

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 2587 OF 2021

Mr. Stanislaus J.T. D'Souza
(since deceased) :

Mrs. Katherine Anne D'Souza
and ors.

.... Petitioners

v/s.

Mr. Federick Cyril Braganza and anr.

.... Respondents

Mr. Vishwajit P. Sawant, Sr. Advocate a/w. Mr. Prabhakar M.
Jadhav for the Petitioners.

Mr. Rajendra Thakkar a/w. Ms. Pooja Thakkar for the Respondents.

CORAM: SMT. ANUJA PRABHUDESSAI, J.

DATED : 17th NOVEMBER, 2022.

JUDGMENT :-

. This Petition under Article 227 has been filed assailing order dated 10/02/2020 whereby learned Appellate Bench, Small Causes Court dismissed the Civil Revision Application No.35 of 2020 and thereby confirmed the order dated 16/11/2019 passed by learned Small Causes Court, Mumbai rejecting Application for amendment of written statement and appointment of Commissioner.

2. The Respondents are the legal representatives of the original Plaintiff-Joanita Braganza (hereinafter referred to as the 'Plaintiff').

The Petitioners are the legal representatives of the original Defendant - Stanislaus J.T. D'Souza (hereinafter referred to as 'the Defendant').

3. The dispute is in respect of premises being flat No.F/4 in building Fairville Estate, Plot No.68, Juhu, Vile Parle. The said premises (hereinafter referred to as 'the suit premises') admeasures 670 sq. feet and comprises of 02 bedroom, hall and kitchen with 02 sanitary blocks. The Plaintiff is the owner of the suit premises. In the year 1972, the Plaintiff had entered into a leave and license agreement in favour of the Defendant and put him in possession of the suit premises. In the year 1994, the Plaintiff filed a suit for eviction inter alia on the ground of bonafide requirement and non payment of rent. The Plaintiff claims that despite being the owner of the suit premises, she and her family members are constrained to reside in a tenanted premises at Byculla, which is insufficient to accommodate the large family. The Plaintiff also claimed that the Defendant had failed and neglected to pay the rent.

4. The Defendant contested the suit and disputed bonafide requirement of the Plaintiff and claimed that the premises in possession of the Plaintiff are spacious enough to accommodate her family. The Defendant claimed that the Plaintiff had failed to give particulars of the

tenanted premises at Byculla. The Defendant also denied that they are in arrears of rent and further claimed that greater hardship will be caused to her if the decree of eviction is passed in favour of the Plaintiff.

5. The Trial Court framed the issues on 27/11/2003 and recorded the evidence of the Plaintiff as well as of Defendant No.1(d). At the fag end of the trial, the Defendant filed an application for amendment of the written statement and for appointment of Commissioner. By the proposed amendment, as contained in the Schedule, the Defendant has sought to incorporate pleadings that :

(i) the Plaintiff has falsely alleged that the premises at Byculla is of one bedroom, hall, kitchen and that it is not sufficient to accommodate her and her family, when in fact the premises at Byculla comprise of two bedrooms, hall and kitchen.

(ii) that the allegations of the Plaintiff that Mr. Anaclet and his family are also residing at Byculla is false to the knowledge of plaintiff. That said Anaclet and his family are residing at Flat No.16, 3rd floor, Orlem Luciana Co-operative Housing Society, Malad West, Mumbai. That the Defendant had personally visited the building and taken photographs which show that the said flat is owned by Juliana, the wife of Anaclet.

(iii) great hardship will be caused to the Defendant if the decree of eviction is passed in favour of the plaintiff as compared to the hardship that will be caused to the Plaintiff since the Plaintiff is comfortably residing in the premises at Byculla and that Anaclet is residing comfortably in the flat in Orlem Society.

(iv) the suit premises is the only premises available to the Defendant No.1(d). That after filing of the suit, the Defendant tried to search for alternative premises in the vicinity but the price of the premises available is beyond his reach.

6. The Defendant also filed an application for appointment of Commissioner on the ground that the Plaintiff and his sister have falsely deposed that the premises in their possession consists of one room, hall and kitchen. Defendant claimed that he was recently informed by an unknown person that the said premises consists of two bedrooms, hall and kitchen. The Defendant therefore sought appointment of Commissioner to inspect and to take measurements of the premises at Byculla which are occupied by the plaintiff.

7. In reply to these applications, the Plaintiff pointed out that the suit was filed in the year 1994 and claimed that the Plaintiff No.1 is

handicapped and is over 70 years of age. Referring to the several applications filed by the Defendant, the Plaintiff claimed that by filing these applications at the fag end of the trial, the Defendant has made yet another attempt to delay the suit. The Plaintiff denied the statements made in the Application and stated that the amendment is not necessary to decide the controversy between the parties. The Plaintiff further stated that the Commissioner cannot be appointed on the basis of vague statement made by the Defendant.

8. The Trial Court dismissed the Application mainly on the ground that the proposed amendment is not necessary to determine the real controversy between the parties. The Trial Court has further held that the Commissioner cannot be appointed on the basis of some vague information disclosed by some unknown person. Being aggrieved by this order, the Defendant preferred Revision Application before the Appellate Bench of the Small Causes Court.

9. The Appellate Bench, while rejecting the said Revision Application, observed that the suit is of the year 1994. The Application for amendment and appointment of Commissioner has been filed after the Plaintiff had closed her evidence and after recording of the defence

evidence. The Court took note of the fact that the Defendant had filed additional written statement on 13/10/1997, 18/04/2007, 24/10/2008, 30/06/2010 and on 15/01/2013 and held that the grounds raised in the proposed amendment were available at the time of filing of the previous additional written statements. The Appellate Court further held that the written statement is sought to be amended on the basis of oral information received from some anonymous person. The Appellate Court has also affirmed that the amendment is not necessary to decide the real controversy between the parties and has further held that the Commissioner cannot be appointed for the purpose of collecting evidence. Being aggrieved by rejection of the Revision Application, the Defendant has filed this Writ Petition under Article 227 of the Constitution of India.

10. Mr. Sawant, learned Senior counsel for the Petitioner/Defendant submits that the Plaintiff had specifically averred that the tenanted premises occupied by her is not sufficient to accommodate a large family consisting of her son Anaclet, his wife and child. He submits that the amendment was necessitated since the Defendant had recently learnt that Anaclet and his wife are residing in a flat in Orlem Luciana Co-operative Housing Society at Malad West, Mumbai. Since only two

members of the Plaintiff's family are now residing in the premises at Byculla, the plea of bonafide requirement would not subsist. He further submits that appointment of Commissioner is also necessary to determine the issue of bonafide requirement.

11. Learned counsel for the Defendant submits that Order VI Rule 17 CPC confers wide powers on the Court to allow amendment of the pleadings and that it is well-settled that the Court should be liberal in granting the prayer for amendment particularly in the case of amendment of written statement, unless serious prejudice is caused to the other side. He further submits that delay in filing the Application is no ground to refuse the prayer for amendment. In support, he has relied upon the decision of *Baldev Singh and ors. v/s. Manohar Singh and another (2006) 6 SCC 498* and *Andhra Bank v/s. ABN AMRO Bank N.V. and others (2007) 6 SCC 167*. He has also relied upon the decision of this Court in *Revanti Babubhai Mota v/s. Mrs. Mangala Gokhale (Writ Petition No.679 of 2015)* wherein the learned Single Judge of this Court has held that the appointment of Commissioner would help the Court to decide the issue of hardship.

12. Per contra, Mr. Rajendra Thakkar, learned counsel for the

Respondent/Plaintiff submits that filing of the Application for amendment and appointment of Commissioner is yet another tactic to delay the suit which was filed in the year 1994. He submits that the pleadings in paragraph 11 of the plaint would indicate that apart from Anaclet, the Plaintiff and her two other unmarried children are residing in the premises at Byculla. The fact that the wife of Anaclet has subsequently purchased a flat at Malad would not obliterate the bonafide requirement of the Plaintiff and family members to have a suitable and comfortable premises of their own. He further submits that the averments in the plaint indicate that the Defendant has already secured suitable accommodation at Versova, Andheri and that the Defendant has admitted purchase of such premises admeasuring 900 to 1000 sq. feet. In this fact situation, appointment of Commissioner does not subserve any purpose. Furthermore, the Defendant cannot seek appointment of Commissioner on a vague plea that he has been informed by an unknown person that the Plaintiff is residing in a two bedroom apartment in Byculla. He submits that the Plaintiff has stated that the area of the premises in his possession is 590 sq. feet even though she was not under an obligation to specify the plinth area of the said premises. He submits that both the Courts below have considered all the relevant facts and have rightly come to the conclusion that the

proposed amendment is not necessary to determine the controversy between the parties. He submits that these concurrent findings of fact cannot be interfered with in exercise of powers under Article 227 of the Constitution. He has relied upon the decision of the Hon'ble Supreme Court in ***Mrs. Rena Drege v/s. Lalchand Soni, etc. AIR 1998 SCC 1990.***

13. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

14. Order VI Rule 17 of CPC, which deals with amendment of pleadings, reads thus:-

“17. Amendment of pleadings.- *The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:*

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.”

15. It is pertinent to note that proviso to Rule 17 of Order VI was added with an object of curtailing the delay caused by indiscriminate filing of amendment application. In the instant case, the suit was filed prior to insertion of the proviso and the amendment not being retrospective, the rigors of the proviso are not applicable. Nevertheless, while considering the application for amendment, the Court is required to consider whether : (i) the amendment is essential to determine the real question in controversy between the parties. (ii) that the Application is bonafide or malafide. (iii) whether allowing the application will cause prejudice to the other side.

16. In *Rajesh Kumar Aggarwal vs. K.K.Modi & Ors. 2006 (4) SCC 385*, the Hon'ble Supreme Court has held that the object of the Rule is that Court should try the merit of the case that come before them and should, consequently, allow all amendments that should be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side. It is held that the first part of the Rule is discretionary (may) and leaves it to the Court to order amendment of pleading. The second part is imperative (shall) and enjoins the Courts to allow all amendments which are necessary for the purpose of determining real question in

controversy between the parties. It is observed that the real controversy test is the basic or the cardinal test and it is the primary duty of the Court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed; if it is not, the amendment will be refused. It is held that while considering whether an application for amendment should not be allowed, the Court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment.

17. In *Baldev Singh* (supra), the Hon'ble Supreme Court has reiterated that the Court should be extremely liberal in granting the prayer for amendment of pleadings as may be necessary to determine the real controversy between the parties unless such amendments cause serious injustice or irreparable loss to the other side. The Hon'ble Supreme Court has held that the amendment of a plaint and amendment of a written statement are not necessarily governed by the same principle. Though some general principles are common to both, the rule that the plaintiff cannot be allowed to amend his pleadings so

as to alter materially or substitute his cause of action or the nature of his claim has no counter part in the law relating to the amendment in the written statement. It is held that adding a new ground of defence or substituting or altering defence does not raise the same problem as adding, altering or substituting the new cause of action. Accordingly, the Courts are inclined to be more liberal in allowing amendment of the written statement than of plaint and question of prejudice is less likely to operate with same rigor in the former than in the later case. It is held that inconsistent pleas can be raised by the Defendant in the written statement although the same may not be permissible in the case of plaint.

18. In *Andhra Bank* (supra), the Hon'ble Supreme Court has held that delay is no ground for not allowing the prayer of amendment of the written statement. It was held that while allowing the application for amendment of pleadings, the Court cannot go into the question of merit of such amendment. The only question at the time of considering the amendment of the pleadings would be whether such amendment is necessary for decision of the real controversy between the parties in the suit.

19. In ***Sampath Kumar vs. Ayyakannu and anr***, AIR 2002 SC 3369, the Hon'ble Supreme Court while considering the question of delay in moving an application for amendment, observed as under:-

" 9. Order 6, Rule 17 of the CPC confers jurisdiction on the Court to allow either party to alter or amend his pleadings at any stage of the proceedings and on such terms as may be just. Such amendments as are directed towards putting-forth and seeking determination of the real questions in controversy between the parties shall be permitted to be made. The question of delay in moving an application for amendment should be decided not by calculating the period from the date of institution of the suit alone but by reference to the stage to which the hearing in the suit has proceeded. Pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of the trial or after conclusion thereof. In former case generally it can be assumed that the defendant is not prejudiced because he will have full opportunity of meeting the case of the plaintiff as amended. In the latter cases the question of prejudice to the opposite party may arise and that shall have to be answered by reference to the facts and circumstances of each individual case. No strait-jacket formula can be laid down . The fact remains that a mere delay cannot be a ground for refusing a prayer for amendment."

20. Reverting to the facts of the present case, one of the grounds of

eviction was bonafide requirement of the suit premises. It is well settled that the landlord is the best Judge of his requirement. The tenant cannot dictate to him or her as to how and in what manner he should live. Furthermore, the bonafide requirement cannot be judged merely from the size of the premises in possession of the landlord or the number of his family members. Several other factors such as social and financial status of the landlord, age, profession of the landlord and his family members, etc. are some of the relevant factors to determine the bonafide need of the landlord.

21. In the instant case, the plaintiff had raised a plea of bonafide requirement on the ground that - (i) despite being the owner of the suit premises, she is constrained to reside in a tenanted premises at Byculla. (ii) that the premises at Byculla are insufficient to accommodate her large family consisting of her son – Anaclet, his wife and child, one unmarried daughter – Sandra and unmarried son – Federick. (iii) that her son Federick and her daughter Sandra have not been able to settle down in life for want of accommodation. (iv) that defendant had purchased a flat at Versova, four bungalows, Andheri and has adequate and suitable accommodation. In the light of these pleadings, the mere fact that Anaclet, his wife and child are residing in another flat which is

in the name of the wife of Anaclet is not relevant to decide the real controversy between the parties.

22. The applications for amendment and appointment of Commissioner were filed after 25 years from the date of the institution of the suit. It is true that the application for amendment cannot be dismissed only on the ground of delay. Nevertheless, the discretion to allow the amendment at a belated stage, particularly after commencement of trial, has to be exercised judiciously upon examining the facts and circumstances of the case in their entirety. Suffice it to say, the discretion cannot be exercised in favour of a party, whose object is nothing but to misuse the provision and drag the proceedings indefinitely. In the instant case, the suit for eviction was filed in the year 1994. The Defendant had filed the written statement and subsequently filed additional written statements on 13/10/1997, 18/04/2007, 24/10/2008, 30/06/2010 and 15/06/2013. The applications under consideration viz. applications for amendment and appointment of Commissioner have been filed after recording of the evidence of the Plaintiff and DW1, without offering any explanation for the delay in filing the application for appointment of Commissioner or for incorporating the proposed amendment in the previous

applications. The suit is pending since 1994 and the Defendant has succeeded in delaying the proceeding by filing amendment applications one after the other. It is manifestly evident that the applications are filed with a design to prevent the Court from proceeding with the suit. Such dilatory tactics not only prejudice the rights of the Plaintiff but is sheer abuse of process of Court. Hence, I do not find any illegality or infirmity in the impugned order which warrants interference in exercise of Writ jurisdiction.

23. Under the circumstances and in view of discussion supra, the Petition is dismissed. The Trial Court is directed to dispose of the suit within six months from the date of the order.

**PREETI
H JAYANI**

(SMT. ANUJA PRABHUDESSAI, J.)

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