

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4659 OF 2019

Vinay Jagdishchandra Pande ...Petitioner
vs.
Satyanarayan Pande and Another ...Respondents

Mr. T.M. Gole, for the Petitioner.
None for the Respondents.

CORAM : **R.G. KETKAR, J.**
DATE : **AUGUST 7, 2019**

P.C.

. Heard Mr. T.M. Gole, learned counsel for the Petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, the Petitioner has challenged the order dated 5th May, 2018 passed by the learned trial Judge below Exhibit 36 in R.A.E. & R. Suit No. 416/767 of 2010. By that order, the learned trial Judge allowed the application moved by the Defendants under Order VI Rule 17 of the Code of Civil Procedure, 1908 (for short C.P.C.) for amending the written statement. The Plaintiff has instituted the suit against the Defendants for recovery of possession of Flat No. 2, Ground Floor, Laxmi Niwas Building situate at Plot No. 49, City Survey No.

287, more particularly described in paragraph 1 of the Plaint (for short “suit premises”).

3. The Defendants filed written statement on 1st November, 2011 at Exhibit 15. The issues were framed by the learned trial Judge on 8th August, 2014. The Plaintiff filed affidavit in examination in chief on 19th January, 2015. The Defendants took out application for amending the written statement on the ground of subsequent events. The learned trial Judge had allowed that application.

4. In support of this Petition, Mr. Gole contended that the learned trial Judge was not justified in allowing the application. As the Plaintiff has filed affidavit in examination in chief, the trial has commenced. The Defendants have to satisfy the conditions stipulated in the proviso to Order VI Rule 17 of the C.P.C. The Defendants have not shown due diligence. He further submitted that Defendants had contended that the Dy. Registrar, Co-Operative Societies, K/East Ward, Mumbai has passed order on 21st May, 2015 in Appeal No. 21 of 2013. The Plaintiff has instituted Writ Petition No. 721 of 2016 in this Court challenging

the order dated 21st May, 2015 and the said Petition is pending. The learned trial Judge was not justified in allowing the application. He further submitted that the proposed amendment totally changes the defence of the Defendants. For all these reasons, the impugned order deserves to be set aside.

5. I have considered the submissions advanced by the learned counsel for the parties and perused the material on record. A perusal of the application for amendment and also schedule of proposed amendment shows that the Defendants have contended that Defendant No. 1 is the son of Nandkishore Ghasiram Pande who was the original owner of the suit premises. After his death, Defendant No. 1 being the son and heir is entitled to the estate of Nandkishore Ghasiram Pande who died intestate and that too after death of alleged nominee. Defendant No. 1 applied to the Shri Rajasthan Co-operative Housing Society Limited for membership and transfer of plot and shares including suit premises in his name but the society rejected the application. Aggrieved by this rejection, Defendant filed Appeal under section 23(2) of the Maharashtra Co-operative Societies Act, 1960 before Dy. Registrar. On 21st May, 2015 the said Appeal was allowed and the Society was directed to

admit the Defendant No. 1 to the membership of the society. The Revision was preferred by one Vijay G. Sarda against the order of the Appellate authority which was dismissed by the Registrar on 5th October, 2015.

6. The Plaintiff has instituted Writ Petition No. 721 of 2016 Revision in this Court. It is however, material to note that till date no stay is granted by this Court to the order dated 21st May, 2015. Thus as on date the order dated 21st May, 2015 is neither stayed nor set aside. That apart, as mentioned earlier, the development had taken place after filing of affidavit of examination in chief by the Plaintiff. The learned trial Judge has considered this aspect from paragraphs 18 to 20 of the impugned order. For the reasons recorded in these paragraphs, I do not find that learned trial Judge has committed any error in passing the impugned order. Hence, the Petition fails and the same is dismissed.

7. It is however made clear that where a decree is appealed from, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as ground of objection in the memorandum of appeal as contemplated by

section 105(1) of C.P.C.

8. As the Plaintiff had already filed affidavit in examination in chief, liberty is reserved to the Plaintiff to file additional affidavit of examination in chief, if so advised.

9. Order accordingly.

(R.G.KETKAR, J.)