SUPREME COURT OF INDIA

Mashyak Grihnirman Sahakari Sanstha Maryadit

Vs.

Usman Habib Dhuka

C.A.No.3917 of 2013

(P.Sathasivam, M.Y.Eqbal and Arjan Kumar Sikri JJ.)

18.04.2013

JUDGMENT

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 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.

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 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 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, 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 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 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 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 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 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 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 :

> "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.

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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.

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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 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. …..

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 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 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. ……

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

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 :

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

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.

> 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 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 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 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.