

VRJ

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

WRIT PETITION NO.10375 OF 2023

Jyoti Corporation ... Petitioner
V/s.
Arun Virajlal Gohil & Ors. ... Respondents

**WITH
WRIT PETITION NO.10380 OF 2023**

Jyoti Corporation ... Petitioner
V/s.
Omprakash H. Bhatia ... Respondent

**WITH
WRIT PETITION NO.10381 OF 2023**

Jyoti Corporation ... Petitioner
V/s.
Bharti Murgesan & Ors. ... Respondents

**WITH
WRIT PETITION NO.10382 OF 2023**

Jyoti Corporation ... Petitioner
V/s.
Bhaskar R. Waval & Ors. ... Respondents

**WITH
WRIT PETITION NO.10383 OF 2023**

Jyoti Corporation ... Petitioner
V/s.
Sunil Srichand Narang & Ors. ... Respondents

**WITH
WRIT PETITION NO.10384 OF 2023**

Jyoti Corporation ... Petitioner
V/s.
Gopal T. Talreja & Ors. ... Respondents

**WITH
WRIT PETITION NO.10386 OF 2023**

Jyoti Corporation	... Petitioner
V/s.	
Rajmukari Harilal Bhatia, since deceased	... Respondents

**WITH
WRIT PETITION NO.10387 OF 2023**

Jyoti Corporation	... Petitioner
V/s.	
Sonali M. Jagtap & Ors.	... Respondents

**WITH
WRIT PETITION NO.10388 OF 2023**

Jyoti Corporation	... Petitioner
V/s.	
Tikamdas Tejumal Talreja & Ors.	... Respondents

**WITH
WRIT PETITION NO.10390 OF 2023**

Jyoti Corporation	... Petitioner
V/s.	
Sundaram Pechi, since deceased through legal heirs & Ors.	... Respondents

**WITH
WRIT PETITION NO.10391 OF 2023**

Jyoti Corporation	... Petitioner
V/s.	
Lata Srichand Narang & Ors.	... Respondents

**WITH
WRIT PETITION NO.10392 OF 2023**

Jyoti Corporation	... Petitioner
V/s.	
Madhu A. Gandhi & Ors.	... Respondents

**WITH
WRIT PETITION NO.10407 OF 2023**

Jyoti Corporation	... Petitioner
V/s.	
Avinash R. Wavahal	... Respondent

Mr. H.R. Pawar for the petitioner.

Mr. Amrut Joshi with Ms. Kavita Sharma i/by Ganesh & Co., for respondent No.1 in all WPs.

CORAM : AMIT BORKAR, J.

DATED : AUGUST 24, 2023

P.C.:

1. All these writ petitions contain common question of law and facts and, therefore, are being decided by common judgment.
2. The petitioner is the owner of the suit structure. Respondent No.1 in each petition is the occupant. Respondent No.2- Corporation issued notice for demolition of structure occupied by respondent No.1 in exercise of power under section 351 of the Bombay Municipal Corporation Act. Respondent No.1 in all civil writ petitions filed different suits challenging notice issued under section 351 of the Bombay Municipal Corporation Act, 1888. The ground for challenge in each suit is similar. Parties led their oral evidence. According to the petitioner, in the cross-examination of the owner, it is revealed that the owner settled dispute with similarly situated occupants by paying different amounts. Schedule of one of the agreement contains a recital that such structure was

in existence since 1960. Respondent No.1, therefore, filed a chamber summons for amendment of the plaint to incorporate pleadings in relation to alleged agreement executed by the owner with similarly situated occupants. It is also averred that the City Civil Court protected the occupants of similarly situated shops in a civil suit. Broadly the amendment incorporates aforesaid two factors.

3. The trial Court by the impugned order allowed the amendment. The petitioner (owner) has, therefore, filed present petitions.

4. According to the learned advocate for the petitioner (owner), the amendment was not necessary for deciding real controversy between the parties. The facts narrated in the schedule of amendment were within the knowledge of the plaintiff before filing of suit and, therefore, there is no diligence. According to him, the property which was subject matter of the judgment claimed in the schedule of amendment was totally different property in different premises and, therefore, such judgment has no relevance with the controversy involved. According to him, agreement containing recital of existence of structure prior to 1960 has not been signed by the owner and it has no relevance with the suit structure. He submitted that the suit having been fixed for final arguments, at this stage, amendment of plaint cannot be permitted. In support of his submissions, he relied on following judgments:

a) **Vijay Hathising Shah & Anr v. Gitaben Parshottamdas Mukhi**

& Ors. reported in (2019) 5 SCC 360;

b) **Vidyabhai & Ors. v. Padmalatha & Anr.** reported in 2009 (1) All MR 471; and

c) **Life Insurance Corporation of India v. Sanjeev Builders Pvt. Ltd. & Ors.** reported in (2022) 7 SCC 864.

5. Per contra, learned advocate for the plaintiff submitted that filing of application for amendment was the outcome of cross-examination of the owner. The cross-examination of owner containing relevant statements was conducted on 24th April 2023. The application for amendment was filed on 28th April 2023. According to him, the agreement sought to be relied upon in the schedule of amendment contains a recital of existence of similarly situated structure prior to 1960. The judgment relied upon is also in respect of similarly situated structure. Whether the structures were similarly situated or not is the matter of merit. At this stage, it is not necessary to consider the said aspect. According to him, the scope of challenge to the order of allowing amendment has been settled by the judgments of this Court and the Apex Court. In the absence of perversity in the reasoning or absence of jurisdictional fact, existence of jurisdictional fact, the trial Court was within its right to allow the amendment as once the satisfaction is recorded on the point of jurisdictional fact, the Court needs to consider aspect of necessity to decide real controversy between the parties. The trial Court having exercised discretion in favour of the petitioner, the superior Court in exercise of power under Article 227 of the Constitution of India would not interfere

with positive exercise of jurisdiction. He also submitted that the impugned order is capable of being challenged under section 151 of the Civil Procedure Code, 1908, and therefore, at this stage no interference is called for. In support of his submission, he relied on following orders of this Court:

- a) **Surendra Dejoo Shetty v. Smt. Irene George Lobo & Anr.** in Civil Writ Petition No.7000 of 2010 (Principal Seat) decided on 19 October 2010;
- b) **Wenceslaus H. Gonsalves Clovis Gonsalves & Ors v. Hill Dream Co-operative Housing Society Ltd. & Ors.** in Civil Writ Petition No.4242 of 2016 (Principal Seat) decided on 10 October 2016;
- c) **Waman Khente v. Sheikh Faheem & Ors.,** in Civil Writ Petition No.4276 of 2017 (Nagpur Bench) decided on 23 June 2022; and
- d) **Santosh Babu Tubki & Anr. v. Raghoba Sawant (Dec.) & Ors.** in Civil Writ Petition No. 311 of 2022 (Goa Bench) decided on 9 February 2023.

6. Having perused the document on record, it needs to be noted that scope of the suit challenging notice under section 351 of the MMC Act is to decide whether the impugned structure is prior to datum line of 1st April 1962 or whether the structures are constructed after due permission from planning authority. According to the plaintiff, his case falls in first category. It was, therefore, necessary for the trial Court to adjudicate as to whether the suit structure was in existence prior of 1st April 1962.

7. On perusal of the cross-examination, it appears that the owner has stated as under:

“10. ... I have made complaint to MCGM. Out of 50 structures some of the occupiers vacated the shops. To vacate premises to them I have paid them some amount. I have entered into agreement with them at the time of vacating shops. I cannot produce said agreement...”

8. Said statements were made on 24th April 2023. The application for amendment has been filed on 28th April 2023. There is no material on record that the plaintiff was aware of existence of agreement referred in the cross-examination prior to filing of the suit. Prima facie, therefore, it appears that the fact of paying occupiers of vacated structure was brought to the notice of plaintiff on 24th April 2023 and the application for amendment having been filed on 28th April 2023, the plaintiff has satisfied jurisdictional fact of due diligence.

9. The next question is as to whether the amendment is necessary for the purpose of deciding real controversy between the parties. As stated earlier, it is the case of the plaintiff in paragraph Nos.21 and 22 of the schedule of the amendment that the structure covered by the agreement referred in paragraph No.22 of the schedule is similarly situated with the suit structure. Therefore, it is for the trial Court to decide as a matter of fact the structure is similarly situated or not but at this stage, it is not necessary to go into merits of the claim of the plaintiff. Similar would be the situation in relation to the judgment relied upon in paragraph No.27 of the schedule of amendment. It is for the trial Court to decide on merits as to whether the suit structures are similarly

situated with the structures covered by the judgment referred in paragraph No.27.

10. However, accepting the averments made by the plaintiff in paragraph Nos.21 and 27, claiming similarity along with pleading in paragraph Nos.4(a) and 4(b) of the plaint which, at this stage, alleged element of commonality. As stated earlier, it is for the trial Court to decide whether the structures are similarly situated or whether the recital in the alleged agreement which is denied by the owner is similarly situated with the suit structure. Therefore, in my opinion, the amendment was necessary to decide real controversy between the parties.

11. In so far as the judgment relied upon by the petitioner is concerned, it appears that the Apex Court has consistently held that finding on due diligence would be jurisdictional fact and in absence of satisfaction on jurisdictional fact, application for amendment in a suit filed after 2002 cannot be allowed. As held earlier, in view of satisfaction recorded by this Court in earlier part of the judgment, I am satisfied that the plaintiff could not have filed such application before 28th April 2023 as the facts came to the knowledge of the plaintiff on 24th April 2023.

12. On overall consideration of the matter and in the absence of perversity being pointed out, it is not necessary to interfere with the impugned orders.

13. The civil writ petitions are, therefore, dismissed. No costs.

14. Considering the fact that the suit is of the year 2012 and the stage at which the application for amendment is filed, the trial

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signed by
VAIBHAV
RAMESH
JADHAV
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RAMESH
JADHAV,
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Court is directed to decide the suits finally within three months from today.

(AMIT BORKAR, J.)