

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7792 OF 2023

Marigold Premises Pvt. Ltd
and Anr.

...Petitioners.

Versus

Marigold Phase III Co-operative Housing
Society Ltd and Others.

..Respondents.

Mr. Girish S. Godbole, Senior Advocate with Mr. Vaibhav Sugdare, Mr. Sour Subha Ghosh, Mr. Samarth Chowdhary, Ms. Sanaya Patel i/b IndusLaw for the petitioner.

Mr. Atul Daga, Mr. Ayaz Baliwala and Mr. Yogesh A. Gaikwad i/b M/s. Baliwala and Co, for respondent No.1.

Mr. Shon D. Gadgil, Mr. Murtaza Chherawala, Ms. Asmita Mogre, Ms. Mihika Awate and Ms. Pranjali Ranade i/b CNS Juris for respondent No. 2 and 3.

Coram : Sharmila U. Deshmukh, J.

Date : July 10, 2023.

P. C. :

1. By this petition filed under Article 227 of the Constitution, the petitioner questions the order dated 20th October 2022 allowing the amendment application preferred by respondent No.1-original Plaintiff in Special Civil Suit No.223 of 2018.

2. The Petitioners herein are the original Defendant Nos 1 and 2,

the Respondent No 1 is the original Plaintiff and the Respondent Nos 2 and 3 are the original Defendant Nos.3 and 4. For the sake of convenience, parties are referred to by their status before the trial Court.

3. The factual matrix is as under :

Special Civil Suit no 223 of 2018 was instituted seeking the following reliefs :

- “(a) that this Hon’ble Court be pleased to declare that the Conveyance Deed dated 29 April 2017 executed by and between Defendant Nos. 1 to 4 is illegal, null and/or void ab initio and of no legal effect ;
- (b) for an order and decree of this Hon'ble Court directing the Defendants to deliver up the original Conveyance Deed dated 29 April 2017 executed by and between Defendant Nos.1to 4 and to cancel and invalidate the same;
- (c) that this Hon’ble Court be pleased to declare that all actions taken by the Defendants pursuant to the Conveyance Deed dated 29 April 2017 are illegal, null and void and of no legal consequence;
- (d) for a mandatory order and injunction of this Hon’ble Court directing Defendant Nos. 1 to 4 to do all acts, deeds and matters and things as may be necessary to amalgamate Plot Nos. 4/1 and 4/2 into a single undivided Plot No.4 as per the plan annexed at Annexure 3 to the MOU, and for such purpose, direct Defendant nos. 1 to 4 do all acts and take all steps as may be necessary for amalgamation;

- (e) that this Hon'ble Court be pleased to pass an order for a mandatory injunction restraining the Defendants, whether by themselves or through their directors, officers, servants and agents from acting pursuant to the Conveyance Deed dated 29 April 2017 in any manner whatsoever;
- (f) the said Defendant Nos 1 and 2 be ordered and decreed to pay to the Plaintiff a sum of Rs 45,00,00,000/ (Rupees Forty Five Crores only) alongwith interest thereon at the rate of 18% p.a. or at such other rate as this Hon'ble Court may deem fit and proper from the date of filing of the present Suit till the date of payment and realisation thereof as per the Particulars of Claim as produced on record of this Hon'ble Court along with the list of documents;"

4. The case of plaintiff is that defendant nos.1 to 4, in connivance with one another and in violation of the terms of Court order dated 14th October 2014, have revised the layout, subdivided the suit property and executed a deed of conveyance dated 29th April 2017 in relation to a disproportionate portion of the sub-divided suit property to the exclusion of plaintiff and behind its back, in order to defeat the plaintiff's right title and interest in the suit property. The suit property is described in paragraph 4 of the plaint is the land forming plot no.4 as detailed in Schedule -II.

5. The factual narration in the plaint is :

- Defendant no.2 had executed a development agreement on 20th

March 2002 in favour of defendant no.1 in respect of the land described in Schedule-I which is referred to as "the said larger land" and after obtaining sanction from Pune Municipal Corporation for the master layout of the said larger land, the said larger land was divided in 4 plots, namely, Plot nos.1 to 4.

- Defendant no.1 has carried out construction of various residential bungalows and buildings on the suit property and had thereafter sold those bungalows and flats to individual purchasers who are the members of 3 societies. As in the year 2014, dispute arose between 3 societies on one hand and defendant no.1 and 2 on the other hand, in relation to the proposed revisions sought to be made to the layout plan of the said larger land, the said 3 societies as co-plaintiffs had filed a suit being Regular Civil Suit No.441 of 2014. In the suit of 2014, the plaintiff herein and defendant nos.1 to 4 entered into a compromise in the form of memorandum of understanding [for short "MOU"] dated 14th of October 2014 and a consent decree in terms of the MOU came to be passed disposing of regular civil suit no. 441 of 2014.
- Prior to the passing of consent decree, there were meetings

held by 3 societies and the minutes of meetings, i.e., resolutions contemplate and speak of a single joint conveyance to be executed by and between defendant no.1 and defendant no.2 on one hand and 3 societies on the other and sub-division of the plot was agreed to be carried out as per the agreed terms of MOU and Consent Terms.

- After the execution of consent terms, to enable the subdivision of suit property, an architect came to be appointed. However, between October 2014 and March 2015, the process of subdivision of suit property from the said larger land and execution of joint conveyance deed in favour of 3 societies remained incomplete. In March 2015, defendant no.1 confirmed that the process of subdivision was at an advanced stage and suggested an extension of 4 months to complete the subdivision. During this process the plaintiff learnt that defendant no.1 had illegally sold and handed over to certain individual flat purchasers, the open sky terraces, gardens and garden area which formed part of the common area of 3 societies. The plaint then refers to various correspondence between the parties during the period 2015 and 2016 as regards the implementation of terms of MOU.

- In the year 2017 defendant no.1 was called upon by the plaintiff to execute a joint conveyance to which a response was received that defendant nos.3 & 4-societies had approached defendant no.1 for execution of separate conveyance deed. On 20th April 2017, defendant no.1 informed the plaintiff that the suit property has been subdivided into 2 plots, namely, plot no. 4/1 and plot no.4/2 ,and, the subdivision was sanctioned by Pune Municipal Corporation as far as back on 22nd December 2016. Subsequent to the said information received, there was an exchange of correspondence between the parties as well as the architect and an exchange of legal notices. As the defendants failed to comply with the consent terms and were in violation of the terms of memorandum of understanding, Special Civil Suit No. 223 of 2018 came to be filed.
- The cause of action is stated to arose on 20th April 2017, when the plaintiff was made aware for the first time that defendant nos.1 to 4 had subdivided the suit property in violation of the consent terms and thereafter on 1st May 2017 when the plaintiff learnt that defendant nos.1 and 2 had executed a conveyance deed on 29th April 2017 in favour of defendant nos.3 and 4 in

respect of the portion of suit property to the detriment and exclusion of plaintiff.

6. Before proceeding further it would be relevant to advert to the earlier suit, viz, RCS No.441 of 2014 filed by the plaintiff and defendant nos.2 and 3, i.e., the 3 societies, against defendant nos.1 and 2, inasmuch as the MOU came to be executed in those proceedings and the present suit of the year 2018 alleges violation of that MOU. RCS no.441 of 2014 was filed for a declaration that defendant nos.1 and 2 therein cannot revise and/or get sanctioned any plan in respect of the suit property without obtaining prior written consent from the plaintiffs and for an order of permanent injunction restraining the defendants from revising the sanctioned layout of the suit property and using or developing the proposed parking space or any other portion of the suit property, in any manner, without the consent of the Plaintiffs and from creating any rights in the suit property and Plaintiff's property and from causing any obstruction to the Plaintiffs from fully utilising and enjoying the common amenities upon the suit property including proposed parking space.

7. In RCS No.441 of 2014, the suit property has been described as

the remaining plot out of the entire property as per the master layout whereby the entire property is divided into plot no.1, plot no.2, plot no.3 and remaining plot. The Plaintiff's property is described as portion out of the suit property admeasuring 51,110 square meters and the entire land is described as land bearing Survey No.15/1, 15/2/1, 15/2/2, 15/3, 15/4, 15/5 and 15/6 admeasuring about 45 acres and 25 gunthas. Considering the description of properties, Plot No.4 referred to in Special Civil Suit No. 233 of 2018 is Plot No. 4 situated on portion of the remaining plot.

8. Now, let us turn to the relevant clauses of the MOU entered into between the parties, the consent decree having been passed in terms of the MOU, which reads thus:

- "1.1 The sub-division of the Said Land (Plot No.5 more particularly described in Annexure 2 hereto) from the Said Larger Land (more particularly described in Annexure 1 hereto), shall be undertaken by the Developer on the basis of Plan annexed hereto as Annexure 3 and shall make the necessary fillings with the relevant authorities, and is also authorised, from time to time, to sign all documentation as may be required by the relevant authorities and/or the Architect, on behalf of the Societies.
- 3.3 The Parties have agreed that other than as set out above, the Developer and/ or the Owner shall not make any filings or submit any revised plants to any authorities or take any action whatsoever in respect of the Said land more particularly described in the Annexure 2. However, it is expressly agreed between the parties that the Developer is absolutely entitled to develop the balance land, being outside the Said Land. But falling within the Said

Larger Land pending the sub-division proposal and even after sub-division and revise the master layout without affecting the Said Land, for carrying out and completing the development and construction on the balance land out of the said larger land. The Developer undertakes not to carry out changes in the Said land, its area and the FSI consumption on the Said Land during revisions in the master layout.

- 4.2 The execution and registration of the deed of conveyance, in the form annexed hereto, shall be completed by the parties, within 7 days of the completion of the sub-division, and confirmation of the same given by the Architect Stamp duty, registration fees. LBT and other incidental expenses relating to the execution and registration of the said Deed of Conveyance including Service tax, VAT, additional Stamp Duty, if any, shall be borne and paid by the Societies Jointly and severally.
- 6.2 However, notwithstanding anything stated herein, in the event that for any reason whatsoever, the sub-division process is not completed within 6 months from the date of execution hereof this MOU shall stand terminated *in toto* without prejudice to rights of either Parties, and the Parties shall be at liberty to pursue all legal rights and remedies available to them as if this MoU had never been executed."

9. Perusal of the terms which are entered into between the parties discloses the agreement between the parties that the subdivision of said land (which is described in the MOU as the land admeasuring about 48,638 square meters on which the developer has constructed multiple structures) from the larger land (which is described as the entire area admeasuring about 45 acres 18 gunthas) shall be undertaken by the developer on the basis of the plan annexed at Annexure-III thereto and that the developer and owner shall not submit any revised plan to the authorities and an undertaking was

given that the developer will not carry out any changes in the said land, its area and its FSI consumption of the said land during the revision in the master layout. It was also agreed that the execution and registration of conveyance deed shall be completed by the parties within 7 days of completion of sub division and after complying with the legal provisions thereof. It is pertinent to note that as per clause 6.2 of the MOU, if the subdivision process is not completed within 6 months from the date of execution of MOU, the MOU shall stand terminated without prejudice to the rights of either party with liberty to the parties to pursue all legal rights and remedies available to them as if the MOU has not been executed.

10. The clauses of MOU have been set out to demonstrate that the agreement which was entered into between the parties as also to note clause 6.2, which makes time the essence of MOU. It is this clause which is pressed into service by the defendants in their written statement in Special Civil Suit No.223 of 2018 and in paragraph 6 of the written statement it is pleaded as under :

"6. These Defendants say that admittedly for the reasons not attributable to these Defendants, the said intended subdivision process did not complete within a period of 6 months from the date of MOU which expired on by end of 13/04/2015 and hence the said MOU stood automatically terminated and cancelled and the same thereafter ceased to exist and hence the suit filed by the Plaintiff on the basis of

the said MOU, which does not exists and stood terminated by end of 13/04/2015, as aforesaid is not maintainable and for this reason, these Defendants say that the Plaintiff is not entitled to make any claim and/or to seek any relief on the basis of the understanding then arrived at and which was reduced to writing under the said MOU, which stands cancelled, as aforesaid"

11. After the written statement was filed in the year 2018, application for interim injunction was preferred and thereafter in July 2020, the application for amendment under Order-6 Rule-17 read with section 151 of the CPC was filed by the plaintiff.

12. In the application, it is contended that amendments are proposed in view of the stand in the written statement that the MOU dated 14th October 2014 ceases to exist on 13th April 2015. The contention was that the proposed amendments are in the nature of alternative reliefs without changing the nature of suit. The schedule of the proposed amendments annexed to the application seeks to incorporate pleadings and prayers which can be summarised as seeking reliefs in the alternative in respect of the larger land, that is, the piece and parcel of land admeasuring 45 acres and 25 gunthas.

13. In the schedule of amendment, although the plaintiff proposed several amendments, I am giving the gist of only those amendments

which have been objected to by the defendants.

- (a) *to add as paragraph 2-A averments as regards seeking alternative reliefs in respect of the said larger land admeasuring 45 acres 25 gunthas.*
- (b) *to add as paragraph 51-B that in view of the MOU, the plaintiff had restricted its claim only to plot no.4, however in view of the stand now adopted by the defendants in the written statement, the plaintiff in the alternative is now entitled to take a stand that the plaintiff continues to have a right, title and interest in the said larger land which was a subject matter of Suit no.441 of 2014 and that the plaintiff is entitled to seek restitution of their rights by an order of decree to direct the defendants to restore the position ante in respect of the said larger land.*
- (c) *to add as paragraph 51-C ; That the Court order and declare that the MOU is valid, subsisting and binding on the Defendants.*
- (d) *To add as paragraph 51-F; that in event the court comes to a conclusion that the plaintiff is not entitled to the relief in respect of plot no.4/1, which has been claimed herein, and in event the*

court comes to a conclusion that MOU stood terminated, for a declaration that the plaintiff continues to hold an undivided right, title and interest in the suit in the said larger land admeasuring 45 acres 25 guntas, and that defendant nos.1 and 2 have no right to put up construction on the larger land,

(e) To add as paragraph 51-G : that in view of the stand which is adopted by defender nos.1 and 2, the defendants be restrained by decree of perpetual injunction from putting up any construction on the larger land and for a decree of perpetual injunction restraining defendant nos.1 and 2 from alienating or parting with the possession or dealing with or creating any third party rights in the said larger land.

(f) To add as paragraph 51-H ; that construction activities is being carried out by defendant Nos.1 on Plot No.9 without the Plaintiff's consent despite the fact that the Plaintiff continues to hold an undivided share in the larger land.

(g) To add as paragraph 51-I: That the actions of defendants are in direct breach and disobedience of the consent terms and defendant no.2 having failed to comply with its obligations and

undertakings, is not entitled to deal with or dispose of any portion of the said larger land and as such Plaintiffs are entitled to temporary injunction against the Defendant Nos 1 and 2 from putting up any construction upon the said larger land.

- (h) To add in paragraph 53 that the cause of action to claim relief in respect of the larger land arose in view of the stand taken by the Defendants in the written statement and the same is not barred by law of limitation.*
- (l) To add in prayer clauses declaration as regards the subsistence of MOU and entitlement of Plaintiffs to Plot No 4/1 and direction for single conveyance deed.*
- (m) To add in prayer clause ; The alternative relief which was sought for a declaration that the plaintiff continues to hold an undivided right, title and interest in the larger land, that defendant nos.1 and 2 have no right to put up any construction on the larger land and for a decree of perpetual injunction restraining defendant nos.1 and 2 from putting up any construction or alienating any portion of the said land. The second alternative relief is a relief of grant of compensation to the extent of ₹75,00,00,000/-.*

(n) To add in prayer clause: prayer for interim relief restraining the Defendants from dealing with the said larger land.

14. The application for amendment was opposed by defendant nos. 1 and 2 on the ground that by the proposed amendment, the plaintiff without abandoning the primary relief, wants to enlarge and enhance the scope of suit to the larger land and, as such, changes the nature of the suit and its subject matter. The second objection was that relief sought was barred by limitation considering that the MOU existed only for a period of 6 months, and after a period of 5 years a time barred amendment is sought to be incorporated.

15. The application for amendment came to be allowed by the impugned order dated 14th February, 2022, which came to be challenged before this court by way of Writ Petition No.6908 of 2022. This Court vide order dated 7th September 2022 remanded the matter to the trial court to decide the said application afresh. By the impugned order dated 20th October 2022, the application came to be allowed.

16. While permitting the amendment, trial court observed that the

settled principles of law is that all amendments ought to be allowed for the purpose of determining the controversy between the parties and that the amendments sought are pre-trial amendments. The trial court held that the amendment did not change the nature of suit for the reason that the suit is filed on the basis of MOU, and the existence of MOU has been denied by the Defendants. The objection on ground of limitation was rejected by holding that the question of limitation is a mixed question of fact and law.

17. Heard Mr. G. S. Godbole, learned senior counsel appearing for the petitioner, Mr. Atul Daga, learned counsel appearing for respondent no.1 and Mr. Shon D. Gadgil, learned counsel for respondent nos.2 and 3.

18. Mr. Godbole, learned senior counsel appearing for the petitioner has taken this Court to the plan in respect of the entire layout and would contend that plot no.4 in respect of which the dispute is raised forms a small part of the entire larger land. He has also invited the attention of this Court to the pleadings of the earlier suit of 2014 and the present suit of the year 2018, and the MOU to contend that the claim of Plaintiff throughout was only in respect of the suit land which was plot no.4 and at no point of time the entire

larger land was in issue in these proceedings. He would further submit that the proposed amendment seeks to raise mutually exclusive pleas which is impermissible. His contention is that apart from change in the nature of suit, the amendments are barred in view of the provisions of Order-II Rule 2, CPC inasmuch as in the earlier suit as well as in the present suit, no relief was claimed in respect of the larger land and is hit by doctrine of election and waiver. Although, he would urge that the proposed amendments raise a time barred claim, he fairly conceded that the question of limitation will be a mixed question of fact and law and would require evidence to be led.

19. He relies upon the decision of the Apex Court in the case of ***Revajeetu Builders and Developers v. Narayanaswamy & Sons [(2009) 10 SCC 84]*** and in particular paragraph 63 of the said judgment which deals with the factors to be taken into consideration while dealing with the application for amendment. He has tendered the statement of schedule of amendments to point out the amendments objected to by the Defendants. He has also tendered Schedule-I and Schedule-II of Special Civil Suit No.223 of 2018 describing the entire larger land as the suit land.

20. *Per contra*, Mr. Daga, learned counsel appearing for the original

plaintiff submits that by proposed amendment the plaintiff is seeking alternative relief and there is no prohibition in raising inconsistent/ alternative pleas in the plaint. He would further submit that it is by reason of the stand taken by the defendant that the MOU stood automatically terminated, that the alternative relief of declaration in respect of the entire larger land is sought. He further submits that as regards the objection of limitation raised, the same being a mixed question of fact and law can be decided at the time of trial. He would further submit that the correspondence between the parties refers to the MOU and at no point of time, the MOU was stated to be cancelled. He would further submit that it is settled position that the merits of amendment are not required to be gone into and considering that the proposed amendments are in the nature of alternative relief, and being pre-trial amendment, the same ought to be allowed. In support of his contentions, Mr. Daga relied upon the decision of the Apex Court in ***G. Nagamma v. Siromanamma [(1996) 2 SCC 25]*** and would submit that the plaintiff is entitled to plead even inconsistent pleas and that in the facts of that case before the Apex Court as the amendment did not affect the cause of action nor the relief was materially affected, the same was allowed.

21. After the hearing was concluded, judgments were circulated by

the counsel for parties. Learned counsel for the Petitioner has circulated the following judgments:

- 1) Ganesh Trading Co., v. Moji Ram [(1978) 2 SCC 91];**
- 2) Baldev Singh v. Manohar Singh [(2006) 6 SCC 498]; and**
- 3) LIC v. Sanjeev Builders Pvt Ltd [2022 SCC OnLine SC 1128].**

and learned counsel for Respondent No 1 has circulated the following judgments:

- 1) Prajkata v. Yellapa [(2004) 6 SCC 415];**
- 2) Sampath Kumar v. Ayyakannr [(2002) 7 SCC 559];**
- 3) N C Bansal v. UP Financial Corporation [2018(2) SCC 347];**
- 4) Krishnaji Shanker v. Sitaram Gangadhar [2003(1) MhLJ 233];**
- 5) NTPC v. Reliance Industries {2009 SCC OnLine Bom 628};**
- 6) Rajabahaddur v. Prakash [2016(2) MahLJ 639];**
- 7) Vaish Co-op. Adarsh Bank Ltd v. Geetanjali Despande [(2003) 102 DLT 570];**
- 8) LIC v. Sanjeev Builders Pvt Ltd [2022 SCC OnLine SC 1128];**
- 9) G. Nagamma v. Siromanamma [(1996) 2 SCC 25];**
- 10) Praful Manohar Rele v. Krishna Ghosalkar [(2014) 11 SCC 316];**
- 11) Madra Salt & Chem Industries v. collector Thane [2001(3) MhLJ 151]; and**
- 12) Ganesh Prasad v. Rajeshwar Prasad [2023 SCC OnLine SC 256].**

22. Considered the submissions and perused the papers and proceedings.

23. Before proceeding further, it will be apposite to refer to the decision of the Apex Court in the case of ***Life Insurance Corporation of India vs Sanjeev Builders Private Limited and Another*** (*supra*) which is relied upon by both the parties. In that case, the suit was filed for specific performance and in the alternative there was claim for damages. The amendment proposed sought enhancement of the amount of damages. The Apex Court considered the entire law on the subject of allowing or rejecting prayer for amendment of pleadings and in that context also considered the application of Order-II Rule 2 of CPC to amendment application apart from the issue of doctrine of constructive *res judicata* and limitation. After considering the conspectus of the decisions on the subject, the Apex Court summed up the final conclusions in paragraph 70 which reads thus :

"70. Our final conclusions may be summed up thus :

- (i) Order II Rule 2 CPC operates as a bar against a subsequent suit if the requisite conditions for application thereof are satisfied and the field of amendment of pleadings falls far beyond its purview. The plea of amendment being barred under Order II Rule 2 CPC is, thus, misconceived and hence negatived.*
- (ii) All amendments are to be allowed which are necessary for determining the real question in controversy provided it does not cause injustice or prejudice to the other side. This is mandatory, as is apparent from the use of the word "shall", in the latter part of Order*

VI Rule 17 of the CPC.

- (iii) The prayer for amendment is to be allowed*
 - (i) if the amendment is required for effective and proper adjudication of the controversy between the parties, and*
 - (ii) to avoid multiplicity of proceedings, provided*
 - (a) the amendment does not result in injustice to the other side,*
 - (b) by the amendment, the parties seeking amendment does not seek to withdraw any clear admission made by the party which confers a right on the other side and*
 - (c) the amendment does not raise a time barred claim, resulting in divesting of the other side of a valuable accrued right (in certain situations).*
- (iv) A prayer for amendment is generally required to be allowed unless*
 - (i) by the amendment, a time barred claim is sought to be introduced, in which case the fact that the claim would be time barred becomes a relevant factor for consideration,*
 - (ii) the amendment changes the nature of the suit,*
 - (iii) the prayer for amendment is malafide, or*
 - (iv) by the amendment, the other side loses a valid defence.*
- (v) In dealing with a prayer for amendment of pleadings, the court should avoid a hypertechnical approach, and is ordinarily required to be liberal especially where the opposite party can be compensated by costs.*
- (vi) Where the amendment would enable the court to pin-pointedly consider the dispute and would aid in rendering a more satisfactory decision, the prayer for amendment should be allowed.*
- (vii) Where the amendment merely sought to introduce an additional or a new approach without introducing a time barred cause of action, the amendment is liable to be allowed even after expiry of limitation.*
- (viii) Amendment may be justifiably allowed where it is intended to rectify*

the absence of material particulars in the plaint.

- (ix) *Delay in applying for amendment alone is not a ground to disallow the prayer. Where the aspect of delay is arguable, the prayer for amendment could be allowed and the issue of limitation framed separately for decision.*
- (x) *Where the amendment changes the nature of the suit or the cause of action, so as to set up an entirely new case, foreign to the case set up in the plaint, the amendment must be disallowed. Where, however, the amendment sought is only with respect to the relief in the plaint, and is predicated on facts which are already pleaded in the plaint, ordinarily the amendment is required to be allowed.*
- (xi) *Where the amendment is sought before commencement of trial, the court is required to be liberal in its approach. The court is required to bear in mind the fact that the opposite party would have a chance to meet the case set up in amendment. As such, where the amendment does not result in irreparable prejudice to the opposite party, or divest the opposite party of an advantage which it had secured as a result of an admission by the party seeking amendment, the amendment is required to be allowed. Equally, where the amendment is necessary for the court to effectively adjudicate on the main issues in controversy between the parties, the amendment should be allowed. (See [Vijay Gupta v. Gagninder Kr. Gandhi & Ors.](#), 2022 SCC OnLine Del 1897)”*

. While summing up the conclusions, the Apex Court categorised the conclusions as regards when the prayer for amendment is to be allowed, the exceptions to the permitting of amendments and the general guidelines when dealing with prayer for amendment. The settled position was reiterated that all amendments are to be allowed which are required for effective and proper adjudication of the

controversy between the parties and to avoid multiplicity of proceedings. The exceptions are: if time barred claim is sought to be introduced in which case it becomes a relevant factor for consideration, the result of amendment is change in the nature of suit, the prayer for amendment is *mala fide* or the result of amendment is loss of valid defence. The Apex Court held that delay in applying for amendment alone is not a ground to disallow the prayer and where the amendment changes the nature of suit to set up an entirely new case, the amendment must be disallowed. However, if the amendment sought is only with respect to relief in the plaint and is predicated on facts already pleaded, the amendment is required to be allowed.

24. In the light of guiding principles of the Apex Court, let us consider the facts of present matter. As indicated above, by the proposed amendments, the Plaintiff seeks declaration as regards the right, title and interest of the Plaintiffs in the larger land and consequential amendments in the body of plaint. The contentions of Mr. Godbole are that : (a) the amendments are barred under Order-II Rule 2 of the CPC (b) the amendments seek to raise a time barred claim and (c) the amendments results in mutually exclusive pleas which is impermissible in plaint.

25. I shall now deal with the first objection taken as regards the bar under the provisions of Order-II Rule 2 of CPC. To counter the submission, reliance is placed by Mr. Daga on the decision of the Apex Court in the case of **LIC v. Sanjeev Builders Pvt Ltd** (*supra*) where the Apex Court, declining to accept the contention that the amendment application is liable to be rejected by applying the bar under Order-II Rule 2, CPC held that Order-II Rule 2 of the CPC cannot apply to an amendment which is sought on an existing suit. The contention of Mr. Godbole is that there was a previous suit of the year 2014 which has resulted in a decree. The present suit of the year 2018 seeks to claim the same relief which was sought in the year 2014 and having omitted to claim any relief in respect of the larger land in the previous suit of 2014, the plaintiff now cannot by way of an amendment application, seek to circumvent the provisions of Order-II Rule-2. His contention is that what cannot be done by way of filing a separate suit cannot be permitted to be done by way of an amendment application. In the facts of the case being considered by the Apex Court in **LIC** (*supra*) there was no prior suit and the amendment application was sought in the existing suit itself and it was in that context, the Apex court held that the provisions of Order-II Rule-2 of CPC cannot apply to an amendment in an existing suit.

However, I am not inclined to accept the submissions of Mr. Godbole in view of the principles laid down in the Constitution Bench decision of the Apex Court in ***Gurbux Singh v. Bhooralal (AIR 1964 SC 1810)***, where in paragraph 6 the Apex Court has observed as under :

“In order that a plea of a bar under O. 2. r. 2(3), Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based, (2) that in respect of that cause of action the plaintiff was entitled to more than one relief, (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court, omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar. No doubt, a relief which is sought in a plaint could ordinarily be traceable to a particular cause of action but this might, by no means, be the universal rule. As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. It is for this reason that we consider that a plea of a bar under O. 2. r. 2, Civil Procedure Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identity of the cause of action in the two suits.

. Applying the law laid down by the Constitution Bench of the Apex Court in ***Gurbux Singh (supra)***, it was necessary that for the plea of a bar under Order-II Rule-2 to succeed, the defendant must make out a case that the second suit is in respect of the same cause of action as that on which the previous suit and that in respect of the cause of action, the plaintiff was entitled to more than one relief and

thus being entitled without obtaining leave from the Court, omitted to sue for the relief for which the second suit has been filed. A perusal of the reply which is filed by the defendant to the application for amendment does not make out any such case. On the contrary the objection on the ground of bar of Order-II Rule 2 was not even raised in the reply. In the absence of necessary pleadings and submissions to that effect being on record, it cannot be inferred that the proposed amendment in the second suit is in respect of the same cause of action as that on which the previous suit was based. In so far as the contention of election and waiver is concerned, the doctrine of waiver contemplates abandonment of right which may be express or implied by conduct but the basic requirement is that it must be an intentional act with knowledge. In the present suit of 2018, the Plaintiff sought enforcement of terms of MOU and it cannot be said that there was an express or implied abandonment of right in the larger land. By reason of execution of the MOU, the Plaintiff restricted its right to Plot No 4, however, the same cannot be construed as an intentional act to abandon rights in the larger land. It cannot be said that at the time of institution of suit, the Plaintiffs could have claimed rights in the larger land as the suit was restricted to the enforcement of the MOU. It was only upon the Defendant's stand being made clear that the Plaintiff's are now seeking alternative relief in respect of the larger land. As

such it cannot be inferred that at the time of institution of suit, the Plaintiffs took a conscious decision to waive its right in the larger land and confine itself only to Plot No 4.

26. The other objection to the amendment is on the ground of limitation. Mr. Godoble, learned Senior Counsel did not labour much on the said objection and rightly so. It is settled that ordinarily the question of limitation is a mixed question of fact and law requiring evidence to be led and in the present case there are pleadings in the plaint that there was correspondence between the parties till the year 2017 and only in the year 2017, the Plaintiff acquired knowledge about the sub-division of plot in violation of the consent terms. It was fairly conceded that there is no infirmity in the finding of the Trial Court on the issue of limitation inasmuch as the issue of limitation can be framed and decided during the trial.

27. Let us now consider the pivotal issue which formed the major part of arguments of the learned counsels for the parties. The rival submissions canvassed were that the proposed amendments introduced an alternative plea which was not prohibited as against the claim that the proposed amendment raised mutually exclusive pleas which cannot be permitted in the plaint. Before venturing further, it

would be beneficial to understand the marked distinction between “an alternative plea” and “mutually exclusive plea”. While the former is in the nature of complementary pleadings to the original plaint, the latter seeks to displace the original pleadings. The contention of Mr. Godbole, learned senior counsel for the Petitioner is that the amendment raises mutually exclusive pleas. As indicated above, the test is whether the amendment in the present case displaces the original pleadings in which case it will be held to be raising mutually exclusive pleas.

28. At this stage it will be beneficial to refer to the decision of the Apex Court in the case of ***Ganesh Prasad vs Rajeshwar Prasad (supra)*** relied upon by the learned counsel for the Plaintiff. The Apex Court was considering a case where initially the Plaintiff filed a suit in Small Causes Court on the premise that the Defendant was a tenant and sought eviction on the ground of arrears of rent and unlawful subletting. In that suit, the Defendant came with a defence of being a mortgagee. The suit came to be dismissed for non prosecution and the Plaintiff filed a separate suit seeking to redeem the mortgage and take back possession. The Court permitted the amendment of the suit based on the stance taken by the Defendant in the first suit,

which was the subject matter before the Apex Court. In that facts of the case the Apex Court held thus :

“37. Thus, the Plaintiffs and Defendant are entitled to amend the plaint, written statement or file an additional written statement. It is, however, subject to an exception that by the proposed amendment, an opposite party should not be subject to injustice and that any admission made in favour of the other party is not but wrong. All amendments of the pleadings should be allowed liberally which are necessary for determination of the real controversies in the suit provided that the proposed amendment does not alter or substitute a new cause of action on the basis of which the original lis was raised or defence taken.

42. A three-Judge Bench of this Court in the case of Firm Srinivas Ram Kumar v. Mahabir Prasad and Others reported in AIR 1951 SC 177, has held that a party is entitled to take alternative pleas in support of its case. Where alternative pleas arose to some extent from the admitted position of the defendant, such plea is not impermissible merely because it is inconsistent with the other plea. It held that a plaintiff may rely upon different rights alternatively and there is nothing in the CPC to prevent a party from making two or more inconsistent sets of allegations claiming relief therein in the alternative. It further observed that although, a Court should not grant relief to a plaintiff in a case in which there is no foundation in a pleading on which the other side was not called upon or had opportunity to meet yet when the alternative case which, the plaintiff could have made was not only admitted by defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes.”

29. The Apex Court quoted with approval the decision in the case of

G. Nagamma v. Siromanamma (supra) which held that since the Plaintiff therein was seeking alternative reliefs, he is entitled to plead even inconsistent pleas. The Apex Court considered the decision of **Revajeetu Builders (supra)** which referred to the decision in **Ganesh Trading Co (supra)** and held that the decision in **Ganesh Trading Co (supra)** does not refer to the three Judge Bench judgment in **Firm Srinivas Ram Kumar v. Mahabir Prasad [1951 SCC 136]**. In paragraph 47 and 48, the Apex Court held thus :

“47. In the event, if the pleas sought to be introduced by plaintiff by way of an amendment is also the plea, which the defendant has set up in his written statement and such a plea of the plaintiff is an alternative plea, even though it is inconsistent with the original plea, since there is no prejudice caused to the defendant, the Court is not precluded from allowing the amendment.

48. At this stage, we may refer to rely upon the decision of this Court in the case of State of **Madhya Pradesh v. Union of India and Another reported in (2011) 12 SCC 268**. We quote the relevant observations as contained in para 8 of the judgment: -

“8. The purpose and object of Order 6 Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the courts while deciding such prayers should not adopt a hypertechnical approach. Liberal approach should be the general rule, particularly in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of

litigations.”

30. Applying the law laid down by the Apex Court in the case of ***Ganesh Prasad v. Rajeshwar Prasad (supra)*** and keeping in mind the distinction between alternative plea and mutually exclusive pleas, the pleading in the plaint as well as the proposed amendment will have to be examined. The plaint as it originally stood, after reciting the factual position as regards the suit of 2014 and the MOU executed, pleads that the conveyance deed of Plot No.4/1 executed by Defendant Nos.1 and 2 in favour of Defendant Nos.3 and 4 is in violation of the terms of MOU. The plaint challenged the conveyance deed and sought direction for cancellation of MOU and amalgamation of Plot Nos.4/1 and 4/2 into single undivided Plot No.4. A meaningful reading of the plaint discloses that the Plaintiffs sought enforcement of the consent decree in terms of the MOU passed in the earlier suit of 2014. By virtue of the stand taken by the defendant in written statement that the MOU stood terminated, the amendments are proposed seeking alternative relief. It needs to be noted that the Plaintiff has not given up its original stand that the MOU is subsisting and in fact by the proposed amendment seeks to incorporate a specific prayer as regards the subsistence of MOU. It is settled that when seeking alternative reliefs inconsistent pleas are permissible.

The amendments does not introduce any fresh cause of action nor changes the basic structure of suit, viz, the enforcement of obligations under the MOU. The Plaintiff has come with a case that there is a valid and subsisting MOU and if it is held that the MOU is terminated in that event alternative relief of restoration of status quo ante is sought viz, the Plaintiff's right, title and interest in undivided entire larger land. As to whether the Plaintiff is entitled to the said relief is a question of trial. However, in my opinion, the amendment does not raise mutually exclusive pleas as it does not displace the original pleadings. Neither does the amendment enlarge the scope of suit for the reason that the adjudication will be as regards the enforcement of MOU and if held not be enforceable the alternative relief of status quo ante will be considered.

31. As regards the delay in filing the application for amendment, the Apex Court has held in the case of ***Life Insurance Corporation of India (supra)*** that delay in applying for amendment alone is not a ground to disallow the prayer.

32. As far as the decisions relied upon by learned senior counsel for Petitioners is concerned, the Apex Court in ***Ganesh Prasad (supra)*** has observed in paragraph 45 that the decision in ***Revajeetu Builders***

(supra) which refers to the decision in **Ganesh Trading Co., (supra)** holding that the entirely new or inconsistent cause of action amounting virtually to the substitution of a new plaint or a new cause of action will be refused by the Court if it amounts to depriving the party, against which a suit is pending, of any right which may have accrued in its favour due to the lapse of time and held that the judgment in the case of **Ganesh Trading Co., (supra)** does not refer to the decision of the Apex Court in **Firm Shrinivas Ram Kumar (supra)**.

33. As regards the decision in the case of **Baldev Singh (supra)** is concerned, the Apex Court has taken a view that inconsistent pleas can be raised by the defendant in the written statement although the same may not be permissible in the case of plaint. However, considering the recent decision of the Apex Court in **Ganesh Prasad (supra)**, in my view, the decision in **Baldev Singh (supra)** dealing with the order rejecting an application for amendment of a written statement is inapplicable to the facts of the present case.

34. Apart from the discussion above, it is to be noted that being a pre-trial amendment, the amendment is required to be liberally allowed and the Defendants will have a chance to meet the case set

up by way of amendment. Equally pertinent to note is Section 105 of CPC which provides that where a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case may be set forth as a ground of objection in appeal, where no appeal lies from any order made by a Court in exercise of its original and appellate jurisdiction.

35. In light of the above, I do not find any reason to interfere with the impugned order permitting the amendment in exercise of jurisdiction under Article 227 of Constitution of India. Writ Petition stands dismissed.

36. At this stage, a request is made for extension of interim relief which has been operating in favour of the petitioner since February 2022. The interim relief is extended for a further period of four weeks.

[Sharmila U. Deshmukh, J.]