

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1862 OF 2024

Swapna Sadanand Ayare (since deceased)
through LR's.

...Petitioners

Versus

Kamala Shankardas Tanwani (since
deceased) through LR's.

...Respondents

Mr. Pradeep Thorat, a/w Aditi Naikare, for the Petitioner.
Ms. Meezan Patel, for Respondent Nos.3(a) and 3(b).

CORAM: N. J. JAMADAR, J.
DATED: 24th FEBRUARY, 2025

Order:-

1. Heard the learned Counsel for the parties.
2. The petitioners – plaintiffs assail the legality, propriety and correctness of an order dated 17th January, 2024 passed by the learned Judge, City Civil Court, Grater Bombay, in Chamber Summons No.881 of 2019 in SC Suit No.3970 of 2011, whereby the Chamber Summons taken out by the plaintiffs to amend the plaint and also annex the documents in respect of the transactions proposed to be incorporated by way of amendment came to be rejected.
3. The petitioners instituted the suit for a declaration that the respondents – defendant Nos.1 to 5 are the tresspassers of

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the suit premises, recovery of possession of the suit premises and damages for unlawful occupation. The plaintiffs asserted that defendant No.6 was the land lady. Defendant No.1 had agreed to transfer her tenancy in respect of the suit premises in favour of the plaintiffs. Defendant No.6 had shown her willingness. After receipt of a substantial consideration, defendant Nos.2, 4 and 5 surrendered their tenancy in favour of defendant No.6 on 25th July, 2009. On 29th September, 2009 a tenancy agreement was executed between the plaintiffs and defendant No.6. However, the said agreement could not be registered for non- payment of the stamp-duty thereon. The defendants, however, refused to hand over possession of the suit premises. Hence, the suit.

4. During the pendency of the suit, the plaintiffs took out the chamber summons seeking amendment in the plaint asserting, *inter alia*, that during the pendency of the suit a fresh tenancy agreement came to be executed between the plaintiffs and defendant No.6 in respect of the suit premises and the same has been registered on 15th December, 2016. A Rectification Deed came to be executed on 20th February, 2017 so as to correct the date of letting out of the premises. It was, therefore, necessary to bring those facts on the record of the Court.

5. The respondents – defendants resisted the application. It was contended that the proposed amendment was sought to be made to fill in the lacuna in the plaintiffs’ case as the original tenancy agreement dated 29th September, 2009 is not registered.

6. By the impugned order, the learned Judge, City Civil Court, was persuaded to reject the application observing that, the endeavour of the plaintiffs was to cure the defect in their case by bringing on record new tenancy agreement. The purpose of the amendment was to rectify the defect in the earlier instrument by way of a new instrument. The proposed amendment does not satisfy the requirement of the proviso to Rule 17 of Order VI of the Code of Civil Procedure, 1908 (“the Code”).

7. Mr. Thorat, the learned Counsel for the petitioner, submitted that the learned Judge, City Civil Court, approached the matter from an incorrect perspective. The proviso to Rule 17 of Order VI had no application at all. The amendment application was moved at a pre-trial stage. Thus, the learned Judge, City Civil Court could not have imported the principles which govern a case where the amendment is sought after the commencement of the trial. The learned Judge clearly misdirected himself, urged Mr. Thorat.

8. Ms. Patel, the learned Counsel for the respondent Nos.3(a) and 3(b), however, stoutly supported the impugned order. The learned Counsel urged that the only purpose of the amendment was to overcome the legal defect in establishing the case of the plaintiffs based on the tenancy agreement purportedly executed by the landlady in favour of the plaintiffs on 29th September, 2009. Since the said tenancy agreement is not registered, an endeavour has been made to get the tenancy transferred by executing subsequent agreement with retrospective effect. Therefore, the learned Judge, City Civil Court, was justified in rejecting the prayer for amendment.

9. The learned Counsel for the respondents also invited the attention of the Court to an order passed by the Division Bench in Appeal No.530 of 2012 in Notice of Motion No.2374 of 2011 in Suit No.1739 of 2011 (as the suit was originally instituted before this Court), especially to the observations in paragraph 5 to the effect that the circumstances in which the tenancy has been transferred, eventually to the appellant-plaintiffs herein, are the matters of serious dispute. It was, thus, urged that no interference is warranted in exercise of supervisory jurisdiction.

10. I have given careful consideration to the submissions canvassed across the bar. It is well recognized that all

amendments which are necessary for the determination of the real question in controversy between the parties are required to be allowed. It is also trite the Court is expected to take cautious cognizance of the events which transpire during the pendency of the suit and bear upon the outcome of the suit. Ordinarily, two overarching principles weigh with the Court in deciding an application for amendment in the plaint. First, whether the amendment is necessary for deciding the real question in controversy between the parties. Second, the potentiality of the prejudice to the adversary. The other considerations like the change in the nature and character of the suit, the relief being barred by any law and whether the proposed amendment takes away any right vested in the adverse party, on account of an admission in the pleadings and the like, also bear upon the determination.

11. In the case at hand, the stand of the plaintiffs that defendant No.6 had transferred the suit property in their favour, remains the same. What is sought to be incorporated by way of amendment is the execution of subsequent registered instruments by defendant No.6 in favour of the plaintiffs.

12. At the outset, it is necessary to note, the proviso to Order VI Rule 17 does not come into play as the amendment was

sought at a pre-trial stage. There is substance in the submission of Mr. Thorat that the learned Civil Judge, City Civil Court, could not have imported the principles which govern an application for amendment after the commencement of the trial.

13. The learned Judge also misdirected himself in entering into the merits of the amendment. It is well neigh settled that while considering an application for amendment the Court is not expected to delve into the merits of the case sought to be set up by way of amendment. Whether the proposed amendment and the documents which are sought to be produced by way of amendment bear upon the original case set up by the plaintiffs or validate the said tenancy agreement, are the matters for adjudication at the trial.

14. A useful reference, in this context, can be made to a decision of the Supreme Court in the case of *Life Insurance Corporation of India vs. Sanjeev Builders Pvt. Ltd. and another*,¹ wherein, after an elaborate analysis of the precedents, the Supreme Court enunciated the principles which govern the exercise of jurisdiction to allow the amendment in the pleadings as under:

“71. Our final conclusions may be summed up thus:

71.1

1 2020 SCC OnLine SC 1128.

71.2 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.

71.3 The prayer for amendment is to be allowed

71.3.1 if the amendment is required for effective and proper adjudication of the controversy between the parties, and

71.3.2 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).

71.4 A prayer for amendment is generally required to be allowed unless;

71.4.1 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,

71.4.2 The amendment changes the nature of the suit,

71.4.3 The prayer for amendment is mala fide, or

71.4.4 By the amendment, the other side loses a valid defence.

71.5 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.

71.6 Where the amendment would enable the court to pinpointedly consider the dispute and would aid in rendering a more satisfactory decision, the prayer for amendment should be allowed.

71.7 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.

71.8 Amendment may be justifiably allowed where it is intended to rectify the absence of material particulars in the plaint.

71.9 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.

71.10 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.

71.11 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)

15. Applying the aforesaid principles to facts of the case, the proposed amendment neither introduces a new case nor substantially alters the character of the suit. The claim of the plaintiffs that the tenancy has been transferred by defendant No.6 in their favour remains stratic. The plaintiffs intend to bring on record the subsequent instruments executed by defendant No.6 in their favour. The legality and validity of the tenancy agreement dated 29th September, 2009 would be required to be determined on the basis of intrinsic evidence on the factors like execution and registration. Whether the subsequent instrument cures the defect on account of non-registration is a matter to be adjudicated at the trial. Therefore, in my considered view, the learned Judge could not have

rejected the application for amendment at a pre-trial stage. The petition, therefore, deserves to be allowed.

16. Hence, the following order:

: O R D E R:

- (i) The petition stands allowed.
- (ii) The impugned order stands quashed and set aside.
- (iii) The chamber summons stands allowed.
- (iv) Necessary amendment in accordance with the schedule of amendment be carried out within a period of three weeks from the date of uploading of this order.

No costs.

[N. J. JAMADAR, J.]