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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL (L) NO.717 OF 2014

The All India Handloom Fabrics
Marketing Cooperative Society Ltd. ...Appellant
vs.
M/s.Evans' Frazer Co.(India) Ltd. ...Respondent

Mr.Neveille Mukerji i/b Veritas Legal for the
appellant
Mr.Shailesh Rajda i/b M/s.DSR Associates for the
respondent

CORAM : A.S.OKA, &
P.D.NAIK, JJ.
DATE : MARCH 28, 2016

ORAL JUDGMENT: (PER A.S.OKA, J.)

1 The submissions of the learned counsel for the parties were heard in the last week. The order dated 28th January 2015 directs that the appeal shall be disposed of finally at the stage of admission.

2 By this appeal, the appellant-original plaintiff has taken an exception to the Order dated 16th September 2015 passed by the learned Single Judge on a Chamber Summons taken out by the appellant. For the sake of convenience, the parties are referred in this order with reference to their status before the Trial Court.

3 By the Chamber Summons No.607 of 2013, the plaintiffs sought leave to amend the plaint. By the impugned order, the Chamber Summons has been

dismissed.

3 With a view to appreciate the submissions made by the learned counsel for the parties, a brief reference to the facts of the case will be necessary. Initially, the present suit was filed by the plaintiffs in the Court of Small Causes at Mumbai. The defendants are the owners of the building known as Fort House, D.N.Road, Mumbai. According to the case of the plaintiffs, in the year 1956, they were granted permission to occupy the ground floor of the said building admeasuring 7000 sq ft on Leave and Licence basis. Subsequently, an area of 3474 sq ft on the rear side was permitted to be occupied by the plaintiffs. The total area in possession of the plaintiffs was 10,474 sq ft. It is stated that initially Leave and Licence was granted for a period of 5 years which was extended by a further period of 5 years.

4 In October 1982, a major fire broke out in the building in which substantial part of the building was destroyed.

5 The plaintiffs filed a suit against the defendants and Mumbai Municipal Corporation in the City Civil Court, Mumbai. The case made out in the plaint was that the plaintiffs and the defendants have carried out repairs to the said building and that the plaintiffs offered to contribute towards cost of construction of the portion of the building which was in their possession. It is alleged that a

sum of Rs.10,00,000/- was paid by the plaintiffs to the defendants.

6 Thereafter, there was a prolonged correspondence between the parties. The appellants filed a present suit being RAD Suit No.1436 of 1999 in the Court of Small Causes at Mumbai. In the said suit, the plaintiffs relied upon the consent terms filed in RAD Suit no.925 of 1996 filed by them against the defendants. Some of the relevant clauses in the said consent terms are clauses 1, 4,4a read thus:

"1 Agreed and declared that prior to the destruction by fire of the building known as Fort House situate at 221, Dr. D.N. Road, Fort, Bombay 400 001, the plaintiffs were occupying since 1956 a portion on the ground floor of the said Fort House having an area of about 10,474 sq ft as the monthly tenants of the defendants at the monthly rent of Rs.11,200/-

2...

3...

4 Agreed and declared that in lieu of and in substitution for the monthly tenancy of the premises having built up area of 8380 sq ft in the re-constructed building as provided in clause 3 above, the defendants hereby agree and undertake to give to the plaintiffs on ownership basis free of cost of

construction the possession of the premises on the ground floor with proper frontage in proportion to the frontage the plaintiffs were enjoying all along till the property was destroyed by fire, on the left hand side of the said building Fort House while entering the same viz towards the property known as Badri Mahal, Jeejeebhai Dadabhai Lane to be reconstructed by the defendants having a built up area of 5100 sq ft.

4(a) It is further agreed that the plaintiffs will not claim any monthly tenancy rights as provided in clause 3 above and that the said monthly tenancy rights of the plaintiffs under clause 3 above will stand merged in the ownership rights of the plaintiffs as provided in clause 4 about but instead of 8380 sq ft built up area the defendant will give built area of 5100 sq ft on ownership basis.

5 Agreed and declared that the reconstructions of the building by the defendants shall be in accordance with the building plans approved by Municipal Corporation of Greater Bombay and the said building will be completed with reasonable despatch and unless prevented by the factors beyond the control of the defendants, the defendants agree and undertake to give possession of the said premises admeasuring

5100 sq ft built up in the said reconstructed building on the ground floor with proper appropriate and proportionate frontage as agreed to be given by or before June 2001 or earlier as may be possible and such possession shall be given to the plaintiffs by the defendants before the defendants give possession to any other party or person or before the defendants themselves start using and occupying any portion in the said reconstructed building. The intent being that the defendants shall first secure the possession of the said agreed premises to the plaintiffs before allowing others or themselves to occupy the said reconstructed building."

7 The first prayer in the suit was that the consent terms/agreement dated 19th August 1996 filed in the Court of Small Causes in RAD Suit No.921 of 1996 is still valid, subsisting and binding enforceable contract by and between the parties to the suit. The second prayer is for declaring clauses 8 and 12 of the consent terms as null and void.

8 It appears that an objection to the jurisdiction of the Court of Small Causes to entertain the said suit filed by the plaintiffs was raised by the defendants. By the Judgment and Order dated 18th December 2007, the Court of Small Causes dismissed the suit by observing that the suit was

not maintainable and that the said Court has no jurisdiction to entertain the suit. An appeal was preferred by the plaintiffs before the Appeal Bench of Court of Small Causes. By Judgment and Order dated 5th December 2012, the said appeal was partly allowed. The Appeal Bench while holding that the Court of Small Causes had no jurisdiction to entertain the suit directed to return the plaint for presentation before the appropriate Court. Thereafter, on 1st March 2013, the plaintiffs filed the plaint in this Court. It is claimed that the plaint was filed as it is without making any material amendments.

9 By the Chamber Summons on which impugned order has been passed, the plaintiffs sought amendment of plaint for incorporating additional averments and prayers. One averment which is sought to be added was that as per the terms of the said consent terms/agreement, the plaintiffs are entitled to possession of the premises admeasuring 5100 sq feet on ownership without payment of any monitory consideration. A prayer to that effect was sought to be added. In the alternative, a prayer was sought to be added seeking a decree directing the defendants to provide to the plaintiffs an area of 8380 sq ft on the pre existing rental basis on the ground floor in the newly constructed building. By way of amendment, a prayer was sought to be incorporated for an injunction restraining the defendant from giving away or parting with the possession of the premises admeasuring 8380 sq ft

including 5100 sq ft on the ground floor in the front side of the newly constructed building. The another prayer sought to be added is of a decree for possession directing the defendants to place the plaintiffs in possession of the premises admeasuring 5100 sq ft on ownership basis or the premises admeasuring 8380 sq ft on tenancy basis. A prayer was sought to be incorporated directing the defendants to pay compensation at Rs.11,200/- per month from 1st July 2001 till the plaintiffs are placed in possession of the premises in newly constructed building. Prayer (e5) was also sought to be added. However, the learned counsel for the appellants on instructions stated that the appellants are not pressing for incorporation of the said prayer.

10 The learned Single Judge while passing the impugned order observed that all the prayers which are sought to be added by way of amendment ought to have been made in the original suit. The learned Judge held that evidence has been led on all material issues and therefore, the plaintiff is cannot get an opportunity to lead new evidence, thereby possibly improving upon the case already made out before the Court of Small Cases.

11 The learned Senior Counsel for the appellants submitted that in the suit for declaration filed by the plaintiffs the prayers are sought to be added for consequential reliefs. He submitted that only because evidence was adduced before the Court of

Small Causes, it cannot be said that the suit is partly heard before this Court. His submission is that the trial will have to be conducted *de novo* as there is a concluded finding that the Court of Small Causes had no jurisdiction to entertain the suit. His submission is that the findings recorded by the Court of Small Causes are the findings by the "Coram non judis". He urged that the reasons given by the learned Single Judge for rejecting the prayer for amendment have no basis as the amended provisions of the Code of Civil Procedure, 1908 will not apply to the original suit which was filed in the year 1999. Moreover, it cannot be said that the suit is part heard.

12 The learned senior counsel representing the respondents pointed out that the prayers sought to be incorporated are time barred. Secondly, he submitted that the prayer sought to be added by way of prayer clause (e-4) for compensation from 1st July 2011 contains inadvertent mistake, as in the proposed paragraph No.30A of the plaint, it is contended that the compensation at the rate of Rs.11,200/- per month is payable upto 30th June 2001 and not from 2011. He submitted that apart from the fact that the proposed amendments will change the entire nature of the suit, proposed amendments are barred by limitation. He submitted that the very fact that the plaintiffs were forced to file a suit for recovery of possession shows that the possession of the defendants of the premises claimed by the plaintiffs has become adverse to the plaintiffs and

therefore, by virtue of Article 65 to the Schedule to the Limitation Act, 1963, the prayer for possession is completely time barred.

13 We have given careful consideration to the submissions. As far as amended provisions of said Code of 1908 and in particular Rule 17 of Order VI are concerned, after the institution of the suit in this Court, the same has not reached the stage of hearing. The evidence was recorded before the Court of Small Causes which ultimately held that the said Court had no jurisdiction to entertain the suit. Therefore, in any event, it cannot be said that the Chamber Summons for amendment was moved after the trial commenced.

14 We have already adverted to the prayers made in the plaint and relevant clauses of the agreement/consent terms sought to be relied upon by the plaintiffs. When the suit was filed, the building was not reconstructed. In the suit, the substantive prayer was for declaration that the consent terms/agreement dated 20th August 1996 are valid, subsisting and binding enforceable contract by and between the plaintiffs and the defendants. Now, we must make a reference to the prayers sought to be added by way of amendment. Prayer (e-1) is for perpetual injunction restraining the defendants from parting with possession of the premises agreed to be allotted to the plaintiffs. Prayers (e-2) and (e-4) which are material read thus:

(e-2) That the defendants may be ordered and decreed to hand over possession of the suit premises namely 5100 sq ft on ownership basis or 8380 sq ft on tenancy basis as per said Consent Terms dated 20th August 1996.

(e-3)...

(e-4) The defendants may be ordered and decreed to pay the compensation at Rs.11,200/- p.m from 1st July 2011 till possession is given to the plaintiffs as compensation for the period the plaintiffs are kept out of and deprived of possession of the premises in the new building Fort House, reconstructed by the defendants."

15 The prayer (e-3) is for ad-interim relief in terms of prayers (e-1) and (e-2). As far as the prayer (e-2) is concerned, the limitation will start running from the date on which the possession of the defendants of the premises in question becomes adverse to the plaintiffs. The issue of bar of limitation is a matter for trial. As far as prayer (e-4) is concerned, we are not on the question whether there is a typographical error in the prayer. Suffice it to say that prayer (e-4) is a consequential prayer to prayer (e-2). On plain reading of the said prayers, it cannot be said that when the Chamber Summons was taken out on 20th July 2013, the prayers e-2 and 3-4 were was barred by limitation.

16 In any event, even if amendment is permitted,

the issue of bar of limitation of the prayers in the amended plaint always remains open.

17 The learned Single Judge has not considered the merits of the Chamber Summons. He observed that the evidence has been already led on material issues. As stated earlier, the said evidence is adduced before the Court of Small Causes which had no jurisdiction. Therefore, there was no impediment in the way of deciding the Chamber Summons on merits especially when the recording of evidence before this Court had not commenced.

18 In our view, the Chamber Summons ought to have been made partly absolute by permitting the amendment as sought, except the prayer clause (e-5). To that extent, the Appeal must succeed.

19 Hence, we pass the following order:

- (I) Impugned order dated 16th September 2014 is hereby quashed and set aside and the Chamber Summons No.607 of 2013 is made absolute in terms of prayer clause (a);
- (II) We however make it clear that the plaintiffs are not entitled to incorporate prayer clause (e-5) which is sought to be added by way of amendment;
- (III) We make it clear that the issue of maintainability of the added prayers as well as the issue of bar of limitation in relation to amended prayers is expressly kept open;

- (IV) Appeal is partly allowed on above terms;
- (V) We make it clear that we have made no adjudication on the merits of the controversy in the pending suit.
- (VI) Amendment shall be carried out within a period of three weeks from the date on which this Judgment and order is uploaded on the website of this Court.

(P.D.NAIK,J.)

(A.S.OKA,J.)