

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2337 OF 2022

AND

WRIT PETITION NO. 2339 OF 2022

AND

WRIT PETITION NO. 2340 OF 2022

1. Kalpesh Babulal Jain & Anr.

.... Petitioners

V/s.

1. Sheikh Abdul Kased and Ors.

....Respondents

Dr. Mr. Abhinav Chandrachud a/w. Mr. Dharam Sharma a/w. Ms.

Uma Sharma a/w. Mr. Sauresh Shetye i/by. Dharam & Co.,

Advocate for the petitioners in all petitions.

Mr. G.S. Godbole i/by. Ms. Sukeshi Bhandari, Advocate for respondents no.1 and 2 in all petitions.

Mr. Sanket Mungale, Advocate for respondents no.3 to 6 in WP-2337-2022 and WP-2340-2022 and for respondents no.3 to 7 in WP-2339-2022.

CORAM : SANDEEP K. SHINDE, J.

Closed for Orders on : 21st September, 2022.

Order Pronounced On : 19th October, 2022.

P.C. :

1. Taking exception to order dated 8th March, 2021 passed by the Judge, City Civil Court at Bombay in Chamber Summons No.392/2018, the defendants in Short Causes Suit No. 1114/2017, preferred these petitions under Article 227 of the Constitution of India.

Facts in brief are as under :

2. One, late Khansaheb Gulam Abbas Gulam Ali, was owner of the suit property described in para-1 of the plaint. He made a oral gift of the said property on 30th June, 1955 to his two daughters and two daughters-in-law by name, (i)Khatijabai, (ii)Zehrabai, (iii)Manubai and (iv)Lailabai. Under a declaration dated 8th July, 1955 Khansaheb Gulam Abbas Gulam Ali made a declaration of the gift to the donees, who accepted it and the said gift of declaration was registered before the Sub-Registrar of Assurance, Bombay at Serial No. Bom 4423 of 1955.

3. Khatijabai expired on 25th July, 2010; Manubai expired on 18th January, 1998 and Lailabai expired on 25th February 1997, leaving behind no heirs except, Zehrabai, who became absolute owner of the suit property under Shia Law of inheritance.

4. That under registered Conveyance Deed dated 18th May, 2015 plaintiffs purchased the suit property from Zehrabai for Rs.60,00,000/-. The property consist of 42 units i.e. shops and rooms in four chawls ("suit property" for short), which were let out to tenants by predecessor of the plaintiffs.

5. It is plaintiff's case that, at the time of purchasing the suit property, Zehrabai had informed that some of the tenants were in arrears of rent and thus by letter dated 20th May, 2015, plaintiffs were authorized by Zehrabai, to collect the rent, from them. In April, 2017 some of the tenants informed the plaintiffs, that letters alongwith the purported letter of attornment were being circulated by the defendants no.1 and 2 claiming to be owners of 25% of the suit property. Thereafter, plaintiffs enquired with the Sub-Registrar, whereupon they learnt that, under purported Conveyance Deed dated 29th August 2016, defendants no.1 and 2 had acquired 25% of undivided share of Lailabai in the suit property from defendants no.3 to 6, the alleged legal heirs of Lailabai.

6. Thus, plaintiffs' case is that they purchased the suit property in 2015 from Zehrabai who represented them that she was the only surviving heirs and representative of Khansaheb Abbas Gulam Abbas Ali, and therefore, the Deed of Conveyance dated 29th August, 2016 under which the defendants no.1 and 2 allegedly purchased 25% undivided share of Lailabai from the defendants no.3 to 6 is illegal, null and void and does not bind on them and therefore deserves to be revoked. In the backdrop of aforesaid

facts, the respondents no.1 and 2 filed Short Cause Suit No. 1114 of 2017 against the petitioners-defendants no.1 and 2 and respondents no.3 to 6 (defendants no.3 to 6) seeking declaration that, Deed of Conveyance dated 29th August, 2016 executed by defendants no.3 to 6 in favour of petitioners is bad in law.

7. Defendants no.1 and 2 filed their Written Statement in August, 2017 and denied the petitioners case and have made several allegations of fraud, suppression etc. against the plaintiffs. Their case is that, Khatijabai, Manubai and Lailabai did not die issue-less. They would assert that, defendants no.3 to 6 being heirs of Lailabai, had acquired 1/4th share in the suit property and accordingly they (defendants no.3 to 6), conveyed their right, title and interest, to them vide registered Conveyance Deed dated 29th August, 2016.

8. Pending suit on 16th February, 2018, plaintiff took out Chamber Summons No. 392, seeking to amend the plaint in terms of draft amendment schedule annexed to the Chamber Summons, stating that;

(i) That Zehrabai at the time of negotiating, informed petitioners, that certain documents executed by Khatijabai, Manubai and Lailabai relinquishing their undivided share in the suit property, in her favour, were missing and had assured to handover the said document as and when traceable;

(ii) That Zehrabai handed over declarations executed by her sister, Khatijabai and sister-in-laws (Manubai and Lailabai) which clearly states that, they had during their lifetime, relinquished their undivided share in the suit property in favour of Zehrabai.

(iii) That, joint declaration dated 11th February, 1988 executed by Manubai and Lailabai and the declaration dated 13th September, 1999 executed by Khatijabai, relinquishing their respective rights, in favour of Zehrabai renders ownership claim of defendants no.1 and 2 to the extent of 25% in the suit property, malafide and baseless.

(iv) That, since sisters and sister-in-laws of Zehrabai had released their undivided share in the suit property to Zehrabai, the alleged legal heirs of said Lailabai i.e. defendants no.3 to 6 have no right to sell the same.

9. As such, the plaintiff sought leave to incorporate above pleadings (i to iv) in the plaint.

10. The learned trial Court, vide order dated 8th January 2021, made the Chamber Summons absolute and directed the plaintiffs to carry out amendments within two weeks.

11. Feeling aggrieved by this order, the defendants have preferred these petitions.

12. Heard learned Counsel for the parties.

13. Admittedly, plaintiff sought to amend the plaint before commencement of the trial.

14. Plaintiffs, at first, asserted Zehrabai's exclusive right in the suit property, inherited by her by survivorship. Thus pleaded, that after Khatijabai expired on 25th July, 2012; Manubai on 18th January, 1998 and Lailabai on 25th February, 1997 leaving behind no heirs, Zehrabai became absolute owner of the suit property under Shia Law. Dr. Chandrachud, learned Counsel for the respondents-defendants no. 1 and 2 submitted, averments sought to be incorporated in the plaint, to the effect that, Khatijabai, Manubai and Lailabai, executed Deeds of release, thereby releasing their right, title and interest in the suit property in favour of Zehrabai, being not consistent with and mutually destructive, to pleadings in paragraph-5 of the plaint, the trial Court ought not to have permitted the plaintiffs to amend the plaint. Dr. Chandrachud, relied on the decision in the case of **B.K. Narayana Pillai V/s. Parmeswaran Pillai & Anr. (2000) 1 SCC 712** to contend that inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts should not be allowed to be incorporated by means of amendment to the pleadings. Dr. Chandrachud, relied on paragraph-4 of the said decision, wherein the Hon'ble Supreme Court has held that, "the defendant has right to take alternative plea in defense which, however, is subject to exception that, by the proposed amendment,

the other side should not be subjected to injustice and that any admission made in favour of the plaintiff, is not withdrawn. Dr. Chandrachud, would submit that in the case at hand, the proposed amendment, contradicts the earlier pleadings, whereby the plaintiffs were claiming, that Zehrabai became absolute owner of the suit property by survivorship; whereas, by amendment, they seek to plead that, Zehrabai's absolute ownership to the suit property, is referable to release deeds executed by Manubai, Lailabai and Khatijabai. Dr. Chandrachud, would therefore argue, such pleadings are not only inconsistent but amounts to withdrawal of admission, causing injustice to the defendants.

15. The next authority relied on by Dr. Chandrachud, is a decision in the case of **Vimal Chand Ghevarchand Jain & Ors. V/s. Ramakant Eknath Jadoo, (2009) 5 SCC 713**, wherein the Hon'ble Supreme Court, in paragraph-25, held that, "the defendants although are entitled to raise alternative and inconsistent plea, but should not be permitted to raise pleas which are mutually destructive to each other. Dr. Chandrachud would also rely on the decision in the case of **Suzuki Parasrampuriah Suitings Private Limited Versus. Official Liquidator of Mahendra Petrochemicals Limited (in Liquidation) and Others, (2018) 10 Supreme Court Cases 707**, wherein it was held that, "a litigant can take different stands at different times but cannot take contradictory stands in the same case and a party cannot be permitted to approbate and reprobate on same facts and take inconsistent shifting stands. Dr. Chandrachud, would rely on

paragraphs-12 and 13 of *Suzuki* (supra), wherein it was held that, “action at law is not a game of chess. A litigant who comes to Court invokes its writ jurisdiction must come with clean hands. Taking inconsistent pleas, by party makes its conduct far from satisfactory.”

16. Thus, it is argued that, the amendment sought in the plaint is not only inconsistent with earlier pleadings but being self-destructive, the trial Court ought not to have permitted the plaintiffs to amend the plaint.

17. In the case at hand, a pleading sought to be incorporated are neither self-destructive nor inconsistent with the earlier pleading, Moreover amendment, does not seek to amend the prayers or seek additional prayers. Infact amendment, simply seeks to add in details to, manner and the mode through which Zehrabai, became absolute owner of the suit property. The amendment does not alter materially, cause of action or nature of plaint, nor substitute it. In any case, it is not a case of mutually destructive pleadings. Plea based on adverse possession, is a destructive plea in relation to plea based on title; which is not the case here. Settled law is, it is impermissible to take inconsistent plea by way of amendment which denies other side, the benefit of admission, contained in the earlier pleadings. In the case of **Sarva Shramik Sangh V/s. Indian Oil Corporation Ltd. And Ors., (2009) 11 SCC 609**, Hon’ble Supreme Court in paragraph-19 held that; “When there is no inconsistency in the facts alleged, party is not prohibited from taking alternative pleas,

available in law. Similarly, on the same facts, different or alternative reliefs can also be claimed.”

18. Consistent in the law enunciated in *Sarva Shramik Sangh* (supra), Mr. Godbole, learned Senior Counsel for the respondent, aptly relied on **Shree Niwas Ramkumar, AIR 1951 SCC 177; G. Nagma, 1996 2 SCC 25; Arundhati Mishra, 1994 2 SCC 29; Jairam Manohar AIR 1969 SC 1267, and Dadasaheb Shankar (2003) 1 Mh.L.J. 446.**

19. In *Shree Niwas* (supra), it was held that the plaintiff may rely on “different rights alternatively and there is nothing in the Civil Procedure Code to prevent the party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative.”

20. In *G. Nagma* (supra), appellant had filed a suit for specific performance of agreement of reconveyance dated 30th August, 1967. Application under Order 6 Rule 17 of CPC was filed seeking amendment of plaint. The appellants pleaded that, transactions of execution of sale-deed and obtaining a document for reconveyance were single transaction i.e. mortgage by condition sale. In paragraph-9, appellants wanted alternative relief to redeem the mortgage. Thus, they sought alternatively to grant a decree for redemption of mortgage. The application seeking amendment was rejected by the trial Court and in Revision, High Court confirmed the order of the trial Court, on the ground that amendment would change the nature of suit, as well as, cause of action. In

consideration of these facts, the Apex Court permitted appellants to file amended plaint, having found that, plaintiffs were seeking alternative reliefs and amendment was neither changing cause of action, nor the reliefs were materially affecting. In the case at hand, admittedly the amendment would neither change the nature of the suit nor cause of action. Therefore, it would not cause injustice to the petitioner, nor it would amount to withdrawal of admission.

21. The next judgment relied on was in the case of *Mudra Salt* (2001) 3 Mh.L.J. 151. In this decision, learned Judge of this Court relying on the decision of the Supreme Court in the case of *Jairam Manohar*, 1969) 1 SCC 869, has ruled that, the amendment to the plaint could be allowed, if it does not cause injustice to the defendant. Mr. Godbole, also relied on the decision in *Arundati Mishra* (supra), wherein Apex Court has held that, it is open to the parties to raise even mutually inconsistent pleas, and if the relief could be founded on alternative plea, it could be granted.

22. Thus, the law enunciated in above decisions, is that, on the same facts, different alternative reliefs can be claimed, but mutually repugnant and contradictory pleas which are destructive of each other, cannot be permitted to be urged. In the case at hand, the plaint was sought to be amended at the pre-trial stage, by which the plaintiffs are simply seeking to add details as to how, Zehrabai became absolute owner of the suit property. Therefore, the amendment neither changes the form of the suit nor does it change the cause of action, nor it contradicts the previous pleadings. ,

therefore, a stray observation in the paragraph-8 of the impugned order that, stand of the plaintiff is contrary to the stand in the plaint, itself does not render the impugned order, incorrect.

23. For all these reasons, in my view, the order impugned, calls for no interference. In the result, all petitions are dismissed.

24. However, the petitioners may file their additional Written Statement on/or before 20th November, 2022.

**NEETA
SHAILESH
SAWANT**

Digitally signed by
NEETA SHAILESH
SAWANT

Date: 2022.10.19
19:40:26 +0530

(SANDEEP K. SHINDE, J.)