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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4334 OF 2023

Shri. Hanumantrao Namdeo Gharge
deceased through legal heir

Shri. Samit Hanumantrao Gharge

...Petitioner

Versus

Shri. Sabeer Kasam Shaikh

...Respondent

Mr. Abhijeet Desai a/w. Mr. Karan Gajra, i/b. Desai Legal for the Petitioner.
Ms. Divya A. Pawar a/w. Mr. Sandesh Patil, for Respondent.

CORAM : MADHAV J. JAMDAR, J.

DATED : 9th JUNE 2023

P.C. :

1. Heard Mr. Abhijeet Desai, learned counsel appearing for the
Petitioner and Ms. Divya Pawar, learned counsel appearing for the
Respondent.

2. By the present Writ Petition, the Petitioner who is the original
Appellant /original Defendant is challenging the legality and validity of
the order dated 2nd February 2023 passed by the learned Ad-Hoc
District Judge-1, Thane below Exhibit-34 in Regular Civil Appeal
No.167 of 2016. By the impugned order, said Exhibit-34 application
filed by the Appellant seeking amendment of the written statement was
rejected.

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3. It is the contention of Mr. Desai, learned counsel appearing for the Petitioner that by the amendment application, subsequent events were sought to be brought on record. He submitted that the Slum Rehabilitation Authority issued notice dated 14th May 2018 and directed the Petitioner to vacate the suit premises within a period of 7 days and thereafter, the Petitioner was heard and order was passed on 9th October 2018 directing him to vacate the suit premises. He further submitted that thereafter, the Petitioner vacated the suit premises and the same were demolished and thereafter in November-2018, the construction work of the new building has started. He further submitted that the construction is in progress and alternate premises in lieu of suit premises by name "Samit Electric Works" is reserved by the Slum Rehabilitation Authority in lieu of the suit premises. Therefore, by the application bearing Exhibit-34, the subsequent facts were sought to be brought on record in the written statement.

4. By the impugned order, the learned Ad-Hoc District Judge-1, Thane rejected the said Exhibit-34 application on the ground that if the amendment is allowed, the nature of the defence will change and by the said amendment, it will have effect of ouster of the jurisdiction of

the Court trying the suit. The learned Judge further observed that the Appellant failed to exercise due diligence in filing the amendment application. It is further stated that the appeal is pending since 2016 and the amendment application was filed in 2021, when the appeal was to be heard finally.

5. While supporting the impugned order, it is the contention of Ms. Divya Pawar a/w. Mr. Sandesh Patil, learned counsel appearing for the Respondent that the amendment will have the effect of changing the entire complexion of the defence. It is submitted that suit has been decreed and the appeal is pending since 2016. By the proposed amendment what is sought to be brought on record are the events which have taken place in 2018 and therefore, amendment application which has been filed in 2021, clearly shows that the Petitioner has failed to show due diligence, which is the mandatory requirement of 2002 Amendment of the C. P. C. by which proviso was added in Order VI Rule XVII. It is further submission of the Respondent that the application was made when the appeal was to be taken up for hearing. Therefore, it is submitted that the Writ Petition be dismissed.

6. The factual position on record show that in 2016, the Regular

Civil Suit No.437 of 2007 filed by the Respondent was decreed by the Judgment and Decree dated 30th April 2016. The present Petitioner challenged the same by filing Civil Appeal No.167 of 2016. During the pendency of said appeal proceedings were initiated against the present Petitioner under the provisions of the Slum Areas (Improvement and Clearance) Act, 1956 (hereinafter referred to as “**the Slum Act**”) and the order was passed of eviction against the present Petitioner on 9th October 2018. Subsequently, the suit premises were demolished and construction work of new building is going on. If the facts which are stated in the schedule of the amendment are taken into consideration, then it is clear that the facts stated therein have taken place in May-2018, October-2018 and November-2018 and construction is still going on. Therefore, there is no substance in the reasoning given by the learned Trial Court that the Petitioner has failed to show due diligence.

7. The further observation of the learned Trial Court that in view of the amendment of the written statement, it will have the effect of the ouster of the jurisdiction of the Court and therefore, the same is not permissible cannot be accepted. In this case, the ouster of the jurisdiction, if any will take place in view of the provisions of the Slum

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Act and in view of the declaration of the suit premises as slum. In any case, the said reasoning given by the learned Appellate Court clearly shows that the learned Appellate Court has gone into the merits of the amendment, which is not permissible.

8. For the above reasons, the Writ Petition deserves to be allowed. The impugned order dated 2nd February 2023 passed below Exhibit-34 in Regular Civil Appeal No.167 of 2016 is quashed and set aside. The said application bearing Exhibit-34 filed in Regular Civil Appeal No.167 of 2016 is allowed, subject to payment of cost of Rs.10,000/- by the Petitioner to the Respondent. The said cost be paid within a period of two weeks from today. The Petitioner is permitted to amend the written statement within a period of two weeks after the said cost is paid.

9. The Writ Petition is allowed in above terms with no order as to costs.

[MADHAV J. JAMDAR, J.]