

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION (STAMP) NO. 28570 OF 2018

Dr.Anand Utture]
 Trustee, Balmohan Vidyamandir Trust,]
 Residing at Flat No.103, Sushila Sadan,]
 Plot No.10, Dr. M.B. Raut Road,]
 Shivaji Park, Dadar,]
 Mumbai – 400 028.]...Petitioner

Versus

1. **Shri Girish Moreshwar Rege,**]
 Trustee, Balmohan Vidyamandir Trust,]
 Residing at Flat No.1, Bldg. No.1,]
 Vijay Vatika, Near Vijay Garden,]
 Ghodbunder Road, Thane – 400 615]
]
2. **Shri Guruprasad Rege**]
 Director & Trustee,]
 Balmohan Vidyamandir Trust,]
 Residing at 16, Madhavi,]
 Mahim Makarand Society,]
 Veer Savarkar Marg, Mahim,]
 Mumbai – 400 016.]
]
3. **Shri Dattatraya Rege,**]
 Director & Trustee,]
 Balmohan Vidyamandir Trust,]
 Residing at Plot No.179, Flat No.9 &]
 Malati Apartments, Yeshwant Nagar,]
 Talegaon Dabhade, Dist. Pune.]
]
4. **Shri Makarand Bhonsle**]
 Trustee, Balmohan Vidyamandir Trust,]
 Residing at B-8, Kamal Kishore CHS,]
 Bal Govindas Road, Mahim,]
 Mumbai – 400 016.]
]
]

5. Shri Rajesh Nadkarni,
Trustee, Balmohan Vidyamandir Trust,]
Residing at A-1.6, Shanti Society,]
Mogul Lane, Mahim, Mumbai – 400 016.]
]
6. **Smt. Supriya Nair,**]
Trustee, Balmohan Vidyamandir Trust,]
Residing at 402/7 A, Fortune/59,]
New Mhada Colony, Lokhandwala Circle,]
Andheri (W), Mumbai 400 053.]
].. Respondents
7. **Balmohan Vidyamandir Trust**
being a Public Charitable Trust registered
under the Bombay Public Trust Act,
under registration No.E-1075 (BOM),
having office at Shivaji Park, Mumbai.

Mr.A.Y. Sakhare, Senior Advocate a/w. Mr.Prashant P. Chavan
i/b Ravindra R. Chile for petitioner.

Mr.V.S. Kapse i/b Mr.Nikhil S. Rajeshirke for respondent No.1.

Mrs.Deepa P. Chavan i/b Madekar & Co. for respondent No.2.

Mr.Rohan Karande i/b M/s. Divekar & Co. for respondent No.3.

Mr. Vijay Patil i/b Prabhakar Jadhav for respondent No.4.

Ms. Reshmarani Nathani i/b P.S. Legal for respondent No.7.

CORAM : N. J. JAMADAR, J.
RESERVED ON : 22nd JULY, 2019
PRONOUNCED ON : 17th OCTOBER, 2019

JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally at the admission stage.

2. This petition under Article 226 of the Constitution of India assails the legality, propriety and correctness of an order dated 27th September 2018 passed by the learned Judge, City Civil Court, Bombay in Chamber Summons No. 1713 of 2018 in S.C. Suit No. 2617 of 2016, whereby the Chamber Summons taken out by the respondent no.1-plaintiff to amend the prayer clause (c) of Notice of Motion No. 4473 of 2013 to substitute the date “2nd November 2019” in place of “4th September 2016” came to be allowed subject to payment of costs to the defendants.

3. Shorn of unnecessary details the background facts leading to this petition can be stated as under :-

(a) Balmohan Vidyamandir Trust-the respondent No.7 is a Public Trust registered under the Maharashtra Public Trusts Act, 1950 (hereinafter referred to as ‘the Act’). The affairs of the Trust are governed by a Scheme of Management and Administration framed under section 50A(1) of the Act. The Respondent Nos.1-the plaintiff, and the respondent Nos. 2 to 6-the defendant Nos.1 to 3, 5 and 6, are the Trustees of Balmohan Vidyamandir Trust. The respondent No.1-plaintiff was also an

employee of the Trust. The plaintiff was also designated as 'Trustee In-charge', Marathi Medium.

(b) Certain allegations of fiscal misconduct, negligence and malfeasance were made against the plaintiff. A Show-cause notice dated 21st August 2016 was issued to the plaintiff as to why appropriate disciplinary action should not be taken against the plaintiff, Director, Balmohan Vidyamandir, Marathi medium School. The plaintiff submitted reply to the Show-cause Notice on 2nd September 2016. In the meeting of the Board of Directors of Balmohan Vidyamandir Trust held on 4th September 2016, after considering the allegations against the plaintiff, the material in support thereof, the Show-cause notice and reply thereto, and due deliberation, it was resolved that the services of the plaintiff as Director, Balmohan Vidyamandir, Marathi medium school, be terminated with immediate effect and, thus, the charge of the post of directorship stood withdrawn forthwith from the plaintiff.

(c) In the another meeting of the Board of Trustees held on 2nd November 2016, after due consideration and deliberation, it was resolved that the plaintiff be permanently removed and perpetually discharged from his designation as the “Trustee In-charge” of Balmohan Vidyamandir, Marathi medium School of the Trust and it was further resolved that the defendant No.1 Shri Guruprasad Rege be appointed as ‘Interim Trustee-In-charge’ awaiting the orders of the learned charity Commissioner in terms of Clause 29 of the Scheme dated 31st May 2010.

(d) The plaintiff instituted S.C.Suit No. 2617 of 2016 and sought, *inter-alia*, declaration that the aforesaid resolutions dated 4th September 2016 and 2nd November 2016 are bad in law, illegal, null and void and of no effect. The plaintiff had also sought interim relief seeking to restrain the defendants from acting upon the resolutions which were impugned.

(e) In the said suit, the plaintiff took out Notice of

Motion No. 4473 of 2016 for the following reliefs :

“a. Pending the hearing and final disposal, this Hon’ble Court be pleased to direct the Defendants to open the office premises and hand over the same to the Plaintiff forthwith and put the Plaintiff in possession thereof.

b. That pending the hearing and final disposal of the suit, this Hon’ble Court be pleased to restrain the Defendants by an interim order and injunction from desisting to act on the purported resolution dated 04.09.2016.

c. That pending hearing and final disposal of the suit, this Hon’ble Court be pleased to restrain Defendants by a temporary injunction from any manner acting upon or in pursuance of the purported resolution dated 04.09.2016 referred to in prayer clause (a) above.....”

(f) By an order dated 4th January 2017 in Notice of Motion No. 4473 of 2016, the learned Judge had granted ad-interim relief in terms of prayer clauses (a), (b) and (c) extracted above.

(g) The defendants assailed the said order dated 4th January 2017 by preferring Appeal from Order No. 27 of 2017. Initially by an order dated 25th January 2017, this Court had directed the parties to maintain status-quo. By an order dated 13th August 2018, this Court set aside the

interim order dated 4th January 2018 and the trial court was directed to dispose of the notice of motion expeditiously.

(h) As the Notice of motion stood remitted to the trial court for a fresh hearing and decision, the plaintiff took out the Chamber Summons and sought to amend the prayer clause (c) of the Notice of Motion by deleting the date '4th September 2016' and incorporating the date '2nd November 2016' instead. The plaintiff averred that the said date '4th September 2016' came to be inadvertently mentioned in prayer clauses (b) and (c) both. Since the plaintiff had challenged the legality and validity of the resolution dated 2nd November 2016, it was imperative to amend the prayer clause (c) by correcting the date '2nd November 2016' instead of '4th September 2016', which was mentioned therein on account of a typographical error.

(i) The defendant No.7 resisted the said prayer on the ground that it was not bonafide. At the outset, it was

asserted that the prayer to amend the Notice of Motion by taking out a Chamber Summons was misconceived. The amendment would also completely change the character of the interim relief sought in the Notice of Motion. The defendant No.7 contended that the amendment, if allowed, would run in teeth of the order passed by this Court on 13th August 2013 in Appeal from order No. 27 of 2017, which directed the trial court to adjudicate the Notice of Motion as it stood.

(j) The learned Judge was, however, persuaded to allow the Chamber Summons holding, *inter-alia*, that though the relief in the Chamber Summons may not be within the ambit of the provisions contained in Order VI Rule 17 of the Code of Civil Procedure, 1908 ('Code'), yet it was tenable under section 153 and 151 of the Code. Since the plaintiff had called in question the legality and validity of two resolutions, dated 4th September 2016 and 2nd November 2016, the relief in terms of prayer clause (c) ought to be in accord with the prayers in the suit and no prejudice was likely to be caused to the defendants by

allowing the Chamber Summons. Being aggrieved by and dissatisfied with the impugned order, the defendant No. 4 has approached this Court.

4. I have heard Shri A.Y. Sakhare, the learned Senior Counsel for the petitioner, Shri V.S. Kapse, the learned counsel for the respondent No.1 and Mrs. Deepa Chavan, the learned counsel for the respondent No.2.

5. Shri Sakhare, the learned Senior Counsel strenuously urged that the learned Judge was not at all justified in permitting the plaintiff to amend prayer clause (c) of the Notice of Motion as, though apparently innocuous, the change in the date from '4th September 2016' to '2nd November 2016' has the effect of changing very nature of the interim relief. It was submitted that the learned Judge lost sight of the fact that there was no prayer in the plaint whereby the plaintiff sought an interim relief qua the resolution dated 2nd November 2016. On the contrary, all the interim reliefs were in connection with prayer clause (a) which expressly referred to the resolution dated 4th September 2016. Shri Sakhare would thus urge with that since the interim relief and ad-interim reliefs are to be granted only in the aid of the main

relief, in the absence of a specific relief relatable to the resolution dated 4th November 2016, the trial court could not have allowed the Chamber Summons.

6. It was further submitted that the claim that the date ‘4th September 2016’ came to be mentioned inadvertently is unworthy of countenance as the matter was not only heard at length before the trial Court while dealing with prayer for ad-interim relief, but also before this Court in Appeal against the order. It defies comprehension that the plaintiff could not have noticed the alleged mistake in mentioning the date, urged Shri Sakhare. Lastly, it was urged, with a degree of vehemence, that a litigant who comes to the Court with unclean hands, does not not deserve any relief interim or final. In order to lend support to this submission, the learned counsel placed reliance upon the judgment of the Supreme Court in the case of ***Amar Singh Vs. Union of India & Ors.***¹.

7. Ms. Deepa Chavan, the learned counsel for respondent No.2, in addition to the aforesaid submissions advanced by Shri Sakhare, urged that the impugned order suffers from the vice of judicial impropriety

1 (2011) 7 Supreme Court Cases 69

as this Court had directed the trial Court to decide the Notice of Motion afresh, after taking specific note of the prayers made by the plaintiff in the Notice of Motion. In these circumstances, it was not open either for the plaintiff to seek amendment in the prayer clause in the said Notice of Motion or to the Court to allow such a prayer which runs counter to the express directions of this Court. Ms. Chavan would further submit that in Appeal against Order No. 27 of 2017, it was specifically brought to the notice of this Court that nothing survived for consideration in the Notice of Motion as the plaintiff had sought the benefits from the Provident Fund authorities on the premise that he had retired as a Director on attaining the age of superannuation, which was admittedly in the context of the resolution dated 4th September 2016. The counsel for the plaintiff, faced with the said situation, had then made the submission that the plaintiff could explain the said position. Thus, the Chamber Summons was actuated by an oblique motive of introducing a new interim relief which had not been hitherto sought, in respect of the removal of the plaintiff from the position of “Trustee In-charge” under the resolution dated 2nd November 2016. The learned Judge, according to Ms. Chavan, was not alive to this aspect of the matter and thus committed a manifest error in permitting the amendment in the Notice of Motion.

8. Per contra, Shri Kapse stoutly submitted that the learned Judge was wholly justified in allowing the Chamber Summons. The submissions advanced on behalf of the defendants were stated to be too technical in nature. Shri Kapse would urge that indubitably the plaintiff had challenged legality and validity of both the resolutions dated 4th September 2016 and 2nd November 2016 and specific prayers were made in the plaint. It is plain that plaint is required to be read as a whole. If so read, the issues raised by the plaintiff become abundantly clear. Thus, the objections, sought to be raised by the defendants, to the amendment so as to incorporate the interim relief qua the resolution dated 2nd November 2016, were rightly repelled by the learned Judge, contended Shri Kapse.

9. Shri Kapse further submitted that the learned Judge was within her rights in drawing support and assistance from the provisions contained in section 153 and 151 of the code for permitting the amendment in the Notice of Motion. In support of this submission, Shri Kapse placed reliance upon the judgments of this Court in the cases of *Mrs. Shubhada K. Borkar Vs. Ankush Rajaram Naik (D) heirs & Anr.* ², *Mahadeo S/o Maruti Bhanje Vs. Balaji S/o. Shivaji Pathade* ³

² [2013] 6 All M.R. 829

³ [2012] 5 Bom. CR 777

and *Ratnakar Bank Limited Vs. Usha Rajaram Nimbalkar* ⁴.

10. I have carefully considered the aforesaid submissions. I have also perused the material on record.

11. Since the tenability of an application for amendment of prayer clause of a Notice of Motion was raised and the same has been dealt with by the learned Judge, it may be apposite to consider the said aspect of the matter at the threshold. The learned Judge was of the view that the objection to the tenability of the Chamber Summons on the premise that Order VI Rule 17 of the Code had no application as the Notice of Motion did not constitute pleading, in the strict sense, was of no avail as the provisions of section 153 and 151 of the Code invested ample powers in the Court to permit a party to make all necessary amendments for the purpose of determining the real question in controversy.

12. Indeed, section 153 of the Code confers a general power upon the Court to amend any defect or error in any proceedings in a suit so as to determine the real question in controversy. The reliance placed on behalf of the plaintiff on the judgments in the cases of *Mrs.*

4 [2013] 4 All M.R. 538

Shubhada K. Borkar (Supra), ***Mahadeo S/o Maruti Bhanje*** (Supra) and ***Ratnakar Bank Limited*** (Supra) appears to be well founded.

13. In the case of ***Mrs. Shubhada K. Borkar*** (Supra), a Single Judge of this Court held that the learned trial Judge was not justified in holding that he had no power to amend the petition under Order 21 Rule 97 of Code. It was further observed that even assuming that Order 6 Rule 17 of Code is not strictly applicable to such proceedings, nevertheless, the learned Judge has ample powers under Sections 151 and 153 of Code to amend the petition considering that in terms of Rule 101 of Order 21 of the Code such questions cannot be determined in a separate suit.

14. In the case of ***Mahadeo S/o Maruti Bhanje*** (Supra), a Division Bench of this Court had observed that section 153 of the Code, being in the body of the Code, is to be read in more general terms in conjunction with the proviso to the Rule 17 of the Order VI of Code framed to regulate the procedure, but in case of conflict between them, the provisions in section 153 of the Code must prevail.

15. In the case of ***Ratnakar Bank Limited*** (Supra), another Single

Judge of this Court held that though the provisions of Order VI, Rule 17 may not apply to an application to correct the boundaries in an application in the Execution Petition, yet the Executing Court has inherent powers under section 151 and it is empowered to permit an amendment under section 153 of the Code.

16. In view of the aforesaid pronouncements and the clear and unambiguous general power of amendment vested in the Court under section 153 of the Code, it is fairly well recognized that the Court is not bereft of the power to allow an amendment at any stage, even at the stage of execution, or to permit an amendment in the Notice of Motion, when such amendment is necessary for determination of the real question in controversy between the parties.

17. It would be contextually relevant to deal with the challenge to the tenability of the Chamber Summons in the backdrop of the orders passed by this Court in Appeal from Order No.27 of 2017. As indicated above, an endeavour was made to draw home the point that once this Court has noted the prayers in the Notice of Motion, and thereafter, remitted the matter back to the trial court for determination afresh, by setting aside the ad-interim order, it was not

open to amend the prayer clauses in the notice of motion and the trial court was enjoined to decide the Notice of Motion as it stood. To appreciate the sustainability of the aforesaid submission, it may be advantageous to reproduce the relevant part of the order passed by this court in Appeal From Order No.27 of 2017 dated 13th August 2018. Paragraphs 7 to 12 are relevant and, thus, extracted below :

“7) Even otherwise, prima facie, it is necessary to observe that mandatory reliefs of this nature cannot be granted at the ad-interim stage unless an exceptional case is made out. Now that the notice of motion is ripe for hearing, it is not necessary to make any further observations in this regard.

8) The learned Counsel for the appellants, however, point out that the Respondent No.1 (plaintiff) in the meanwhile has filed applications before the Provident Fund Authorities stating that he has retired as a Director on attaining the age of superannuation. Mr. Dani submits that if this is the position, according to the Respondent himself, then, nothing further will really survive in the Notice of Motion No. 4473 of 2016.

9) Mr. Kapse, the learned Counsel for the respondent (plaintiff) submits that he can explain the position arising out of the applications filed before the Provident Fund Commissioner.

10) At this stage, since this Court is merely the merely directing the learned Trial Court to dispose of the Notice of Motion on its own merits, there is no reason for this Court to go into all these issues. No doubt, the learned Trial Court will take into consideration all these issues as well as the rival contentions on these issues in deciding the notice of motion on its own merits and in accordance with law.

11) Accordingly, the impugned ad-interim order is

formally set aside and the learned Trial Court is directed to dispose of the notice of motion on its own merits and in accordance with law without being influenced by any of the observations in the impugned order which in any case is set aside by the present order. The Notice of Motion is to be decided on its own merits and in accordance with law after taking into consideration the rival contentions as articulated before me today as well as the other rival contentions which arise in the matter.

12) The learned Trial Judge is requested to dispose of the Notice of Motion as expeditiously as possible and in any case within a period of three months from today.”

18. The aforesaid order makes it explicitly clear that this Court was of the *prima-facie* view that the mandatory reliefs, as sought by the petitioner, in the Notice of Motion, could not have been granted at the ad-interim stage, unless an exceptional case was made out. Since the Notice of motion was ripe for hearing, this Court was of the view that it would be appropriate to remit the matter back to the trial court as vide ad-interim order, this Court had stayed the operation of the ad-interim order passed by the trial court dated 4th January 2017. The trial Court was thus directed to decide the Notice of Motion on its own merits and in accordance with law after taking into consideration the rival contentions as articulated before this Court as well as the other rival contentions which arise in the matter. In the aforesaid backdrop, a submission was sought to be made on behalf of

the defendants that since this Court had specifically adverted to the prayer clauses (a) to (c) in the Notice of Motion, noted the contentions advanced before the Court and, thereafter, directed the trial court to decide the Notice of Motion on its own merits, the trial court could not have permitted the amendment in the prayer clauses and indirectly expanded the scope of adjudication.

19. I am afraid to accede to these submissions. The fact that this Court had noted the prayers in the Notice of Motion [(a) to (c)] or that the contentions advanced in support and opposition thereto, do not by themselves imply that the trial court was precluded from considering an application for amendment in the Notice of Motion. The Notice of Motion was essentially in the nature of prayers for interim relief, during the pendency of the suit, wherein the plaintiff had assailed the resolutions dated 4th September 2016 and 2nd November 2016. Thus, what was to be decided, at an interim stage, by the trial court was as to whether the plaintiff was entitled to interim reliefs, pending adjudication of the challenge to those resolutions. The remittance of the matter to the trial court for consideration of the prayers in the Notice of Motion, therefore, cannot be construed as a restraint upon the jurisdiction of the trial court to

entertain any proceeding in relation to the said Notice of Motion. Thus, I am impelled to hold that the learned Judge did not commit any error in considering the prayers for amendment in the Notice of Motion.

20. On the justifiability of the exercise of the discretion by the learned Judge to permit amendment in prayer clause (c), the matter needs to be considered in the backdrop of the real dispute between the parties. As indicated above, the plaintiff was holding two posts. One, the Director, Balmohan Vidyamandir Trust, Marathi Medium School, of which he was purported to be divested by the resolution dated 4th September 2016. And, two, the Trustee-In-charge, Balmohan Vidyamandir, Marathi Medium School, of which he was allegedly removed by the resolution dated 2nd November 2016.

21. At the hub of the controversy in the suit is the legality and validity of the two resolutions and the consequent action of the defendants. Prayer clauses (a) and (b) of the plaint read as under :-

“(a) That this Hon’ble Court be pleased to declare that the purported resolution dated 04-09-2016 allegedly passed by the Board of Trustees of Balmohan Vidyamandir Trust to remove the Plaintiff from the post of Director is bad in law, illegal, null and void and of no effect.

(b) That this Hon'ble Court be pleased to declare that the purported resolution dated 02-11-2016 allegedly passed by the Board of Trustees of Balmohan Vidyamandir Trust to remove the Plaintiff from the post of Trustee In Charge of Marathi Medium is bad in law, illegal, null and void and of no effect."

22. The aforesaid prayer clauses make it abundantly clear that declaration was sought in respect of the resolutions dated 4th September 2016 and 2nd November 2016 as being illegal and void. Interim reliefs were also sought in the plaint. Evidently, prayer clauses (g), (h) and (i), which are in the nature of interim reliefs pertain to the main relief sought in prayer clause (a) qua the resolution dated 4th September 2016. Indisputably, the plaintiff has not sought amendment in prayer clauses (g), (h) and (i) in the plaint, with reference to the resolution dated 2nd November 2016. However, these factors do not detract materially from the endeavour of the plaintiff to seek interim relief qua the resolution dated 2nd November 2016. The reason is not far to seek. The suit assails the legality and validity of the resolution dated 2nd November 2016 as well. There is a substantive prayer in that regard. Therefore, it cannot be urged that the relief, which the plaintiff sought by way of amendment of prayer clause (c) in the Notice of Motion, was not in aid of the main relief.

23. The submission of Shri Sakhare, the learned Senior Counsel that the ground put-forth by the plaintiff for seeking the amendment, namely inadvertence and/or technical error, is unfathomable, may carry some weight. The fact that the parties have had two rounds of litigation, as regards the grant of interim relief, may impinge the claim of the plaintiff that the mistake in the date in the prayer clause (c) was not noticed till the Chamber Summons was moved. However, the substance of the matter cannot be lost sight of. Since the suit assails the legality and validity of the resolution dated 2nd November 2016 and the very same date, i.e., 4th September 2016 finds mention in prayer clauses (b) and (c), extracted above, though the prayers are couched in slightly different words, it becomes evident that the pursuit of an interim relief in the context of a resolution dated 2nd November 2016 cannot be said to have been intentionally omitted. Thus, the learned Judge was justified in permitting the plaintiff to amend the prayer clause (c) of the Notice of Motion.

24. Even otherwise, as the learned Judge has exercised the discretion, which is in furtherance of the objective of determining the real question in controversy between the parties and, thus, cannot be termed as either perverse or arbitrary, no interference is warranted by

this Court in exercise of the extraordinary jurisdiction. Thus, I am not persuaded to accede to the submissions on behalf of the defendants.

25. The conspectus of the aforesaid consideration is that the petition deserves to be dismissed. Hence the following order :

O R D E R

(i) The petition stands dismissed.

No costs.

(ii) Rule discharged.

[N.J. JAMADAR, J.]

At this stage, the learned counsel for the petitioner seeks continuation of the order dated 11th October, 2018, whereby the interim protection granted by the trial court on 22nd September, 2018, came to be further continued.

None present for the plaintiff/respondent no.1.

Since the interim protection has been in operation during the pendency of the petition, the prayer for further continuation of the interim protection appears reasonable. Hence, the interim protection granted by the trial court on 22nd September, 2018, and which has

been continued till date, is hereby extended for the period of four weeks from today.

[N.J. JAMADAR, J.]