

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.574 OF 2018

Jitendra Velji Faria and Anr. .. Applicants
Versus
Municipal Corporation of Gr. Mumbai and Ors. .. Respondents

WITH
WRIT PETITION NO.12569 OF 2019

Jitendra Velji Faria and Anr. .. Petitioners
Versus
Municipal Corporation of Gr. Mumbai and Ors. .. Respondents

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- Mr. Rakesh Kumar Rajaram Tiwari, Advocate for Applicants / Petitioners.
 - Mr. Om Suryawanshi a/w. Mr. Santosh Parad, for Respondent No. 1 – MCGM.
 - Mr. Mahendra Agrekar i./by Mr. Rajesh Gehani, Advocate for Respondent No.3
 - Ms. Lakshmi Murali, Advocate for Respondent No.5.
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CORAM : MILIND N. JADHAV, J.

DATE : DECEMBER 19, 2022

JUDGMENT:

1. This common Judgment shall dispose of Civil Revision Application No.574 of 2018 and Writ Petition No.12569 of 2019 filed by Applicants / Petitioners i.e. original Plaintiffs.

2. For convenience, parties shall be referred to as Plaintiffs and Defendants. The principal contesting party is Defendant No.5 namely M/s. Lotus Grih Nirman Pvt. Ltd. in both proceedings.

3. Civil Revision Application takes exception to the order dated 31.07.2018 passed by the Ad-hoc Judge, City Civil Court, Borivali Div. Dindoshi, Mumbai (for short '**the Trial Court**') in Notice of Motion No.2398 of 2016 in L.C. Suit No.1440 of 2011. It is pertinent to note that the date of filing of Notice of Motion is 26.07.2016.

4. Writ Petition No.12569 of 2019 takes exception to order dated 24.06.2019 passed in Chamber Summons No.1512 of 2018 in the same Suit proceedings.

5. Notice of Motion was filed by Plaintiffs for seeking recall of the Plaintiff's witness i.e. P.W. No.2 (expert witness) and for exhibiting additional evidence and documents. Chamber Summons was filed by the Plaintiffs for amendment of the Suit plaint for bringing subsequent events on record.

6. Both the above proceedings have been comprehensively dismissed by the Trial Court by separate reasoned orders.

7. To appreciate the *lis* between the parties, it will be apposite to note the relevant facts for necessary for adjudication of the present proceedings.

8. There were certain disputes between Plaintiffs and the Developer in respect of re-development / reconstruction of the building housing their shop premises. Dispute Applications under

Section 91 of the Maharashtra Co-operative Societies Act, 1960 (for short '**MCS Act**') were filed in the Co-operative Court. The dispute between the parties led to filing of six Writ Petitions in this Court in 2009 wherein the Developer was a party alongwith the Municipal Corporation. Parties reconciled their differences and entered into Consent Terms which were taken on record on 03.07.2009, by virtue of which the six Writ Petitions were disposed of. I need not detain myself with the details of the Consent Terms, save and except to state that the Plaintiffs are legal heirs / successor-in-title to one of the Petitioner therein namely Chotiben Velji Faria in Writ Petition No.3023 of 2009 out of the six Petitioners who had entered into the Consent Terms.

9. Plaintiffs have filed Civil Suit L.C. Suit No.1440 of 2011 in the Trial Court, *inter alia*, contending that the present Defendant No.5 has taken over redevelopment / reconstruction of the subject property claiming through Defendant No.2 and that the Consent Terms dated 03.07.2009 would continue to bind the Defendant No.5 and it is the Plaintiff's grievance that the Defendant No.5 is not adhering to the Consent Terms and therefore, has sought various reliefs seeking declaration that Consent Terms are binding on Defendant No.5, seeking immediate restraint on further construction, seeking direction to Defendant No.5 to amend the plans in accordance with the Consent

Terms and the subsequent tripartite Agreement dated 26.10.2009, to appoint a RCC Consultant and Architect to compare the plans and the construction made, permanent injunction against Defendant No.5, direction to remove / undo the construction already made which is not in consonance with the Consent Terms.

10. The Suit is filed in July 2011.

11. In the above background, the Plaintiffs filed the interlocutory proceedings. Both Plaintiffs are the legal heirs of Chotiben Velji Faria.

12. Notice of Motion No.2398 of 2016 was filed by the Plaintiffs on 26.07.2016 for seeking leave of the Court to produce Additional Affidavit of evidence of P.W.No.1 and P.W.No.2 in the Suit proceedings. It was contended by Plaintiffs that they had examined P.W.No.1 and P.W.No.2 and their cross-examination was also over but they received certain documents under the Right To Information Act, 2005 (for short '**RTI**') from the Municipal Corporation and desired to file those documents on record and also lead evidence by filing the additional Affidavit of P.W.No.1 and P.W.No.2. Plaintiffs would submit that since the evidence of Defendant has not yet started no prejudice would be caused to Defendants, if Plaintiffs are allowed to lead evidence by filing additional Affidavit of evidence of both their witnesses.

13. Defendant No. 5 resisted the Notice of Motion by filing its reply and submitted that pursuant to completion of cross-examination of P.W.No.1 and P.W.No.2 in the suit proceedings, Defendant No.5 filed its Affidavit in lieu of examination-in-chief on 28.10.2015. It was submitted that Notice of Motion for recall of the witness by the Plaintiffs was dismissed earlier also. Defendant No.5 would submit that Plaintiff had examined the expert witness (P.W.No.2) who was extensively cross-examined by the Defendants. In that view of the matter, Defendant No.5 strongly resisted the Notice of Motion and sought its dismissal.

14. Mr. Tiwari, learned Advocate appearing for the Plaintiffs in the Civil Revision Application would submit that the Notice of Motion filed by Plaintiffs ought to have been allowed since the impugned order dated 31.07.2018 has been passed with complete non application of mind and deprives the Plaintiffs from placing on record the documents received from the Municipal Corporation under the RTI which describe the status of the suit property. He would submit that the said documents are necessary for placing reliance since the Municipal Corporation though being a party to the Suit has not filed its written statement and there is an order of “No WS” against the Corporation. He would submit that the necessity to rely on the newly acquired documents is pertinent because the Defendant No.5 has

constructed the Suit property in contravention of the Consent Terms and the tripartite Agreement. Next he would submit that the newly acquired documents under the RTI would prove this point that the constructed Suit property by Defendant No.5 is contrary to the Consent Terms. The Plaintiffs have also referred to and relied upon compilation of five documents namely letter dated 14.02.2019, Notice of Motion No. Nil filed in the trial Court regarding vacating of transit accommodation, reply dated 11.06.2019, order dated 24.05.2019 and complaint dated 26.01.2020 in support of their case to argue that the construction of the suit property is contrary to the Consent Terms and therefore the impugned order deserves to be set aside.

15. Before I advert to the findings in the impugned order passed in the Notice of Motion it will be appropriate to refer to the second proceeding namely the Chamber Summons so that the observations and findings can be recorded thereafter. Chamber Summons No.1512 of 2018 has been filed for seeking amendment to the Plaint as per the Schedule annexed to the Chamber Summons. I have perused the Schedule at Exhibit-A to the Chamber Summons. Affidavit in support to the Chamber Summons would reveal that it is contended by Plaintiffs that the averments made in the Schedule are subsequent events which are necessary for incorporation in the Suit plaint.

16. Mr. Tiwari, learned Advocate for the Plaintiffs would submit

that the impugned order dated 24.06.2019 rejecting the Chamber Summons has been passed without complete non application of mind and the learned Trial Court has failed to read and understand the purpose of filing the Chamber Summons.

17. Defendant No.5 has resisted the Notice of Motion by filing Affidavit-in-Reply dated 30.01.2017. Ms. Murali, learned Advocate for Defendant No.5 has drawn my attention to the Affidavit-in-Reply and contended that the entire attempt of the Plaintiffs is to improve and revisit the evidence and cross-examination of the Plaintiffs witnesses / depositions which has already been recorded by the Trial Court. She would submit that the proceedings are an absolute abuse of the due process of law. She would submit that the answering Defendant has complied with the Consent Terms as agreed and the Plaintiffs are aware of the same. She would submit that the dispute raised by the Plaintiffs has reached the Supreme Court and no reliefs were granted to the Plaintiffs save and except to direct expeditious hearing of the Suit by the Trial Court. She would submit that the order of the Supreme Court is dated 22.05.2013. She would submit that Trial Court has already passed orders appointing Architects as Court Commissioners who have visited the Suit site, surveyed and measured the construction of the Suit properties and report thereto has been filed and exhibited in the proceedings. Next she would submit that

after completion of cross-examination of the Plaintiff's expert witness namely P.W.No.2, Plaintiffs filed Application for recall of the said witness which was dismissed by the Trial Court. Hence she would submit that the Notice of Motion be dismissed with costs.

18. In so far as Writ Petition No.12569 of 2019 is concerned she would submit that the Chamber Summons filed by the Plaintiffs for seeking amendment is once again an abuse of the due process of law. She would submit that the same has been belatedly filed when the Affidavit of evidence of Defendant's Witness (D.W. No. 1) has been filed in 2015 and the documents relied upon by the Defendants have already been exhibited. She would submit that perusal of the Affidavit in support of the Chamber Summons would show that there is merely a fresh interpretation and description of the Suit property stated therein in order to improve the Plaintiff's case in evidence, which has been filed much belatedly after completing the entire witness action of both the Plaintiffs' witnesses and after perusing the Affidavit of evidence and documents exhibited by the answering Defendant of its witness (D.W.No.1). She would therefore submit that such an amendment cannot be allowed and the order dated 24.06.2019 has been correctly passed by the Trial Court.

19. I have heard Mr. Tiwari, learned Advocate for the Plaintiffs and Ms. Murali, learned Advocate appearing for the Defendant No.5

who is the contesting Respondent in both the proceedings. With their able assistance, I have perused the pleadings of the case. Submissions made by the Advocates have received due consideration of this Court.

20. At the outset, it needs to be stated that there is not much dispute about the aforementioned facts in so far as the proceedings before the Trial Court are concerned. Record indicates that evidence of P.W.No.1 was completed as far back as on 27.07.2015. Thereafter on 10.08.2015, an Affidavit of examination-in-chief of Architect (P.W.No.2) was filed and on 24.08.2015, cross-examination of P.W.No.2 was completed by the answering Defendant. *Pursis* of closure of evidence by Plaintiffs was filed on 24.08.2015. Thereafter on 28.10.2015, Affidavit of evidence of Defendant No.5 (Exhibit-33) and list of documents (Exhibit-34) was filed. Record further indicates that Plaintiffs filed Notice of Motion No.3134 of 2015 raising objection to the answering Defendant's case. It was contended by Plaintiffs therein that the construction of the Suit premises was contrary to the Consent Terms and therefore Commissioner Report dated 13.12.2013 (Exhibit-35) and Architect's Report (Exhibit-36) were allowed to be filed on record. Arguments in Notice of Motion No.3134 of 2015 were heard and on 27.01.2016 the Notice of Motion was dismissed. On 21.06.2016, the review Application of dismissal of Notice of Motion was also dismissed by the Trial Court. It is only thereafter that on

24.08.2016 the fresh Notice of Motion No.2398 of 2016 was registered.

21. It is seen that the fresh Notice of Motion is for recall of Plaintiff's witnesses. Plaintiffs desired to file additional Affidavit of evidence of the Plaintiffs' witnesses. Record clearly indicates that this is done after the cross-examination of the said witnesses is already completed and the contesting Defendant No.5 has placed on record its evidence along with the documents which are exhibited by the Court. It is further pertinent to note that the documents which the Plaintiffs desire to rely upon are: (i) certified copy of plan issued by Municipal Corporation, (ii) letter / reply by Municipal Corporation to RTI application and (iii) Advocate's notice, postal receipt and acknowledgment. The learned Trial Court after considering the three documents has returned the finding that the first two documents are documents issued by the Municipal Corporation and it is not necessary for the Plaintiffs to file additional Affidavit and to lead further evidence for interpretation of the documents. I am in complete agreement with the said finding and it calls for no interference. Document at serial No.(i) above is a public document, certified copy of which can be proved in evidence in accordance with law. There is no material on record to show as to why Plaintiffs did not obtain this document / plan for relying on the same through its two witnesses

earlier in the year 2015. It is extremely pertinent to note that and further record clearly indicates that P.W.No.2 is an RCC Consultant and has deposed as an Expert witness and has been cross-examined extensively. It is seen that there was a change of Advocate during the recording of evidence of P.W.No. 2 and the present Advocate representing the Plaintiffs came on record subsequently after the cross-examination of P.W. No. 2 was over. It is clear that the additional Affidavit of P.W. No. 2 which is now sought to be introduced is clearly attempting to improve upon the evidence recorded by the Trial Court and as observed by the Trial Court while passing the order dated 31.07.2018. Such a course of action to improve the case of the party after its witness action is over and after the Affidavit in lieu of examination-in-chief alongwith list of documents of the contesting Defendant is filed, disclosed and taken on record is wholly impermissible in law. In the facts and circumstances of the present case, it is clear that the Plaintiffs are attempting to fill in the lacunae in the evidence of both its witnesses. This Court cannot lose sight of the fact that P.W.No.2 is an expert witness. He is a structural engineer. The learned Trial Court has returned cogent findings in paragraph Nos.5 to 8 of the order dated 31.07.2018 which are reproduced hereinunder:-

“5. Now the plaintiffs wish to file additional affidavit of PW-1 as they have received some documents under RTI Act. This is not a ground to allow the plaintiffs to lead additional evidence

when they have closed their evidence and defendant no.5 is under cross-examination. The plaintiffs have come before this Court with the said notice of motion in a very casual manner. The documents for which the PW-1 wish to file additional affidavit is the certified copy of plan issued by defendant no.1 Municipal Corporation. Document at SI.No.2 is information given by defendant no.1 MCGM in reply to RTI application. The third documents is notice of an advocate for the plaintiffs and the postal receipt and acknowledgment. As far as first two documents are concerned those are issued by defendant no.1 corporation. The defendant no.1 corporation can admit these documents. Therefore it is not necessary for the plaintiffs to file additional affidavit of PW-1 is allowed to lead further additional evidence then it will be an abuse of process of law and again some development occurs, he will come with some additional affidavit of evidence and this will go on which is not permissible as per law.

6. As far as affidavit of PW-2 is concerned, nothing is mentioned in an affidavit in support of motion, as to why PW-2 an expert witness is again needed to examined by way of filing of additional affidavit. He had filed his affidavit in lieu of examination-in-chief and was cross-examined by defendant no.5, now again what is his purpose of filing additional affidavit and examining him is not spelt out by the plaintiffs. It will amount to re-visiting evidence which PW-2 had already given in the Court which is not permissible. Therefore this Court finds that this is an futile attempt made by the plaintiffs and it cannot be allowed and it is an to abuse of process of law.

7. As far as the authority i.e. **Rajesh Verma vs. Annex Holdings and Investment and others**, I have gone through this authority. In this authority, an affidavit in lieu of examination-in-chief was filed and thereafter before he was cross-examined a permission was sought to further examination-in-chief of the said witness. In our case in hand this is not the case. In our case in hand, both witnesses are cross-examined, whereas in above authority only an affidavit in lieu of examination-in-chief was tendered and he was not cross-examined. Therefore this authority will not come to come to rescue the plaintiff.

8. As far as second authority is concerned, which is under Order XVIII Rule 17A of CPC, the Hon'ble High Court had observed that to achieve ends of justice and fully and finally decided the controversy between the parties and as there is no bar to produce additional documents and affidavits at a later stage, the Court can allow taking into consideration the grounds raised in an application. So from this authority what can be gathered is that witness can be recalled, even Order XVIII Rule 17A of CPC is repealed. But in our case in hand, as stated above grounds are not just and proper to allow the plaintiffs to lead additional evidence. Therefore this authority will also not be helpful to the plaintiffs."

22. I do not find any reason to disturb the findings as they are passed appropriately and correctly in the facts and circumstances of the present case. The order dated 31.07.2018 does not call for any interference and is therefore sustained. As a consequence, Civil Revision Application No. 574 of 2018 is dismissed.

23. In respect of the order dated 24.06.2019 passed by the learned Trial Court it is seen that the learned Trial Court has clearly recorded the timeline in the present case. It is pertinent to note that the learned Trial Court has observed that on perusal of the entire Affidavit in support of the Chamber Summons it emerges that Plaintiffs have not disclosed any sufficient reason for filing the Chamber Summons at such a belated stage. It appears that the word 'not' in line No.2 of page No.5 of the order dated 24.06.2019 has been incorrectly stated / inserted. I have perused the Affidavit of Plaintiff dated 03.10.2018 filed in support of the Chamber Summons which is at Exhibit-C page No.33 of the Writ Petition No.12569 of 2019. All that is stated in the Affidavit are bare facts and nothing more. The Trial Court is therefore absolutely correct in recording that sufficient reasons have not been given by the Plaintiffs nor there is disclosure of any reason as to why the proposed pleadings could not be filed at the time of institution of the suit in the year 2011. It also needs to be mentioned that, as recorded by the Trial Court, the Suit structure is

completely ready and part Occupation Certificate has already been received. Record indicates that five out of the six original disputants / Petitioners before this Court have not raised any grievance whatsoever with respect to the Consent Terms and the tripartite Agreement between the parties executed thereafter. This is an extremely strong circumstance for consideration. Perusal of the pleadings filed by the Plaintiff in the present proceedings show that the Plaintiffs are guilty of delaying the suit proceedings on the face of record. Considering that the Supreme Court had vide its order dated 22.05.2013 directed that the trial of the suit be expedited, the filing of the present proceedings before the Trial Court by the Plaintiffs after completing the Plaintiffs' evidence in its entirety is an abuse of the due process of law. This cannot be permitted. I fully endorse the reasons given by the learned Trial Court in the order dated 24.06.2019 while dismissing Chamber Summons No.1512 of 2018. The said order is therefore sustained. As a consequence, Civil Revision Application

24. In view of the above observations and findings the Plaintiffs i.e. Applicants in Civil Revision Application No.574 of 2018 and Petitioners in Writ Petition No.12569 of 2019 are directed to pay costs of Rs.10,000/- to the Kirtikar Law Library, High Court, Mumbai. Costs shall be deposited within a period of two weeks from the date of uploading of this Judgment / Order. Subject to payment of costs,

receipt of which shall be placed on record before the trial Court. The trial Court shall proceed with the suit proceedings as expeditiously as possible and dispose of the suit preferably within a period of six months from today.

25. With the above directions, Civil Revision Application No.574 of 2018 and Writ Petition No. 12569 of 2019 are dismissed.

H. H. SAWANT

[MILIND N. JADHAV, J.]

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