

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 8481 OF 2016

Sir Jamsetjee Jejeebhoy
And Ors.

...Petitioners

Versus

Mr. Yazdi Hosi Desai
And Ors.

...Respondents

....

Mr.Karl Tamboly a/w. Ms.Naisa Jejeebhoy, Mr.Aditya N. Raut,
Ms. Sujata More i/b. Desai Desai Carrimjee & Mulla, Advocate
for the Petitioners.

Mr. Girish Godbole, Senior Advocate a/w. Mutahhar Khan and
Nipa Raka i/b. Mulla & Mulla & CBC, for the respondents.

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With

Writ Petition NO. 7893 OF 2016

Mr. Yazdi Desai and Others.

...Petitioners

Versus

Sir Jamshedji Jeejeebhoy and Others.

...Respondents

....

Mr. Girish Godbole, Senior Advocate a/w. Mutahhar Khan and
Nipa Raka i/b. Mulla & Mulla & CBC, for the petitioners.

Mr.Karl Tamboly a/w. Ms.Naisa Jejeebhoy, Mr.Aditya N. Raut,
Ms. Sujata More i/b. Desai Desai Carrimjee & Mulla, Advocate
for the Respondents.

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CORAM : R. G. KETKAR, J.

DATE : 02nd SEPTEMBER, 2016

P.C.

1. Heard Mr. Karl Tamboly, learned Counsel for the

petitioners in Writ Petition No.8481/2016 and for the respondents in Writ Petition No.7893/2016 and Mr.Girish Godbole, learned Senior Counsel for the respondents in Writ Petition No.8481/2016 and for the petitioners in Writ Petition No.7893/2016, at length.

2. Rule. Learned Counsel for respective respondents waive service. At the request and by consent of the parties, Rule is made returnable forthwith and the Petitions are taken up for final hearing.

3. Writ Petition No.8481/2016 is filed by the petitioners, hereinafter referred to as the 'plaintiffs', challenging the judgment and order dated 14.6.2016 passed by the learned Judge, presiding over court Room No.16 of Court of Small Causes at Mumbai below Exhibit-415 in R.A.E. Suit No.1218/2002 of 2002. By that order, the learned trial Judge rejected the application made by the plaintiffs on 15.3.2016 for leading evidence in rebuttal to prove the contents of three documents collectively marked as Exhibit-411.

4. Writ Petition No.7893/2016 is filed by the petitioners, hereinafter referred to as the 'defendants', challenging the judgment and order dated 2.7.2016 passed by the learned trial Judge below Exhibit-445 filed by the plaintiffs in the same Suit. By that order, the learned trial Judge allowed the application Exhibit-445 made by the

plaintiffs to permit them to prove the documents collectively marked as Exhibit-411. The relevant and material facts giving rise to filing of these petitions, briefly stated, are as under.

5. On 31.10.2002, the plaintiffs have instituted suit against the defendants essentially on the ground of reasonable and bonafide requirement as contemplated by Section 16(1)(g) of the Maharashtra Rent Control Act, 1999 (for short, 'Act'). On 30.4.2003, the defendants filed written statement. On 3.11.2003, the learned trial Judge framed issues. On 2.11.2004, the plaintiffs filed affidavit of evidence of PW-1. It is the case of the defendants that after commencement of the trial Court and during the course of cross-examination of PW-1, sometime in the year 2008, it came in the light of the defendants that the plaint and Vakalatnama were not signed by any of the plaintiff's trustees at the time of institution of the suit and in fact bore the signature of some third person.

6. On 28.3.2011, cross-examination of PW-1 was completed. On 15.7.2011, PW-2 filed affidavit of evidence. On 5.10.2012 the cross-examination of PW-2 was completed and the plaintiffs closed their evidence. On 23.11.2012 on behalf of the defendants DW-1 filed affidavit of evidence. On 6.6.2013, the defendants filed application at Exhibit-124 for amending the written statement. In paragraph-8 of the

written statement, the defendants asserted that the plaintiffs mischievously led the defendants to make believe that the plaint was signed by all the Trustees which came to light only when the plaintiffs witness PW-1 was cross examined on 9.1.2008. Realizing their folly the plaintiffs made an application before the trial Court in 2013 seeking leave to sign the plaint after a lapse of more than 10 years of filing of the suit. The defendants contended that the reason for the then Trustees not signing the plaint was lack of consensus amongst the then Trustees as some of the then Trustees may not be wanting to file suit against the defendants looking at the history of both the institutions. The plaintiffs opposed that application. After hearing both sides, by order dated 22.7.2013, the learned trial Judge allowed the application. The learned trial Judge observed that the proposed amendment will not change the nature of earlier written statement filed by the defendants. The plaintiffs would get an opportunity to rebut the contentions raised by the defendants in the proposed amendment. Hence, in order to have a fair trial and in order to avoid further multiplicity of judicial proceedings, the learned trial Judge observed that the proposed amendment deserves to be allowed. The defendants carried out the amendment on 24.7.2013.

7. On 31.10.2013, the cross-examination of DW-1 was over. It is the case of the plaintiffs that on 18.11.2013, DW-1

filed additional affidavit of evidence. However, DW-1 did not make himself available for cross-examination on the additional affidavit of evidence. DW-2 filed affidavit of evidence dated 5.2.2014. DW-2 also did not make himself available for cross-examination. On 15.2.2016, DW-3 filed affidavit of evidence. It was *inter alia* submitted that the plaint has not been properly verified and that there was no consensus amongst the original trustees for filing suit against the defendant trust. During the course of cross-examination of DW-3, the plaintiffs confronted DW-3 with the power of attorney. The defendants raised objection *inter alia* on the ground that they will not get an opportunity to cross-examination the witness of the plaintiffs on these documents thereby prejudicing the defendants case. The learned trial Judge over-ruled the objections by observing that the documents were produced during the cross-examination of the witness of other side. The learned trial Judge marked these documents at Exhibits (Exhibit-411) subject to proof of contents. The learned trial Judge recorded the submission made on behalf of the defendants that the positive evidence of consensus is required to be led by the plaintiffs.

8. In pursuance of the liberty reserved by order dated 22.7.2013 passed by the learned trial Judge allowing application made by defendants at Exhibit-124 for amending written statement, the plaintiffs filed application

Exhibit-415 on 15.3.2016 to prove the documents which were already marked subject to proof of contents thereof. The defendants resisted the application by filing reply dated 22.3.2016. The plaintiffs filed rejoinder dated 7.4.2016. By the impugned order, the learned trial Judge rejected the application by observing that no case is made out under Order XVIII Rule 3 of C.P.C. It is against this order, the plaintiffs have instituted Writ Petition No.8481/2016.

9. After rejection of the application Exhibit-415, the plaintiffs filed application Exhibit-445 on 27.6.2016 for proving the contents of the documents, which were collectively marked as Exhibit-411. The defendants resisted the application by filing reply dated 28.6.2016. By the impugned order dated 2.7.2016, the learned trial Judge allowed the application. The defendants have instituted Writ Petition No.7893/2016 challenging that decision.

10. Learned Counsel for the parties fairly stated that the fate of Writ Petition No.7893/2016 will be governed by the decision rendered in Writ Petition No.8481/2016.

11. In support of Writ Petition No.8481/2016, Mr.Tamboly submitted that the learned trial Judge committed error in rejecting the application by referring to provisions of Order XVIII Rule 3 of C.P.C. He submitted that the learned trial Judge should have treated the application as one under Section 151 of C.P.C. He has taken me through

the material on record and in particular the fact that in the original written statement dated 30.4.2003 the defendants did not raise the contention as regards plaint and Vakalatnama being not signed by the trustees of the plaintiff. He submitted that after the evidence of the plaintiffs witnesses was over on 5.10.2012, for the first time, the defendants raised this contention by filing application dated 6.6.2016 at Exhibit-124 for amending the written statement. For the first time the defendants contended that the plaint was not signed by all the plaintiffs and that the suit is not maintainable as there was no consensus amongst the trustees at the time of institution of the suit. He has invited my attention to the order dated 22.7.2013 passed by the learned trial Judge allowing the application for amendment of written statement. The learned trial Judge specifically observed that the plaintiffs will get an opportunity to rebut the contentions raised by the defendants in the proposed amendment.

12. Mr. Tamboly further submitted that during the cross-examination of DW-3 on 4.3.2016, he was confronted with the power of attorney as well as the circular resolutions signed by all the trustees of the plaintiff trust. The defendants raised objection on the ground that they will not get an opportunity to cross-examine the witness of the plaintiff on these documents thereby causing prejudice to them. The learned trial Judge over-ruled said objections and

marked those documents as Exhibit-411 subject to proof of contents thereof. He therefore submitted that in view of the order passed by the learned trial Judge during the course of cross-examination of DW-3 the plaintiffs must be given an opportunity to prove the contents of documents marked as Exhibit-411.

13. Mr. Tamboly relied upon the decision of Apex Court in the case of ***K.K. Velusamy v. N. Palanisamy, (2011) 11 SCC 275*** and in particular paragraphs-9 to 11 thereof. He submitted that in order to avail opportunity given by the trial Court for proving the contents of documents marked as Exhibit-411, it is necessary for the plaintiffs to lead evidence. He submitted that even if the provisions of Order XVIII Rule 3 of C.P.C. are not applicable, nonetheless, under Section 151 of C.P.C., the Court has inherent powers to make such orders as may be necessary in the interest of justice or to prevent abuse of process of Court. In the absence of any provision providing for reopening of the evidence or recalling of any witness or cross-examining for the purpose of securing clarification required by the Court. Inherent power under Section 151 of C.P.C. subject to its limitation can be invoked as to reopen the question and or to recall the witness for further examination. Said power is not affected by express bar conferred by the Code under Order XVIII Rule 3 to recall the witness.

14. On the other hand, Mr. Godbole supported the order impugned in Writ Petition No.8481/2016. He invited my attention to cross-examination of PW-1 conducted on 9.1.2008 which is to the following effect:

“The secretary of the plaintiff's trust has signed and verified the plaint i.e. Ms. Tarapore. It is true that none of the Trustees of the plaintiff Trust have signed the plaint. I along with some of the trustees have given instructions for preparing the plaint. I have gone through the contents of the plaint which is submitted in the Court. Some of the Trustees instructed for preparing copy of affidavit of evidence.”

15. Relying upon this portion during the cross-examination of PW-1, Mr. Godbole submitted that way back in the year 2008, the plaintiffs were put to notice about none of the trustees signing the plaint. The plaintiffs, however, did not file application immediately for rectifying said mistake.

16. As against this, Mr. Tamboly relied upon Order VI Rule 14 of C.P.C. to contend that the pleading can be signed by the party and his pleader, if any. Proviso thereto lays down that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf. In the present case, the Secretary of the Plaintiff's Trust Ms Tarapore was duly

authorized by the plaintiff to sign and verify the plaint.

17. Mr. Godbole also invited my attention to affidavit of evidence of PW-1 and in particular paragraph-3 thereof, wherein reference is made to resolution dated 20.2.1956. Mr. Godbole submitted that on 6.7.2012, the learned trial Judge passed order regarding admissibility of the documents. The plaintiffs produced photocopy of the order dated 11.1.1954 passed in Appeal No.625/1953 by this Court. Learned trial Judge referred to Section 42 of the Indian Evidence Act, 1872 and held that said order cannot be exhibited.

18. Mr. Godbole submitted that basically the case of the defendants is that there is no consensus amongst the Trustees of the plaintiff to institute the suit against the defendants. He has invited my attention to the order dated 22.7.2013 passed by the learned trial Judge below Exhibit-124 allowing the application for amendment of written statement and submitted that though by that order, the learned trial Judge gave plaintiffs opportunity to rebut the contentions raised by the defendants in the proposed amendment, they did not file application for adducing evidence in rebuttal. He has taken me through Roznama of 22.7.2013 as also the order passed by the learned trial Judge on 10.3.2016 during the course of cross-examination of DW-3 whereby the learned trial Judge over-ruled the objections raised by the defendants and marked the

documents subject to proof of contents thereof.

19. Mr. Godbole submitted that in fact in the written statement dated 30.4.2003 in paragraph-1, the defendants have specifically raised objection about the maintainability and tenability of the suit. In other words, he submitted that the contention that the plaint is not signed by all the trustees was specifically raised in the original written statement. He also relied upon the decision of the Apex Court in the case of ***Bagai Construction, through its proprietor Lalit Bagai v. Gupta Building Material Store, (2013) 14 SCC 1*** and in particular paragraphs-7, 9, 11 and 14 thereof. Mr. Godbole submitted that the application Exhibit-124 was allowed on 22.7.2013. The second application for amendment at Exhibit-321 was allowed on 30.1.2016. By that order, the learned trial Judge permitted the defendants to incorporate paragraphs-F and G of the schedule annexed to the application for amendment. That time, the learned trial Judge did not give an opportunity as was given while allowing the application Exhibit-124. Lastly, he submitted that in any case the petition may be dismissed by reserving liberty to the plaintiffs to challenge the order passed below Exhibit-415 as per Section 105(1) of C.P.C..

20. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. Mr. Godbole submitted that

in paragraph-1 of the written statement dated 30.4.2003, the defendants have taken objection to maintainability and tenability of the suit *inter alia* on the ground that the plaint is not verified by the trustees. Paragraph-1 of said written statement read thus :

“1. At the outset, the defendants submit that the suit as instituted by the Plaintiffs is misconceived, not tenable and maintainable in law and deserves to be dismissed *prima facie*. The defendants deny that the suit as filed is proper and maintainable and that the Plaintiffs are authorized to file such a suit.”

. Perusal of this paragraph does not indicate that said objection was raised by the defendants at the threshold.

21. As noted earlier on 3.11.2003, the issues were framed. On 2.11.2004 the plaintiffs filed affidavit of evidence of PW-1. On 28.3.2011, the cross-examination of plaintiff was over. On 15.7.2011, affidavit of evidence of PW-2 was filed. His cross-examination was over on 5.10.2012 and the plaintiffs closed their evidence. On 23.11.2012, the defendants filed affidavit of evidence of DW-1. On 6.6.2013, the defendants filed application for amending the written statement. By order dated 22.7.2013, the learned trial Judge allowed that application. While allowing the application, the learned trial Judge specifically gave liberty

to the plaintiffs to rebut the contentions raised by the defendants in the proposed amendment. The relevant portion of that order reads thus :

“... The plaintiffs would get an opportunity to rebut the contentions raised by the defendants in the proposed amendment. ...”

22. The cross-examination of DW-1 was over on 31.10.2013. DW-2 thereafter filed additional affidavit of evidence on 18.11.2013. He however thereafter did not make himself available for cross-examination on additional affidavit. On 5.2.2013, DW-2 filed affidavit of evidence. However, he also did not make himself available for cross-examination. DW-3 filed affidavit of evidence on 15.5.2016 *inter alia* alleging that the plaint is not properly verified and that there was no consensus amongst the original trustees for filing of the suit against the defendant Trust. On 4.3.2016, D.W.3 was confronted with the power of attorney as well as resolution circular signed by all the Trustees of the plaintiff Trust including Jamshed Gugazdar. The defendants raised objection for showing the documents to the witness on the ground that these documents are of the plaintiffs and they ought to have and should have produced at the time of leading their evidence which they have not done. After hearing the Advocates on the objections, the learned trial Judge over-ruled the objections and on

10.3.2016 marked documents as Exhibit-411 collectively. The documents Exhibit-411 are to the following effect.

1. Original circular No.33 of 2003 dated 30.8.2002;
2. Original resolution dated 12.9.2002; and
3. Original Special Power of Attorney dated 2.9.2002.

23. The learned trial Judge also noted the submissions advanced on behalf of the defendants that for establishing the consensus amongst the Trustees to institute the suit, the plaintiff will have to lead positive evidence. It is as under:

“Learned Counsel for the defendants after giving answer by witness submitted that positive evidence of consensus is to be led by the plaintiff.”

24. It is thereafter the plaintiff filed application Exhibit-415 on 15.3.2016 for leading evidence in rebuttal to prove the documents Exhibit-411. In view of order dated 22.7.2013 below Exhibit-124 as also the order dated 10.3.2016 passed by the learned trial Judge over-ruling the objections raised by the defendants and marking documents as Exhibit-411, in my opinion, the learned trial Judge should have allowed the application Exhibit-415. While rejecting the application, in paragraph 12, the learned trial Judge observed that there is no specific provision which has been referred in the application for seeking relief. In fact the learned trial Judge referred to the order permitting the

amendment of the written statement by the defendants as also evidence of DW-3. In view thereof, the plaintiffs are required to adduce evidence in rebuttal. The learned trial Judge thereafter proceeded to refer to Order XLIII Rule 3 of C.P.C. and observed in paragraph-14 thus :

“14. On a plain reading of Rule 3 of Order 18 of CPC it is clear that when there are several issues and the burden of proving some of the issues lies on the other party, then an option has been given to the party beginning evidence either to produce his evidence or to reserve his right to adduce rebuttal evidence in respect of those issues in which the burden of proof is on the other party. Thus one of the requirements to be satisfied for reserving the right to lead rebuttal evidence is that there shall be an issue in respect of which the burden of proof lies on the other party. Then it is open to the party beginning evidence to reserve his right to adduce rebuttal evidence. It is pertinent to note that the language of Rule 3 does not indicate that the party who intends to adduce rebuttal evidence shall obtain the permission of the Court. On the other hand the language used is that the party beginning may at his option either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party. The language is plain and unambiguous and there is absolutely no difficulty to understand the intention of the legislature. What is required under the Rule is intimation to the Court as to the option of the party but not permission of the Court to reserve his right to lead rebuttal evidence. To

hold that it is mandatory for the In law rebuttal is a form of evidence that is presented to contradict or nullify other evidence that has been presented by an adverse. However, it cannot be disputed that unless the matter involves an issue, in respect of which the burden of proof lies on the other party Rule 3 does not entitle a party to reserve his right to lead rebuttal evidence. Hence it is always open to the Court to disallow a party to lead rebuttal evidence in the absence of an issue in respect of which the burden of proof lies on the other side. Thus, the decisions referred supra on behalf of the defendants have rendered no real assistance to adjudicate this application.”

25. In my opinion, the approach of the learned trial Judge was not correct. The learned trial Judge totally misdirected himself while adopting approach as reflected in paragraphs-12 and 14. In the case of **K.K. Velusamy** (supra), Apex Court has referred to the provisions of Section 151 and Order XVIII Rule 17 of C.P.C. and has observed in paragraph-11 thus:

“11. There is no specific provision in the Code enabling the parties to re-open the evidence for the purpose of further examination-in-chief or cross-examination. Section 151 of the Code provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court. In the

absence of any provision providing for re-opening of evidence or recall of any witness for further examination or cross-examination, for purposes other than securing clarification required by the court, the inherent power under Section 151 of the Code, subject to its limitations, can be invoked in appropriate cases to re-open the evidence and/or recall witnesses for further examination. This inherent power of the court is not affected by the express power conferred upon the court under Order 18 Rule 17 of the Code to recall any witness to enable the court to put such question to elicit any clarifications.”

26. Perusal of paragraph-11, extracted hereinabove, shows that the Apex Court has observed that there is no specific provision enabling the parties to reopen the evidence for the purpose of further examination-in-chief or cross-examination. Further relying to Section 151 of C.P.C., Apex Court observed that the inherent power under Section 151 of C.P.C. subject to its limitation can be invoked in proper cases to reopen the evidence and or recalling the witnesses for further examination.

27. For the reasons already indicated, in my opinion, this is the appropriate case for invocation of powers of Section 151 of C.P.C.. Mr. Godbole relied upon the decision in **Bagai Construction** (supra) and in particular paragraph-7 onwards. In paragraph-7, Apex Court referred to Order VII Rule 1 and Order XVIII Rule 1 as also Section

151 of C.P.C. In paragraph-9, Apex Court referred to the decision in *Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate*, (2009) 4 SCC 410 and extracted paragraphs-25, 28, 29 and 31 of that decision. In paragraph-10, Apex Court referred to the decision in *K.K. Velusamy* (supra). He submitted that by moving application Exhibit-415 the plaintiffs intend to fill up lacuna in the evidence of their witness.

28. In that case, the respondent had instituted suit against the appellant before Apex Court for recovery of Rs.4,35,250.18 along with interest accrued thereon. After the arguments were concluded in the suit, the matter was posted for judgment on 3.11.2009. In the meantime, on 31.10.2009, the respondent moved two applications one under Order VII read with Section 151 for placing on record certain documents and another under Order XVIII, Rule 17 read with Section 151 for seeking permission to recall P.W.1 for proving certain documents by leading his additional evidence. By order dated 25.2.2010, the learned District Judge dismissed both the applications. The High Court allowed the revision application. The facts in the case of *Bagai Construction* (supra) are materially different from the present case. At the cost of repetition, by order dated 22.7.2013 the learned trial Judge while allowing the application for amendment as the plaintiffs to rebut the contentions raised by the defendants in the proposed

amendment. Not only that while over-ruling objections raised during the course of cross-examination of DW-3 on 10.3.2016, the learned trial Judge marked Exhibit-411 subject to proof of contents. The learned Judge recorded the submissions made on behalf of the defendants that the positive evidence of consensus is required to be led by the plaintiffs. It is, therefore, imperative on the part of the plaintiffs to lead evidence for proving the contents of Exhibit-411. Looked from this angle, I find that the learned trial Judge was not justified in rejecting the application. Hence, the impugned order dated 14.5.2016 is quashed and set aside. Application Exhibit-415 stands allowed and instead of permitting the plaintiffs to lead evidence in rebuttal they are permitted to lead evidence to prove the contents of documents collectively marked as Exhibit-411. Rule is made absolute with no order as to costs.

29. In view of order passed in Writ Petition No.8481/2016, Writ Petition No.7893/2016 fails and the same is dismissed. Rule is discharged with no order as to costs.

(R. G. KETKAR, J.)