

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 9990 OF 2015**

Kishor Shamji Shah

..Petitioner

Vs.

**Bai Prabhadevi Haridas Bhatia (Deceased)
through Lrs & Ors.**

..Respondents

Mr. B. R. Dalal for the Petitioner

Mr. Chirayu Bhatia Respondent No.3 in person present

CORAM : R. M. SAVANT, J.

DATE : 5th JANUARY, 2016

P.C.

1 The Writ Jurisdiction of this Court is invoked against the order dated 1-9-2015 passed by the Appellate Bench of the Small Causes Court, by which order, the Revision Application No.228 of 2015 filed by the Petitioner came to be dismissed and resultantly the order dated 9-5-2015 passed by the Learned Judge of the Small Causes Court, Mumbai allowing the applications Exhibit 89 and Exhibit 92 came to be confirmed.

2 The Suit in question being RAE Suit No.7 of 2000, has been filed by the Respondent Nos.1 to 5, vide prayer clause (a) they have sought possession of Room No.8 of the 2nd floor of H.V. Bldg., 197, Narsi Natha Street, Bhat Bazar, Mumbai 400 009. However, in the plaint, the Plaintiffs have mentioned Room No.3 on the 1st floor of the said building as the tenanted

premises. The Suit proceeded to trial and was at the stage when the Defendant No.2 was under cross-examination. It is at the said stage that the application Exhibit 89 was filed for correcting the room number in paragraph 1 of the plaint. This was probably in view of the fact that in the affidavit in examination in chief of the Defendant No.2 it was stated that the Defendant No.2 is not in possession of the premises which have been mentioned in paragraph 1 of the plaint. After the application Exhibit 89 came to be filed that the application Exhibit 92 came to be filed for correction of the floor number which was mentioned in the said paragraph 1 to change the floor number from the 1st floor to the 2nd floor. The said applications were replied to on behalf of the Defendant No.2 and the contention taken was that the correction / amendment cannot be permitted in view of the fact that the Defendant No.2 was under cross-examination and having regard to the settled principles applicable to Order VI Rule 17 of the Civil Procedure Code no amendment can be allowed after the trial has commenced.

3 The Trial Court considered the said applications Exhibit 89 and Exhibit 92. The Trial Court did not countenance the submission urged on behalf of the Defendant No.2 that the amendment sought was barred by law of limitation. The Trial Court was of the view that on the said ground alone the amendment cannot be refused as it is essential to adjudicate the real controversy between the parties and to impart substantial justice. The Trial

Court adverted to the cross-examination of the Defendant No.2 wherein he has admitted that he is in possession of Room No.8. The Trial Court was therefore of the view that no prejudice would be caused to the Defendant if the correction / amendment is allowed. The Trial Court observed that it would be open for the Defendant No.2 to take an appropriate recourse in respect of the point of limitation in the Written Statement that would be required to be filed to the amended plaint pursuant to the correction / amendment. As indicated above the Trial Court accordingly by its order dated 9-5-2015 allowed the said applications Exhibit 89 and Exhibit 92.

4 The Defendant No.2 aggrieved by the said order dated 9-5-2015 filed Revision Application No.228 of 2015. The Appellate Bench of the Small Causes Court having regard to the Judgment of this Court reported in **2013 Bom C.R. 247** in the matter of **Bhartiben Shah Vs. Gracy Thomas & Ors.** held that the order dated 7-5-2015 allowing the applications Exhibit 89 and Exhibit 92 was not revisable and accordingly rejected the Revision Application on the ground that the same was not maintainable. As indicated above, it is the said order dated 1-9-2015 passed by the Appellate Bench of the Small Causes Court thereby in a way confirming the order dated 1-9-2015 passed by the Trial Court which is taken exception to by way of the above Petition.

5 The Learned Counsel for the Petitioner Mr. Dalal would contend

that having regard to the fact that the Suit was at the stage where the cross-examination of the Defendant No.2 was under process, the Trial Court could not have allowed the application Exhibit 89 and Exhibit 92. The Learned Counsel would contend that the Plaintiffs have not complied with the due diligence test as the application has been moved after a period of almost 14 years. It was also the submission of the Learned Counsel that the applications could not be allowed as the amendment sought was barred by the law of limitation. In support of the said contention, the Learned Counsel sought to place reliance on the judgment of the Apex Court in the matter of **T. N. Alloy Foundry Co. Ltd. Vs. T. N. Electricity Board & Ors.** wherein the Apex court has held that the Court as a rule should decline to allow amendments if a fresh suit on the amended claim would be barred by limitation on the date of the application. The Learned Counsel also sought to place reliance on the judgment of the Apex Court reported in **JT 1996(2) S.C. 230** in the matter of **Radhika Devi Vs. Bajrangi Singh & ors.** wherein the Apex Court has held that accrued right in favour of the Respondents cannot be allowed to be defeated by permitting amendment of the plaint. This was in the context of Order VI Rule 17 of the Civil Procedure Code. It was therefore the submission of the Learned Counsel Mr. Dalal that the orders impugned in the present Petition are required to be interdicted by this Court in its Writ Jurisdiction.

6 Per contra Mr. Chirayu Bhatia the Respondent No.3 who is

representing the Plaintiffs, appears in person and supported the impugned order. It was the submission of the party in person that what has been sought by the amendment is only a correction of the number of the tenanted premises as also the floor number and in view of the evidence which has come on record in the cross-examination of the PW-2, no prejudice would be caused to the Defendant No.2. It is also the submission of the Respondent No.3 that since the Suit is of the year 1999 predating the amendments in the Civil Procedure Code which have taken place in the year 2002 the rigors of Order VI Rule 17 would not apply and therefore the orders passed by the courts below should be sustained on the said ground also.

7 Having heard the Learned Counsel for the Petitioner and the party in person, in my view, there is no merit in the above Petition. It is required to be noted that in the Suit as filed, in prayer clause (a) of the Suit, the relief is sought in respect of Room No.8 on the 2nd floor, obviously the said premises were therefore the tenanted premises in respect of which the relief was sought in the plaint. It is in view of the fact that the wrong number of the room was mentioned in paragraph 1 of the plaint and also in view of the fact that in the cross-examination of the Defendant No.2 it has come on record that he is in possession of Room No.8 on the 2nd floor, that the Plaintiffs sought amendment by way of correcting the room number as well as the floor on which the tenanted premises were situated. In so far as the Trial Court is concerned, the

Trial Court as indicated above did not countenance the submission urged on behalf of the Defendant No.2 that the amendment sought was barred by law of limitation. The Trial Court was of the view that the Defendant No.2 can take appropriate stand in the additional Written Statement in respect of the amendment which was sought. In so far as the Suit which is predating the year 2002, it is well settled that the amended provisions of the Civil Procedure Code are not strictly applicable. The question that arises is whether the Plaintiffs are entitled to correct the room number and floor number in paragraph 1 so as to bring the same in consonance with the prayer clause.

8 It is well settled that an amendment which leads to an effectual and complete adjudication of the list between the parties is required to be allowed by over looking the technicalities if any. But the technicalities in the instant case is the delay which has occurred in applying for amendment, for which the Defendant No.2 has been compensated by way of costs. The Trial court has also granted liberty to the Defendant No.2 to take an appropriate stand, in so far as point of limitation is concerned. It is also well settled that the point of limitation can always be kept open for being adjudicated at the time of trial and solely on the said ground an amendment application cannot be rejected. In my view, the judgments in T. N. Alloy's case and in Radhika Devi's case (supra) would not apply in the facts and circumstances of the present case, where the amendment sought is only in respect of the correction

of the room number and the floor on which the suit premises are located. Moreso as indicated above, the Defendant No.2 has been granted liberty to take an appropriate stand in so far as the point of limitation is concerned, the order passed by the Trial Court though challenged in Revision, the Revision having not been entertained, the order passed by the Trial Court has thereby been confirmed. In my view, since the Trial Court has deemed it appropriate to exercise discretion in favour of the Plaintiffs by allowing the correction / amendment, this Court does not deem it appropriate to interfere with the said discretion in the Writ Jurisdiction of this court under Article 227 of the Constitution of India. The Writ Petition is accordingly dismissed.

[R.M.SAVANT, J]