

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

CIVIL WRIT PETITION No. 12465 OF 2016

Naresh Shambhulal Joshi

....Petitioner
(Org. Plaintiff)

Vs.

Karmashi Jethabhai Somaiya Trust
and Ors.

.....Respondents
(Org. Defendants)

Mr. Pawan Pandey I/b. Clayderman and Co., for Petitioner
Mr. S.U. Kamdar, Senior Advocate a/w. Mr. Surya Abhishek i/b. M/s. Hariani &
Co., for Respondent No.1

CORAM : M.S. SANKLECHA, J.
TUESDAY, 8th AUGUST, 2017

P.C.

1. This petition under Article 227 of the Constitution of India challenges the order dated 30th July, 2016 passed by the City Civil Court at Mumbai. The impugned order rejects the Petitioner's Chambers Summons for amendment of its plaint.

2. The Plaintiff had filed its plaint 23rd June, 2011 seeking permanent injunction, restraining the Respondents from dispossessing the Petitioner from the suit premises. At that time, the Petitioner had also filed an application under Order 2 Rule 2 under the Code of Civil Procedure, 1908 (Code) seeking leave to

omit certain reliefs. On 14th July, 2017, application under Order 2 Rule 2 of the Code filed by the Petitioner was dismissed as not pressed, with liberty to file a fresh application.

3. Thereafter, on 4th August, 2014, the Petitioner filed the fresh application under Order 2 Rule 2 of the Code and the same was dismissed on 27th October, 2014. Thereafter, the Petitioner filed the Chamber Summons on 18th November, 2014, seeking to amend the plaint. This Chamber Summons for amendment was partially rejected by the impugned order on the following grounds.

- (a) that the chamber summons is for amendment cannot be accepted in view proviso to Order 6 Rule 17 of the Code. This is so as the trial had commenced.
- (b) that the proposed amendment completely changes the cause of action, as originally the claim was filed only for injunction restraining the Respondents from dispossessing the Petitioner from the suit property while now the proposed amendment seeks a declaration that the Slum Rehabilitation Scheme (SRA) is illegal and bad in law and also seek a permanent accommodation on the ownership basis under the SRA Scheme; and
- (c) that the proposed amendments are barred by limitation, inasmuch as the

chamber summon has been taken out after a period of three years after filing of the suit and the limitation provided for obtaining declaration is three years from the date the right of sue first accrues;

The chamber summons was allowed by the impugned order to the extent the Trustees of the respondent no.1 Trust were allowed to be added as parties.

4. Being aggrieved with the impugned order to the extent it rejects the amendment, Mr. Pandey, learned counsel for the Petitioner points out that the amendment has been sought only in view of the subsequent events viz. Receipt of necessary information / documents under the Right to Information Act on 24th June, 2014 r/w. Communication dated 8th July, 2014 and in view of G.R. Issued by the State of Maharashtra on 24th July, 2014 under which he claims to be entitled for protection. Therefore, this is not a case where there is a change in the cause of action but only bring in on record subsequent events. So far as the issue of limitation is concerned, the amendment at this stage could be allowed subject to the issue of limitation being kept open. So far as the invocation of proviso to Order 6 Rule 17 of the Code is concerned, it is submitted that the application for amendment would not be hit by it, as there was due diligence on the part of the Petitioner as the amendment application could not have been made earlier as the information was received only after filing of the plaint.

5. Before dealing with the submission of the petitioners, it must be emphasized that the challenge to the impugned order is not to be seen through the prism of an appeal Court. The impugned order is in challenge before me in exercise of the petitioner's grievance thereto in the context of Article 227 of the Constitution of India. This jurisdiction is not to examine the merits of the impugned order and substitute the view of the impugned order even when a possible view has been taken. It is a jurisdiction to be exercised only to ensure that the judicial officer does not act beyond the boundaries of law i.e. unwarranted exercise of jurisdiction, gross abuse of jurisdiction or non exercise of jurisdiction vested in law and / or outrageous miscarriage of justice.

6. It is undisputed position before me that before the chamber summons for amendment was taken out by the petitioner on 18th November, 2014 the issues had been settled and even an affidavit in lieu of examination in chief had already been filed. As held by the Apex Court in **Vidyabai and Others Vs. Padmalatha and Anr. [(2009) 2 Supreme Court Cases 409]**, the trial can be said to have commenced when affidavit in examination in chief is filed. Therefore, the proposed amendment would be hit by the proviso to Order 6 Rule 17 of the Code. In such cases, an amendment would only be allowed, if the Court comes to

the conclusion that inspite of due diligence, the party could not have raised the issue earlier. In this case, the impugned order finds absence of due diligence on the part of the Petitioner inasmuch as at the time of filing the suit, it had filed an application under Order 2 Rule 2 of the Code, which was not pressed and the fresh one filed was also rejected on 27th October, 2014. It was submitted on behalf of the petitioner that the delay in moving the application was inspite of having applied for documents under the RTI Act, they could not incorporate it in the plaint when filed, as the necessary documents from RTI were not obtained. However, the aforesaid submission is not acceptable for the simple reason that the suit was filed on 26th November, 2011 while the application for documents under the RTI Act was filed only on 26th December, 2012. Thus this issue and reliefs sought on the above basis was not even contemplated by the Petitioner, when the suit was filed.

7. It is also the submission of the Petitioner that the subsequent G. R. of the Government of Maharashtra dated 22nd July, 2014 is issued subsequent to the filing of the plaint and, therefore, amendment should have been allowed. However, as found by the trial Court, it seeks to declare the SRA scheme bad and illegal and obtain a permanent accommodation on ownership basis. This leads to a change in cause of action as the plaint as filed is for simplicitor injunction

against the Respondents from dispossessing the Petitioner from his premises. The Trial Court on the facts of the case in the impugned order has come to the conclusion that this was not a case where the amendment is being sought to be made after commencement of the Trial for reasons beyond the control of the Petitioner, in spite of his best efforts to modify the application before commencement of the trial. The finding of the Trial Court in respect of absence of due diligence on the part of the Petitioner is a possible view on the facts. Therefore, would not warrant interference under Article 227 of the Constitution of India.

8. In the view I have taken on facts as arising herein on the applicability of the proviso to Order 6 Rule 17 of the Code viz. the proposed amendment is barred, the other issues do not require consideration in detail at my hand. In any case, the view taken on the change of cause of action by the impugned order is also a possible view and not shown to be perverse to warrant interference under Article 227 of the Constitution of India.

9. Therefore, in the present facts, I am not persuaded to exercise my jurisdiction under Article 227 of the Constitution of India. However, it would be open to the petitioner to raise these issues under Section 105 of the Code if and when suit is dismissed and an appeal is filed from the final order under the Code.

10. As pointed above, the view taken by the trial Court is a possible view and there is no reason for me to exercise my supervisory jurisdiction to interfere with the view by the Trial Court.

Hence, Writ Petition is dismissed. No order as to costs.

[M. S. SANKLECHA, J.]