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**IN THE COURT OF THE AD HOC DISTRICT JUDGE-3, RAIGAD-
ALIBAG**

AT ALIBAG.

(Before R.V. Utpat)

Civil Appeal No.26/2010.

Exh.No.20.

- 1) Subhash Vinayak Aparadh,)
Age-53 years, Occupation-Service,)
)
- 2) Anand Vinayak Aparadh,)
Age-45 years, Occupation-Service,)
)
- 3) Vijay Vinayak Aparadh,)
Age-50 years, Occupation-Service,)
)
- 4) Vinayak Rama Aparadh (deceased),)
Through legal heirs,)
4/1. Sumitra Vinayak Aparadh,)
Age-80 years, Occupation-Service,) Appellants.
) (Original plaintiffs)
- 4/2. Ulhas Vinayak Aparadh,)
Age-58 years, Occupation-Service,)
)
- 4/3. Subhash Vinayak Aparadh,)
Age-53 years, Occupation-Service,)
)
- 4/4. Vijaykumar Vinayak Aparadh,)
Age-50 years, Occupation-Service,)
)
- 4/5. Anand Vinayak Aparadh,)
Age-45 years, Occupation-Service,)
)

- 5) Ulhas Vinayak Aparadh,)
Age-58 years, Occupation-Service,)
6) Vasant Krishnaji Langi,)
(Deleted from original suit))
7) Laxman Mahadeo Thale,)
Age-70 years, Occupation-Retired,)
All R/o.Pen, Tal.Pen, Dist.Raigad.)

V/s.

- 1) Joma Masanya Kothekar(deceased)
Through legal heirs-)
1/1. Narayan Joma Kothekar,)
Age-50 years, Occ.Business,)
1/2. Machhindra Joma Kothekar,)
Age-32 years, Occ.Business,)
1/3. Bhaskar Joma Kothekar,)
Age-30 years,)
All R/o.Dolvi, Tal.Pen, Dist.Raigad))
2) M/s.Vardhaman Construction,)
Through partners-)
2/1. Shrikant Narayan Mhatre,)
Age-67 years, Occ.Business,)
2/2. Prashan Shrikant Mhatre,)
Age-40 years, Occ.Business,)
2/3. Mahendra Chunilal Bafana,)
Age-52 years, Occ.Business,)
2/4. Kirtikumar Chunilal Bafana,)
Age-48 years, Occ.Business,)
Respondent Nos.2/1 and 2/2)
R/o.Shrinivas Shikshan)

..... Respondents
(Original defendants)

Society, Pen, Tal.Pen, Dist.Raigad)
Respondent Nos.2/3 and 2/4)
R/o.Bazarpeth Pen,)
Tal.Pen, Dist.Raigad.)
)
3) Pen Nagarpalika Parishad,)
Pen, through the Chief officer,)
Pen Nagarpalika Parishad, Pen,)
Tal.Pen, District-Raigad.)

Appeal against Judgment and Decree
dated 08/01/2010 passed by the
learned Civil Judge Junior Division,
Pen in Regular Civil Suit No.76/1998.

Appearance :- Adv. Mr. R.V.Oak, for appellants
Ex-parte against respondents No.1/1 to 1/3.
Adv.Mr.D.G.Patil, for respondents No.2/1 to 2/4
Adv.Mr.Prasad Patil, for respondent No.3

J U D G M E N T

(Delivered on 24/08/2016)

1. The judgment and decree of the learned Civil Judge Junior Division, Pen in Regular Civil Suit No.76/1998 thereby dismissing the suit for declaration and injunction is under challenge in this appeal. The parties are referred to as per their original status in the suit for the sake of convenience unless otherwise stated.

2. Plaintiffs' case in brief is as follows :

That, the properties bearing City Survey No.1256/2, 1333, 1334, 1335, 1336, 1337, 1338 and 1339 were previously

owned by one Mr. Manohar, who sold it to one Mr. Sathe and the original defendant No.1 purchased it from the daughter of Mr. Sathe. Plaintiffs are residing in the Municipal House No.12/85, situated in the City Survey No.1338 and 1339 as monthly tenant ever since Mr. Manohar was the owner of the said property and have been using the open space, latrine and the well situated to the southern side of the said tenanted premises. Neither the defendant No.1 nor his Predecessors-in-title have objected the same. The said open space, latrine and well are appurtenant to the tenanted premises and they are essential for the use of tenanted premises. Defendant No.1 had entered into development agreement with defendant No.2 in regard to the suit property on 08/08/1997. Prior to that, defendants No.1 and 2 had caused publication of notice in local newspaper on 28/05/1997 and the plaintiffs and other tenants had replied the said notice thereby asserting their aforesaid right to appurtenances. Then, there was a talk between plaintiffs and defendants No.1 and 2 and the defendants agreed to give new premises to the plaintiffs by the virtue of agreements dated 11/10/1997 and 13/10/1997. However, some other tenants did not agree to it and since no proper consent letter was given to defendant No.3-Municipal Council, the building plan came to be rejected. Thereafter, defendant No.2 omitted City Survey No.1338 from the building plan and submitted a new plan to the defendant No.3. When plaintiffs got notice of it, they asked defendant No.2 about the same and said defendant stated to them that, plaintiffs would not be given any premises in the proposed building and they do not have any sort of right claimed by them. Apprehending that their

right to use the appurtenances as stated above would be destroyed, plaintiffs have filed suit for declaration and injunction. By way of amendment they have averred that, pending the suit, the plaintiffs No.1, 3 and 5 have purchased 8 rooms situated in City Survey No.1338 from Mr. Jayant Mhatre and Mr. Ranjit Bafana by registered sale deed dated 12/04/2004 alongwith right over well and latrine situated in City Survey No.1339 and now plaintiff No.2, 4/1 and 4/5 are tenants of plaintiffs No.1, 3 and 5.

3. Defendants No.1 and 2 have resisted the suit by filing their written statement at Exh.18 and additional written statement (Exh.156). They have admitted that the plaintiffs No.1 and 5 to 7 are tenants in City Survey No.1338. But, they have denied that they are and were having any rights to enjoy appurtenances as claimed. They have specifically averred that while developing the suit property, the way to latrine and well situated in City Survey No.1339 has been kept intact. So also, the portion of chawl/building situated in City Survey No.1338 is excluded from the development and the defendants had never attempted to deceive any of the tenants including plaintiffs. No cause of action has arisen and on these averments, they have prayed for dismissal of the suit.

4. Defendant No.3 has not filed any written statement. In view of the rival pleadings, the learned Trial Court was pleased to frame issues at Exh.78. Thereafter, plaintiffs and defendants adduced their respective evidence. On appreciation of the evidence, learned Trial Court held that, the plaintiffs had failed to

prove that they are owner of the City Survey No.1339 and as such they are not entitled to declaration and injunction as prayed.

5. The appellants have contended that the learned Trial Court has not framed proper issues and the subsequent events have not been considered by the learned Trial Court in proper perspective. They have also contended that the amendment application(Exh.207) moved by them was wrongly rejected by the learned Trial Court. It is also contended that the approach of the learned Trial Court was hyper-technical and the learned Trial Court has failed to appreciate that, the plaintiffs are having right to enjoy appurtenances such as latrine, open space and to take water from the common well.

6. I have heard learned advocate Mr.R.V.Oak for the appellants and learned advocate Mr.D.G.Patil for respondent No.2 at length. The respondents No.1/1 to 1/3 have not appeared in this appeal and the appeal proceeded *ex parte* against them. Learned advocate for respondent No.3 did not turn up to argue the matter.

7. Following points arise for my determination and I have recorded my findings thereon for the reasons stated hereinafter :

POINTS

FINDINGS

- | | |
|---|-------------------|
| 1. Is it proved that the plaintiffs have right to use the open space, latrine and well situated in City Survey No.1339? | Does not survive. |
|---|-------------------|

- | | |
|---|---------------------|
| 2. Is it proved that the defendants have obstructed the plaintiffs from using the well, open space and latrine? | Does not survive. |
| 3. Is it necessary to allow the amendment application(Exh.207) and remand the matter back? | In the affirmative. |
| 4. What order and decree? | As per final order. |

- : REASONS : -

AS TO POINT NO.3 :-

8. Before I embark upon the scrutiny of evidence, it is necessary to take into consideration some material undisputed facts. Indisputably, the suit property was owned by Mr.Manohar and since then, the plaintiffs were tenants in the chawl cum building situated in City Survey No.1338. Original defendant No.1- Joma Masanya Kothekar subsequently purchased the said property. It is also not in dispute that, during the pendency of the suit, plaintiffs No.1, 3 and 5 have purchased eight rooms, situated in the City Survey No.1338 by virtue of a registered sale deed dated 12/04/2004 from Mr. Jayant Mhatre and Mr. Ranjit Bafana, who had purchased the same from original defendant No.1 in the year 2000.

9. In the backdrop of these admitted facts, it is necessary to appreciate the rival contentions. As the appellants have

contended that, the rejection of amendment application(Exh.207) by the learned Trial Court is erroneous and as the said order has been challenged by the plaintiffs-appellants, it is necessary to first decide that question. Hence, I am taking up this point before the other points.

10. As stated earlier, there is no dispute that, during the pendency of the suit, the original defendant No.1-Mr. Joma Masanya Kothekar sold the property bearing City Survey No.1338 alongwith the chawl situated in it to Mr. Jayant Mhatre and Mr.Ranjit Bafana by registered sale deed dated 29/12/2000. It is also not disputed that the said Mr. Jayant Mhatre and Mr.Ranjit Bafana have sold eight rooms out of the said chawl to the plaintiffs No.1, 3 and 5 (Ulhas Vinayak Aparadh, Subhash Vinayak Aparadh and Vijay Vinayak Aparadh) by registered sale deed dated 12/04/2004. Both these sale deeds are on record at Exh.217 and 192 respectively. The learned advocate Mr.Oak for the plaintiffs vehemently submitted that, the plaintiffs had moved an application for amendment of the plaint in order to incorporate these subsequent events and the said application was allowed. However, at the time of seeking the amendment, it was mistakenly averred that, the plaintiffs have become owner of the said well, latrine and open space. In fact, by the virtue of the said sale deed, only right to use the said well, open space and latrine was acquired by the plaintiffs. Therefore, the plaintiffs had moved the subsequent application(Exh.207) for making necessary correction in the relief clause. But, the learned Trial Court by assigning reason of delay and by observing that, the plaintiffs were not due

diligent, rejected the application. Mr.Oak further invited my attention to the observations of the learned Trial Court made in paragraphs No.13 and 14 of the impugned judgment and vehemently submitted that the rejection of the amendment application has resulted in miscarriage of justice. He also vehemently submitted that the issues are not properly framed. Per contra, the learned advocate Mr.D.G.Patil for defendant No.2 vehemently submitted that, the application(Exh.207) was rightly rejected by the learned Trial Court, as it was moved after commencement of trial.

11. I have given thoughtful consideration to the rival submissions. It appears that, on 01/04/2008, the plaintiffs had moved application(Exh.142) for amendment, which came to be allowed on 04/08/2008. By the said amendment, new paragraph No.7A came to be inserted in the plaint so also, a new prayer clause 11-A came to be incorporated in place of earlier clause No.11-A whereby, the plaintiffs prayed for declaration that, the plaintiffs No.1, 3 and 5 have ownership right over the well, latrine and open space situated in City Survey No.1339. While allowing said amendment, the learned Trial Court observed that, it was necessary to allow the amendment so as to bring on record subsequent events and mere delay should not be a ground to refuse amendment. Thereafter, plaintiffs moved application (Exh.207) contending that, they have acquired only right to use the well, latrine and open space by the virtue of the said sale deed, and at the time of seeking earlier amendment, they had inadvertently prayed for declaration of ownership right. On these

contentions, plaintiffs prayed for substituting the words 'right of use and enjoyment' instead of 'ownership' in prayer clause 11-A of the plaint. However, the learned Trial Court rejected the said application by observing that, the proposed amendment was contradictory to the earlier amendment and the plaintiffs were not diligent in seeking the amendment. It was also observed that, delay would be caused in deciding the suit if the amendment was allowed.

12. On perusal of the sale deeds it appears that, ownership right over well, latrine and open space was not intended to be transferred, but only right to take water from the well and to use the latrine and open space situated in City Survey No.1339 was transferred by said sale deeds. Paragraph 6 of the sale deed(Exh.192) is material in this regard. The words 'ownership right' (मालकी) are scored and substituted by words 'use and enjoyment'. It seems that, while seeking the earlier amendment plaintiffs committed mistake. But, said mistake appears to be unintentional. The reasoning given by the learned Trial Court that, the amendment sought by application(Exh.207) is contradictory to the earlier pleading is not justified. In fact, the plaintiffs were intending to claim lesser right than the right claimed earlier and it cannot be said that the subsequent amendment sought by plaintiffs is inconsistent with or contradictory to earlier pleading. The earlier amendment was allowed just eight months prior to moving of the application(Exh.207) and at that time, the view of the learned Trial Court was, that mere delay is not a ground to refuse amendment. But, the learned Trial Court while rejecting the

application(Exh.207) has observed that, allowing amendment may occasion further delay. No doubt, the trial was commenced, but since the plaintiffs intended to just correct the relief clause, it would not have caused any prejudice to the defendants. On the contrary, it was necessary to allow the said amendment in order to do complete justice to the parties.

13. In Paragraph No.14 of the impugned judgment, the learned Trial Court has specifically observed that, from the recitals of the sale deed(Exh.217), it reveals that, only right of use of common well and latrine was transferred. In paragraph No.15, the learned Trial Court has observed that, only the easementary/vahivat right over the common well and latrine situated in the suit property is alienated in favour of the plaintiffs and the plaintiffs have not acquired any ownership right. By observing so, the learned Trial Court has further held that, plaintiffs have failed to prove that they are owner of the suit property. In fact, plaintiffs never intended to claim any ownership right over the common well, latrine or passage, but they were intending to assert the right to use and enjoy those amenities, which are appurtenant to the tenanted premises according to them. In those circumstances, it was necessary to allow the amendment. The rejection of the amendment application(Exh.207) has certainly resulted in miscarriage of justice. Hence, I hold that it is necessary to allow the amendment application(Exh.207) and remand back the matter to the learned Trial Court for fresh decision on merits. I answer this point in the affirmative accordingly.

AS TO POINTS No.1 AND 2 :-

14. Since, I have held that, the matter needs to be remanded back to the trial court for fresh decision on merits, these points do not survive for determination. Hence, I answer them accordingly.

AS TO POINT No.4 :-

15. The legal corollary of my finding on point No. 3 leads me to pass the following order :

- : O R D E R : -

- 1) Appeal is allowed.
- 2) The judgment and decree of the learned Civil Judge, Junior Division, Pen in Regular Civil Suit No.76/1998 dated 8/01/2010 is hereby quashed and set aside and the suit is remanded back to the learned Trial Court for deciding it afresh.
- 3) The application(Exh.207) is allowed. The plaintiffs shall carry out amendment accordingly without seeking any adjournment before the learned Trial Court. The learned Trial Court shall give reasonable opportunity to the defendants to make consequential amendment to their written statement if any.
- 4) The learned Trial Court is at liberty to recast the issues in view of the amendment and shall give reasonable opportunity to the parties to adduce additional evidence if they so desire.

- 5) The parties are directed to appear before the learned Trial Court on 26/09/2016.
- 6) No order as to costs.
- 7) Decree be drawn accordingly.

Alibag,
Date :- 24/08/2016.

(R.V.Utpat)
Ad Hoc District Judge-3,
Raigad-Alibag.