IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1873 OF 2009

Mrs.Flavia Louiee D'Souza & Ors. ..Petitioners
V/s.
Mr.Nitin Kantilal Gandhi & Anr. .. Respondents

Mr.P.J. Thorat a/w Mr. Bipin J. Joishi for the petitioners.
Mr.V.Y. Divekar a/w Ms.Sayali Gharpure i/b M/s.Divekar and Co. for the Respondents.

CORAM : R.G. KETKAR, J.

DATE : 30th JUNE, 2016.

P.C.

1. Heard Mr.P.J. Thorat learned counsel for the Petitioners and Mr.V.Y. Divekar learned counsel for the Respondents at length.

2. By this petition under Article 227 of the Constitution of India, petitioners have challenged the judgment and order dated 11th August 2008 passed by the learned Judge presiding over Court Room No.6 of the Court of Small Causes at Bombay below Exh.19 in R.A.D. Suit No.1565 of 2005. By that order, the learned Trial Judge rejected the application

made by plaintiff No.2 under Order 6 Rule 17 of Code of Civil Procedure, 1908 (for short 'C.P.C.') for amending the plaint.

3. Petitioners, hereinafter referred to as 'plaintiffs', have instituted a Suit on 26th October 2005 inter alia claiming for declaration that they are heirs and family members of Alan D'Souza (since deceased) (Original Tenant) and are entitled to the right of the Suit premises as the tenants namely Flat No.1, admeasuring 1803 sq. ft. (excluding fowl house) Marian Mansion, 240 Central Avenue, Chembur, Mumbai-400 071 situate on CTS No.1376, 1376/1 to 6 1803 sq.ft. (for short 'suit premises'). Plaintiffs further sought declaration that they are the tenants of defendant Nos.1 and 2 are entitled to be put into immediate use, occupation and possession of the suit premises. By prayer clause (c), plaintiffs sought interim relief directing the defendant Nos.1, 2 and defendant No.3 to prove alternate accommodation and area equivalent to 1803 sq.ft. (excluding fowl house). The plaintiffs alleged that the building was demolished on 23rd October 2005.

4. During pendency of the suit, plaintiff No.2 filed an application for amendment on 18th September 2007 for amending the plaint in terms of schedule annexed to the application.

5. Defendant No.1 filed reply for himself and on behalf of defendant No.2 on 16th July 2008 opposing the application. By the impugned order, the learned Trial Judge rejected the application. In paragraph 7, the learned Trial Judge has given reasons. Paragraph 7 reads thus :

> *"7. After conscious hearing both the sides and going through the record and proceedings, it appear that the proposed amendment as per schedule annexed with the application is based on some complaints, which were initiated by the plaintiffs against the defendants before the Competent Authority. The said proceedings has nothing to do with the present proceedings. I want to submit here that if the proposed amendment will be allowed, then it will be certainly changes the nature of the suit. The plaintiff No.2 wants to introduce some irrelevant facts after framing of issues. I want to submit here that cited case laws is also not applicable to the present facts of the case. Hence, I do not find any merit in the contentions of the plaintiff No.2. I seems that only to protract the trial of the matter, the plaintiff No.2 wants to add some new facts.*

Hence, the application is devoid of any merits. Consequently, I proceed to pass following order.

ORDER

The application is rejected.
No order as to costs."

6. It is against this order, the plaintiffs have instituted the present Petition. In support of this Petition, Mr.Thorat has taken me to through the plaint, application for amendment, reply filed by defendants as also the documents produced along with the application for amendment and submitted that the impugned order deserves to be set aside.

7. On the other hand Mr.Divekar supported the impugned order. He submitted that the learned Trial Judge rejected the application on two grounds (i) that the proposed amendment is not relevant for deciding the controversy raised between the parties and (ii) the proposed amendment changes the nature of the Suit.

8. Mr.Divekar invited my attention to prayer clause (c-1) wherein plaintiffs in the alternative of prayer (b-1) have

prayed for passing decree of mandatory orders for granting permanent alternate accommodation of equivalent size i.e. 1803 sq.ft. carpet area on the ground floor of the property referred in prayer (a-1) on ownership basis. Whereas in the Suit, plaintiffs have prayed declaration of their tenenancy rights, by the proposed amendment they are seeking permanent alternate accommodation of 1803 sq.ft. on ownership basis. The learned Trial Judge was, therefore, fully justified in rejecting the application on the ground that the proposed amendment changes the nature of the suit.

9. I have considered the rival submissions advanced by the learned counsel for the parties. I have also perused the material on record. Plaintiffs have asserted that their predecessor Alan D'souza was tenant of Flat No.1, admeasuring approximately 1803 sq.ft. and that they are the heirs and representatives of Alan D'souza. The plaintiffs have claimed declaration that they are the heirs and family members of deceased Alan D'souza and as such are entitled to the right of suit premises namely Flat No.1, admeasuring 1803 sq.ft. It is in

that context one has to consider the application made by the plaintiffs for amending the plaint. The Plaintiffs have referred to the proceedings before the Competent Authority under Urban Land (Ceiling and Regulation) Act, 1976 (for short 'ULC Act'). In particular, plaintiffs have referred to the order dated 19th May 2007 passed by the Competent Authority as also order passed by the Divisional Commissioner in Appeal Nos.355 and 254 of 2007. They have also referred to IOD dated 17th October 2006 issued by the Executive Engineer (Building proposal). Referring to these documents, plaintiffs specifically say that defendants have agreed to provide 1803 sq.ft. area to heirs of Alan D'souza-Original Tenant.

10. Perusal of the order dated 19th May 2007 passed by the Competent Authority shows that the authority has made reference to the present suit as also order dated 04th May 2006 passed by the trial Court in the present suit and has directed the developer to ensure that while getting a plan sanctioned, the tenancy rights of Alan D'souza is kept in mind. It is also recorded that defendants have shown 1803 sq.ft. built up area

reserved for Alan D'souza and the same is shown on approved plan and has given an undertaking that he will abide by the final decision of the Court in tenancy right matter. The Competent Authority has also directed that occupation certificate of Building-A shall not be issued unless the agreement made with the legal heirs of tenant Alan D'souza as per the final outcome of the present Suit and the same is submitted to its office for compliance.

11. Aggrieved by this order, defendants preferred Appeal before the Additional Commissioner, Konkan Division on 04th October 2007. The Additional Commissioner dismissed the appeal. Even the co-owners Appeal namely John Joseph Anthony's Appeal was also dismissed by the Additional Commissioner. Defendants have given undertaking to the Competent Authority and in particular in paragraph 3 it is stated thus:-

> *"That in 'A' wing there were 4 tenants we had settled with 3 tenants and necessary documents have been already submitted. For 4th tenants was vacant and the concern tenant Shri.D'Souza had expired and for years it was vacant. Due to*

dilapidated condition of the building, building collapsed. Heirs of late D'souza claim tenant right. They have filed a case in small chase court bearing no.1565/2005. In the above case court has given interim ruling to keep accommodation for rehabilitation of tenant. On this tenant no 3rd party in interest shall be created. Accordingly tenant of 1000=00 sq.ft. Have been kept on second floor. However heirs of late D'souza is pleading and insisting to keep the flat of 1803.00 sq.mtr carpet area flat. However now have kept a flat of 1803.00 sq.mtr on second floor for rehabilitation. Plan of second floor with area calculations is enclosed herewith. We do hereby state and undertake that this flat admeasuring 1803.00 sq.ft. Will be kept in abeyance. We will not create any third party interest on this flat. We shall abide by judgment of court and as per judgment area of the flat as described by final court will be handed over. We hereby delcare state and undertake that this undertaking shall be binding on us on our legal heirs, assigns, administrators and any one deriving right title and interest through."

12. Perusal of the impugned order shows that the learned Trial Judge rejected the application on two grounds. Firstly, the proposed amendment is not necessary for deciding the controversy raised in the present proceedings. To say the least, the said finding is totally unsustainable and it is perverse. The learned Trial Judge did not even refer to the documents

produced by the plaintiffs along with the application for amendment. In view thereof, I have dealt with those documents in detail. From the documents produced along with application for amendment, it is evident that they are relevant for deciding the controversy raised between the parties. Secondly, the learned Trial Judge observed that proposed amendment changes the nature of the suit. Mr. Divekar submitted that by the proposed prayer clause (c-1), plaintiffs are claiming permanent accommodation on ownership basis. Mr. Thorat states that plaintiffs are not claiming permanent accommodation on ownership basis but on same terms and conditions on tenancy basis. Even otherwise it cannot be said that plaintiffs are claiming permanent alternative accommodation on ownership basis. Amended prayer clause (c-1) reads thus :-

> *"(c-1) In the alternative of prayer (b-1) this Hon'ble Court be pleased to pass decree and mandatory orders for granting permanent alternate accommodation of equivalent size i.e. 1803 square feet (carpet area) on the Ground Floor of the property referred in prayer (a-1) above,*

13. In my opinion proposed amendment does not change the nature of the suit. In view thereof, even the second ground for rejecting the application for amendment is not sustainable. Hence the impugned order is set aside. Application of Exh.19 is allowed. Plaintiffs shall carry out amendment within four weeks from today and shall serve amended plaint on the defendants. Defendants shall file written statement within four weeks from the receipt of the amended plaint.

14. Rule is made absolute in the aforesaid terms with no order as to costs. Order accordingly.

(R.G. KETKAR, J.)