

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

WRIT PETITION NO. 3158 OF 2017

The Ganesh Co-operative
Housing Society Ltd.,

.. Petitioner

Vs.

Mr. Sanjay Gopalkrishna Ullal

.. Respondent

...

Ms. Snehal Modi for the Petitioner.

Mr. Chandrakant N. Chavan for the Respondent.

**CORAM : M.S. SONAK, J.
DATE : 10 AUGUST 2017.**

P.C. :

1. Not on board. In view of urgency, taken on production board.
2. Heard Ms. Snehal Modi for the petitioner and Mr. Chandrakant Chavan for the Respondent.
3. Ms. Snehal Modi, learned counsel for the petitioner states that the petitioner will not press the motion that this petition be taken up by the Hon'ble Justice Jamdar before whom the matter had been argued for some length in the month of March, 2017. He submits that said motion will be withdrawn.
4. Accordingly, Rule.

5. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith.

6. This is the second round of litigation with regard to leave granted by the Trial Judge to the respondent to amend the written statement partly. Since the amendment was applied for after the commencement of the trial, and there were no findings as regards due diligence on the part of the respondent, this court, by its order dated 7th June, 2016 had remanded the matter to the Trial Judge. Upon the matter being remanded, the learned Trial Judge has made the impugned order dated 16th December, 2016. Learned Trial Judge has held that there was no lack of due diligence on the part of the respondent in applying for leave to amend.

7. Ms. Modi, learned counsel for the petitioner, submits that this is a case of withdrawal of admissions and setting up of inconsistent and mutually destructive pleas. She submits that initially the respondent in several paragraphs of the written statement, including in particular paragraphs 10 and 15 had clearly admitted that he does not claim any right whatsoever in the open terrace. By the proposed amendment, at clause (i) and (ii) of the Schedule, the respondent sought to withdraw such admissions. Such withdrawal was however not permitted by the learned Trial Judge, instead, the learned Trial Judge granted leave to amend the written statement in terms of clause (iii) of the schedule by way of an addition of paragraph 10(a) after paragraph 10 of the written

statement. Ms. Modi submits that again in paragraph 10(a), the respondent has attempted to withdraw the admissions and set up a totally inconsistent and mutually destructive case, which is impermissible. Ms. Modi submits that the settled position in law is that a party may not withdraw admission or set up an inconsistent and mutually destructive case. On this ground itself, the impugned order warrants interference.

8. Without prejudice, Ms. Modi submits that the respondent has not at all established due diligence. She points out that this suit was filed in the year 2012. After the commencement of the trial, the respondent, applied for amendment by merely stating that on account of oversight that averments were made in paragraphs 10 and 15 of the written statement claiming no rights in respect of the open terrace. There were no particulars set out in the Civil Application on the aspect of due diligence. She submits that some so-called vague and fabricated particulars set out in the affidavit in rejoinder deserve no credence because they are in the nature an afterthought. She submits that learned Trial Judge has not considered this aspect in the proper legal perspective and the impugned order warrants interference in exercise of the extra ordinary jurisdiction.

9. Mr. Chavan, learned counsel for the respondent submits that this is a case for explanation of the so-called admissions which are always permissible by resorting to provisions of Order VI Rule 17 of the Code of Civil Procedure. He submits that a detailed explanation has been furnished on the

aspect of due diligence and further explanation, is backed by documents emanating from the petitioner society itself. He submits that discretion has been exercised by the learned Trial Judge in a fair and reasonable manner and the same may not be interfered with by this court in the exercise of extra ordinary jurisdiction under Article 227 of the Constitution of India.

10. Mr. Chavan upon a query as to the quantum of costs, obtained instructions from the respondent who is present in the Court. Respondent has voluntarily agreed to pay the cost of Rs.50,000/- in place of cost of Rs.1000/- awarded by the learned Trial Judge.

11. Rival contentions now fall for my consideration.

12. In this case, the learned Trial Judge has quite rightly not permitted the respondent to delete the admissions in paragraphs 10 and 15 of the written statement. The learned Trial Judge has however permitted the respondent to add paragraph 10 (a) to the written statement. The issue as to whether the averments in paragraph 10 of the written statement, now permitted to be introduced by way of amendment are only in the nature of explanation of admission or whether to some extent, they amount to withdrawal of admissions or whether, they introduce mutually destructive pleas are issues, which, in the facts and circumstances of the present case can be left open for determination by the learned Trial Judge in the course of trial of the suit. In this case, discretion has been exercised in a particular

manner and at least *prima facie* it cannot be said that such exercise of discretion is vitiated by any perversity or jurisdictional error. This is however, not required to be construed as approval of the impugned order. In a situation of this nature, it is sufficient to state that a case warranting interference under Article 227 of the Constitution of India has not been made out. Accordingly, it will be appropriate if the impugned order is left undisturbed but liberty is granted to the petitioner to challenge the impugned order, in case, the suit itself is decided against the petitioner and the petitioner chooses to institute a substantive appeal against such dismissal. In such substantive appeal, the petitioner would be undoubtedly entitled to challenge the impugned order. In any case, such specific liberty is reserved in favour of the petitioner in this regard. Such a course of action in the facts and circumstances of the present case will meet the ends of justice.

13. On the aspect of due diligence, there is no necessity to make any observations, particularly since liberty is granted to the petitioner in the aforesaid terms. However, atleast at this *prima facie* stage, it cannot be stated that the impugned order is in excess of jurisdiction so as to warrant interference under Article 227 of the Constitution of India. In the affidavit in rejoinder some explanation was offered in the matter of due diligence and further, such explanation was backed by some documents as well. The issue as to whether such documents are fabricated or not is required to be examined in the course of the trial. The only reason for making this *prima facie* observation is to indicate that no case of the degree warranting interference under Article 227 of the

Constitution has been made out though such issues can always be gone into in a substantive appeal if and when any occasion for the same arises.

14. Accordingly, it is made very clear that observations made in the present order, need not influence the Appellate Court, if and when any occasion arises for challenging the impugned order. Such observations are only for the purpose of determining whether any case is made out to exercise extra ordinary jurisdiction under Article 227 of the Constitution of India.

15. The costs awarded in the impugned order, in the facts and circumstances of the present case, constitutes only a pittance. The learned Trial Judge was required to take into consideration the prejudice *inter alia* on account of delay. Since, the respondent has volunteered to pay costs of Rs.50,000/-, there is no necessity to interfere with the impugned order in exercise of jurisdiction under Article 227 of the Constitution of India.

16. The respondent is directed to pay to the petitioner costs of Rs.50,000/- within a period of four weeks from today. In case costs are not paid or deposited before the learned Trial Judge within a period of four weeks from today, the respondent shall not have the benefit of the impugned order dated 16th December, 2016. In such eventuality, the amendment though already carried out shall be struck out from the records of the learned Trial Judge.

17. The petitioner is granted period of six weeks from today to file an additional affidavit in lieu of examination-in-chief of its witnesses. Accordingly, the learned Trial Judge is directed to defer the hearing in the suit by a period of six weeks from today. However, once such affidavit is filed, the learned Trial Judge is directed to dispose of the suit as expeditiously as possible.

18. The Rule in this petition is disposed of in the aforesaid terms with liberty as aforesaid.

(M.S. SONAK, J.)