 67 years, Occ Business,)
R/0 03, Pumjab colony, Canaol Road,)
Jail Road, Nahsik Road, Nashik)

..Petitioners

Vs.

1 Nashik Diocesan Trust Association Pvt Ltd)
Nashik having its registration No.4054/43,))
Notice to be served on R. No.2)

2 Rt. Rev. Pradeep Lamuel Kamble)
Age 63 years, Occ Bishop)
R/o Bishop House, 1, Outram Road,)
Tarakpur, Ahmednagar)

3 Dr. Arvind Gangadhar More)
Age 60 years Occ Business)
R/o B-3, Gopalnagar, Ozar Road,)
Panchavati, Nashik)

4 M/s G. B. Constructions, Manmad)
partnership Firm)
(Notice to the served on Respondent No.5)

5 Shabbir Tayyab Bhai Manajiwala	)	
Age 59 years, Occ Business	)	
6 Hatim Tayyab Bhai Mamajiwala	)	
Age 53 years, Occ Business	)	
7 Mohd. Nazmuddin Mamajiwala	)	
Age 33 years, Occ Business	)	
Nos. 5 to 7 r/o Dr. Ambedkar Road,	)	
Manmad, Tal Nandgaon Dist Nashik	)	
8 The Chief Officer,	)	
Municipal Council, Manmad, Tal.	)	
Nandgaon, District Nashik	)	
9 The Charity Commissioner	)	
Charity Commissioner Bhavan	)	
Dr.Annie Besant Road, Worli, Mumbai	)	
10 The Joint Charity Commissioner	)	
Nashik Region, Nashik, Dist Nashik	)	
11 The Dy. Charity Commissioner	)	
Nashik Region, Nashik, Dist Nashik	)	
Nos.10 & 11 r/o Janki Plaza	)	
Near Kharwanda Park, Dwarka,	)	
Nashik, District Nashik	)	..Respondents

Mr. Ashok Gade for the Petitioners

Mr. Anil Kumar Patil for the Respondent Nos.4 to 7

CORAM : R.M.SAVANT, J

DATE : 5th October 2015

ORAL JUDGMENT :

1 Notice for final disposal was issued in the above Petition on 10-2-2015. The Respondent Nos.1 to 3 have been served, but none appears for the said Respondents. The Learned Counsel Mr. Anil Kumar Patil appears for the Respondent Nos.4 to 7.

2 Rule. With the consent of the Learned Counsel for the parties made returnable forthwith and heard.

3 The Writ Jurisdiction of this Court is invoked against the order dated 19-11-2014 passed by the Learned 2nd Joint Civil Judge Senior Division, Malegaon, by which order, the application Exhibit 96 filed by the Petitioners / Plaintiffs for amendment of the Plaint, came to be rejected.

4 The Petitioners herein are the original Plaintiffs who have filed the Suit in question for a declaration that the Sale Deed dated 10-8-2005 executed by the Respondent Nos.2 and 3 in favour of the Respondent Nos.4 to 7 is illegal, null and void etc. In the said Suit, the Plaintiffs had filed an application for temporary injunction. The said application was rejected by the Trial Court i.e. the Learned Civil Judge Senior Division, Malegaon, as a result of which

Appeal from Order No.766 of 2006 came to be filed by the Petitioners in this Court. The Appeal from Order came to be admitted and as and by way of interim reliefs it was directed as follows :

“Needless to observe that all steps taken by Defendants 4 to 7 will be subject to the outcome of the present proceedings. The Defendants 4 to 7 shall put all the proposed purchasers of the units in the newly constructed building on the disputed plot to notice about the pendency of the present proceedings and the fact that their rights will be subject to the outcome of the present proceedings. The Respondents 4 to 7 or persons claiming through them shall not construct any further structure on the suit plot save and except to complete the finishing work of the building already constructed and standing on the disputed plot”

5 The said Appeal from Order therefore came up for final hearing before another Learned Single Judge of this court on 2-9-2013 and came to be disposed of and in the context of the present Petition paragraph 3 of the order dated 2-9-2013 is material and is reproduced hereinunder:

“The position so referred above is intact till this date. The third party rights so created as recorded above subject to “lis pendense”. The effect of the same is quite settled. The subsequent developments therefore as not placed on record, no further relief can be granted to the Appellants, except the relief so granted and as recorded above. Therefore, in the interest of justice, I am inclined to dispose of this Appeal by keeping all points open for both parties to re-agitate the same in view of change of circumstances. The trial Judge to reconsider the matter if Application is filed again for injunction and/or any relief and/or for appropriate order.”

6 The Learned Judge therefore observed that in view of the fact that subsequent development were not placed on record, no further relief can be granted to the Appellants except the relief so granted and as recorded above.

7 At this stage, it is required to be noted that the Defendant Nos.4 to 7 had filed their Written Statement on 21-9-2006 and in paragraph 36 of the said Written Statement, it was stated that the Defendants have almost completed the construction of a three storied building on the plot of land in question. Hence the factum of three storied building on the plot of land being put up was placed on record on behalf of the Defendant Nos.4 to 7 as long back as on 21-9-2006.

8 It is after the disposal of the Appeal from Order No.766 of 2006 by order dated 2-9-2013, that the instant application Exhibit 96 came to be filed for amendment of the plaint so as to place on record the fact that a three storied building is already put up on the site in question by the Defendant Nos.4 to 7 and for seeking the relief that the said building be ordered to be demolished and possession of the plot be handed over to the Plaintiffs. The said application was replied to on behalf of the Defendant Nos.4 to 7. It was their contention in the said reply that the Plaintiffs are very well aware of the building being put up and that the instant application was filed merely to delay

the proceedings.

9 The Trial Court considered the said application and has by the impugned order dated 19-11-2014 rejected the same. The rejection is on the ground that the due diligence test has not been satisfied by the Plaintiffs and that the amendment is not necessary for adjudication of the Suit in question. As indicated above is the said order dated 19-11-2014 which is taken exception to by way of the above Petition.

10 Heard the Learned Counsel for the parties.

11 The Learned Counsel for the parties would advance submissions for and against the amendment application being granted. Where as it was the submission of the Learned Counsel for the Petitioners Mr. Gade that it is only after the Appeal from Order came to be disposed of that the Plaintiffs could file the application for amendment of the plaint. It is the submission of the Learned Counsel for the Respondent Nos.4 to 7 Mr. Anil Kumar Patil that the fact that the building being put up on the said plot of land was brought to the notice of the Plaintiffs in the year 2006 and inspite of the same the application for amendment was not moved and has been moved only in the year 2014 and that too after the Plaintiffs have filed their affidavit of evidence and therefore the Trial Court was right in rejecting the application for amendment of the

plaint.

12 Having heard the learned Counsel for the parties I have considered the rival contentions. In the instant case, it is required to be noted that against the rejection of the application Exhibit 5, the Plaintiffs / Petitioners had filed Appeal from Order No.766 of 2006 in this Court. The said Appeal from Order was admitted by this Court and came to be disposed of by order dated 2-9-2013. Whilst disposing of the said Appeal from Order, a Learned Single Judge of this Court has observed that since the subsequent event has not been brought on record, it was not possible to grant interim reliefs on the said basis. The instant application Exhibit 96 for amendment of the plaint has been moved almost a year thereafter i.e. November 2014 and the amendment sought is for inclusion of paragraphs 22(a) and 25(b), the averments sought to be incorporated are to bring the subsequent facts on record and seek relief on the said basis. Though Appeal from Order was pending in this Court, it is required to be noted that there was no stay of the proceedings. It would be in the said context that the order in the instant Petition would have to be passed. It is also required to be noted that the Defendant Nos.4 to 7 had placed on record in the Written Statement which they had filed on 6-9-2006 that a three storied building has already been put up and which is almost complete. Hence the factum of three storied building being put up and being complete was brought to the notice of the Plaintiffs in

the year 2006 itself. Hence some indulgence would have to be shown to the Plaintiffs on account of the fact that the Appeal from Order was pending, however the same would not entitle the Plaintiffs to amendment being incorporated in the Suit right from its inception. Having regard to the nature of the amendment sought which as indicated above is to bring subsequent facts on record, the said amendment application would have to be allowed, resultantly the impugned order dated 19-11-2014 is quashed and set aside and the application Exhibit 96 would stand allowed. The Plaintiffs would be entitled to amend the plaint in terms of the amendment sought vide the said application Exhibit 96. However, since the amendment application has been moved on 5-11-2014 in respect of an event which has taken place in the year 2006, the issue of limitation is kept open for being agitated before the Trial Court. The Writ Petition is allowed to the aforesaid extent. Rule is accordingly made absolute in the aforesaid terms with parties to bear their respective costs of the Petition.

13 The hearing of the Suit in question is expedited and is directed to be disposed of by 30-6-2016.

[R.M.SAVANT, J]

CERTIFICATE

Certified to be true and correct copy of the original signed order