

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10637 OF 2016

Krishnadevi Chadratandas Bagri through her son
and C.A. Bhatat C. Bagri ... Petitioner
Vs.
Pramila Rajshekhar Jigjini and others ... Respondents

WITH

WRIT PETITION NO.9849 OF 2015

Arvind Rajshekhar Jigjini ... Petitioner
Vs.
Krishnadevi Chadratandas Bagri and others ... Respondents

Mr. Vaibhav Mehta i/b. Vaibhav Mehta & Associates for Petitioner in Writ
Petition No.10637 of 2016 and for Respondents in Writ Petition No.9849 of
2015.

Mr. Ajit S. Karwande a/w. Mr. S. B. Shenoy for Petitioner in Writ Petition
No.9849 of 2015 and for Respondents in Writ Petition No.10637 of 2016.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 23, 2017

P.C. :

Heard Mr. Mehta, learned Counsel for petitioner in Writ Petition
No.10637 of 2016 and for respondents in Writ Petition No.9849 of 2015
and Mr. Ajit S. Karwande, learned Counsel for petitioner in Writ Petition
No.9849 of 2015 and for respondents in Writ Petition No.10637 of 2016
at length.

2. Writ Petition No.9849 of 2015 was instituted by the petitioner,
hereinafter referred to as 'defendant No.2' challenging the judgment and
order dated 27.08.2015 passed by the learned Judge presiding over
Court Room No.7 of the Small Causes Court at Mumbai below exhibit-
37 in R.A.E. Suit No.431/698 of 2011. By that order, the application
made by the defendants was rejected. That application was made for
striking out paragraphs 10, 14 to 19 in examination-in-chief of the

plaintiff on the ground that the application made by the plaintiff under Order VI, Rule 17 of C.P.C. for amending the plaint at exhibit-14 was rejected on 05.07.2014. Despite rejection of the amendment application, plaintiff intends to make back-door entry by incorporating paragraphs 10, 14 to 19 in affidavit in examination-in-chief, which cannot be allowed.

3. By consent of the parties that Petition was disposed of on 24.08.2016 giving liberty to the plaintiff to challenge the order dated 05.07.2014 passed by the learned trial Judge below exhibit-14 rejecting the application made by the plaintiff for amending the plaint. At the same time, all contentions of the defendants in that regard were expressly kept open.

4. In pursuance of that liberty, plaintiff has instituted Writ Petition No.10637 of 2016 in this Court on 02.09.2016 challenging the order dated 05.07.2014 passed by the learned trial Judge below exhibit-14 rejecting the application made by the plaintiff for amending the plaint. Defendants have filed the affidavit dated 27.09.2016 of respondent No.2, Arvind Rajshekhar Jigjini resisting the Petition. After hearing both sides on 22.10.2016, order was passed in Writ Petition No.10637 of 2016. After setting out the background in which plaintiffs instituted Writ Petition No.10637 of 2016, in paragraph 5, it was observed that “after perusing the order impugned in the present Petition and the order dated 27.08.2015, below exhibit-37, impugned in Writ Petition No.9849 of 2015, I am inclined to suo motu review the order dated 24.08.2016 passed in Writ Petition No.9849 of 2015.” Accordingly, Writ Petition No.10637 of 2016 was ordered to be listed on 02.12.2016 and on that date, it was made clear that the Court would consider reviewing the order dated 24.08.2016 passed in Writ Petition No.9849 of 2015 and

hear both the Petitions together. Accordingly, after obtaining the administrative order from the Hon'ble the Chief Justice, both these Petitions are placed before me.

5. Mr. Mehta invited my attention to the order dated 24.08.2016 passed by this Court in Writ Petition No.9849 of 2015. In particular, in paragraph 4, statement made by Mr. Mehta that the impugned order below exhibit-37 may be set aside by reserving liberty to the plaintiff to challenge the order dated 05.07.2014 passed below exhibit-14 was recorded. In paragraph 6, opposition made by respondents for granting liberty was recorded. Submission that in any case, if the Court was inclined to grant liberty, all contentions of the defendant No.2 may be expressly kept open in the proposed Petition was also recorded.

6. By consent of the parties, Petition was disposed of and order dated 27.08.2015 was set aside and application exhibit-37 was allowed. Plaintiff was given liberty to challenge the order dated 05.07.2014 passed below exhibit-14 rejecting the application for amending the plaint. All contentions of the defendants in that regard were expressly kept open.

7. Mr. Mehta submitted that Writ Petition No.9849 of 2015 was disposed of by consent of the parties. In pursuance of the liberty granted, plaintiffs instituted Writ Petition No.10637 of 2016 challenging the order rejecting the amendment application. He submitted that defendants are opposing that Petition also. Defendants cannot have it both ways. On one hand, defendants are opposing application for amendment and on the other hand, they have applied for striking out paragraphs 10, 14 to 19 on the ground that evidence is beyond the pleadings. He further submitted that under Article 227 of the

Constitution of India, Court has power to suo motu review its own order and plaintiff should not suffer because of the mistake committed by the Court.

8. On the other hand, Mr. Karwande has taken me through the affidavit filed by respondent No.2, Arvind Rajshekhar Jigjini. He submitted that plaintiff instituted Suit on 30.03.2011. In paragraph 5 of the plaint, ground of bonafide and reasonable requirement of Dr. Ashokkumar C. Bagri was pleaded. On 07.06.2011, defendants filed written statement denying the assertions made in paragraph 5 of the plaint. On 31.08.2015, trial Court framed the issues. On 10.02.2014, plaintiff filed application exhibit-14 for amending the plaint. Defendants filed affidavit on 14.03.2014 opposing the application for amendment. On 05.07.2014, trial Court rejected the application exhibit-14. Plaintiff did not file application either for review or challenged that order. Thus, the order dated 05.07.2014 rejecting the application exhibit-14 had attained finality.

9. Mr. Karwande submitted that on 23.08.2014, plaintiff filed examination-in-chief. In that affidavit, plaintiff included all the averments contained in the application exhibit-14, which was rejected by the trial Court. Defendants, therefore, took out application at exhibit-37 on 16.02.2015 for striking out paragraphs 10, 14 to 19 of the affidavit of examination-in-chief of the plaintiff. The trial Court rejected that application on 27.08.2015. On 30.09.2015, Writ Petition No.9849 of 2015 was filed in this Court challenging the order rejecting the application exhibit-37. That Petition was disposed of finally on 24.08.2016. He, therefore, submitted that Writ Petition No.10637 of 2016 filed by the plaintiffs is abuse of process of law and order passed below exhibit-14 on 05.07.2014 attained finality. He submitted that

Writ Petition No.10637 of 2016 is not maintainable and requires to be dismissed with compensatory costs.

10. Mr. Karwande further submitted that if the Petition instituted by the plaintiff is allowed and plaintiff is permitted to amend the plaint, it will amount to back-door entry for leading evidence which was already struck out by this Court by passing order on 24.08.2016 in Writ Petition No.9849 of 2015. Even on this ground, Writ Petition No.10637 of 2016 deserves to be dismissed. He submitted that by striking out paragraphs 10, 14 to 19 from examination-in-chief of the plaintiff, right is accrued in favour of the defendants and the same cannot be taken away by passing any order in Writ Petition No.10637 of 2016. He further submitted that though the order below exhibit-14 was passed on 05.07.2014, petitioners have not explained the delay in filing the Petition on 02.09.2016, and as such, the said Petition suffers from gross delay and laches.

11. He further submitted that plaintiff has not filed any petition seeking review of the order dated 24.08.2016 passed in Writ Petition No.9849 of 2015. He submitted that even this Court, while exercising power under Article 227 of the Constitution of India, cannot suo motu review its own order. He submitted that this Court has no inherent power to suo motu review its own order.

12. Mr. Karwande relied upon the decision of the Apex Court in ***State of Haryana Vs. Babu Singh, (2008) 2 SCC 85***, and in particular, paragraphs 18 to 20 to contend that review of the order dated 24.08.2016 will amount to misplaced sympathy, generosity and private benevolence.

13. I have considered the rival submissions advanced by the learned

Counsel appearing for the parties. I have also perused the material on record. Plaintiff has instituted Suit against the defendants for recovery of possession of room No.5 admeasuring 350 sq.ft. situate on the first floor of Bagri Niwas, 53/55, Nath Madhav Path (Khatter Gali Lane), Mumbai 400 002 (for short 'suit premises') under the provisions of the Maharashtra Rent Control Act, 1999. Defendants have filed written statement resisting the Suit. In paragraphs 3 and 5, they have set out availability of various premises to the plaintiff and have contended that in view of this, plaintiff is not entitled to decree of eviction.

14. Plaintiff, therefore, filed application exhibit-14 for amending the plaint so as to deal with paragraphs 3 and 5 of the written statement and explain as regards the premises referred therein. By order dated 05.07.2014, the learned trial Judge rejected the application. On 23.08.2014, plaintiff filed examination-in-chief so as to explain and deal with the case made out by the defendants in paragraphs 3 and 5 of the written statement. Defendants took out application exhibit-37 for striking out paragraphs 10, 14 to 19 which was rejected by the trial Court on 27.08.2015. Aggrieved by that order, defendants instituted Writ Petition No.9849 of 2015 which, as noted earlier, by consent, was allowed on 24.08.2016, reserving liberty to the plaintiff to challenge the order dated 05.07.2014 passed below exhibit-14. Accordingly, plaintiff instituted Writ Petition No.10637 of 2016 challenging the order dated 05.07.2014. Defendants have opposed the Petition by filing reply. In that context, after hearing both sides as also considering the affidavit filed on behalf of the defendants, this Court passed order on 22.10.2016 indicating that Court is inclined to consider reviewing order dated 24.08.2016. Plaintiff wanted to explain and deal with the averments made in paragraphs 3 and 5 of the written statement by amending the plaint. Defendants resisted that application and application for

amendment came to be rejected on 05.07.2014. At the same time, plaintiff, in order to explain and deal with the averments made in paragraphs 3 and 5 of the written statement, filed affidavit in lieu of examination-in-chief. Defendants filed application exhibit-37 for discarding paragraphs 10, 14 to 19. The learned trial Judge rejected that application. However, by consent of the parties, order passed by the trial Court rejecting the application exhibit-37 was set aside and application exhibit-37 was allowed. Thus, plaintiff now can neither amend the plaint so as to explain and deal with the contents of paragraphs 3 and 5 of the written statement and at the same time, nor can he lead evidence explaining and dealing with paragraphs 3 and 5 of the written statement.

15. Mr. Karwande relied upon decision of the Apex Court in **State of Haryana** (*supra*). In that case, respondent had earlier instituted C.W.P. No.2890 of 1997 in the High Court of Punjab & Haryana at Chandigarh inter alia praying for quashing and setting aside order dated 18.06.1996 thereby voluntarily retiring him from the services and for reinstatement. On behalf of the State Government, attention of the High Court was drawn to the original application submitted by the respondent in February 1996 seeking voluntary retirement from service. It was pointed out that the document produced as annexure P-2 by the respondent along with the Writ Petition contained interpolation. It was submitted that the words "if the Government has got any such law that I can get pension under the benefit of ex-service, I may be given retirement" were not stated in the original application and those words had been added later on by the respondent in order to prove his plea that he sought conditional voluntary retirement. The High Court dismissed that Petition by imposing costs of Rs.5,000/- on 31.08.1998.

16. Respondent thereafter instituted Writ Petition No.4619 of 1999 inter alia praying for direction against the respondents to release the retirement benefits, namely, pension, gratuity, commutation of pension as also revised pay scales, revised pension, revised gratuity. He also took out application under Section 151 of C.P.C. being Civil Miscellaneous No.10362/99 dated 29.04.1999 in CWP No.2890/97, claiming retiral benefits under Rule 6.16(2) of the Punjab Civil Service Rules Vol. II. By order dated 19.07.2002, Division Bench allowed that application and directed the appellants to pay pension to the respondent within a period of 3 months. Aggrieved by that order, the State of Haryana and others approached the Apex Court.

17. In paragraph 15, the Apex Court referred to the Service Rules applicable to the respondent. In paragraph 16, the Apex Court noted that respondent did not seek benefit of pension in first Writ Petition No.2890 of 1997, which was dismissed by the Division Bench with costs. In paragraph 17, the Apex Court noted that High Court had found that respondent in his application seeking voluntary retirement had pleaded inability to serve the Roadways due to illness and adverse family conditions and in that application, he did not incorporate the condition that his request should be accepted only if he was found entitled to a pension on the basis of the entire period of service. The documents produced before the Division Bench were held to be fabricated for which he was penalized by the High Court by imposing costs of Rs.5,000/- while dismissing the Petition on 31.08.1998. Writ Petition No.4619 of 1999 filed by respondent seeking retirement benefits i.e. pension, gratuity, commutation of pension as also revised pay scales, revised pension and revised gratuity was allowed to be withdrawn by the Division Bench of the High Court vide order dated 19.04.1999 and the relief of pension was granted in Civil Miscellaneous No.10362/99 by

order dated 19.07.2002. It is in that context, the Apex Court observed that High Court was not justified in invoking the powers under Section 151 of C.P.C.

18. In my opinion, the said decision is not applicable to the facts of the present case. In the case of ***Surya Dev Rai Vs. Ram Chander Rai, 2003 (6) SCC 675***, in paragraph 22, the Apex Court has dealt with the powers of the High Court under Article 227 of the Constitution of India, which reads thus,

“22. Article 227 of the Constitution confers on every High Court the power of superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction excepting any court or tribunal constituted by or under any law relating to the armed forces. Without prejudice to the generality of such power the High Court has been conferred with certain specific powers by sub-Articles (2) and (3) of Article 227 with which we are not concerned hereat. **It is well-settled that the power of superintendence so conferred on the High Court is administrative as well as judicial, and is capable of being invoked at the instance of any person aggrieved or may even be exercised suo motu. The paramount consideration behind vesting such wide power of superintendence in the High Court is paving the path of justice and removing any obstacles therein. The power under Article 227 is wider than the one conferred on the High Court by Article 226 in the sense that the power of superintendence is not subject to those technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction.** Else the parameters invoking the exercise of power are almost similar.

(emphasis supplied)”

19. It is equally settled principle of law that no party should suffer because of the mistake committed by the Court. Applying the tests laid down by the Apex Court in ***Surya Dev Rai (supra)***, I am of the opinion that this is an eminent case to review order dated 24.08.2016 passed by this Court in Writ Petition No.9849 of 2015. Hence, the order dated 24.08.2016 is recalled and Writ Petition No.9849 of 2015 is restored to the file of this Court.

20. After hearing the learned Counsel for the parties at length and in the light of the above discussion, I do not find that the learned trial Judge has committed any error while rejecting the application exhibit-37. Hence, Writ Petition No.9849 of 2015 fails and the same is dismissed. In view of the dismissal of the Writ Petition No.9849 of 2015, Mr. Mehta does not press Writ Petition No.10637 of 2016 and the same is accordingly disposed of as not pressed. Order accordingly. It is made clear that defendants will be at liberty to cross-examine plaintiff on his affidavit in examination-in-chief, including paragraphs 10, 14 to 19. Order accordingly.

(R. G. KETKAR, J.)

Minal Parab