

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1655 OF 2016

The David Sasoon Library & Reading Room ... Petitioner
Vs.
M/s. Lund & Blockley Pvt. Ltd. and others ... Respondents

Mr. Prabhakar K. Shetty for Petitioner.
Ms Shlesha Sheth i/b. FZB & Asso. for Respondents No.2 and 5.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 18, 2019

P.C. :

Heard Mr. Shetty, learned Counsel for petitioner and Ms Sheth, learned Counsel for respondents No.2 and 5 at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'plaintiff', has challenged the order dated 20.07.2015 passed by the learned Judge, Court Room No.20 of the Court of Small Causes, Mumbai below exhibit-96 in R.A.E. Suit No.408/1161 of 1986. By that order, the learned trial Judge allowed the application made by Suzanne Fali Poncha, one of the Directors of defendant No.5 and Proprietor of the defendant No.2 seeking amendment of the written statement.

3. Rule. Ms Sheth waives service for respondents No.2 and 5. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

4. The petitioners have instituted Suit against defendants No. 1 to 5 namely, (i) M/s. Lund & Blockley Pvt. Ltd., (ii) Lund & Blockley Opticians, (iii) Hindustan Wires Limited, (iv) M/s. Vam Organic Chemicals and (v) Premier Optical Pvt. Ltd. for recovery of possession

of two rooms on the ground floor of building situate at 154, Mahatma Gandhi Road, Fort, Bombay 400 023 (for short 'suit premises'). Initially, the Suit was instituted only by plaintiff No.1 namely, The David Sassoon Library & Reading Room. Defendant No.2 filed written statement dated 13.08.1990. In paragraph 1, it was contended that the Suit as filed is not maintainable and is liable to be dismissed with costs. On 30.01.1991, additional written statement was filed. On behalf of the plaintiff, examination in chief of P.W.1 was filed in 2007. On 01.04.2014, defendant No.2 completed cross-examination of P.W.1. At that stage, defendants No.2 and 5 filed application exhibit-96 under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') inter alia contending that in paragraph 1 of the written statement dated 13.08.1990, defendants contended that Suit as filed is not maintainable and is liable to be dismissed. In additional written statement dated 30.01.1991, it was stated thus,

“1. These defendants state that the suit as filed is not maintainable and is liable to be dismissed with costs. Without prejudice the defendants say that the written statement with regard to para 1 to 7 has already been furnished. These defendants crave leave to and rely upon the written statement when produced with its true interpretation and meaning.”

5. Defendant No.5 adopted written statement of defendant No.2. On 16.07.2007, issues were framed by the trial Court. However, no issue was framed on the maintainability of the Suit as contended by defendants No.2 and 5 in their written statement. On 11.10.2007, Vivekanand Ramchandra Ajgaonkar filed his examination-in-chief as P.W.1. In his cross-examination conducted by Advocate for the defendant No.1, P.W.1 disclosed names of the trustees of the plaintiff. In view thereof, defendant No.5 filed application for amending written statement by inserting paragraph 2A which is to the following effect:

“2A) the defendant submits that the present suit filed by the plaintiffs as a Public Charitable Trust registered under

the Bombay Public Trust Act 1950 and the Societies Registration Act 1860 is not maintainable in the absence of impleadings all the Trustees as Plaintiffs and / or further being in violation of the mandatory requirements of Sec.6 of the Societies Registration Act, 1860.”

6. It appears that during the pendency of this application, plaintiffs filed application exhibit-102 inter alia for amending the plaint thereby joining all the trustees as party plaintiffs in the Suit. By order dated 20.07.2015, the learned trial Judge allowed that application exhibit-102. On the same day, the learned trial Judge allowed application exhibit-96 filed by defendants No.2 and 5 and permitted them to carry out amendment in the written statement as per the Schedule annexed to the application. It is against this order, plaintiffs have instituted the present Petition.

7. In support of this Petition, Mr. Shetty submitted that issues were framed on 16.07.2007. A perusal of the application exhibit-96 shows that defendants No.2 and 5 have brought on record the fact that P.W.1 filed his examination-in-chief dated 11.10.2007. Defendant No.1 cross-examined P.W.1 on 12.09.2012. He relied upon Order I, Rule 13 of C.P.C. to contend that all objections on the ground of non-joinder or mis-joinder of parties shall be taken at the earlier possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived. He submitted that the contention of the defendants No.2 and 5 that for the first time P.W.1 disclosed names of the trustees in the cross-examination on 10.09.2012 is only ground for raising this contention in the application at exhibit-96 that too was filed on 07.07.2014. He submitted that in any case, the said contention is no longer available as by order dated 20.07.2015 below exhibit-102, the learned trial Judge has allowed plaintiff to implead the

trustees as plaintiffs.

8. Mr. Shetty invited my attention to paragraph 12 of the order below exhibit-102 where the learned trial Judge observed that initially the Suit was filed by the then President Mr. M. B. Keni. Thus, it cannot be said that there was no representation of the trustees when the Suit was filed in the year 1986. He submitted that the said order is not challenged by defendants No.2 and 5. For all these reasons, he submitted that the impugned order is liable to be set aside.

9. On the other hand, Ms Sheth supported the impugned order. She submitted that in the written statement dated 13.08.1990 as also in additional written statement dated 30.01.1991, contention about maintainability of the Suit based on the provisions of the Bombay Public Trusts Act, 1950 and Societies Registration Act, 1860 was already taken. By the proposed amendment, defendants No.2 and 5 are amplifying the said objection. Merely because, application exhibit-102 is allowed that will not amount to giving up objections raised by defendants No.2 and 5 in the written statements. She also relied upon the decision of this Court in *Nagar Wahan Mandir Vs. M/s. Akabaralli Abdulhusen & Sons*, 1994 (2) Bom.C.R. 251 to contend that unless instrument of trust otherwise provides all co-trustees must join for filing a suit to recover possession of the property from the tenant, Suit is not maintainable. In the present case, Suit was instituted only by the Trust, and therefore, defendants had raised objection about the maintainability. She submitted that even if the trial Court has allowed application exhibit-102, it is subject to the outcome of the Suit. She, therefore, submitted that no case is made out for interfering with the impugned order.

10. 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, defendant No.2 had filed written statement dated 13.08.1990. In paragraph 1, defendants contended that Suit as filed is not maintainable and is liable to be dismissed with costs. No better and further particulars were given for challenging maintainability of the Suit. Defendant No.5 filed written statement adopting the written statement of defendant No.2. From the record, it is evident that on 16.07.2007, issues were framed. On 11.10.2007, P.W.1 filed examination-in-chief. It is the case of the defendants No.2 and 5 that during the cross-examination conducted by Advocate for the defendant No.1 on 10.09.2012, P.W.1 disclosed names of the trustees of the plaintiff.

11. In my opinion, the defendants No.2 and 5 could have invoked the provisions of Order XI by calling upon the plaintiff to disclose the names of the trustees of the plaintiff-Trust. Admittedly, defendants No.2 and 5 did not invoke provisions of Order XI and sought discovery by interrogatories. Be that as it may. Order I, Rule 13 lays down that all objections on the ground of non-joinder or mis-joinder of parties shall be taken at the earlier possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived. Thus, defendants No.2 and 5 also did not take objection of non-joinder of all the trustees before settlement of issues.

12. In any case, the said objection has lost its significance in view of the order dated 20.07.2015 passed by the learned trial Judge below exhibit-102. In paragraph 12 of that order, the learned trial Judge specifically observed that initially the Suit was filed by the then

President Mr. M. B. Keni. Thus, it cannot be said that there was no representation of the trustees when the Suit was filed in the year 1986.

Section 6 of the Societies Registration Act, 1860 reads thus,

“6. Suits by and against societies.- Every society registered under this Act may sue or be sued in the name of the president, chairman, or principal secretary, or trustees, as shall be determined by the rules and regulations of the society and, in default of such determination, in the name of such person as shall be appointed by the governing body for the occasion:

Provided that it shall be competent for any person having a claim or demand against the society, to sue the president or chairman, or principal secretary, or the trustees thereof, if on application to the governing body some other officer or person be not nominated to be the defendant.”

13. Thus, in view of the finding recorded in paragraph 12 of the order dated 20.07.2015 below exhibit-102, the Suit was instituted by the then President, Mr. M. B. Keni. Section 6, extracted hereinabove is complied. It is an admitted position as on date that defendants No.2 and 5 have not challenged the order dated 20.07.2015 below exhibit-102. In view thereof also, I do not find that the learned trial Judge was justified in allowing the application. Ms Sheth submitted that order below exhibit-102 is subject to the outcome of the Suit. I do not find any merit in this submission also as no such finding is recorded in the order dated 20.07.2015. Hence, impugned order dated 20.07.2015 is liable to be set aside and is accordingly set aside. Application exhibit-96 is dismissed. Rule is made absolute accordingly with no order as to costs.

(R. G. KETKAR, J.)