

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION [ST] NO.19374 OF 2018**

Amanollah Merwan Irani & Anr.	]	Petitioners
Vs.		
Naagraj Ganeshmal Jain	]	Respondents
.....		
Mr. Rajesh Kanojia i/b Res Juris, for Petitioners.		
.....		

CORAM : R.G. KETKAR, J.

DATE : 24TH JULY, 2018.

P.C:

Not on board. At the request of Mr. Kanojia, taken up in the production board.

2. Heard Mr. Kanojia, learned Counsel for the petitioners.

3. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as “defendants” have challenged the judgment and order dated 14th June, 2018 passed by the learned Judge, Court Room No.26 of the Court of Small Causes at Mumbai in R.A.E. & R Suit No.638/1028 of 2012. By that order, the learned trial Judge allowed the application filed by the plaintiffs, 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.

4. In support of this Petition, Mr. Kanojia submitted that respondents/plaintiffs purchased the suit property from the erstwhile landlord

namely Bai Hemkorbai Devidas and Devidas Purabhdas Charities Trust in December, 2011. Suit is instituted in the year 2012 invoking ground of additions and alterations of permanent nature as contemplated by section 16 (1) (b) of the Maharashtra Rent Control Act, 1999 (for short 'Act'). He invited my attention to one of the issues framed by the learned trial Judge namely issue No.2 and discussion in paragraph 13. The learned trial Judge declined to pass decree under section 16 (1) (b) by observing that no particulars have been given by the plaintiff regarding alleged additions and alterations in the suit premises by defendants. No reliable evidence is adduced to that effect. Thus, the plaintiffs failed to establish the ground of additions and alterations of permanent nature in the suit premises.

5. Mr. Kanojia submitted that basically the plaintiffs also did not specifically plead as to when alleged additions and alterations were carried out. The suit was decreed ex-parte. The defendants filed application under Order-IX, Rule-13 of the C.P.C for setting aside ex-parte decree. Application was rejected by the trial Court. The appeal preferred by the defendants was dismissed by the Appellate Court. By order dated 4th October, 2017, this Court disposed of the Writ Petition and by consent of the parties, set aside the ex-parte decree and restored the suit to the file of the Small Causes Court. He submitted that the defendants filed MARJI Application for filing written statement which was allowed and in pursuance thereof, written statement is filed opposing the suit. He submitted that the plaintiffs filed application for inspection of the suit premises in 2018 and took inspection on 3rd February, 2018. Thereafter, filed present application Exhibit 31 for amending the plaint. He submitted that the learned trial Judge was not justified in allowing the application as the plaintiffs did not satisfy the conditions stipulated in proviso to Order-VI, Rule-17. He submitted that the trial had already commenced as the plaintiffs had adduced evidence. He relied upon Order-XLI, Rule-23 of the

C.P.C to contend that the evidence, if any, recorded in the original trial subject to all just exceptions, be evidence during the trial after remand. In view of Order-XLI, Rule-23 as the evidence already adduced by the parties shall, subject to all just exceptions, be evidence during the trial after remand, it cannot be said that the plaintiffs have satisfied conditions stipulated in proviso to Order-VI, Rule-17. In any case, by allowing amendment, right accrued in favour of the defendants is taken away. For all these reasons, he submitted that impugned order deserves to be set aside. Hence, the Petition requires consideration.

6. I have considered submissions advanced by Mr. Kanojia. I have also perused the material on record. As noted earlier, the suit instituted by the plaintiffs was decreed ex-parte. Ultimately, that decree was set aside and the suit was restored to the file of the Small Causes Court. It is also matter of record that subsequently defendants filed MARJI Application for filing written statement and the said application was allowed. Written statement is now on record of the trial Court. In view thereof, it will be necessary for the plaintiffs to adduce evidence in the suit after remand. It is no doubt true that the plaintiffs had taken inspection of the suit premises and on that basis has filed application for amendment of the plaint. It is settled principle of law that by allowing the application for amendment, the Court has not granted amendment. The plaintiffs will have to prove their case. At the same time, defendants will be at liberty to file additional written statement to the amended plaint.

7. Mr. Kanojia relied on Order-XLI, Rule-23 of the C.P.C to contend that the as the plaintiffs had adduced evidence before the trial Court, the trial has commenced. The learned trial Judge decreed the suit ex-parte. The plaintiff has not satisfied conditions stipulated in proviso to Order-VI, Rule-17. In my

opinion, the suit was not disposed of by the learned trial Judge upon a preliminary point. The suit was decided on merits, albeit ex-parte. Ex-parte decree was set aside ultimately by this Court. In my opinion, as the suit was not disposed of on a preliminary point, Order-XLI, Rule-23 is not applicable in the present case.

8. In my opinion, after setting aside ex-parte decree and restoration of the suit, the suit will have to proceed *de novo*. It will be open to the plaintiffs to rely upon the evidence already adduced or to adduce a fresh evidence. While allowing the application for amendment, the learned trial Judge has observed that amendment is necessary for determination of controversy between the parties. In view thereof, I do not find any merit in the submission of Mr. Kanojia that the plaintiffs do not satisfy conditions stipulated in proviso to Order-VI, Rule-17.

9. In the light of the aforesaid discussion, I do not find that the learned trial Judge has committed any error. The Petition fails and the same is dismissed. The defendants are at liberty to file additional written statement within three months from today.

10. 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.]