

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO. 11997 OF 2017**

M/s. Ish Homes Pvt. Limited] Petitioner

Vs.

Jaiprakash Prahlad Mishra & Ors.] Respondents

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Mr. Khan Javed Akhtar, for petitioner.

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CORAM : R.G. KETKAR, J.

DATE : 5TH APRIL, 2018.

P.C.

Heard Mr. Khan Javed Akhtar, learned Counsel for the petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as “plaintiff” has challenged the judgment and order dated 3rd August, 2017 passed by the learned Judge, Court Room No.9 of the Court of Small Causes at Mumbai below Exhibit 72 in R.A.E. & R Suit No.125/180 of 2011. By that order, the learned trial Judge partly allowed the application filed by respondent No.1, hereinafter referred to as “defendant No.1” for striking out paragraphs 3 to 8 of the additional affidavit dated 16th March, 2017 filed by the plaintiff at Exhibit 70.

3. In support of this Petition, Mr. Khan submitted that the plaintiff had filed application at Exhibit 65 for producing documents and leading additional evidence. By order dated 22nd February, 2017, the learned trial

Judge allowed the application and permitted the plaintiff to produce the documents and lead evidence to prove the documents i.e Conveyance Deed and copy of the resolution dated 21st December, 2010. He submitted that there is no Conveyance Deed and the plaintiff wants to prove agreement of sale and copy of the resolution dated 21st December, 2010. He has invited my attention to the copy of the plaint instituted by the plaintiff and in particular, paragraph 6 thereof. In paragraph 6, the plaintiff specifically stated that the defendants are in arrears of rent and permitted increases from 1st April, 1989 to 31st December, 2010 aggregating to Rs. 3581/-. He also invited my attention to the Affidavit of evidence of the plaintiff dated 9th October, 2014 and in particular paragraph 8 thereof where it is stated that the defendants are in arrears of rent and permitted increases from 1st April, 1989 to 31st August, 2014 aggregating to Rs. 630/-.

4. Mr. Khan invited my attention to the additional affidavit of evidence dated 15th March, 2017 and in particular paragraphs 5,6 and 7 thereof. He submitted that in paragraph 5, the plaintiff stated that as per clause 11 of the agreement, the plaintiff is authorized to recover all arrears of rent and permitted increases and pay over the same to the owners immediately on receipt of the same from the tenants or occupants. He submitted that as the plaintiff is permitted to prove contents of the agreement, the learned trial Judge was not justified in discarding paragraph 5 of the additional affidavit of evidence.

5. In so far as paragraph 6 is concerned, it refers to clause 11 of the agreement and it was stated that the tenants were in arrears of rent to the tune of Rs.6,00,000/-. The plaintiff had paid entire arrears of rent and permitted increases from 1989 till the date of purchase of the property to the erstwhile landlord. The plaintiffs also referred to original Bank Statement of Bank of Baroda at Exhibit E. In paragraph 7, the plaintiff's witness denied that the

plaintiff is not entitled to past arrears of rent and permitted increases. He submitted that as statements in paragraphs 5 to 7 are based on agreement of sale and by order dated 22nd April, 2017, the plaintiffs are permitted to prove contents of the agreement of sale, the learned trial Judge was not justified in partly allowing the application made by defendant No.1 striking out paragraphs 5 to 7 of additional affidavit at Exhibit 70.

6. I have considered the submissions advanced by learned Counsel for the petitioner. I have also perused the material on record. By the impugned order, the learned trial Judge has struck out paragraphs 5 to 7 of additional affidavit dated 15th March, 2017 which is at Exhibit 70. In paragraph 7, the learned trial Judge has observed thus;

“Perused the order dated 22/2/2017 passed below Exh.65. By the application Exh.65, plaintiff has sought the relief of permission to produce the conveyance deed and the copy of resolution along with minute book. After hearing both the parties, the application is allowed on 22/2/2017. The plaintiff was permitted to produce the documents and further permission was granted in favour of the plaintiff to lead the evidence for proving the documents. With the additional affidavit Exh.70 plaintiff has filed the copy of resolution, minute book and the copy of agreement. In respect of contents of para 5 to 7 of the affidavit, no permission was granted in favour of the plaintiff. In para 5 of the affidavit there is whisper about authorization for recovery of arrears of rent and permitted increases. At the same time, in para 6 of the affidavit there is whisper about payment of arrears of rent and permitted increases by the plaintiff company. Considering these circumstances, in para 7 of the affidavit plaintiff has denied that it is not entitled to claim past arrears of rent and permitted increases”.

7. That apart, a perusal of the plaint itself does not even remotely indicate reference of the agreement of sale which is sought to be relied by the plaintiff. In other words, the additional affidavit of evidence cannot travel beyond the pleadings of the plaintiff.

8. Rules-4 and 5 of Order-XIX read thus;

Order XIX:

1. Power to order any point to be proved by affidavit._

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4.Court may control evidence._(1)The Court may, by directions, regulate the evidence as to issues on which it requires evidence and the manner in which such evidence may be placed before the Court.

(2)The Court may, in its discretion and for reasons to be recorded in writing, exclude evidence that would otherwise be produced by the parties

5.Redacting or rejecting evidence._A Court may, in its direction, for reasons to be recorded in writing-

(i)redact or order the redaction of such portions of the affidavit of examination-in-chief as do not, in its view, constitute evidence;

(ii)return or reject an affidavit of examination-i-chief as not constituting admissible evidence”.

9. In view thereof and also for the reasons recorded in paragraph 7 of the impugned order, I do not find that the learned trial Judge has committed any error in passing the impugned order. Hence, the Petition fails and the same is dismissed.

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.]