

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION

**WRIT PETITION NO.9519 OF 2013**

Mid Town, May Tower Co-Op.  
Housing Society Ltd. ...Petitioner  
vs.  
Sohli D. Chinoy and Ors. ...Respondents

Mr. Prabhanjan Gujar, for the Petitioner  
Mr. Vishwanath Patil I/b. Mr. Ahya Kewal, for Respondent No. 2.

**CORAM : M. S. SONAK, J.**

**DATE : APRIL 05, 2019**

**JUDGMENT**

. Heard Mr. Gujar, the learned counsel for the Petitioner  
and Mr. Patil, learned counsel for Respondent No. 2.

2. On 8<sup>th</sup> June, 2015 this Court has made following order

*“Heard Mr. Gujar, learned Counsel for petitioner.  
2. By this Petition under Article 227 of the Constitution of India, the petitioner-original plaintiff has challenged the order dated 08.03.2013 passed by the learned trial Judge below exhibit-87 in Regular Civil Suit No.1776 of 2007. By that order, the learned trial Judge rejected the application made by the petitioner under Order VI, Rule 17 of the Code of Civil Procedure, 1908 for amending the plaint.  
3. Issue notice to respondents, returnable on 07.07.2015. Notice to indicate that subject to the time constraint and convenience of the Court, Petition will be disposed of finally at the stage of admission. Notice shall further indicate that despite service, if the respondents fail to appear, the Court will proceed to decide the Petition on its own merits.  
4. In the meantime, there shall be ad-interim order in terms of prayer clause (e).”*

3. Mr. Guijar, learned counsel for the Petitioner for the submits that service has been compete upon all the Respondents and even affidavit of service has been filed. Accordingly, Rule. Rule is made returnable forthwith in view of the order dated 8<sup>th</sup> June, 2015 in which it was made clear that this Petition will be disposed of finally at the stage of admission. Further if the Respondents failed to appear, the Court will proceed to decide the Petition on its own merits.

4. The challenge in this Petition is to the order dated 8<sup>th</sup> March, 2013 by which the learned trial Judge rejected the Petitioner's application below Exhibit 87 seeking to amend the Plaint and to add *Alpine Society* as party Defendant.

5. Mr. Gujar submits the amendment application seeking leave to amend was challenged before the commencement of trial and the amendment is essential for effectively deciding the issue which arises in the suit. He submits that the learned trial Judge erred in rejecting leave to amend on ground that the reliefs were barred by law of limitation since this a pre-trial amendment, this should be liberally allowed.

6. Mr. Patil, learned counsel for Respondent No. 2 defends the impugned order on the basis of reasoning reflected therein.

7. Mr. Patil points out that the matter was posted for filing of affidavit in lieu of examination in chief. The Petitioner sought for three adjournments and then filed the application seeking amendment at Exhibit 87. He points out that the Petitioner was aware in the year 2009 that *Alpine Society* is a necessary party and yet no efforts were made to seek impleadment. He therefore submits that this Petition is required to be dismissed with costs.

8. The rival contentions now fall for determination.

9. The application seeking leave to amend was taken up before the commencement of trial. This means that the provision under Order VII Rule 11 of Code of Civil Procedure (CPC) is not attracted to the situation of this nature. The Petitioner seeks leave to slightly modify the prayer clause in the Plaint. Initially the Petitioner had sought for declaration that he is alone the owner in respect of the suit property. However, now it is relieved that the Petitioner along with Defendant No. 3 are the owners of the suit property. Therefore, the prayer clause sought to be amended so as to seek declaration in such terms. He submits that such amendment is necessary for deciding the issue effectively which arise in the suit.

10. According to me, the amendment of the aforesaid

nature was required to be allowed particularly since leave was applied for prior to the commencement of the trial in the suit.

11. In so far as the issue of impleadment of *Alpine Society* is concerned, if the Petitioner adverts that the said party is necessary, then there was no reason to decline the leave to amend. The issue of limitation could have always been kept open. On the basis of material on record, there was no case made out to reject leave to amend, on the ground that the relief, if any, to implead *Alpine Society* as a party was barred by limitation. The issue of limitation in such a situation is a mixed question of law. The issue of limitation will have to be framed and the parties will have to give opportunity to lead evidence of such issue.

12. The learned trial Judge has incorrectly invoked the provision under Order VI Rule 17 in the present case. The learned trial Judge has failed to appreciate the scope of ruling of this Court in ***Harinarayan G. Bajaj vs. Vijay Agrawal and ors. 2012 (4) ALL MR 628***. The fact and situation in the said decision was not comparable to the present case. No doubt, the Petitioner could have been more diligent in the matter particularly when it came to impleadment of the *Alpine Society*. However, the prejudice, if any, to the Defendants is always be compensated in terms of costs.

13. Accordingly, the impugned order dated 8<sup>th</sup> March, 2013 is set aside.

14. The Petitioner's application (Exhibit 87) is allowed. The necessary amendment to be carried out within three weeks from the date of this order is uploaded on the website.

15. The Petitioner to pay costs of Rs. 15,000/- to the Respondents. The amount of costs to be deposited before the trial Court within three weeks from today.

16. Once the costs are deposited, only then, the Petitioner can carry out the amendment. If the costs are not deposited within three weeks, then this Petition shall be deemed to have been dismissed with costs of Rs. 15,000/- without further reference to this Court.

17. It is clarified that though the amendment is allowed the issue of limitation is kept expressly open. Similarly, all contentions of all parties on the merits are also expressly kept open.

18. The Petitioner to serve the copy of the amended Plaint to all the Defendants and thereafter the Defendants are at liberty to file additional written statement if they so desire, within a period of four weeks from the date of receipt of copies of the amended Plaint.

19. The learned trial Judge will also have to issue notice to the newly impleaded party and offer this party sufficient time to file the written statement.
20. Rule is made absolute on the aforesaid terms.
21. All concerned to act on the basis of authenticated copy of this order.

**(M. S. SONAK, J.)**