

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5444 OF 2015

Mr. Mussani Nurullah Allauddin .. Petitioner
vs.
Mr. Leslie John Merchant .. Respondent

WITH

WRIT PETITION NO. 5445 OF 2015

Mrs. Rashida Nurullah Allauddin .. Petitioner
vs.
Mr. Leslie John Merchant .. Respondent

Mr. Shailesh Shah, Senior Advocate i/b A.M. Rajabally for the
Petitioners in both petitions.
Mr. R.A. Thorat, Senior Advocate i/b Ms Pratibha Shelke for the
Respondent in both petitions.

CORAM : M. S. SONAK, J.
DATE : 11 AUGUST 2015.

P.C. :-

1] These two petitions can be disposed of with the common
order, as the learned senior advocate for the parties state that the
facts involved therein are substantially the same.

2] Accordingly, Rule in both the petitions. With the consent of
and at the request of learned senior advocate for the parties, Rule is
made returnable forthwith.

3] The petitioners, in both these petitions, are the tenants of the commercial premises of which the respondent is the landlord. By the impugned orders dated 22 August 2014 and 7 May 2015, the Trial Court and the Revisional Court have declined leave to the petitioners to amend the respective written statements, primarily on the ground that such leave was applied for after the commencement of trial and no sufficient cause was shown or diligence demonstrated, as to why such amendment could not be applied for earlier.

4] Mr. Shailesh Shah, learned senior advocate for the petitioners in both the petitions, submitted that the amendments applied for are vital to the defence of the petitioners. The amendments primarily seek to bring on record the details of other properties held or owned by the respondent-landlord. This is relevant because eviction has been sought for on the ground of reasonable and *bona fide* requirement. Mr. Shah submitted that the advocate earlier engaged by the petitioners had to be replaced in March 2013. Although, certain details with regard to the properties held by the respondent were available by January-February 2013, the petitioners had applied for and were hopeful for obtaining the further details with regard to the properties as also other Civil Suits instituted by the

respondent seeking eviction of other tenants. It is in these circumstances that the applications seeking leave to amend came to be filed in November 2013, by which time, that is, in April 2013, the respondent had already filed its affidavit in lieu of examination-in-chief. Mr. Shah submitted that the cross-examination is yet to begin and in the facts and circumstances of this case, the due diligence was duly demonstrated. The prejudice, if any, to the respondent can always be compensated by costs, more particularly since it was the duty of the respondent to disclose all details with regard to the premises held by them.

5] Mr. R.A. Thorat, learned senior advocate for the respondent-landlord, in the context of amendments applied for, submitted that several amendments relate to the matters which were known to the petitioners on the date when their written statements were filed. The other matters relate to residential premises and consequently are totally irrelevant to the issues raised in the eviction petition. Mr. Thorat pointed out that the eviction is applied for in respect of commercial premises. In this context, the circumstance that the respondent has some other residential premises is totally irrelevant. Mr. Thorat further pointed out that in the plaint itself there was

reference to commercial premises held by the respondent, therefore, this is not a case of suppression. Mr. Thorat, ultimately submitted that the applications for amendment as also the text/schedule of the amendments make it clear that the property details were available to the petitioners by January 2013 and consequently, there is no explanation as to why the amendments were not applied for prior to commencement of the trial in April 2013. For all these reasons, Mr.Thorat submitted that this is not a fit case to interfere in exercise of extra ordinary jurisdiction under Article 227 of the Constitution of India.

6] Having heard the learned senior advocate for the parties and perused the record, some partial reliefs can be granted to the petitioners, but subject to payment of substantial costs. Mr. Thorat is right in his submission that the proposed amendment contained in paragraphs B(i) and B(ii) are matters which the petitioners knew, at the stage, when the written statements were filed by them. Accordingly, there is no explanation whatsoever as to what prevented the petitioners from incorporating such averments in their written statements as originally filed or at any stage prior to the

commencement of the trial. Accordingly, no case is made out for leave to amend by way of introducing paragraphs B(i) and B(ii).

7] In so far as the proposed amendment in the remaining paragraphs are concerned, the same relates to both residential as well as commercial premises. In the plaint as well as in the written statements as originally filed, no doubt, there was some reference to the commercial premises held by the respondent. The amendments, however, seek to place on record certain details in the context of such as well as other premises. The amendments also seek to place on record certain details with regard to the legal proceedings instituted by the respondent against the other parties/tenants. There is also reference to certain premises which are residential. At this stage, it is too premature to proceed on the basis that all such material is either extraneous or irrelevant to the issues which will arise in the proceedings. Ultimately, in such matters, the Courts will have to consider the issue of comparative hardship and at least in the context of such an issue it cannot be *prima-facie* said that the material which the petitioners seek to place on record is totally extraneous or irrelevant.

8] Although there is material on record, in the form of statements made by the petitioners themselves that the property details at least in respect of some of the properties were available by January or February 2013, it is to be noted that certain other details, including in the context of pending litigation, decrees and other information was acquired post the commencement of the trial. This is also not a case where the trial has reached at some advanced stage. The respondent has filed affidavit in lieu of examination-in-chief and the cross-examination is yet to commence. The petitioners have stated that their earlier advocate was required to be replaced. Therefore, upon cumulative considerations of all these circumstances, an opportunity can be granted to the petitioners to amend their written statements in the context of the proposed averments, except of course the averments contained in paragraphs B(i) and B(ii). However, this shall be subject to payment of substantial costs by the petitioners.

9] The petitioners, no doubt, could have acted with greater diligence. Nothing prevented the petitioners from applying for the amendments at least on the basis of property cards which were received by them in January-February 2013. If the explanation that

further information was due and it was felt that the comprehensive amendment would be appropriate, is to be accepted then the same shall have to be subject to payment of substantial costs by the petitioners. The petitioners have explained that they waited for collection of all the material so as to file a comprehensive amendment, in the meanwhile, they were required to replace their earlier advocate. For all these factors, at least, the respondent is in no way responsible. The proceedings instituted by the respondent have been delayed on account of this issue of the amendment. For all these reasons, if, in the interest of justice, the amendments are to be allowed even partially, the petitioners shall have to pay costs in respect of the same.

10] This Court as well as the Hon'ble Apex Court have held that normally no amendment to be permitted once the trial has commenced, unless good reasons exist and the applicant demonstrate that despite due diligence such amendment could not be applied for earlier. In the present case, if the factors like replacement of earlier advocate and the time required for collection of material and the advise that a comprehensive amendment based upon the entire material which is collected are taken into

consideration, then leave can be granted to a limited extent. It is also to be noted that at the stage when the amendment was applied for, only affidavit in lieu of examination-in-chief had been filed and the cross-examination is yet to begin.

11] Upon cumulative considerations of all the aforesaid circumstances, leave is granted to amend the written statements in terms of Schedule appended to the respective applications seeking leave except of course in the context of averments contained in paragraphs B(i) and B(ii). This shall be subject to payment of cost of Rs.75,000/- by the petitioners in favour of the respondent. Such costs to be paid or deposited before the Trial Court within a period of two weeks from today. In case such costs are deposited, the petitioners can carry out amendment to their written statements within a period of two weeks thereafter. In case costs are not deposited within a period of two weeks, then these petitions shall be deemed to have been dismissed.

12] It is made clear that the costs of Rs.75,000/- each shall be deposited in each of the Civil Suits, i.e., R.A.E. Suit No. 182/230 of 2011 and R.A.E. Suit No. 183/231 of 2011.

13] If costs of Rs.75,000/- are deposited in each of the above suits, the respondent is at liberty to withdraw the same unconditionally.

14] Further, the proceedings in two R.A.E. Suits are directed to be expedited. Rule is made partly absolute to the aforesaid extent in each of the petitions. There shall be no separate order as to costs in these petitions.

15] All concerned to act on the basis of an authenticated copy of this order.

(M. S. SONAK, J.)

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