

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 2899 OF 2016

Dr. Sharadchandra Narayan Abhyankar	...Petitioner
<i>Versus</i>	
Kashinath Vithal Dali (since deceased)	
Through LR's. and others	...Respondents

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Mr. Anant Vadgaonkar, Advocate for the Petitioner.
Ms. Shakuntala A. Mudbidri, Advocate for the Respondents.

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CORAM : R. G. KETKAR, J.

DATE : 05th FEBRUARY, 2019

P.C.

1. Heard Mr. Anant Vadgaonkar, learned counsel for the petitioner and Ms. Shakuntala Mudbidri, learned counsel for the respondents, at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'plaintiff' has challenged the order dated 20.6.2015 passed by the learned Jt. Civil Judge, Junior Division, Ratnagiri below Exhibit-103 in R.C.S. No.63/1995. By that order, the learned trial Judge rejected the application made by the plaintiff seeking permission to file written statement to the counter claim set up by the defendant.
3. Rule. Ms. Mudbidri waives service. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of

the parties, Rule is made returnable forthwith and the petition is taken up for final hearing. The relevant and material facts, giving rise to filing of the present petition, briefly stated, are as under.

4. The plaintiff has originally instituted Suit against Shankar Vitthal Dali (for short, 'original tenant') on 6.4.1995 for recovery of possession of three rooms in Municipal House No.2327 situate at Ratnagiri, more particularly described in paragraph-1 of the plaint. The plaintiff filed the suit invoking the grounds under Sections 12 and 13(1) (g) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, 'Act'). It appears that the original tenant had expired on 17.9.1995.

5. On 16.11.1995, the respondents herein filed application for bringing them as heirs and legal representatives of the original tenant on record. The trial Court rejected the application. Aggrieved by that decision, the matter was carried to this Court and in April, 2003, Writ Petition filed by the respondents was allowed and the plaintiff was directed to bring them on record as heirs and legal representatives of the original tenant. Accordingly the respondents were brought on record. The respondents thereafter filed written statement at Exhibit-47 on 10.10.2003. In paragraphs-8(d) and 13, the respondents claimed to have inherited tenancy jointly and accordingly set up counter claim for

declaration of their tenancy rights in the suit premises.

6. The plaintiff filed application Exhibit-50 on 1.11.2003 for excluding the counter claim set up in paragraph-8(d), 13 and prayer clause (1). By order dated 2.1.2004, the learned trial judge rejected the application. Aggrieved by that decision, the plaintiff instituted Writ Petition No.1749/2004 in this Court.

7. It was brought to the notice of this Court that respondent No.1 Kashinath Vithal Dali died on 13.4.2009 and no steps to bring his heirs and legal representatives on record were taken till date. This Court, therefore, disposed of Writ Petition as abated.

8. It appears that several applications were taken out by the plaintiff in that Writ Petition. One of the applications was Civil Application No.2469/2013. That application was dismissed for default on 27.6.2014. The plaintiff, therefore, took out Civil Application No.2800/2014 for restoration of that Civil Application. By order dated 11.6.2015, Civil Application No.2800/2014 was disposed of by restoring Civil Application No.2469/2013 to the file of this Court.

9. During pendency of Civil Application No.2469/2013, the plaintiff filed application Exhibit-103 on 15.6.2015 seeking permission to file written statement to the counter claim set up by the respondents. On 17.6.2015, reply was filed by the respondents opposing the application. By

the impugned order dated 20.6.2015, the learned trial Judge rejected the application. It is against this order, the plaintiff has instituted the present Petition. It is common ground between the parties that Writ Petition No.1749/2004 was ultimately disposed of by this Court on 28.9.2010.

10. In support of this Petition, Mr. Vadgaonkar submitted that the suit is instituted in the year 1995 and, therefore, it will be governed by the unamended provisions of Code of Civil Procedure, 1908 (for short, 'C.P.C.'). He submitted that in the application at Exhibit-103 inadvertently Exhibit No.40 was mentioned instead of Exhibit No.50. He submitted that in paragraph-4 of the impugned order, the learned trial Judge observed that Exhibit No.40 is the Vakalatnama filed by Advocate Arvind Joshi and, therefore, reference of Exhibit-40 in the application Exhibit-103 is not correct. The learned trial Judge further observed in paragraph-5 that in the application the plaintiff did not mention the Writ Petition number pending in the High Court and, therefore, the delay caused by the plaintiff to file written statement to the counter claim is not satisfactorily explained. As the suit is old, the learned trial Judge was of the view that it would not be just and proper to allow the plaintiff to file written statement to the counter claim of the defendant. He submitted that the learned trial Judge has not given cogent reasons while rejecting the application. Merely because Exhibit number is wrongly mentioned and

Writ Petition number is not given that by itself will not be sufficient for rejecting the application.

11. On the other hand, Ms. Mudbidri supported the impugned order. She strenuously contended that the plaintiff is responsible for causing delay. The suit is instituted in the year 1995 and the learned trial Judge was, therefore, justified in observing that the suit being old, the plaintiff did not properly explain the delay in filing the application for permission to file written statement.

12. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As mentioned earlier after the respondents filed their written statement Exhibit-47 on 10.10.2003, the plaintiff took out application Exhibit-50 for excluding paragraph-8(d), 13 and prayer clause (1). That application was rejected by the trial Court on 2.1.2004. The plaintiff instituted Writ Petition No.1749/2004 in this Court. By order dated 28.9.2010, the petition was disposed of as abated. The plaintiff filed application for restoration of that Writ Petition. By order dated 11.6.2015, this Court restored Civil Application No.2469/2013.

13. During pendency of that application on 15.6.2015, the plaintiff filed application Exhibit-103 for permission to file written statement to the counter claim of the defendant. A perusal of that application shows that

the plaintiff contended that he filed application Exhibit-40 for excluding counter claim. In my opinion, this is obviously an inadvertent error. The plaintiff had filed application Exhibit-50 for excluding the counter claim. That apart, the plaintiff did not mention Writ Petition number in the application Exhibit-103. The fact, however, remains that the plaintiff had filed Writ Petition challenging the order dated 2.1.2004 rejecting his application Exhibit-50. In view thereof as also having regard to the fact that the suit is governed by the unamended provisions of C.P.C., the learned trial Judge was not justified in rejecting the application on technical ground. The learned trial Judge rejected the application on the ground that the plaintiff did not give correct exhibit number of the application for excluding counter claim as also did not mention Writ Petition number.

14. In view thereof, the impugned order is set aside. Application Exhibit-103 is allowed. The plaintiff shall file written statement to the counter claim within four weeks from today and serve copy during that period on the other side. Rule is made absolute in aforesaid terms with no order as to costs.

15. All concerned parties to act upon the authenticated copy of this order. Order accordingly.

(R. G. KETKAR, J.)