

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO.46 of 2019

Smt. Shaila alias Shailaja Bhalchandra	
Bhagwat (since deceased) through L.R.	
Pandharinath @ Uday Bhalchandra Bhagwat	..Petitioner
<i>Versus</i>	
Prafulla Dattatraya Phadake	..Respondent

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Mr. V.N. Bolinjkar, Advocate for the Petitioner.
Mr. Akash D. Warang, Advocate for the Respondent.

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CORAM : R. G. KETKAR, J.

DATE : 09th JULY, 2019

P.C.

1. Heard Mr. V.N. Bolinjkar, learned counsel for the petitioner and Mr. Akash Warang, learned counsel for the respondent, at length.
2. This Petition takes exception to the order dated 16.11.2018 passed by the learned 7th Jt. Civil Judge, Senior Division at Thane below Exhibit-237 in R.C.S. No.57/2009. By that order, the learned trial Judge allowed the application made by the respondent, hereinafter referred to as the 'plaintiff', under Order VI Rule 16 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.') for striking out pleadings in additional written statement dated 4.7.2018 (Exhibit-235) of defendants No.1 & 2. The learned trial Judge has struck out the additional written statement of defendants No.1 & 2 at Exhibit-235.

3. Rule. Mr. Warang 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. The relevant and material facts giving rise to filing of present petition, briefly stated, are as under.

4. The plaintiff has instituted suit against Shaila @ Shailaja Bhalchandra Bhagwat, hereinafter referred to as 'defendant No.1', *inter alia* alleging ground of arrears of rent. It appears that the petitioner, hereinafter referred to as 'defendant No.2', filed application for his impleadment. He was accordingly impleaded as defendant No.2. Defendant No.2 filed written statement on 7.6.2010. Defendant No.1 filed written statement on 16.10.2012. Defendant No.1 filed application dated 16.12.2015 at Exhibit-154 for amending the written statement. By the proposed amendment, defendant No.1 intended to delete some paragraphs and substitute certain paragraphs. By order dated 8.1.2016, the learned trial Judge rejected said application.

5. Defendant No.1 thereafter filed her affidavit of evidence in lieu of examination-in-chief at Exhibit-169 under Order XVIII Rule 4 of C.P.C. on or about 28.3.2016. On 13.4.2016, the plaintiff filed application Exhibit-175 for discarding evidence of defendant No.1. By order dated 2.7.2016, the learned trial Judge allowed the application and the statements in paragraphs-1 to 3 & 10 of the evidence affidavit

of defendant No.1 that “At the time of death of her husband, she along with defendant No.2 were legal heirs and defendant No.2 was and is residing in the suit property along with her and defendant No.2 was paying rent of suit property even though rent receipts issued in her name” were struck out from her evidence affidavit.

6. It appears that defendant No.1 expired on 30.11.2016 and to that effect purshis dated 5.12.2016 was filed by her Advocate. On 4.8.2017, the plaintiff filed application at Exhibit-226 *inter alia* contending that the legal representative of defendant No.1 is already on record in other capacity, namely, defendant No.2. He may be added in the capacity of legal representative of defendant No.1. By order dated 4.11.2017, the learned trial Judge allowed the application and accordingly defendant No.2 is shown as legal representative of defendant No.1. Defendant No.2 instituted Writ Petitions in this Court challenging that order. These petitions were dismissed as withdrawn. Defendant No.2 has thereafter filed additional written statement on behalf of defendant No.1 and defendant No.2 on 4.7.2018 at Exhibit-235.

7. The plaintiff, therefore, took out application Exhibit-237 under Order VI Rule 16 and Section 151 of C.P.C. for striking out the averments made in paragraphs-1, 2 and 3 of the additional written statement. By the impugned order, the learned trial Judge has allowed

that application. It is against this order, defendant No.2 has instituted present petition.

8. In support of this Petition, Mr.Bolinjkar submitted that on the application made by the plaintiff, defendant No.2 is also impleaded in the capacity of legal representative of defendant No.1. In view of Order XXII Rule 4(2) of C.P.C., defendant No.2 is entitled to make any defence appropriate to his character as legal representative of the deceased defendant. By the impugned order, the learned trial Judge allowed the application mainly on the ground that as defendant No.1 has died, there is no question of filing additional written statement on her behalf. Though while passing the order below Exhibit-226, the plaintiff was directed to add defendant No.2 as legal heir of deceased defendant No.1 and to carry out amendment in the plaint, use of the word “amendment” does not refer to the amendments of pleadings as contemplated by Order VI Rule 17 of C.P.C.. There are no amendments made in the pleadings of the plaintiff and, therefore, no right to file consequential amendment in written statement accrued in favour of defendant No.2.

9. In paragraph-7, the learned trial Judge undoubtedly referred to the position under Order XXII Rule 4(2) of C.P.C. and observed that in the present case defendant No.2 did not file his written statement in the capacity of the legal heir of deceased defendant No.1.

On the contrary, he filed additional written statement for himself and on behalf of defendant No.1. Such eventuality is not contemplated under the law. In my opinion, the approach of the learned trial Judge is hyper-technical. Once it is conceded that defendant No.2 is also brought on record in the capacity of legal representative of defendant No.1, in terms of Order XXII Rule 4(2) of C.P.C., he is entitled to make any defence appropriate to his character as legal representative of the deceased defendant.

10. During the course of hearing, certain suggestions were made to the learned counsel for defendant No.2 to delete paragraph-1 as also delete the portion in paragraph-2 dealing with contention of defendant No.2 that “the notices given by the plaintiff does not specify the outer limit of the compliance with the demand as also there is no period is prescribed for the compliance”.

11. Mr. Bolinjkar states that defendant No.2 is present in the Court today. He has tendered a photo-copy of his Aadhaar Card, which is taken on record and marked 'X', for identification. Upon taking instructions from him, Mr. Bolinjkar states that defendant No.2 will file fresh written statement in the capacity of legal representative of defendant No.1. He will not incorporate the contentions of paragraph-1 of the written statement at Exhibit-235. In paragraph-2 he will also not raise contention as regards “the notices given by the plaintiff does not

specify the outer limit of the compliance with the demand as also there is no period is prescribed for the compliance.” Defendant No.2 will restrict his contention to the effect that the plaintiff's demand is in excess and that as per the demand in the notice the suit is not filed. Mr.Bolinjkar states that the next date of hearing before the trial Court is 22.7.2019. Before next date of hearing, defendant No.2 will file fresh written statement in the capacity of legal representative of defendant No.1 and serve copy in advance on the other side.

12. Mr. Warang has no objection for adopting this course.

13. In view thereof, the impugned order dated 16.11.2018 passed by the learned 7th Jt. Civil Judge, Senior Division at Thane below Exhibit-237 in R.C.S. No.57/2009 is set aside. Defendant No.2 is permitted to file written statement in the aforesaid terms on or before 22.7.2019 and serve copy in advance on the other side. Rule is made absolute in aforesaid terms with no order as to costs. Petition is disposed of.

14. All concerned parties, including the trial Court, to act upon the authenticated copy of this order. Order accordingly.

(R. G. KETKAR, J.)