

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.12644 OF 2015

Ramkali Sitaram Kushwaha (Kacchi) and others... Petitioners
Vs.
Gopichand Narayan Naik (decd) through LRs
Radhabai Gopichand Naik and others ... Respondents

Mr. R. S. Datar for Petitioners.
Mr. C. Mortis for Respondents.

CORAM : R. G. KETKAR, J.
DATE : SEPTEMBER 22, 2016

P.C. :

Heard Mr. Datar, learned Counsel for petitioners and Mr. Mortis, learned Counsel for respondents at length. Rule. Mr. Mortis waives service. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, petitioners, hereinafter referred to as 'plaintiffs' have challenged the judgment and order dated 12.02.2005 passed by the Appellate Bench of the Small Causes Court, Mumbai below exhibit-10 in Appeal No.333 of 2006. By that order, the Appellate Bench allowed the application made by the respondents, hereinafter referred to as 'defendants', for leading additional evidence in terms of the amendment set out in the Schedule annexed to the application by carrying out the amendment in the written statement dated 23.07.1995.

3. By order dated 19.01.2016, notice was issued to the respondents and parties were put to notice that subject to the time constraint and convenience of the Court, Petition will be disposed of finally at the stage of admission. In paragraph 5, it was observed that prima facie, the

Appellate Bench was not justified in directing the defendants to amend the written statement and should have treated the application under Order XIX, Rule 1 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'). The Appellate Bench should have permitted the defendant to lead evidence in respect of the assertions made in paragraph 4 and permitted the plaintiffs to cross-examine the defendant and also lead evidence, if so advised.

4. Mr. Mortis submits that the impugned order may be modified in terms of paragraph 5 of the order dated 19.01.2016. In view thereof, the impugned order is modified in the following terms:

a. The application filed by the respondents-defendants for amendment of the written statement shall be treated as application under Order XIX, Rule 1 of C.P.C. Defendants are permitted to lead evidence in respect of the assertions made in paragraph 4 and plaintiffs are permitted to cross-examine the defendants and also lead evidence, if so advised;

b. Liberty to apply to the Appellate Court for expeditious disposal of the appeal is granted. If such application is made, the learned appellate Court may pass appropriate order;

c. Rule is made absolute in the aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)

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