

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 446 OF 2019

Shri. Gayasuddin Kifayatullah Zariwala	...Petitioner
<i>Versus</i>	
Mohammed Rafiq Mohammed Siddik	...Respondent

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Mr. Y.E. Mooman i/b. Manisha B. Gawde, Advocate for the Petitioner.
Mr. J.P. Mishra a/w. Nitesh Pandey, Advocate for the Respondent.

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CORAM : R. G. KETKAR, J.

DATE : 22nd JANUARY, 2019

P.C.

1. Heard Mr.Y.E. Mooman, learned counsel for the petitioner and Mr.J.P. Mishra, learned counsel for the respondent, at length. Mr.Mishra seeks leave to file Vakalatnama on behalf of the respondent within a week's time. Leave as prayed for is granted.

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 28.11.2018 passed by the learned Judge, Court Room No.22 of the Court of Small Causes at Mumbai below Exhibit-57 in R.A.E. & R. Suit No.39/66 of 2008. By that order, the learned trial Judge allowed the application made by the respondent, hereinafter referred to as the 'defendant', under Order VI Rule 17 of Code of Civil Procedure, 1908 (for short, 'C.P.C.') for amending the written statement. The learned trial Judge allowed the application subject to

payment of costs of Rs.1000/- to the plaintiff.

3. Rule. Mr.Mishra 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

4. In support of this Petition, Mr. Mooman submitted that the plaintiff has instituted the suit against the defendant *inter alia* invoking the grounds of (1) arrears of rent and (2) committing encroachments and acts of waste contrary to the provisions of Section 108(o) of the Transfer of Property Act, 1882 (for short, 'T.P. Act'). The defendant has encroached upon the open compound in front of the suit premises and stored and dumped household furniture and articles and thereby consumed more FSI available to the plaintiff. The plaintiff has also sought eviction on the ground of annoyance and nuisance. The defendant filed written statement some time in February, 2009. On 13.9.2011, issues were framed by the learned trial Judge.

5. Mr. Mooman has taken me through the written statement filed by the defendant and submitted that the defendant has not challenged the status of the plaintiff as a landlord. He submitted that the defendant filed application Exhibit-57 in or about July, 2018 for inserting paragraph-10(a). In paragraph-10(a), the defendant

contended that the contention of the plaintiff that he is the absolute owner of the suit property is incorrect due to the claim of M/s. Sirsiwala Realty as one of the co-owners and landlords of the suit property. That the suit filed by the plaintiff against the defendant is not maintainable more so due to non-joinder of M/s. Sirsiwala Realty as one of the co-owners and landlords of the suit property. The defendant further contended that Suit No.947/2013 is filed by M/s. Sirsiwala Realty against the plaintiff and others for partition and other reliefs in respect of the suit property and the same is pending for adjudication.

6. Mr. Mooman relied upon the order dated 18.10.2016 passed by this Court in Writ Petition No.7506/2015 and companion Writ Petitions [M/s. Sirsiwala Realty and others Vs. Gyasuddin Kifayatulla Zariwalla and others]. He submitted that the presence of other co-owners is not necessary in a suit for eviction between the landlord and the tenant. He, therefore, submitted that the impugned order deserves to be set aside thereby dismissing application Exhibit-57.

7. On the other hand, Mr. Mishra supported the impugned order. He submitted that basically the plaintiff instituted the suit claiming to be absolute owner of the suit property. He submitted that the plaintiff is not the absolute owner and M/s. Sirsiwala Realty is one of the co-owners. Thus, the plaintiff has suppressed the material facts from the

Hon'ble Court. He further submitted that the proposed amendment does not change the nature of the suit and no prejudice will be caused to the plaintiff if the amendment is allowed. He further submitted that the approach of the Court while considering the application for amendment of the plaint and the application for amendment of the written statement is different. Application for amendment of written statement is required to be considered liberally. The application for amendment can be made even at the appellate stage also. In support of his submissions, he relied upon following decisions:

- (i) **Bharat Petroleum Corporation Ltd. Vs. Precious Finance Investment Pvt. Ltd., 2006(6) Bom. C.R. 510**
- (ii) Order dated 27.2.2014 passed by this Court (Coram: R.D. Dhanuka, J.) in Notice of Motion No.23/2014 in Suit No.947/2013 between **M/s. Sirsiwala Realty and others Vs. Gyasuddin Kifayatulla Zariwala and others.**

8. 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, the defendant has filed application Exhibit-57 under Order VI Rule 17 of C.P.C. for amending the written statement. In the case of **Bharat Petroleum Corporation Ltd.** (supra), the learned Single Judge has dealt with the approach the

Court has to adopt while considering the application for amendment of the plaint and application for amendment of the written statement. The learned Single Judge has held that liberal approach has to be adopted while considering the application for amendment of the written statement. In the same judgment, the learned Single Judge also held that the Court can allow amendment of pleadings even at the appellate stage. There is no dispute with the proposition laid down in **Bharat Petroleum Corporation Ltd.** (supra).

9. Order VI Rule 17 of C.P.C. reads thus :

ORDER VI
PLEADINGS GENERALLY

“17. Amendment of pleadings. The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.”

10. A perusal of the above provision shows that all amendments which are necessary for the purpose of determining the real questions in controversy between the parties are to be allowed. In the present case, the question is whether the proposed amendment is necessary for

deciding the real controversy between the parties.

11. As mentioned earlier, the plaintiff has instituted suit for eviction of the defendant by invoking the grounds under Sections 15, 16(1)(a) read with Section 108(o) of T.P. Act and Section 16(1)(c) of the Maharashtra Rent Control Act, 1999 (for short, 'Act').

12. Section 35 of the Act lays down that nothing contained in Sections 33 and 34 of the Act shall be deemed to bar a party to a suit, proceeding or appeal in which a question of title to premises arises and is determined, from suing in a competent Court to establish, his title to such premises.

13. In the present case, by filing application under Order VI Rule 17 of C.P.C., the defendant has prayed for impleadment of M/s. Sirsiwala Realty on the ground that it is also one of the co-owners of the suit property. As mentioned earlier, M/s. Sirsiwala Realty have already instituted suit on the Original Side of this Court for partition among other reliefs. In a suit for eviction between the landlord and tenant, presence of other co-owners is not necessary.

14. Mr. Mooman relied upon the order dated 18.10.2016 passed by this Court in Writ Petition No.7506/2015 and companion Writ Petitions [M/s. Sirsiwala Realty and others Vs. Gyasuddin Kifayatulla Zariwalla and others]. He submitted that with a view to giving a go-bye

to that order, the defendant has filed present application seeking self-same relief which was sought by M/s. Sirsiwala Realty. I find merit in this submission. Basically presence of M/s. Sirsiwala Realty is absolutely not necessary for deciding the eviction suit between the plaintiff and the defendant. The defendant has conceded that the plaintiff is the co-owner of the suit property.

15. In the case of **Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and others, (2009) 10 SCC 84**, the Apex Court has laid down the factors to be taken into consideration while dealing with applications for amendment. Paragraph-63 of that decision reads thus:

“63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.

- (1) Whether the amendment sought is imperative for proper and effective adjudication of the case?
- (2) Whether the application for amendment is bona fide or mala fide?
- (3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
- (4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;
- (5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? and
- (6) As a general rule, the court should decline amendments if a fresh suit on the amended

claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order VI Rule 17. These are only illustrative and not exhaustive.”

16. Applying the principles laid down in paragraph-63, extracted hereinabove, to the facts of the present case, I am more than satisfied that the amendment proposed is not necessary for effectively deciding the controversy raised between the parties. Application for amendment is also not bonafide. By refusing the amendment will not lead to injustice or lead to multiple litigation. In view thereof, the impugned order cannot be sustained and as such is liable to be set aside and application Exhibit-57 deserves to be dismissed.

17. In the result, the petition is allowed. The impugned order dated 28.11.2018 passed by the learned trial Judge below Exhibit-57 in R.A.E. & R. Suit No.39/66 of 2008 is set aside. Application Exhibit-57 stands dismissed. Rule is made absolute in aforesaid terms with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)