

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

**WRIT PETITION (STAMP) NO. 6563 OF 2021**

1. Raymond Ltd.  
2. Gautam Singhania  
Chairman and Managing Director,  
Raymond Ltd. ...Petitioners

Versus

1. New Sarnath Co-op. Hsg. Society  
Ltd.  
2. Mr. Hariom Gupta (deceased)  
Chairman of the Respondents.  
3. Mrs. Shobha Shetty Secretary of  
Respondents.  
4. Sarnath Co-op. Housing Society  
Ltd. ...Respondents

Mr. Shyam Devani with Ms. Anshika Mishra and Mr. Vedanta Jalan  
i/b. M/s. AZB & Partners for the Petitioners.

Mr. A.N. Narula with Ms Meena Bhalla i/b. M/s. Jhangiani Narula &  
Associates for the Respondent Nos.1 to 3.

**CORAM : ANUJA PRABHUDESSAI, J.**

**JUDGMENT RESERVED ON : 05<sup>th</sup> APRIL, 2022.  
JUDGMENT PRONOUNCED ON : 06<sup>th</sup> MAY, 2022.**

**JUDGMENT :-**

1. With consent, matter is heard finally at the stage of admission.
2. The Petitioners, who are the Defendant Nos.1 and 2 in the suit (hereinafter referred to as Defendants) have challenged the impugned order dated 17.02.2021, passed by the learned Judge, City Civil Court,

Gr. Bombay allowing the Chamber Summons No.1236 of 2016 for amendment of the plaint as per the schedule.

3. Mr. Devani, learned counsel submits that by amendment as proposed in Clause E, the Respondent Nos.1 and 2 (hereinafter referred to as the Plaintiffs) have sought declaration that certain clauses of the Agreements executed between the members of the Plaintiff No.1 society and the Defendants are illegal, void, ab-initio and not binding upon the members. He submits that the said Agreements were executed some time in the year 1976. The Plaintiffs/members were in possession of these Agreements and there is no explanation for seeking such relief at a belated stage. He submits that the relief of declaration is ex-facie barred by law of limitation and such preliminary objection could not have been relegated to the stage of trial. He therefore submits that the impugned order is unsustainable. Reliance is placed on the decision of *FGP Ltd. vs. Saleh Husseini Doctor & Anr 2014 (6) ABR 124* to contend that when the Plaintiff does not approach the Court with clean hand and does not explain the delay, then such belated application for amendment deserves to be rejected.

4. Learned Counsel for the Defendants further submits that the

Plaintiffs have relied on several documents, proposed Exhibits M1 to M12, which were always in their possession and within their knowledge. If any cause of action had accrued on the basis of the said documents, the said documents ought to have been produced along with the suit. He further submits that the Plaintiffs are seeking to introduce a new cause of action which is unconnected and irrelevant to the suit. It is stated that right once accrued in favour of the Defendants, cannot be defeated by way of amendment. The learned Judge was therefore not justified in allowing the chamber summons.

5. Learned counsel for the Defendants further submits that an attempt is made to convert the interim relief in prayer clauses (d) to (h) into final relief after lapse of 12 years. It is contended that such reliefs as on the date of amendment are barred by law of limitation, and as such the learned Judge was not justified in allowing the Plaintiffs to convert the prayers for interim relief into final relief. Reliance is placed on the decision of *Ashutosh Charutvedi v/s. Prano Devi & Ors. 2008 (15) SCC 610*.

6. Learned counsel for the Defendants further submits that by the proposed amendment, the Plaintiffs have sought to introduce new facts

and seek additional reliefs solely on the basis of new cause of action. Reliance has been placed on the decision of the Honourable Supreme Court in the case of *Revajeetu Builders and Developers vs. Narayan Swami & Sons. (2009) 10 SCC 98* to contend that the basic test which should govern the Courts discretion in granting or refusal of the amendment is whether such amendment is necessary for the determination of the real question in controversy. Learned counsel for the Defendants states that the plaint is sought to be amended after a lapse of 12 years by blaming the erstwhile lawyer for not bringing on record the relevant facts. It is contended that the proposed amendment is malafide and allowing the application has caused prejudice to the Defendants.

7. It is further stated that the issues were settled in November 2014 and the matter was listed for recording of evidence. Since the trial in the matter had already commenced, the proposed amendment could not have been allowed, particularly when the Plaintiffs had failed to establish due diligence. Reliance is placed on the decisions of Apex Court in *Revanna vs. Anjanamma (Dead) By Lrs. & Ors. (2019) 4 SCC 332; Vidyabai & Ors. vs. Padmalatha (2009) 2 SCC 409; Chander Kanta Bansal vs. Rajindra Singh Anand (2008) 5 SCC 117; and The*

*Liquidator, (The Maratha Market Peoples Co-operative Bank Ltd. vs. Jijae Estate and Ors. 2019 (1) All MR 884; Ajendraprasadji N. Pandey vs. Swami Keshavprakeshdasji N. And Ors. 2006(12) SCC.* It is submitted that the learned Judge has overstepped its jurisdiction by allowing the amendment on the basis of the facts which were within the knowledge of the Plaintiffs at the time of filing of the suit. Reliance is placed on the decision of *Peacock Plywood Pvt. Ltd. vs. Oriental Insurance Co. Ltd. 2006(12) SCC 673.*

8. Per contra, learned Counsel for the Plaintiffs has challenged the very maintainability of the petition under Article 227 stating that the powers of the Court under Article 227 have to be exercised sparingly only in appropriate cases for the purpose of keeping the subordinate Court and Tribunals within the bounds when the order is violative of the fundamental basic principles of justice and fair play or when there is patent or flagrant error in procedure or law resulting in manifest injustice and not for mere correcting errors. Reliance is placed on the decision of *Hari Vishnu Kamath vs. Sayyed Ahmed Ishaque & Ors. AIR 1955 SC 233; Radheshyam & Anr, vs. Chabbi Nath (2015) 5 SCC 423; Ouseph Mathai & Ors. vs. Abdul Khadir (2002) 1SCC 310; Trimbak Gangadhar Telang & Anr. vs. Ramchandra Ganesh Bhide & Ors. AIR*

**1977 SC 122.**

9. It is submitted that the learned Judge has allowed the amendment on the touchstone of the principles laid down by the Honourable Supreme Court and there being error apparent on the face of record, the order does not warrant interference in exercise of powers under Article 227 of the Constitution. It is submitted that amendment is necessary for the proper and effective adjudication of the case and that the Defendants have failed to spell out any prejudice that is likely to be caused. It is further submitted that the claim that the amendment is barred by limitation is ex facie felicitous as it is the established position of law that statutory obligation gives continuous cause of action to the society against the promoter and as such there is no question of the suit being barred by limitation. Reliance is placed on the decision in *Madhuvihar Co-operative Housing Society Ltd. vs. Jayantilal Investments (2006) Bom. CR 36; Indira Baburao Kanade vs. Matru Chhaya CHS 2016 SCC Online Bom. 6075*. Reliance is also placed on the decision of *Rajesh Kumar Aggarwal vs. K.K.Modi & Ors. 2006 (4) SCC 385* to contend that the Court should try the merits of the case and consequently allow the amendments that may be necessary for determining the question of relevant controversy

between the parties provided it does not cause injustice or prejudice to the other side.

10. Learned counsel for the Plaintiffs has relied upon the decision in ***Mahila Ramkali Devi & Ors. vs. Nandram through Lrs. and Ors (2015) 13 SCC 132***, wherein it is held that the party cannot be refused relief merely because of some mistake, negligence, inadvertence or even any fraction of rules of procedure unless the Court is satisfied that party applying was coming malafidely or that by his blunder he has caused injury to his opponent which cannot be compensated for by order of Court.

11. It is submitted that such belated amendments can be allowed keeping open the point of limitation to be decided at the time of final hearing. The Counsel for the Plaintiffs submits that by the proposed amendment, the Plaintiffs have only sought to elaborate the suffering or inconvenience of the members on account of non availability of the access to the common terrace, restriction on user of recreation space /garden and the efforts made by the Plaintiffs to seek conveyance from the Defendants. It is stated that full occupancy certificate has not been granted even after 50 years of construction and that the

correspondence between MCGM and Defendants relating to Occupancy Certificate was deliberately left out in collusion with the builder or due to over sight.

12. I have perused the records and considered the submissions advanced by the learned Counsel for the respective parties.

13. Order VI Rule 17 of CPC, which deals with amendment of pleadings, reads thus:-

*“17. Amendment of pleadings.- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:*

*Provided 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.”*



14. This provision, sans the proviso, enables the Court to allow either party to amend the pleadings at any stage of the proceedings provided that the amendments are imperative to determine the real question in controversy between the parties. In *Rajesh Kumar Agarwal and Ors* (supra) the Hon'ble Supreme Court has held that the object of the Rule is that Court should try the merit of the case that come before them and should, consequently, allow all amendments that should be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side. It is held that the first part of the Rule is discretionary (may) and leaves it to the Court to order amendment of pleading. The second part is imperative (shall) and enjoins the Courts to allow all amendments which are necessary for the purpose of determining real question in controversy between the parties. It is observed that the real controversy test is the basic or the 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. It is held that while considering whether an application for amendment should not be allowed, the Court should not go into the

correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment.

15. In *M. Revanna* (supra) the Hon'ble Supreme Court has held that leave to amend may be refused if it introduces totally different, new and inconsistent case or challenges the fundamental character of the suit. In *Revajeetu Builders and Developers* (supra) the Hon'ble Supreme Court has observed that the following factors ought to be taken into consideration while allowing or rejecting the application for amendment:-

- (1) whether the amendment sought is imperative for proper and effective adjudication of the case;
- (2) whether the application for amendment is bonafide or malafide;
- (3) the amendment should not cause such prejudice to the other side, which cannot be compensated adequately in terms of money;
- (4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

- (5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and
- (6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

16. Though Order VI Rule 17 enables the Court to allow amendment at any stage of the proceedings, proviso to Order VI Rule 17 of the Code restricts the jurisdiction of the Court to allow the amendment after commencement of the trial unless Court is satisfied that despite due diligence, the party could not have sought the amendment earlier. In *Chander Kanta Bansal* (supra) the Hon'ble Supreme Court has held that the entire object of the proviso is to avoid surprises and to check the delays and expedite hearing of cases. It is held that the proviso does not create a complete bar nor shuts out entertaining of any later applications as it grants discretion to the Court to allow amendment if it is satisfied that the party could not have raised the matter before the commencement of trial inspite of due diligence. It is held that the words 'due diligence' means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own

affairs. In *Vidyabai* (supra) the Supreme Court has held that the date on which the issues are framed is the first date of hearing and filing of an affidavit in lieu of examination -in-chief of the witness, would amount to commencement of proceedings. The decision in *Vidyabai* has been followed in the case of *Mohinder Kumar Mehra* (supra).

17. In the instant case, the issues were settled on 03/11/2014 and the matter was listed for evidence. The records reveal that the case was adjourned time and again and on 26/08/2016 even before filing of the affidavit in lieu of examination-in -chief, the Plaintiffs filed the chamber summons for amendment of pleadings. The chamber summons for amendment was thus filed before commencement of trial. Hence, the case is not covered by the proviso to Order VI Rule 17 of the Code.

18. The next question for consideration is whether the amendment is necessary to determine the real question in controversy between the parties.

19. It is not in dispute that the Defendants are the owners of the property admeasuring 5000 sq. yards bearing C.S. No. 764 of Malabar

& Cumballa Hill Division, now called as Bhulabhai Desai Road. In the year 1960, the Defendants, as Developer and Promoter, decided to develop the said land by constructing residential buildings thereon. The land was divided into three plots- Plot A, Plot B and Plot C respectively. The Defendants constructed a building on Plot A which was exclusively for their use and two buildings were constructed in Plot B. The first building was constructed sometime in the year 1961, and the second building was constructed in the year 1972. Both these buildings consist of ground + 12 floors with terrace and have separate lifts and entrances. The purchasers of the first building constructed in the year 1961 have formed Defendant No.3 Society -Sarnath Co-operative Housing Society Ltd.(hereinafter referred to as Defendant No.3). The purchasers of the second building constructed in the year 1972 are the members of Plaintiff No.1 society (New Sarnath Co-operative Housing Society Ltd.).

20. The Plaintiffs filed a suit with grievance that :-

- (i) The Defendants have constructed certain structures, blocked the access and thus converted the recreational area (Plot C) for their own use;
- (ii) The Defendants failed to discharge their obligation

by executing conveyance and lease deed in favour of the the Plaintiff No.1-Society;

(iii) The Defendants with malafide intention incorporated a clause in the Agreements that the common terrace will belong to the Defendants and that purchasers shall have no right of access to the said building terrace. The said clause is in contravention of Section 11 and 12 of Transfer of Property Act as void ab-initio.

(iv) The Defendants have retained the common terrace of the building on Plot B exclusively for their use and have denied the members of the Plaintiff No.1-society, the access to the said terrace.

(v) The Defendants did not demolish/remove the old structures from the recreational area (Plot C) as to enable the Municipal Corporation to grant Completion Certificate to the second wing of the building (New Sarnath Co-operative Housing Society)

21. Based on these pleadings the Plaintiffs sought following reliefs:

*“(a) That this Hon’ble Court may be pleased to declare that Plaintiffs society is entitled to enforcement of statutory obligation and seek Deed of Conveyance from Defendant No.1, in respect of building and portion of land admeasuring about 992.15 sq. yards equivalent to 829.15 sq.mtrs or there about, bearing old survey No.81, New Survey No.4/7131, 5/7131 and 6/7132 and Cadastral Survey No.764 of Malbar Hill and Cambata Hill division and Building known as New Sarnatah Co-operative Housing Society Limited Bhulabhai Desai Road, Mumbai 400 026.*

*(b) That this Hon’ble Court be pleased to order and direct the Defendant No.1, their Officers, servants and agents to forthwith execute a deed of conveyance in favour of the Plaintiffs in respect of a building and portion of land admeasuring about 992.15 sq. yards equivalent to 829.15 sq.mtrs or there about. Bearing old survey No. 81, New Survey No.4/7131, 5/7131 and 6/7132 and Cadastral Survey No. 764 of Malbar Hill and Combata Hill division known as New Sarnath Co-operative Housing Society Limited, Bhulabhai Desai Road, Mumbai 400 026.*

*(c) That this Hon’ble Court be pleased to declare that the Plaintiff No.1 and its members are entitled to use common terrace of the said building and the Recreational space/Garden as shown in plot “C” situate at New Sarnath Co-operative Housing Society Limited, 59,*

*Bhulabhai Desai Road, Mumbai 400 026.*

*(d) That, pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to restrain the Defendants No. 1 and 2, their Officers, servants and agents from obstructing and preventing the Plaintiffs society and its members from entering or remaining upon or using the Recreational space/Garden in plot situate at New Sarnath Co-operative Housing Society Limited, 59, Bhulabhai Desai Road, Mumbai 400 026.*

*(e) That, pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to restrain the Defendants No. 1 & 2, their Officers, servants and agents by an order and injunction of this Hon'ble Court from in any way preventing, restraining or obstructing in any manner whatsoever the Plaintiffs No.1 or its members for using or entering upon the terrace of the said building known as New Sarnath Co-operative Housing Society Limited, 59, Bhulabhai Desai Road, Mumbai 400 026.*

*(f) That, pending the hearing and final disposal of the suit, this Hon'ble Court may be pleased to restrain the Defendants No. 1 & 2, their Officers, servants and agents by an order and injunction of this Hon'ble Court from in any way preventing or obstructing the Plaintiff No.1 or its members from carrying out necessary repair work to the drainage line within the area of the Recreational*



*space/garden at New Sarnath Co-operative Housing Society Limited, 59, Bhulabhai Desai Road, Mumbai 400 026.*

*(g) That, pending the hearing and final disposal of the suit, this Hon'ble Court may be pleased to order and direct the Defendant No. 1 & 2 their Officers, servants and agents immediately to remove all the dumping material from the said recreational area/Garden and hand over a duplicate key of the Garden gate to the Plaintiffs No.2 or 3 as office bearers of the Plaintiff No.1 adjacent to the Building New Sarnath Co-operative Housing Society Limited, 59, Bhulabhai Desai Road, Mumbai 400 026.*

*(h) The pending the hearing and final disposal of suit, this Hon'ble Court may be pleased to order and direct the Defendant No. 1 & 2 their Officers, servants and agents and as to demolished the portion of a wall dividing Plaintiffs Builder and the Recreational space/Garden situate at New Sarnath Co-operative Housing Society Limited, 59, Bhulabhai Desai Road, Mumbai 400 026.”*

22. The proposed amendment as contained in the schedule to the chamber summons relates to :

(i) amendment of cause title:-

relevant paras (Clauses A and B);

(ii) User of common terrace:-

relevant paras (Clause C3 (j)(i), Clauses C, E and I c-1)

(iii) Non execution of conveyance deed and lease deed:-

relevant paras - (Clause D 3(bb), 3(cc), 3(dd),  
3(ee), 3(ff), 3(gg), 3(hh), 3(ii))

(iv) Not obtaining complete occupancy certificate:-

relevant paras -Clause D 3(y), 3(z), 3(aa), Clause H  
11(ii), Clause I c-2:-

(v) User of recreational ground /Plot C:-

relevant paras - (Clauses F8(i), H 11 (i))

(vi) Construction of a building (JK House) in Plot A and  
utilization of FSI /TDR:-

relevant paras (Clause D 3(kk), 3(ll), 3(mm), 3(nn),  
3(oo), 3(pp), Clause H 11(iii), Clause I c-3, c-4.

(vii) Converting interim relief into final relief by  
substituting word 'pending' to 'permanently' in  
prayer clauses (d) to (h) of the plaint.:-

-relevant para – Clauses G and J.

23. It is to be noted that in clauses (A) and (B) the plaintiffs have

sought to replace the name of the former Chairman of the Plaintiff No.1- Society with the name of the present Chairman as Plaintiff No.2 and further to amend the address of the Plaintiff No.1-Society.

24. As regards the user of terrace, (relevant paras Clause C 3 (j) (i), Clauses C, E and I c-1) the Plaintiffs have sought to incorporate the pleadings that the Plaintiff No.1 society has been deprived of its valuable right to use, possess and enjoy the common terrace in view of non-availability of access to the terrace from the Plaintiffs building. Hence, the Plaintiffs are entitled to a declaration that they are entitled to use the common terrace. The aforestated amendment is not inconsistent with the pleadings, in fact the Respondents-Plaintiffs have already sought a declaration that the Plaintiff No.1 and its members are entitled to use the common terrace of the said building. The amendment sought in this para is only in the form of elaboration of the existing pleadings.

25. The proposed amendment in Clauses E and I relates to a declaration that Clauses No.13 (a) and 13(b) and 41 (a), 41(b), 41(c), 41(d) and 41(e) in Sale Agreements entered between the members of the Plaintiff No.1 -Society and the Defendant No.1-builder are illegal,

bad in law, void ab-initio and contrary to the provisions of Maharashtra Ownership of Flats Act and the same are not binding upon the Plaintiffs and its members. The Defendants have vehemently opposed this amendment on the ground that the prayer is barred by the law of limitation.

26. In *South Konkan Distilleries Anr. vs. Prabhakar Gajanan Naik and Ors. 2008 (14) SCC 632*, the Hon'ble Supreme Court has reiterated that *"it is well settled that the Court must be extremely liberal in granting the prayer for amendment, if the Court is of the view that if such amendment is not allowed, a party, who has prayed for such an amendment shall suffer irreparable loss and injury. It is also equally well settled that there is no absolute rule that in every case where a relief is barred because of limitation, amendment should not be allowed. It is always open to the Court to allow an amendment if it is of the view that allowing of an amendment shall really subserve the ultimate cause of justice and avoid further litigation."*

27. In the instant case, in para 3(j) the Plaintiffs had averred that *"...the building terrace is a property of the society and the Defendant Builder has no right to acquire the said building terrace for their use*

*and occupation as garden. The defendant builders has no right in law to deprive the members of the plaintiffs society or members of other society the access to the said common terrace. In fact, the parapet of the said terrace is maintained by both these societies. However, with malafide intention and with oblique motive the Defendant builders incorporated a clause in the agreement for sale and also in the deed of conveyance that common terrace would belong to the Defendant builders and purchasers shall have no right of access to the said building terrace. The said clause is void-ab-initio. Any restriction on the ownership right is also in contravention of provisions of Sections 11 and 12 of Transfer of Property Act. The Plaintiffs submits that a common terrace, recreational space as garden are the properties exclusively belonging to the housing society and the members have right to use the said recreational space and common terrace of the building.”*

28. Similarly, in para 7 of the plaint the Plaintiff has specifically averred that “*the clause in agreement for sale pertaining to the terrace indicates that the common terrace of the building cannot be used by flat purchasers is void ab-initio. The said clause is in contravention of the provision of section 11 of Transfer of Property act and therefore*

*the said clause is not binding on the Plaintiff No.1 society and its members. Plaintiffs submit that this Hon'ble Court may be pleased order and direct the Defendants builders to immediately allow the Plaintiffs to use the common terrace on the same building...."* The Plaintiffs have also sought a declaration that the members of the Plaintiff No.1 – Society are entitled to use common terrace of the building.

29. It is thus evident that challenge to the validity of the said clauses was implicit in the factual matrix set out in the plaint. By the proposed amendment, the plaintiffs have only sought a relief in furtherance to the said plea in the plaint. The said amendment therefore does not introduce a new case. Reliance is placed on the decision of the Apex Court in ***Abdul Rehman v/s. Mohd. Ruldu (2012) 11 SCC 341*** wherein it is held that *'it is settled law that if necessary factual basis for amendment is already contained in the plaint, the relief sought on the said basis would not change the nature of the suit'*. Similarly, in the case of ***Vineet Kumar vs. Mangal Sain Wadhare AIR 1985 SC 817*** the Hon'ble Supreme Court has held that *"Normally amendment is not allowed if it changes the cause of action. But it is well recognised that where the amendment does not constitute an*

*addition of a new cause of action, or raise a new case, but amounts to no more than adding to the facts already on the record the amendment would be allowed even after the statutory period of limitation.”*

30. In the present case, the Plaintiffs have claimed that the terrace is a common area and have sought a declaration that the said clauses in the Agreement are in contravention of their statutory rights. The Plaintiffs have not introduced a new or inconsistent case but have sought the relief based on the pleadings already on record. The proposed amendment is necessary to determine the real controversy between the parties. The questions whether the terrace is a common area and the members of the Petitioner Society have statutory right to use the same viz-a-viz the issue of validity of the said clauses need adjudication on merits. Reliance is placed on the decisions in **Raghu Thilak John** and **Pankaja** (supra), wherein the Hon’ble Supreme Court has observed that whether question of limitation was a disputed question of fact, the prayer for amendment could not be rejected and in that circumstances the issue of limitation can be made an issue in the suit itself. Hence, the discretion exercised by the learned Judge in allowing the Plaintiffs to incorporate the said prayer by making the

plea of limitation a subject matter of the issue is in conformity with law.

31. The plaintiffs have averred that the defendants have failed and neglected to execute deed of conveyance and thus discharged its statutory obligation of conveying the building and the land in favour of the plaintiff no.1 – Society. The plaintiffs have also sought a declaration that it is entitled to enforce statutory obligation and seek deed of conveyance from defendant no.1 in respect of building no.2 and the plot admeasuring 992.15 sq. yards. It is pertinent to note that the Defendants had raised a plea that the members of the Building No.2 had chosen not to become members of the Defendant No.3 society. By the proposed amendment (relevant paras Clause D 3(bb) to 3(ii)) the Plaintiffs have sought to elaborate the steps taken by the Plaintiff to persuade the Defendants to form the co-operative society and execute a deed of conveyance and a lease deed and have sought to bring on record the circumstances under which Plaintiff No.1 society came to be formed. The Plaintiffs have also sought to produce correspondence in this regard. The said amendment is not inconsistent but is in consonance with the pleadings and is necessary to decide the controversy between the parties. Moreover, no prejudice will be



caused to the Defendants by allowing the Plaintiffs to incorporate the said pleadings and to produce the said correspondence, which relate to the controversy between the parties.

32. By way of proposed amendment (in paragraph Clause D3(y), 3(z), 3(aa), clause H 11 (ii) clause I c2 ) the Plaintiffs have also sought to incorporate pleadings that till date the Defendant No.1 has not obtained complete occupation certificate of the Plaintiffs' building and have sought to direct the Defendant to take necessary steps and obtain complete occupation certificate from the Municipal Corporation in respect of the Plaintiffs-Building. The aforesaid amendment is opposed on the ground of limitation. It may be mentioned that providing the occupancy certificate to the society and executing deed of conveyance is a statutory duty of the builder under Section 6 and 11 of the MOFA. The breach of statutory obligation creates a continuing wrong which gives continuing cause of action to the society against the builder. Hence, the relief for enforcement of statutory obligation under MOFA can neither be barred by the law of limitation nor capable of monetary evaluation. Reliance is placed on the decision of this Court in ***Madhu Vihar Co-operative Housing Society*** and ***Indirabai Baburao Kanade*** (supra). This being the legal position, the proposed amendment

seeking to direct the Defendants to take steps to obtain occupancy certificate cannot be rejected on the ground of limitation.

33. As regards the amendment relating to the recreational space (Plot C), the Plaintiffs had specifically pleaded that “*the area shown in plot C is garden to be used exclusively as recreation area by various members of the said building including the Plot A. However, the Defendants Builder developed dishonest intention and high handedly and contrary to the provisions of law converted the said recreational area for their own use and occupation such as for dumping various material, constructed cooling tower for their own show room, which is in the building Plot A and illegally retain the said recreational area in their own use, occupation, possession and further blocked access to the said recreational areas for the flat purchasers.*” The Plaintiff had also referred to the correspondence with the Municipal Corporation of Greater Bombay as regards the said recreational area and further averred that “*...the Defendants-promoters instead of giving access to the garden illegally constructed a wall thereby separating and dividing the said plot between existing building and said garden and also put up a gate from the main road side and locked the said garden gate thereby totally depriving the Plaintiffs -society members to have any*

*access to garden /recreational area.”* The plaintiffs have sought a declaration that they are entitled to use the recreational garden as shown in Plot C.

34. The Defendants have denied that Plot C is meant to be recreational ground for common use of all purchasers. It is stated that a wall separating Plot B and Plot C was constructed at the time of construction of the Building in Plot B, and that the said Plot is in exclusive use of the Defendant No.1, that they are entitled to use the same for their own use and benefit. By the proposed amendment the Plaintiffs have sought to aver that the recreation space /garden is part and parcel of entire lay out in which the Plaintiffs' building is situated. It is contended that the recreation space /garden is a common amenity for the members of the Plaintiff No.1 and Defendant No.3 societies and that the act of the Defendant No.1 to retain the said recreation space / garden exclusively for them, to the exclusion of plaintiff No.1 and the Defendant No.3 will result into imbalance of FSI upon redevelopment of Plaintiffs' building.

35. The proposed amendment is not irrelevant or inconsistent with the pleadings. The Plaintiffs have not introduced a new cause of action

on the contrary, the amendment relates to the question in controversy. The plea that Plot C is a recreational area and that the members of the Plaintiff-society are entitled to use the same will have to be adjudged on merits and not at the stage of amendment.

36. The Plaintiffs have also sought to incorporate pleadings relating to demolition and reconstruction of JK house in Plot A. It is stated that on 23/03/2006 the Municipal Corporation issued letter to Defendant No.1 stating that the building "JK House" constructed in Plot A was in dilapidated condition and unsafe for human habitation. Subsequently, Defendant No.1 obtained various permissions from various authorities for reconstruction of JK House and constructed a high rise 41 floor building, part occupation certificate in respect of which was issued on 31/01/2012. The Plaintiffs have also sought to direct the Defendants to disclose the detailed calculation of FSI /TDR consumed in construction of multi storied building JK House on the Plot A and further to restrain the Defendants from consuming and / or utilising and /or deriving any benefits in the form of FSI / TDR for the purpose of any construction of the building JK House or any other structure in Plot A or Plot C.

37. A perusal of the plaint clearly indicates that Plot A was not the subject matter of the suit. The demolition notice in respect of JK House in Plot A was issued in the year 2006 and the plans for reconstruction were approved in the year 2008-2009 and the construction of 41 storied building in Plot A was completed in the year 2012. The Plaintiffs have sought to bring the said facts on record in the year 2016. There is not only delay in approaching the Court, but the proposed amendment introduces a new cause of action and expands the scope of the plaint. It is well settled that the amendment, which is totally different and changes the fundamental nature and character of the suit cannot be allowed. Allowing such amendment would cause prejudice to the Defendants, which cannot be compensated by cost. Learned Judge has therefore exceeded the jurisdiction in allowing amendment, in respect of the construction of JK House in Plot A and utilization of FSI /TDR in respect of the said construction.

38. The Plaintiffs have also sought to amend the prayer clauses (d) to (h) by converting the prayers for interim relief to final relief. The Plaintiffs are not seeking any relief, which has no foundation in the plaint but by this amendment, the Plaintiffs have only sought to rectify

the defect in pleadings. In ***Mahila Ramkalidevi*** (supra) the Hon'ble Supreme Court has observed that *“It is well settled that rules of procedure are intended to be a handmade to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of rules of procedure. The Court always gives relief to amend the pleadings to the party, unless it is satisfied that the party applying was acting malafide or that by his blunder he has caused injury to his opponent, which cannot be compensated for by an order of cost.”*

39. As noted above, there are essential pleadings in respect of the reliefs of permanent injunction as sought in prayer clauses (d) to (h) and the Plaintiffs have only sought to rectify the error or defect in the pleading. The amendment is not malafide nor irrelevant and does not cause any prejudice or injury to the Defendants and is relevant to decide the controversy between the parties. The learned Judge has therefore not committed any error in allowing the Plaintiffs to amend the prayer clauses (d) to (h).

40. Under the circumstances and in view of discussion, supra the Writ Petition is partly allowed. The impugned order, which pertains to

the proposed amendment in Clauses D 3(y), 3(z), 3(aa), 3(bb), 3(kk), 3(ll), 3 (mm), 3(nn), 3(oo), 3(pp), Clause H 11(iii) and Clause I-c3 and I-c4, which relates to the construction of JK House in Plot A and utilization of FSI and TDR is hereby set aside.

**(ANUJA PRABHUDESSAI, J.)**