

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3379 OF 2010

Coomie Behram Doongaji

..Petitioner

Versus

Bilwa Kanta Chowdhery

Since deceased through legal heirs
and representatives

Renate Martina Alfred Esberger and others

..Respondents

Mr. N. P. Shimpi, Advocate for the Petitioner.

Mr. Naseem Patrawalle I/by Malvi Ranchoddas & Co., Advocate for
Respondent Nos.1(c) to 1(f).

CORAM : PRADEEP NANDRAJOG, C.J.
DATE : 26th JULY, 2019

P.C.

- 1] Heard learned counsel for the parties.
- 2] Challenge is to an order dated 28.04.2009 passed by the learned Judge, Small Causes Court at Bombay dismissing Petitioner's application to permit the Petitioner to lead additional evidence.
- 3] The application does not indicate under which provision of law it was filed but from the perusal of the application it is apparent that the provision of Order XVIII Rule 17-A of the Code of Civil Procedure was invoked. Relevant would be highlighted that the said provision was revoked with effect from 01.07.2002 i.e. before the

impugned order was passed.

4] The Petitioner owns Flat No.II Type on 3rd Floor as also a Garage in a Building constructed on Plot No.181, Back Bay Reclamation, Bombay. The same were let out to Bilwa Kanta Chowdhery on 08.01.1966. The lease was extended till 31.12.1975. As per the Petitioner the tenant defaulted in payment of rent from September 1972.

5] The tenant filed an application in the Court of Small Causes Court at Mumbai praying that standard rent be fixed.

6] Alleging default in payment of rent, the Petitioner terminated the lease not only on the ground of non-payment of rent but even sub-letting.

7] On 03.04.1974 the Petitioner filed a suit for ejectment of the tenant alleging non-payment of rent and sub-letting. Suit proceeded.

8] The Petitioner claims to have gained knowledge that the tenant had acquired suitable alternative accommodation and was no longer residing in the tenanted premises. The Petitioner filed another suit for ejectment of the tenant in 1980 on said ground.

9] Proceedings in the two ejectment suits filed by the

Petitioner as also the application filed by the tenant seeking fixation of standard rent were clubbed and matter proceeded to trial.

10] In July 1993 the first suit for ejectment on ground of non-payment of rent and sub-letting was amended. In September 1994 the Petitioner amended the second plaint and further pleadings were made. Issues were settled once again on 27.09.1995.

11] The suit filed in the year 1980 was amended once again on 26.12.1997 to which an additional written statement was filed on 19.01.1998. The Petitioner commenced leading evidence on 17.06.1998 and concluded the same on 13.04.1999.

12] In March 2006 the Petitioner sought amendment of the suit filed in the year 1980. The proposed amendment sought incorporation of pleadings by giving particulars of the alternative premises acquired by the tenant. The amendment was allowed on 10.10.2006. Additional written statement was filed by the tenant. The tenant died and his legal heirs were brought on record. They started leading evidence in rebuttal. During cross-examination questions were put to the witnesses concerning the alternative accommodation statedly acquired by the tenant and needless to state the witnesses denied the same.

13] An application was thereafter filed to permit the Petitioner to lead additional evidence which has been dismissed vide impugned

order dated 28.04.2009; reasoning that the proposed evidence to be led was not in sync with the pleadings. The said reasoning is immediately contradicted by the learned Judge by recording: '*These things which may or may not be are beyond the pleadings or so, cannot be commented at this stage*'.

14] A plethora of case law cited by the Petitioner has been noted and distinguished.

15] Indeed the counsel for the Petitioner cited all and sundry judgments which were irrelevant for the reason they dealt with additional evidence required by Courts at the appellate stage to be led.

16] Unfortunately for the Petitioner, the counsel did not point out to the learned Judge a very simple fact. The simple fact was that the Petitioner has led evidence between 17.06.1998 till 13.04.1999, but as noted above, sought for amendment and was granted leave to amend the second suit. The order permitting the amendment is dated 27.09.2006. The said fact would have an affect on the right of the Petitioner to lead additional evidence.

17] This would require the learned Judge, Small Causes Court to compare and contrast the pleadings pre amendment and post amendment. The amendment is made on 27.09.2006.

18] This issue would have no bearing on Order XVIII Rule

17-A of the Code of Civil Procedure being deleted from statutory provision. For the reason with respect to the amended pleadings, the parties would be entitled to lead evidence.

19] Thus, declaring that the Petitioner would be entitled to prefer another application bringing afore-noted facts to the notice of the learned Judge, Small Causes Court, Mumbai, who shall uninfluenced by the impugned order dated 28.04.2009 pass an order on said application keeping in view the law and the facts which I have succinctly narrated.

20] The Writ Petition is disposed of.

CHIEF JUSTICE