

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION  
WRIT PETITION NO. 10155 OF 2013

AND

WRIT PETITION NO. 4678 OF 2015

Meher Keki Palia & anr.

.. Petitioners

vs.

M/s. Diana Soaps Company & ors.

.. Respondents

Mr. P.S. Dani, Sr. Advocate i/b Ms Jui A. Nerurkar for the Petitioners.

Mr. G.S. Godbole i/b Mr. S.L. Shah for Respondent Nos.2 and 3.

**CORAM : M. S. SONAK, J.**

**DATE : 9 JULY 2015.**

**P.C. :-**

1] These two petitions can be disposed of by a common order.

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

3] In Writ Petition No. 10155 of 2013, the challenge is to the following orders made by the learned Small Causes Court (Trial Court):

A] The order dated 17 July 2013 below Exhibit-33, by which Respondent Nos.2 and 3 have been granted leave to amend their written statement;

B] The order dated 8 May 2013 below Exhibit-31, by which the Petitioners' application seeking direction to Respondent Nos.2 and 3 to lead evidence first came to be rejected.

4] In so far as the order dated 17 July 2013 is concerned, there is no jurisdictional error in the making of same. This is because, the amendment was applied for before the commencement of the trial.

The amendment was applied for in view of certain subsequent events in the nature of compromise between the Petitioners herein and Respondent No.1. The amendment was necessary for the purposes of adjudication of the issues which arise in the matter. Accordingly, there is no reason to interfere with the impugned order dated 17 July 2013.

5] In so far as the second order dated 8 May 2013 is concerned, once again there is no reason to interfere with the same. This is because, the Petitioners have instituted proceedings seeking eviction of the Respondents, not merely on the grounds of alleged unauthorised subletting, but also on the grounds that the Petitioners require the suit premises reasonably and bonafide. In such circumstances, it is not for the Petitioners to insist that Respondent Nos.2 and 3 to lead evidence first. Besides, as has been held by this Court in case of *Bhagirath S. Somani & anr. Vs. Rameshchandra Daulala Soni & anr. - 2007 (4) ALL MR 514* under the scheme of Order 18 Rule 1 of the CPC, a Plaintiff, cannot insist that the Defendant leads evidence first, though it may be open to a Defendant to offer to lead evidence first. There is accordingly, no jurisdictional error in making of the impugned order.

6] In Writ Petition No. 4678 of 2015, the challenge is to the orders dated 22 August 2014, 23 September 2014 and 18 April 2015, all of which, have the effect of closure of Petitioners' evidence in R.A.E. Suit No. 809/1296 of 2007. It is the case of the Petitioners that no evidence was led by the Petitioners because of pendency of Writ Petition No. 10155 of 2013, in which the order dated 8 May

2013 seeking directions to Respondent Nos.2 and 3 to lead evidence first, was challenged. Although, the mere pendency of the petition was not a proper ground to refuse to lead the evidence, nevertheless, the fact remains that the petition was pending and the Petitioners did expect a reversal of the order dated 8 May 2013. This Court has not interfered with the order dated 8 May 2013. However, since the impugned orders completely preclude the Petitioners from leading evidence in their suit, the same would, in the circumstances be harsh. It cannot be said that the Petitioners have really gained substantially by the delay which has occasioned in the meantime. Such delay shall however been taken into consideration by the Trial Court, should any occasion arise to direct payments of mesne profit by the Respondents. This is because, the Respondents are not responsible for such delay. In these circumstances, the impugned orders dated 22 August 2014, 23 September 2014 and 18 April 2015 are set aside and the Petitioners are granted liberty to lead evidence in R.A.E. Suit No. 809/1296 of 2007. This shall however be subject to the Petitioners paying costs of Rs.5000/- to Respondent Nos.2 and 3. Such costs to be paid or deposited in the Trial Court within a period of two weeks from today. The costs, if deposited, may be withdrawn by Respondent Nos.2 and 3 unconditionally.

7] In view of setting aside of the aforesaid impugned orders, obviously, Respondent Nos.2 and 3 will also be entitled to lead their evidence in rebuttal. This aspect is clarified, because in the meantime, Respondent Nos.2 and 3 have submitted a purshis to the effect that they do not desire to lead any further evidence in the matter, because of making of the impugned orders. The purshis is,

therefore, deemed to be withdrawn at the oral request of Mr. Godbole, learned counsel appearing for Respondent Nos.2 and 3.

8] Accordingly, Rule is discharged in Writ Petition No. 10155 of 2013 and made absolute in Writ Petition No. 4678 of 2015 to the extent indicated. There shall be no separate order as to cost in these petition.

9] All concerned to act upon an authenticated copy of this order.

**(M. S. SONAK, J.)**