



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

WRIT PETITION NO.8070 OF 2022

Anita Frank Mascarenhas and Anr. Petitioners
Vs.
Jagdish Nandlal Rajpopat and Ors. Respondents

Ms. Apartna D. Vhatkar for the Petitioners.
Mr. Vishal Kanade i/b Mr. Haresh J. Lulia for Respondents.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 19 AUGUST 2023.

P. C.

1. Heard.

2. The challenge in the petition is to the order dated 24/8/2021 rejecting the petitioner's Chamber Summons No.7/2021 seeking amendment of the plaint.

3. S.C. Suit No.846/2020 has been instituted by the plaintiff seeking declaration that the schedule of property mentioned in the agreement for sale dated 1/8/2019 is inconsistent with the schedule mentioned in the chain of agreements which are annexed at Exhibits A, B and C to the plaint to the extent of illegal

and wrongful inclusion of "pocket garden" attached to row house No.1 and as such not enforceable as against the occupier of row house No.2 i.e. plaintiff.

4. The dispute appears to be in respect of common area which is adjoining the row houses constructed by developer known as Lakdawala Developer. In the plaint the claim appears to be that the plaintiffs who are owners of row house No.2 have the right to enjoy common pocket garden, which in the agreement executed in favour of subsequent transferee, is shown to be the area included along with row house No.1. It appears that the plaintiffs and defendant Nos.3 and 4 are occupying adjacent row houses and as such the dispute has arisen in respect of ownership and enjoyment of the pocket garden. In these proceedings on 17/12/2020 an application was moved seeking amendment of the plaint. By the proposed amendment the plaintiff sought to correct the description of the CTS Nos and also to incorporate certain documents and pleadings as regards the disputed portion which came to be rejected by the impugned order dated 24/8/2021. The observation of trial Court was that on 7/12/2020 defendant Nos. 3 and 4 had tendered

their written statement and the trial Court came to the conclusion that subsequently an attempt has been made by the plaintiff to obtain the documents and then seek an amendment not only in respect of change of CTS number but addition of prayer clauses. The trial Court appears to have been swayed by the fact that written statement was filed by defendant Nos.3 and 4 and by way of proposed amendment, the plaintiff is attempting to pre-empt the defence taken by defendant Nos.3 and 4.

5. In my opinion the trial Court failed to appreciate that the amendment is pretrial amendment and it is now settled by catena of decisions that pre-trial amendments are to be liberally allowed subject to the caveat that amendment should not change the nature of the suit or introduce fresh cause of action. In the present case it does not appear that by the proposed amendment any new cause of action was sought to be introduced or that the amendment changes the nature of the suit. Perusal of the proposed amendment indicates that better and correct particulars are sought to be given based on certain documents, which came to the knowledge of the plaintiff subsequently, and additional prayers and pleadings are sought to be incorporated. In my opinion the

reasoning of the trial Court is unsustainable inasmuch as after the plaint is amended, defendant Nos.3 and 4 will be entitled to file their written statement to the amended portion of the plaint.

6. In light of discussion above, the impugned order dated 24/8/2021 is clearly unsustainable and is hereby quashed and set aside. As a consequence, Chamber Summons Nos.7/2021 stands allowed. Writ Petition succeeds.

SHARMILA U. DESHMUKH, J.