IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8284 OF 2017

M/s. Mehal Enterprises … Petitioner
Vs.
M/s. P. K. Velu & Company Private Limited … Respondent

WITH
WRIT PETITION NO.10834 OF 2017

M/s. Mehal Enterprises … Petitioner
Vs.
M/s. P. K. Velu & Sons … Respondent

Mr. Gaurav Joshi, Senior Advocate a/w. Ms Neeta Jain, Mr. Gaurav Sawant and Mr. Vinay Shingada i/b. Markand Gandhi & Co. for Petitioner in both the Petitions.
Mr. P. K. Dhakephalkar, Senior Advocate a/w. Mr. Jaydeep Deo, Mr. Omprakash Vaishnav, Mr. H. Vaswani I/b. Mr. Suneet Kumar Tyagi for Respondent in both the Petitions.

CORAM : R. G. KETKAR, J.
DATE : APRIL 3, 2018

P.C. :

Heard Mr. Joshi, learned Senior Counsel for the petitioner and Mr. Dhakephalkar, learned Senior Counsel for the respondent in both the Petitions at length.

2. Writ Petition No.8284 of 2017 takes exception to the judgment and order dated 12.04.2017 passed by the Appellate Bench of the Small Causes Court, Mumbai in (III) Revision Application No.8 of 2017. By that order, the Appellate court allowed the Revision Application preferred by the respondent, hereinafter referred to as 'defendant', and quashed and set aside the judgment and order dated 21.11.2016 passed by the learned Judge, Court Room No.23 of the Court of Small Causes at Mumbai below exhibit-27 in T.E.Suit No.182/225 of 2008 and allowed the application exhibit-27 made by the defendant for amending

the written statement subject to payment of costs of Rs.5,000/- to the petitioner, hereinafter referred to as 'plaintiff'.

3. Writ Petition No.10834 of 2017 takes exception to the judgment and order dated 12.04.2017 passed by the Appellate Bench of the Small Causes Court, Mumbai in (III) Revision Application No.7 of 2017. By that order, the Appellate court allowed the Revision Application preferred by the respondent, hereinafter referred to as 'defendant', and quashed and set aside the judgment and order dated 21.11.2016 passed by the learned Judge, Court Room No.23 of the Court of Small Causes at Mumbai below exhibit-27 in T.E.Suit No.181/224 of 2008 and allowed the application exhibit-27 made by the defendant for amending the written statement subject to payment of costs of Rs.5,000/- to the petitioner / plaintiff.

4. Rule. Mr. Dhakephalkar waives service for respondent in both the Petitions. Having regard to the nature of controversy raised in these Petitions and in view of the order dated 12.03.2018, Rule is made returnable forthwith and the Petitions are taken up for final hearing. Since the common questions of law and fact arise in these Petitions, the same can conveniently be disposed of by passing a common order. In order to appreciate the controversy raised between the parties, the facts from Writ Petition No.8284 of 2017 are taken into consideration.

5. Plaintiff, has instituted T.E.Suit No.182/225 of 2008 against defendant M/s. P. K. Velu & Company Private Limited inter alia contending that plaintiff is the owner of the open plot of land admeasuring 3372.23 square yards equivalent to 2819.59 sq.mtrs. bearing Survey No.103-B (part), Village Hariyali, Vikhroli, Mumbai - 400 083 (for short 'suit premises'). It was also contended that by a

Conveyance dated 12.02.2003 executed between the plaintiff and one M/s. New Dholera Shipping and Trading Company, plaintiff had purchased the suit premises along with other property. Defendant was a sitting tenant in respect of the suit premises at a monthly rent of Rs.640/- at the time when the property was conveyed to the plaintiff. It is the case of the plaintiff that plaintiff as well as their predecessor in title had informed the defendant about a change of ownership of title and defendant accepted the same and paid rent to the plaintiff. On 12.10.2006, plaintiff through its Advocate had terminated the tenancy of the defendant in respect of the suit premises. On 07.11.2006, defendant gave reply inter alia claiming that they were tenants of the entire plot admeasuring 4,652.18 sq.mtrs. and have constructed structures thereon. The defendant further contended that the termination of the tenancy by the plaintiff is illegal and claimed protection of the Maharashtra Rent Control Act, 1999 (for short 'Maharashtra Rent Act'). The Suit was instituted on 04.08.2008 under Section 41 of the Presidency Small Causes Court Act, 1881 (for short 'P.S.C.C. Act') for recovery of possession of the suit premises among other reliefs.

6. Defendant filed written statement on 06.01.2009 inter alia contending that defendant is a tenant in respect of land comprised in the suit premises as also the structures constructed thereon and are protected under the Maharashtra Rent Act. In paragraph 1, defendant contended that they are tenants of the property which includes the land comprised in the Suit as also structures constructed thereon. In paragraph 5, defendant submitted that the notice dated 12.10.2006 is not legal and does not terminate the tenancy of the defendant. In paragraph 6, defendant contended that they are the tenants of the property let out to it which includes the land comprised in the Suit and the tenancy is still valid and subsisting and is not terminated. In paragraph 10, defendant

contended that they have paid rent of the suit premises to the plaintiff. In paragraph 11, defendant denied that plaintiff became entitled to recover rent from the defendant and relying upon the plaintiff, defendant have paid rents to them. Defendant are not estopped from putting the plaintiff to the strict proof of its derivative title to the suit premises merely because rent has been paid by the defendant to the plaintiff which was done without ascertaining the facts and the correct position.

7. On 15.04.2009, defendant filed application inter alia seeking permission to deposit the rent in respect of the suit premises before the Small Causes Court. On 02.02.2010, application made by the defendant was allowed and the defendant was directed to continue to deposit rent in each succeeding month and to deposit the arrears of rent. On 28.01.2013, the learned trial Judge framed issued. On 12.02.2013, plaintiff filed affidavit in examination in chief dated 04.02.2013 of one of its partners along with list of documents. On 16.08.2013, defendant filed say on admissibility of documents. On 23.09.2014, 30.10.2014, 20.01.2015 and 14.10.2015, cross-examination of P.W.1 was conducted by the Advocate for the defendant. On 17.02.2016, defendant filed application under Order VI, Rule 17 of C.P.C. for amending written statement (exhibit-27). On 23.02.2016, plaintiff filed affidavit in reply opposing the application. On 01.04.2016, defendant filed affidavit in rejoinder at exhibit-29. By order dated 21.11.2016, the learned trial Judge rejected the application. Aggrieved by that decision, defendant filed Revision Application before the Appellate Bench of the Small Causes Court. By the impugned order dated 12.04.2017, the Appellate Court has allowed the Revision Application. It is against this order, plaintiff has instituted this Petition.

8. In support of this Petition, Mr. Joshi submitted that the Appellate

Court was not justified in allowing the Revision Application. He submitted that the learned trial Judge held that defendant did not satisfy the condition stipulated in proviso to Order VI, Rule 17 of C.P.C. He has invited my attention to the application, exhibit-27, made by the defendant and in particular paragraphs 2 to 6. Mr. Joshi relied upon the decision of the Apex Court in the case of ***Modi Spinning and Weaving Mills Co. Ltd. Vs. Ladha Ram & Co.***, **(1976) 4 SCC 320**, and in particular paragraph 10. In paragraph 10, it was observed thus,

> "10. It is true that inconsistent pleas can be made in pleadings but the effect of substitution of paragraphs 25 and 26 is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. The High Court rightly rejected the application for amendment and agreed with the trial court."

9. Mr. Joshi has taken me through the order passed by the learned trial Judge as also by the Appellate Court and submitted that the impugned order deserves to be set aside thereby rejecting the application for amendment made by the defendant.

10. On the other hand, Mr. Dhakephalkar supported the impugned order. He submitted that defendant can raise inconsistent pleas in the written statement. The application for amendment of the plaint and application for amendment of the written statement are to be considered by applying different yardsticks. The application for amendment of the written statement is to be considered liberally. He submitted that by the proposed amendment, defendant is not taking mutually destructing plea but has taken alternative plea. He has invited my attention to cross-examination of P.W.1 Rameshchandra Hanjarimal Shah. During the course of cross-examination, P.W.1 stated that he had not inspected the title deeds of predecessor in title of the plaintiff in respect of the suit

premises. He had not obtained the original title deeds from the predecessor in title. He had no occasion to examine Deed of Conveyance dated 22.09.1972. He does not remember the contents and particulars of the property card. He is not aware whether New Dolera Shipping and Trading Co. Ltd. agreed to sell the property to the defendant.

11. Mr. Dhakephalkar has invited my attention to the application for amendment. In paragraph 5, defendant contended that in the earlier written statement, it had already contended that the Small Causes Court has no jurisdiction to entertain and try the Suit under Section 41 of the P.S.C.C. Act. By letter dated 08.01.1997, New Dolera Shipping and Trading Co. Ltd. i.e. the plaintiff's predecessor in title handed over the title deeds of the larger property with the defendant. Memorandum of Understanding dated 14.01.1997 was executed between New Dolera Shipping and Trading Co. Ltd. i.e. the plaintiff's predecessor in title and the defendant. He has also invited my attention to the Schedule of Amendment. He submitted that the Schedule of Amendment has to be read in its entirety. If it is so read, it will be clear that defendant is claiming to be a prospective purchaser and the words used therein namely, "that in pursuance of MoU dated 14.01.1997, defendant acquired right, title and interest in respect of the suit premises and that defendant is occupying the suit premises as a purchaser thereof" are to be understood in the light of the earlier portion of the proposed amendment where defendant pleaded it had paid consideration of Rs.1,00,000/- on 07.11.1996 and Rs.2,00,000/- on 20.01.1997 and Rs.1,00,000/- on 27.01.1997. In other words, defendant has paid part considerations for purchasing the suit premises. He also relied upon the following decisions:

a. **NTPC Limited, New Delhi Vs. Reliance Industries Limited**,

Mumbai, ***2009 (5) Mh.L.J. 253***, and in particular paragraphs 13, 14, 22 and 23;

b. ***Bharat Petroleum Corporation Limited Vs. Precious Finance Investment Pvt. Ltd.***, **2007(1) Mh.L.J.331**, and in particular paragraphs 14 and 33(i);

c. ***Baldev Singh Vs. Manohar Singh***, **(2006) 6 SCC 498**, and in particular paragraphs 14 and 16;

d. ***Pankaja Vs. Yellappa***, **(2004) 6 SCC 415**, and in particular paragraph 12;

e. ***Basavan Jaggu Dhobi Vs. Sukhnandan Ramdas Chaudhary***, **1995 Supp (3) SCC 179**, and in particular paragraph 3;

f. ***Akshaya Restaurant Vs. P. Anjanappa***, **1995 Supp (2) SCC 303**;

g. ***Panchdeo Narain Srivastava Vs. KM Jyoti Sahay***, **1984 (Supp) SCC 594**;

h. **Devasahayam Vs. P. Savithramma**, **(2005) 7 SCC 653**, and in particular paragraphs 22, 30 and 42;

12. I have considered the rival submissions advanced by the learned Senior Counsel appearing for the parties. I have also perused the material on record. As noted earlier, during the course of cross-examination of the plaintiff's witness, defendant has filed application for amendment of written statement on 17.02.2016. In the case of ***Vidyabai Vs. Padmalatha***, **(2009) 2 SCC 409**, in paragraph 8, the Apex Court has observed thus,

> "8. … The question, therefore, which arises for consideration is as to whether the trial had commenced or not. In our opinion, it did. The date on which the issues are framed is the date of first hearing. Provisions of the Code of Civil Procedure envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination in chief of the witness, in our opinion, would amount to 'commencement of proceeding'."

13. Thus, in the present case, the trial has already commenced and the question is whether defendant has established due diligence in the present case. The question therefore, is whether defendant has satisfied the conditions stipulated in proviso to Order VI, Rule 17 of C.P.C. Order VI, Rule 17 of C.P.C. reads thus,

> "17. Amendment of pleadings.– The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:-
>
> Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

14. As noted earlier, defendant has filed written statement on 06.01.2009. I have already made reference to various paragraphs of the written statement in the earlier paragraphs of this order. Defendant unequivocally contended that they are the tenants of the property and that the notice dated 12.10.2006 did not legally terminate the defendant's tenancy of the property let out to the defendant. Defendant reiterated that they are the tenants of the property and their tenancy is still valid and subsisting and is not terminated. It was further contended that relying on the plaintiff's, defendant have paid rent to the plaintiff.

15. On 15.04.2009, defendant also filed application seeking permission to deposit rent of the suit premises before the Small Causes Court, which was allowed on 02.02.2010 and defendant were directed to deposit the rent as also the arrears in the trial Court.

16. A perusal of the application for amendment clearly shows that in paragraph 3, defendant contended that during the course of cross-examination of P.W.1, it came on record that predecessor-in-title of

plaintiff have agreed to sell the suit premises to the defendant and that plaintiffs do not have original title itself in respect of the suit premises though they have purchased the suit premises by the alleged Deed of Conveyance. In paragraph 4, it is stated that suit premises is party of larger property admeasuring about 5529.9 sq.mtrs. Plaintiff's predecessor-in-title has agreed to sell the defendant entire larger property and defendant agreed to purchase the same and in lieu of the said transaction, predecessor in title of the plaintiff had handed over all the original title deeds with the defendant. Name of the defendant is also inserted in the property card and 7 x 12 extract.

17. In paragraph 5, reference is made to letter dated 08.01.1997 of New Dolera Shipping and Trading Co. Ltd. handing over the title deeds of the larger property with the defendant as also Memorandum of Understanding dated 14.01.1997 executed between New Dolera Shipping and Trading Co. Ltd. and the defendants. In paragraph 6, it was asserted thus,

> "6. I say that as there are many hands changed in staff of legal department of the defendant in last 7-8 years and also changed office location of the legal department at 2-3 places, the files containing the original documents were not traceable. I say that while cross-examination of P.W.No.1 is on, present staff in legal department of the defendant searched the godown of the Defendant, where old records of legal department were lying, they ley hands on the old files, where many files containing all old correspondence and original documents relating of the suit premises were found. I say that on perusal of said files by the present persons legal department has come to know that the documents are having bearing on the present matters / suits and therefore, they discussed with Advocate for the defendants. I say that in such way in spite of due diligence, defendants could not produce those documents nor could rely upon those documents in the pleading nor in the written statement. However, these documents are relevant for determining the issues involved in the suit. I say that the said material facts are necessary to decide the controversy and relief for proper adjudication of the issue and / or for passing the final judgment by this Hon'ble Court. I say that it is,

> therefore, absolutely necessary in the interest of justice and equity for this Hon'ble Court to take notice of all the circumstances in order to shorten the litigation. The fact as stated hereinabove are absolutely necessary to take into consideration while deciding the suit and particularly the issue of maintainability of the present suit. I therefore say that the defendants be permitted to bring on record the better particulars as prayed and as set out in the Schedule annexed hereto."

18. By order dated 21.11.2016, the learned trial Judge rejected the application. In paragraph 8, the learned trial Judge referred to the assertions made in the written statement where defendant clearly pleaded that defendant is a tenant of the suit premises. It was further observed that even if for the sake of argument, it is assumed that the MOU is not available with the defendant while filing written statement, however, it is hard to believe that defendant was not aware of that fact at the time of filing written statement. Even though the law does not preclude defendant from taking up as many defences available or even to raise contrary defences, in the given facts and circumstances, the attempt of the defendant in the present case is not honest. In paragraph 7, the learned trial Judge considered the application of the defendant on the touchstone of due diligence and observed that no doubt, it is case of the defendant that MOU and other relevant documents were not traceable at the time of filing of the written statement, still, defendant was not prevented by any way to that effect. It is very hard to believe even after acquiring the documents like MOU in the nature of agreement of sale and even after passing some consideration, the defendant could not memorize the same at the time of filing of the written statement. The learned trial Judge, therefore, recorded a categorical finding that defendant is not diligent in bringing facts on record.

19. In paragraph 8, the learned trial Judge dealt with the decision in Gudial Singh Vs. Gurdev Singh, AIR 1991 P & H 240 and observed that

this was not a case of subsequent event during the course of the trial. The learned trial Judge also dealt with the decision of NTPC Ltd. Vs. Reliance Industries Limited, 2009 (4) ALL MR 24. The learned trial Judge ultimately held that defendant has not satisfied the conditions stipulated under proviso to Order VI, Rule 17 of C.P.C. and rejected the application.

20. As against this, the appellate Court observed in paragraph 23 that defendant nowhere in its reply to the notice to quit mentioned about MOU and has in fact clearly stated its status as a tenant of the suit premises while disputing the correctness of the termination of tenancy. The same position was reiterated by the defendant in its written statement. In paragraph 26, the appellate Court considered the explanation given in paragraph 6 of the application that the staff of the defendant while checking the old papers of the Legal Department came across vital documents which were lying in one of the godowns of the defendant. P.W.1's cross-examination was under progress. It was claimed that these vital documents could not be brought on record nor could be relied upon by the defendant in its written statement prior to the commencement of trial as the same were not traceable. It was further claimed that the staff of the Legal Department of the defendant kept on changing from time to time. Even the office of the Legal Department was shifted on 2-3 occasions.

21. In paragraph 28, the Appellate court observed that as the defendant is an entity, its matters are dealt with by several persons and it is quite possible that the documents might not be traceable on account of the change of staff handling a particular matter. The possibility of of the documents being not traceable cannot be ruled out. It was thus observed that in so far as the other aspect that such vital facts would not ordinarily

be missed out is concerned, the Appellate Court was of the view that, if the documents were not traceable, it could well be that the factum of execution and existence thereof could also be missed out as the specific department of the defendant was not looking after the matter. To say the least, this is not the case of the defendant. In paragraph 29, the Appellate Court made general observations about ownership rights being larger than the tenancy rights. In paragraph 31, the Appellate Court observed that a trial Court adopted a bit too harsh approach and in doing so has apparently gone into the merits of the amendment. In paragraph 34, the Appellate Court observed that the defendant had made out a case of due diligence. The Appellate Court observed also noted that P.W.1 admitted that the title deeds of the property were not with them.

22. A perusal of the recitals in the title deed dated 12.02.2003, itself, shows that the vendors retained the deeds and writings specified in the Schedule thereunder written and had agreed to give to the purchasers a covenant for production of the deeds and writings. In other words, the title deeds were retained by the plaintiff's predecessor in title. That apart, it cannot be digested that till cross-examination of P.W.1, defendant was not aware of MOU dated 14.01.1997. Assuming in favour of the defendant that MOU and related documents were not traceable at the relevant time, still, that did not prevent defendant from pleading these facts. It is also material to note that defendant is a private limited company. On the defendant's own showing it has a Legal Department. The persons in-charge of that Department cannot claim to be rustic villagers or that they are innocent illiterates unaware of Court procedures. The reason given in the application for amendment cannot be accepted. Reliance placed by Mr. Dhakephalkar on various decisions (referred hereinabove) do not advance the case of the defendant.

23. In my opinion, the application made by the defendant is neither honest nor bonafide. In fact, the learned trial Judge, while rejecting the application, has specifically recorded a finding that the application made by the defendant is not honest. In the case of ***Revajeetu Builders Vs. Narayanaswamy and Sons***, **(2009) 10 SCC 84**, after considering the entire law on the subject of amendment, in paragraph 63, the Apex Court laid down basic principles that are required to be taken into consideration while allowing or rejecting the amendment. Paragraph 63 reads thus,

> "63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:
>
> (1) whether the amendment sought is imperative for proper and effective adjudication of the case?
>
> (2) whether the application for amendment is bona fide or mala fide?
>
> (3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
>
> (4) refusing amendment would in fact lead to injustice or lead to multiple litigation;
> (5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? and
> (6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.
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> These are some of the important factors which may be kept in mind while dealing with application filed under Order VI Rule 17. These are only illustrative and not exhaustive."

24. Applying the tests laid down to the facts of the present case, I am satisfied that application for amendment is not bona fide. The defendant has not satisfied the condition stipulated in proviso to Order VI, Rule 17 of C.P.C. The amendment would certainly cause prejudice to the plaintiff, which cannot be compensated adequately in terms of money.

By refusing amendment, it will not cause injustice or lead to multiple litigations. In my opinion, the Appellate Court was also not justified in observing that the trial Court was bit too harsh while rejecting the application. In fact, the Appellate Court should have posed question to itself as to even if MOU and other related documents were not traceable, why defendant did not plead its case that it is a purchaser on the strength of MOU as also it became the prospective purchaser on the basis of MOU. Having regard to the conduct of the defendant also, the Appellate Court was not justified in interfering with the order of the trial Court. Impugned order, therefore, cannot be sustained and is liable to be set aside and accordingly is set aside. Applications exhibit-27 in T.E.Suit No.182/225 of 2008 as also in T.E.Suit No.181/224 of 2008 stand dismissed. Rule is made absolute in terms of prayer clauses (b) and (d) with no order as to costs.

(R. G. KETKAR, J.)

Minal Parab