

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

WRIT PETITION NO. 4501 OF 2016

Shekhar N. Shetty and Anr.

..Petitioners.

Vs

Mr. Madhavlal Naryanlal Pitte

.. Respondent

Mr. Shardul Singh i/b Mr. Vaibhav R. Gaikwad, Advocate for
Petitioners.

Mr. B.N.Shukla i/b B.N.Shukla & Co, Advocates for Respondent.

**CORAM : R.G.KETKAR,J.
DATE : 16/06/2016**

PC:

1. Heard Mr. Shardul Singh, learned counsel for the petitioners and Mr. B.N.Shukla, learned counsel for the respondent at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as 'defendants', have challenged the Judgment and order dated 25.7.2014 passed by the learned Judge presiding over Court Room No. 13 below Exhibit-111 in R.A.E. Suit No.1120/2233 of 1997 as also the Judgment and order dated 9.9.2014 passed by the Appellate Bench of the Small Causes Court at Mumbai in Revision Application No.253 of 2014. The trial Court allowed the application made by the respondent, hereinafter referred to as 'plaintiff', under Order VI, Rule 17 of C.P.C. for amending the

plaint. Aggrieved by that decision, the defendants preferred Revision Application under section 34(4). The Appellate Bench dismissed the Revision Application on the ground that the order passed by the trial Court was procedural and does not affect the substantive rights of the parties and, therefore, revision is not maintainable.

3. Mr. Singh strenuously contended that the learned trial Judge was not justified in allowing the application for amendment. He submitted that the plaintiff instituted the suit, inter alia, contending that he is appointed as Receiver by an order of this Court in Suit No. 224 of 1961 and in that capacity he is pursuing that suit for eviction of the defendants from the suit premises. On 2.5.2008, the Court Receiver who was appointed by order dated 20.10.1961, was discharged without passing accounts subject to payment of his costs, charges and expenses. The Court also passed order in terms of minutes of order. Clause 7 thereof provided that defendant no.4 (plaintiff herein) appointed as the receiver by order dated 21.7.1967 was continued and appointed as receiver of the estate as referred in Schedule 'B' with all powers under Order 40, Rule 1 of the C.P.C. including the power of sale. It is not in dispute that the suit premises is one of the properties included in Schedule B.

4. Mr. Singh submitted that after coming to know of the order

dated 2.5.2008 discharging the plaintiff as court receiver, the defendants took out application for amending written statement contending, inter alia, that as the suit is instituted by the plaintiff in his capacity as court receiver and as the court receiver is discharged, right to sue does not survive. That amendment was allowed on 27.9.2012 and written statement was accordingly amended. It is only thereafter the plaintiff took out application on 9.1.2013 for amending the plaint. He submitted that the application is taken out after 5 years and 8 months. In other words, the application for amending the plaint was taken out belatedly. He submitted that the proposed amendment completely changes the nature of the suit. By the proposed amendment, the plaintiff wants to contend that he is co-owner and landlord of the suit property. As the nature of the suit changes, the learned trial Judge was not justified in allowing the application for amendment. He, therefore, submitted that petition requires consideration.

5. On the other hand, Mr. Shukla supported the impugned order. He submitted that the impugned order is implemented as the plaintiff has carried out the amendment. On the basis of the pleadings, additional issues are framed on 3.9.2015 and 8.12.2015 and presently the plaintiff's witness is under cross examination. He, therefor, submitted that no case is made out for

invocation of Powers under Article 227 of the Constitution of India.

6. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the suit is instituted in the year 1997. It appears that initially by order dated 20.10.1961, the Court Receiver in respect of the suit property was appointed. Subsequently, the plaintiff was appointed as receiver by order dated 21.7.1967. In paragraph 1 of the plaint, the plaintiff asserted that he is appointed as receiver by order of this Court in Suit No.224 of 1961. It is not in dispute and is matter of record that by order dated 2.5.2008, the Court Receiver appointed by order dated 20.10.1961, was discharged and in terms of clause 7 of the minutes of order, the plaintiff who was appointed by an order dated 21.7.1967 as court receiver, was continued in respect of the estate as referred in Schedule 'B'. It is also not in dispute that the suit premises is included in Schedule 'B'. On 9.1.2013, the plaintiff filed application Exh.111, inter alia, contending that he is co-owner and landlord of the suit property in his capacity as receiver appointed by order dated 21.7.1967. He has instituted suit for decree of eviction against the defendants on various grounds under the Bombay Rents Hotel and Lodging House Rates Control Act, 1947. Reference is

made to the order dated 2.5.2008. By the proposed amendment, the plaintiff wants to incorporate paragraph 1(a) to 1(d) so as to bring on record the orders passed in Suit No.224 of 1961 as also wants to add paragraph 12-A and prayer clause (ee) towards mesne profits.

7. Mr. Singh submitted that by the proposed amendment, the nature of the suit changes. Whereas earlier the plaintiff had instituted suit in capacity as court receiver, by the proposed amendment, he claims to be co-owner and landlord of the suit premises. The very foundation of the suit has changed. As a Court Receiver was discharged by order dated 2.5.2008, right to sue does not survive.

8. It is not possible to accept this submission. By order dated 2.5.2008, no doubt, Court Receiver appointed by order dated 20.10.1961 was discharged. At the same time, by clause 7 of the Minutes of the order, the plaintiff who was appointed as court receiver by order dated 21.7.1967 was continued in respect of the estate mentioned in schedule 'B' which also includes the suit property.

9. That apart, by the proposed amendment, the plaintiff claims that he is a co-owner and landlord. It is also not in dispute that after amending the plaint, additional issues are framed on 3.9.2015, namely, whether the suit is maintainable for want of

cause of action to the plaintiff as receiver. In my opinion, this issue takes care of apprehension expressed by Mr Singh. Having regard to the fact that the suit is of the year 1997 and further having regard to the fact that the proposed amendment is necessary for deciding the controversy between the parties, I do not find that the courts below committed any error in allowing the application. While allowing the application for amendment, the learned trial Judge has specifically observed in paragraph 7 that the proposed amendment will not change the nature of the suit and the proposed amendment is necessary for determining the real controversy between the parties. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed. It is expressly made clear that where a decree is appealed from by the petitioners, 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 per Section 105(1) of C.P.C.

(R.G.KETKAR, J.)