

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 8406 OF 2019

Sherna N. Pocha and anr. .. Petitioners
vs.
Om Construction Pvt. Ltd. .. Respondent

Mr. Ashish Kamat a/w. Ms Spenta Havewala, Murtuza Federal and Mr. Krunal Mehta i/b Mfederal and Company for the Petitioners.

Mr. P.K. Dhakephalkar, Sr. Counsel i/b Mr. Jaydeep Deo for the Respondent.

CORAM : R. G. KETKAR, J.
DATE : 6th AUGUST 2019.

P.C. :-

1] Heard Mr. Ashish Kamat, learned Counsel for the petitioners and Mr. P.K. Dhakephalkar, learned Senior Counsel for the Respondent at length.

2] By this petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as the defendants, have challenged the order dated 4th July 2019 passed by the learned Trial Judge, Small Causes Court at Mumbai below Exhibit 35 in R.A.E. Suit No. 504/1406 of 1991. By that order, learned Trial Judge allowed the application made by the plaintiff under Order VI Rule 17 of

the Code of Civil Procedure, 1908 (for short “CPC”) for amending the plaint thereby introducing the prayers for *mesne* profits by carrying out necessary amendments and by incorporating paragraph No.10A in the plaint.

3] The plaintiff have instituted the suit against the defendants on 22nd March 1991 invoking the grounds under Section 108 (o) of Transfer of Property Act, 1882 (for short “*T.P. Act*”) read with Section 13(1)(a), 13(1)(g) and 13(1)(k) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short ‘*Act*’). Issues were framed on 20th June 2000. Initially, on 16th June 2001, the suit was dismissed in default. On 4th July 2009, the suit was restored. On 29th January 2016, the plaintiff filed an application for injunction which was rejected on 18th July 2016. On 10th February 2017, the present application is filed under Order VI Rule 17 of CPC by the plaintiff for amending the plaint for incorporating paragraph No.10A as also the prayer for *mesne* profits. The defendants filed reply opposing the application. By the impugned order, learned Trial Judge has allowed the application.

4] In support of this petition, Mr. Kamat raised three contentions:

- (i) the proposed amendment is barred by limitation on the ground that the amendment is introduced after 26 years from the date of filing of the suit;
- (ii) it is also hit by Order II Rule 2 of CPC; &
- (iii) the proposed amendment is *mala fide*.

5] In support of his submissions, Mr. Kamat relied upon the following decisions:

- “(i) Canning Mitra Phoenix Ltd vs. M/s. Popular Constructions and anr. - 1994 Mh.L.J. 812;**
- (ii) MV.X.Press Annapurana and anr vs. Gitanjali Woolens Pvt. Ltd. And ors. -AIR 2011 Bom 105;**
- (iii) L.C. Hanumanthappa (since dead) represented by Lrs vs. H.B. shivakumar – (2016) 1 SCC 332; and**
- (iv) Revajeetu Builders and Developers vs. Narayanaswamy and sons and ors. - (2009)10 SCC 84.**

6] On the other hand, Mr. P.K. Dhakephalkar supported the impugned order. He submitted that insofar as the Order II Rule 2 of CPC is concerned, the Division Bench of this Court in case of *Canning Mitra Phoenix Ltd. (supra)*, has observed in paragraph 7 that leave under sub-rule (3) of Rule 2 of Order II can be sought any time during pendency of the first suit, but

the Court will consider the leave on the grounds, facts and circumstances. In the present case, the plaintiff has filed the application under Order VI Rule 17 of CPC for amending the plaint. In view thereof, the prayer for *mesne* profit is not hit by Order II Rule 2 of CPC. In any case, he submitted that the issue of limitation as also entitlement of the plaintiff from claiming *mesne* profits from the date of institution of the suit or from the date of passing of decree may be kept open.

7] Mr. Kamat submits that if it is clarified that all contentions of the defendants including contentions as regards entitlement of the plaintiff for *mesne* profits from the date of institution of the suit or from the date of passing of decree as also issue of limitation are kept open, he will be satisfied with this.

8] In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India and the petition is dismissed. It is 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 a ground of objection in the memorandum of appeal as contained in Section 105(1) of CPC. It is further clarified that all contentions of the defendants including on the issue of limitation as also entitlement of the plaintiff for claiming *mesne* profits from the date of institution of the suit or from the date of passing of decree are kept open.

9] Mr. Kamat assures that within four weeks from today, the defendants will file additional statement to the amended plaint and serve the copy to the other side during this period. Order accordingly.

(R. G. KETKAR, J.)