

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8398 OF 2023

Smt. Ranjana Dharmaraj Chinchavale
and Ors.

... Petitioners

Versus

Pushpa Navin Delwadia

... Respondent

— —
Mr. Shreepad Murthy with Mr.Abhishek Patil i/by Mr. P. G. Sawant
for Petitioners.

Mr. Tejas Bhide for the Respondent.
— —

CORAM : SHARMILA U. DESHMUKH, J.

DATE : August 7, 2023.

P. C. :

1. The challenge in the petition is to the order dated 06.05.2023 rejecting the application of the defendants seeking amendment in the counter-claim. S.C.Suit No.7536 of 2006 was instituted by the respondent-plaintiff for specific performance of an unregistered agreement for sale executed on 01.07.1995. In the said proceedings, counter-claim was filed by the petitioners seeking the following reliefs.

“(a) It is declare that the defendants are the owner of the suit flat i.e. Flat No.C-1/404 in the Building No.C-

1 of the P & T Staff Mitra Mandal co-operative Housing Society Ltd., situated at Tarun Bharat, Chakala, Andheri (East), Mumbai – 400099 and entitled to get all the benefits arising out of said suit flat or Flat No.1201 having carpet area 669 sq feet on the 12th floor of the building No.1A and one parking space in the Puzzle parking or in the stilt in the form of stacked parking in proposed building No.1A of the P & T Staff Mitra Mandal co-operative Housing Society Ltd., situated at Tarun Bharat, Chakala, Andheri (East), Mumbai-400099.

(b) The Plaintiff be also restrained by permanent order of this Hon'ble Court from transferring, creating third party right in respect of the suit Flat No. C-1/404 in the Building No. C-1 of the P & T Staff Mitra Mandal co-operative Housing Society Ltd., situated at Tarun Bharat, Chakala, Andheri (East), Mumbai – 400099 or Flat No.1201 having carpet area 669 sq feet on the 12th floor of the building No.1A and one parking space in the Puzzle parking or in the stilt in the form of stacked parking in proposed building No.1A of the P & T Staff Mitra Mandal co-operative Housing Society Ltd., situated at Tarun Bharat, Chakala, Andheri (East), Mumbai-400099 to any third person;

(c) this Hon'ble Court be please to declare that registered tripartite agreement dated 28.08.2016 executed between Plaintiff, Developer and Society is illegal, bad in law and null and void;"

02. The case of the Petitioner in the counterclaim is that the Petitioner's deceased husband had handed over the possession of the old flat to the Respondent for temporary accommodation and that during the pendency of the application for transfer of share certificate in name of the Petitioner, the Respondent filed suit No.7536 of 2006 claiming to be in lawful possession having purchased the suit flat.

3. Chamber Summons No.1138 of 2022 came to be filed seeking amendment of counterclaim. By the proposed amendment, the defendants sought to incorporate the relief for possession of the suit flat no.1201 and for payment of compensation of Rs.50,000/- p.m. and other consequential amendments in the body of the plaint. The schedule of the amendment indicates that averments sought to be incorporated by way of the proposed amendment was that the plaintiff, and the society and the developers by joining hands had handed over the possession of the new flat in the month of March, 2022. As regards the amendment pertaining to pecuniary valuation, the said is not required to be considered in view of the enhanced jurisdiction of the City Civil Court. The application for amendment was opposed by the plaintiff on the ground that the same is barred

by limitation, placing reliance on the provisions of Article 65 of the Limitation Act, 1963.

4. The trial Court rejected the chamber summons on the ground that the counter claim is filed in the year 2018 and the chamber summons is taken out on 01.08.2023. The trial Court also noted the submission of the Respondent that the cause of action had accrued long ago when the plaintiff was put in possession of the suit premises in part performance of the agreement in the year 1993.

5. Heard learned counsel for the parties.

6. Learned counsel appearing for the Petitioners submits that during the pendency of the proceedings, there was redevelopment of the new building in which flat no.1201 with a increased carpet area i.e.669 sqr. feet was handed over to the plaintiff. He would further submit that this was by virtue of a tripartite agreement dated 30.05.2017 executed between the plaintiff, developer and the Society. He points out the prayers made in the counter-claim and would submit that the Petitioners had sought the relief of all benefits arising out of the said suit flat No.1201, having carpet area 669 sqr. feet in the redeveloped building. He has further pointed out the agreement which was

entered into between the parties, in which the schedule would indicate the old and new premises.

7. *Per contra*, learned counsel appearing for the Respondent opposed the petition on the ground that the reliefs sought by way of the proposed amendment is *ex-facia* barred by the limitation. He draws support from the provisions of Article 65 of the Limitation Act, 1963. He would further submit that the cause of action arose to the Petitioners in the year 1993, when in pursuant to payment of part consideration, the possession was handed over to the plaintiff. He would further submit that the cause of action further arose in the year 1996, when the entire consideration was paid. He would urge that in any event upon the filing of the suit in the year 2006, the cause of action arose.

8. Considered the submissions and perused the papers with the assistance of the learned counsel appearing for the parties.

9. The facts of the case are the S.C.Suit No.7356 of 2006 was instituted by the Respondent seeking specific performance of an unregistered agreement of the year 1995. At the time of filing of the suit, the suit flat was flat No.C/1/404. During the pendency of the proceedings, there was redevelopment of the building in which the

suit flat was situated. A tripartite agreement was executed on 30.05.2017 between the Respondent, the society and the developer, pursuant to which the possession of the flat was handed over and the interim arrangement was arranged between the parties, as regards the allotment of the new flat to the Respondent being flat no.1201. As a consequence, the identity of the suit flat came to be changed and the suit premises is now the new flat in the redeveloped building. There was an amendment application filed by the Respondent to incorporate the relief that the Petitioner is bound and obliged to transfer to the name of the plaintiff the suit flat no.1201 and to perform their part of the contract.

10. It is not disputed that there has been a change in the identity of the flat. It is also not disputed that in the counterclaim which is filed on 25.06.2018, the Petitioners sought declaration of ownership as regards the old flat as well as the new flat i.e. flat No.1201. At that point of time, the position of the suit flat was that the building in which the old flat situated was demolished and agreement had been entered into in respect of new flat No.1201. At the time of filing of the counterclaim, it does not appear that the possession of the new flat had been handed over to the Respondent. There is a specific assertion in the proposed amendment that in the

month of March, 2022, the new suit flat has been handed over to the Respondent. As such, in the schedule of amendment relief was sought seeking possession of the new flat. Learned counsel for the Respondent has objected to the proposed amendment on the ground that the proposed amendment seeking possession of the flat is barred by the law of limitation by virtue of Article 65 of the Limitation Act. The provisions of Article 65 of the Limitation Act provides for limitation of 12 years for possession of immovable property when the possession of the defendant becomes adverse to the plaintiff. In the present case, the suit came to be filed in the year 2006, claiming the ownership of the premises. However, during the pendency of the proceedings, subsequent events have taken place by virtue of which there is a new flat which come into existence i.e. flat No.1201. The possession as per the proposed amendment has been handed over in the month of March, 2022 to the plaintiff. As such, the issue of limitation will be a mixed question of law and fact, as the proposed amendment seeks possession of the redeveloped flat, which is stated to have been handed over in the month of March, 2022.

11. The trial Court rejected the application for proposed amendment on the ground that the counterclaim is filed in the year

2018 and the present chamber summons is taken out on 01.08.2023 and period of more than three years has been passed. It appears that the rejection is on the ground of delay. It is not disputed that the proposed amendment is a pretrial amendment and as such, is required to be liberally allowed and delay *per se* should not be a ground for rejecting the application for amendment.

12. The Apex Court in the case of ***Life Insurance Corporation of India vs. Sanjeev Builders Private Limited and Anr.***, reported in ***2022 SCC OnLine SC 1128***, has held that there is no absolute rule that in every case where a relief is barred because of limitation, amendment should not be allowed. It is always open to the court to allow an amendment if it is of the view that allowing of an amendment shall really sub-serve the ultimate cause of justice and avoid further litigation. Applying the law laid down by the Apex Court to the facts of the present case the proposed amendment seeks possession of new flat which possession is claimed to have been handed over in the month of March, 2022. As such, if the amendment is not allowed, the Petitioner were suffered irreparable loss and injury.

13. In my opinion, considering the facts and circumstances, the claim of possession which is sought to be incorporated by way of

proposed amendment, cannot be said to be *ex-facie* barred by limitation and the issue of limitation will have to be framed and decided after evidence has been led.

14. In light of the above, the impugned order dated 06.05.2023 is hereby quashed and set aside and the writ petition stands allowed. As the impugned order dated 06.05.2023 is quashed and set aside, the chamber summons No.1138 of 2022 stands allowed.

15. Needless to clarify that the amendment as regards the valuation are not required to be incorporated in view the enhanced jurisdiction.

(Sharmila U. Deshmukh, J.)