

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

WRIT PETITION NO. 10017 OF 2016

Shri Hemantkumar Tejrjji Mehta

..Petitioner.

Vs

1.Mr. Imian Joseph Fernandes;
2.Mr Anthony John Fernandes;
3.Mrs. Constance Mary Fernandes;
4.Mr. Agneto Anthony Fernandes;
5.Mr. Michael William Fernandes;
6.Mr. Milind Savio Fernandes;
7.Mr. Amardeep john Fernandes;

.. Respondents

Mr. Simile Purohit a/w Karan Dua i/b Wadia Ghandy & Co.
Advocates for Petitioner.

Mr. P.K.Shetty a/w Kunal Chheda i/b M.V.Kini & Co., Advocates for
Respondents No.1, 3 to 7.

**CORAM : R.G.KETKAR,J.
DATE : 02/09/2016**

PC:

1. Heard Mr. Simile Purohit, learned counsel for the petitioner and Mr. P.K.shetty, learned counsel for respondents no.1, 3 to 7 at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 8.5.2015 passed by the learned Judge presiding over Court Room no.37 of the Court of Small Causes at Bombay, Bandra Branch, below Exhibit 89 in R.A.E. Suit No.1030 of 2007. By that order, the learned trial Judge allowed the application made by

Milind Savio Fernandes, son of plaintiff no.2 Agnelo Anthony Fernandes, taken out for himself and on behalf of his mother and 4 brothers for bringing them on record as legal representatives of plaintiff no.2, since deceased. The learned trial Judge permitted them to be brought on record as plaintiffs as also allowed them to carry out amendment as per Schedule annexed with the application.

3. Plaintiff no.1-Imian Joseph Fernandes and plaintiff no.2 Anthony John Fernandes instituted suit against the petitioner, hereinafter referred to as 'defendant', for recovery of possession of Room No.2, situate at ground floor of building known as 'Fatima Villa', 3rd floor, Santacruz, (East), Mumbai-400055 (for short, 'suit premises'), on the ground of arrears of rent and reasonable and bonafide requirement, as contemplated by sections 15 and 16(1)(g) of the Maharashtra Rent Control Act, 1999 (for short, 'Act'). In paragraph 28, the plaintiffs pleaded their reasonable and bonafide requirement. Plaintiff no2 filed affidavit of evidence in lieu of examination-in-chief. In paragraph 36, he deposed about requirement. Wife of plaintiff no.2 is examined as PW 2. Son of plaintiff no.2- Milind is examined as PW 3.

4. Mr. Purohit invited my attention to cross examination of PW 1 Anthony, wherein he denied that his son Agnelo is residing at

Borivali. He does not have any flat in Borivali. He denied that his son Agnelo is not residing with him. He also denied that his son Amardeep is not residing with him. He further denied that he made false statement in paragraph 37(A) of his affidavit of evidence.

5. Mr Purohit has invited my attention to affidavit of examination-in-chief of the defendant and in particular paragraphs 18 and 19 thereof to contend that Agnelo Fernandes, son of plaintiff no.2, has purchased a flat bearing no. C-104, first floor Varsova building, Trishul -I Cooperative Housing Society, Seven Bungalows, Versova, Andheri (West), Mumbai 400 061 in the year 2009. Milind Fernandes, son of plaintiff no.2 resides at plot no.220, Kansal Section, Ambernath-421501. In short, he submitted that Agnelo and Milind, sons of plaintiff no.2 Anthony have their own premises at Andheri and Ambernath respectively. He submitted that during the pendency of the suit, plaintiff no.2 Anthony Fernandes died on 29.10.2014. Milind Savio filed application Exh.89 on 17.12.2014 purportedly under Order 22 of C.P.C. He has taken me through Schedule annexed with that application to contend that in addition to bringing legal representatives of plaintiff no.2 on record, by the proposed amendment they want to incorporate paragraph 28(a) so as to plead requirement of legal representatives of plaintiff no.2.

6. Mr. Purohit submitted that basically plaintiffs instituted suit for recovery of possession on bonafide requirement of their family and not for their individual requirement. The suit is instituted in the year 2007. During the pendency of the suit, Agnelo s/o plaintiff no.2 has purchased the premises at Andheri in 2009. Though the evidence was adduced post 2009, the said fact was not deposed by them. In fact, the plaintiffs closed their evidence in 2011 and the defendant filed his affidavit in examination-in-chief. After the acquisition of premises by children of plaintiff no.2 were brought on record, the present application was filed for bringing legal representatives of plaintiff no.2 on record as he expired in 2014. He submitted that basically the plaintiffs cannot be allowed to incorporate paragraph 28(a) so as to plead requirement of legal representatives of plaintiff no.2 as the said requirement was already pleaded in the original suit. Under the guise of bringing legal representatives of plaintiff no.2 on record, the plaintiffs are bringing on record requirement of legal representatives of plaintiff no.2. The learned trial Judge allowed the application only on the ground that no prejudice will be caused to the defendant as he will get opportunity to cross examine plaintiffs' witness. He submitted that in fact basically the need pleaded was of entire family of the plaintiffs and not the individual requirement of plaintiff no.2. He, therefore, submitted

that the impugned order deserves to be set aside.

7. On the other hand, Mr. Shetty supported the impugned order. He has taken me through paragraph 28(a) of the proposed amendment and submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

8. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. In paragraph 28 of plaintiff, the plaintiffs have pleaded case of reasonable and bonafide requirement. It is no doubt true that PW 1 (plaintiff no.2) filed his affidavit of evidence on 16.12.2009. PW 2 filed her affidavit of evidence in lieu of examination in chief on 20.10.2010 and PW 3 Milind Savio filed his affidavit of his examination-in-chief on 17.8.2011. During the course of cross examination of PW 1, he denied the suggestions given to him that his son Agnelo is not residing with him and that he does not have any flat in Borivali. He also denied that his son Amardeep is not residing with him. It is also material to note that the plaintiffs closed their evidence in 2011. Thereafter, the defendant filed his affidavit of examination-in-chief in 2013. In particular, in paragraphs 18 and 19 he deposed about acquisition of premises by Agnelo at Andheri (W) and Milind at Ambernath, sons of plaintiff no.2.

9. It is not in dispute that during pendency of the suit on 29.10.2014 plaintiff no.2 Anthony died leaving behind applicants as his legal representatives. After his death, application Exh.89 is filed on 17.12.2014 for bringing them on record as also for amending the plaint as per the Schedule annexed to the application. In paragraph 28(a) of the schedule, the plaintiffs have asserted that plaintiff no.2 (a) to 2 (e) were residing on the 2nd floor of Fatima Villa 3rd road, Santacruz (E) Mumbai 400055 along with plaintiff no.1 and plaintiff no.2, since deceased. Flat on the 2nd floor of Fatima Villa admeasures 950 sq.ft carpet area and consists of 3 bed room, Hall, Kitchen flat. At present, plaintiff no.1, plaintiff no.2(a)-Mrs. Constance, plaintiff no.2(d)-Milind with his wife and two children, plaintiff no.2(e)-Amardeep with his wife and one child are residing in that flat. Prior to October, 2011, plaintiff no.2(b) Agnelo Anthony Fernandes was residing with his wife on the 2nd floor flat at Fatima Villa with other family members. Plaintiff no.2(b) had purchased a flat in October, 2009 at Andheri, Mumbai due to shortage of space at Fatima Villa and also due to the intended marriage of plaintiff no.2(e)-Amardeep. Plaintiff no.2(b) Agnelo shifted to flat at Trishul-1 in October, 2011 as plaintiff no. 2(e) was to get married in December, 2011. It is further asserted that plaintiff no.2(c) Michael William Fernandes was employed at Houston, Texas, U.S.A. since last five years and

he was staying there with his wife and two children due to exigencies of his employment there. The permanent residence of plaintiff no. 2(c) Micheal is Fatima Villa and whenever he visits India with his family once in year or vacations. He and his family members are staying on the 2nd floor flat at Fatima Villa. Thus, perusal of paragraph 28(a) sought to be incorporated by way of proposed amendment, shows that the plaintiffs have set up requirement of legal representatives of plaintiff no.2 after his death.

10. Mr. Purohit submitted that basically the requirement pleaded in the suit is of the entire family and not of the individual requirement of plaintiff no.1 or plaintiff no.2. While allowing the application, the learned trial Judge has observed that the requirement of plaintiff no.2 has extinguished on account of his death. By the proposed amendment, they intend to bring on record the requirement of legal representatives of plaintiff no.2. As the said development has taken place during the pendency of the suit, it cannot be said that it will prejudice the case of the defendants. In any case, they will get opportunity to cross examine the plaintiff's witness.

11. I do not find that the learned trial Judge has committed any error in passing the impugned order. By allowing the amendment it does not mean that the Court has accepted the case pleaded

by the plaintiffs. Plaintiffs will have to establish their case as sought to be incorporated by paragraph 28(a) which will be subject to cross examination by the defendant. In view thereof, no case is made out for interference of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)