

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

WRIT PETITION NO.1918 OF 2016

Arun Narayan Patil and Ors.

...Petitioners

vs.

Jayshree Jaywant Patil and Ors.

...Respondents

Mr. Nirman Sharma with Mr. Ashish Mishra, Mr. Deeshank Doshi and Mr. Vishnudutt Mishra for *the Petitioners*.

Mr. Virag Tulzapurkar, Senior Advocate with Mr. Aditya Shiralkar, Mr. Akshit Dedhia, Mr. Vinit Anam and Mr. Sanjay Patil i/b M/s. Vardhaman Juris LLP for *Respondent No.72*.

**CORAM : SANDEEP V. MARNE, J.
JUDG. RESD. ON : 13 August 2026
JUDG. PRON. ON : 27 August 2026**

JUDGMENT:

1) By this Petition, Petitioners/Plaintiff Nos.1(a) to 1(d) have challenged Order dated 14 September 2015 passed by the learned Judge, City Civil Court Mumbai, rejecting Chamber Summons Nos. 718 of 2010 and 1089 of 2011 filed for amendment of the plaint in S.C. Suit No. 9984 of 1991.

2) Plaintiffs have instituted S.C. Suit No. 9984 of 1991 for declaration of properties as Hindu Undivided Family (HUF) properties and

seeking partition thereof by metes and bounds. The suit was originally instituted in this Court as High Court Suit No. 1212 of 1991. The suit properties in Exhibit E included land bearing Survey No.151A situated at Village-Nahur, Mumbai Suburban District. Plaintiffs claim that even the said land bearing Survey No.151A is a joint family property. By Indenture dated 14 January 1971, the land bearing Survey No.151A admeasuring 38,374.72 sq.m. was transferred by Ratansey Karsandas and Ors. (*Khots of Bhandup*) to Bafna Charitable Trust. In their Suit for partition, Plaintiffs made averments not to implead Bafna Charitable Trust as party defendants so as to avoid misjoinder, even though property bearing Survey No.151A was sought to be declared as joint family property and partition thereof was sought.

3) In Suit No. 1212 of 1991, Court Receiver was appointed in respect of the suit properties, including the land bearing Survey No, 151A. Bafna Charitable Trust got aggrieved by the appointment of Court Receiver *qua* land purchased by it in Survey No.151A and filed Notice of Motion No. 3479 of 2004 under Order 40 Rule 1(2) of the Code of Civil Procedure, 1908 (**Code**) seeking deletion of land bearing Survey No.151A from the Suit and for discharge of the Court Receiver. By order dated 1 August 2008, this Court allowed Notice of Motion No. 3479 of 2004, directing deletion of land bearing Survey No.151A from the Suit and discharging the Court Receiver in respect thereof by granting liberty to the Plaintiffs to adopt appropriate proceedings against Bafna Charitable Trust. The order dated 1 August 2008 has attained finality on account of dismissal of the Appeal by the Division Bench on 17 October 2008 and

order dated 14 May 2009 passed by the Hon'ble Supreme Court in SLP (C) No. 11531 of 2009.

4) On 28 October 2009, Bafna Charitable Trust (**BCT**) conveyed the plot of the land bearing Survey No.151A admeasuring 38374 sq.m. in favour of Respondent No.72 - M/s. Atul Builders and Estates Ltd. (**Atul Builders**). Plaintiffs filed Chamber Summons No. 718 of 2010 in the Suit seeking to amend the plaint to implead the Trust and seeking a declaration that it has no right in Survey No.151A. Another Chamber Summons being Chamber Summons No. 1089 of 2011 was filed in the Suit seeking impleadment of Respondent No.72 -Atul Builders and seeking similar relief *qua* it. By order dated 12 August 2011, this Court dismissed both the Chamber Summons. Plaintiffs preferred Appeal against the single judge order and by order dated 1 December 2011, the order dated 12 August 2011 was set aside by consent and the Chamber Summons were remanded for fresh consideration.

5) Suit No. 1212 of 1991 was transferred to the City Civil Court in the year 2012 and was renumbered as S.C. Suit No.9984 of 1991. By common order dated 14 September 2015, the Court has dismissed both the Chamber Summons Nos. 718 of 2010 and 1089 of 2011. Aggrieved by order dated 14 September 2015 passed by the City Civil Court, the Petitioners, who are original Plaintiff Nos.1(a) to 1(d), have filed the present petition.

6) The Petition is opposed by Atul Builders (Respondent No. 72). None has appeared on behalf of BCT. However, since the petition is

pending since the year 2015 and the trial of the suit is withheld, I have proceeded to decide the petition on merits rather than awaiting appearance on behalf of BCT. Accordingly, I have heard the learned counsel appearing for the Petitioners and Respondent No.72.

7) Mr. Nirman Sharma, the learned counsel appearing for the Petitioners would submit that the City Civil Court has grossly erred in dismissing both the Chamber Summons. He submits that there are apparent inconsistencies in the order of the City Civil Court. That in para-20 of the order, the Court has rejected the ground of limitation but has proceeded to dismiss the Chamber Summons observing that the same could not have been filed after a delay of 20 long years. Mr. Sharma invites the attention of this Court to the order dated 1 August 2008 passed by this Court in Notice of Motion No. 3479 of 2004 submitting that the specific liberty was granted to the Plaintiffs to adopt appropriate proceedings. He submits that this Court directed deletion of land bearing Survey No.151A from the Suit only on account of non-impleadment of BCT to the Suit. That a specific finding to that effect is recorded in para-22 of the order dated 1 August 2008. That, deletion of the property bearing Survey No.151A was sought by the BCT only on the ground that it was not impleaded as a party Defendant to the Suit. That the said inadvertence was sought to be corrected by seeking to implead BCT as well as its assignee - Atul Builders as party Defendants to the Suit by filing application for amendment.

8) Mr. Sharma further submits that this is a pre-trial amendment and therefore the Trial Court ought to have been liberal in

granting the same. In support, he relies on judgment of the Apex Court in the case of **Life Insurance Corporation of India vs. Sanjeev Builders Private Limited & Anr**¹. He further submits that the amendment does not change the nature of the Suit in any manner. That it is permissible for a coparcener to challenge alienation of joint family properties by another co-parcener in the partition suit and in support, he relies on judgment of Calcutta High Court in **Ganeshmull Surana Versus. Nagraj Surana**² and of Madras High Court in **Chinaswamy Naidu Versus. Amsaveni Ammal & Ors.**³. He submits that when Plaintiffs attempted to get themselves impleaded in the Suit filed by Defendant No.1 against BCT (Suit No. 8031 of 1984) impleadment of Plaintiffs is opposed both by BCT, as well as by Atul Builders. He invites attention of this Court to order dated 8 August 2017 passed by the Hon'ble Supreme Court in that regard. He submits that the call on impleadment of Plaintiffs in that suit would be decided based on the outcome of the present Petition. He submits that if the amendments are disallowed, Plaintiffs would be rendered remediless in respect of unauthorised joint family property alienation in favour of BCT and Atul Builders. He submits that the issue of limitation is a mixed question of law and fact and cannot be gone into at the stage of deciding application for amendment. That Plaintiffs are not questioning alienation but are merely seeking a declaration that land bearing Survey No.150A is a joint family property in which BCT and Atul Builders have no right, title or interest. That such prayer in a partition suit can never be treated as barred by limitation. That the case does not involve the proposed amendment being hopelessly time barred. That there are also

1 (2022) 16 SCC 1

2 1951 SCC Online Cal 309

3 MANU/TN/0470/1985

inconsistent findings in the impugned order. He therefore submits that the impugned order is liable to be set aside. He prays for Writ Petition being made absolute in terms of prayers made therein.

9) Mr. Tulzapurkar, the learned senior advocate appearing for Respondent No.72 opposes the Petition. He submits that no interference is warranted in the well-considered order passed by the City Civil Court. That the proposed amendments are hopelessly time-barred. That the alienation of land bearing Survey No.151/A in favour of BCT has occurred on 14 January 1971 and Chamber Summons No. 718 of 2010 filed in 2010 seeking to challenge that alienation is clearly barred by limitation under Article 58 of the Limitation Act, 1963. That the averments in para-13 of the plaint clearly indicates knowledge on the part of the plaintiffs about the said alienation. In support of his contention that the proposed amendment is barred by limitation, he relies on judgment of the Apex Court in **South Konkan Distilleries and Anr. Versus. Prabhakar Gajanan Naik & Ors**⁴. That there is a conscious exclusion of challenge to the Indenture dated 14 January 1971 from the suit. That what is consciously sought to be excluded cannot be sought to be included in the Suit after substantial delay. That right to sue *qua* Indenture dated 14 January 1971 had accrued before filing of the Suit and despite having knowledge of the said transaction, Plaintiffs consciously avoided to seek any relief against BCT. That therefore the application for amendment is rightly rejected.

10) Mr. Tulzapurkar further submits that even otherwise, the issue of validity of Indenture dated 14 January 1971 cannot be included in

4 (2008) 14 SCC 632

a partition suit. He submits that in a partition suit, unauthorised alienation made in favour of a third party cannot be questioned as the same constitutes a different cause of action. In support of his contention that the issue of alienation cannot be subject matter of the present Suit, Mr. Tulzapurkar relies upon the judgment of the Apex Court in **Trinity Infraventures Ltd. & Ors. Versus. M.S. Murthy & Ors.**⁵ and of Delhi High Court in **Shri Sanjive Shukla Versus. Shri, Rajiv P. Shukla**⁶. That, in any case, alienation in the present case is not made by Patil family, but the same is made by altogether different persons, namely Khot family. That Suit No. 8031 of 1984 has already been filed in the City Civil Court by Defendant No.1, challenging the Indenture dated 14 January 1971. That therefore there is absolutely no cause for including any reliefs relating to land bearing Survey No.151A or for questioning rights of BCT/Atul Builders *qua* that land in the present Suit. That the proposed amendments would clearly change the nature of the Suit and he relies on judgment of the Apex Court in **Asian Hotels (North) Limited Versus. Alok Kumar Lodha & Ors.**⁷

11) Mr. Tulzapurkar submits that even otherwise, the alienation of 14 January 1971 in favour of BCT or alienation of 28 October 2009 in favour of Atul Builders is not subject matter of challenge even in the proposed amendments. He submits that liberty granted by this Court by order dated 1 August 2008 cannot be construed to mean liberty to amend the plaint and reinclude the land bearing Survey No.151A which was specifically directed to be deleted by this Court. That the amendments

5 2023 SCC Online SC 738

6 2015 SCC Online Del 8943

7 (2022) 8 SCC 145

seeks to overreach the order passed by this Court on 1 August 2008. He submits that the City Civil Court has rightly dismissed both the chamber summons for amendment. He prays for dismissal of the Petition.

12) Rival contentions urged on behalf of the parties now fall for my consideration.

13) Petitioners are Plaintiff Nos.1(a) to 1(d) in High Court Suit No.1212 of 1991 which is renumbered as S.C. Suit No.9984 of 1991 after being transferred to the City Civil Court. Petitioners are aggrieved by common order dated 14 September 2015 passed by the City Civil Court rejecting two applications for amendment filed by them, Chamber Summons Nos.718 of 2010 and 1089 of 2011. The first amendment application in the form of Chamber Summons No.718 of 2010 was filed for impleadment of proposed Defendant No.65 to 71, being BCT and its members/trustees, as party Defendants to the Suit and for seeking a declaration that they have no right, title or interest in respect of the land bearing Survey No.151A. The second amendment application being Chamber Summons No.1089 of 2011 was filed seeking impleadment of Atul Builders as party Defendant No.72 to the Suit and seeking similar declaration of it having no right, title or interest in the suit property bearing Survey No.151A. Both the Chamber Summons have been rejected by the City Civil Court by common order dated 14 September 2015.

14) In the Suit as originally filed in the year 1991, the land bearing Survey No.151A was included in the list of suit properties at Exh. E. Well before filing of the Suit, land bearing Survey No.151A was

alienated by Khot family in favour of BCT by Indenture dated 14 January 1971. The alienation was thus not by any coparcener of the Patil joint family but the same was done by altogether different persons. Plaintiffs had knowledge about such alienation and it appears that one of the joint family members (Defendant No.1) has instituted Suit No.8031 of 1984 challenging the said alienation. Plaintiffs referred to the alienation in favour of BCT, as well as filing of Suit No.8031 of 1984 by Defendant No.1 in para-13 of the plaint which reads thus:

13. The Plaintiffs say that it is the allegation of the said Bafna that by a Deed of settlement dated 14th January 1971 made between Rattansey karsandas and others (viz. Khat of Bhandup / Bhandup Estate) the said Khats gifted the proportion mentioned in the statement Ex.'F' hereto to the Bafna Charitable Trust. The Plaintiffs submit that the purported gift is void ab initio as the said khots/Inamdars had no subsisting rights in respect of the said properties, which are part of the properties described in Ex.'E' hereto. The Plaintiffs say that in the present suit, they have not joined the said Bafna as a party Defendant in order not to cause misjoinder of the cause of action and/or parties and particularly because the Defendant No.1 has filed a suit bearing Suit no.8031 of 1984 against the said Bafna and others in the City Civil Court for the following reliefs:-

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15) Thus, despite being aware of the position that Khot family had alienated land bearing Survey No.151A in favour of BCT by Indenture of 14 January 1971, Plaintiffs consciously did not implead BCT so as to avoid the vice of misjoinder of cause of action. However, though BCT was not impleaded as party defendant to the Suit nor alienation of 1971 was questioned in the Suit, Plaintiffs somehow included land bearing Survey No.151A in the list of suit properties in S.C. Suit No.9984 of 1991.

16) After Plaintiffs were successful in seeking appointment of a Court Receiver *qua* suit properties including land bearing Survey No.151A

by the Division Bench order in the year 1994, BCT got aggrieved by appointment of Court Receiver *qua* the land owned by it and accordingly filed Notice of Motion No.3479 of 2004 for deletion of land bearing Survey No.151A and for discharge of the Court Receiver. It appears that similar prayer was also sought by some other persons *qua* land bearing Survey No.77.

17) Notice of Motion No. 3479 of 2004 filed by BCT was allowed by this Court by order dated 1 August 2008, thereby directing deletion of land bearing Survey No.151A from the suit, as well as discharging the Court Receiver *qua* the said land. The order dated 1 August 2008 has attained finality on account of dismissal of the Appeal by order dated 17 October 2008 and by dismissal of Special Leave Petition filed in the Supreme Court by order dated 14 May 2009. Plaintiffs read order dated 1 August 2008 as grant of liberty to them to file application for impleadment of BCT as party defendant to the Suit. This belief of the Plaintiff emerges from the objection raised by the BCT that it was never impleaded as party defendant to the Suit or to the application seeking appointment of Court Receiver, but still the Court Receiver was clamped on the property owned by the Trust. No doubt, the Trust did raise such an objection and this Court was also convinced with the said objection of non-impleadment, which is apparent from the finding of the Court in para-22 of the order, which reads thus:

22. In the present case the Applicants have asserted their title to the property by virtue of the registered deed and they are in possession of the property. If any of the parties to the suit wanted to affect either of these rights in any manner, it would have been necessary for them to take recourse to due process of law by filing an action against the Applicants. They cannot possibly be placed

in a more advantageous position by filing a suit against each other without impleading the Applicants and obtaining the drastic order of appointment of a Court Receiver which materially affects the Applicant's rights. In such cases, the only course according to me is to discharge the Court Receiver, set-aside the order appointing the Court Receiver and leave it to the parties to adopt proceedings in accordance with law against the Applicants.

18) Thus, non-impleadment of BCT was considered as one of the factors relevant for holding that the Court Receiver could not have been appointed without impleadment of a necessary party (BCT). However, this Court did not stop at only discharging the Court Receiver, but also directed deletion of land bearing Survey No.151A from the list of suit properties. In the operative part of the order, this Court has held as under:

30. In the circumstances, the Notice of Motion is made absolute in terms of prayers (a) and (b). It is needless to add that this order will not affect the rights of the parties to the proceedings from adopting appropriate proceedings against the Applicants. Only with a view to enabling the Plaintiffs to adopt appropriate proceeding and not on merits it is ordered that the Applicants shall not create any third party rights in respect of the suit properties for a period of four weeks from today.

19) Mr. Sharma submits that a specific liberty was granted to the Plaintiffs to adopt appropriate proceedings and accordingly the City Civil Court ought to have allowed the Chamber Summons for impleadment of BCT to the suit, which was a shortfall/inadvertence on the part of the Plaintiffs in the suit as originally filed. I am unable to agree. The words '*adopt appropriate proceedings*' in para-30 of the order does not mean redoing of something which was expressly prohibited by this Court. If only Court Receiver was to be discharged on account of non-impleadment of BCT, what Mr. Sharma contends would have been right. However, this Court walked a step further and directed even deletion of land bearing

Survey No.151A from the list of suit properties. The order has now attained finality. Therefore, once land bearing Survey No.151A stood deleted from the array of the suit, the same could not have been sought to be re-included by amendment of the Suit.

20) There is also a reason why land bearing Survey No.151A cannot be included nor the BCT can be impleaded as party Defendant to the suit in the peculiar facts and circumstances of the present case. As observed above, there is conscious exclusion of BCT from the suit in view of averments made in para-13 of the plaint which are culled out in the preceding paras. Plaintiff has deliberately and consciously kept BCT out of the suit on account of Defendant No.1 filing Suit No. 8031 of 1984 against the Trust. Therefore, if BCT is now permitted to be impleaded in the suit, the same would give rise to inconsistent position being taken by the Plaintiffs. Plaintiffs believe that validity of Indenture of 1971 cannot be subject matter of the present suit as the same is a subject matter of Suit No. 8031 of 1984. This appears to be a reason why even in the proposed amendment, there is no challenge to the Indenture dated 14 January 1971. The prayers in the Schedule of amendment application (Chamber Summons No.718 of 2010) are reproduced below:

(h-i) that it be declared that the Defendant Nos. 65 to 69 and the Defendant No. 70 have no right, title or interest in respect of the lands bearing Survey No. 151A corresponding to CTS No. 448, 448A, 4488, 449, 449/1, 450, 450/1, 451, 452, 452/1 to 3, 453, 453/1 to 2, 454, 455, 456, 456/1, 457, 457/1 to 2, 458, 459, 460, 461, 461A, 518, 519, 520, 521, and Survey No. 77 corresponding to CTS Nos. 478 and 479, and Survey No. 80 corresponding to CTS No 833 of Village Nahur, Taluka Kurla, B. S. D. in the of the Properties of the Joint Family, at Exhibit "E" "Part I A of the Plaint, and shown in the Plans annexed by the City Survey Officer, Mulund to the letter dated 9.3.2005 addressed to the Court Receiver, High Court, Bombay.

21) Similarly, there is also no challenge to the Indenture dated 28 October 2009 by which Respondent No.72 -Atul Builders has purchased land bearing Survey No.151A from BCT. The prayers sought to be added in the suit through Chamber Summons No. 1089 of 2011 are as under:

a) that the Plaintiffs be allowed to implead the Respondents as the Defendant No. 72 to the Suit.

b) that the Properties bearing Survey No. 151A corresponding to CTS No. 448, 448A, 448B, 449, 449/1, 450, 450/1, 451, 452, 452/1 to 3, 453, 453/1 to 2, 454, 455, 456, 456/1, 457, 457/1 to 2, 458, 459, 460, 461, 461A, 518, 519, 520, 531, and Survey No. 77 corresponding to CTS Nos. 478 and 479, and Survey No. 80 corresponding to CTS No 833 of Village Nahur, Taluka Kurla, B. S. D. of the Properties of the Joint Family, at Exhibit "E" Part I A of the Plaint, and shown in the Plans annexed by the City Survey Officer, Mulund to the letter dated 9.3.2005 addressed to the Court Receiver, High Court, Bombay, be restored and/or added to the particulars at Exhibit "E" to the Plaint.

22) Thus, there is no challenge by the Plaintiffs either to Indenture dated 14 January 1971 or 28 October 2009. On the other hand, there is challenge to Indenture dated 14 January 1971 in Suit No.8031 of 1984. It is therefore highly debatable as to whether Plaintiff can seek declaration of absence of title in favour of BCT or in favour of Atul Builders without raising a challenge to the two Indentures. In that sense, the proposed amendments are clearly faulty. In any case, even if a challenge to the said two Indentures was to be included in the proposed amendments, yet the same could not have been granted.

23) Mr. Tulzapurkar has attempted to suggest an extreme proposition that a coparcener can never question alienation by another coparcener of joint family in a suit for partition. In support, he relies on

judgment of the Apex Court in *Trinity Infraventures Ltd.* (supra) in which it has held in para-115 as under:

115. But in a simple suit for partition, the parties cannot assert title against strangers, even by impleading them as proforma respondents. The strangers who are impleaded in a partition suit, may have nothing to say about the claim to partition. **But they may have a claim to title to the property and such a claim cannot be decided in a partition suit.**

(emphasis added)

24) In my view, however, the judgment in *Trinity Infraventures Ltd* merely enunciates the principle that in a simple suit for partition, parties cannot assert title against strangers. It does not mean that alienation made by a coparcener of joint family property can never be questioned in a partition suit. Similar reliance by Mr. Tulzapurkar on judgment of the Delhi High Court in *Shri Sanjive Shukla* (supra) appears to be inapposite. The Delhi High Court has held in para-14 of the judgment as under:

14. Thus, it is clear that the scope of the relief in a suit for partition cannot be changed to a suit for eviction and possession by impleading third parties, who are neither necessary nor proper parties to the original suit. It was while keeping in mind the aforesaid settled law that the order dated 29.04.2009 came to be passed in I.As No. 1461/2007 and 1465/2007, applications filed by the interveners for seeking impleadment. The said order has admittedly attained finality as neither the plaintiff, nor the defendants or the intervenors have challenged the same in appeal. Once the predecessor Bench has declined to implead the interveners as parties in the present suit, by this application, the plaintiff cannot be permitted to convert a partition suit into a suit for declaration, eviction, possession, etc. Therefore, any relief prayed for by the plaintiff in the present application for directions to the local police to evict the trespassers/squatters has to be turned down. The Court declines to convert the present suit for partition into a suit for declaration, eviction, possession, etc., that too, after a preliminary decree has already been passed in the suit as long back as on 23.01.2012. In case a cause of action has arisen in favour of the plaintiff, it is for him to seek his remedies against the said third parties in independent proceedings.

25) All that the Delhi High Court has held is that in a suit for partition, the issue of eviction cannot be mixed. Therefore, the judgment of the Delhi High Court in *Shri Sanjive Shukla* can also not be read in support of an abstract principle that in no case alienation made by a coparcener in a joint family property can ever be questioned in a partition suit.

26) In fact, the law appears to be otherwise. It is permissible to challenge alienation of joint family property by *Karta* or by another coparcener even in a suit for partition. The challenge cannot be independent of suit for partition. Unless shares of coparceners are determined, it is not possible to know whether the alienation by the Defendant is of the property falling in the share of Plaintiff. Therefore, only a combined suit for partition and alienation can resolve the *lis* relating to validity of alienation. I would stop here since it is not necessary to go into the larger issue of permissibility to challenge alienation by a coparcener of joint family property in a suit for partition in the facts and circumstances of the present case.

27) Here, the alienation is not done by a coparcener, but the same is done by an outsider i.e. Khot family. Therefore, the issue of alienation by Khot family to BCT cannot be a subject matter of suit for partition between Patil family members. Whether Khots had title to pass on to BCT is something which cannot be decided in suit for partition of joint family properties of Patils. Knowing this well, the alienation by Khots to BCT is consciously kept out of the scope of the suit by the Plaintiffs. The alienation made by Khot family in favour of BCT is questioned

independently by a suit filed by Defendant No. 1. Knowing this difficulty, Plaintiffs have consciously kept the challenge to alienation not only outside the purview of the main suit, but have consciously not included the prayer for challenging the Indentures dated 14 January 1971 and 28 October 2009 even in the proposed amended prayers. Since the issue of permissibility to challenge alienation by a coparcener of joint family property in a partition suit is irrelevant in the facts and circumstances of the present case, it is not necessary to discuss the ratio of the judgment of Calcutta High Court in ***Ganeshmull Surana*** and of Madras High Court in ***Chinnasamy Naidu*** (supra).

28) Coming to the aspect of limitation, in my view, the City Civil Court has rightly held the proposed amendments to be grossly time barred. Mr. Sharma has attempted to highlight inconsistencies in the findings recorded by the City Civil Court on the issue of limitation. He has invited attention of this Court to findings recorded in para-20 of the impugned order which reads thus:

20] As the Hon'ble Bombay High Court laid down the law that Article 137 of Limitation Act is not applicable to Order 6 Rule 17 of CPC, in my considered view there is no substance in the objection as raised by the respondents that the claim as made by plaintiffs in the chamber summons is barred by limitation. Thus, in my view on this ground the chamber summons as taken out by plaintiffs can not be rejected.

29) He submits that having held that the objection of limitation was rejected, the City Civil Court could not have once again gone into the issue of limitation involved in proposed amendments for rejection of the Chamber Summons. In my view, the findings relating to limitation

applicable for proposed amendments are to be found in para-26 of the Order, which are as under:

26] The Hon'ble Apex Court in the matter of "Rajesh Kumar" referred supra held that the object of the rule is that Courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side. Order 6 Rule 17 consist of two parts whereas the first part is discretionary and leaves it to the Court to order amendment of pleading. The second part is imperative and enjoins the Court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties. The real controversy test is the basic or cardinal test and it is the primary duty of the Court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed, if it is not the amendment will be refused. Bearing in mind the above legal position if the chamber summons is considered in its correct perspective it seems that the plaintiffs by way of present chamber summons want to incorporate the claim of cancellation of settlement deed dated 4.10.1971 and setting aside of consent decree passed in Suit No. 1340/1985 after a period of 20 years of filing suit, though they were aware about it way back in 1991, in my considered view under these set of facts the discretionary powers vested in this court under Order 6 Rule 17 of CPC cannot be exercised in favour of plaintiffs. I say so because without joining the respondents as party defendants and adding the survey numbers to the suit the real dispute between the parties which is in respect of partition and separate possession can be set at rest. In my further view as the purported amendment is applied at very belated stage, no purpose would be served even if the proposed respondents are made party defendant and the survey numbers 151-A, 77 and 80 added to the suit. Thus, I hold that the chamber summons as taken out by plaintiffs is devoid of any merit and fit to be rejected. Thus, I answer the above points accordingly and proceed to pass following order.

30) What is recorded by the Trial Court in para-20 of the Order are findings related to application of period of limitation for filing Chamber Summons. The City Civil Court has held that Article 137 of Limitation Act is not applicable to Order 6 Rule 17 of the Code. It is well settled position that an application for amendment can be filed any time during pendency of the suit and the Legislature has not prescribed any particular time limit from the date of filing of the suit for moving an

amendment application. In that sense, the observations in para-20 of the order were quite unnecessary. The aspect of limitation is relevant, not for the purpose of filing of amendment application but the same is relevant in the context of the proposed amendment sought. If the Court arrives at the conclusion that the proposed amendment is barred by limitation, the amendment can be refused. The law in this regard is well settled by the judgment of the Apex Court in ***Life Insurance Corporation of India vs. Sanjiv Builders Pvt. Ltd.*** (supra) wherein the Hon'ble Apex Court has summarised the principles relating to amendment of pleadings and has held that when amendment is found to be grossly barred by limitation, the court would be justified in rejecting the same. The principles summarised by the Hon'ble Apex Court in paras-71 to 71.11 of the judgment as under:

71. Our final conclusions may be summed up thus:

71.1. Order 2 Rule 2CPC 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 2 Rule 2CPC is, thus, misconceived and hence negatived.

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 6 Rule 17CPC.

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.

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 do 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 pin-pointedly 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* [Vijay Gupta v. Gagninder Kr. Gandhi, 2022 SCC OnLine Del 1897].)

(emphasis added)

31) In the present case, Plaintiffs are seeking to incorporate a prayer in the plaint that BCT does not have any right, title or interest in land bearing Survey No.151A. Such relief is sought without challenging Indenture dated 14 January 1971. They had knowledge of the said Indenture at least at the time of filing of the Suit as is apparent from the findings in para-13 of the plaint. However, amendment application for seeking relief against BCT was filed by the Plaintiffs (Chamber Summons No. 718 of 2010) in May 2010. The amendment sought to be incorporated is thus grossly barred by limitation. Even the amendment sought in Chamber Summons No. 1089 of 2011 *qua* Atul Builders would be barred by limitation since Atul Builders has merely stepped into the shoes of BCT. When challenge to alienation in favour of BCT is barred by limitation, consequently even relief sought *qua* Atul Builders would also be barred by limitation. It cannot even be contended by the Plaintiffs that what is sought to be introduced through amendments is a mere different or new approach to the existing suit. Introduction of a new or additional approach can be permitted provided time barred cause of action is not sought to be introduced [Para 71.4.1 of *LIC Vs. Sanjeev Builders*]. Here reliance by Mr. Tulzapurkar on judgment of the Apex Court in ***South Konkan Distilleries*** (supra) is also apposite, in which it is held in para 23 as under:

23. The learned counsel for the appellants, however, relied on a decision of this Court in *A.K. Gupta & Sons Ltd. v. Damodar Valley Corpn.* [AIR 1967 SC 96] in order to satisfy us that the prayer for amendment for a sum already specified in the plaint or such other amount as was to be determined after accounts, ought to be allowed though the suit for recovery of money was barred when the

amendment was sought. In our view, that decision of this Court stands on a different footing altogether and will not be of any help to the appellants. **In that decision, it was made clear that the amendment of pleadings introducing new case cannot be allowed, if suit on such case is barred.** In that decision also, it was made clear that in the matter of allowing amendment of pleadings, the general rule is that a party is not allowed by amendment to set up a new case or a new cause of action, particularly when a suit on the new cause of action is barred. However, an exception was given in that decision saying where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts merely to a different or additional approach to the same facts, the amendment is to be allowed even after expiry of the statutory period of limitation. We have already observed that there is no quarrel on the proposition enunciated by this Court in the aforesaid decision. As held hereinabove, the date on which the application for amendment of the written statement and the counterclaim was filed, the claim was already barred by limitation. Therefore, if a fresh suit was filed on the amended claim, there cannot be any dispute that the same could also be barred by the law of limitation. Under these circumstances and applying also the principles laid down in the aforesaid decision in *A.K. Gupta* [AIR 1967 SC 96] , in the facts of this case, **we are of the view that since even on the date of filing of the application for amendment of the written statement and the counterclaim, the claim was barred and no fresh suit could be filed on such amended claim and, therefore, the two courts below had acted within their jurisdiction in rejecting the prayer for amendment of the written statement and the counterclaim.** It may not be out of place to mention that following the principle laid down in *A.K. Gupta case* [AIR 1967 SC 96] this Court again in *Vineet Kumar v. Mangal Sain Wadhera* [(1984) 3 SCC 352 : AIR 1985 SC 817] expressed the same view to which we have already adhered to.
(emphasis added)

32) It is also seen that if the amendment is allowed, the same would alter the nature of the suit. An enquiry in a suit for partition of joint family properties will get diverted into validity of alienation made by Khot Family in favour of BCT. Khot Family are not party defendants to the suit. BCT was consciously excluded from the suit by making averments in para-13 of the plaint. In such circumstances, enquiry into validity of transactions between Khot family and BCT would clearly alter the nature of the suit and any relief *qua* acquisition of title by BCT would amount to misjoinder of cause of action. The principle of Plaintiff being dominus

litis cannot be applied in the present case for introduction of new parties to the suit (BCT and Atul Builders) since neither they are necessary parties nor the alienation made in their favour can form subject matter of challenge in the present suit. Reliance by Mr. Tulzapurkar on judgment of the Apex Court in *Asian Hotels (North) Ltd.* in this regard is apposite, in which it has held in para-36 and 37 of the judgment as under:

36. The High Court while allowing the amendment application in exercise of powers under Order 6 Rule 17 of the Code of Civil Procedure has not properly appreciated the fact and/or considered the fact that as such, by granting such an amendment and permitting the plaintiffs to amend the plaints incorporating the prayer clause to declare the respective charges/mortgages void ab initio, the nature of the suits will be changed. **As per the settled proposition of law, if, by permitting the plaintiffs to amend the plaint including a prayer clause nature of the suit is likely to be changed, in that case, the Court would not be justified in allowing the amendment. It would also result in misjoinder of causes of action.**

37. From the impugned order [*Alok Kumar Lodha v. Asian Hotels (North) Ltd.*, 2021 SCC OnLine Del 4370] passed by the High Court, it appears that what has weighed with the High Court is that the plaintiffs, is the dominus litis and heavy reliance is placed in *Kasturi* [*Kasturi v. Iyyamperumal*, (2005) 6 SCC 733]. **However, the principle that the plaintiffs is the dominus litis shall be applicable only in a case where parties sought to be added as defendants are necessary and/or proper parties. The plaintiffs cannot be permitted to join any party as a defendant who may not be necessary and/or proper parties at all on the ground that the plaintiff is the dominus litis.**

(emphasis added)

33) Mr. Sharma has sought to complain that the Petitioners are being rendered remediless *qua* their rights in respect of land bearing Survey No.151A. He submits that though Defendant No.1 has filed Suit No. 8031 of 1984 challenging the alienation made in favour of the BCT, Plaintiffs apprehend that Defendant No.1 may settle the said suit regarding rights of the Trust and that therefore Plaintiffs attempted to intervene and get themselves impleaded in Suit No. 8031 of 1984. That

they were allowed to be impleaded in the suit. However, their impleadment was challenged before the Hon'ble Apex Court *inter alia* by Atul Builders and by order dated 8 August 2017, the Hon'ble Apex Court has set aside the impleadment order entertaining the objection of Atul Builders. He has placed on record copy of order dated 8 August 2017 passed by the Hon'ble Apex Court. Having gone through the order, it appears that the Hon'ble Apex Court has directed that a call on impleadment can be taken afresh by the Trial Court after decision is rendered by this Court in the present Petition. This is clear from the following findings recorded by the Hon'ble Apex Court in the order dated 8 August 2017:

In our opinion, in case the impleaded party interest is confined to the said land and if ultimately the same stand deleted from the purview of the litigation due to which the impleadment has been ordered, in that case there would be no requirement of continuance of impleaded respondents as party to the suit. In case they succeed in partly maintaining interest even in any of the aforesaid survey numbers or otherwise their impleadment will hold good. In case the newly added respondents are able to show that their interest would be finally affected, even otherwise by the litigation, after deletion also impleadment will hold good.

A call on impleadment can be taken afresh by the trial court after the decision is rendered in the pending writ application in the High Court at Bombay in which deletion of the aforesaid survey numbers appears to have been questioned.

34) It would therefore be for the Plaintiff to reapply for their impleadment in Suit No. 8031 of 1984 and mere factum of their non-impleadment in that suit cannot be a ground for allowing them to enlarge the scope of enquiry in the present suit by incorporating amendments which are hopelessly time barred and outside the scope of inquiry in the present suit.

35) Considering the overall conspectus of the case I am of the view that the City Civil Court has rightly rejected the application for amendment. No interference is warranted in the impugned order. the Writ Petition is accordingly **dismissed**.

[SANDEEP V. MARNE, J.]

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