

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.2711 OF 2019**

Prabhavati Madhusudan Majethia and another.	]	Petitioners
Vs.		
Morarji Hariram (since deceased)	]	
Nirmalaben Morarji Thakkar and others.	]	Respondents

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Mr. B.A. Singh, learned Counsel for the Petitioners.
Ms. Firdous Moosa a/w Mr. Manoj Gupta, learned Counsel for the Respondents.

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CORAM : R.G. KETKAR, J.

DATE : 19TH MARCH, 2019.

P.C.

Not on board. At the request of Mr. Singh, taken up for admission.

2. Heard Mr. Singh, learned Counsel for the petitioners and Ms. Moosa, learned Counsel for the respondents at length.

3. This Petition takes exception to the order dated 6th December, 2018 passed by the learned trial Judge below Exhibit 88 in R.A.E & R Suit No.872/1383 of 2005 as also the order dated 5th February, 2019 passed by the Appellate Bench of the Court of Small Causes at Mumbai in Revision Application No.25 of 2019. By these orders, the Courts below rejected application Exhibit 88 made by the petitioners/defendants No.1 and 2 on 16th November, 2018 for framing additional issue on the basis of the additional written statement dated 27th August, 2010 filed by them.

4. In support of this Petition, Mr. Singh submitted that the plaintiffs amended the suit on 26th July, 2010. The defendant filed additional written statement on 27th August, 2010. Following additional issue was framed on 23rd June, 2011;

“Whether Plaintiff proves that Defendant Nos.1 and 2 are liable to be evicted from suit premises on the ground of denial of his title to the suit premises?”

He submitted that the learned trial Judge, however, did not frame any issue as to whether the plaintiffs have waived plea of denial of title as pleaded by the defendants in the amended written statement. It is, therefore, necessary to frame additional issue. He alternatively submitted that, in any case, it may be clarified that defendants No.1 and 2 will be at liberty to lead evidence as regards ground of waiver on the additional issue framed on 23rd June, 2011.

5. On the other hand, Ms. Moosa supported the impugned orders. She submitted that the Courts below rejected the application on the ground that the defendants are trying to protract the proceedings. She submitted that the suit is instituted in the year 2005. The defendants filed written statement in November, 2005. Issues were framed on 8th January, 2010. On 26th July, 2010, the plaintiffs amended the plaint. On 27th August, 2010, defendants filed additional written statement. Additional issue was framed on 23rd June, 2011 and the present application is taken out on 16th November, 2018. She, therefore, submitted that the Courts below rightly rejected the application filed by defendants No.1 and 2.

6. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. The trial

Judge while rejecting the application on 6th December, 2018 observed that additional issue in respect of ground of denial of title by the defendants is already framed. In so far as the Appellate Court is concerned, in paragraph 7, the Appellate Court has observed thus;

“...Whether plaintiffs waived by their own conduct the ground of denial of title against the defendants No.1 & 2 is a relevant fact while considering the issue of denial of title. (The) defendants No.1 & 2 have sufficient opportunity to put-forth their case that plaintiffs are not the owners of the suit premises..”

7. In view thereof, it is not necessary to interfere with the impugned orders. The Appellate Court has given that liberty to the defendants to adduce evidence on their plea of waiver. Subject to this, the Petition fails and the same is dismissed. Liberty is reserved to the parties to make application for expeditious hearing of the suit before the trial Court. If such application is made, the trial Court to pass appropriate order on that application.

8. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in memorandum of Appeal as contemplated by Section 105(1) of C.P.C.

[R.G. KETKAR, J.]