

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.4404 OF 2018

Bharat Haridas Shroff	...	Petitioner
Vs.		
Sushil Narayan Wagh	...	Respondent

Mr. Harshad A. Sathe for Petitioner.

CORAM : R. G. KETKAR, J.
DATE : APRIL 9, 2018

P.C. :

Not on Board. At the request of Mr. Sathe, learned Counsel for the petitioner, taken up for admission.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'defendant', has challenged the order dated 09.03.2018 passed by the learned 6th Additional Judge, Small Causes Court, Pune below exhibit-39 in Civil Suit No.369 of 2016. By that order, the learned trial Judge rejected the application made by the defendant for recasting issues, which were framed below exhibit-35.

3. In support of this Petition, Mr. Sathe strenuously contended that defendant has denied the case of the respondent-plaintiff that he is the co-owner or landlord of the suit premises. He has invited my attention to paragraph 5 of the reply dated 24.12.2016 given by the defendant to the notice dated 27.10.2016 issued on behalf of the respondent-plaintiff. In paragraph 5, defendant asserted thus,

“5. With respect to para 2 of the notice, it was never informed to my client, that your client is co-owner and landlord of the suit property. As on today as per property card extract the property stands in the name of Mr. Narayan Digambar Wagh. My client says that after 1998 joint tenants used to pay rent to Mr. Narayan Digambar Wagh and he has issued receipt for the same. Kindly ask your client to clarify whether there is any partition or transfer by which your client has become co-owner

of the said property and to send the copy of the said document to my client.”

4. Mr. Sathe also invited my attention to paragraph 6 of the written statement. In paragraph 6, defendant specifically asserted that he is not aware as to whether plaintiff is the co-owner and landlord of the property Waghwada situate at 741, Raviwar Peth, Pune-2. It was further contended that there is no attornment by original landlord that henceforth plaintiff is their owner and landlord. Rent is accepted Narayan Digambar Wagh. He invited my attention to the issues framed at exhibit-35 and submitted that without hearing the defendant, the learned trial Judge framed the issues on 07.11.2017. He also invited my attention to paragraph 4 of the plaint where plaintiff asserted that he is the co-owner and landlord of the suit premises, more particularly mentioned in paragraph 1 of the plaint. He also invited my attention to paragraph 8 of the written statement where defendant did not admit the contents of paragraph 4 of the plaint. In paragraph 8, defendant asserted that contents of paragraph 4 are neither true and correct and the same are not admitted by the defendant. Plaintiff never collected rent from the defendant and joint tenants. For these reasons, he submitted that the impugned order deserves to be set aside.

5. I have considered the submissions advanced by Mr. Sathe. I have also perused the material on record. By the impugned order, the learned trial Judge has rejected the application made by the defendant for recasting the issues framed at exhibit-35 on 07.11.2017. While rejecting the application, the learned trial Judge considered paragraphs 6 and 9 of the written statement. A perusal of paragraph 12 of the reply dated 24.12.2006 shows that by way of abundant caution, defendant enclosed cheques of Rs.24,800/- and Rs.600/- as mentioned in paragraph 7 of the notice to plaintiff. In paragraph 9 of the written statement, defendant asserted that in pursuance of the notice dated 27.10.2016 issued by the

plaintiff, defendant replied on 24.12.2016 and along with the reply, amount demanded in the notice was sent by the defendant to the plaintiff under protest and without prejudice to his right by cheque.

6. In view thereof, the learned trial Judge held that defendant did not deny the assertions made by the plaintiff that he is neither co-owner nor landlord. In paragraph 7, the learned trial Judge dealt with notice dated 27.10.2016 and reply dated 24.12.2016 and held that defendant has not denied that plaintiff is the co-owner and landlord of the suit premises. After perusing paragraphs 5 and 12 of the reply dated 24.12.2016 as also paragraphs 6 and 9 of the written statement filed by the defendant, I do not find that the learned trial Judge has committed any error. Order XIV, Rule 1(1) lays down that issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other. Sub-rule (2) thereof lays down that material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. Sub-rule (3) thereof lays down that each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

7. In view of provisions of Order XIV, Rule 1 as also paragraphs 5 and 12 of the reply dated 24.12.2016 and paragraphs 6 and 9 of the written statement, I do not find that the learned trial Judge has committed any error in rejecting the application. Hence, Petition fails and the same is dismissed. 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 the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R. G. KETKAR, J.)