

**Aasma Abdul Majeed and Another Vs. Jayram Arjun Tisge and Others**

**Aasma Abdul Majeed and Another Vs. Jayram Arjun Tisge and Others**

**SooperKanoon Citation :** [sooperkanoon.com/328979](http://sooperkanoon.com/328979)

**Court :** Mumbai

**Decided On :** Sep-09-1998

**Reported in :** 2000(1)BomCR74; 1999(1)MhLj17

**Judge :** A.V. Savant, J.

**Acts :** [Code of Civil Procedure \(CPC\), 1908](#) - Order 6, Rule 17

**Appeal No. :** Writ Petition No. 5370 of 1997

**Appellant :** Aasma Abdul Majeed and Another

**Respondent :** Jayram Arjun Tisge and Others

**Advocate for Def. :** A.H. Palekar, Adv.

**Advocate for Pet/Ap. :** Khadapkar and ;R.G. Ketkar, Adv.

**Judgement :**

ORDER

**A.V. Savant, J.**

1. Heard both the learned Counsel Shri Khadapkar for the petitioners and Shri Palekar for respondents Nos. 1 to 4. The two petitioners are original plaintiffs Nos. 4 and 8. Respondents are the original defendants and the rest of the plaintiffs.

2. The short point which arises for my consideration is whether the order dated 8th October, 1997 rejecting the petitioners' (plaintiffs Nos. 4 and 8) application for amendment is justified in the facts of the case.

3. The plaintiffs filed Reg. Civil Suit No. 36 of 1983 in the Court of the Civil Judge, Jr. Dn., Malegaon. The plaint is dated 19th January 1983. The plaintiffs averred that they were the owners of certain property-land having purchased the same from the defendants in the year 1980. The suit property was already divided into plots in the year 1976 and the division was duly approved by the Asstt. Director of Town Planning on 29th June, 1976. It is averred that the plots were finally sanctioned by the concerned authority. The plaintiffs contended that original defendants Nos. 1 to 4 were divested of the ownership of the plots which vested in the plaintiffs pursuant to the sale deed of 1980 though the date of sale deed is not mentioned in the plaint. It is then averred that the defendants had approached the concerned authority 'for change in the lay out of the suit plan without consulting the plaintiffs'. This action on the part of the defendants was alleged to be illegal. It is further averred that if the sub-division was sanctioned behind their back, they would suffer irreparable loss and the area of plots was likely to be reduced. There should not be any conversion or change in the size of the plots particularly after the plots were purchased by the plaintiffs.

4. In the year 1983 an amendment of the plaint was allowed on 25th October, 1996. Pursuant to the said amendment, para 6-A has already been inserted in the plaint which reads as under :---

'6-A. That during the pendency of the suit defendant No. 1 on 7-4-1994 sold an area admeasuring 153.31 Sq. Mtrs. from out of plot No. 24 to defendant No. 4. In fact even the said portion is in possession of plaintiff Aasma Bai as owner since prior to the suit and even today. The defendant No. 1 sold the portion during the pendency of the suit. Hence, the transactions is submitted by the principles of lis pendens and hence the said transaction is not binding on plaintiffs.'

5. By their written statement initially filed by defendants Nos. 1 to 3, they contended that the apprehension expressed by the plaintiffs regarding the size of the plot being reduced was baseless. It was contended that there was

inconsistency in the pleadings in paras 1 to 6 of the plaint. In para 7 of the written statement, it is contended that after the plots were sold to the plain-tiffs there were some defects in some plots and, therefore, a new plan was submitted to the Asstt. Director of Town Planning and after sanction of the said plan there were no changes in the situation of the plots sold to the plaintiffs. It is contended that there was already excess land available with the defendants on the West of the plots in dispute and, therefore, the area of the plaintiff's plots was not affected adversely. The defendants denied rest of the contentions and it was stated that there was no cause of action which had occurred in 1981. The defendants had a right to have a re-lay-out prepared. However, as a result thereof the plots of the plaintiffs were not adversely affected. Hence, it was contended that there was no merit in the plaintiffs, contention. The first written statement was filed on 16th September, 1983 and the additional written statement was filed on 24th August, 1987.

6. On 9th September, 1997, the plaintiffs moved an application for amendment in which they pleaded that para 6-B be added after para 6-A and para 10-A be added after para 10. By para 6-A which was inserted earlier, the plaintiffs complained that during the pendency of the suit defendant No. 1 had sold an area of 153.31 sq. meters from out of plot No. 24 to defendant No. 4 on 7th April, 1994. In fact, it was alleged that petitioner No. 1 Aasma Abdul Majid was the owner and was in possession of the said portion which was sold during the pendency of the suit. It was, therefore, contended in para 6-A, already inserted by the earlier amendment, that the transaction was hit by principles of lis pendens and was not binding on the plaintiffs. Since this amendment was allowed on 25th October, 1996, the plaintiffs prayed for further amendment by application dated 9th September, 1997. Following averments are sought to be inserted by the proposed amendment.

Para 1-A is to be added after para 1 as under:

'1-A : Description of encroached portion by defendant No. 4. An area admeasuring 23 x 39 from out of plot No. 24 of Gat No. 229, 230, 232 bounded by portion of plot No. 24 Road to South. Portion of plot No. 24 to north. Portion of plot No. 24 to west and plot No. 23 to east. More properly shown by sketch in schedule below plaint by 'A B C D'.

Para 6-B is to be added after para 6-A.

'6-B : The defendant No. 4 after purchasing the plot illegally, has started making construction of a tin shed and has completed construction on an area admeasuring round about 24 x 40 feet. The plaintiff No. 4 had applied vide Exh. 119 restraining defendant No. 4 from making any construction. The Court was pleased to issue show cause notice and taking disadvantage of it, defendant No. 4 has forcefully completed the construction of shed and has dispossessed the plaintiff from the said area. The plaintiff No. 4 has lost his frontage. This construction is in between road and plaintiff's construction. This plaintiff has access from southern side only and now this access is almost blocked. The plaintiff No. 4 is giving rough sketch of encroached portion. Hence plaintiff is filing this suit for possession of premises and other reliefs.'

Para 10-A is to be added after para 10 as under :

'The suit for the purpose of possession of encroachment portion by defendant is valued at Rs. 20,000/-. The plaintiff No. 4 being a woman and relief being confined to her only no Court fee stamp is required to be affixed.'

'In plaint column the original defendant No. 4 be renumbered as defendant No. 5.'

In prayer clause para 11-a-lis to be added after para 11-A.

'The defendant No. 4 be directed to demolish construction by mandate of a Court and the said portion be given in possession of this plaintiff.'

7. This application has been rejected excepting that the number of defendant No. 4 is permitted to be corrected. Barring the 'formal' change in the serial number of defendant No. 4 as defendant No. 5, rest of the proposed amendment is rejected.

8. Having heard both the learned Counsel, I am of the opinion that as a result of the subsequent changes which have occurred during the pendency of the suit and as a result of para 6-A having been inserted, by earlier amendment, it is necessary in the interests of justice to permit the petitioner to further amend the plaint. In L.J. Leach and Co. Ltd. and another v. Messers. Jardine Skinner and Co. :

[1957]1SCR438 , the Apex Court held that it was no doubt true that the courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether the amendment should be ordered, and does not affect the power of the Court to order it, if that is required in the interests of justice. Relevant observations are to be found in para 16 of the judgment at page 362.

9. It is well settled that the Court has to be liberal in permitting amendment unless a serious injustice or irreparable loss is caused to other side. If the nature of the suit is not likely to be changed as a result of the amendment it should normally be permitted. See *Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil and others*, : [1957]1SCR595 . The Apex Court had occasion to consider the test laid down in the earlier decision in *L.J. Leach and Co's case* (supra) in the later decision in *Pirgonda Hongonda Patil's case*. In *Haridas Aildas Thadani and others v. Godrej Rustom Kermam*, : AIR 1983 SC319 , the Apex Court again considered the test laid down by it earlier in *Pirgonda Hongonda Patil's case* (supra). The Court reiterated in *Haridas Thadani's case* that the Court should be liberal in granting the prayer for amendment of pleadings unless serious injustice or irreparable loss is caused to other side. In the present case the learned trial Judge having earlier granted the amendment and permitted the petitioner to insert para 6-A ought to have granted the application dated 9th September, 1997. The main averments which are sought to be inserted by way of para 6-B are as a result of subsequent events which have occurred during the pendency of the suit. Hence, in my view, no prejudice would be caused to the defendant if the petitioners are permitted to amend the plaint. Needless to say that in the event of such an amendment being granted the defendants will be entitled to file their additional written statement and raise such contentions as are available to them in accordance with law.

10. In my view, the learned trial Judge erred in coming to the conclusion that the proposed amendment would introduce a totally different relief and, therefore, amendment should not be allowed. The learned trial Judge was also impressed by the fact that evidence of both parties was already over in the 1983 suit. Assuming that to be so, if the tests laid down by the Apex Court ought to be allowed.

11. In the circumstances, I pass the following order.

i) The application dated 9th September, 1997 (Exh. D page 23 in this petition) is hereby granted. The plaintiffs are permitted to carry out the amendment in the plaint as per their application dated 9th September, 1997 within a period of six weeks from the date of receipt of the writin the Trial Court and serve a copy of this amended plaint on the defendants within a month of the date on which the amendment is carried out.

ii) The defendants are permitted to file their written statement/Additional Written Statement within a period of six weeks from the date of service of the copy of the amended plaint on them.

iii) The Trial Court is directed to frame further issues, if any, arising out of the amended pleadings and then proceed with the trial in accordance with law. Needless to say that if the plaintiffs fail to carry out the amendment within the time frame mentioned above, their application dated 9th September, 1997 will stand rejected and the learned Trial Judge will proceed with the hearing of the suit further in the absence of such amendment.

12. Rule is made absolute accordingly. There will, however, be no order asto costs.

13. Order accordingly.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**