

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.8022 OF 2017

Nimmi Vishindas Vazirani | Petitioner

Vs.

Bhavana Rajendra Kalapi & Ors. | Respondents

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Mr. Mustafa Doctor Sr. Advocate a/w Mr. Anirudh Hariyani, Mr. Somnath Chowdhary and Mr. S. Ghosh, for Petitioner.

Mr. Rajesh Patil, for Respondents.

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CORAM : R.G. KETKAR, J.

DATE : 12TH MARCH, 2018.

P.C.

Heard Mr. Doctor, learned Senior Counsel for the petitioner and Mr. Patil, learned Counsel for the respondents at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner (hereinafter referred to as “defendant”) has challenged the judgment and order dated 18th July, 2016 passed by the learned Judge, Court Room No.23 of the Court of Small Causes at Mumbai below Exhibit 55 in R.A.E. Suit No.946 of 2004. By that order, the learned trial Judge allowed the application made by the respondents (hereinafter referred to as “plaintiffs”) under Order-VI, Rule-17 of the Code of Civil Procedure, 1908 (for short 'C.P.C') for amending the plaint.

3. In support of this Petition, Mr. Doctor strenuously contended that the application made by the plaintiffs under Order-VI, Rule-17 of the C.P.C does not satisfy the conditions stipulated in proviso to Order-VI, Rule-17 of the C.P.C. He submitted that the plaintiffs have not made out a case of due diligence in the present case. In the present case, issues were framed on 3rd September, 2010 only in respect of grounds u/s 16 (1) (b) and 16(1) (g) of the Maharashtra Rent Control Act, 1999 (for short 'Act'). Respondents filed affidavit of examination-in-chief of respondent No.4 on 18th March, 2011. Respondent No.4 is under cross-examination. In other words, the trial has already commenced and at that stage, the plaintiffs have filed application at Exhibit 55 on 12th January, 2016. He invited my attention to paragraph 7 of the plaint as also application for amendment and in particular paragraph 2. In paragraph 2 of the application, plaintiffs themselves asserted that the averments made in the plaint are insufficient. Averments made are not complete to make out a ground of non user as contemplated by section 16 (1) (n) of the Act. To get eviction decree under the said ground, the ground has to be pleaded in exact wording of Section 16 (1) (n) of the Act.

4. Mr. Doctor submitted that a perusal of paragraph 7 of the plaint does not indicate that ground as contemplated by 16 (1) (n) of the Act is not made out. He submitted that application for amendment is clearly an afterthought. The learned trial Judge has totally misdirected himself while allowing the application because learned trial Judge failed to apply test of due diligence in the facts and circumstances of the present case.

5. In support of his submissions, he relied on the decisions;

- [1] **Ajendraprasadji N. Pandey Vs. Swami Keshavprakeshdasji N. & Ors., (2016) 2 Supreme Court Cases 1 and in particular paragraphs 11, 36, 43 and 55,**
- [2] **J. Samuel and others Vs. Gattu Mahesh and others, (2012) 2 Supreme Court Cases 300,** in particular paragraph 19 thereof.

6. Mr. Doctor submitted that in the case of **Ajendraprasadji N. Pandey** (supra), the Apex Court in terms has held that under proviso to Order-VI, Rule-17, no application for amendment can be allowed after the trial has commenced, unless in spite of due diligence, the matter could not be raised before the commencement of trial. Relying on paragraph 35, he submitted that in the present case, no grounds are raised in the amendment application to contend that despite exercise of due diligence, the proposed amendment could not be raised before commencement of the trial. He, therefore, submitted that Petition requires consideration.

7. On the other hand, Mr. Patil supported the impugned order and submitted that a perusal of paragraph 7 of the plaint shows that the ground of non user is made out in the plaint itself and by the proposed amendment, the plaintiffs are elaborating and expanding the ground of non user. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

8. I have considered the rival contentions of the learned Counsel for the parties. I have also perused the material on record.

Paragraph 7 of the plaint reads thus;

“The Plaintiff states that the defendant is more than 74 years old and she has kept the premises locked for more than 4 years and she has stopped the business. The suit premises are kept unused, unkempt and without any lawful user. The Plaintiff states that defendant has lost interest in business and as such she is negligent in maintaining the suit premises by suitable tenantable repairs”.

9. A perusal of above paragraph clearly shows that the plaintiff specifically asserted that the defendant has kept the premises locked for more than four years. She has stopped business. The suit premises are kept unused and unkempt without any lawful user. A perusal of these assertions, in my opinion, clearly makes out the ground of non user as contemplated u/s 16 (1) (n) of the Act. It is no doubt true that issues are framed. Mr. Doctor submitted that in fact, the plaintiffs should have insisted for framing issue on the ground of non user. It is also evident that issue as contemplated u/s 16 (1) (n) - non user is not framed by the trial Judge and that the plaintiffs' evidence has commenced and as far as witness of the plaintiffs namely respondent No.4 is concerned, he is under cross-examination. In other words, the trial has commenced. Question is whether the plaintiffs had already laid foundation for ground of eviction u/s 16 (1) (n) of the Act in the plaint, as originally instituted.

10. In the case of **Abdul Rehman and another Vs. Mohd. Ruldu and others, (2012) 11 Supreme Court Cases 341**, the Apex Court has observed in paragraph 13 as under;

“Next, we have to see whether the proposed amendments would alter the claim/cause of action of the plaintiffs. In view of the same, we verified the averments in the unamended plaint. **As rightly pointed out by Ms. Manmeet Arora, learned counsel for the appellants that the entire factual matrix for the relief sought for under the proposed amendment had already been set out in the unamended plaint.** We are satisfied that the challenge to the voidness of those sale deeds was implicit in the factual matrix set out in the unamended plaint and, therefore, the relief of cancellation of sale deeds as sought by the amendment does not change the nature of the suit as alleged. **It is settled law that if necessary factual basis for amendment is already contained in the plaint, the relief sought on the said basis would not change the nature of the suit.** In view of the same, the contrary view expressed by the trial court and the High Court cannot be sustained. It is not in dispute that the relief sought by way of amendment by the appellants could also be claimed by them by way of a separate suit on the date of filing of the application. Considering the date of the sale deeds and the date on which the application was filed for amendment on the plaint, we are satisfied that the reliefs claimed are not barred in law and no prejudice should (sic would) have been caused to Respondents 1-3 (Defendants 1-3 therein) if the amendments were allowed and would in fact avoid multiplicity of litigation”.

(emphasis supplied)

11. It is well settled law that if necessary factual basis for amendment is already contained in the plaint, the relief sought on the said basis would not change nature of the suit as noted earlier. Making clear and explicit what was already implicit in the plaint will not change the nature of the suit. 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 the suit. On facts, as noted earlier, ground of non user was implicit in factual matrix set out in unamended plaint and the

proposed amendment does not change nature of the suit.

12. Mr. Doctor relied on paragraphs 10, 11, 36, 43 and 55 of **Ajendraprasadji N. Pandey** (supra). In paragraph 43, the Apex Court observed that under the proviso to Order-VI, Rule-17 of C.P.C no application for amendment can be allowed after the trial has commenced, unless in spite of due diligence, the matter could not be raised before the commencement of trial. In paragraph 44, the Apex Court extracted the relevant dates and thereafter dealt with the conduct of the appellants/defendants. In paragraph 54, the Apex Court observed that the appellant was lacking in bona fides in filing Special Leave Petition before it. In paragraph 55, it was noted that in the application Exhibit 95 for amendment no facts were pleaded nor any ground raised to even remotely contend that despite exercise of due diligence, these matters could be raised by the appellants.

13. Mr. Doctor relied on paragraph 19 of the decision in the case of **J. Samuel** (supra). In that case, it was observed that in the suit for specific performance of contract, unless there is a specific averment in terms of section 16 (1) (c) of the Specific Relief Act 1963, the suit filed by him is liable to be dismissed. Application for amendment was made to introduce a specific plea of readiness and willingness on the ground that it was missed by “type mistake” filed before the trial Court after arguments were completed and matter was posted for judgment. It is in this circumstances, the Apex Court held that omission of such vital plea amounts to lack of due diligence and cannot be regarded as mere typographical mistake. The trial Court rightly rejected the amendment application and High Court erred in allowing the same.

14. In the present case, it cannot be said that the application made by the respondent for amending the plaint or that the conduct of the plaintiff lacking bona fides. The decision in the case of **Ajendraprasadji N. Pandey** (supra) is not applicable to the facts of the present case. Decision in the case of **J. Samuel** is also not applicable to the facts of the present case.

15. In view thereof, I do not find that the learned trial Judge has committed any error in allowing the application for amendment. Reliance placed by Dr. Mustafa on the decisions in the cases of **Ajendraprasad N. Pandey** and **J. Samuel and others** (supra) do not advance case of the defendants. Hence, the Petition fails and as such is dismissed.

16. It is, however, expressly made clear that where a decree is appealed from by the petitioner, 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 memorandum of Appeal as contemplated by Section 105(1) of C.P.C.

[R.G. KETKAR, J.]