

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 9128 OF 2014

Omkar Co-operative Hsg. Society Ltd. ...Petitioner

Versus

Kishore Kalyanji Badiani & Ors. ...Respondents

WITH

WRIT PETITION NO. 5599 OF 2010

Kishore Kalyanji Badiani ...Petitioner

Versus

Omkar Co-op. Hsg. Society Ltd. & Ors. ...Respondents

V. S. Kapse i/b Sonal Doshi & Co. - Advocate for the petitioner in WP 5599 of 2010 & Respondent 1 in WP 9128 of 2014.

S. M. Railkar – Advocate for the petitioner in WP 9128 of 2014 and Respondent no. 1 in WP 5599 of 2010.

CORAM : DAMA SESHADRI NAIDU, J.

DATE : 27th September 2019.

JUDGMENT :

WP No.9128 of 2014:

The petitioner society—Omkar Co-operative Hsg. Society Ltd.—owns the property now in respondent Kishore Kalyanji Badani's possession. Kishore got that property with the assignment

of tenancy from Jatashankar Kaluram Tiwari, the original tenant. He is no more. As he was the second defendant in the suit, now his legal representatives are on record. So Kishore was the assignee and Jatashankar the assignor. The deed was registered.

2. The Society filed RAE Suit No. 1050 of 1995 against both the assignor and the assignee for eviction on the grounds of subletting and structural changes to the property. The trial Court decreed the suit on 29.08.2008. After that, the assignee filed Appeal No. 618 of 2008 before the Appellate Bench of the Small Cause Court, Mumbai. In that appeal, the assignee filed an interim application below Exhibit 22 of 2010, to have his written statement amended. That allowed, the Society has come before this Court with this Writ petition, assailing the Appellate Bench's impugned order, dated 06.08.2014.

WP No.5599 of 2010:

3. With a suit getting decreed, the persons in possession can no longer claim to be a tenant. His stay, pending the appeal, entails the lessor to claim compensation or damages. So the Society applied to the Appellate Bench below Ext. 6 for interim compensation. Through its order, 11.06.2010, the Bench directed the assignee to deposit the contractual rent and, in addition, Rs.31.200/- per month regularly.

4. Questioning the Appellant Bench's order, dt.11.06.2010, the assignee has filed this writ petition.

Background:

5. Both the Society and the assignee have agreed that one Hasan Khan Abdulla Khan was the owner of a piece of vacant property. In July 1972 he leased it to one Anil Ramchandra Garge for 99 years. Later, Garge constructed tenements and let them out to 16 lessees. But, later, Hasan Khan Abdulla Khan filed R.A.E. Suit No.373/1232 of 1984 for eviction against the original lessee Garge. In that suit, he also arrayed all the Garge's 16 tenants as parties, the assignor being one of them.

6. As seen from the record, the suit ended in a compromise *vis-à-vis* the 16 tenants. But against Garge, it was decreed. It seems the decree has become final, too. The 16 tenants, in fact, formed the society—Omkar Co-op. Hsg. Society—and that Society is now before the Court. The assignor was one of those 16 tenants; he was, thus, not only a party to the suit but also to the consent terms. He seems to have assigned his tenancy rights to the assignee, the first respondent.

7. In the course of time, the Society filed RAE Suit No.1050 of 1995. It wanted the assignor's and the assignee's eviction on the grounds of subletting and unauthorized structural changes. The Small Cause Court decreed the suit in 2008. Then, the assignee

alone filed Appeal No.618 of 2008 before the Appellate Bench of the Small Cause Court.

8. Incidentally, the assignor never contested the case during his lifetime; nor have his legal heirs after his death.

9. Pending that appeal, the assignee filed an application Below Ext.22 of 2010—two years after his filing the appeal and fifteen years after the Society’s filing the suit—that he should amend his written statement filed decades ago, so to say. The assignee also filed Application under Exhibit No.23 of 2010 to produce certified copies of all the proceedings and orders passed in RAE & E Suit No.373/1232 of 1984 to be read in evidence, and to be permitted “to lead such oral evidence on the said certified copies as may be required.” Through an order, dt.06.08.2014, the Appellate Bench allowed the amendment application (Ext.22 of 2010). Consequently, it remanded the matter to the trial Court “to enable the parties to lead evidence.” On the same day, the Appellate Bench allowed the additional evidence application (Ext.23 of 2010), too.

10. But as it seems to be the practice here, the Society has filed one Writ Petition under Article 227 of the Constitution, to challenge both the orders—one on amendment of the pleadings (Order 1, Rule 10 of CPC), and the other on the additional evidence (Order 41, Rule 27). Here, I have considered only the amendment petition—that is, the order, dated 6th August 2014,

under Ext.22 of 2010. Besides, I permit the petitioner to file a fresh writ petition against the order, dt. 06.08.2014, under the Ext. No.23 of 2010, which concerns the additional evidence, the delay notwithstanding. In other words, to have proper adjudication of two distinct issues under two separate orders, I allow the petitioner to plead independently for the remedy or relief it has already, compositely, sought in W. P. No.9128 of 2014. This arrangement affects the rights of neither.

Submissions:

Assignee:

11. Shri V. S.Kapse, the learned counsel for the assignee, supports the impugned order. According to him, the Appellate Bench has fairly concluded that a defendant in a suit can take inconsistent pleas. So it has allowed the assignee's application for amending the written statement.

12. To elaborate Shri Kapse has argued that the Society's claiming title suffers from incurable legal infirmities. According to him, even the very lease deed, said to be in tune with the compromise terms between Hasan Khan and the Society, has remained unregistered. He has also submitted that the suit property, in fact, has nothing to do with the initial dispute between Hasan Khan and his lessee Garge. By the same reckoning, the outcome in RAE Suit No 373/1232 of 1984 does not affect

the assignee's right to hold on to the property. If at all anyone wishes to seek the assignee's eviction, it must be Hasan Khan but not the Society, which has nothing to do with the property.

13. Eventually, Shri Kapse has submitted that while the appeal was pending, on advice the assignee realized the legal intricacies of the case. As a result, he secured a few documents and, then, filed two interlocutory applications: one for the amendment and the other for the additional evidence. According to him, on the merits, through a well-considered order, the Appellate Bench has allowed those applications. And they need no interference.

Society:

14. On the other hand, Shri S. M. Railkar, the learned counsel for the Society, has submitted that the assignor was a party to RAE Suit No 965/3367 of 1978. So was he even to the consent terms. Now the assignee claims his rights only through his assignor. And that assignor was bound by the terms of the compromise decree. Then, it does not lie in the assignee's mouth to take a stand contrary to the consented terms.

15. According to Shri Railkar, the amendment will change the nature of the case and will send the litigation in a spiral for a couple more decades. After taking me through the record, Shri Railkar has submitted that the principles for allowing an amendment application, especially at the appellate stage, are well

established. To elaborate, he has submitted that the defendant, though could take inconsistent pleas, cannot under that guise develop a new case at the appellate stage to the Society's prejudice. Thus, he urges that the impugned order is unsustainable and ought to be dismissed.

16. Heard Shri V. S. Kapse, instructed by M/s. Sonal Joshi & Co., the learned counsel for the assignee, and Shri Saurabh M. Railkar, the learned counsel for the Society.

Discussion:

17. As I could see, the trial Court in RAE 373/1232 of 1984, recorded the consent terms between Hasan Khan and 16 tenants. Of course, the judgment covered other issues, too. It eventually decreed the suit as follows:

In result, I held that fact is proved that plaintiff [Hasan Khan] is the owner and the landlord of the suit premises. Fact is also proved that defendant no. 1 [Garge] has forfeited his right to claim any tenancy under the agreement dated 24.7.72 in view of breach of the specific term of the said agreement and as shown by his conduct that he is not ready and willing to pay the rent and to follow the terms of the agreement, and therefore I hold that plaintiff suit for prayer clause (a) i.e. for declaration that plaintiff has validly terminated the tenancy of defendant no. 1 will have to be allowed *in addition to a consent decree between plaintiff and defendants 3 to 17 as per the terms of compromise.*

...

Plaintiff's suit is hereby decreed. It is hereby declared that plaintiff has validly terminated the tenancy of defendant no. 1 who has forfeited his right to claim any tenancy.

Consent Decree in terms of compromise filed by plaintiff and defendants No. 3 to 17 shall be drawn.

(italics supplied)

18. I gather from the record that under this compromise decree, Hasan Khan and the 16 tenants entered into a fresh lease on 13.01.1995. Then all those 16 tenants formed a registered society and continued to intermeddle with the property. And the assignor was one of those 16 tenants. As I have already noted, the assignee traces his right through the assignor. Then, both faced the eviction proceedings. The assignor never joined the issue, nor did his legal heirs after his death. Only the assignee has been contesting.

19. As the issue relates to the amendment of the written statement, it pays to examine what defence the first respondent has initially taken in the suit. Though some of the documents referred to here are not part of this writ petition, they are found in the other writ petition: WP No. 5599 of 2010. The assignee has filed that writ petition questioning the quantification of the interim compensation. As both were taken up together, the respective counsel have drawn my attention to Ext. B written statement in the other writ petition.

20. In para 6 of the written statement, the assignee has taken

a plea that the Society has no right to file the suit without the General Body's or the Managing Committee's resolution. Besides that, in para 9, he has elaborated his defence but confined it to his right to continue in possession. As I could see from the written statement, he has not questioned the Society's right to deal with the property—at least, as an intermeddler of the leased property.

21. Now I will also examine the interlocutory application the assignee has filed to have his pleadings amended. In Civil Application No. 1901 of 2011, the assignee has elaborated on the justification for having the written statement amended at the appellate stage. He pleads that only after consulting his advocate, he came to know about the legal inconsistency in the issues. According to him, on legal advice he applied for the certified copies and secured all records from the file of RAE Suit No. 370/1232 of 1984. After going through them, he has realized that the Society has no title to the property and that the landlord continues to be either Hasan Khan or Anil Garge.

22. In para 5 of the application for amendment, the assignee has pleaded that Garge's lease or tenancy has never been determined under Section 14 (2) of Bombay Rent Act, 1947. So Garge continued, even still is continuing, to be Hasan Khan's tenant.

23. Let me see how the assignee defends his right to be in possession. In one breath, he pleads that Anil Garge must be his

immediate landlord. For he traces his right to possession through his assignor, who was once Garge's tenant. But the fact remains that Garge suffered an adverse decree. Hasan Khan has Garge's tenancy terminated, and that was judicially affirmed in RAE Suit No.370/1232 of 1984. Under the same decree, Hasan Khan allowed the 16 tenants to collectively handle the property as his tenants and agents, too. This arrangement has judicial recognition.

24. In another breath, the lessee pleads that only Hasan Khan could seek his eviction, for he remains the owner after Garge lost the suit and, as a result, had his tenancy terminated.

25. Here the assignee traces his right through his assignor. And the assignor was a party not only to the suit the Society filed but also to RAE Suit No. 370/1232 of 1984, which Hasan Khan filed. As one of the 16 tenants, he compromised with Hasan Khan and became part of the Society. In that context, the assignee cannot take a contradictory stand. That apart, well-entrenched is the proposition that a defendant can take all conceivable inconsistent pleas. But they ought to be taken at an appropriate time.

26. Decisional finality is a judicial imperative, and the decisional correctness is only a virtue—a desirable one, though. We cannot, in the name of correctness, litigate for an eternity. Order 6, Rule 17 of CPC places procedural bounds on the amendment of pleadings. In the course of litigation, a step in the

right time stands accepted; the same step out of time stands rejected as a misstep—out of sync.

27. So let us examine Order 6, Rule 17 of CPC. This provision suffered an amendment in 1999 but was brought into force on 1st July 2002. The amended provision reads:

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.* (italics supplied)

28. The assignee wants to amend the pleadings. Through that, he wants to question the Society's right to seek his eviction. First, he has no privity of contract with the Society, nor has he any with Hasan Khan. Initially, he did not question the Society's right to evict him; he only questioned the alleged procedural lapses in the Society's deciding to evict him. Now, he wants not only to

question the Society's authority, but also to assert that the very suit schedule property is different. In the ordinary circumstances, as defendant he could have been entitled to take all conceivable pleas in his defence. The only limitation could have been that the pleas are not mutually contradictory—though inconsistent they may be.

29. But here, he traces his rights through the assignor, the first respondent. That assignor was a party to the suit, out of which the terms of compromise emerged. And those terms of compromise bind not only the assignor as a signatory but also the assignee. For the assignee cannot take a plea beyond what the assignor could take.

30. That apart, the proviso to the amended Order 6, Rule 16 prohibits any amendment after the trial has commenced unless the court concludes that despite due diligence, the party could not raise the plea before the trial commenced.

31. I am afraid, all the developments now the lessee wanted to plead through an amendment are matters of public record. In addition, as the assignee, he is deemed to have known the contractual obligations his assignor has suffered. If the assignor has suppressed any material fact and if that has prejudiced the assignee, it is a different matter. Then, the assignee's remedy is against the assignor, but not, say, against the Society, which has nothing to do with the assignee. If the assignor suffers a legal shortcoming, so does the assignee.

32. The proviso to Order 6 Rule 17 CPC, holds the Supreme Court¹, virtually prevents a party from amending the pleadings once the trial has commenced. True, the amendment can be allowed only if the court concludes that despite due diligence, the party could not raise the plea before the trial commenced. The proviso, to an extent, curtails or controls the court's discretion to allow amendment at any stage. Therefore, the burden is on the person who wants to amend the pleadings after the trial has commenced.

33. The Supreme Court in *M. Revanna* also stresses that indisputably an amendment cannot be claimed as a matter of right and under all circumstances. Though courts normally allow amendments to pleadings to avoid multiplicity of litigation, it needs to consider whether the application for amendment is in good faith or in bad faith and whether the amendment causes such prejudice to the other side as cannot be compensated adequately in terms of money.

34. Here, the assignee pleads that his counsel studied the case and suggested that it should be improved. Then, the assignee secured the documents his counsel required—in the midst of the trial. I do not think the assignee's attempt to improve the case, halfway, through amendment passes judicial muster under Order 6, Rule 17 of CPC, especially its proviso.

¹ *M. Revanna v. Anjanamma*, (2019) 4 SCC 332

35. I, therefore, allow the Writ Petition No.9128 of 2014 to the extent of the prayer that concerns the order under Ext.22 of 2010.

WP No.5599 of 2010:

36. The Society wanted monthly interim compensation at Rs.52,032/-. The assignee, of course, opposed it. Both parties laid material before the Appellate Bench about the just interim compensation the assignee can be ordered to pay. The Appellate Bench considered the ratio of the *State of Maharashtra v. M/s. SuperMax International Pvt. Ltd. & ors.*². It has also considered the valuation report. Then, it has found 60% of the valuer's assessment as the proper amount. To arrive at that figure, it has "kept in [its] mind the locality and contractual rent of the suit premises (Rs.700/-) per month and the business potentiality of that area."

37. Then, the Appellate Bench of the Small Cause Court has stayed the "execution of the decree to the extent of possession" on condition of the assignee's depositing Rs.31,200/- per month, besides the contractual rent, by 15th day of each month from the date of the decree. The arrears were required to be paid in one year.

38. Equitably, as directed in *SuperMax*, the Appellate Bench permitted the Society to withdraw the contractual rent. But it

² (2009) 9 SCC 772

directed the interim compensation to be “invested in any nationalized bank every month, and each deposit would be for a period of one year.” And it required the Registrar of the Small Cause Court to deposit the amounts in a Nationalized Bank and to renew the deposits annually if necessary.

39. Recently, this Court in *Previn Govind Sharma v. Dinyar Jal Jamshedji*³, has observed that in the name of interim compensation, the Revisional or Appellate Court is not considering or determining the *mesne* profits. It is only laying down the condition or conditions under Order 41, Rule 5 (3) (c) & (5) of CPC. Nothing more. It has also noted that if this Court indulges in a threadbare analysis and judicially determines the relative merits of the rival *mesne* profits reports at an interlocutory stage—more so under Order 41, Rule 5 of CPC—that preempts the trial Court’s legitimate adjudicatory powers under Order 20, Rule 12 of CPC. Here, what this Court intends, or requires, to do is to use the “commonsense which is a cluster of life's experiences” rather than depend on the rival facts presented by warring litigants.”

40. Indeed, any adjudication, if it were, under Order 41, Rule 5 of CPC involves an element of *ad hocism*, a permissible level of guesswork, and a dose of discretion. That provision is a step-in-aid in appeal proceedings; it tries to keep both the rivals in the litigation on an even keel. One has the reality of a decree; the

³ Judgment, dt.21.06.2019

other a possibility of its reversal. The decree, say in an eviction suit, alters the characters of parties. The tenant is no longer a tenant; he is, at best, an occupant. And that occupation stands branded as unauthorised. The suspension of the decree does not obliterate the judicial findings; it only keeps its effect—its execution—at bay. So to have the legitimate judicial dictum put on hold in the name of stay, the appellant needs to submit himself to certain terms—the terms of, for example, paying monetary compensation. A stay is not for the mere asking. Nor can the appellant paint himself a victim under Order 41, Rule 5 of CPC. That said, I must also acknowledge that the appellate courts will not lose sight of the distinction between what is ideal and what is practical; what is discretionary and what is arbitrary; what is a fair guess and what is a wild whim⁴.

41. Finally, *Previn Govind Sharma* has observed that with the judicial overload, the docket explosion, and the clogging adjudicatory avenues at every echelon, we cannot expect a mini-trial even under Order 41, Rule 5 of CPC, for fixing, say, an interim compensation. It is ideal. But with the litigious multitude knocking at the court's doors, clamouring for speedy justice; it is an unaffordable legal luxury.

42. Here, in the revision, the appellant cannot insist on reappreciation of his case on merits. This Court can only examine the jurisdictional errors, if any, committed by the Appellate Bench.

Therefore, the tenant seeking to stall the execution of a decree from a final court of fact has more burden to bear.

43. I, therefore, decline to interfere with the Appellate Bench's order, dt.11.06.2010. The interim arrangement was made a decade ago, and the Society has not been withdrawing the amounts. The amounts are being deposited. The condition is more *in terrorem* than as recompense.

Before parting, I may observe that subject to the docket pressure, the Appellate Bench of the Small Cause Court will make every endeavor to dispose of this appeal, as it was of 2010, expeditiously—preferably in one year.

[DAMA SESHADRI NAIDU, J.]