

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.12119 OF 2016

Dena Bank and others ... Petitioners
Vs.
Aseem Rais s/o Yusuf Rais and another ... Respondents

Mr. K. D. Shukla for Petitioners.

CORAM : R. G. KETKAR, J.
DATE : OCTOBER 19, 2016

P.C. :

Not on Board. At the request of the Mr. Shukla, learned Counsel for petitioners, taken up for admission.

2. By this Petition under Article 227 of the Constitution of India, petitioners have challenged the judgment and order dated 21.06.2016 passed by the Appellate Bench of the Small Causes Court in Revision Application No.64 of 2016. By that order, the appellate Court allowed the Revision Application preferred by the respondents, hereinafter referred to as 'plaintiffs', and quashed and set aside the judgment and order dated 26.11.2015 passed by the learned trial Judge below exhibit-37 in T.E.&R. Suit No.75/95 of 2011. The appellate Court permitted the plaintiffs to carry out amendment in the plaint.

3. In support of this Petition, Mr. Shukla strenuously contended that the Suit is instituted in the year 2011. During the course of recording of the evidence, plaintiffs took out application for amending the plaint. In view of the amendment to C.P.C. of 2002, plaintiffs have to make out a case as contemplated by proviso to Order 6, Rule 17 of C.P.C. Plaintiffs have to establish that inspite of due diligence, they could not have raised the matter before the commencement of trial. In the present case, plaintiffs have not satisfied the conditions stipulated in proviso to Order

4. Mr. Shukla has invited my attention to the trial Court's order, and in particular 5 thereof. The learned trial Judge noted that defendants have completed cross-examination of P.W.1 and the Suit was posted for further evidence of plaintiffs meaning thereby the trial of the Suit has already commenced. The learned trial Judge also considered the admissions given by the plaintiffs' witness P.W.1 in the cross-examination and observed that on the basis of the admissions in the cross-examination, plaintiffs have sought to amend the plaint. The learned trial Judge further observed that it is settled law that admissions brought on record in a cross-examination cannot be taken away or withdrawn. Allowing the present application will amount to permitting plaintiffs to withdraw those admissions brought on record in the cross-examination of P.W.1. He submitted that the appellate Court committed serious error in allowing the application for amendment. For the reasons recorded in paragraph 5 of the trial Court's order, he submitted that Petition requires consideration.

5. I have considered the submissions advanced by Mr. Shukla. I have also perused the material on record. Plaintiffs have instituted Suit against the applicants herein. Plaintiffs have described themselves as under:

2/5

Society, TPS IV, 3rd Road, Bandra,)
Mumbai - 400 050.)

2. Mr. Arof Rais s/o. Yusuf Rais)
Age 77 yrs., adult, Occupation : Business)
Residing at Akanksha, 4th Floor, Off.)
Yari Road, Versova, Mumbai - 400 006.)

The trustees of “Khan Bahadur Haji)
Amir Saheb Rais Trust” A trust)
Registered under The Bombay Public)
Trust Act, 1950, having its registered)
Office : Imperial Mahal, Khodabad)
Circle, Dadar T.T., Mumbai-400 014) ... PLAINTIFFS”

6. Plaintiff No.1 Asem Rais is shown as son of Yusuf Rais. Plaintiff No.2 Arif Rais is also shown as son of Yusuf Rais. In the application for amendment, it is asserted that father of plaintiff No.2 is Khan Bahadur Amir Saheb Rais and not Yusuf Rais. In view thereof, by the proposed amendment, plaintiffs have prayed for deleting the name of Yusuf Rais from the name of plaintiff No.2 and substituting in its place “Khan Bahadur Amir Saheb Rais”.

7. Plaintiffs No.1 and 2 are described as trustees of Khan Bahadur Haji Amir Saheb Rais Trust, **a Trust registered under the Bombay Public Trusts Act, 1950**. By the proposed amendment, plaintiffs have prayed for deleting the following words:

“registered under the Bombay Public Trusts Act, 1950”;

and adding the following words:

“family / private”

8. In other words, plaintiffs want to contend that it is a family / private Trust and is not a Trust registered under the Bombay Public Trusts Act, 1950. Plaintiffs have further contended that as per the instrument of Trust, they have appointed four new trustees. These newly appointed trustees are necessary parties and are required to be

added as party plaintiffs in the Suit by amending the cause title. The learned trial Judge however rejected the application on the ground that allowing the amendment application will amount to permitting plaintiffs to withdraw those admissions brought on record during the cross-examination. Mr. Shukla was not in a position to produce material substantiating that Trust is registered under the Bombay Public Trusts Act, 1950 by producing Registration Certificate. In my opinion, the proposed amendment is merely of a formal nature. It does not alter the nature of the Suit. The Suit essentially remains to be the eviction suit between landlord and tenant, premises being exempt under Section 3(1) (b) of the Maharashtra Rent Control Act, 1999. The appellate Court dealt with these aspects from paragraphs 11 to 14 and 16. After considering the material on record, the appellate Court observed in paragraph 18 that there is hardly anything on the basis of which it can be said that the amendment sought for is not within the four corners of law and accordingly set aside the trial Court's order and allowed the Revision Application. After considering the application for amendment as also amendment proposed by the plaintiffs, I do not find that the appellate Court committed any error so as to warrant interference under Article 227 of the Constitution of India. 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, 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.

9. Having regard to the fact that the plaintiffs have come with the case that applicants are not entitled to protection under the Rent Act as premises is exempt in view of Section 3(1)(b), the learned trial Judge is

requested to decide the Suit as expeditiously as possible and preferably within 6 months from the production of the authenticated copy of this order. Writ to be sent down forthwith.

(R. G. KETKAR, J.)

Minal Parab