

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

WRIT PETITION NO.7620 OF 2016

Kailash Anupam Khimsiya)
of Bombya, Indian Inhabitant,)
residing at 12, Radha Kunj,)
Juhu Church Road, Juhu, Mumbai -49.) .. Petitioner

Versus

1. M/s.Shamji Enterprises)
Partnership firm, registered under)
The Indian Partnership Act, 1932)
having its office at Flat No.14,)
Swastik Building, 2nd Floor,)
Nalwar Nagar, Jogeshwari (E),)
Mumbai – 400 060.)

2. Violet Creado)

3. Reynold Creado)

4. Dennis Creado)

5. Leslie Creado)

6. John Creado)

7. Joseph Creado)
The Respondent Nos.2 to 7 all of Mumbai)
Indians, Christian Inhabitants, residing at)
House No.G-28, Gauthan No.3,)
A.B. Nair Road, Juhu Church,)
Bombay 400 049.)

8. Judy Fernandes Nee Creado of Mumbai)
Indian, Christian, Inhabitant, residing at)
97/a, Ednore Villa, Fernandes Street,)
Vile Parle (E), Mumbai 400 057.)

9. Cecilia Pinto nee Creado of Mumbai)
 Indian, Christian, Inhabitant, residing at)
 Vikas Sadan, Near Trolley Line,)
 Kanjur Marg (E), Bombay – 400 042.) .. Respondents

ALONG WITH

WRIT PETITION NO.7824 OF 2016

Alpesh Maganlal Khimsiya)
 of Bombay, Indian Inhabitant,)
 residing at 12, Radha Kunj,)
 Juhu Church Road, Juhu, Mumbai -49.) .. Petitioner

Versus

1. M/s.Shamji Enterprises)
 Partnership firm, registered under)
 The Indian Partnership Act, 1932)
 having its office at Flat No.14,)
 Swastik Building, 2nd Floor,)
 Nalwar Nagar, Jogeshwari (E),)
 Mumbai – 400 060.)

 2. Violet Creado)

 3. Reynold Creado)

 4. Dennis Creado)

 5. Leslie Creado)

 6. John Creado)

 7. Joseph Creado)
 The Respondent Nos.2 to 7 all of Mumbai)
 Indians, Christian Inhabitants, residing at)
 House No.G-28, Gauthan No.3,)
 A.B. Nair Road, Juhu Church,)
 Bombay 400 049.)

8. Judy Fernandes Nee Creado of Mumbai)
Indian, Christian, Inhabitant, residing at)
97/a, Ednore Villa, Fernandes Street,)
Vile Parle (E), Mumbai 400 057.)

9. Cecilia Pinto nee Creado of Mumbai)
Indian, Christian, Inhabitant, residing at)
Vikas Sadan, Near Trolley Line,)
Kanjur Marg (E), Bombay – 400 042.)

.. Respondents

Mr.Vishal V. Kanade a/w Mr.Kishor Savla i/by Mr.Manish P. Jagani for
the petitioner in both the petitions.

Ms.Nilima Vinay Sanglikar for the respondent nos.2 to 9.

CORAM : R.D. DHANUKA, J.

DATE : 23rd October 2018

Judgment :-

. By these petitions filed under Article 227 of the Constitution of India, the petitioners (original plaintiffs) have impugned the order dated 23rd February 2016 passed by the learned Judge of City Civil Court, Greater Mumbai dismissing the Chamber Summons No.856 of 2014 inter alia praying for amendment of the plaint under Order VI Rule 17 of the Code of the Civil Procedure, 1908.

2. The plaintiffs have filed two separate suits both dated 13th March 2009 inter alia praying for vacant possession of the suit shops against all the defendants and for permission to deposit certain amounts

jointly with the defendant nos.2 to 9 on behalf of the defendant no.1 and for order of an injunction.

3. It was the case of the plaintiffs that there was an agreement entered into between the plaintiffs and the defendant no.1 in respect of the said suit shops. The defendant nos.2 to 9 resisted the said suit by filing written statement. One of the plea raised in the written statement that there was no substantive prayer in the suit filed by the plaintiffs. There was a simplicitor prayer for possession. The said written statement was filed by the defendant nos.2 to 9 on 22nd July 2010. The plaintiffs admittedly filed a chamber summons inter alia praying for amendment of the plaint in the month of February 2014. The said chamber summons is rejected by the learned trial Judge mainly on the ground that it would amount to change of cause of action and on the ground of delay.

4. Mr.Kanade, learned counsel for the petitioners (original plaintiffs) invited my attention to some of the averments made in the plaint and would submit that though in the prayer clause, there was no specific prayer for specific performance entered into between the plaintiffs and the defendant no.1, foundation was already laid in the plaint. He submits that in view of the objection raised by the defendant

nos.2 to 9 in the written statement that there was no substantive prayer, the plaintiffs were required to seek amendment to the plaint and seek necessary prayer of specific performance and other substantive prayers. He submits that there could be thus no prejudice caused to the defendants if the prayer for specific performance would have been allowed to be included in the plaint. He submits that issue of limitation can be kept open.

5. Learned counsel for the plaintiffs submits that evidence in the suit has not commenced till date and thus this Court has to take a liberal view in the matter and shall set aside the impugned order refusing to allow the plaintiffs to amend the plaint.

6. Ms.Sanglikar, learned counsel appearing for the respondent nos.2 to 9, on the other hand, submits that neither there was any prayer for specific performance nor any foundation had been laid. She submits that the prayer for specific performance even otherwise was ex facie barred by law of limitation on the date of filing of chamber summons itself. In support of this submission, learned counsel placed reliance on the judgments of the Hon'ble Supreme Court in the case of ***Revajeetu Builders and Developers Vs. Narayanaswamy & Sons & Ors., (2009)***

10 SCC 84 and in particular paragraph 63 thereof. She also placed reliance on the judgment of this Court in the case of ***Harinarayan G. Bajaj & Anr. Vs. Vijay Agarwal & Ors., 2012 (2) Mh.L.J. 106*** and in the case of ***Sasa Detergent Division Vs. Damodar S. Mudliyar & Ors., 2012 (2) Mh.L.J. 15*** in support of her submission that Article 137 to Schedule of the Limitation Act, 1963 would be attracted to the chamber summons seeking amendment to the plaint. The said chamber summons itself was filed beyond the period of limitation. The learned trial Judge ought to have rejected the said chamber summons on that ground also. She submits that no interference is thus warranted with the impugned order.

7. A perusal of the plaint filed by the plaintiffs clearly indicates that the prayer was for seeking vacant possession of the suit shops against all the defendants. Prayer clause (b) was for permission to deposit certain amount with the defendant nos.2 to 9 on behalf of the defendant no.1. There was no prayer for specific performance in the plaint.

8. A perusal of paragraphs 2 and 4 of the affidavit in support of the chamber summons indicates that it is rightly understood by the plaintiffs that the suit was simplicitor for possession. It is not in dispute

that in the plaint filed by the plaintiffs, there was no prayer for specific performance. Admittedly the written statement was filed by the defendant nos.2 to 9 on 22nd July 2010 whereas the chamber summons was filed in the month of February 2014. Article 58 to Schedule of the Limitation Act, 1963 provides for three years period for filing a suit for declaration when the right to sue first accrues. In so far as the prayer for specific performance is concerned, Article 54 to Schedule of the Limitation Act, 1963 would apply.

9. Even if the date of objection raised in the written statement that there was no substantive prayer in the plaint i.e. 22nd July 2010 is considered as the date of cause of action, the chamber summons filed in the month of February 2014 was ex facie barred by law of limitation. In my view, Ms.Sanglikar, learned counsel for the respondent nos.2 to 9 is right in her submission that Article 137 of Schedule of the Limitation Act, 1963 would be applicable to the chamber summons. She placed reliance on the judgments of this Court in the case of ***Harinarayan G. Bajaj & Anr. Vs. Vijay Agarwal & Ors. (supra)*** and in the case of ***Sasa Detergent Division Vs. Damodar S. Mudliyar & Ors. (supra)***. Both the judgments would squarely apply to the facts of this case. I respectfully bound by the said judgments.

10. The Hon'ble Supreme Court in the case of ***Revajeetu Builders and Developers Vs. Narayanaswamy & Sons & Ors. (supra)*** has laid down the guidelines to be considered by the Court while considering an amendment under Order VI Rule 17 of the Code of Civil Procedure, 1908. It is held by the Hon'ble Supreme Court that the amendment should not cause any prejudice to the other side which cannot be compensated adequately in terms of money. It is also held that as a general rule, the Court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application. In my view, if the learned trial Judge would have allowed the amendment for specific performance for declaration which prayer is not inserted in the original suit which was filed for possession, such amendment would definitely cause prejudice to the case of the defendant nos.2 to 9 specifically raised in the written statement which was filed as far back as on 22nd July 2010. In my view, since the fresh suit for seeking prayer for specific performance and declaration would have been barred on the date of filing application for amendment, the trial Court even otherwise could not have allowed such amendment. The principles of law laid down by the Hon'ble Supreme Court in case of ***Revajeetu Builders and Developers Vs. Narayanaswamy & Sons & Ors.(supra)*** would apply to the facts of this case. I am respectfully bound by the said judgment.

11. I do not find any infirmity in the impugned order dated 23rd February 2016 passed by the learned Judge of City Civil Court, Greater Mumbai. Both the petitions are devoid of merits and are accordingly dismissed. No order as to costs.

12. Mr.Kanade, learned counsel for the plaintiffs seeks extension of time to file affidavit of evidence. Affidavit in lieu of examination-in-chief of the first witness shall be filed by the plaintiffs within two weeks from today before the trial Court. A copy of such affidavit in lieu of examination-in-chief shall be served upon the advocate for the defendants simultaneously. It is made clear that no further extension of time would be granted.

R.D. DHANUKA, J.