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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8071 OF 2018

1. Haji Mahomed Wakf Trust,
A trust registered under the Indian
Trust Act, 1882 and having registered
office at 27, Prabhat, 76, B.Desai
Road, Mumbai – 400 026.
2. Ms.Najma Yusufali Murad, Age:
72 years, Occu: Business, Indian
Inhabitant, residing at 27, Prabhat,
76, B.Desai Road, Mumbai–400 026.
3. Kausar Hanif Murad, Age: 60 years,
Occu: House Indian Inhabitant, residing
at 27, Prabhat, 76, B.Desai Road,
Mumbai–400 026.
4. Hanif Yusufali Murad, Age: 77 yrs.,
Occu: Business, Indian Inhabitant,
residing at 27, Prabhat, 76, B.Desai
Road, Mumbai–400 026.
- 5.. Javed Hanif Murad, Age: 36 yrs.,
Occu: Business, Indian Inhabitant,
residing at 27, Prabhat, 76, B.Desai
Road, Mumbai–400 026. ..Petitioners.

All the Trustees of Petitioner No.1.

V/s.

Jayesh Babulal Morakhia
Age:57 Indian Inhabitant, residing

at Doctor Building 'E', 28/32,
2nd Pathan Street, 1st Floor,
Room No.73, Mumbai-400 004.

..Respondent.

Mr.Archit Jayakar I/b. Jayakar &U Paretners for the petitioners.

None for the respondent.

CORAM: M.S.SONAK, J.

DATE : DECEMBER 12, 2018

ORAL JUDGMENT

Heard Mr.Jayakar for the petitioner.

2. By order dated September 19, 2018, a notice was directed to be served upon the respondent and the parties were to put to notice that subject constraint of time and convenience of the Court, the petition may be disposed of finally on the returnable date.

3. Learned counsel for the petitioner submits that the respondent has been duly served and affidavit of service is being filed in the Court. He points out that a copy of the order dated September 19, 2018 was filed before the learned trial Court by

way of a pursis. A copy of the pursis along with the order dated September 19, 2018 was furnished to the learned advocate appearing for the respondent in the trial Court.

4. Despite the aforesaid, neither the respondent nor his advocate are present today. Taking into consideration the said facts, it is not possible to further adjourn this petition.

5. The challenge in this petition is to the order dated January 8, 2018 by which the learned trial Court has condoned the delay and permitted the respondent to file additional written statement as a consequence of the petitioner amending the plaint and adding Javed Hanif Murad as plaintiff No.6.

6. Mr.Jayakar, learned counsel for the petitioner submits that in the present case, there is no sufficient cause indicated to condone the delay to file additional written statement after leave was granted to the petitioner to carry out amendment to the plaint. In any case, he submits that in such matters, additional written statement has to be confined to answer the amendment made by the plaintiffs and such opportunity is not to be misused

for the purpose of setting up an altogether new plea to the surprise of the opposite party and the Court. He relied upon the decision in the case of *Gurdial Singh and others V/s. Raj Kumar Aneja and others*¹ in support of his contention. He points out that the amendment carried out by the petitioner-plaintiff was a formal amendment, but the respondent-defendant has chosen to file additional written statement which runs into 13 paragraphs and seeks to re-answer each and every paragraph of the original plaint. Mr. Jayakar submits that this is clearly a case of misuse of the said opportunity and, therefore, the impugned order warrants interference.

7. Since the respondent is absent in spite of service, I have perused the material on record with a view to examine the challenge as raised.

8. In this case, the petitioner-original plaintiff instituted R.A.E. & R. Suit No.627/1032/2011 seeking eviction of the respondent-defendant. The petitioner-plaintiff are a Trust and, therefore, the trustees there, were impleaded as the plaintiffs.

¹ (2002) 2 Supreme Court Cases 445

9. The record indicates that plaintiff No.2 Yusufali Haji Mohammed Murad, one of the trustee expired and, therefore, the surviving trustees resolved that Mr.Javed Hanif Murad be appointed as a trustee of the Trust. Accordingly, leave was applied to delete plaintiff No.2 and such deletion was granted and necessary deletion was affected. Later on i.e. on March 19, 2013 further leave was applied to amend the plaint and add Javed Hanif Murad as plaintiff No.6. This leave was applied to amend the plaint in terms of schedule appended to the application dated March 19, 2015, which reads as follows :-

“S C H E D U L E

1. *In the title of the Plaint after Plaintiff No.5 add the following as Plaintiff No.6.*

6. *Javed Hanif Murad*

Age 33, Occupation Business

Indian Inhabitant, residing at

27, Prabhat, 76 B.Desai Road,

Mumbai 400 026

All the Trustees of the Plaintiff No.1 ..Plaintiffs.

2. In paragraph no.1 of the Plaint, after the words 'Plaintiff No.2 to' the numeral '5' to be deleted and the

numeral '6' to be added. ”

10. It is pertinent to note that except for seeking leave as aforesaid to implead Javed Hanif Murad as plaintiff No.6, there was no further amendment carried out to the paint.

11. The respondent, in the year 2011 had already filed written statement to the original plaint. Therefore, unless the respondent had any serious objection or any legal issues subsequent upon the impleadment of Javed Hanif Murad as plaintiff No.6, there was no question of filing any additional written statement. In any case, in all such matters, additional written statement has to be confined to answer the amendment made by the opposite party and such opportunity is not to be misused for the purpose of setting up an altogether new plea to the surprise of the opposite side and to the Court.

12. In *Gurdial Sing and others (supra)*, the Hon'ble Apex Court in paragraph 20 has made the position clear when it comes to a consequential amendment or plea and filing of additional written statement as a consequence of the amendment of the plaint. The observation reads as follows:-

“ Some of the High Courts permit, as a matter of practice, an additional pleading, by way of response to the amendment made in the pleadings by opposite party, being filed with the leave of the Court. Where it is permissible to do so, care has to be taken to see that the additional pleading is confined to an answer to the amendment made by the opposite party and is not misused for the purpose of setting up altogether new pleas springing a surprise on the opposite party and the Court. A reference to Order 6 Rule 7 CPC is apposite which provides that no pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.”

13. In the present case, the trial Court has exercised discretion to condone the delay in filing the additional written statement. There is no case made out to interfere in the exercise of discretion to the extent of condonation of delay in filing the additional written statement.

14. However, the learned trial Court has not even adverted to the issue as to whether such opportunity could have been used by the respondent for filing additional written statement which runs into 13 paragraphs and seeks to answer each and every averments in the original plaint. Taking into consideration the nature of the amendment carried out, there was no question of permitting the respondent to file such an additional written statement. To that extent, the order impugned will have to be set aside and the leave granted for filing additional written statement, the typed copy of which is placed on record from page Nos.115A to 115-S, will have to be revoked. Accordingly, the impugned order to this extent is set aside.

15. Rule is made absolute in the aforesaid terms.

16. The respondent is, however, granted two weeks time to file additional written statement. However, the respondent will have to confine this additional written statement to answer the amendment made by the petitioners and to not to re-answer the averments made in the unamended plaint. The time limit of 15 days will commence from the date the petitioners will serve an

authenticated copy of the order on the respondent as well as on the learned counsel appearing for the respondent before the trial Court.

17. There shall be no order as to costs.

18. All concerned to act on an authenticated copy of this order.

(M.S.SONAK, J.)