



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

WRIT PETITION NO. 13449 OF 2023

Miss. Laleh Ardeshir Dubhash & Ors.

}Petitioners

(Orig. Defds Nos.4 to 6)

: Versus :

Mr. Swaraj Shrikumar Hate & Ors.

}....Respondents

(Orig. Plffs No.1 & 2-

Orig.Defds No.3 to 19)

Mr. Sandesh D. Patil *i/by. Mr. Piyush Shah and Mr. Vijay Rajput, for the Petitioners.*

Mr. Girish S. Godbole, Senior Advocate *i/by. Mr. Shivraj Patne and Ms. Deepashikha Godbole, for Respondent Nos. 1 and 2.*

CORAM : SANDEEP V. MARNE, J.

Dated : 4 July 2024.

ORAL JUDGMENT :

1) By this petition, the Petitioners have challenged the order dated 10 July 2022 passed by the Small Causes Court, Mumbai allowing the application filed by the Plaintiffs at Exhibit-126 for amendment of the plaint.

2) Plaintiffs have instituted R.A.E. & R Suit No. 407 of 1998 seeking recovery of possession of the suit premises from the Defendants

essentially on the ground of *bonafide* requirement of the Plaintiffs. Additionally, it was pleaded that some of the Defendants are in unlawful possession of the suit premises. By application filed at Exhibit-126, Plaintiffs now want to add the ground of unlawful subletting of the tenanted premises as well as non-user thereof. The Small Causes Court has allowed the application for amendment by order dated 10 July 2022 and aggrieved by that order, Petitioners/ Defendant Nos.4 to 6 have filed the present petition.

3) Mr. Patil, the learned counsel appearing for Petitioners would submit that this is the ninth amendment which is sought to be introduced in the plaint filed in a suit which is pending since the year 1998. That the only reason pleaded for introducing the amendment at such belated stage was ‘oversight’ and ‘inadvertence’. That the Apex Court has held in ***Basavaraj Vs. Indira and Ors***¹ that inadvertence or oversight cannot be a ground for allowing application for amendment. He would also place reliance on judgment of Single judge of this Court in ***Orient Club Building and Association V/s. Nilofer Abijit Gupta and Ors.***². He would further submit that the Small Causes Court has erred in allowing the amendment on the ground that the issue of limitation is being left open. That the issue of limitation is also a relevant factor to be considered while deciding the application for amendment and that if the claim is found to be time barred, it is one of the relevant considerations for rejecting the amendment. In support he would rely upon judgment of this Court in ***Damodhardas Govindprasad Sangi V/s. Fatehsinh, through LRs and Ors.***³.

¹ (2024) 3 SCC 705

² 2024 SCC Online Bom 1887

³ 2022 SCC Online Bom 6724

4) *Per-contra*, Mr. Godbole, the learned senior advocate appearing for Respondents/Plaintiffs would oppose the petition and support the order passed by the Small Causes Court. He would submit that no prejudice is caused to Petitioners on account of application for amendment being allowed as the nature of the suit remains the same. That it is open for the landlord to file a fresh suit on additional grounds for eviction of tenant and the present order aims at preventing multiplicity of litigation. That this is a Suit filed for recovery of possession under the provisions of the Maharashtra Rent Control Act, 1999 and therefore in the event of the suit being decreed, the possession would become illegal only from the date of passing of the decree. Therefore, delay in decision of the Suit does not affect the interest of the Defendants in so far as the liability for payment of mesne profits is concerned. He would submit that the amendment is necessary for the purpose of determining the real question of controversy between the parties and so long as the amendment does not change the nature of the suit, the same has rightly been allowed by the Small Causes Court. He would pray for dismissal of the petition.

5) After having heard the submissions canvassed by the learned counsel for the parties, it must be observed at the very outset that the suit is pending for the last 26 long years and at such a belated stage, application for amendment of the plaint is moved and the same is allowed. Plaintiffs are prosecuting the suit for last 26 long years and are delaying their own suit by incorporating numerous amendments in the plaint. Mr. Godbole, has placed before me copy of the plaint amended from time to time, which indicates that it is full of several amendments carried out in different colours. There is

no dispute to the position that so far, as many as eight amendments have been effected in the plaint. Mr. Godbole would attribute those amendments mainly to the change in the status of the parties to the suit with passage of time. He would submit that most of the amendments relate to death of parties, change of trustees, introduction of new parties who are found to be in occupation etc. He would therefore submit that this Court need not be swayed by the number of amendments that have been effected in the plaint. While Mr. Godbole might be correct in justifying the need to effect amendments in the plaint, one must also be mindful of the fact that 26 year old suit needs to be decided at some point of time.

6) While seeking to blame the Plaintiffs for delaying decision of the suit, Petitioners are also not free from blemish. In the Suit pending since the year 1998, it appears that Defendant Nos.1 to 6 (including the Petitioners) failed to file written statement for over 15 years. They filed application on 1 August 2013 seeking condonation of delay in filing the written statement which came to be rejected by the Small Causes Court by order dated 9 October 2019. The matter was carried in Revision before the Appellate Bench, which ultimately allowed Defendant Nos.1 to 6 to file written statement by order dated 10 March 2022. Thus Defendant Nos.1 to 6 (including Petitioners) have filed written statement after 24 years. Thus, the cause for delay is mainly attributable to Petitioners, who not only failed to file written statement for over 15 long years but spent period of 9 long years thereafter in prosecuting their application for condonation of delay in filing the written statement.

7) Having considered the manner in which the suit is being prosecuted by the parties, it is time to revert to the main issue involved in the petition. As observed above, the relief sought in the Suit is for eviction of Defendants from the suit premises. On the ground of *bonafide* requirement. However, at the same time, as Plaintiffs noticed different occupants in suit premises, the Plaint has been amended from time to time and several Defendants are added, who are found to be in possession of the suit premises. The pleading with regard to the induction of Defendant Nos.7 to 14 and 16 to 18 unlawfully into the suit premises are already present in the Plaint. Now, the amendment that is sought to be introduced relates to raising of ground of unlawful subletting to Defendant Nos.7 to 14 and 16 to 18. In that sense, the amendment does not change the nature of the suit, even in respect of ground of unlawful subletting. In fact, the foundational pleadings about the ground of unlawful subletting were already present in the Plaint before effecting the impugned amendment and what is sought to be added now is just the formal ground of unlawful subletting.

8) So far as ground of non-user is concerned, the same is essentially raised against Defendant Nos.1 to 6 and Defendant Nos.15(a) to 15(c), which again is linkable to the act of unlawful subletting to Defendant Nos.7 to 14 and 16 to 18. Plaintiffs want to contend that Defendant Nos.1 to 6 and Defendant Nos.15(a) to 15(c) are liable to be evicted on the ground of non-user as they have parted with possession of the premises. In my view therefore, the amendment sought to be introduced in the Plaint does not change the nature of the suit in any manner, especially in view of the fact that

the foundational pleadings for unlawful subletting and non-user already existed in the Plaint.

9) Mr. Patil has strenuously relied upon judgment of the Apex Court in *Basavraj* (supra) in which it is held in paras-10, 11, 13 and 15 as under :

10. The proviso to Order 6 Rule 17 CPC provides that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. In the case in hand, this is not even the pleaded case of Respondents 1 and 2 before the trial Court in the application for amendment that due diligence was there at the time of filing of the suit in not seeking relief prayed for by way of amendment. **All what was pleaded was oversight. The same cannot be accepted as a ground to allow any amendment in the pleadings at the fag end of the trial especially when admittedly the facts were in knowledge of Respondents 1 and 2-plaintiffs.**

11. The relevant paragraphs of the application seeking amendment of the plaint are reproduced hereunder :

2. That, **due to oversight and by mistake** the plaintiff was unable to sought relief declaration of decree as null and void and unable to pay required Court fee some unavoidable circumstances and the proposed amendment is very essential for deciding the matter in dispute.

3. ***

4. That, if the proposed amendment is allowed no prejudice will be cause to the other side, on the other hand if it is not allowed then the deponent will be put to great loss and will also leads multiplicity of litigations. Hence it is just and proper to allow the proposed amendment to meet the ends of justice.

13. Initially, the suit was filed for partition and separate possession. By way of amendment, relief of declaration of the compromise decree being null and void was also sought. **The same would certainly change the nature of the suit, which may be impermissible.**

15. **If the amendment is allowed in the case in hand, certainly prejudice will be caused to the appellant.** This is one of the important factors to be seen

at the time of consideration of any application for amendment of pleadings. Any right accrued to the opposite party cannot be taken away on account of delay in filing the application.

(emphasis added)

10) True it is that, in ***Basavraj*** the Apex Court has held that parties seeking amendment after commencement of the trial must show due diligence and mere ‘oversight’ cannot be accepted as a ground to allow the amendment. However, the main reason why the amendment is disallowed by the Apex Court in ***Basavraj*** is the change in the nature of the suit. In case before the Apex Court, the suit was initially filed for partition of the ancestral property relying upon compromise decree. In the application filed at the fag end of the trial, Plaintiff sought to challenge the compromise decree on which reliance was originally placed in the plaint. In these facts, the Apex Court held that the amendment changed the nature of the suit. In my view, the ratio of the judgment in ***Basavraj*** would not apply to the facts of the present case where there is no change in the nature of the suit in any manner.

11) Mr. Patil has also relied upon judgment of Single Judge of this Court in ***Orient Club Building and Association*** (supra) which has followed the judgment of the Apex Court in ***Basavraj*** and it is held in paras-23 and 24 as under:

23. The amendment is sought after a period of ten years and **the said amendment raises a new plea which is in the alternative that the Plaintiff be declared as a tenant**, in absence of heirs having not arrived at a settlement. Ahmed Khairaz died on 2 February 2012. During his lifetime, he was not joined as a party Defendant in RAD suit. Much later in the year 2018, Ahmed Khairaz’s legal heirs are sought to be added as party Defendants, with a new case, and **the only reason given for delay of 10 years is ‘oversight’**.

The trial has began in the year 2011, hence the proposed amendment sought is a post-trial amendment.

24. In my view, such a plea after a period of ten years cannot be allowed. **The reason of delay given as ‘due to oversight’, is not acceptable as sufficient to allow the amendment.** I am of the view that there is no due diligence on part of Plaintiff.

(emphasis added)

12) In my view, the judgment in ***Orient Club Building and Association*** needs to be understood in the facts of that case and would not constitute a binding precedent that in every case, oversight cannot be a reason for not allowing any amendment in the plaint. In appropriate cases, oversight on the part of a party or his/her advocate in adding necessary pleadings in the Plaint can be a valid reason for allowing the amendment. It all depends on facts and circumstances of each case. In ***Basavraj***, the Apex Court held that oversight cannot be recognised as a fit ground for allowing amendment since the trial was at the fag end. In the present case, though the issues are framed and Plaintiff has filed evidence, it appears that the cross-examination of P.W.1 is yet to commence. In fact, so far as Petitioners are concerned, the real action in the Suit *qua* them has started recently after they were permitted to file written statement after 24 years. Similarly, this Court refused to recognize ‘oversight’ as valid ground for permitting amendment in ***Orient Club Building and Association*** as the amendment sought to introduce a new case.

13) Reliance by Mr. Patil on the judgment of this Court in ***Damodhardas Govindprasad Sangi*** also does not cut any ice. This Court has relied upon the judgment of the Apex Court in ***Life Insurance Corporation***

*of India V/s. Sanjeev Builders Private Ltd.*⁴ in which principles relating to amendment of pleadings have been summed up in para-70 of the judgment as under:

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 negated.
- (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.

⁴ 2022 LiveLaw (SC) 729

- (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, 2022 SCC OnLine Del 1897)

(emphasis added)

14) Mr. Patil has particularly relied upon principal No. (iv) (i) relating to impermissibility to allow amendment in respect of a time barred claim. No doubt, the Apex Court has held that introduction of time barred claim becomes a relevant factor while deciding application for amendment. In the present case however, the issue as to whether the claims of subletting and non-user is time barred or not is a triable issue, in view of the fact that induction of unauthorised occupants in the suit premises has already been pleaded in the unamended plaint.

15) Also of relevance is the fact that delay in decision of the Suit in fact enures to the benefit of Defendants. Defendant can not only enjoy possession/occupation of the suit premises but in the vent of suit being decreed, the possession would become unlawful only from the date of decree and not from the date of institution of suit, since the suit is filed for recovery of possession under the provisions of Maharashtra Rent Control Act 1999. In the event any order for payment of mesne profits is made in future, the same would be payable from the date of decree. The amendment thus does not prejudice Petitioners in any manner. Petitioner who share majority of blame for delay in carriage of the suit, cannot be heard to complain about delay.

16) If the amendment was to be rejected, Plaintiffs would be required to institute a fresh suit on the grounds of non-user and subletting. The amendment thus prevents multiplicity of litigation.

17) Considering the overall conspectus of the case, I am of the view that the Small Causes Court has not committed any glaring error for this Court to exercise jurisdiction under Article 277 of the Constitution of India to interfere in the order allowing amendment of Plaint. The only interference needed is with regard to the quantum of costs imposed by the Small Causes Court. The Court has imposed costs of only Rs.1,000/- while allowing the amendment. In my view, considering the fact that the suit is pending since the year 1998 and that this is 9th amendment in the Plaint introduced after a substantial period of delay, the Small Causes Court ought to have mulct Plaintiffs with exemplary costs for their negligent approach in prosecuting the suit. Though Plaintiffs may have delayed decision of their own suit, but

long pendency of proceedings also puts burden on the Court resources. In the last 26 years, the Suit must have been listed on countless occasions involving Court resources on each adjourned date. Time has come when parties are made to realize that Court's resources cannot be taken for granted and party found to be misusing the same is put to terms. In my view, therefore imposition of costs of Rs. 1,00,000/- would meet the ends of justice. Though costs are imposed, Petitioners would not be entitled to receive the same as they are also responsible for delay in carriage of the suit. Instead, let the costs be paid to the Legal Services Authority.

18) I accordingly proceed to pass the following Order:

- (i) Order dated 10 July 2022 passed by the Small Causes Court, Mumbai allowing the application filed by the Plaintiffs at Exhibit-126 for amendment of the plaint is modified to the limited extent that costs payable for allowing the amendment shall be Rs. 1,00,000.
- (ii) The costs shall be deposited by the Plaintiffs before the Mumbai District Legal Services Authority, Small Causes Court within three weeks and receipt thereof shall be produced before the Small Causes Court.
- (iii) The Writ Petition is accordingly **disposed of**.

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[SANDEEP V. MARNE, J.]