

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO.797 OF 2016
IN
WRIT PETITION NO.9165 OF 2015**

Kishankumar s/o Bootaram Anand

..Applicant

Vs.

Rajkumar S/o Bootaram Anand & Ors

..Respondents

Mr. S. S. Kanetkar for the Applicant /original Petitioner

Mr. Ajay Joshi for the Respondent Nos.1 and 2

CORAM : R. M. SAVANT, J.

DATE : 14th SEPTEMBER, 2016

P.C.

1 At the outset the word “attributed” in the last line of paragraph 1 of the order dated 22-9-2015 to be substituted by the word “contributed”. The Learned Counsel for the parties are agreeable to the said correction. The order dated 22-9-2015 to stand corrected accordingly.

2 The above Civil Application has been filed by the Applicant i.e. the original Petitioner seeking recall / review of the order dated 22-9-2015 passed in the above Writ Petition. By the said order, the above Writ Petition came to be dismissed and resultantly the order dated 23-3-2015 passed by the Learned Judge of the Small Causes Court, Pune, rejecting the application Exhibit 74 filed by the Applicant, came to be confirmed.

3 The Applicant has sought review of the said order dated 22-9-2015 on the ground that the Trial Court has erroneously recorded a finding by proceeding on the premise that the relief sought in the said application Exhibit 74 is beyond the scope of the counter claim. The said finding has been confirmed by this Court whilst dismissing the Petition by the said order dated 22-9-2015. This finding of the Trial Court according to the Applicant is oblivious of the fact that the counter claim filed by the Applicant was allowed to be amended vide order dated 18-8-2012 passed on application Exhibit 39. By the said amendment, the Applicant had sought incorporation of prayers relating to the second floor premises which were prayer clauses (iv) and (v) of the said application Exhibit 39. Hence according to the Applicant the basis of the order dated 23-3-2015 passed on Exhibit 74 goes away. Since the Trial Court has proceeded on the basis that the counter claim does not include the property mentioned in Schedule III according to the Applicant there is an error apparent on the face of the record. As indicated above the Applicant has therefore sought recall / review of the order dated 22-9-2015 passed in the above Petition.

4 I have gone through the amendment application Exhibit 39 filed on behalf of the Applicant seeking amendment to the counter claim filed by the Applicant who is the Defendant No.1 in the Suit. No doubt, vide prayer clauses (iv) and (v) the reliefs have been sought in respect of the property on

the second floor which is part of schedule III, however, the same would not make any difference in so far as the rejection of the Writ Petition and sustaining the order dated 23-3-2015 is concerned. A reading of the said order dated 23-3-2015 discloses that apart from the reason that the relief sought vide Exhibit 74 is beyond the scope of the counter claim, the order is founded on three other grounds or reasons namely that there is no prima face proof that the Applicant / Defendant No.1 has contributed for the construction of first and second floor, that the name of the Plaintiff i.e. the Respondent herein is entered in the record of the society in view of the Will executed by his father, thirdly there is no prima facie case that the Defendant is the owner of the suit premises and fourthly that there is no contract to pay any rent to the Defendant No.1. Hence the rejection of Exhibit 74 is not only on the ground that the reliefs sought vide the said Exhibit 74 is beyond the scope of the counter claim but is also for the reasons which have been adverted to hereinabove. Hence even if the said reason is not to be taken into consideration, the order dated 23-3-2015 passed by the Trial Court i.e. the Learned Judge of the Small Causes Court can be sustained on the basis of the other reasons mentioned in the said order. For the nature of the relief sought vide Exhibit 74, the Defendant had to show some semblance of a right in respect of the second floor which the Trial Court in the order dated 23-3-2015 has observed that the Defendant has prima facie not shown.

5 For the reasons aforesated no ground for review of the order dated 22-9-2015 is made out hence no relief can be granted to the Applicant in the above Civil Application, the same to accordingly stand rejected.

6 Needless to state that if the Applicant / Defendant No.1 succeeds in the counter claim, he can then claim mesne profits which claim would undoubtedly be decided on its own merits and in accordance with law.

[R.M.SAVANT, J]