

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 11156 OF 2011

Mr. Khalil Ahmed Khan and Ors ..Petitioners.

Vs

Mr.Nelson Francis Bugri and Ors .. Respondents

Mr. P. J. Thorat a/w Ms. Pratibha Shelke, Advocate for Petitioners.
Mr. R. P. Ojha, Advocate for Respondents.

CORAM : R.G.KETKAR,J.
DATE : 09/06/2016

PC:

1. Heard Mr. P.J.Thorat, learned counsel for the petitioners and Mr. R.P.Ojha, learned counsel for the respondents at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged Judgment and order dated 10.3.2011 passed by the learned Judge, presiding over Court No.7 of the Court of Small Causes at Bombay (Bandra Branch) below Exhibit-35 in R.A.E. Suit No.306/757 of 2005 as also Judgment and order dated 15.11.2011 passed by the Appellate Bench of the Small Causes Court in Revision Application No. 114 of 2011. By these orders, the Courts below allowed the application at Exh.35 filed by the respondents, hereinafter referred to as 'plaintiffs', under Order VI, Rule 17 of C.P.C. for amending the plaint subject to costs of Rs.2000/-.

3. In support of this petition, Mr. Thorat submitted that the plaintiffs have instituted suit in the year 2005, i.e. after amendment of C.P.C. in the year 2002. On 7.11.2005, Written Statement was filed resisting the suit. On 8.8.2007, issues were framed. In September, 2007, affidavit of evidence was filed on behalf of the plaintiffs. The said witness was partly cross examined on 10.10.2007. On 15.2.2010, the plaintiffs filed application Exhibit-35 for amending the plaint. He invited my attention to paragraphs 3 to 5 of the application and submitted that the plaintiffs did not make out a case of due diligence as contemplated by proviso to Order VI, Rule 17 of C.P.C.

4. Defendants filed reply dated 5.4.2010 opposing the application. He submitted that specific contention was raised in the reply that as the suit is part heard, no amendment in the plaint can be allowed under the amended provisions of C.P.C.

5. Learned trial Judge allowed the application. While allowing the application, the learned trial Judge observed in paragraph 7 that there is substance in the argument of the learned Advocate for the defendants that in view of the proviso appended to Order VI, Rule 17, the prayer for amendment cannot be allowed after commencement of the trial unless the Court is satisfied that despite due diligence, the party was not in a position to raise the matter before commencement of the trial. The learned trial

Judge, however, thereafter proceeded to observe that proviso to Order VI, Rule 17 is not strictly applicable. He further submitted that the said approach of the learned trial Judge is contrary to the decision of the Apex Court in the case of Vidyabai Vs. Padmalatha, (2009) 2 Supreme Court Cases 409.

6. As far as the order of the appellate bench is concerned, in paragraph 10, the appellate bench also observed that there is no averment as regards satisfaction of the conditions stipulated in the proviso to Order VI, Rule 17. He, therefore, submitted that Petition deserves to be allowed, thereby, dismissing application Exh.35.

7. On the other hand, Mr. Ojha supported the impugned orders. He submitted that the plaintiffs have instituted suit against the defendants on various grounds, such as, additions and alterations and unlawful subletting. In paragraph 3 of application Exhibit-35, the plaintiffs contended that the defendants have inducted respondents, i.e. proposed defendants no.3 and 4, in the suit premises without their consent and authority. In paragraph 4, the plaintiffs have incorporated additional ground of eviction, namely, bonafide requirement as per the Schedule attached to the application. In paragraph 5, it is asserted that the amendment deserves to be allowed to avoid multiplicity of the proceedings.

8. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. From the narration of the facts, it is evident that the trial has commenced. The plaintiffs have filed application contending that the defendants have inducted respondents, i.e. proposed defendants no.3 and 4, in the suit premises. In paragraph 4 of the reply, the defendants have contended that on or about 30.4.2008, defendant no.2 stopped conducting business from the suit premises. The respondents (proposed defendants no.3 and 4) are nephews of defendant no.2. Respondents were introduced by defendant no.2 with a request to permit him to conduct his business in the suit premises. By Agreement dated 1.5.2008, he permitted the respondents to conduct business of defendant no.1 from the suit premises. Thus, prima facie at this stage, defendant no.1 has accepted the contentions advanced by the plaintiff in paragraph 3 of the application. Whether it amounts to subletting or not, is a matter of evidence and cannot be gone into at this stage. It is also not in dispute that the plaintiffs have instituted suit on the grounds of additions and alterations of permanent nature as also unlawful subletting. By the proposed amendment, the plaintiffs contend that the defendants have unlawfully sublet the suit premises to the respondents (proposed defendants no.3 and 4).

In other words, the ground of unlawful subletting is already a ground raised by the plaintiffs. In the case of Abdul Rehman Vs Mohd Ruldu, (2012) 11 Supreme Court Cases 341, the Apex Court has held that amendment of plaint after commencement of trial making clear and explicit what was already implicit in plaint is permissible. The nature of the suit is not changed. All amendments which are necessary for the purpose of determining real questions in controversy between the parties should be allowed if it does not change basic nature of suit, provided it does not cause injustice or prejudice to the other side. Main purpose of allowing amendment is to minimize litigation.

9. In the present case, the ground of unlawful subletting is already raised. Even after amendment the suit essentially remains suit for eviction and thus nature of the suit is not changed. In my opinion, the proposed amendment does not cause any prejudice to the other side and the defendants will be at liberty to file their additional written statement.

10. As far as the trial court is concerned, it is not as if the trial Court is not aware of the fact that the suit is instituted after amendment of C.P.C. in the year 2002. In paragraph 7, the learned trial Judge has observed that it cannot be disputed that the plaintiff can file a separate suit against the defendants on the ground of reasonable and bona fide requirement. Even that was

not seriously disputed by Mr. Thorat during the course of argument. Mr. Thorat submitted that the plaintiffs can file separate suit raising ground of bona fide and reasonable requirement. The learned trial Judge has considered this aspect and has observed that in order to avoid multiplicity of proceedings, it is necessary to allow the amendment application

11. As far as the Appellate Court is concerned, in paragraph 11 the Appellate Court noted that the defendants admitted in the reply about the proposed defendants no.3 and 4 conducting the business and the question whether the defendants have sublet the suit premises to the proposed defendants no.3 and 4 or not, will have to be agitated on merits.

12. Mr. Thoart relied upon the decision of the Apex court in the case of Vidyabai (supra). In paragraphs 10 and 11, it is observed thus:

“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'."

Relying upon these paragraphs, Mr. Thorat submitted that the Courts below have not justified in allowing the application for amendment.

13. In view of the decision of the Apex Court in the case of Abdul Rehman (supra) extracted herein above, I do not find that the reliance placed by Mr. Thorat on the ruling of Vidyabai (supra) advances the case of the defendants. In the present case, it is not disputed and cannot be disputed that the plaintiffs can institute separate suit raising ground of reasonable bonafide requirement. As far as the ground of unlawful subletting is concerned, that is one of the grounds for eviction. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Hence, Petition fails and the same is dismissed. Rule is discharged with no order as to costs. It is, however, expressly made clear that where a decree is

appealed from by the petitioners, 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.

(R.G.KETKAR, J.)