

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 3639 OF 2014**

**Hirabai Jaywant Lolekar (deceased)
through LRS & Ors.**

..Petitioners

Vs.

**Mandakini Mohan Pathare (deceased)
LRS & Ors.**

..Respondents

**Mr. P. G. Karande for the Petitioners
Dr. Pallavi Divekar i/b Divekar & Co. for the Respondent Nos.2 and 3**

**CORAM : R. M. SAVANT, J.
DATE : 30th NOVEMBER, 2015**

P.C.

1 The Writ Jurisdiction of this court is invoked against the order dated 4-2-2014 passed by the Appellate Bench of the Small Causes Court, by which order the application Exhibit 36 filed by the Petitioners i.e. original Defendants for amendment of the Written Statement and for incorporating two grounds in the Memo of Appeal, came to be rejected.

2 The Appeal in question being Appeal No.638 of 2005 has been filed by the Defendants i.e. the Petitioners herein. The said Appeal has been filed against the decree in RAE Suit No.156/256 of 2002 filed by the Respondent Nos.1 to 3 herein. The said decree has been passed on the ground of bonafide requirement. In the said Appeal, the Petitioners/Appellants have filed the instant application Exhibit 36 to amend the Written Statement filed by

them in the Suit so as to incorporate paragraph 8(a) which contains averments relating to certain flats which are available to the Plaintiffs i.e. the Respondent Nos.1 to 3 herein. The Appellants also want to incorporate three grounds in the Memo of Appeal i.e. grounds (hh), (ii) and (jj). The said grounds also relate to the case of bonafide requirement made out by the Plaintiffs. The said application was replied to on behalf of the Respondent Nos.1 to 3 herein by filing reply of one Vijay Pathare. The case made out in the application Exhibit 36 was denied by the Plaintiffs and it was contended that the Appellants were not entitled to amend the Written Statement as also incorporate three additional grounds.

3 The Trial Court considered the said application Exhibit 36 and has by the impugned order dated 4-2-2014 rejected the said application. The Trial Court has rejected the application principally on the touchstone of Order VI Rule 17 of the Civil Procedure Code and the proviso thereof. The Trial Court held that in the absence of any pleadings as to why the facts now sought to be incorporated by way of an amendment were not pleaded earlier. The Trial Court held that the Defendants would not be entitled to amend the Written Statement having regard to the principles applicable to Order VI Rule 17 of the CPC. The Trial Court as can be seen proceeded on the premise that the Suit was filed in the year 2002, in so far as it relate to Order VI Rule 17 is concerned, the Trial Court held that unless the due diligence test as postulated

in the proviso to Rule 17 is satisfied, the Defendants were not entitled to amend the Written Statement. The Trial Court has accordingly rejected the said application Exhibit 36.

4 It is the submission of the Learned Counsel appearing for the Petitioners that the Suit was filed in January 2002 whereas the amendments which have been introduced in the CPC were in July 2002 and therefore the amendment in question would not apply to the instant Suit and therefore there is no requirement for the Defendants to satisfy the due diligence test. In so far as the addition of grounds in the Appeal Memo are concerned, it is the submission of the Learned Counsel that the Defendants are merely seeking to incorporate additional grounds and therefore the Trial Court has erred in rejecting the application for inclusion of the additional grounds.

5 Per contra the Learned Counsel appearing for the Respondent Nos.1 to 3 i.e. the original Plaintiffs Ms Divekar, sought to support the impugned order. The Learned Counsel sought to draw this court's attention to the averments made in the application wherein the averment relating to the fact that the facts which are now sought to be incorporated vide paragraph 8(a) are the facts which subsequently came to the knowledge of the Defendants, is conspicuously absent. The Learned Counsel would contend that the incorporation of the said paragraph 8(a) so as to include the facts

contained therein would prejudice the original Plaintiffs in the Appeal.

6 Having heard the Learned Counsel for the parties I have considered the rival contentions. As indicated above, by the application Exhibit 36 two fold amendments have been sought one is to incorporate paragraph 8(a) in the Written Statement i.e. the amendment of the Written Statement is sought and the second amendment sought is to incorporate the grounds in the Memo of Appeal. In so far as the amendment to the Written Statement is concerned, as indicated above the same has been rejected by the Trial Court on the touchstone of Order VI Rule 17 of the CPC. The Trial Court was of the view that the Defendants in terms of proviso to Order VI Rule 17 were required to satisfy the due diligence test whereas in the instant case, the averments as to when the Defendants became aware of the facts which are now sought to be incorporated in paragraph 8(a), is conspicuously absent. In my view, the Trial Court has erred in applying the test laid down by Order VI Rule 17 of the CPC and the proviso thereof which has been added by the amendments which were incorporated in the year 2002. As held by a catena of judgments of this Court a Suit which is anti dating July 2002, the provisions of the amended Civil Procedure Code would not apply and therefore the Trial Court had erred in applying Order VI Rule 17 as amended to the instant Suit. Notwithstanding the said error committed by the Trial Court, it would have to be seen whether the Defendants are entitled to amend the Written Statement by incorporating

paragraph 8(a) as set out in the schedule to the amendment application. In the said context it will have to be borne in mind that the Suit filed by the Respondent Nos.1 to 3 has been decreed by the Trial Court on the ground of bonafide requirement. Hence the decree passed by the Trial Court is an intervening fact which cannot be lost sight of whilst considering the application for amendment of the Written Statement.

7 In so far as paragraph 8(a) is concerned, the amendment application is bereft of any particulars as to when the said facts which are sought to be incorporated in paragraph 8(a) came to be knowledge of the Defendants. In so far as the death of the landlord i.e. Mandakini Pathare is concerned, it has been stated by the Defendants that the said fact came to be known to them subsequent to the decree. However in so far as the availability of accommodation mentioned in paragraph 8(a) is concerned, the said fact of the date of knowledge being acquired is conspicuously absent. In my view, the said aspect is very vital considering the fact that the Appellants / Petitioners herein have suffered a decree on the ground of bonafide requirement.

8 In my view therefore, though Order VI Rule 17 would have no application, nevertheless the Defendants would not be entitled to amend the Written Statement as they have not stated as to when the said facts became known to them. Hence in so far as the rejection of the application of

amendment of the Written Statement, that part of the order cannot be found fault with.

9 Now coming to the additional grounds, incorporation of which is sought by the instant application Exhibit 36, in my view, the Trial Court has erred in rejecting the application to incorporate the said grounds. The incorporation of the said grounds would not mean that the said grounds are accepted by the Appellate Court. It is for the Appellate Court to consider whether the case is made out as set out in the said grounds and at the stage of consideration of the application for amendment, the Court cannot be judgmental in respect of the said case. Hence in so far as the application for amendment for incorporation of the grounds is concerned, the same would stand allowed. The Petitioners / Appellants would be entitled to incorporate the said grounds in the Memo of Appeal raising a challenge to the impugned decree. Amendment to be carried out within four weeks from date. The Petition is accordingly partly allowed to the extent mentioned hereinabove and is disposed of as such.

[R.M.SAVANT, J]