

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.5074 OF 2003

Amar Sharma (decd) through heirs and LRs Madhavi
Amar Sharma and others ... Petitioners
Vs.
Omprakash Bharti and another ... Respondents

Mr. K. K. Parekh for Petitioners.
Mr. Prakash Shah a/w. Jas Sanghavi i/b. Mr. Anil Balani for Respondent
No.1.

CORAM : R. G. KETKAR, J.
DATE : AUGUST 10, 2018

P.C. :

Heard Mr. Parekh, learned Counsel for the petitioners and
Mr. Shah, learned Counsel for the respondent No.1 at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'defendant No.2', has challenged the judgment and order dated 14.03.2002 passed by the learned Judge, Court Room No.35 of the Court of Small Causes at Bombay (Bandra Branch) in Interim Notice No.1737 of 1999. By that order, the learned trial Judge allowed the notice taken out by the respondent No.1, hereinafter referred to as 'plaintiff', under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for amending the plaint subject to payment of costs of Rs.1,000/- by the plaintiff to the defendant No.2.

3. In support of this Petition, Mr. Parekh advanced following submissions:

a. Court having no jurisdiction to entertain and try the Suit, cannot entertain and allow application for amendment conferring jurisdiction upon it;

b. Whether by allowing the amendment, plaintiff can be permitted to withdraw the admissions given by him.

4. Mr. Parekh invited my attention to the Suit instituted by the plaintiff. In paragraph 1, plaintiff contended that respondent No.2, hereinafter referred to as 'defendant No.1', was appointed as a caretaker of flat No.C/7 in Chand Co-operative Housing Society situate at Juhu Road, Bombay 400 019 (for short 'suit premises') as per the understanding with the plaintiff and the defendant No.1. Defendant No.2 is the present illegal occupant of the suit premises. In paragraph 2, the plaintiff reiterated that he agreed to allow defendant No.1 to use the suit premises for the purpose of residential accommodation on caretaker basis. In short, Mr. Parekh submitted that everywhere plaintiff has described defendant No.1 as a caretaker. As there is no relationship of landlord and tenant between the plaintiff and the defendant No.1, the Small Causes Court has no jurisdiction to entertain and try the Suit.

5. During the pendency of the Suit, plaintiff took out application for interim relief. Defendant No.2 objected to the jurisdiction of the Small Causes Court on the ground that as there is no relationship of landlord and tenant between the parties, Small Causes Court has no jurisdiction. The plaintiff, therefore, took out interim notice under Order VI, Rule 17 of C.P.C. seeking permission to substitute relationship of plaintiff and defendant No.1 as landlord and tenant in place of landlord and caretaker. He submitted that by the impugned order, the learned trial Judge has allowed the notice and permitted plaintiff to amend the plaint. This amounts to the trial Court though having no jurisdiction to try the Suit, allowing the application thereby conferring jurisdiction on it as also it amounts to permitting the plaintiff to withdraw the admissions given in the plaint.

6. On the other hand, Mr. Shah supported the impugned order. He submitted that reading of the plaint in its entirety would indicate that Suit is between landlord and tenant and is instituted under Sections 12(2), 13(1)(e) and 13(1)(g) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act'). The Small Causes Court will, therefore, have jurisdiction to entertain and try the Suit. He, therefore, submitted that no case is made out for interfering with the impugned order.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. It is no doubt true that in paragraphs 1 and 2, plaintiff has described defendant No.1 as a caretaker. In the same paragraph, plaintiff has asserted that he agreed to allow defendant No.1 to use the suit flat for the purpose of residential accommodation on caretaker basis for a consideration @ Rs.1,000/- per month along with a security deposit of Rs.20,000/- which was to be returned to the defendant No.1 without interest. In paragraph 3, plaintiff asserted that till date, plaintiff has not received any consideration nor any compensation from the defendant No.1. Without the consent of the plaintiff, defendant No.1 has illegally sublet the suit flat to the defendant No.2 some time in the year 1975 and during the course of his employment with defendant No.1. Defendant No.2 is, therefore, in illegal occupation of the suit flat. Defendant No.1 has unlawfully sublet the suit flat to the defendant No.2 with a view to defeating plaintiff's claim on the suit flat.

8. In paragraph 4, plaintiff reiterated that despite several demands and repeated reminders for payment of arrears of compensation / rent, defendant No.1 has failed to pay compensation and vacate the suit flat. The plaintiff has issued letter dated 21.10.1981 calling upon the defendant No.1 to pay compensation and vacate the suit flat. The

plaintiff has referred to letter dated 18.07.1994 by which the suit flat was given on a caretaker basis and on security deposit of Rs.20,000/- and on monthly compensation for Rs.1,000/- in March 1975 but has not received a penny till date. In paragraph 5, plaintiff has asserted that defendants failed and neglected to make payment of arrears or any part thereof, and has referred to the notices dated 12.12.1994, 22.03.1994 and 26.04.1995 terminating the understanding / contract for license to act as caretaker. In paragraph 8, plaintiff has contended that defendants are in arrears of compensation of Rs.2,63,000/- @ Rs.1,000/- per month for 263 months. Thus, the plaintiff has claimed possession of the suit premises by invoking grounds under Sections 12(2), 13(1)(e) and 13(1)(g) of the Act and also claimed arrears of compensation.

9. In view thereof, it cannot be said that the Small Causes Court has no jurisdiction to entertain and try the Suit. As in paragraphs 2, 3 and 4, plaintiff has referred defendant No.1 as a caretaker, by the proposed amendment, he wants to substitute the word “caretaker” by the “tenant”. It is also not in dispute that defendant No.2, till date, has not filed written statement. In my opinion, by allowing the amendment, it cannot be said that the Court having no jurisdiction to entertain and try the Suit by allowing the amendment has assumed jurisdiction and that by allowing the amendment, admissions given by the plaintiff would stand withdrawn. Once it is accepted that plaintiff has claimed compensation from defendant No1, it cannot be construed that he was a caretaker. Basically, caretaker is not expected to pay anything for occupation. Understood thus, I do not find that the learned trial Judge has committed any error in allowing the application. It is also not disputed that the plaintiff, instead of filing application for amendment, could have withdrawn the Suit with liberty to file fresh Suit invoking grounds under the Act. By taking out application for amendment, the plaintiff has avoided multiplicity of proceedings. In view thereof, I do not find that

the learned trial Judge committed any error in allowing the application. Hence, Petition fails and the same is dismissed. Mr. Parekh assures that within 4 weeks from today, defendant No.2 will file written statement to the Suit. Liberty to the parties to apply for expeditious disposal of the Suit. If such application is made, the learned trial Judge will pass appropriate order. Rule is discharged with no order as to costs.

10. It is, however, made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in any 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 Civil Procedure Code.

(R. G. KETKAR, J.)

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