

MASHYAK GRIHNIRMAN SAHAKARI SANSTHA
MARYADIT

A

v.

USMAN HABIB DHUKA & ORS.
(Civil Appeal No. 3917 of 2013)

APRIL 18, 2013

B

[P. SATHASIVAM, M.Y. EQBAL AND
ARJAN KUMAR SIKRI, JJ.]

CODE OF CIVIL PROCEDURE, 1908 :

C

O.6, r.17 read with O.2, r.2 – Amendment of plaint – Declined by City Civil Court, but permitted by High Court – Held: The statement that plaintiffs were not aware of conveyance dead, prima facie, is not correct – Plaintiffs had come to know of conveyance dead much before filing of suit, but relief was not sought for in the plaint – There is no ground for allowing the amendment sought for by plaintiffs which was not only a belated one but was clearly an after-thought for the obvious purpose to avert the inevitable consequence – Order of High Court set aside and that of City Civil Court restored.

D

E

The appellant Co-operative Housing Society entered into a development agreement with respondent no.4 - developer in respect of development of Society's property. The plaintiffs-respondent nos.1 to 3, claiming themselves to be the members of the appellant- Society filed a suit in the City Civil Court challenging amalgamation of two plots owned by the Society and praying for directions, *inter alia*, for demolition of the construction raised on the amalgamated plot. While declining the interim injunction, it was observed that the plaintiffs never raised any objection to conveyance deed dated 8.2.1989. The plaintiffs took out Chamber Summary for amending the plaint and seeking to incorporate the

F

G

H

- A relief of declaration of conveyance deed dated 8.2.1989 as illegal, *mala fide* and bad in law. The City Civil Court dismissed the Chamber Summons. However, the High Court in writ petition under Art. 227 of the Constitution set aside the order of City Civil Court and permitted the
- B plaintiffs to amend the plaint.

Allowing the appeal, the Court

- C HELD: 1.1. The amendment petition reveals that the main ground for seeking relief is that the plaintiff-responder Nos.1 to 3 were allegedly not aware of the conveyance deed dated 08.02.1989. Indisputably, plaintiff-responder no.1 was the office-bearer of the Society at the relevant time and by Resolution taken by the Society he was authorized to complete the transaction.
- D Therefore, it is incorrect to allege that the plaintiff-responder No.1 was not aware about the transaction of 1989. [paras 6 and 7] [879-D; 880-B-C]

- E 1.2. Moreover, before the institution of the suit in the year 2010, the plaintiffs allegedly came to know about the Conveyance Deed dated 8.2.1989, some time in the year 2009, but relief was not sought for in the plaint which was filed much later i.e. 14.10.2010. The High Court has not considered these undisputed facts and passed the impugned order on the general principles of amendment as contained in O.6, r.17 of the Code of Civil Procedure.
- F There is no ground for allowing the amendment sought for by the plaintiffs which was not only a belated one but was clearly an after-thought for the obvious purpose to avert the inevitable consequence. The High Court has
- G committed serious error of law in setting aside the order passed by the trial court whereby the amendment sought for was dismissed. The order of the High Court is set aside and that passed by the trial court restored. [paras 7 and 8] [880-C-F]

H

**MASHYAK GRIHNIRMAN SAHAKARI SANSTHA MARYADIT 875
v. USMAN HABIB DHUKA**

**CIVIL APPELLATE JURISDICTION : Civil Appeal No. A
3917 of 2013.**

From the Judgment & Order dated 14.2.2012 of the High
Court of Bombay in WP No. 130 of 2012.

Shekhar Naphade, Pallav Shishodia, Shrish Kumar Misra, B
I.A. Siddiqui, S.P. Bharati, K.D. Jha, Rahul Gupta, Gaurav Jain,
Abha Jain, N.K. Jain, S. Sukumaran, Uday H. Kedar, Anand
Sukumar, Bhupesh Kumar Pathak, Debjyoti Basau, Meera
Mathur for the Appearing parties.

The Judgment of the Court was delivered by C

M.Y.EQBAL, J. 1. Leave granted.

2. This appeal is directed against the order dated 14th
February, 2012 of the High Court of Judicature at Bombay in D
Writ Petition No. 130 of 2012 whereby the order dated 3rd
December, 2011 passed by the learned Judge of City Civil
Court, Dindoshi, Goregaon, Mumbai was set aside and the
plaintiffs (respondent Nos. 1 to 3 herein) were permitted to
amend the plaint. E

3. The facts of the case are that the plaintiffs are allegedly
the members of the appellant – a Co-operative Housing Society
(defendant No. 1 in the suit) (in short “the Society”) which had
entered into a development agreement in the month of F
November 2006 with Respondent No. 4 M/s. Universal Builders
(in short “the Developer”) in respect of the development of the
Society’s property. The plaintiffs challenged the re-development
in the Co-operative Court at Mumbai but failed. The Co-
operative Appellate Court also refused to grant any relief to G
them. They thereafter filed a suit in the City Civil Court at
Mumbai inter alia challenging amalgamation of plots bearing
CTS Nos. 978 and 979 (both owned by the appellant-Society),
praying for directions to Municipal Corporation of Greater
Mumbai as regards demolition of fully/partially constructed
buildings of appellant-Society on the amalgamated plot, H

A seeking injunction restraining the Society and the Developer from utilizing the entire available balance TDR/FSI of the plot and praying for directions that the entire amount received/receivable by the Society by selling its balance FSI/TDR be kept in fixed deposit to be utilized for reconstruction of the existing

B buildings etc. The plaintiffs also took out Notice of Motion in the suit for getting interim relief seeking that the Society and the Developer be restrained from carrying out any construction over the plot. The Civil Judge vide order dated 4th January, 2011 rejected the Notice of Motion holding that the plaintiffs

C were aware of all the facts but they did not raise any objection on dispute; they allowed the Society and the Developer to enter into agreement to obtain amalgamation order, IOD and CC and to raise construction; and when the substantial construction had been raised the plaintiffs were seeking relief of restraining the

D Society and the Developer from raising further construction. It was further held by the City Civil Court that the plaintiffs never raised any objection or protested against the Conveyance Deed dated 8th February, 1989. The matter was carried in appeal before the High Court by filing Appeal from Order (A.O.), but no relief was granted by the High Court and the plaintiffs sought

E adjournment to seek amendment in the suit. Thereafter, the plaintiffs took out Chamber Summons for amending the plaint thereby seeking to incorporate the relief of declaration of Conveyance Deed dated 8th February, 1989 as illegal, mala fide and bad in law stating that due to oversight and bona fide

F mistake the relief could not be sought earlier and to add certain other facts which were allegedly not incorporated in the plaint. The said application was opposed by the opposite parties on several grounds including that Order II Rule 2 leave was not obtained and that the decision not to challenge the conveyance

G at the time of filing suit was in order to get out of clutches of limitation. The Chamber Summons was dismissed by the learned Judge of City Civil Court vide order dated 3rd December, 2011 holding :

H "18. Thus, on going through record, prima facie it

appears that the proposed amendment in the schedule of Chamber Summons was within the knowledge of Plaintiffs at the time of filing of the Suit. However, at the time of filing the suit, they have failed to challenge execution of conveyance deed dated 8.2.1989, mala fide and bad in law. On the contrary it has come on record that they do not want to challenge the same as same was obtained by fraud or misrepresentation. Moreover, Plaintiffs are not party to execution of said Conveyance deed nor legal heirs of deceased Jamal Gani. So also the Plaintiffs have not made party to six executants of the said conveyance deed to Chamber Summons nor sought any relief against them. It also appears from record that Plaintiffs in their Chamber Summons stated that due to oversight and inspite of "due diligence" they could not bring the said facts on record at the time of filing of suit. But the said statement appears to be contrary to their pleading in the Plaint as well as in A.O. Therefore, cannot be accepted.

A

B

C

D

xxx xxx

xxx

20. In the present case, I have already held that the Plaintiffs were within the knowledge of proposed amendment at the time of filing of the suit. But they have failed to incorporate same in the suit. So also Plaintiffs failed to show that inspite of the "due diligence" they could not ... relief against them. It also appears from record that Plaintiffs in their chamber summons stated that due to oversight and inspite of "due diligence" they could not incorporate said facts in the Plaint. On the contrary record shows that they have omitted to incorporate the same in the Plaint. Plaintiffs also failed to show that the proposed amendment is necessary for the purpose of determining the real controversy and dispute between the parties. Therefore, observations made in the above authorities are not helpful to the Plaintiffs in support of their submission.

E

F

G

xxx xxx

xxx

H

A 26. In the present case also deed of conveyance was
executed in the year 1989 and prior to 1988 Plaintiff No.
1 is a member of the society and also was chairman of
the society from 1997-2002 and he was aware about
B execution of said conveyance deed since 1989. So also
he was aware about the said facts prior to filing of the suit.
In spite of the same he has failed to seek declaration.

C 27. Thus, considering the facts and circumstances
of the case, it appears from record that the facts
mentioned in the schedule of Chamber Summons which
D Plaintiffs want to incorporate in Plaint as well as prayer
clause were of the year 1989 and Plaintiffs were within
knowledge of the same prior to filing of the suit. However,
the Plaintiffs have failed to bring the said facts before the
Court. So also Plaintiffs have only challenged
E amalgamation of Plot No. 978 and 979 in the Suit. So also
Plaintiffs were not a party to the conveyance deed nor legal
heirs of deceased Jamal Gani. Plaintiffs also failed to
show that the proposed amendment is necessary for
determining the real question in controversy between
parties. So also the Plaintiffs failed to show that inspite of
"due diligence" they could not bring the same on record,
therefore, they are not entitled for same. Hence they are
not entitled to amend the Plaint as prayed.

F Chamber Summons No. 322/11 is hereby
dismissed with cost."

G 4. Aggrieved by the above-quoted order, the plaintiffs filed
a writ petition under Article 227 of the Constitution of India
before the High Court. The High Court vide order dated 14th
February, 2012 set aside the order dated 3rd December, 2011
of the City Civil Court permitting the plaintiffs to amend the
plaint observing :

H "3. The basis upon which the opposition is
considered and the order is made is not in accordance

**MASHYAK GRIHNIRMAN SAHAKARI SANSTHA MARYADIT 879
v. USMAN HABIB DHUKA [M.Y. EQBAL, J.]**

with law. A party must be entitled to aver whatever the party requires. The averments in the plaint would not show whether the case is truthful or false. That would be agitated on merits. That has been agitated upon in the interim application as also in the Appeal from Order.

4. It may be clarified that amendments allowed can be defended by the defendants in a separate written statement if an earlier written statement is filed. Consequently, the impugned order disallowing the amendments sought by the plaintiff and dismissing the Chamber Summons with costs required to be revised.”

5. Hence, defendant No. 1-Society (appellant herein) has filed this appeal by special leave.

6. We have heard learned counsel appearing for both sides and have minutely gone through the pleadings of the parties and the amendment petition. From perusal of the amendment petition, it reveals that the main ground for seeking relief is that the plaintiff-respondent Nos.1 to 3 were allegedly not aware of the conveyance deed dated 08.02.1989. For better appreciation, para 32-(b) of the amendment petition is reproduced hereinbelow:-

“The Plaintiffs say that all documents were applied under RTI and some of the same were received by Plaintiffs on 2.3.2009. The Plaintiffs further say that prior thereto Plaintiffs were unaware of any such Conveyance dated 8.2.1989. The Plaintiffs further say that for the first time after going through the certified copies received under RTI Act the Plaintiffs came to know about such manipulation and forgery in he registered Conveyance dated 8.2.1989. The Plaintiffs further say that the signature of the deceased Jamal Gani Khorajia has been got forged and documents executed and registered and a signature got manipulated through some fake persons, who must have impersonated deceased Mr. Jamal Gani Khorajia.

A The Plaintiffs say that is the matter of common sense that when Jamal Gani Khorajia had expired on 14.8.1984 then how could he execute the said Conveyance dated 8.2.1989 after 5 years from the date of his death."

B 7. *Prima facie* the aforesaid statement made in the amendment petition is not correct. Indisputably, the plaintiff-respondent no.1 was the office-bearer of the Society at the relevant time and by Resolution taken by the Society respondent No.1 was authorized to complete the transaction.

C Hence, it is incorrect to allege that the plaintiff-respondent No.1 was not aware about the transaction of 1989. Moreover, before the institution of the suit in the year 2010, the plaintiffs allegedly came to know about the Conveyance Deed dated 8th February, 1989, some time in the year 2009, but relief was not
D sought for in the plaint which was filed much later i.e. 14th October, 2010. The High Court has not considered these undisputed facts and passed the impugned order on the general principles of amendment as contained in Order VI Rule 17 of the Code of Civil Procedure. Hence we do not find any
E ground for allowing the amendment sought for by the plaintiffs which was not only a belated one but was clearly an after-thought for the obvious purpose to avert the inevitable consequence. The High Court has committed serious error of law in setting aside the order passed by the trial court whereby the
F amendment sought for was dismissed. The impugned order of the High Court cannot be sustained in law.

8.For the aforesaid reasons, the appeal is allowed, the impugned order passed by the High Court is set aside and the order passed by the trial court is restored. No order as to costs.

G R.P.

Appeal allowed.