

dik

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

WRIT PETITION NO. 7774 OF 2017

Suresh Rajaram Kandpile

...Petitioner

VS

Unkunown & Unnamed Heirs & Legal
representatives of Late Dilip Singh PU

...Respondents.

.....

Mr P.S.Dani, Sr. Advocate a/w Viraj Kandpile i/b Hemali S.
Kurane for the Petitioner

Mr Prasad Pathare for Respondent No.2.

.....

**CORAM : B. P. COLABAWALLA, J.
JULY 17, 2017.**

P.C.:

This Writ Petition has been filed under Article 227 of the Constitution of India challenging the Judgment and Order dated 4th May, 2017 passed below Exh.31. This application (Exh.31) was an amendment application filed by Respondent No.2 herein (original Defendant No.2 before the Trial Court). For the sake of convenience, I shall refer to the parties as they were arrayed before the Trial Court.

2

The Petitioner herein (original Plaintiff) filed R.A.E.

Suit No.454/745 of 2011 for eviction of the Defendants. The suit was initially filed on two grounds, namely, bona-fide requirement and non-user of the suit premises. This suit was contested by Defendant No.2 by filing his Written Statement (“W.S.”). Thereafter, issues were framed and the Plaintiff also filed his affidavit of evidence. It is only thereafter that an amendment application was filed on behalf of Defendant No.2 dated 27th July, 2016 seeking to amend the W.S. filed on his behalf. This amendment application came to be allowed by the impugned order dated 4th May, 2017. It is being aggrieved by this order that the Petitioner is before me in my writ jurisdiction under Article 227 of the Constitution of India.

3 In this factual backdrop, Mr Dani, learned Senior Counsel appearing on behalf of the Petitioner, principally made three submissions.

- (i) That the Trial of the suit having already commenced as contemplated under Order VI Rule 17 of the Code of Civil Procedure, 1908 (“CPC”), the amendment application could not

have been allowed unless the Court was satisfied that in spite of due diligence, Defendant No.2 could not bring on record what was now sought to be brought on record by virtue of the amendment. Without this satisfaction, there was a jurisdictional bar from allowing the amendment. In support of this proposition, Mr Dani, learned Sr. Counsel relied upon a decision of the Supreme Court in the case of **Vidyabai & Ors Vs. Padmalatha & Anr¹**;

- (ii) That in any, event the amendment sought to be now brought on record was completely inconsistent not only when the W.S. as originally filed, but even in the amendment application inconsistent and mutually destructive pleas were taken. In other words, Defendant No.2 was taking mutually destructive pleas which could not be permitted by way of

¹ 2009(1) All MR 471.

this amendment, was the submission;

- (iii) That in any event, this amendment had the effect of withdrawal of an admission made by Defendant No.2. According to Mr Dani, in the W.S. as originally filed, Defendant No.2 had specifically admitted that the Plaintiff was the landlord of Defendant No.2. It was this admission that was now sought to be withdrawn by virtue of the amendment, and therefore, could not be allowed.

4 It is, on these three grounds, that Mr Dani assailed the impugned order.

5 On the other hand, Mr Pathare, learned advocate appearing on behalf of Defendant No.2, submitted that there was no merit in any of the aforesaid contentions. He submitted that even though it is true that the amendment application was filed after commencement of the trial, this application clearly made out a case of due diligence as contemplated under Order VI Rule

17 of the CPC. In this regard he was on pains to point out paragraphs 5 to 9 of Exh.31 (the amendment application) to contend that the jurisdictional requirement as contemplated under Order VI Rule 17 of the CPC was clearly met in the facts of the present case. In these circumstances, he submitted that the reliance placed by Mr Dani on a decision of the Supreme Court in the case of **Vidyabai** (supra) was wholly misconceived.

6 As far as the argument regarding inconsistent pleadings is concerned, Mr Pathare submitted that it is well settled that the amendment of a plaint and the amendment of the W.S. stand on two totally different footings. As far as the amendment of the W.S. is concerned, the Defendant can certainly take mutually destructive pleas and that cannot be a ground for rejecting the amendment application. He submitted that an additional or new ground of defence or even substituting or altering the defence by taking inconsistent pleas in the Written Statement can be allowed as long as the amendment does not cause grave irretrievable prejudice to the Plaintiff or displacing him completely. In the facts of the present case, there was no question of causing the Plaintiff any grave irretrievable

prejudice by allowing the amendment, was the submission. In these circumstances he submitted that even assuming for the sake of argument that Defendant No.2 had taken inconsistent and mutually destructive pleas, the same was no ground for not allowing the amendment as sought for by Defendant No.2.

7 As far as the argument regarding withdrawal of an admission is concerned, Mr Pathare submitted that there was no withdrawal of any alleged admission made by Defendant No.2. He submitted that what is sought to be brought on record are certain the facts and documents which ought to have been placed on record by the Plaintiff in the first place as they were within their knowledge. This having been suppressed by the Plaintiff, it was necessary to bring these facts on record by seeking necessary amendments to the W.S. as well as bringing certain necessary documents on record. He submitted that if one reads the amendment as a whole, there is no withdrawal of any alleged admission made by Defendant No.2 in the W.S. as originally filed. For all the aforesaid reasons, Mr Pathare submitted that there was no merit in this Writ Petition and the same ought to be dismissed.

8 I have heard the learned counsel for parties at length. I have perused the papers and proceedings in the Writ Petition. I have also carefully gone through the impugned order dated 4th May, 2017.

9 On the first contention raised by Mr Dani, namely, that the amendment application ought to have been rejected by the Trial Court because Defendant No.2 had not established any due diligence as contemplated under Order VI Rule 17 of the CPC, I find this argument to be factually incorrect. I have gone through the amendment application (Exh.31). Paragraph Nos.5 to 9 of this application reads thus:

“5. *One Mr. Rishikesh Keshav Bele, resident of Room No.25, 596 Gangaram Niwas, N.M.Joshi Marg, Byculla (W), sometime in and about the 3rd week of April 2016 disclosed to the Defendant No.2 copy of Reply dt; March 1990 filed by the Special Land Acquisition Officer No.5, Bombay & B.S.D. To Writ Petition No.722 of 1990. Certain other documents were also disclosed to the Defendant No.2. Amongst the Documents is also a copy of Letter dt; 15/3/2016 addressed by Resident Executive Engineer, MHADA, Mumbai to Shri Rishikesh Keshav Bele. Hereto*

annexed and marked as Exhibit -A(colly) are copies of documents handed over by Shri Rishikesh Bele to the Defendant No.2.

6. *The Defendant No.2 states that prior to the aforesaid period, the Defendant No.2 had heard about information concerning the subject matter of the papers exhibited above. However, the Defendant No.2 did not have any credible proof in his hands on the basis of which he could act.*

7. *The Defendant No.2 states that his adoptive father, the original tenant of the Suit Premises, apart from the regular talks had not disclosed or shown any documents regarding the affairs of the suit premises. The Defendant No.2 started working in and about the year 1975. From the year 1985 to about 1987 the Defendant No.2 was working out of India. The Defendant returned in and about 1987 and was in India till about 1991. In and about 1991 the Defendant No.2 again took up a job out of India and since then was working outside India till the year 2009. The Defendant No.2 therefore did not attended much to the affairs of the building. The Defendant No.2 states that as the building was in a bad state, there was leakage and seepage into the premises, the residents of the building had formed themselves into a Society. The Defendant No.2 was not exactly aware as to what was the agenda taken up by the said Society apart from the repairs of the Suit Building due to his unavailability. The ladies of the house did not really understand what exactly was going on. The Defendant No.2 used to contribute his share of the expenses which they paid and never really made a detailed enquiry as to what*

exactly was going on.

8. *The Defendant No.2 states that the Affidavit in Reply dt: March 1990 makes it clear that the building, of which the suit premises forms a part, has been acquired by the MHADA as per the provisions of S.93(5) of the Maharashtra Housing and Area Development Act, after passing an order dt. 1/9/1989. Pursuant to the said Order the MHADA processed with the acquisition and published a notification dt. 8/11/1989 in the Maharashtra Government Gazette, Part-I, Konkan Division Supplement on 16/11/1989 on pages 986 and 987 sanctioning the acquisition proposal and vesting the said property absolutely in the Bombay Housing and Area Development Board. The Defendant No.2 states that, the said Affidavit makes it clear that in view of the said publication, the said property vested absolutely in the Bombay Housing and Area Development Board free from all encumbrances. These documents appear to be acquired by Shri. Rishikesh Keshav Bele through the Right to Information Act. The contents of the Reply are reiterated in the Letter dt: 15/3/2016 recently addressed by the MHADA.*

9. *The Defendant No.2, in view of the aforesaid material, that came into his possession, made an Application Dt. 22/4/2016 in Writ Petition No. 722 of 1990 before the Hon'ble High Court and prayed for Certified Copy of the Judgment/Order dt: 30/7/1993 disposing the aforesaid Writ Petition. Hereto annexed and marked as Exhibit-B is a copy of the Application dt: 22/4/2016."*

10 What is clearly stated in this application is that the facts mentioned therein were brought to the notice of Defendant No.2 only in the 3rd week of April 2016. Though it is stated that prior to this, Defendant No.2 had heard about this information, since he had no concrete evidence, there was no question of amending the W.S. before the said date. To my mind, the explanation given in these paragraphs clearly indicates that the facts that are now sought to be brought on record by virtue of the amendment, were clearly not within the knowledge of Defendant No.2 prior to the commencement of the trial. What is important to note over here is that it is not the case of the Plaintiff that prior to the trial having commenced, the facts and the documents which are now sought to be brought on record were in the knowledge of Defendant No.2 prior to the commencement of the trial. This being the case, I do not find any infirmity in the impugned order allowing the amendment. After the commencement of the trial, I find that the jurisdictional requirement as contemplated under Order VI Rule 17 of the CPC was clearly met in the facts and circumstances of the present case. This being the factual position, I find that the reliance placed by Mr Dani on a decision of the Supreme Court in the case

of **Vidyabai** (supra), is wholly misplaced.

11 Even the argument of Mr Dani that by virtue of the amendment, Defendant No.2 seeks to raise mutually destructive pleas, is without any substance. It is now well settled that a Defendant is certainly allowed to raise inconsistent or mutually destructive pleas in the W.S. The amendment of a plaint and the amendment of a W.S. stand on totally different footings. The general principle that the amendment of pleadings cannot be allowed so as to alter materially or substitute the cause of action or the nature of the claim, applies to amendment of the plaint. It has no counterpart principles relating to an amendment of a Written Statement. In case of amendment to a W.S., the courts would be more liberal in allowing the application than that of a plaint as the question of prejudice would be far less in the former than the latter. The only thing that the Court has to see whilst allowing amendment to a W.S. is that the same does not cause grave and irretrievable prejudice to the Plaintiff or displacing his case completely. Nor the amendment should allow the Defendant to wriggle out of an admission, as an admission is based on evidence which would be in favour of a person who

would be entitled to take advantage of that admission. Subject to these exceptions, amendment of a W.S. can certainly be allowed. This being the position in law, I do not find any merit in the contention of Mr Dani that because the amendment seeks to raise inconsistent and mutually destructive pleas, the same ought not to be allowed.

12 The last contention raised by Mr Dani was that the amendment has the effect of withdrawal of an admission made by Defendant No.2 in the W.S. as originally filed. The W.S. as originally filed, in paragraph 2 thereof, states that the Plaintiff is the owner and landlord of the suit premises. In the amendment that is now sought, Defendant No.2 in paragraph (r) has stated that the documents now produced on record make it abundantly clear that the original Plaintiff as well as the son and Power of Attorney Holder and the legal heirs had suppressed the material facts from the Trial Court. They had suppressed the fact that MHADA has acquired the property and that the property has vested in the Bombay Housing and Area Development Board free from all encumbrances. That litigation in respect of the subject property was pending before the Hon'ble Supreme Court and this

issue was not finally decided. In view of these documents it is stated that the Plaintiff could not claim himself to be the landlord of the property, and that all rights, title and interest in that property vested in it. Therefore, at the time of filing of the suit, no cause of action could have said to have arisen in favour of the Plaintiff to seek relief under the provisions of the Maharashtra Rent Control Act, 1999, is the averment. Thereafter, in paragraph (v), Defendant No.2 states that he is not in any way challenging any right, title and interest of the Plaintiff. Defendant No.2 is merely placing on record the true and correct facts that have been suppressed by the Plaintiff from the Trial Court and that the Plaintiff is practicing a fraud upon the Trial Court. Reading the schedule of amendment as a whole, I do not think that there is any withdrawal of an admission as is sought to be contended by Mr Dani. On going through the impugned order, I find that the same suffers from no infirmities and/or an error apparent on the face of the record requiring my interference under Article 227 of the Constitution of India. I find that the Trial Court has correctly applied its mind to the facts of the present case and has given proper and cogent reasons for allowing the amendment application filed by

Defendant No.2.

13 In these circumstances, I find no merit in this Writ
Petition. It is accordingly dismissed. However, in the facts and
circumstances of the case, there shall be no order as to costs.

(B. P. COLABAWALLA, J.)