

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 9688 OF 2010**

M/s Amar Builders

..Petitioner.

Vs

Champalal Indraraj Sand alias
Rahatekar and Ors

.. Respondents

Mr.P.S.Dani, Senior Advocate i/b Nachiket V. Khaladkar, for
Petitioner.

Mr. S.S.Kanetkar, Advocate for Respondents no.1A(i) to (v) and
2(i) to (v).

**CORAM : R.G.KETKAR,J.
DATE : 20/07/2016**

PC:

1. Heard Mr. P.S.Dani, learned senior counsel for the petitioner and Mr. S.S.Kanetkar, learned counsel for respondents no.1A(i) to (v) and 2(i) to (v) at length. Rule. Mr. Kanetkar waives service on behalf of the respondents. At the request and by consent of the parties, Rule is made returnable forthwith and petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, herein after referred to as 'defendant', has challenged the Judgment and order dated 20.4.2009 passed by the learned District Judge below Exhibits 8 and 9 in Civil Appeal No.9 of 2009. The respondents, hereinafter referred to as 'plaintiffs', have filed applications-Exhibits 8 and 9 under Order

VI, Rule 17 of C.P.C. for amending the plaint and also amending written statement at Exh.32 to the counter claim set up by the defendant. By the impugned order, the learned District Judge allowed the applications subject to the plaintiffs depositing costs of Rs.1500/- within a period one week. Out of that amount, the learned District Judge directed payment of Rs.1000/- to the defendants and balance of Rs.500/- to be credited to Government.

3. The plaintiffs instituted suit, inter alia, praying for renewal of lease period of the suit property in their favour for a further period of 99 years from 22.5.2006 as per clause 2 of the lease deed dated 22.5.1907 and for fixation of standard and reasonable annual lease rent. The subject matter of the property is plot bearing C.T.S. No.893/3, final plot no. 267/7 admeasuring 827.58 sq. meters, situate at Shivajinagar, Bhamburda, T. P. Scheme no.1, Pune 411004 which is a part of original S.No.70, Bhamburda, Pune (for short, 'suit property').

4. The defendant resisted the suit by filing written statement and also set up counter claim for possession of the suit property after demolishing all structures on the suit property as also for perpetual injunction restraining the plaintiffs from creating third party interest. The plaintiffs filed written statement opposing the counter claim. By judgment and decree dated 18.10.2008, the

learned Addl. Judge, Small Causes Court, Pune dismissed the suit and decreed the counter claim of the defendant. The learned trial Judge directed the plaintiffs to remove the construction on the suit land and hand over the vacant possession within three months. Aggrieved by that order, the plaintiffs preferred appeal on or about 20.12.2008. Pending the appeal, the plaintiffs took out application Exhibit-8 on 20.12.2008 for amending the plaint. The plaintiffs also filed application Exhibit-9 for amending written statement at Exh.32 to the counter claim. By the proposed amendment, the plaintiffs want to incorporate paragraph 10A to paragraph 10D in the plaint (Exhibit-1). By application Exh.9, the plaintiffs want to incorporate paragraph 4A to 4D in the written statement filed to the counter claim. By the impugned order, the learned District Judge allowed the applications. It is against this order, the defendant has instituted this petition.

5. In support of this petition, Mr. Dani invited my attention to the proposed amendment. By the proposed amendment, the plaintiffs want to challenge the title of the defendant. It is contended that the defendant has produced copies of sale deeds executed between heirs of earlier owner and the defendant vide Exh.61. There are discrepancies in the sale deeds. Some of the sale deeds have been executed by the alleged power of attorney

holders of legal heirs. However, power of attorney is not attached to the sale deed. It is further contended that the defendant has claimed that it has purchased the suit property from legal heirs of Shri Bajirao Patil Shirole, Shri Bhagwantrao Rajaram Patil Shirole and Shri Ganpatrao Rajaram Patil shirole.

6. In the application Exh.9, the plaintiffs have sought amendment to written statement Exhibit-32 to the counter claim set up by defendant and has contended in the proposed amendment that the defendant has admitted that the plaintiffs have carried out construction over the suit property and thus the plaintiffs are tenants according to the provisions of the Maharashtra Rent Control Act, 1999. It is further contended that the suit is not maintainable in view of section 26 of the Provincial Small Causes Courts Act, 1887 as there is no relationship of lessor and lessee between the parties. The Small Causes Court, therefore, has no jurisdiction to decide the counter claim.

7. Mr. Dani submitted that in fact in paragraph 2(a) of written statement filed by the plaintiffs to the counter claim, the plaintiffs specifically admitted that the defendant is the owner of the suit property. He further submitted that the suit is instituted in the year 2006. In view of proviso to Order VI, Rule 17 of C.P.C, the plaintiffs have to satisfy the conditions stipulated in proviso to Order VI, Rule 17. The learned District Judge while allowing the

applications has not considered whether the plaintiffs have satisfied the conditions laid down in proviso to Order VI, Rule 17. He, therefore, submitted that the impugned order requires to be set aside.

8. On the other hand, Mr. Kanetkar supported the impugned order. He submitted that while deciding the amendment, the Court cannot enter into merits of the proposed amendment. In any case, if the learned District Judge has not recorded any findings about satisfaction of the conditions laid down in proviso to Order VI, Rule 17, the impugned order may be set aside, thereby, directing the learned District Judge to decide the applications Exhibits 8 and 9 afresh.

9. I have considered the submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the plaintiffs have instituted suit for renewal of lease. This itself presupposes that there is relationship of lessor and lessee between the parties. That apart, the sale deeds were produced on record by the defendant on 8.9.2008 in pursuance of notice for production given by the plaintiffs. In paragraph 2(a) of the written statement to the counter claim, the plaintiffs specifically admitted the ownership of the defendant. By the proposed amendment, the plaintiffs want to challenge the title of the defendant as also want

to contend that Small Causes Court has no jurisdiction to entertain and try the suit as there is no relationship of lessor and lessee between the parties. For the reasons indicated earlier, I find that by the proposed amendment, the plaintiffs want to withdraw admissions given in the pleadings.

10. That apart, in paragraph 6, the learned District Judge observed that the sale deeds were produced on 8.9.2008 in pursuance of notice of production given by the plaintiffs. The documents were produced after cross examination of the witness of the defendant was over. In paragraph 7, it was observed that as the plaintiffs engaged Advocate it was bounden duty of Advocate to take notice of production of the said document and to advise the plaintiffs accordingly. In such circumstances, if no such steps are taken, the plaintiffs cannot be blamed for the same. Applications Exhibit-8 and Exhibit 9 clearly show that after production of the said documents, the plaintiffs came to know that the defendant is not owner of the suit land and has not purchased the entire property. Exhibits 8 and 9 are filed on 20.12.2008 along with Appeal and, therefore, it cannot be held that there was due diligence on the part of the plaintiffs to make application after the knowledge about the said fact. It was further held that the reliance placed by the defendant on the decision of *Ajendraprasadji N. Pande vs. Swami* AIR 2007 SC

806, has no application to the facts of the present case.

11. It is not in dispute that the defendant has produced sale deeds on 8.9.2008. The learned trial Judge decreed the suit on 18.10.2008. Even assuming that the documents were produced after the cross examination of witness of the defendant was over, it did not preclude the plaintiffs to recall witness of the defendant for putting questions on the basis of sale deeds produced on 8.9.2008. In other words, there is no material on record to show that any efforts were made by the plaintiffs for further cross examination of the defendant's witness on the sale deeds which are produced on 8.9.2008. In paragraph 2 of the application at Exh.8 the plaintiffs contended that 16 sale deeds were produced at the fag-end of the proceedings after cross examination of the defendant witness was over and hence they did not get chance to rebut the same in the written statement or cross examination of the defendant. In other words. The plaintiffs did not come with the case that their Advocate was negligent in taking steps after production of these sale deeds. However, in paragraph 7, the learned District Judge found fault with the Advocate for the plaintiff which was not the case of the plaintiffs. That apart, the learned District Judge held that the decision of the Apex Court in the case of Ajendraprasadji N. Pande (supra) is not applicable on the ground that the applications Exhibits 8 and 9 were filed on

20.12.2008 along with appeal. In my opinion, the learned district Judge has totally misdirected in that regard. Order VI, Rule 17 reads thus:

“17. Amendment of Pleadings.- the Court may at any stage at the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.”

Proviso requires party applying to satisfy that inspite of exercise of due diligence, party could not have raised the matter **before commencement of trial**. Thus, in the present case the plaintiffs have to make out the case that inspite of due diligence they could not have raised the matter before commencement of the trial. The learned District Judge however proceeded on the premise that as the applications were filed along with appeal, the decision of Ajendraprasadji N. Pande (supra) is not applicable. In my opinion, the approach of the learned District Judge was totally perverse.

12. In the case of Vidyadevi Vs. Padmalatha, (2009) 2 S.C.C. 409, the Apex Court observed in paragraphs 10 and 11 as under.

“10. By reason of the Civil Procedure Code (Amendment)

Act, 2002 (Act 22 of 2002), the Parliament inter alia inserted a proviso to Order VI Rule 17 of the Code, which reads as under:

“Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.”

It is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefore are satisfied, viz., it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial.

11. From the order passed by the learned Trial Judge, it is evident that the respondents had not been able to fulfill the said pre-condition. The question, therefore, which arises for consideration is as to whether the trial had commenced or not. In our opinion, it did. The date on which the issues are framed is the date of first hearing. Provisions of the Code of civil Procedure envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination in chief of the witness, in our opinion, would amount to ‘commencement of proceeding’.

13. Applying the tests laid down by the Apex Court, I do not find that the learned District Judge was not justified in allowing the applications. Mr. Kanetkar submitted that the matter may be remanded to District Court for deciding the Applications Exhibits 8 and 9 afresh. The suit is instituted in the year 2006 and was decreed in the year 2008. Petition is pending since 2010. In paragraph 9 of the impugned order, the learned District Judge has noted the contention of the defendant that the plaintiffs are

adopting dilatory tactics and if the amendment is allowed, the entire exercise of framing issues and recording evidence will have to be undergone again. The learned District Judge observed that apprehension expressed by the defendant has some substance. In view thereof, it is not possible to accept the request made by Mr. Kanetkar to remand the matter.

14. In the light of above discussion, Petition succeeds. Impugned order dated 20.4.2009 is set aside. Applications Exhibits 8 and 9 are dismissed. Rule is made absolute in the aforesaid terms with no order as to costs.

(R.G.KETKAR, J.)