

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1351 OF 2015

Eldred Anthony Nicholas Lobo

.. Petitioner

vs.

Soli Kharas

.. Respondent

(being the heir and legal
representative of
deceased Tehmina P Kharas)

Mr. P.S. Dani, Sr. Advocate a/w. Mr. Zain Mookhi & Mr. Ooril Panchal
i/b. Mahimtura and Company for the Petitioner.

Mr. Kevic Setalvad, Sr. Advocate, A. Ahmedji, Chhamata Shukla and
Afreen Mukadam for the Respondent.

CORAM : M. S. SONAK, J.

DATE : 02 SEPTEMBER 2015.

P.C. :-

1] Rule. With the consent of and at the request of learned
counsel for the parties, Rule is made returnable forthwith.

2] This petition is directed against the order dated 9 January
2015, by which the Trial Court has denied the petitioner leave to
amend the plaint and raise the ground of denial of title.

3] Against the impugned order, remedy of revision would be
available. However, considering that a short point is involved, which
stands covered by the decisions of the Apex Court as well as this
Court, the parties are not relegated to remedy of revision.

4] Based upon certain averments in paragraphs 1,2,5 and 12 of the written statement filed by the respondent, the petitioner applied for leave to amend the plaint and raised the ground of denial of title. The Trial Court has declined leave by *inter alia*, observing that there is no provision under the Civil Procedure Code, 1908 (CPC) or any procedural law to deal with the pleadings in the written statement of the defendant by filing any rejoinder or by amending the pleadings in the plaint and further, since the ground of eviction on basis of denial of title is a legal ground, the petitioner can apply for framing of issue and seek a decree of eviction upon the said ground.

5] In my judgment, the impugned order is unsustainable. In the first place, leave for amendment has been applied at the pre-trial stage. Even issues are yet to be framed in the matter. Secondly, based upon the pleadings in the written statement, if at all, any ground is available to the plaintiff for seeking eviction, then, there is no bar under the CPC for seeking amendment of the plaint in order to incorporate such a ground. Thirdly, in the light of decisions of the Apex Court as also this Court, if plaintiff desirous to seek eviction of defendant on the ground of malafide denial of title, then, such plaintiff is normally required to amend the plaint, so that proper

issues are cast and the defendant is afforded proper opportunity for meeting with the case of such plaintiff. For all these reasons, the impugned order is liable to be set aside.

6] In case of **Majati Subbarao vs. P.V.K. Krishna Rao (deceased)**

by **Lrs.**¹, the Apex Court, at paragraph '6' observed thus:

It was submitted by learned counsel for the appellant that, in any event, the respondent failed to apply for amendment of his plaint and incorporate the ground of denial of title therein as he was bound to do so in order to get relief on that ground which had arisen after the eviction petition was filed. We agree that normally this would have been so but, in the present case, we find that the Trial Court, namely, the Rent Controller, framed an issue as to whether the tenant's denial of the landlord's title to the schedule property including the said premises was bona fide. The parties went to trial on this clear issue and the appellant had full knowledge of the ground alleged against him. It was open to him to have objected to the framing of this issue on the ground that it was not alleged in the eviction petition that the appellant had denied the title of the respondent and that the denial of title was bona fide. If he had done that the respondent could have well applied for an amendment of the eviction petition to incorporate that ground. Having failed to raise that contention at that stage it is not open now to the appellant to say that the eviction decree could not be passed against him as the ground of denial of title was not pleaded in the eviction petition. No other argument have been advanced before us.

(emphasis supplied)

1 AIR 1989 SC 2187

7] Similarly, the Apex Court, in case of *J.J. Lal Pvt. Ltd. & ors. vs. M.R. Murali & anr.*², at paragraphs 16 and 19, has observed thus:

16. *Om Prakash & Ors. Vs. Ram Kumar & Ors. (1991) 1 SCC 441* was a landlord-tenant dispute where the plaintiff-landlord claimed relief of a direction to the tenant to put the landlord in possession on the ground of non-payment of rent under rent control law. This Court opined that under the relevant provisions in the statute a landlord seeking eviction of the tenant is required to make an application in this behalf. Such application is sustainable on one of the grounds specified in the Act. When a specific allegation is made that the tenant is in arrears, the tenant is given an opportunity to pay or tender the rent within a stipulated time and avoid an order of eviction. In the absence of definite allegation of non-payment of rent the tenant is not expected to meet the case by being called upon to answer the claim. It was held that a party cannot be granted a relief which is not claimed, if the circumstances of the case are such that the granting of such relief would result in serious prejudice to the interested party and deprive him of the valuable rights under the statute. In an action by the landlord the tenant is expected to defend only the claim made against him and if a cause of action arises to the landlord on the basis of the plea set up by the tenant, in such action, it is necessary that the landlord seeking to enforce that cause of action in the same proceedings must do so by amendment or may have recourse to separate proceedings to entitle the landlord to relief on the basis of such cause of action. The principle that the court is to mould the relief taking into consideration subsequent events is not applicable in such cases.

17. ...

18. ...

19. For several reasons, we are of the opinion that a decree on the ground of denial of landlord's title by tenant and such denial being not bona fide could not have been a ground for directing eviction of tenant in the present case. Firstly, the

2 (2002) 3 SCC 98

application for eviction filed by the landlord do not plead such a cause of action, setting out material facts and as providing a ground for relief of eviction. The plea taken by the defendant-tenants in their additional counter does not by itself amount to denial of title so as to render them vulnerable to eviction by attracting applicability of Section 10(2) (vii) of the Act. The basic question was whether the landlords themselves treated the plea taken by the tenants in their additional counter as denial of their title and if that be so the landlords should have amended their application for eviction incorporating the averment that the said additional counter amounted to denial of title of the landlords and such denial was not bona fide. Thereupon the tenants would have had an opportunity of explaining the facts and circumstances in which the additional counter, alongwith the pleas raised therein, came to be filed and if that amounted to denial of landlords' title then how did they propose to justify such denial as bona fide. Such pleas could have been subject matter of trial and evidence adduced by the parties followed by expression of opinion by the Controller as to whether a ground for eviction was made out or not. Before the Controller none of the parties were alive to the fact that alleged denial of title by tenants could possibly be clicked by the landlords as a ground for eviction. The Appellate Authority for the first time formulated a point at issue touching this ground during the course of its decision and yet held in favour of the tenants holding that such denial was bona fide. If at all the Appellate Authority was inclined to frame an issue then it ought to have been tried on the lines laid down in Order 41 Rule 25 of the Code of Civil Procedure. The High Court, as already stated, shifted the emphasis and treated the denial of title by tenant as primary ground for eviction and proceeded to decide the same. Thus what was not in issue before the trial Court at all became the core issue on which the High Court has founded its decision. This is not only violative of the established procedure for civil trials but also violative of principles of justice and fair play. The tenants have been certainly prejudiced in their defence and, therefore, availability of that ground for eviction of tenants in the present proceedings cannot be sustained.”

(emphasis supplied)

8] This Court, in case of *Lena Pereira and ors. vs. Mary Boracho and ors.*³, at paragraph, 10 has observed thus:

10. Mr. Rege strongly relied on the provisions of Section 116 of the Evidence Act. He contends that under Section 116 no tenant of immovable property shall be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property. He contends that the moment the tenants in the instant case set up a plea of joint tenancy, they were, in effect, disputing the title of the landlords and, therefore, Section 116 of the Evidence Act furnishes to the Court a clear ground for holding that the tenants ceased to enjoy the protection of the Rent Act and for evicting them forthwith without any further ado. In my judgment, this contention cannot be accepted for more than one reasons. In the first place, no such ground was taken in the pleadings by the plaintiffs. The suit did not seek eviction of the defendants on the ground that there was disclaimer or that the tenants had disputed the title of the plaintiffs. It is also pertinent to note that the so called disclaimer or dispute of title of the landlord did not arise before the suit was filed nor was it made a ground for eviction. On the other hand, the contractual tenancy of the defendants was terminated by the plaintiffs' notice dated 10th March, 1979. After having done so, the plaintiffs filed the present suit and sought relief from the Small Causes Court, which has exclusive jurisdiction under Section 28 of the Rent Act, to grant relief in the matter of eviction where there is a relationship of landlord and tenant as defined under the Act. Even after the defendants amended their written statement and took up the plea of joint tenancy, thus disputing the title of the plaintiffs as landlords, the petitioners did not amend the plaint and raise this fact as a ground for eviction. Even when the matter was carried in appeal, no amendment of the plaint was sought to incorporate such a ground for eviction. The only time we see this contention surfacing is in the appeal memo vide paragraphs (i), (j) and (k). The explanation of the petitioners for not raising an additional ground for eviction on the basis of the tenants disputing the landlord's title is

3 AIR 1992 Bombay 93

that if they had done so, the Small Causes Court would not have jurisdiction to entertain the suit and they might have been driven to the Civil Court for relief. This is hardly an explanation which can be accepted. By not doing what they ought to have done, the plaintiffs cannot get the benefit of what they had not pleaded."

(emphasis supplied)

9] From the aforesaid, it is clear that if plaintiff seeks to raise a ground that the defendant-tenant has denied the title and such denial is not *bona fide*, normally, it is for such plaintiff to apply for amendment of his plaint to incorporate the ground of denial of title in order to get relief upon the said ground which had arisen after the suit for eviction was instituted. In the present case, considering the circumstance that leave to amend in this regard was applied even prior to the issues being framed, the same, ought to have been granted.

10] Mr. Kevic Setalvad, learned senior advocate for the respondent, however, submitted that under the Rent Act denial of landlord's title, is not one of the grounds which entitle a landlord to recover possession of the suit premises. That apart, Mr. Setalvad submitted that perusal of the averments in the written statement would make it clear that there is no denial of title of the landlord, so as to warrant any action of eviction. Mr. Setalvad pointed out that in

case of *Majati Subbarao (supra)*, the A.P. Buildings (Lease, Rent and Eviction) Control Act, 1960 contained a specific provision entitling the landlord to seek eviction where the tenant has denied the title of landlord or claimed a right of permanent tenancy and such denial or claim was not *bona fide*. Similarly, Mr. Setalvad pointed out in case of *J.J. Lal Private Limtied (supra)*, the T.N. Buildings (Lease, Rent and Eviction) Control Act, 1960 contained a specific ground to the same effect. Accordingly, Mr. Setalvad submitted that the two decisions were distinguishable and could not be relied upon. Mr. Setalwad, also invited this Court to refer to paragraph '11' of the decision in case of *Lena Periera (supra)* and submitted that in the absence of provision to the contrary under the Rent Control Legislation, the aspect of denial of title is not relevant for seeking eviction of the tenant, but at the highest, may attract the provisions contained in Section 116 of the Evidence Act, which enumerates the principle of estoppel as between the tenant and landlord. For all these reasons, Mr. Setalvad submitted that there is no case made out to interfere with the impugned order.

11] At this stage, it is not necessary for this Court to go into the issue as to whether or not denial of title is indeed a ground which

entitles a landlord to secure eviction of his tenant under the provisions of Rent Act. Similarly, this is also not the stage to decide whether the averments in the written statement indeed constitute denial of title and further, whether such denial is *bona fide* or not. However, it is expressly made clear that all such issues are specifically kept open for determination by the Trial Court after the pleadings are amended and issues are framed. In fact, the impugned order to the extent it states in paragraph '6' that it is an undisputed fact that denial of title of landlord by tenant is one of the legal ground available for the landlord to seek eviction from the tenanted premises, is in excess of jurisdiction and such observation is also struck out. This is because, the Trial Court, could not have expressed any such opinion, at the stage of consideration of an application seeking leave to amend the plaint. Accordingly, even such issue is specifically kept open.

12] Accordingly, the impugned order dated 9 January 2015 is set aside. Leave to amend as applied at Exhibit-11 is granted. Amendment to be carried out within four weeks from today. The respondent shall be entitled to file his additional written statement in response to amended the plaint within a period of four weeks

from the receipt of amended plaint. All contentions of all parties on merits of the ground now incorporated, including whether or not such a ground is either available under the Rent Act or has been made out, are specifically kept open.

13] The observations in the impugned order that denial of title by landlord is one of the legal grounds available to the landlord to seek eviction of the tenant, is struck out. However, this issue is specifically kept open for consideration by the Trial Court. All contentions of all parties in this regard are, therefore, kept open.

14] Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

(M. S. SONAK, J.)

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CERTIFICATE

“I certify that this Order uploaded is a true
and correct copy of original signed Order.”