

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 501 OF 2017

Smt. Neelam Omprakash Singh
And Ors.

...Petitioners

Versus

Awadhinarayan Laxmi Singh
And Ors.

...Respondents

....

Mr.S.C. Mangle i/b. Chetan Agrawal, Advocate for Petitioners.

Mr. Vikhil Dhoka i/b. Solicis Lex, for Respondent No.1.

Ms. Oorja Dhond, Advocate for Respondent No.5 – Corporation.

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CORAM : R. G. KETKAR, J.

DATE : 03rd FEBRUARY, 2017

P.C.

1. Heard Mr.S.C. Mangle, learned Counsel for the petitioners, Mr. Dhoka, learned Counsel for respondent No.1 and Ms. Dhond, learned Counsel for respondent No.5, at length.

2. Mr. Mangle seeks leave to delete respondents No.2 to 4 on th ground that respondent No.1, being the original plaintiffs, is the only contesting respondent. Leave as prayed for is granted. Amendment shall be carried out forthwith.

3. Rule. Learned Counsel for the respective

respondents waive service. In view of the narrow controversy raised in the Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the petition is taken up for final hearing.

4. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as 'defendants No.1 to 3' have challenged the judgment and order dated 20.10.2016 passed by the learned Judge, City Civil Court, Dindoshi, Mumbai in Chamber Summons No.912/2016 in L.C. Suit No.290/2008. By that order, the learned trial Judge allowed the Chamber Summons taken out by respondent No.1, hereinafter referred to as the 'plaintiff', under Order VI Rule 17 of C.P.C. for amending the plaint. In support of this Petition, Mr.Mangle submitted that the plaintiff has instituted suit inter alia for declaration that defendants No.1 to 3 have no right in excess of 6056 sq. ft. of built up premises comprising of 1st floor and part second floor of the existing building on the land bearing C.T.S. No.81-A and/or 81-AI and 81-AII of village Chincholi, Taluka Borivli, Mumbai Sub-Urban District and/or to execute any work of development /construction on the said land and/or existing building thereon by enclosing the stilt portion of the building 'B' and/or executing the work of addition, alteration or construction of additional floor either by using the balance

FSI of the said lands and/or by use of DRC/TDR thereon; for perpetual injunction restraining defendants No.1 to 3 from carrying on any work of construction on the plot bearing CTS No.81-AII of village Chincholi; for mandatory injunction directing defendant No.7 to demolish the covering of stilt portion on the ground floor of the building on Plot No.81-A2 situate on CTS No.80-81 of village Chincholi; restraining defendant No.7 from regularizing the said stilt covered portion of the building constructed on plot No.81-AII situate on CTS No.80-81 of village Chincholi.

5. Defendants No.1 to 3 filed written statement in February, 2007. In paragraph-6, defendants No.1 to 3 specifically contended that defendant No.1 had applied for work of development to defendant No.7 in accordance with the laws and rules prescribed therefore and applied for permission which has been sanctioned. The plans were approved and defendant No.1 has carried out the work in accordance with the approved plan and the permission of occupation was given to defendant No.1 on 1.1.2008.

6. He invited my attention to paragraph-3 of the affidavit of the plaintiff dated 27.6.2016 in support of Chamber Summons. In paragraph-3, the plaintiff averred that he was under impression that defendants No.1 to 3 have unauthorizedly carried out purported construction work and apprehended that defendant No.7 will regularize

the same. On 17.10.2015, defendants No.1 to 3 filed examination-in-chief along with compilation of documents wherein defendants No.1 to 3 have annexed copies of occupation certificate dated 1.1.2008 along with sanctioned plans in respect of development / addition / alteration work carried by defendants No.1 to 3 on the said land in respect of building No.'B'.

7. Mr.Mangle has taken me through the affidavit in reply filed by defendants No.1 to 3 taken out by the plaintiff. He submitted that in paragraph-7 of the impugned order, the learned trial Judge has observed that defendants No.1 to 3 did not produce the sanctioned plans, occupation certificate pertaining to disputed construction along with their pleadings in the year 2010 and 2011. The plaintiff cannot be expected to know about existence of such documents. Merely mentioning in the pleadings in the year 2010 and 2011 that defendant No.7 sanctioned the plans of defendants No.1 to 3 and also granted occupation certificate in respect of the disputed construction, the plaintiff cannot be expected to know from the office of the Corporation about the existence of such documents. The plaintiff came to know about these documents in October, 2015 when the defendants No.1 to 3 produced those documents in the Court and supplied copies thereof the plaintiff along with affidavit in examination-in-chief of their

witness. The plaintiff was thereafter expected to make necessary enquiry about these documents and then to take steps for carrying out amendment I the plaint. The plaintiff has done this diligently after the documents were filed by defendants No.1 to 3 and, therefore, the bar contained in Order VI Rule 17 of C.P.C. would not operate against the plaintiff. He submitted that the findings recorded by the learned trial Judge are perverse and cannot be sustained.

8. On the other hand, Mr. Dhoka supported the impugned order. He submitted that the plaintiff took out motion. The learned trial Judge declined ad-interim order. Against that Appeal From Order is preferred in this Court. Defendants No.1 to 3 had not produced the sanctioned plan, occupation certificate either in the trial Court or before this Court. He also submitted that the plaintiff address letter dated 16.1.2008 to the Assistant Commissioner of Corporation for supplying the approved plans. However, the Corporation did not give any response to the communication addressed by the plaintiff. He, therefore, submitted that no case is made out for interfering with the impugned order.

9. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, in written statement filed by defendants No.1 to 3 in February, 2011,

in paragraph-6 they have specifically contended about obtaining sanctions from the Corporation for carrying out development as also obtaining Occupation Certificate on 1.7.2008. The learned trial Judge, however, has not considered as whether to any attempts were made by the plaintiff by issuing interrogatory as contemplated by Order XI Rule 16 of C.P.C. The learned trial Judge has also not considered the contention advanced by defendants No.1 to 3 in their reply that the proposed amendment is time barred. In my opinion, the findings recorded by the learned trial Judge are perverse. The learned trial Judge should have posed question as to what steps the plaintiff had taken after defendants No.1 to 3 filed written statement in February, 2011 and came with the case of obtaining sanctions and carrying on construction in the property in dispute. Instead of posing correct question, the learned trial Judge was of the opinion that the plaintiff cannot get any information merely on the basis of the pleadings of defendants No.1 to 3.

10. As the learned trial Judge has not considered this aspect, the impugned order cannot be sustained and is liable to be set aside thereby directing to reconsider this Chamber Summons afresh. Hence following order :

- i) The impugned order is set aside. Chamber Summons is restored to the file of learned trial Judge

for deciding it afresh.

- ii) Rule is made absolute in aforesaid terms with no order as to costs.
- iii) All contentions of the parties are kept open.
- iv) Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)