

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.10887 OF 2014

Vijay Dhanwatay S/o. Marutirao Dhanwatay.] ... Petitioner

Versus

1. Messrs. Imperial Real Estate Service,]
2. Mr. R. Vivekananda Rao,]
3. Smt. Asha Nandan Hanovar.] ... Respondents

Mr. Khan Javed Akhtar for Petitioner.

Mr. Bodke i/b Chitnis Vaithy & Co. for Respondents.

CORAM :- M. S. SONAK, J.

DATE :- SEPTEMBER 10, 2015

P. C. :-

1. Rule.

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

3. This petition challenges orders dated 17/07/2012 and 01/10/2014 made by the Trial Court and the Revisional Court, rejecting the Petitioner's application at Exh.65 seeking to amend the plaint and raise the ground of non-user of the suit premises without any reasonable cause.

4. The application seeking leave to amend was filed on 10/05/2012 i.e. prior to the commencement of the trial with the filing of the affidavit in lieu of examination-in-chief on 11/03/2013. The Trial Court dismissed the application on 17/07/2012, basically on the ground that the trial had already commenced at the stage when the application seeking leave to amend came up for consideration. The Revisional Court, in its order dated 01/10/2014, has made reference to the deposition of the Petitioner (PW 1) on 12/11/2013, in the course of which he has stated to have admitted that from 24/09/1971 till the date of deposition, the Defendants are using the suit premises for office purposes. The Revisional Court has held that in view of such admission, there is no point in permitting leave to amend to raise the ground of non-user.

5. Having heard the learned Counsel for parties and perused the record, interest of justice would require that the impugned orders are set aside and leave to amend, as prayed for in the application at Exh.65, is granted. In the first place, the Trial Court was not at all right in rejecting the application on the ground that the trial had already commenced. Admittedly, the application seeking leave to amend was filed on 10/05/2012 and the trial commenced with the filing of affidavit in lieu of examination-in-chief by the Petitioner on 11/03/2013. Merely because the application seeking leave to amend was considered after commencement of the trial, is by itself, no reason to invoke the proviso to Order 6 Rule 17 of the CPC and deny leave to amend.

6. Insofar as the so called 'admission' in deposition of the Petitioner on 12/11/2013 is concerned, it is too premature at this stage to style the said deposition as some sort of admission. It is to be noted that in para 33 of the affidavit in lieu of examination-in-chief, the Petitioner had categorically stated that the suit premises are not being used and therefore, the electric consumption of the suit flat is shown as 'Nil' or 'Negligible'. The learned Counsel for Petitioner has several explanations to offer with regard to the so called 'admission' in the course of cross-examination. However, this is hardly the stage to either consider or accept such explanations. The learned Counsel for Petitioner is however right, that based on the so called 'admission', there was no reason to decline leave to amend. Ultimately, even though it may not be permissible to withdraw admissions, it is always permissible to explain the same. Accordingly, the Appeal Court was not right in endorsing the Trial Court and rejecting leave to amend.

7. In this case, if leave to amend is declined, the same will lead to multiplicity. Any observation on the merits of the matter at the stage of consideration of an application seeking leave to amend is also not proper. All that the Petitioner seeks to do is to raise yet another ground for seeking eviction of the Respondent. Whether such ground bears merit or not, is ultimately a matter to be decided after the parties have led their evidence in the matter.

8. In matters where amendment is applied prior to the commencement of the trial, liberality is warranted. No doubt, some

prejudice is bound to occasion to the Respondents. However, the prejudice in such a situation is not of the order which cannot be compensated in terms of costs. This is therefore a case where the Petitioner shall have to pay costs to the Respondents landlord particularly now that the Petitioner will seek to lead fresh evidence in the context of ground of non-user. Further, it is reported that the Petitioner has obtained order of expedition of the proceeding before the Trial Court. There is no reason for such order to continue any further and the suit can always be decided in its turn.

9. Accordingly, the impugned orders are set aside. Petitioner's application at Exh.65 is allowed. Leave to amend is granted. Amendment to be carried out within a period of two weeks from the date of production of authenticated copy of this order before the Trial Court. The Respondents shall be entitled to file an additional written statement within a period of four weeks from the date of service of the amended plaint.

10. In case, the Petitioner and the Respondents desire to examine themselves once again, the Trial Court is requested to permit them to do so. This, however, does not mean that the affidavits and depositions on record can be withdrawn. The same are required to be retained on record and taken into consideration at the stage of final disposal of the suit. Liberty is only for the purposes of leading additional evidence in the context of the amendment now permitted.

11. The aforesaid relief is subject to the Petitioner paying costs of Rs.25,000/- (Rupees Twenty Five Thousand Only) within a period of four weeks from today. In case the costs are not paid, then this petition shall be deemed to have been dismissed.

12. The parties to appear before the Trial Court on 12/10/2015 at 11.00 a.m. and produce authenticated copy of this order.

13. Rule is made absolute with costs to the aforesaid extent.

(M. S. SONAK, J.)

CERTIFICATE

Certified to be true and correct copy of the original signed
Order.