

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO.9126 OF 2013**

**Smt. Kitty Lobo (Since deceased deleted)**

**Neil James Lobo and others**

**.. Petitioners**

**Versus**

**Smt. Pooja Manhas and another**

**.. Respondents**

**Mr. D. A. Joseph i/by M/s. David & Associates, for the Petitioners.**

**Mr. A. H. Singh, for the Respondents.**

**CORAM : R.M. SAVANT, J.**

**DATE : 16<sup>th</sup> NOVEMBER, 2015**

**PC.**

1. The Writ Jurisdiction of this Court is invoked against the order dated 14.02.2013 passed by the two Judge Bench of the Small Causes Court at Bandra, Mumbai, by which order the Revision Application filed by the Petitioners came to be dismissed and resultantly, the order dated 23.11.2010 passed by the Learned Judge of the Small Causes Court rejecting the application Exh.63 for deleting the Defendant No.2 from the suit in question came to be confirmed.

2. The question that arises in the above Petition is whether the Plaintiff can be permitted to delete the Defendant No.2 from the suit in question. The suit in question being LE & C Suit No.37/53 of 1998 has

been filed by the Plaintiff for eviction against the Defendant No.1 from the suit premises being Room No.7, situated on the first floor, House No.75B, admeasuring 225 sq.ft., Vakola Village, Santracruz (E), Mumbai-400 055. In the context of the question adverted to hereinabove, it is required to be noted that the Respondent No.2 herein is the Defendant No.2 to the suit. It has been stated in paragraph 1 of the plaint that the Defendant No.2 is only a formal party. However, in paragraphs 3 and 6 certain acts have been attributed to the Defendant No.2. The sum and substance of the case of the Plaintiff was that the Defendant No.2 was an acquaintance of the son of the original Plaintiff and it is on his saying that the possession of the premises in question was given by the Plaintiff to the sister of the Defendant No.2 i.e. Defendant No.1. It is further the case of the Plaintiff that the Defendant No.1 is a gratuitous licensee. The said case is the foundation of the suit in question.

3. It appears that the Defendant No.2 has filed his written statement in the suit, whereas the Defendant No.1 has not filed her written statement and there are certain orders passed in respect of the written statement of the Defendant No.1 which are not necessary to be gone into in this Petition, as the companion Petition concerns the said orders. Be that as it may, the Trial Court framed issues on the basis of the pleadings which were on record i.e. the plaint and the written statement

filed by the Defendant No.2 and the matter proceeded to trial. It is an undisputed position that the affidavit of evidence came to be filed by the Plaintiff on 14.06.2010 and the Plaintiff was cross-examined by the advocate of the Defendant No.2 and which cross-examination was completed on 25.06.2010. The record discloses that thereafter Defendant No.2 filed his affidavit of examination-in-chief on 03.07.2010 and the advocate for the Plaintiff cross-examined the Defendant No.2 on 13.07.2010 after which an application was filed on behalf of the Defendant No.2 for examining three more witnesses in support of his case. It appears that prior thereto on 25.03.2010 the Plaintiff had filed an application for deletion of the Defendant No.2. An issue arose as regards whether the said application was in fact filed by the Plaintiff which issue had reached this Court vide Misc. Civil Application No.92 of 2010 wherein this Court directed the Trial Court to hear the said application for deletion of the Defendant No.2 before proceeding with the suit, that is how the Trial Court considered the said application for deletion of the Defendant No.2 and has by its order dated 23.11.2010 rejected the said application. The Trial Court has referred to the facts as stated hereinabove, namely the fact that the evidence was led by the parties and it is on the said basis the Trial Court was of the view that the application could not be allowed and accordingly rejected the same.

4. The Plaintiff carried the matter by way of a Revision being Revision Application No.185 of 2011. The Lower Appellate Court has by the impugned order rejected the said Revision Application. The Lower Appellate Court has reiterated the ground on the basis of which the Trial Court has rejected the application namely that the parties have led evidence in as much as the Plaintiff was cross-examined by the Defendant No.2 and the Defendant No.2 was cross-examined by the Plaintiff. The Lower Appellate Court was of the view that the evidence cannot be allowed to be washed away in the manner sought by the Plaintiff. The Lower Appellate Court has also adverted to the fine distinction between a proper party and a necessary party and has thereafter rejected the Revision Application. As indicated above, it is the said order dated 14.02.2013 which is taken exception to by way of the above Writ Petition.

5. It is the submission of the Learned Counsel appearing on behalf of the Petitioners Mr. D. A. Joseph that the Defendant No.2 being a formal party, the Plaintiff does not want to proceed against the said Defendant. It was further the submission of the Learned Counsel that the Plaintiff cannot be asked to proceed against a party against whom he does not claim any relief and thereby delay the adjudication of the proceedings. This was the principal contention urged on behalf of the Petitioners.

6. Per contra, it was the submission of the Learned Counsel appearing on behalf of the Respondents that having regard to the stage at which the said application was considered namely after the evidence was led by the parties, the order passed by the Courts below cannot be faulted with. It was also the submission of the Learned Counsel for the Respondents based on the averments in the plaint the presence of the Defendant No.2 is necessary. It was also his submission that since the suit as originally filed is on the basis of certain averments which find a place in the plaint, the parties having led evidence on the said basis, the Defendant No.2 cannot be permitted to be deleted at this stage.

7. Having heard the Learned Counsel for the parties, I have considered the rival contentions. As indicated above, though the suit is mainly directed against the Defendant No.1, a reading of the plaint discloses that though the Defendant No.2 has been described as a formal party certain averments find a place in the plaint regarding the Defendant No.2 especially in paragraphs 3 and 6 thereof. It appears that the Plaintiff had also entered into a correspondence with the Commissioner of Police as the Defendant No.2 according to the Plaintiff was a Police Officer working with the local Police Station. Hence, the Plaintiff can be said to have rightly joined the Defendant No.2 to the suit in question. As indicated above, the Defendant No.2 has filed his written statement and dealt with

the averments in the plaint. Thereafter the Defendant No.2 has also cross-examined the Plaintiff and has also led his own evidence and was cross-examined on behalf of the Plaintiff. This all transpired, prior to the application filed by the Plaintiff for his deletion was considered by the Trial Court. The Courts below therefore on the said basis have reached a conclusion that having regard to the said fact of the evidence being led by the parties, the application of the Plaintiff for deletion of the Defendant No.2 could not be allowed. As indicated above, the Plaintiff has attributed certain acts to the Defendant No.2 which find a place in the plaint. It is the case of the Plaintiff that it is on account of the Defendant No.2 that the Defendant No.1 was put in possession as the Defendant No.2 was a friend of the son of the Plaintiff. Hence, having regard to the fine distinction between a necessary and formal party, the Defendant No.2 in the instant case can be said to be a proper party whose presence is necessary for an effectual adjudication of the suit. In my view, therefore, the order passed by the Courts below rejecting the application for deletion of the Defendant No.2 does not suffer from any illegality or infirmity for this Court to interfere in its Writ Jurisdiction. The Writ Petition is accordingly dismissed.

**[R.M. SAVANT, J]**