

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.11947 OF 2017

Madhavashram Pvt. Ltd. ... Petitioner
Vs.
Dnyanesh Padmakar Mahajan and another ... Respondents

WITH
WRIT PETITION NO.12430 OF 2018

Dnyanesh Padmakar Mahajan and another ... Petitioners
Vs.
Madhavashram Pvt. Ltd. ... Respondent

Mr. S. R. Page for Petitioner in W.P.No.11947 of 2017 and for Respondent in W.P.No.12430 of 2018.
Mr. V. S. Paradkar for Petitioners in W.P.No.12430 of 2018 and for Respondents in W.P.No.11947 of 2017.

CORAM : R. G. KETKAR, J.
DATE : JANUARY 7, 2019

P.C. :

Heard Mr. Page, learned Counsel for the petitioner in Writ Petition No.11947 of 2017 and for the respondent in Writ Petition No.12430 of 2018 as also Mr. Paradkar, learned Counsel for the petitioners in Writ Petition No.12430 of 2018 and for the respondents in Writ Petition No.11947 of 2017 at length.

2. Writ Petition No.11947 of 2017 is instituted by the petitioners, hereinafter referred to as 'plaintiffs', challenging the order dated 24.07.2017 passed by the learned Judge, Shri P. G. Deshmukh, presiding over Court Room No.9 of the Court of Small Causes at Bombay below exhibit-39 in L.E.&C. Suit No.233/282 of 2008. By that order, the learned trial Judge allowed the application exhibit-39 filed by the defendants for amending the written statement.

3. Writ Petition No.12430 of 2018 is filed by the defendants challenging the order dated 27.07.2017 passed by the learned trial Judge, Shri R. S. Rote presiding over Court Room No.6 of the Court of Small Causes at Bombay below exhibit-42 in L.E. & C. Suit No.10/12 of 2009 as also the judgment and order dated 22.12.2017 passed by the Appellate Bench of the Small Causes Court in (iii) Revision Application No.265 of 2017. By these orders, the Courts below rejected the application made by the defendants under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for amending the written statement.

4. Rule. Learned Counsel for the respective respondents waive service. In view of the narrow controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

5. It appears that on 19.07.2016, defendants in L.E.&C. Suit No.233 /282 of 2008 gave notice to the plaintiffs to produce documents. In pursuance thereof, on 26.07.2016, plaintiffs produced - (i) agreement dated 28.12.1950 entered by and between Madhavashram Limited and Mr. Parashram Pandurang Mahajan and (ii) agreement for sale dated 28.12.1950 entered by and between Mr. Parashram Pandurang Mahajan and Madhavashram Limited. Defendants filed application in that Suit under Order VI, Rule 17 of C.P.C. for amending the written statement in terms of schedule appended to the application dated 13.06.2017. Plaintiffs filed affidavit in reply opposing that application on 27.06.2017. By the impugned order dated 24.07.2017, the learned trial Judge allowed the application. Mr. Page invited my attention to paragraph 14 of the impugned order. After referring to the decision in **Vidyabai Vs. Padmalatha, (2009) 2 SCC 409**, the learned trial Judge observed in paragraph 14 thus,

“14. I have already discussed that plaintiffs came before the Court with the story that defendants are the gratuitous licensee of the plaintiffs. By filing the written statement, defendants have denied the contention of plaintiffs. It is further contended by the defendants that plaintiff company is the creation of late Parshuram Mahajan who had started the business of lodging house in the name of Madhavashram at suit building. Therefore, considering these circumstances, in my opinion, if in view of certain admissions given in the cross-examination, defendants are intending to amend the written statement, they have sufficiently proved the due diligence within the meaning of proviso to Order 6 Rule 17 of C.P.C. Therefore, guidelines given in the case of Rohit A. Kapadia Vs. Perviz J. Modi (cited above) are well applicable. Defendants are therefore liable to amend the written statement as prayed for. Considering all the above circumstances, I answer point No.1 in the affirmative and in answer to point No.2, I pass the following order:”

6. Mr. Page submitted that in paragraph 14, the learned trial Judge recorded a finding that defendants have proved the due diligence within the meaning of proviso to Order VI Rule 17 of C.P.C.

7. He submitted that similar application was taken out by the defendants in L.E.&C. Suit No.10/12 of 2009 for amending the written statement. By order dated 27.07.2017, the learned trial Judge rejected the application. He invited my attention to paragraphs 10 and 11 of that order, which read thus,

“10. I have gone through the record, it appears that it is not disputed that defendants have filed written statement Exhibit-17 on 23.06.2009. My learned predecessor framed issues. Thereafter plaintiffs have filed affidavit of examination in chief and matter is posted for cross-examination of the plaintiff's witness. Considering the facts itself shows that trial is commenced and matter is posted for cross-examination of plaintiff's witness. Now the defendants want to carry out amendment in the written statement. According to the defendants, they want to add para No.5A after para No.5. Defendants want to mention that suit is not maintainable as the plaintiffs have no locus standi to file present suit, as late Shri Parshuram Pandurang Mahajan vide deed of assignment dated 28.12.1950 assigned the property in favour of M/s.

Madhavashram Pvt. Ltd. Defendants also want to add para No.9A that suit is not maintainable as the provisions of Presidency of Small Causes Court Act are not applicable to the premises which are registered for lodging and boarding purposes.

11. Considering proposed amendment in para No.5, it appears that the defendants want to add the fact that late Shri Parshuram Pandurang Mahajan had assigned the property in favour of the M/s. Madhavashram Pvt. Ltd. on 28.12.1950. Considering the date of deed of assignment, it appears that it took place prior to 59 years of the filing of the suit. In the entire application, defendants have not mentioned why they have not raised said fact at the time of filing of the suit. It is also not mentioned that due diligence they could not raise the said fact at the time of filing of the suit. Therefore, in my opinion, defendants are not entitled to carry out amendment as mentioned in para A of the schedule. According to the defendants, they have taken objection in respect of the jurisdiction of this court. Admittedly, suit is part heard and at this stage defendants want to raise objection in respect of the jurisdiction of the court. According to the defendants, they have taken objection in para No.9 of the written statement. Considering para No.9 of the written statement, it appears that defendants have denied that this Court has jurisdiction. Defendants have not put positive case that this court has no jurisdiction as suit premises is registered for lodging and boarding purpose. Therefore, in my opinion, at this stage defendants are not entitled to carry out amendment.”

8. Aggrieved by this order, defendants preferred (iii) Revision Application No.265 of 2017 before the Appellate Court. By order dated 22.12.2017, the Appellate Court rejected the Revision Application.

9. Mr. Page submitted that in these orders, the Courts below held that defendants are not entitled to amend the written statement as they did not satisfy the requirements stipulated in proviso to Order VI, Rule 17 of C.P.C.

10. Mr. Paradkar supported the impugned order passed in Writ Petition No.11947 of 2017 and attacked the order dated 27.07.2017

passed by the learned trial Judge as also the order dated 22.12.2017 passed by the Appellate Bench in Writ Petition No.12430 of 2018. He submitted that it is only after production of documents, defendants realized that the Suit instituted by the plaintiffs - Madhavashram Pvt. Ltd. is not maintainable as the transactions are with Madhavashram Limited. He, therefore, submitted that no case is made out for interfering with the impugned order in Writ Petition No.11947 of 2017 and Writ Petition No.12430 of 2018 requires consideration.

11. I have already reproduced the findings recorded by the Courts below while dealing with the applications filed by the defendants for amending the written statement. The amendment proposed in the written statements filed in the two Suits was identical. However, the learned Judges have, by giving reasons, allowed one application and rejected the other application.

12. In view of the conflicting orders passed by the Courts below, in my opinion, interest of justice will be served by setting aside the impugned orders in both the Petitions by directing the learned trial Judge to decide the applications afresh. Hence, the following order:

- a. Impugned orders dated 24.07.2017 below exhibit-39 in L.E.&C. Suit No.233/282 of 2008 and 27.07.2017 below exhibit-42 in L.E.&C. Suit No.10/12 of 2009 as also judgment and order dated 22.12.2017 in (iii) Revision Application No.265 of 2017 are set aside;
- b. Application exhibit-39 in L.E.&C. Suit No.233/282 of 2008 and application exhibit-42 in L.E. & C. Suit No.10/12 of 2009 are restored to the file of the trial Court;
- c. It will be open to the parties to apply to the learned Chief

Judge of the Small Causes Court for clubbing the Suits together. If such application is made, the learned Chief Judge will pass appropriate order;

- d. The learned trial Judge will decide the applications afresh in the light of the provisions of Order VI, Rule 17 of C.P.C. and in accordance with law;
- e. All contentions of the parties on merits are expressly kept open;
- f. Rule is made absolute in both the Petitions in the aforesaid terms with no order as to costs.

13. Parties to act upon the authenticated copy of this order.

(R. G. KETKAR, J.)

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