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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4346 OF 2017

- | | | | |
|-----|-------------------------------------|---|----------------|
| 1). | Hemlata Harish Bhatia, |) | |
| | of Mumbai Indian Inhabitant, |) | |
| | having her address at Lalchand |) | |
| | Bungalow, Shanker Lane, |) | |
| | Kandivali (West), Mumbai – 400 067 |) | |
| | |) | |
| 2). | Bharat Vallabhdas Bhatia, |) | |
| | of Mumbai Indian Inhabitant, |) | |
| | having her address at Lalchand |) | |
| | Bungalow, Shanker Lane, |) | |
| | Kandivali (West), Mumbai – 400 067. |) | ...Petitioners |

....Versus....

- | | | | |
|-----|-------------------------------------|---|----------------|
| 1). | Vallabhdas Lalchand Dhamanmal, |) | |
| | of Mumbai Indian Inhabitant, |) | |
| | having her address at Lalchand |) | |
| | Bungalow, Shanker Lane, |) | |
| | Kandivali (West), Mumbai – 400 067 |) | |
| | |) | |
| 2). | Anjana Rajesh Kandhari, |) | |
| | of Mumbai Indian Inhabitant, |) | |
| | having her address at Lalchand |) | |
| | Bungalow, Shanker Lane, |) | |
| | Kandivali (West), Mumbai – 400 067. |) | ...Respondents |

Mr.Ankit Lohia, with Ms.Neeta Parikh and Ms.Pooja Batra for the
Petitioners.

Mr.Sidharth Samantaray with Mr.Yugal Bhatia I/b Ms.Kalpana Trivedi
for the Respondents.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 31ST OCTOBER, 2018
PRONOUNCED ON : 22ND DECEMBER, 2018

JUDGMENT :-

1. By this writ petition filed under Article 227 of the Constitution of India, the petitioners have impugned the order dated 17th November, 2016 passed by the learned City Civil Court, Greater Mumbai, dismissing the Chamber Summons No.1362 of 2015 filed by the petitioners (original plaintiffs) under Order VI Rule 17 of the Code of Civil Procedure, 1908. Some of the relevant facts for the purpose of deciding this writ petition are as under :

2. On 13th January, 2014, the petitioners filed a suit for partition along with Notice of Motion No.502 of 2004 before this Court. On 16th March, 2004, this Court granted ad-interim reliefs in favour of the petitioners on the statement made by the respondent no.1. The said Notice of Motion No.502 of 2004 was however, withdrawn by the petitioners on 10th December, 2004. On 23rd January, 2006, the respondent no.1 and another executed a Sale Deed in respect of the plot located at Kandivali (West). On 12th May, 2006, the respondent no.1 executed a Gift Deed in respect of his 1/3rd share in a bungalow located at Kandivali (West) in favour of the respondent no.2.

3. On 29th November, 2007, The respondent no.1 filed his written statement placing on record the execution of the Sale Deed dated 23rd January, 2006 and the Gift Deed dated 12th May, 2006. On 17th December, 2009, the respondent No.2 and late Padmini Vallabhdas Dhamanmal filed their written statement and confirmed the execution of the Sale Deed and the Gift Deed by the respondent no.1 in their favour.

4. Some time in the year 2012, the said suit filed by the petitioners was transferred to the City Civil Court. On 14th January, 2013, the Bombay City Civil Court framed the issues in the said suit. On 3rd August, 2013, the said suit was dismissed for want of prosecution. Some time in the month of November – December, 2013, the petitioners changed their advocates before the Bombay City Civil Court. On 4th December, 2013, the present advocate appeared for the petitioners for the first time before the Bombay City Civil Court and filed the notice of motion for restoration of the suit. On 14th August, 2014, the said suit was restored by the Bombay City Civil Court.

5. On 22nd February, 2015, the petitioner no.1 (original plaintiff no.1) tendered her affidavit of evidence. On 24th July, 2015, the learned advocate for the petitioners sought time for filing further affidavit in lieu of examination in chief of the plaintiff no.1. On 30th December, 2015, the petitioner no.1 filed the Chamber Summons (1362 of 2015) *inter-alia* praying for the amendment of the plaint. On 11th March, 2016, the respondent no.2 filed a reply opposing the said chamber summons. On 27th July, 2016, the petitioner no.1 filed her affidavit in rejoinder. On 23rd August, 2016, the respondent no.2 filed a sur-rejoinder. On 17th November, 2016, the said chamber summons filed by the petitioners for seeking amendment to the plaint came to be rejected. Being aggrieved by the said order dated 17th November, 2016, the petitioners filed this writ petition under Article 227 of the Constitution of India.

6. Mr.Ankit Lohia, learned counsel appearing for the

petitioners invited my attention to the various documents annexed to the writ petition and also various affidavits filed by the parties and also the impugned order passed by the learned Trial Judge. He also invited my attention to the Schedule appended to the chamber summons which came to be dismissed by the learned Bombay City Civil Court.

7. It is submitted that the said suit was admittedly filed by the petitioners for partition of various properties. He submits that during the pendency of the said suit, the defendant no.1 has transferred his alleged right, title and interest in the suit property in favour of the defendant no.3. The petitioners came to know about the execution of the Gift Deed dated 12th May, 2006 and the Sale Deed dated 23rd January, 2006 only when the respondents filed the written statement before the learned Trial Court in the suit filed by the petitioners. There was an order of *status-quo* passed by the learned Trial Court in the Notice of Motion No.502 of 2004. The petitioners were under an impression that no third party rights might have been created in the property. The said notice of motion was however, subsequently withdrawn on 10th December, 2004. He submits that the petitioners had filed the said chamber summons so as to bring the transactions entered into by the respondent no.1 during the pendency of the suit. The properties which were transferred under those two documents were admittedly part of the suit property. Learned Trial Judge has passed a mechanical order while rejecting the said chamber summons filed by the petitioners. He submits that there would have been no change of cause of action, if the amendment as prayed would have been allowed by the learned Trial Judge. It is admitted that the petitioners have acted with due diligence and have

immediately filed the chamber summons for impugning the transactions in respect of the suit property taken place during the pendency of the suit.

8. It is submitted by the learned counsel that the issues are framed. The transactions which are sought to be impugned in the chamber summons were the transactions between the defendants *inter-se*. He submits that the properties which are transferred by those two documents are the subject matter of the suit in which the petitioners have claimed share. He submits that if the suit is decreed in favour of the petitioners in terms of prayer clause (a), the transactions having taken place during the pendency of the suit would be hit by *lis pendens*. As a matter of fact, the petitioners are not required to file any separate suit. The petitioners seek share in respect of the property which is sold and/or transferred under the Sale Deed and the Gift Deed. The pleadings are flowing from the original cause of action and thus the amendment as sought shall be permitted by this Court.

9. Insofar as execution of the Gift Deed is concerned, learned counsel placed reliance on the judgment of the Karnataka High Court in case of **Venkatappa Subbarayappa vs. Venkataswamy Reddy & Ors. 2012 AIR CC 3040 (Kar)** and in particular paragraphs 5 and 6 in support of the submission that in view of the said Sale Deed and Gift Deed having been executed by the respondent no.1 in respect of the suit property, the petitioners were as a matter of fact not even required to file a separate suit or to challenge those transactions in view of those transactions being hit by *lis pendens* under section 52 of the Transfer of Property Act, 1882

as those properties could not have been transferred at all.

10. Learned counsel for the petitioners placed reliance on the judgment of this Court in case of **Chandrakant Rambhau Khachane & Ors. vs. Nandlal Govardhandas Chandak, 2018(3) Mh.L.J. 165** and in particular paragraphs 3, 5, 7 and 8 in support of the submission that the amendments which are necessary to bring out real controversy between the parties to the suit are permissible unless it changes the nature of the suit. He submits that it was not the case of the respondents that the chamber summons was filed by the petitioners with *malafide* intention. He submits that the amendments sought in the chamber summons is the relief sought to be inserted by way of chamber summons are in furtherance of the original reliefs claimed by the petitioners in the said property. Learned Trial Judge thus ought to have allowed the said chamber summons.

11. Insofar as the judgment of this Court in case of **Kailash Anupam Khimsiya vs. M/s.Shamji Enterprises & Ors.** delivered on 23rd October, 2018 in Writ Petition No.7620 of 2016 is concerned, it is submitted by the learned counsel that this Court in the said judgment had relied upon the judgment delivered by the learned single Judge of this Court in case of **Harinarayan G. Bajaj & Anr. vs. Vijay Agarwal & Ors., 2012 (2) Mh.L.J. 106**. He submits that the judgment on the issue of limitation was overruled by the Division Bench of this Court in Appeal No.200 of 2012. The judgment of this Court in case of **Kailash Anupam Khimsiya** (supra) relying upon the judgment of this Court in case of **Harinarayan G. Bajaj & Anr.** (supra) thus cannot be considered as a binding precedent.

12. Learned counsel for the petitioners placed reliance on the judgment of this Court in case of **Bhimrao Laxman Kamble & Ors. vs. Annaso Dhondiram Manole & Anr. 2018(2) Mh.L.J. 276** and in particular paragraphs 17 and 23 to 27 in support of the submission that since the amendments sought by the petitioners were necessary for determining the real question of controversy and was not changing the basic nature of the suit, even if according to the learned Trial Judge the chamber summons was filed belatedly, the issue of limitation could be kept open by the learned Trial Judge which could be decided at the time of final hearing. The Court has to take liberal approach while considering the application for amendment in the pleadings under Order VI Rule 17 of the Code of Civil Procedure, 1908.

13. Learned counsel for the petitioners strongly placed reliance on the judgment of the Hon'ble Supreme Court in case of **Pankaja & Anr. vs. Yellappa & Ors. (2004) 6 SCC 415** in support of the submission that the discretion of the Court to allow the amendment under Order VI Rule 17 of the Code of Civil Procedure, 1908 depends on the facts and circumstances of each case. If an amendment subserves an ultimate cause of justice and avoiding further litigation, an amendment shall be allowed.

14. Learned counsel for the petitioners placed reliance on the judgment of the Delhi High Court in case of **Alaknanda Properties P. Ltd. vs. Sh.Balbir Singh, 2003 AIHC 452** and in particular paragraphs 8 and 9 in support of the submission that the amendment sought for bringing on record the subsequent development of the illegal transaction of the property in favour of the third persons and to

declare it to be prejudicial to the right, title and interest to the property of the plaintiffs is to be allowed to avoid any multiplicity of proceedings. He submits that no prejudice of any nature whatsoever would have been caused to the respondents if the said amendments would have been permitted.

15. Mr.Sidharth Samantaray, learned counsel appearing for the respondents on the other hand submits that the trial in the suit filed by the petitioners had already commenced. The petitioners had taken inconsistent plea in the application for condonation of delay and have failed to prove that they had acted with due diligence. He submits that since the challenge to the Sale Deed and the Gift Deed by way of chamber summons was *ex-facie* barred by law of limitation and since a fresh suit in respect of such reliefs would be barred by law of limitation, this Court cannot permit the petitioners to carry out the amendments in the plaint. He submits that in the writ petition filed by the petitioners, the petitioners have blamed the earlier advocate in not filing the chamber summons within the time prescribed.

16. Learned counsel for the respondents placed reliance on the judgment of this Court in case of **Ajit Narsinha Talekar vs. Nirmala Wamanrao Kekade & Ors. 2010(5) Mh.L.J. 481** and in particular paragraph 10 and would submit that since the learned Trial Judge has already framed the issues and affidavit in lieu of examination in chief is already filed, the trial has commenced. Since the petitioners have not acted with due diligence, in view of the amended provisions of Order VI Rule 17 of the Code of Civil Procedure, 1908 and more particularly proviso to the said provision, learned Trial Judge even otherwise could not have allowed the said

chamber summons.

17. Learned counsel for the respondents placed reliance on the judgment of the Hon'ble Supreme Court in case of **Rajkumar Gurawala vs. S.K. Sarwagi & Company Private Limited & Anr. (2008) 14 SCC 364** and in particular paragraphs 12 and 18 in support of the submission that since there would be change of cause of action if the amendments as sought by the petitioners would have been allowed by the learned Trial Judge, no such relief could be even otherwise granted by the learned Trial Judge in the said chamber summons.

18. Learned counsel submits that all the judgments referred to and relied upon by the petitioners have dealt with the cases prior to the amendment to Order VI Rule 17 of the Code of Civil Procedure, 1908 in the year 2002. Learned advocate distinguished the judgments of this Court in case of **Khasagi (Private) Devi Ahilyabai Holkar Charitable Trust** (supra) relied upon by the learned counsel for the petitioners on the ground that in the said matter, the amendment was allowed in respect of the description of the property and thus would not assist the case of the petitioners.

19. Learned counsel for the respondents placed reliance on the judgment of the Hon'ble Supreme Court in case of **Revajeetu Builders & Developers vs. Narayanaswamy & Sons & Ors. (2009) 10 SCC 84** and in particular paragraph 63 in support of the submission that as a general rule, the Court should decline the amendments if a fresh suit on the amendment claims would be barred by law of limitation on the date of the application.

20. Learned counsel for the respondents placed reliance on the judgment of this Court in case of **K.T. Kubal & Co. vs. Mujibur Rehman Haji Israr Alam Siddiqui, 2015(3) Mh.L.J. 892** and in particular paragraph 18 in support of the submission that since the affidavit in support of the chamber summons was totally silent on the aspect of due diligence and since the petitioners failed to establish the fact of exercising the due diligence, the chamber summons even otherwise could not have been allowed by the learned Trial Judge.

21. Learned counsel for the respondents placed reliance on the judgment of the Hon'ble Supreme Court in case of **Radhika Devi vs. Bajrang Singh & Ors., AIR 1996 SC 2358** and in particular paragraphs 4 and 6 in support of the submission that the reliefs claimed to be inserted by way of the chamber summons itself were barred by law of limitation on the date of filing such application, the learned Trial Judge thus even otherwise could not have allowed the said chamber summons.

22. Learned counsel for the respondents placed reliance on the judgment of the Delhi High Court in case of **Ravinder Vashisht vs. Nanhi Devi & Ors.** decided on 5th October, 2012 and in particular paragraphs 6 and 8 in support of the submission that since the application was belatedly filed by the petitioners, the same was rightly rejected by the learned Trial Judge.

23. Learned counsel for the respondents placed reliance on the judgment of the Delhi High Court in case of **Harish Relan vs. Kaushal Kumari Relan & Ors.** in RFA (OS) 162 of 2014 delivered

on 3rd August, 2015 and in particular paragraphs 13, 15, 18, 19, 21, 23, 27 and 28 in support of the submission that the Court cannot permit an amendment application which has been filed with substantial delay. He submits that the said judgment of the Delhi High Court has been upheld by the Hon'ble Supreme Court by an order dated 27th April, 2016.

24. Insofar as the issue of *lis pendens* raised by the learned counsel for the petitioners is concerned, it is submitted by the learned counsel that admittedly the said notice of motion filed by the petitioners was withdrawn by them and thus there was no stay against the respondents from the date of withdrawal of the said notice of motion. He submits that in case of **Radhika Devi** (supra), the Hon'ble Supreme Court had rejected the application for amendment in respect of the transfer held during the pendency of the trial. The respondents have also disputed that the suit property in question was HUF property. It is submitted that it is the case of the respondents that the said property devolved upon the respondent no.1 and his two other brothers and that they were entitled to deal with the said property. He submits that if the petitioners ultimately succeed in the suit, the petitioners would be entitled to claim damages in terms of prayer clause (a) of the plaint. He submits that since the rights have accrued in favour of the respondents, in view of the additional prayers of the petitioners having been barred by law of limitation, on this ground itself, the learned Trial Court rightly dismissed the chamber summons filed by the petitioner.

25. Mr.Lohia, learned counsel for the petitioners in rejoinder distinguished the judgment of the Hon'ble Supreme Court in case of

Radhika Devi (supra) on the ground that in the said matter, the transfer of the property had taken prior to the date of filing of the suit i.e. in the year 1978, whereas the suit was filed in the year 1988. In these circumstances, the Hon'ble Supreme Court rejected the application for the amendment. The Hon'ble Supreme Court had also considered the documents in the said matter.

26. Insofar as the judgment of the Delhi High Court in case of **Harish Relan** (supra) is concerned, the petitioners distinguished the said judgment on the ground that even in that matter, the transaction in question was prior to the date of filing of the suit and even the Delhi High Court had rejected an application for amendment to the plaint for impugning the earlier transaction. He invited my attention to paragraph 15 of the said judgment.

27. Insofar as the issue of inconsistency raised by the respondents is concerned, it is submitted by the learned counsel for the petitioners that in view of subsequent transfers having been taken place during the pendency of the suit, section 52 of the Transfer of Property Act, 1882 would stand attracted. There was no change of scope of the suit. The plaint was not even required to be amended by the petitioners. Learned counsel for the petitioners once again led emphasis on the judgment delivered by this Court in case of **Chandrakant Rambhau Khachane & Ors.** (supra), the judgment of this Court in case of **Bhimrao Laxman Kamble & Ors.** (supra) and the judgment of the Hon'ble Supreme Court in case of **Pankaja & Anr.** (supra) and would submit that the judgments relied upon by the petitioners would squarely apply to the facts of this case and are binding in this regard.

28. Insofar as the issue as to whether any prejudice would be caused to the petitioners or not by virtue of the learned Trial Judge rejecting the chamber summons for seeking amendment of the plaint or not is concerned, it is submitted by the learned counsel for the petitioners that the petitioner has been staying out of country for last several years. The respondents have not disputed these facts. The petitioner is widow.

29. Insofar as dismissal of the suit is concerned, it is submitted that the learned advocate appearing for the petitioners at that point of time was fully responsible. The petitioner was not even aware of the said order for quite some time as she was out of country. The suit was restored on 14th August, 2014. On 26th February, 2015, affidavit of evidence was filed. On 30th July, 2015, the chamber summons came to be filed for seeking amendment. There was six months delay post commencement of trial. The cross-examination of the witness proposed to be examined by the petitioners has not commenced. He submits that Article 137 of Schedule to the Limitation Act does not apply to the chamber summons. The prayers in the amendment application arose out of the original cause of action. It is submitted that the reliefs sought to be inserted by the chamber summons were already implicit in the original reliefs claimed in the suit i.e. the relief for prayers for partition of the suit property and thus for effective adjudication of the claims made in the plaint, it was necessary to include the subsequent events on record and to impugn the transactions having been taken place during the pendency of the suit.

30. It is submitted that his clients have no objection if the issue of limitation raised by the respondents is kept open and more particularly as to whether the amendment relating to the transaction during the period of pendency of the suit, a fresh period of limitation would apply or it would relate back to the date of filing the suit. He submits that the subsequent transfers effected by the respondent no.1 without the leave of the Court does not prejudice the case of the petitioners and thus even otherwise no period of limitation would apply.

31. Learned counsel strongly placed reliance on an unreported judgment of this Court delivered on 2nd December, 2015 in case of **Khasagi (Private) Devi Ahilyabai Holkar Charitable Trust & Ors. vs. Shri Audumbar Gangadhar Nikate** in Writ Petition No.2960 of 2013 along with other companion petitioners and would submit that the judgment of this Court in case of **Sasa Detergent Division's** case is distinguished by this Court in the said judgment and held that if the amendment allowed would also result in avoidance of multiplicity of proceedings, the same can be allowed however on payment of costs. He submits that in that case, this Court allowed the amendment even though the cross-examination of the witness had commenced.

REASONS AND CONCLUSIONS :-

32. A short question that arises for consideration of this Court in this writ petition is whether the petitioners (original plaintiffs) despite due diligence could not have applied for amendments of the plaint before commencement of trial and whether the amendments

sought by the petitioners were necessary to bring out the real controversy between the parties to the suit.

33. A perusal of the plaint filed by the petitioners clearly indicates that the petitioners had prayed for declaration that the petitioners are entitled 1/5th share in the properties described at Exhibit-B to the plaint and also prayed for deposit of 1/5th share each of the petitioners in those properties which were sold by the respondents. The petitioners also prayed for partition of the estate of the deceased by metes and bound, if necessary and for delivery of possession of 1/5th share each of the petitioners.

34. It was the case of the petitioners in the application for amendment that during the pendency of the suit filed by the petitioners, by alleged gift deed dated 12th May, 2016 and sale deed dated 23rd January, 2006 between the respondent no.1 and the respondent no.3, two of the properties were transferred by those two documents. It is not in dispute that those properties which were purported to be transferred under those two documents were part of the suit property described in Exhibit "B" to the plaint.

35. During the pendency of the said suit, there was an order of status-quo passed by the learned trial Judge in the Notice of Motion No.502 of 2004. The said notice of motion however was subsequently withdrawn by the petitioners on 10th December, 2004. It was the case of the petitioners that the petitioners were residing abroad. Learned advocate representing the petitioners had not informed the progress of the suit. The suit was dismissed for default in the month of August 2013 and was restored on 30th October,

2014. On 26th January, 2105, the petitioners had filed an affidavit of evidence. On 30th July 2015, the petitioners filed chamber summons for amendment of the plaint. It is the case of the petitioners that there was thus six months' delay post commencement of trial. It is not in dispute that cross-examination of the witness proposed to be examined by the petitioners has not commenced.

36. A perusal of the schedule appended to the chamber summons filed by the petitioners *inter-alia* praying for amendment to the plaint indicates that the petitioners had prayed for inclusion of two additional prayers. First prayer sought to be inserted was to permit the petitioners to stay, use and occupy and enjoy the possession at Lalchand Bunglow, Shanker Lane, Kandivali (West), Mumbai 400 067. Second prayer sought to be inserted was for declaration that the alleged gift deed dated 12th May, 2006 and sale deed dated 23rd January, 2006 were null and void and to be cancelled and not binding on the petitioners. The petitioner no.1 has been working as a Teacher in Bahrain and come to India only during the period of her vacation. She does not have any shelter to stay in India. It is stated in the affidavit in support of the chamber summon that she has been staying outside the country and there is no one to look after her family. She has to maintain her children. It is stated that the said amendment does not in any manner change or enlarge the subject matter of the plaint or introduce a new or different cause of action. In these circumstances, the petitioners had acted with due diligence inspite of due diligence could not apply for amendment to the plaint earlier.

37. This Court in the case of **Chandrakant Rambhau**

Khachane & Ors. (supra) has held that all amendments which are necessary to bring out the real controversy between the parties to the suit are permissible. This Court considered the fact that the very relief of perpetual injunction originally claimed in the suit was based on an alleged invalid sale transaction. The sale transaction was even originally termed as a nominal, sham and bogus and money lending transaction. This Court accordingly held that what was implicit earlier in the relief claimed in the suit is now being sought to be made explicit. This Court has held that the amendment does not change the nature of the suit or take away any substantive right accrued to the opponent in defending the suit. Insofar as issue of limitation is concerned, this Court has held that the merits of the amendment are open to debate including the issue of limitation, the respondent need not have any apprehension of being prejudiced at the trial by reason of the amendment.

38. This Court held that the reliefs sought to be added were implicit in the original relief claimed in the suit and thus the amendment should have been allowed by keeping the issue of limitation open. In the facts of this case, the petitioners had filed a suit for partition of metes and bound and for declaration of 1/5th share each of the petitioners. It is not in dispute that the properties sold and/or transferred under the sale deed as well as under the gift deed were the suit properties. The said purported transfer was *inter-se* between the respondents. In the chamber summons, the petitioners had not applied for impleadment of new party to the suit. If the petitioners succeed in the suit for partition, declaration and for possession of the suit properties, it would be also in respect of those two properties which are purported to have been transferred

during the pendency of the suit.

39. In my view, the additional prayers sought to be inserted by way of chamber summons were thus in furtherance of the original reliefs claimed in the suit and were implicit in the original reliefs claimed. There would be no change of cause of action even if the amendments as prayed by the petitioners would have been allowed by the learned trial Judge though the said chamber summons was filed after commencement of trial. The principles of law laid down by this Court in the case of **Chandrakant Rambhau Khachane & Ors.** (supra) would squarely apply to the facts of this case. I am respectfully bound by the said judgment.

40. This Court in an unreported judgment in the case of **Khasagi (Private) Devi Ahilyabai Holkar, Charitable Trust & Ors. vs. Audumbar Gangadhar Nikate** (supra) has held that the amendment if allowed would also result in avoidance of multiplicity of proceedings, the amendment can be permitted by the trial Court. In the said judgment, this Court had permitted the application for amendment even after completion of cross-examination of one of the witnesses however on payment of reasonable amount of cost.

41. This Court in the case of **Bhimrao Laxman Kamble (since deceased) through his L.Rs. Sharad Bhimrao Kamble & Anr.** (supra) has held that even if the amendment is sought at belated stage, point of limitation can be kept open at the time of final hearing of the suit. This Court also considered the fact that the respondents had also not disputed that relief sought by way of amendment could have also been claimed by the respondents by

way of a separate suit and in such circumstances, as the amendment was necessary for the purpose of determining the real question of controversy between the parties and as it does not change the basic nature of the suit, the trial Court has rightly allowed the amendment. In the facts of this case also, it is not the case of the respondents that the petitioners could not have filed a separate suit for seeking such declaration in respect of those two documents entered into during the pendency of the suit. The principles of law laid down by this Court in the case of **Bhimrao Laxman Kamble (since deceased) through his L.Rs. Sharad Bhimrao Kamble & Anr.** (supra) would squarely apply to the facts of this case. I am respectfully bound by the said judgment.

42. The Supreme Court in the case of **Pankaja & Anr. vs. Yellappa (dead) by L.Rs. & Ors.** (supra) has held that if the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation, the same should be allowed. There can be no straight jacket formula for allowing or disallowing an amendment of pleadings. Each case depends on the factual background of that case. The jurisdiction to allow or not to allow an amendment being discretionary, the same will have to be exercised in a judicious evaluation of the facts and circumstances in which the amendment is sought. The Hon'ble Supreme Court has held that so far as the Court's jurisdiction to allow an amendment of pleadings is concerned, the same is wide enough to permit amendments even in cases where there has been substantial delay in filing such amendment applications. It is held that the dominant purpose of allowing the amendment is to minimize the litigation and thus if the facts of the case so permits, it is always open to the Court to allow

applications in spite of the delay and latches in moving such amendment application. The principles of law laid down by this Court in the case of **Pankaja & Anr. vs. Yellappa (dead) by Lrs. & Ors.** (supra) would squarely apply to the facts of this case. I am respectfully bound by the said judgment.

43. Delhi High Court in the case of **Alaknanda Properties P. Ltd. vs. Sh.Balbir Singh** (supra) has considered the identical facts and had permitted the amendment proposing to bring on record the subsequent events and has held that the amendment has become necessary to do complete justice between the parties and also to effectively determine the lis between the parties. In that case, the Delhi High Court had permitted the amendment relating to the events that had been taken place after filing of the suit and to impugn the transaction entered into between the defendants and third parties in respect of the suit properties and thereafter changing the revenue records. I am in agreement with the views expressed by the Delhi High Court in the case of **Alaknanda Properties Pvt. Ltd. vs. Sh.Balbir Singh** (supra).

44. The Orissa High Court in the case of **Sk. Zahural Islam vs. Tanweer Jahan Begum & Ors.** (supra) has allowed the amendment on the ground that there is no change in the nature of suit. In that matter also, there were transactions in respect of the suit properties during the pendency of the suit which were sought to be declared as null and void by seeking amendment to the plaint. I am in agreement with the views expressed by the Delhi High Court in the case of **Sk. Zahural Islam vs. Tanweer Jahan Begum & Ors.** (supra).

45. The Karnataka High Court in the case of **Venkatappa Subbarayappa vs. Vankataswamy Reddy & Ors.** (supra) has held that sale deed was executed after institution of suit in respect of the property which is directly and specifically in question and thus the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to affect the right of any other party thereto under the decree or order except under the authority of the Court and on such terms as it may impose. The said transaction thus was hit by the principle of *lis pendens* under section 52 of the Transfer of Property Act, 1882. In this case also admittedly the respondent no.1 had transferred the properties in favour of the respondent no.3 during the pendency of the suit and that also without obtaining leave of this Court. In my view, Mr.Lohia, learned counsel for the petitioners is right in his submission that the sale deed and the gift deed executed between the respondents *inter-se* would be hit by the provisions of section 52 of the Transfer of Property Act, 1882. The principles of law laid down by this Court in the case of **Venkatappa Subbarayappa vs. Vankataswamy Reddy & Ors.** (supra) would squarely apply to the facts of this case. I am respectfully bound by the said judgment.

46. Insofar as the judgment of this Court in the case of **Kailash Anupam Khimsiya** (supra) is concerned, learned counsel invited my attention to the judgment of the Division Bench of this Court in Appeal No.200 of 2012 in the case of **Harinarayan G. Bajaj & Anr.** (supra) and would submit that the judgment of the learned Single Judge in the case of **Kailash Anupam Khimsiya** (supra) has been overruled by the Division Bench of this Court in the case of

Harinarayan G. Bajaj & Anr. (supra) and thus the judgment of this Court in the case of **Kailash Anupam Khimsiya** (supra) cannot be considered as binding precedent. In my view, Article 137 of the Limitation Act, 1963 would not apply to the application for amendment. I am respectfully bound by the Division Bench judgment of this Court.

47. Insofar as the judgment of Delhi High Court in the case of **Harish Relan vs. Kaushal Kumari Relan & Ors.** (supra) relied upon by the learned counsel for the respondents is concerned, a perusal of the said judgment indicates that the transaction which was sought to be impugned by the amendment was prior to the date of filing suit and thus in the facts and circumstances of the said matter, the Delhi High Court had rejected the amendment prayed for by the petitioners. In the facts of this case, the petitioners had sought to amend the plaint so as to impugn the transaction in respect of the suit property having taken place during the pendency of the suit. The judgment of Delhi High Court in the case of **Harish Relan vs. Kaushal Kumari Relan & Ors.** (supra) is clearly distinguishable in the facts of this case and would not assist the case of the respondents.

48. Insofar as the judgment of the Honble Supreme Court in the case of **Radhika Devi vs. Bajrangi Singh & Ors.** (supra) relied upon by the learned counsel for the respondents is concerned, a perusal of the said judgment indicates that in the said matter, the suit was filed in the year 1988 whereas transfer which was sought to be challenged by way of amendment was in the year 1978. In the facts of the said matter, the Hon'ble Supreme Court held that

the said challenge to such transaction was barred by law of limitation on the date of filing of the suit and thus the amendment could not be permitted. The facts before the Hon'ble Supreme Court are totally different than the facts of this case. In this case, the transaction sought to be impugned by way of amendment were during the pendency of the suit. The judgment of the Hon'ble Supreme Court in the case of **Radhika Devi vs. Bajrangi Singh & Ors.** (supra) thus would not assist the case of the respondents.

49. Insofar as the judgment of the Hon'ble Supreme Court in the case of **Rajkumar Gurawara (Dead) through L.Rs. vs. S.K. Sarwagi and Company Private Limited & Anr.** (supra) relied upon by the learned counsel for the respondents is concerned, the Hon'ble Supreme Court has laid down the principles to be considered by the Court while considering the application for amendment filed under Order VI Rule 17 of the Code of Civil Procedure, 1908. It is held that the grant of application for amendment be subject to certain conditions, namely, (i) when the nature of it is changed by permitting amendment; (ii) when the amendment would result introducing new cause of action and intends to prejudice the other party; (iii) when allowing amendment application defeats the law of limitation. There is no dispute about the propositions of law laid down by the Hon'ble Supreme Court in the said judgment. In this case, in the suit itself, there was already a prayer for partition of the property which included the property which was transferred by some of the respondents during the pendency of the suit. There was no fresh cause of action introduced by the petitioners in the chamber summons. In so far as the issue of limitation is concerned, the said issue can be kept open.

50. Insofar as the judgment of this Court in the case of **Ajit Narsinha Talekar vs. Nirmala Wamanrao Kekade & Ors.** (supra) relied upon by the learned counsel for the respondents is concerned, there is no dispute that in this case, the petitioners had already filed affidavit in lieu of examination in chief and thus the trial has commenced. However, since the petitioners had made out a case that inspite of due diligence, the petitioners could not have applied for amendment to the plaint before commencement of trial, the said judgment of this Court in the case of **Ajit Narsinha Talekar vs. Nirmala Wamanrao Kekade & Ors.** (supra) would not assist the case of the respondents but would assist the case of the petitioners.

51. Insofar as the judgment of the Honble Supreme Court in the case of **Revajeetu Builders & Developers vs. Narayanaswamy & Sons & Ors.** (supra) relied upon by the learned counsel for the respondents is concerned, the Hon'ble Supreme Court has laid down the principles to be considered by the Court while considering the application for amendment filed under Order VI Rule 17 of the Code of Civil Procedure, 1908 and has held that discretionary powers vested in the Court under the said provision are to be exercised judiciously and with great care. It is held that while deciding applications for amendments, the Courts must not refuse bona fide, legitimate, honest and necessary amendments and should never permit *malafide*, worthless and/or dishonest amendments. It is further held that basic test for granting amendment is whether such amendment is necessary for the determination of the real question in controversy or whether the amendment sought is imperative for proper and effective adjudication of the case.

52. It is held that the Court has to consider the potentiality of prejudice or injustice which is likely to be caused to other side by the amendments. The Court has to take into account whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case. Learned counsel for the petitioners does not dispute the principles of law laid down by the Hon'ble Supreme Court in the case of **Revajeetu Builders and Developers vs. Narayanaswamy & Sons & Ors.** (supra). After considering all these guidelines and principles formulated by the Hon'ble Supreme Court in the said judgment, this Court is of the view that the application for amendment made by the petitioners was *bonafide*, legitimate and honest and was not *malafide* or dishonest. No prejudice of any nature whatsoever would be caused to the respondents if such amendment is permitted. The properties which were sold by some of the respondents during the pendency of this suit were admittedly forming part of the suit properties in respect of which the petitioners had already prayed for partition thereof. The said judgment of this Court in the case of the Honble Supreme Court in the case of **Revajeetu Builders and Developers vs. Narayanaswamy & Sons & Ors.** (supra) would not assist the case of the respondents but would assist the case of the petitioners.

53. Insofar as the judgment of this Court in the case of **K.T. Kubal & Co. vs. Mujibur Rehman Haji Israr Alam Siddiqui** (supra) relied upon by the learned counsel for the respondents is concerned, it is held by this Court that the applicant in the application filed under Order VI Rule 17 of the Code of Civil Procedure must establish that despite due diligence, he could not have raised the matter before commencement of trial. There is no dispute about the propositions

of law laid down by this Court in the said judgment. In my view, in this case, the petitioners have established that despite due diligence, they could not make the application before commencement of trial. The judgment of this Court in the case of **K.T. Kubal & Co. vs. Mujibur Rehman Haji Israr Alam Siddiqui** (supra) thus would not assist the case of the respondents.

54. Insofar as the judgment of the Delhi High Court in the case of **Ravinder Vashisht vs. Nanhi Devli & Ors.** (supra) relied upon by the learned counsel for the respondents is concerned, Delhi High Court in the said judgment in the fact at hand held that proviso appended to Order VI Rule 17 of the Code of Civil Procedure, 1908 was barred by law of limitation. In the facts of this case, the Court will have to consider whether additional prayer for impugning the transaction effected by the respondents in respect of the properties which were already subject matter of the suit were hit by the principles of *lis pendens* under section 52 of the Transfer of Property Act, 1882 and thus whether any fresh cause of action had arisen for impugning those transactions from the date of such transaction or not. The judgment of the Delhi High Court in the case of **Ravinder Vashisht vs. Nanhi Devli & Ors.** (supra) thus would not assist the case of the respondents.

55. Insofar as the submission of the learned counsel for the respondents that none of the judgments referred to and relied upon by the petitioners would assist the case of the petitioners and are distinguishable on the ground that all those judgments were delivered prior to the date of amendment to Order VI Rule 17 of the Code of Civil Procedure, 1908 in the year 2002 is concerned, there is no merit

in this submission of the learned counsel for the respondents. The petitioners having satisfied this Court that despite due diligence, the petitioners could not have applied for amendment so as to impugn the subsequent transactions effected during the pendency of the suit, I am inclined to interfere with the impugned order passed by the learned trial Judge rejecting the chamber summons filed by the petitioners.

56. A perusal of the impugned order dated 17th November, 2016 passed by the learned trial Judge indicates that the learned trial Judge has rejected the said chamber summons mainly on the ground of alleged delay and on the ground that the application for amendment was made post commencement of trial and there would be change of cause of action if such amendment would have been permitted. In my view, the entire basis of the impugned order rejecting the chamber summons filed by the petitioners is based on a wrong factual premise. In my view, the impugned order dated 17th November 2016 is contrary to the principles of law laid down by the Hon'ble Supreme Court, this Court and various other Courts on which judgments reliance is placed by the learned counsel for the petitioners and thus deserves to be quashed and set aside.

57. I therefore pass the following order :-

i). The impugned order dated 17th November, 2016 passed by the *Adhoc* & Assistant Sessions Judge, City Civil & Sessions Court, Greater Mumbai dismissing the Chamber Summons No.1362 of 2015 is quashed and set aside.

ii). Chamber Summons No.1362 of 2015 filed by the petitioners is allowed as prayed. Amendment to be carried out within eight weeks from today.

iii). The petitioners are directed to serve a copy of the amended plaint upon the respondents' advocate within one week from the date of carrying out amendment.

iv). The respondents are permitted to file additional written statements within four weeks from the date of service of amended copy of the plaint and shall serve a copy thereof upon the petitioners' advocate simultaneously.

v). Learned trial Judge is directed to frame additional issues if required in view of the amendments permitted by this Court.

vi). The petitioners would be at liberty to file additional affidavit in lieu of examination-in-chief within two weeks from the date of the learned trial Judge framing the additional issues.

vii). It is made clear that this Court has not expressed any views on merits of the amendment permitted by this Court. Merely because the amendment is permitted by this Court as prayed in the chamber summons, the respondents have not admitted the averments and submissions made in the amendment permitted by this Court.

viii). All contentions on merits and issue of limitation are kept open.

ix). No order as to costs.

(R.D. DHANUKA, J.)