

Urmila Ingale

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 9004 OF 2019

Devendrakumar Takhatmalji Kothari	.. Petitioner
Vs.	
Laxmi Dnyanoba Kamathe	.. Respondent

**ALONG WITH
WRIT PETITION NO. 9005 OF 2019**

Devendrakumar Takhatmalji Kothari	.. Petitioner
Vs.	
Kanifnath Dnyanoba Kamathe	.. Respondent

**ALONG WITH
WRIT PETITION NO. 9006 OF 2019**

Devendrakumar Takhatmalji Kothari	.. Petitioner
Vs.	
Dnyanoba Haribhau Kamathe	.. Respondent

Mr.Venkatesh A.Shastry, for the Petitioner in all Petitions.
Mr.J.S.Kini a/w Ms.Sapna Krishnappa, for the Respondent in all
Petitions.

CORAM : M.S.KARNIK, J.

DATE : 28th AUGUST, 2019

P.C. :

. Heard learned Counsel for the petitioner and learned Counsel for the respondent.

2. As the issue involved in all these Petitions is common, therefore, all Petitions can be disposed of by this common order.

3. The Trial Court rejected the application of the defendant made under Order VI Rule 17 of CPC for amending the written statement. The petitioner is the original defendant. The plaintiff filed Regular Civil Suit for possession and for recovery of rent. In the said Suit, it is averred that the plaintiff is the owner of the suit property. The plaintiff prayed for possession and arrears of rent.

4. The petitioner – respondent by filing written statement took a stand that he is a tenant in respect of the suit property. He denied the contention of the plaintiff that the rent

as agreed was not paid. In fact, in the written statement, a specific case was made out that the defendant was regularly paying rent to the plaintiff. In the written statement details have been set out as to the amounts which have been paid from time to time to the family members of the plaintiff by the defendant. This in order to demonstrate that money in excess of the arrears of rent due claimed by the plaintiff is paid. He prayed that not only the Suit be dismissed, but claimed that defendant is entitled to recover sum of Rs.1,85,163/- from the plaintiff, his wife and son being excess amount paid. To this extent there is a counter claim.

5. The trial Court framed the necessary issues and affidavit of evidence of the plaintiff No.1 was also filed. At the stage of cross examination of P.W.1, the petitioner – original defendant filed an application under Order VI Rule 17 of the Code of Civil Procedure, 1908 for deletion of certain portion from the written statement and also for insertion of paragraph 8A as mentioned in the application for amendment.

6. The trial Court by order impugned rejected the application for amendment. Learned Counsel for the petitioner would submit that the lease was terminated by the plaintiff in the year 2011. According to him, since that date he is a tenant in sufferance. He would further submit that due to incorrect advice of the earlier advocate, certain pleas were taken in the written statement which he now wants to delete. He wanted to insert relevant clause as regards to his status 'as a tenant in sufferance' after termination of lease in the year 2011. He would submit that the amendment would not take away the effect of any admission made in favour of plaintiff. He would further rely upon the decision of the Apex Court in the case of **State of Bihar & ors. Vs. Modern Tent House and anr. Reported in 2017(8) SCC 567** to contend that a liberal approach is to be adopted in the matter of allowing the application for amendment in written statement. He specially makes a reference to paragraph 8 of this decision.

7. He would also invite my attention to the decision of

this Court in the case of **Venco Research and Breeding Farm Ltd. Vs. Rastriya Shramik Aghadi and anr. reported in 2013(5) All M.R. 26.** He would lay emphasis on the guiding principles in the matter of amendment which are quoted in paragraph 6 of the order of this Court. His emphasis is on clauses (x), (xi), (xii) & (xx).

8. Learned Counsel would contend that the trial Court has adopted a hyper technical approach and in the facts of the present case, the trial Court should have adopted a liberal approach. He would further submit that in a given case, defendant can also take inconsistent pleas in the written statement. He would submit that the amendments which are prayed for are merely explanatory in nature and there was no admissions in the written statement the benefit of which the plaintiff would be deprived of if the application for amendment is allowed.

9. Learned Counsel for the respondent supported the impugned order.

10. I have considered the submissions of the learned Counsel. The plaintiff filed the Suit for recovery of possession and arrears of rent. It is the contention of the plaintiff that based on the leave and licence agreement and terms and conditions thereunder and by virtue of notice issued under Section 6 of the Transfer of Property Act, 1882, the plaintiff is entitled to claim possession. It is the plaintiff's case that the defendant is in arrears of rent.

11. By filing written statement, the defendant denied the claim of the plaintiff. He further has taken a stand in the written statement that he is a tenant in respect of the suit property and has from time to time paid various sums of money not only to the plaintiff, but his wife and son. This in order to show that the plaintiff is not in arrears of rent. On the contrary, the defendant prayed that the amount more than Rs.1,00,000/- should be paid over to the defendant by the plaintiff.

12. It is material to note and as pointed out by learned

Counsel for respondent that plaintiff himself has filed a separate Suit being Regular Civil Suit No. 310 of 2011 before the Civil Judge, Junior Division, Saswad for declaration that the petitioner is 'tenant' of the respondent. Learned Counsel for the petitioner submitted that the said Regular Civil Suit No. 310 of 2011 is for a different purpose altogether & the same cannot be intermixed with the plea that can be taken in the written statement in the present Suit. According to him, he can take a different or even inconsistent plea in the present Suit.

13. It cannot be lost sight that in written statement, the plea is taken by the defendant that he is a tenant. Now by amendment, the petitioner want to delete the relevant averments as regards the payments made to the plaintiff, his wife and son which the learned Counsel for the petitioner contends was a counter claim which the petitioner now does not want to press.

14. However, the trial Court found that this plea is taken

belatedly only after the affidavit of evidence of the plaintiff was filed. The plea is sought to be raised by the amendment that petitioner is a “tenant in sufferance” by deleting the earlier plea of the petitioner in the written statement about him being “a tenant” in respect of the suit property admitting that the plaintiff is the landlord and the defendant is not in arrears of rent. As stated earlier, the defendant not only denied that he is in arrears of rent, but claimed to have paid excess amount which he wants to recover by way of counter claim.

15. In my opinion, having regard to the law laid down by the Apex Court, though the defendant can always take inconsistent pleas and even alternate pleas in defence, however, the proposed amendments in my opinion, will cause injustice to the plaintiff as the admissions made in favour of the plaintiff that petitioner ‘is the tenant’ and that ‘defendant is not in arrears’ would be withdrawn and it would result in defeating the rights accrued to the plaintiff on account of lapse of time. No doubt a liberal approach should be adopted while allowing

amendment to the written statement. However, in the present facts as the amendment if allowed will irretrievably prejudice the plaintiff, I am of the opinion that no interference is warranted with the view of the trial Court refusing to allow the amendment. The trial Court held that the plea is taken belatedly after the evidence of the plaintiff and at the stage of his cross examination. It is in these facts, I am not inclined to interfere with the trial Court's order rejecting the application for amendment of written statement.

16. However, the trial Court need not have imposed costs of Rs. 10,000/- for each Petition and neither does the Advocate for the respondent - plaintiff insists for this cost. To that extent order passed by the trial Court is interfered with. The costs if already deposited be paid over to the petitioner. The Petitions are partly allowed and order of trial Court imposing cost is set aside. Rest of the order is maintained. The Petition is partly allowed.

(M.S.KARNIK, J.)