

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

WRIT PETITION NO.10434 OF 2016

Romney Pereira & Ors. ... Petitioners

Vs.

Aggie (Agnes) Alfred Pereira & Ors. ... Respondents

Mr.S.Shamim i/b Shamim & Co. for the Petitioners

Mr.Tejas Deshmukh i/b N.R. Kothari for Resp. Nos.1 to 4

CORAM: Mrs.MRIDULA BHATKAR, J.

DATED: JULY 5, 2017

P.C. :

1. This petition is directed against the judgment and order dated 29.4.2016 passed by the City Civil Court, Borivali Division, Dindoshi, Mumbai, thereby rejecting the Chamber Summons for amendment of the plaint. In this petition, the plaintiffs had taken out a Chamber Summons No.234 of 2015 in L.C. Suit No.811 of 2012 for amendment in the pleadings as per the schedule annexed to the Chambers Summons. By the said Chamber Summons, the plaintiffs wanted to add and delete certain words in the pleadings and so also wanted to add certain facts.

2. The plaintiffs have filed suit for simpliciter injunction that the plaintiffs should not be obstructed from using the first floor of the bungalow. By way of amendment, the plaintiffs claim right and want to add the land on which the bungalow is standing in the description of the suit premises. The learned trial Judge has rejected the said Chamber Summons on the ground that it will change the nature of the suit and the suit was not for partition or possession but only for injunction simpliciter.

3. The plaintiffs have filed the suit for injunction simpliciter in the year 2012. They have already taken out Chamber Summons for amendment earlier and now in 2015 they sought changes in the description of the suit premises in this Chamber Summons. They again sought amendment in the plaint in another Chamber Summons No.190 of 2017 to claim damages as well as mesne profits.

4. One Peter Pereira owned a bungalow alongwith land. He died on 22.12.1979 leaving behind 4 sons, namely, Edward, Thomas, Alfred and Sylvester. Peter, the father, had executed a

will dated 15.8.1977 which was probated on 14.12.1982. As per the will, 4 shares were created for 4 sons. The first floor was allotted to Thomas and Silvester. The outhouse was given to Edward and the ground floor was given to Alfred. Thomas died on 20.9.1999 leaving behind the plaintiffs i.e., his wife and children i.e., plaintiff Nos.2 to 5. Defendants are the legal representatives of the other two sons. Silvester was unmarried and he died and as per the claim of the plaintiffs, the entire floor exclusively is in use of the plaintiffs. However, from December, 2011, the defendants prevented the plaintiffs from entering the house and, therefore, the plaintiffs were constrained to file a suit in the year 2012. The Supreme Court had granted interim injunction. Earlier, the High Court had partly allowed the appeal and the said order of the High Court was stayed by the Hon'ble Supreme Court. The plaintiffs filed Chamber Summons No.235 of 2015, then, Chamber Summons No.234 of 2015. Both the Chamber Summonses were rejected.

5. The plaintiffs have also moved an application under Order 2 Rule 2 of the Civil Procedure Code for reserving the right to ask for other reliefs and the said application was allowed on 10.6.2016.

However, the Supreme Court has directed the matter to be expedited within one year. The issues are framed in March, 2017.

6. The learned Counsel for the petitioners has submitted that these amendments are necessary to make out a case for injunction and also amendment of mesne profit and damages to be carried out in the plaint in order to avoid multiplicity of proceedings. The learned Counsel further submitted that in the suit, the plaintiffs have mentioned about the shares of the parties in the suit property and therefore, there it will not change the nature of the suit.

7. The learned Counsel for the Respondents has submitted that the learned trial Court has rightly rejected both the Chamber Summonses. The learned Counsel submitted that the petitioners were aware of the facts which they wanted to add in the plaint by way of amendment. The plaintiffs are not approaching the Court with clean hands by filing the Chamber Summons. It is pointed out that earlier, the plaintiffs have taken out an amendment application and have added one more defendant i.e., the legal heir of Edward, who is having hand in glove with the defendants. It is a suit for simpliciter injunction and the plaintiffs are not in physical

possession of the suit property and the plaintiffs have no right to seek the relief of injunction without claiming the relief of possession. The plaintiffs have filed the application under Order 2 Rule 2 for claiming possession by filing appropriate Suit. However, such suit is not filed at all and, therefore, this amendment is going to change the nature of the suit and alter the material situation. It is further argued that the plaintiffs are very shrewd and cunning to seek such amendment in the suit for simpliciter injunction. The amendment actually substitutes the cause of action. He relied on the Special Leave Petition No.3768 of 2014. It is submitted that the plaintiffs are abusing the process of law. He submitted that the Apex Court has made the matter time bound i.e., the suit to be heard and decided expeditiously within one year. Though the order was passed on 27.2.2015 and no injunction was granted to the plaintiffs at any time, yet, the suit could not proceed further only because of the plaintiffs as they took out various applications and Chamber Summonses in between.

8. Perused the amendments and the impugned order rejecting the Chamber Summons for amendment. By way of amendment, the plaintiffs want to make averments in respect of the shares of

the legal representatives of Peter Pereira and also want to claim their right on the land bearing survey No.927 on which suit bungalow stands. The Schedule to the Chamber Summons No.234 of 2015 does not show that he has asked for any other prayer. His prayer clause (vii) in the Chamber Summons about the other consequential reliefs cannot be allowed as the suit is only for simpliciter injunction and there is no substantial amendment shown for other reliefs.

9. By allowing the amendment in chamber summons, I am of the view that it will not change the nature of the suit as the plaintiffs choose to bring more facts. They want to place more facts to show their alleged right in the property, however, it being a Suit for injunction simpliciter, proof of their possession is the main issue as it is disputed by the defendants. It is made clear that it is a suit for injunction simpliciter and not for title or for possession and thus, they want the land to be added in the suit premises which is available for access to go to first floor i.e., Suit premises. The trial Court in the present suit is not supposed to determine the fact of title or ownership but has to only consider whether the plaintiffs are in possession and whether they have any right to get relief of

injunction and, therefore, I allow the Chamber Summons No.234 of 2015 except clause (vii) in the schedule.

10. In the circumstances of the case, the writ petition is partly allowed.

11. At this stage, the learned Counsel for Respondent Nos.1 to 4 submits that the respondents want to challenge this order before the Hon'ble Supreme Court and therefore this order be stayed for four weeks.

12. Stay granted for four weeks.

(MRIDULA BHATKAR, J.)