

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 8805 OF 2017

Smt.Neelam Omprakash Singh & Ors. Petitioners

VERSUS

Awadhnarayan Laxmi Singh & Ors. Respondents

Mr.Shashank Mangle, a/w. Mr.Pravin Mengane, i/b. Mr.Chetan Agrawal for the Petitioners.

Mr.Santosh Parad for MCGM.

Mr.Mayur Khandeparkar, a/w. Mr.Vikhil Dhoka, Shyli Shetty, i/b. M/s.Solicis Lex for the Respondent no.1.

CORAM : R.D. DHANUKA, J.

DATE : 8th OCTOBER, 2018

P.C.

By this petition filed under Article 227 of the Constitution of India, the petitioners have impugned the order dated 19th July, 2017 passed by the learned trial judge allowing the Chamber Summons No.912 of 2016 filed by the respondents (original plaintiffs) seeking amendment to the plaint.

2. The plaintiffs had filed a suit for declaration that defendant nos. 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 of the land described in prayer clause (a) of the plaint and for other reliefs. The defendant nos. 1 to 3 filed a written statement contending that the defendant no.1 had applied for permission to carry out the

work of development to the Municipal Corporation and the plan has been already sanctioned. It was also the case of the defendant no.1 that in accordance with the approved plan, the work was carried out and the permission of occupation was given to the defendant no.1 as far back as on 1st January,2008.

3. The issues were framed. The plaintiffs had already concluded his evidence sometime on 7th January,2015. The defendant no.1 has filed an affidavit of evidence along with documents. Along with the said affidavit, the defendant no.1 annexed a copy of the occupation certificate dated 1st January,2008. The cross examination of the defendant no.1 has not commenced.

4. In the month of June 2016, the plaintiffs had filed chamber summons *inter alia* praying for amendment to the plaint and for impugning the document issued by the Municipal Corporation including the occupation certificate relied upon by the defendant no.1 along with the affidavit of evidence. The chamber summons is allowed by the learned trial judge by an order dated 19th July, 2017.

5. Learned counsel for the petitioner invited my attention to the averments made in the plaint, in the written statement, the affidavit in support of the chamber summons and the order passed by this court on 3rd February, 2017 in Writ Petition No.501 of 2017 filed by his client impugning the earlier order passed by the learned trial judge allowing the chamber summons filed by the original plaintiffs. He invited my attention to paragraph (9) of the said order and would submit that this

court while allowing the said writ petition has issued specific directions to the learned trial judge to be complied with upon remand of the said chamber summons. He submits that none of those directions had been complied with by the learned trial judge in the fresh order passed by the learned trial judge on 19th July, 2017.

6. It is submitted by the learned counsel that even otherwise, the affidavit of evidence was filed by the defendant no.1 on 7th October, 2015 whereas the chamber summons was filed in the month of June 2016. He submits that the plaintiffs have not acted with due diligence and cannot be allowed to seek amendment of the plaint and to challenge the documents.

7. Learned counsel invited my attention to the averments in the plaint in support of the submission that the suit which was filed in the year 2008, the plaintiffs themselves had made averments that they had visited the office of the Municipal Corporation to find out the premises in which the defendant nos. 1 to 3 were carrying on construction.

8. It is submitted by the learned counsel that though various documents were referred to and relied upon by the respondent nos. 1 to 3 in the written statement, the petitioners never issued any notice for production of document or for interrogatories of those documents and thus could not have applied for amendment which would change the nature of the suit.

9. Mr. Khandeparkar, learned counsel for the original plaintiffs

submits that though the defendant nos. 1 to 3 in the written statement had alleged that the work was completed in accordance with the sanction plan issued by the Municipal Corporation, no copy of the occupation certificate or any other document in support of the said plea had been annexed to the written statement. He submits that since the defendant nos. 1 to 3 annexed a copy of the occupation certificate for the first time along with the affidavit of evidence filed in the month of October 2015, the plaintiffs thereafter made further enquiries with the Municipal Corporation and obtained additional documents and applied for amendment in the month of June 2016.

10. Learned counsel placed reliance on Order 8 Rule 1A of the Code of Civil Procedure, 1908 in support of the submission that it was duty of the defendant nos. 1 to 3 to annexe the documents referred to and relied upon in the written statement. The defendant nos. 1 to 3 thus could not have opposed the said application for amendment filed by the plaintiffs in the month of June 2016.

11. It is submitted by the learned counsel that insofar as directions issued by this Court in the order dated 3rd February, 2017 are concerned, those directions are subsequently complied with by the learned judge in the impugned order dated 19th July, 2017. He submits that insofar as the provisions permitting the parties to issue notice to produce document is concerned, those provisions are meant for the benefit of the parties for improving their case and not for improving the case of the opponent.

12. Learned counsel for the original defendant nos. 1 to 3 submits that there was no due diligence on the part of the plaintiffs in filing chamber summons.

13. A perusal of the prayers in the plaint which was filed in the year 2008 clearly indicates that the plaintiffs had applied for various declarations in respect of the construction carried out by the defendant nos. 1 to 3. The defendant nos. 1 to 3 on the other hand had categorically pleaded that was carrying out the defendant nos. 1 to 3 in accordance with the sanction plan and the same was completed. In the written statement there was a reference to the occupation certificate and two other documents in support of the plea raised by the defendant nos. 1 to 3. The plaintiffs did not issue any notice to produce the documents or any interrogatories upon the respondents. The witness examined by the plaintiffs are cross examined by the defendant. The defendant no.1 thereafter filed affidavit of evidence in the month of October 2015. The chamber summons came to be filed in the month of June 2016.

14. The learned trial judge has allowed the earlier chamber summons filed by the plaintiffs *inter alia* praying for the amendment of the plaint. By order dated 3rd February, 2017 passed by this court the said order passed by the learned trial judge allowing the amendment came to be set aside. This court noticed various discrepancies in the impugned order which was subject matter of the said Writ Petition No.501 of 2017. In paragraph (9) of the said order and judgment passed by this court, various directions were issued by this court to the

learned trial judge while remanding the matter back to the learned trial court for hearing the chamber summons below.

15. A perusal of the order dated 19th July, 2017 passed by the learned trial judge indicates that inspite of various directions having been issued by this court, the learned trial judge has passed an identical order without considering the directions issued by this court and once again allowed the said chamber summons for payment of cost of Rs.2,000/-.

16. In my view, learned counsel appearing for the defendant nos. 1 to 3 is right in his submission that though errors committed by the learned trial judge were considered by this court while setting aside the earlier order, the learned trial judge committed the same errors in the impugned order dated 19th July, 2017.

17. A perusal of the written statement filed by the defendant nos. 1 to 3 as far as in the year 2008 clearly indicates that the defendant nos. 1 to 3 had relied upon several documents including occupation certificate. It was for the plaintiffs to press in service various provisions made in Code of Civil Procedure before filing his affidavit of evidence.

18. In these circumstances, I am not inclined to accept the submission of Mr.Khandeparkar, learned counsel appearing for the original plaintiffs that the plaintiffs had acted with due diligence in filing an application for amendment of the plaint in the month of June

2016 though the written statement was filed in the year 2008.

19. I, therefore, pass the following order :-

(a) The impugned order dated 19th July, 2017 passed by the learned trial judge allowing the Chamber Summons No.912 of 2016 is quashed and set aside.

(b) Chamber Summons No.912 of 2016 is dismissed.

20. Writ petition is allowed in the aforesaid terms. There shall be no order as to costs.

[R.D. DHANUKA, J.]