

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.3601 OF 2016

Seksaria Sons Pvt. Ltd. ... Petitioner
Vs.
Premier Brass & Metal Works Pvt. Ltd. and another ... Respondents

Mr. Alok Kumar M. Bagla for Petitioner.
Mr. Vivek Kantawala a/w. Ms Bhairavi Waravdekar i/b. Vivek Kantawala &
Co. for Respondent No.2.

CORAM : R. G. KETKAR, J.
DATE : JUNE 10, 2016

P.C. :

Heard Mr. Bagla, learned Counsel for petitioner and Mr. Kantawala, learned Counsel for respondent No.2 at length. On the oral application made by Mr. Bagla, leave to delete respondent No.1 is granted. Amendment shall be carried out forthwith. Rule. Mr. Kantawala waives service for respondent No.2. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the judgment and order dated 05.02.2016 passed by the learned Judge presiding over Court Room No.20 of the Court of Small Causes, Mumbai below exhibit-54 in R.A.E. & R. Suit No.617/1058 of 2001. By that order, the learned trial Judge dismissed the application made by the petitioner, hereinafter referred to as plaintiff, under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for amending the plaint.

3. Plaintiff has instituted Suit against Premier Brass & Metal Works Private Limited on or about 17.07.2001 under the provisions of the

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act'). During the pendency of that Suit, respondent No.2, hereinafter referred to as defendant No.2, filed intervention application for impleading it as a party defendant. By order dated 09.09.2005, application was allowed. On 01.09.2006, issues were framed. Issue No.1 is to the following effect:

“1. Whether the Plaintiffs proves that the Defendant no.1 were their tenant in the suit premises?”

4. That issue was deleted. Issues No.6 and 8 are to the following effect:

“6. Whether the plaintiffs prove that the defendant No.2 have illegally taken possession of the suit premises?

8. Whether the plaintiffs are entitled for the relief or eviction against the defendants?”

5. In 2013, plaintiff filed affidavit of evidence and was thereafter cross-examined. During the course of cross-examination on 28.01.2015, P.W.1 stated thus,

“I have not prayed for eviction of the defendant no.2 neither I have addressed any notice of eviction to him. I have not challenged the order at Ex.38. I am seeking eviction of defendant no.2 as he stepped into the shoes of defendant no.1 by virtue of order (Ex.38). Ashok Agarwal was occupying the suit premises.”

6. The present application is taken out on 29.08.2015 for amending the plaint in terms of schedule appended to the application. Defendant No.2 filed reply opposing the application and by the impugned order, the learned trial Judge rejected the application. It is against this order, plaintiff has instituted the present Petition.

7. Mr. Bagla submitted that the learned trial Judge rejected the application mainly on the ground that by the proposed amendment,

plaintiff wants to resile from the admission given during the course of cross-examination. He submitted that the learned trial Judge relied upon the decisions of the Apex Court in the case of ***Gautam Sarup Vs. Leela Jetly*, (2008) 7 SCC 85** as also ***Revajeetu Builders & Developers Vs. Narayanaswamy and Sons*, (2009) 10 SCC 84** and rejected the application. He submitted that the Suit is instituted prior to amendment of C.P.C. of 2002 and will, therefore, be governed by the unamended provisions of Order VI, Rule 17 of C.P.C. He also relied upon the order dated 25.10.2007 passed by the Division Bench of this Court in Appeal No.605 of 2002 clarifying that any rights that the landlord may have against the assignee are still available to the landlord and the landlord will be free to proceed against the assignee in exercise of any rights that the landlord may have against the assignee. He, therefore, submitted that the learned trial Judge committed serious error in rejecting the application.

8. On the other hand, Mr. Kantawala supported the impugned order. He submitted that defendant No.2 has acquired tenancy rights by way of assignment. Plaintiff did not implead defendant No.2 in the Suit. Defendant No.2 took out interim notice for intervention. Plaintiff opposed that notice on the ground that defendant No.2 are in possession of the suit premises as agents of the Court Receiver as per the order dated 13.08.2002 passed by the Division Bench and that their rights in the suit premises are not yet decided. Defendant No.2 is not in possession of the suit premises in their independent right.

9. Mr. Kantawala further submitted that issue No.1 framed on 01.09.2006 was deleted by the trial Court. He invited my attention to cross-examination of P.W.1 to contend that plaintiff specifically admitted that he has not prayed for eviction of the defendant No.2. He

has also not addressed any notice of eviction to him. He, therefore, submitted that by the proposed amendment, plaintiff wants to withdraw the admission given during the course of his cross-examination. He, therefore submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

10. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. Perusal of the order dated 25.10.2007 passed by the Division Bench of this Court in Appeal No.605 of 2002 shows that the Division Bench referred to the Full Bench decision in the case of ***Tanagerine Electronics Systems Private Limited, Mumbai v/s. Indian Chemicals, Mumbai, 2004 (2) Mh.L.J. 305***. The Full Bench has held that the sale of the tenanted premises can be validly done and any rights that the landlord may have against the assignee are still available to the landlord and the landlord will be free to proceed against the assignee in exercise of any rights that the landlord may have against the assignee. After referring to the Full Bench decision, the Division Bench clarified that what was sold by auction was the tenancy rights of the judgment debtor and the sale does not in any way affect the ownership rights of the landlord.

11. Perusal of issues and in particular issues No.6 and 8 extracted hereinabove shows that by issue No.6, plaintiff will have to prove that the defendant No.2 has illegally taken possession of the suit premises or not. By issue No.8, plaintiff will have to prove their entitlement for the relief or eviction against the defendants. In my opinion, perusal of issue No.6 clearly shows that plaintiff will have to establish its case about defendant No.2 taking illegal possession of the suit premises. It, therefore, cannot be said that plaintiff has not sought any reliefs against

the defendant No.2, more so in the light of clarification given by the Full Bench in the case of **Tanagerine Electronics Systems Private Limited, Mumbai** (*supra*).

12. Mr. Kantawala relied upon the statements made by P.W.1 during the course of cross-examination to the following effect:

“I have not prayed for eviction of the defendant no.2 neither I have addressed any notice of eviction to him.”

13. However, P.W.1 further deposed that “I am seeking eviction of defendant No.2 as he stepped into the shoes of defendant No.1 by virtue of order dated 25.10.2007, which is produced at exhibit-38”. It, therefore, cannot be said that plaintiff admitted that he does not seek decree of eviction against defendant No.2. It is settled law that testimony of the witness has to be considered in its entirety. In my opinion, the learned trial Judge committed serious error in dismissing the application for amendment on the ground that plaintiff wants to resile from the admission given during the course of cross-examination. Having regard to the fact that the Suit is instituted in the year 2001, the Suit will be governed by the unamended provisions of Order VI, Rule 17 of C.P.C. Perusal of Order VI, Rule 17 shows that all the amendments that are necessary for deciding the controversy between the parties are required to be allowed. In my opinion, the proposed amendment is absolutely necessary for the purpose of determining the real questions in controversy between the parties. Hence, the impugned order cannot be sustained and as such, is liable to be set aside and is accordingly set aside. Application at exhibit-54 stands allowed. Plaintiff shall carry out the amendment within 4 weeks from today in terms of the schedule appended to the application. Rule is made absolute in the aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)