



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 11995 OF 2022

Fazal Gani Mukadam & Anr.

...Petitioners.

Versus

Salim Haron Kacchi and Others.

...Respondents.

Ms. Siddhi Bhosale for the petitioner.

Mr. M. L. Patil for the respondents.

Coram : Sharmila U. Deshmukh, J.

Date : October 30, 2023.

P. C. :

1. Heard.

2. The jurisdiction of this Court under Article 227 of Constitution of India has been invoked to challenge the order dated 5th March 2022 rejecting the petitioner's application for amendment of written statement.

3. Learned Advocate for the petitioner submits that by the proposed amendment, petitioner sought to bring on record documents to deny the title of Respondent Nos.1 and 2 to the suit premises. She would submit that the petitioners herein are purchasers of the goodwill of respondent nos.3 and 4, who are the

original tenants of premises. She would contend that after the filing of written statement, the Petitioners obtained certain documents which will indicate that respondent nos.1 and 2, who are the subsequent purchasers, do not have clear title in as much the sale deed of the subject premises was not executed with all the co-owners. According to her, respondent nos.1 and 2 do not have any right to the premises and as such cannot step into the shoes of landlord. Drawing attention of this Court to the finding of Trial Court rejecting the application on the ground of estoppel, she would submit that Section 116 of Evidence Act is inapplicable in as much as the estoppel operates against denial of title of the landlord of such tenant at the beginning of tenancy.

4. *Per contra* learned advocate appearing for respondents has invited the attention of this Court to the written statement of petitioners in which there is an admission that respondent nos.1 and 2, are the owners of suit premises. He has further taken this court to the correspondence exchanged between the parties, which is annexed to the affidavit in reply of the Respondent Nos.1 and 2, to contend that attornment of tenancy is clearly demonstrable. He would submit that by way of proposed amendment, an admission given in favour of Respondent Nos.1 and 2 cannot be permitted to be withdrawn. In

support of his contentions he relies upon decision of the Apex Court in *Vinay Eknatth Lad v. Chiu Mao Chen* [(2019) 20 SCC 182].

5. In rejoinder, learned counsel for the Petitioners would point out paragraph 4 of the written statement to urge that title of Respondent Nos.1 and 2 was always denied by the Petitioners.

6. Considered the submissions and perused the record. For the sake of convenience, parties are referred to by their status before the Trial Court.

7. R.C.S No 31 of 2018 is instituted by the Plaintiffs-subsequent purchasers of the subject premises seeking eviction of Defendants. The Plaintiffs claimed to have purchased the subject premises by virtue of an registered Sale Deed dated 25th April, 2014. It is pleaded in the plaint that Defendant Nos.1 and 2 have indirectly sold the subject premises to Defendant No.3 vide an agreement dated 11th January, 2018 styled as sale of goodwill. In these proceedings, written statement came to be filed by Defendant Nos.3 and 4. The case of Defendant Nos.3 and 4 in the written statement is that goodwill rights of the business has been purchased from Defendant Nos.1 and 2 which included the tenancy rights of Defendant Nos.1 and 2. In paragraph 8 of the written statement, it is pleaded that

Defendant no.1 has no right to sell the Plaintiff's ownership property.

8. By the proposed amendment, Defendant Nos.3 and 4 seek incorporation of pleadings denying title of the Plaintiffs to the suit premises and the relationship of landlord and tenant based on the sale deed and correction deed which came into their hands after the filing of written statement. It is settled that amendments are liberally allowed with the caveat as regards the written statement that admissions given in the written statement should not be permitted to be withdrawn by the amendment. If we peruse the written statement, in paragraph 4 there is general denial that the subject premises has been purchased by the Plaintiffs. In paragraph 8, there is a specific assertion that property owned by the Plaintiffs could not be sold by Defendant No.1. As such there is an admission about the ownership of property by the Plaintiffs. The Trial Court while rejecting the application has relied upon recitals in the agreement for sale of goodwill in which ownership of the Plaintiffs is admitted. By the proposed amendment, Defendant Nos.3 and 4 seek to amend the written statement to deny the ownership right of Plaintiffs. Once having admitted that the Plaintiffs are owners of the property in respect of which Defendant No.1 has no right of sale, in my view, allowing the application for amendment will amount to permitting

Defendant Nos.3 and 4 to withdraw the admission of ownership.

9. In the present case, from the written statement as well as documents which are annexed to petition, not only there is an admission that the plaintiffs are owners of the suit property but there is material to demonstrate that plaintiffs were accepted as landlord of the suit premises by defendant nos.1 & 2, i.e., the original tenants as well as defendant nos.3 and 4 – present petitioners and rent was paid to the plaintiffs.

10. This brings me to the next submission canvassed as regards the application of Section 116 of Evidence Act. In paragraph 5 of the plaint, it is pleaded that Plaintiff No.2 is in receipt of communication dated 14th February, 2018 from Defendant No.4. The said communication addressed to the plaintiffs is annexed at Page 103 to the petition and states that Defendant Nos. 3 and 4 have purchased goodwill of the business including the tenancy rights on 11th January, 2018 and Defendant Nos.1 and 2 had made the payment of rent to the Plaintiffs and by the said communication rent for the months of January, 2018 and February, 2018 was being sent by defendant nos. 3 and 4, which has created an attornment between the parties.

11. In light of the factual position of payment of rent by

Defendant Nos.3 and 4 to the Plaintiffs, the issue is whether Defendant Nos.3 and 4 were estopped from denying the title of Plaintiffs in view of Section 116 of Evidence Act. The issue was considered by the Apex Court in the case of *Bismillah Be v Majeed Shah [(2017) 2 SCC 274]* where it was held in paragraph 24 as under:

"24. Law relating to derivative title of the landlord (Lessor) and challenge, if made, to such title by the tenant (Lessee) during subsistence of tenancy in relation to demised property is fairly well settled. Though by virtue of Section 116 of the Evidence Act, 1872, the tenant is estopped from challenging the title of his landlord during continuance of the tenancy, yet the tenant/lessee is entitled to challenge the derivative title of an Assignee/Vendee of the original landlord (Lessor) of the demised property in an action brought by the Assignee/Vendee against the tenant for his eviction from the demised property under the Rent laws. This right of a tenant is, however, subject to one caveat that the tenant/lessee has not attorned to the Assignee/Vendee. In other words, if the tenant/lessee pays rent to the Assignee/Vendee of the tenanted property then it results in creation of an attornment between the parties which, in turn, deprives the tenant/lessee to challenge the derivative title of an Assignee/Vendee in the proceedings.

12. The above decision of the Apex Court is squarely applicable in the instant case where after being attorned to the Plaintiffs and having paid rent to the Plaintiffs, Defendant Nos. 3 and 4 seek to deny the title of Plaintiffs. In view of the decision of the Apex Court, the proposed amendment of Defendant Nos.3 and 4 to incorporate pleadings denying the title of Plaintiffs is barred by law of estoppel as

rightly held by the Trial Court apart from being impermissible as an admission is sought to be withdrawn.

13. For the foregoing reasons there is no infirmity in the order passed by the trial Court. Petition is therefore dismissed.

14. At this stage, request is made by learned counsel for the petitioners for stay of this order to enable the petitioners to challenge the same in Apex Court. There is no requirement for stay as the challenge was against an order of rejection, however, on insistence of the counsel, the present order is stayed for a period of four weeks from today.

[Sharmila U. Deshmukh, J.]