

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.2507 OF 2019

Roger Gonsalves	]	Petitioner
Vs.		
Sumati Shankar Kudalkar & Ors.	]	Respondents

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Ms. Vidhi Thaker, learned Counsel for the Petitioner.
Mr. Durgesh M. Kulkarni i/b Mr. S.W. Kullkarni, learned Counsel for the Respondents.

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CORAM : R.G. KETKAR, J.

DATE : 18TH MARCH, 2019.

P.C.

Heard Ms. Thaker, learned Counsel for the petitioner and Mr. Kulkarni, learned Counsel for the respondents at length.

2. Leave to amend so as to substitute Exhibit B is granted. Amendment shall be carried out forthwith.

3. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'plaintiff' has challenged the order dated 31st October, 2018 passed by the learned trial Judge below Exhibit 82 in R.A.E & R Suit No.266/473 of 2005. By that order, the learned trial Judge rejected the application made by the plaintiff under Order-VI, Rule-17 of the Code of Civil Procedure, 1908 (for short 'C.P.C') for amending the plaint so as to introduce the ground of reasonable and bona fide requirement as

contemplated under section 16 (1) (g) of the Maharashtra Rent Control Act, 1999 (for short 'Act').

4. Rule. Mr. Kulkarni waives service. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of learned Counsel for the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

5. In support of this Petition, Ms. Thaker submitted that the learned trial Judge rejected the application on the ground that the plaintiff came with the case that there is no parking place in the compound of the suit building and the plaintiff is unable to purchase car/four wheeler. The plaintiff is, therefore, constrained to introduce ground of reasonable and bona fide requirement. The learned trial Judge observed that the suit premises is described as Shop/Gala No.86 in paragraph 3 of the plaint as well as in the tenancy agreement Exhibit 62. The plaintiff has specifically asserted that the suit premises is let out by him to the defendant to use the same as Shop or Godown. By the proposed amendment, the plaintiff has come with the case that there is no facility of parking his own car in the compound of the suit building where the suit premises is situate and only one garage is permitted by the Corporation. She submitted that the learned trial Judge expected the plaintiff to produce documentary evidence showing that Corporation has permitted use of the suit premises as garage. She submitted that this is not a stage of leading evidence. She, therefore, submitted that the impugned order deserves to be set aside.

6. On the other hand, Mr. Kulkarni supported the impugned order. He submitted that the application is made by the plaintiff after commencement of the trial. The plaintiff has not satisfied requirement laid down in proviso to

Order-VI, Rule-17 of the C.P.C. He further submitted that in the cross-examination, P.W.1 Roger Gonsalves admitted that the suit premises is a godown. He submitted that the plaintiff has invoked the ground of change of user of the suit premises. By the proposed amendment, the plaintiff wants to wriggle out the admission given in the cross-examination by P.W.1 which is not permissible. He submitted that P.W.1 further admitted that the suit premises cannot be used for any purpose. In other words, the suit premises are unusable. Mr. Kulkarni further submitted that on one hand in paragraph 3 of the application Exhibit 82, the plaintiff contended that the defendant has changed user of the suit premises by using it for commercial purpose unauthorizedly and illegally. Even in the proposed amendment, the plaintiff has reiterated that authorized garage is illegally occupied and used by the defendants for their business purpose. As against this, in the cross-examination, P.W.1 deposed that the defendant is not doing any business. The defendant is doing nothing in the suit premises. He, therefore, submitted that no case is made out for interfering with the impugned order.

7. In support of his submission, he relied on following decisions;

[1] Abdul Rehman Vs. Mohd Ruldu, (2012) 11 Supreme Court Cases 341.

[2] Mahesh Narssaya Bandi Vs. Kantilal Chunilal Patel, 2018 SCC OnLine 9084.

8. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. The plaintiff has instituted suit for recovery of possession of the suit premises invoking grounds;

- [1] that the tenant has, without the landlord's consent given in writing, erected on the premises any permanent nature [section 16 (1) (b)];
- [2] that the premises have not been used without reasonable cause for the purpose for which they were let for a continuous period of six months immediately preceding the date of the suit and change of user [section 16 (1) (n)];

9. By the proposed amendment, the plaintiff has sought to introduce the ground of bona fide requirement. It is not in dispute and cannot be disputed that the plaintiff can file a separate suit for recovery of possession invoking the ground of reasonable and bona fide requirement. If the proposed amendment is allowed, it would avoid multiplicity of the proceedings.

10. Mr. Kulkarni submitted that the suit premises is unusable. In my opinion, this cannot be a ground for rejecting application for amendment. In fact, the learned trial Judge has not rejected the application for amendment on this ground. Mr. Kulkarni further submitted that the suit is instituted on the ground of non user and change of user. In the cross-examination, the plaintiff admitted that suit premises is a godown. If the proposed amendment is allowed, the plaintiff will be allowed to withdraw admission given in the cross-examination. I do not find any merit in this submission. Even assuming in favour of the defendants that the plaintiff gave admission during the course of cross-examination that the suit premises is a godown, it cannot be disputed that after securing possession of the suit premises, the plaintiff can use it as a garage for parking his vehicle. No provision of municipal laws is shown which prohibits the plaintiff from using the suit premises as a garage.

11. Mr. Kulkarni further submitted that on one hand in paragraph 3 of the application Exhibit 82, the plaintiff contended that the defendant has changed user of the suit premises by using it for commercial purpose unauthorizedly and illegally. Even in the proposed amendment, the plaintiff has reiterated that authorized garage is illegally occupied and used by the defendants for their business purpose. As against this, in the cross-examination, P.W.1 deposed that the defendant is not doing any business. The defendant is doing nothing in the suit premises. As far as this submission is concerned, it is a matter of appreciation of evidence on record and the learned trial Judge will deal with this aspect at the time of hearing of the main suit.

12. Mr. Kulkarni submitted that in any case the plaintiff has not satisfied due diligence as provided in proviso to Order-VI, Rule-17 of the C.P.C. In case of **Abdul Rehman** (supra), the Apex Court in paragraph 13 has observed thus;

“Next, we have to see whether the proposed amendments would alter the claim/cause of action of the plaintiffs. In view of the same, we verified the averments in the unamended plaint. As rightly pointed out by Ms. Manmeet Arora, learned Counsel for the appellants that the entire factual matrix for the relief sought for under the proposed amendment had already been set out in the unamended plaint. We are satisfied that the challenge to the voidness of those sale deeds was implicit in the factual matrix set out in the amended plaint and, therefore, the relief of cancellation of sale deeds as sought by the amendment does not change the nature of the suit as alleged. It is settled law that if necessary factual basis for amendment is already contained in the plaint, the relief sought on the said basis would not change the nature of the suit. In view of the same, the contrary view expressed by the trial court and the High Court cannot be sustained. It is not in dispute that the relief sought by way of amendment by the appellants could also be claimed by them by way of a separate suit on the date of filing of the application. Considering the date of the sale deeds and the date on which the application was filed for

amendment of the plaint, we are satisfied that the reliefs claimed are not barred in law and no prejudice should (sic would) have been caused to Respondents 1-3 (Defendants 1-3 therein) if the amendments were allowed and would in fact avoid multiplicity of litigation”.

13. It is also evident that the suit is instituted for eviction of the defendants. By the proposed amendment, nature of the suit is not changed. Applying the tests laid down by the Apex Court in **Abdul Rehman** (supra) 's case, the learned trial Judge was not justified in rejecting the application for amendment. In view thereof, the impugned order is liable to be set aside and accordingly is set aside.

14. Mr. Kulkarni assures that the defendants will file written statement dealing with amended plaint only, before next date of hearing i.e before 16th April, 2019 on which date the trial Court has fixed the matter and serve the copy in advance on the other side. The parties would be at liberty to adduce additional evidence dealing with ground of reasonable and bona fide requirement. The learned trial Judge will decide the suit on the basis of the evidence on record and in accordance with law un-influenced by the observations made in this order. All contentions of the parties on merits are expressly kept open. Rule is made absolute in the aforesaid terms with no order as to costs.

[R.G. KETKAR, J.]