

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 827 OF 2019

Sanjay Mahadeo Kuwalekar

...Petitioner

Versus

M/s. S. B. Hedavkar & Bros.

And others

...Respondents

....

Mr. Rushikesh Salkar a/w. Abhilesh Chitre i/b. Dhanuka & Partners, for the Petitioner.

Mr. Sameer Tendulkar, Advocate for Respondent No.1.

....

CORAM : R. G. KETKAR, J.

DATE : 04th FEBRUARY, 2019

P.C.

1. Heard Mr. Rushikesh Salkar, learned counsel for the petitioner and Mr. Sameer Tendulkar, learned counsel for respondent No.1, at length.

2. Mr. Salkar seeks leave to delete respondents No.2 to 4 on the ground that respondent No.1, being the original plaintiff, is the contesting respondent. In view thereof, on the oral application made by Mr. Salkar leave to delete respondents No.2 to 4 is granted. Amendment shall be carried out forthwith.

3. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'defendant No.1' has challenged the order dated 5.9.2018 passed by the learned Judge, Court Room

NO.8 of the Court of Small Causes Court at Bombay below Exhibit-46 in R.A.E. Suit No.2208/2010. By that order, the learned trial Judge rejected the application made by defendant No.1 under Order VI Rule 17 of Code of Civil Procedure, 1908 (for short, 'C.P.C.') for amending the written statement.

4. Rule. Mr. Tendulkar waives service. Having regard to 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. In support of this petition, Mr. Salkar has invited my attention to the application made by defendant No.1 along with the proposed amendment in terms of paragraphs-12(C) and 12(D) as also the reply filed by the plaintiff opposing that application. He submitted that in the proposed amendment, defendant No.1 has alleged that the plaintiff has acquired other premises from the erstwhile tenant. In paragraph-5 it is asserted that room No.19 which is next to the petitioner's premises was vacated by the occupant Ms. Rupa Salvi and she shifted to Vashi, Navi Mumbai. Ms. Rupa Salvi wanted to sell that premises and, therefore, she had published an advertisement in 'Maharashtra Times'. He submitted that the plaintiff did not deny specifically the averments made in the application. The learned trial

Judge rejected the application only on the ground that no due diligence, as contemplated by proviso to Order VI Rule 17 of C.P.C.. The learned trial Judge, however, did not consider whether the assertions made in the application have bearing while deciding the suit, namely, bonafide ground.

6. On the other hand, Mr.Tendulkar supported the impugned order. He submitted that the plaintiff has denied each and every paragraph of the application. He submitted that the plaintiff's examination-in-chief was filed in the year 2013 and till date his cross-examination is not commenced. Defendant No.1 is adopting dilatory tactics and, therefore, no case is made out for interfering with the impugned order.

7. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As mentioned earlier, one of the grounds on which the possession is sought is bonafide requirement. In view of the decisions of Apex Court in (i) **Kamleshwar Prasad Vs. Pradumanju Agarwal (Dead) by L.Rs., (1997) 4 SCC 413**, (ii) **Gaya Prasad Vs. Pradeep Shrivastava, 2001 (2) Mh.L.J. 581**, (iii) **Shakuntala Bai and others Vs. Narayan Das and others, (2004) 5 SCC 772**, and (iv) **Baldev Krishan Vs. Satya Narain, (2013) 14 SCC 179**, the bonafide need must subsist at the time of passing

of the decree. In order to decide this issue, the learned trial Judge ought to have allowed the application for amendment and given an opportunity to defendant No.1 to bring on record the circumstances disentitling the plaintiff to claim bonafide requirement. After rejection of the application for amendment, defendant No.1 will be precluded from adducing evidence on this aspect. In view thereof, in my opinion, the impugned order cannot be sustained and as such is liable to be set aside. Hence, the impugned order is set aside. The application for amendment is allowed. The plaintiff is permitted to file additional affidavit of evidence in the trial Court. Amendment shall be carried out within two weeks from today and shall serve copy of the amended slip on the other side during that period. Defendant No.1 will thereafter proceed with the cross-examination of the plaintiff. Mr. Tendulkar assures that within two weeks from today the plaintiff will file affidavit of evidence, if so advised, and serve copy on the other side during this period. Having regard to the fact that the suit is of the year 2010, the learned trial Judge will expedite the hearing of the suit. The parties assure that they will extend full cooperation for early disposal of the suit and will not seek undue adjournment in the matter. Rule is made absolute in aforesaid terms with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)