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

WRIT PETITION 6784 OF 2022

MATA KAMLADEVI EDUCATION SANSTHA ... PETITIONER.
Through it's Secretary – Ramesh Gaikwad.

Versus

GODREJ & BOYEE MFG, CO. LTD., ... RESPONDENT.
At-Pirojshahnagar, Vikhroli,
Mumbai- 400 079.

Mr. Raju Haridas, Advocate a/w. Santosh M. Suryawanshi for the
Petitioner.

Mr. Snanay Shah, Advocate i/by M/s. Bachobhai Munim & Co. for
Respondent.

CORAM : ROHIT B. DEO, J.

DATE : JUNE 14, 2022

P.C. :-

1. The Petitioner Society is the Plaintiff in S.C. Suit 395 of 2016 and is aggrieved by the order dated 16.03.2022 rendered by the City Civil Court, Greater Mumbai, whereby Chamber Summons 93 of 2022 for amendment in the plaint, which is taken out by the Plaintiff, is rejected.

2. The learned trial Judge has recorded two reasons for dismissing the Chamber Summons. The first reason is that the

Application under Order 6 Rule 17 of the Civil Procedure Code, 1908 (Code) is preferred after the commencement of the trial and test of 'due diligence' is not satisfied, and the second reason recorded is that the Plaintiff is attempting to fill in lacunae and to circumvent the observations of the High Court made, while denying the injunctive relief.

3. According to the Plaintiff, the learned trial Judge committed a grave error in rejecting the Chamber Summons inasmuch as, by the proposed amendment all that was sought is the correction to the description of the suit property.

4. I have heard learned counsel Mr. Raju Haridas for the original Plaintiff and the learned counsel Mr. Snanay Shah for the original Defendant and with their able assistance the reasons recorded by the learned trial Judge are scrutinized, in the context of the submissions canvassed.

5. It would be necessary to note the averments in the plaint to the extent relevant.

6. The suit seeks decree of permanent injunction, restraining

the Defendant from obstructing the new construction / reconstruction which may be carried out by the Plaintiff in the suit property and further seeks restraint order qua the purported possession of the Plaintiff.

7. In paragraph 1, the Plaintiff claims to be in possession of the property standing on C.T.S. 189/65, admeasuring 2000 square feet. The Plaintiff refers to the property as "N x C 1 ½, N x C 2 ½" .

Similar description is reiterated in paragraph 3 and the Plaintiff further avers thus :

"In the said census it was revealed that Shri Kaka Bandu Gaikwad has occupied 50 ft x 40 ft = 2000 sq.ft. of land. He has constructed a pakka structure with bricks and cement roof on the said land. The said structure has been in occupation and possession of the said Shri Kaka Bandu Gaikwad. It appears that the said structure has been using as a building for Palnaghar and Balwadi (Nursary)"

8. The rest of the averments in the plaint are not strictly relevant for the purpose of deciding the issue involved. Suffice it to note, that the rest of the averments in the plaint seek to demonstrate the entitlement of the Plaintiff to the injunctive

relief claimed.

9. The Plaintiff took out Chamber Summons 93 of 2022, seeking permission to amend the plaint in terms of the Schedule, which reads thus :

SCHEDULE

i. To delete structure No. NxC 1 ½ , NxC 2 ½ = 2000 sq.ft. and replace NXC 1 1/1 and NxC 2 1/1 = 4000 sq. ft. in paragraph No. 1 & 3 of the Plaint.

ii. To delete the sentence in paragraph No. 3 In the said census it was revealed that Shri Kaka Bandu Gaikwad has occupied 50 ft. x 40 ft = 2000 sq.ft. of land and replace In the said census it was revealed that Shri Kaka Bandu Gaikwad has occupied two structures 50 ft. x 40 ft. each admeasuring area 2000 sq.ft. , total 4000 sq.ft. of the land."

10. In the affidavit in support of the Chamber Summons, the Plaintiff contended that the area of the suit property is 4000 sq. ft. and not 2000 sq.ft., as pleaded in the plaint. The Plaintiff averred that the area in the description of the suit property was noticed, after the new Advocate was appointed and at the stage of cross-examination of the Plaintiff. The Plaintiff attempted to satisfy the test of 'due diligence' by stating that the relevant documents were made available to the earlier

Advocate for drafting the plaint. Although the Chamber Summons does not specifically blame the earlier Advocate, the text and the tenor of the Chamber Summons is that the mistake committed in the description of the suit property was noticed by the new Advocate.

11. The Defendant opposed the Chamber Summons by filing affidavit in response. The Defendant contended that the trial has commenced since the examination-in-chief of the Plaintiff's witness is complete and the stage is the cross-examination. The Defendant emphasized that since the institution of the suit in 2016, till 11.01.2022, when the witness was to be cross-examined, no effort was made to amend the plaint. The Defendant then contended that on the basis of the description of the suit property, the Plaintiff took out Notice of Motion 1517 of 2016, which was allowed by the trial Court on 08.03.2018 and in Appeal, the said order was set aside by the High Court. The Defendant culled out the following observations in paragraphs 5 to 7 rendered by the High Court.

"5] The record clearly indicates that, the respondent has not produced any document on

record from which it can even remotely be discerned that, the structure of the respondent is standing on CTS No. 189/65. During the course of arguments, upon a query by this court, Mr. Deshmukh, learned counsel for the respondent with his usual fairness at this command conceded to the fact that, there is no permission available on record indicating that, any Competent Authority has granted permission to the respondent to construct the said building/ structure mentioned in the plaint.

It thus appears that, without there being any lawful authority to construct the structure in the suit property, the respondent has started construction of the said structure mentioned in the plaint and the respondent now wants to further continue construction of the said structure under the seal of the Court. This cannot be permitted.

6] Perusal of order passed by the trial Court clearly indicates that, the trial Court has given undue importance to irrelevant and superfluous aspects than to concentrate on the point involved in the said suit. As noted earlier, there is no document available on record to infer that the said structure is in fact standing on CTS No. 189/65. It is the contention of the appellant/. Defendant that, the structure under erection by the respondent do not come within the boundary of land declared as slum by the Government. I find substance in the said contention. The balance of convenience does not lie in favour of the respondent. In the absence of nay lawful permission to construct the structure, if temporary injunction is not granted in favour of respondent, no irreparable loss or harm would be caused to the respondent.

7] In view of the above, I find that the Order passed by the Trial Court, thereby allowing the Notice of Motion filed by the respondent, is erroneous and requires interference by this Court.

In view thereof, Order dated 08th March 2019 is hereby set aside.

Appeal is allowed in the aforesaid terms."

12. The Defendant then pointed out that, aggrieved by the order of the High Court, the Plaintiff filed Special Leave Petition (Civil) Diary 5483 of 2020 which the Apex Court dismissed. The Defendant emphasized that even before the Apex Court, the Plaintiff proceeded on the basis of the description of the suit property, as set out in paragraphs 1 and 3 of the plaint. The Defendant submitted that since 2016, the Plaintiff was represented by the five Advocates in the trial Court; one in the High Court and in the Apex Court and the version, that the error in the description of the suit property was noticed by only one of the Advocates, is inherently incredible.

13. The learned trial Judge considered the submissions of the Plaintiff that by amending the plaint, the description of the suit property is proposed to be corrected thus :

“15. The plaintiff in order to describe the property placed on record 7/12 extract of the land where, according to the plaintiff, the suit property is standing and census certificate dated 22.08.1976. The 7/12 extract does not show the description of the property as CTS No. 189/65 admeasuring about NC 1 ½ x NC 2 ½ not show NC 1/1 and NC 2 1/1. The Census Certificate is in the name of Mr. Kaka Bandu Gaikwad, which is filed by the plaintiff on record shows NXC (House no. 2) 1/1 admeasuring 50 x 40 sq.ft. = 2000 sq.ft. The patch card bearing no. 68312 is in the name of Mr. Kaka Bandu Gaikwad (Exh. C) shows description of the structure NXC 2 1/s, 50' x 40' = 2000 sq.ft. The Occupier's card no. 68304 shows description of the structure as N X C 1 1/1, 50' X 40' = 2000 sq.ft. Censure certificate issued by the office of Controller of Slum Bombay and B. S. D on the application of Mr. Kaka Gaikwad shows description / structure no. N X C 1 1/1 = 2000 sq. ft. and NC 2 1/1, 50' X 40' = 2000 sq. ft.

16. The plaintiff also filed letter dated 7.2.2012 issued by Collector with reference to permission to run school on CTS no. 189/65. The description mentioned manually on the said document is NXC 1 1/1 = 2000 sq.ft., NXC 2 ½ = 2000 sq.ft. The alleged description of N X C 1 1/1 to 2 1/1 is not mentioned in the said letter.

17 The plaintiff further annexed letter dated 16.2.2015 issued to Dy. Commissioner in which the plaintiff referred suit property as 2000 sq. ft. another letter dated 18.2.2015, which appears to be issued by the plaintiff to the Revenue Minister in which he gave description of the house no. N X C 1 ½, N X C 2 ½, but not given description of N X C hounse no. 1 1/1 or 2 1/1. Another letter dated 18.09.2015 issued by the plaintiff Society to Chief Minister also refers to house no. N X C 1 ½, N X C 2 ½ = 2000 sq.ft. This letter does not mention house number NXC 1 ½ or 1/1.

18. Thus, from the aforesaid documents it appears that, there are two house numbers, out of which one is NXC 1 1/1 and NXC 2 1/1. The plaintiff described the suit property in para 3 as CTS No. 189 / 65 (House no.1 ½ , N X C 2 ½ = 2000 sq.ft.). There is no description of house no. NXC 1 1/1 or 2 1/1."

14. The learned trial Judge concludes thus :

"20. I have perused the aforesaid judgments. Looking to the pleadings in the plaint and documents, it is not a simple case of wrong description of property. In fact, from the foundation of the plaint the case is only with respect to 2000 sq.ft. Area and not with respect to 4000 sq. ft. area. Moreover, it has already been observed by the Hon'ble High Court that, there is no document on record showing remotely that the alleged structure is standing on CTS 189/65. Therefore, I am of the view that, the aforesaid judgments are not applicable to the present case. The proposed amendment is beyond the basic case of the plaintiff."

15. I am inclined to agree with both the reasons recorded by the learned trial Judge in rejecting the Chamber Summons. Indubitably, the trial has commenced. The proviso to Order 6 Rule 17 of the Code stood triggered. It was incumbent upon the Plaintiff to establish that despite exercising "due diligence", the matter could not have been brought before the Court before the commencement of the trial. The only justification for

seeking amendment, after the commencement of the trial, is that the newly appointed Advocate noticed the error. I am afraid the explanation or justification is clearly a moonshine. The learned trial Judge committed no error in holding that 'due diligence' is not established. I have further scrutinized the material on record in the context of the submission that the proposed amendment merely seeks correction of the description of the suit property. Since, I agree with and confirm the observations of the learned trial Judge in paragraphs 15 to 18, culled out supra, I need not burden this order with reiteration. I am satisfied that under the garb of correcting the description of the suit property and the area from 2000 sq. ft. to 4000 sq. ft., in a sense the Plaintiff is asserting claim as regards additional property which is not the subject matter of the plaint.

16. I see no reason to interfere with the order impugned.

17. Petition is dismissed.

18. No order as to costs.

(ROHIT B. DEO, J.)