IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 447 OF 2019

Bata India Ltd. ...Petitioner
Versus
Mahendra Builders
and another ...Respondents
....
Mr. Shyam Dewani a/w. Chirag Chanani, Shivangi Roy, Sumit Khanna i/b. M/s. Dewani Associates, for the Petitioner.
Mr. Atul Damle, Senior Advocate i/b. S.A. Bhagat, Advocate for Respondents.
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CORAM : R. G. KETKAR, J.

DATE : 22nd JANUARY, 2019

P.C.

1. Heard Mr.Shyam Dewani, learned counsel for the petitioner and Mr. Atul Damle, learned Senior Counsel for the respondents, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'defendant', has challenged the order dated 19.11.2018 passed by the Appellate Bench of the Small Causes Court at Mumbai in Revision Application No.126/2018. By that order, the Appellate Court partly allowed Revision Application preferred by the defendant. The Appellate Court partly allowed application Exhibit-77 filed by the defendant under Order VI Rule 17 of Code of Civil Procedure, 1908 (for short, 'C.P.C.') for amending the written

statement in L.E. & C. Suit No.167/217 of 2009. The defendant is permitted to insert paragraphs 11C and 11D only by way of amendment in the written statement. In other words, the Appellate Court did not permit the defendant to amend the written statement by inserting paragraphs 11A and 11B.

3. The respondents, hereinafter referred to as the 'plaintiffs', had instituted suit against the defendant for recovery of possession of shops No.1 and 2, ground floor, Mahendra Chambers, 134-136, Dr.D.N. Road, Mumbai – 400 001 (for short, 'suit premises'). The plaintiffs contended that by writing dated 11.5.2001, the parties had entered into Joint Retail Venture to carry on business in the suit premises and to share the profits thereof. The period of Joint Venture was nine years commencing from 1.10.2000 and expiring on 30.9.2009. The Joint Venture between the parties came to an end on 30.9.2009. In consequence thereof, the Joint Venture permission/license was granted to the defendant to use the suit premises without any compensation or consideration and thus the same was a gratuitous license granted by the plaintiffs to the defendant to use the suit premises. The plaintiffs further contended that the defendant is liable to pay the to the plaintiffs damages for continuing the use and occupying the suit premises after the expiry/termination of the license and during the pendency of the suit

and for payment until the plaintiffs receive the vacant possession of the suit premises. The plaintiffs, therefore, sought decree of possession of the suit premises as also appointment of the Receiver pending suit. The plaintiffs also sought prayer for an enquiry to be held and determination of *mesne profits* payable by the defendant to the plaintiffs in respect of the suit premises.

4. The defendant filed written statement on 4.1.2010 resisting the suit. By order dated 3.8.2013, the learned trial Judge partly allowed the application made by the plaintiffs for appointment of receiver and for deciding the damages and compensation. The defendant was directed to deposit the arrears of damages/compensation @ Rs.67,447.50 per month since the date of filing the suit i.e. 30.10.2009 upto 30.10.2012 for the period of three years, within a period of one month. The defendant was further directed to go on depositing Rs.77,565/- upto further period of three years commencing from 30.10.2012 and thereafter after adding 15% in the amount of damages as per Joint Retail Venture dated 11.5.2001.

5. The plaintiffs thereafter took out application Exhibit-54 for striking out the defence of the defendant. By order dated 6.2.2014, the learned trial Judge allowed that application. Aggrieved by this decision, the defendant instituted Writ Petitions in this Court. This Court

permitted the defendant to furnish the bank guarantee which shall be kept alive until disposal of the suit and one month thereafter, as the defendant gave no objection for the plaintiffs taking over possession of the suit premises. This course was without prejudice to the rights and contentions of the parties. In pursuance thereof, it is common ground between the parties that the possession is handed over to the plaintiffs on 14.8.2015.

6. By a subsequent order dated 17.12.2015 passed below application Exhibit-73 taken out by the defendant, the learned trial Judge revived the defence of the defendant as the defendant complied the order dated 31.7.2015 passed by this Court in Writ Petitions. The defendant thereafter took out application Exhibit-77 on 29.6.2016 for amending the written statement thereby inserting paragraphs-11A to 11D. The plaintiffs resisted the application by filing reply dated 18.7.2016.

7. By order dated 25.8.2016, the learned trial Judge rejected the application. The defendant thereafter filed Revision Application before the Appellate Court which was partly allowed as indicated earlier. It is against this order, the defendant has instituted the present petition.

8. In support of this Petition, Mr. Dewani submitted that the Appellate Court committed serious error while partly allowing the

application for maintenance. The Appellate Court ought to have allowed application Exhibit-77 in its entirety thereby permitting the defendant to insert paragraphs-11A to 11D. The Appellate Court permitted the defendant to insert only paragraphs-11C and 11D and did not permit insertion of paragraphs-11A and 11B. He further submitted that while deciding application for amendment, the Appellate Court also entered into the merits of the amendment. He submitted that it is settled principle of law that while deciding the application for amendment, the Court is not expected to go into the merits of the proposed amendment. That apart, the Appellate Court also failed to appreciate the settled legal principle of law, namely, liberal approach is required to be adopted while considering the application for amendment of the written statement. In support of these propositions, he relied upon following decisions :

(i) **Rajesh Kumar Aggarwal and others Vs. K.K. Modi and others, (2006) 4 SCC 385** and in particular paragraphs-14 to 19 thereof; and

(ii) **Andhra Bank Vs. ABN Amro Bank N.V. and others, (2007) 6 SCC 167** and in particular paragraphs-5 and 6 thereof.

9. Mr. Dewani has invited my attention to paragraph-10 of the impugned order. In paragraph-10, the Appellate Court observed that by inserting paragraphs-11A and 11B, the defendant is trying to withdraw

contentions raised earlier in the written statement. The defendant cannot be allowed to withdraw the admissions given in respect of possession over the suit premises or he cannot be allowed to take inconsistent plea in respect of plea of possession which is already raised in the written statement. He submitted that in the facts of the present case, the defendant is not withdrawing the contentions raised earlier in the written statement. There is also no question of withdrawing any admission given by the defendant in respect of possession over the suit premises. That apart, it is settled principle of law that the defendant can take inconsistent plea in the written statement. By the proposed amendment, the defendant was to bring on record, the subsequent events that took place during pendency of the suit. He, therefore, submitted that application Exhibit-77 deserves to be allowed in its entirety.

10. On the other hand, Mr. Damale has supported the impugned order. He has taken me through the written statement filed by the defendant. He submitted that though the defendant contended that Small Causes Court has no jurisdiction to entertain and try the suit as there is no relationship of licensor and licensee between the parties and application under Order VII Rule 11 of C.P.C. was taken out for rejection of the plaint, said application was withdrawn. In paragraphs-8 to 10, the

defendants contended that they are in continuous use and has agreed Joint Retail Venture dated 11.5.2001. By the proposed amendment, they want to withdraw the contentions raised in the written statement. The Appellate Court was, therefore, justified in rejecting the request of the defendant for inserting paragraphs-11A and 11B. He, therefore, submitted that no case is made out for interfering with the impugned order.

11. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. The plaintiffs have instituted suit against the defendant *inter alia* praying for following reliefs :

> "a) that the Defendant be decreed and ordered to remove all its things and belongings and to cease using the suit premises being Shop No.1 and 2, Ground floor, Mahendra Chambers, 134-136, Dr. D.N. Road, Mumbai – 400 001 and any part or portion thereof.
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> b) Pending the hearind and final disposal of the suit, some fit and proper person be appointed as Receiver in respect of the suit premises, viz., Shop No.1 and 2 admeasuring 800 square feet on the Ground floor and 800 square feet on the Mezzanine floor (approx) of the building known as Mahendra Chambers situate at 134-136, Dr. D.N. Road, Mumbai – 400 001.
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> c) for an enquiry to be held and determination of mesne profits payable by the Defendant to the Plaintiff in respect of the suit premises being Shop No.1 and 2, Ground Floor, Mahendra Chambers, 134-136, Dr. D.N. Road, Mumbai – 400 001 and the Defendant be ordered to pay the same.

> d) Pending the hearing and final disposal of the suit for an order of this Hon'ble Court directing the Defendant to pay to the Plaintiff damages quantified at Rs.6,00,000/- (Rupees Six Lakhs only) per month for the period from 01-10-2009 and that the Defendant be ordered to pay the same regularly every month till recovery of possession of the suit premises by the Plaintiff."

12. It is common ground between the parties that during pendency of the suit, the defendant has handed over possession of the suit premises to the plaintiffs on 14.8.2015. In view thereof, the prayer clauses (a) and (b), extracted hereinabove, do not survive for determination by the trial Court. The only prayers that would survive for consideration are prayer clauses (c) and (d).

13. In the written statement, in paragraph-7 the defendant contended that by writing dated 11.5.2001 a Joint Retail Venture to carry on business in the suit premises and to share the profits as detailed in the said writing was entered into between the parties.

14. In paragraph-8, the defendant denied that the Joint Retail Venture had come to an end as alleged or otherwise. The defendant denied that there was any permission or license granted to the defendant to use the suit premises without any compensation or consideration or the same was a gratuitous license as alleged or otherwise. The defendant contended that the understanding between the parties was a pure

business venture for which the plaintiffs were to receive commission on percentage basis. The defendant denied that the license granted by the plaintiffs to them had come to an end as alleged or otherwise or at all. The defendant denied that they have no right to continue in the suit premises as alleged or otherwise.

15. In paragraph-9, the defendant dealt with the contentions raised in paragraph-5 of the plaint and denied that the defendant is liable to pay to the plaintiff damages for continuing the use or occupying the suit premises after the alleged expiry or termination of the alleged license or during pendency of the suit or for payment until the plaintiffs receive vacant possession of the suit premises as alleged or otherwise or at all.

16. In paragraph-10, it is contended that they are continuing to use the premises as agreed under the Joint Retail Venture and was being done for last nine years and there is no change in their working.

17. As mentioned earlier, the reliefs survive for determination of the trial Court are in terms of prayer clauses (c) and (d). It is in that context, one has to consider the application made by the defendant proposing amendment in the written statement.

18. A perusal of paragraph-11A shows that the defendant contended that it was not in possession of the suit premises as is alleged

by the plaintiffs. The defendant was jointly conducting the business in the suit premises along with the plaintiff as per the terms and conditions of the writing dated 11.5.2001 which *per se* makes it clear that the relationship between the parties is of Joint Retail Venture partnership.

19. By order dated 25.8.2016, the learned trial Judge rejected the application. By the impugned order, the Appellate Court partly allowed the Revision Application. The Appellate Court referred to the assertions made by the defendant in paragraphs-8 and 10 of the written statement.

20. Mr. Dewani relied upon the decisions of the Apex Court in **Rajesh Kumar Aggarwal** (supra) and **Andhra Bank** (supra) to contend that while considering the application for amendment, the Court cannot go into the merits of the proposed amendment. The defendant can take inconsistent pleas in the written statement. He further submitted that by the proposed amendment, the defendant wants to bring on record the subsequent events.

21. As far as the contention of Mr. Dewani that while considering the application for amendment, the Court cannot go into the merits of the case is concerned, I do not find any difficulty in accepting the same. It is settled principle of law that while considering the application for amendment, the Court cannot go into the merits of the proposed amendment. It is also settled principle of law that the

defendant can raise inconsistent pleas in the written statement. At the same time, it is necessary to consider whether the proposed amendment is necessary for determining the real question in issue. As the defendant has surrendered the possession of the suit premise on 14.8.2015, the only prayers that survive for determination are prayer clauses (c) and (d). It is, therefore, necessary for the Court to deal with those prayers. For deciding this, the proposed amendment in terms of paragraphs-11A and 11B is absolutely not necessary.

22. In the case of **Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and others, (2009) 10 SCC 84,** the Apex Court has laid down the factors to be taken into consideration while dealing with applications for amendment. Paragraph-63 of that decision reads thus:

> "63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.
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> (1) Whether the amendment sought is imperative for proper and effective adjudication of the case?
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> (2) Whether the application for amendment is bona fide or mala fide?
>
> (3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
>
> (4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;
>
> (5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? and

(6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order VI Rule 17. These are only illustrative and not exhaustive."

23. In the case of **Rajesh Kumar Aggarwal** (supra), the Apex Court held that the Court should allow all amendments that are necessary for determining the real question in controversy between the parties.

24. Applying the tests laid down in the case of **Revajeetu** (supra) and **Rajesh Kumar Aggarwal** (supra), I do not find that the Appellate Court committed any error while partly allowing the application thereby permitting the defendant to insert paragraphs-11C and 11D and denying the permission to insert paragraphs-11A and 11B in the written statement. Hence, the petition fails and the same is dismissed.

25. It is made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R. G. KETKAR, J.)

Deshmane (PS)