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

WRIT PETITION NO.835 OF 2023

Pushpa Kishanlal Jain ... Petitioner
Versus
Delna Cyurus Irani and Anr. ... Respondents

Mr. P.J. Thorat i/b. Ms. Aditi S. Naikare, for the Petitioner.
Mr. Roop M. Vasudeo, for the Respondent No.1.

**CORAM: MADHAV J. JAMDAR, J.
DATE : 20th JANUARY, 2023**

P.C.:

1. Heard Mr. P.J. Thorat, learned counsel appearing for the Petitioner and Mr. Vasudeo, learned counsel appearing for the Respondent No.1.

2. The Petitioner who is original tenant, by way of the present Writ Petition filed under Article 227 of the Constitution of India, has challenged order dated 19th August 2022 passed by the learned Appellate Bench of Small Causes Court, Bombay below Exh.32 in Appeal No.156 of 2016.

3. By the said application bearing Exh.32, the Petitioner i.e. the original Appellant has sought to amend the written statement. By the impugned order, the said Exh.32 application i.e. amendment application seeking amendment in written statement at the appellate

stage is rejected.

4. Before considering the legality of the impugned order, it is relevant to note few factual details:-

(i) Respondent No.1 filed R.A.E. Suit No.65/90 of 2010 on 4th January 2010 on the ground of reasonable and bonafide requirement. Said suit was decreed on 12th February 2016 and Appeal No.156 of 2016 was filed challenging the impugned judgment and decree.

(ii) Petitioner filed Exh.22 application in Appeal No.156 of 2016 under Order XLI Rule 27 of the Civil Procedure Code, 1908 seeking permission to lead additional evidence. The said application was filed on 7th November 2017. It is relevant to note the prayers made in the said application, which read as under:-

“(a) That by an Order of this Hon’ble Court, the Applicants be permitted to produce and/or lead additional evidence as per the provisions of Order 41 Rule 27 of Code of Civil Procedure, 1908 in respect document as mentioned in the present Application at Exhibit – A hereinabove in Appeal No.156 of 2016.

(b) In the alternative remand the above matter to the Trial Court directing the Trial Court to allow the Appellant to amend the written Statement filed by the appellant.

(c) And further allow the Appellant/Defendant to lead Additional Evidence in view of the amendment.”

(iii) In the said application filed on 7th November 2017 most of the contentions raised in the present application, particularly with respect to the decree passed in respect of Room No.2A on 2nd May 2017 and decree passed in respect of Room No.2B on 31st July 2014 were sought to be brought on record under Order XLI Rule 27 of CPC.

(iv) The learned Appellate Court of Small Causes Court, Mumbai, by order dated 14th August 2018 passed below Exh.22 in Appeal No.156 of 2016 directed that the said application bearing Exh.22 be heard and decided with main appeal in accordance with law and further directed that the parties shall be at liberty to make necessary submissions regarding said application bearing Exh.22 at the time of final hearing in accordance with law.

(v) Thereafter, the present application bearing Exh.32 of 2016 was filed in said Appeal No.156 of 2016 on 22nd November 2021 seeking to amend the written statement at the appellate stage. As set out earlier most of the facts sought to be brought on record are mentioned in application dated 7th November 2017.

5. It is the contention of Mr. Vasudeo, learned counsel appearing for the Respondent No.1 that this application was taken out when the Appeal was scheduled to be heard finally. It is significant to note that although the amendment application seeking amendment in the written statement was filed on 22nd November 2021, the amendment, *inter-alia*, is regarding decree passed in respect of the said Room No.2A, which was passed on 2nd May 2017 and decree passed in respect of Room No.2B which was passed on 31st July 2014.

6. It is admitted position that as far as said decree passed with respect to Room No.2B is concerned, this Court has admitted Civil Revision Application No.157 of 2021 along with Civil Revision Application No.158 of 2021 and granted *inter-alia*, stay of eviction decree.

7. Mr. Vasudeo, learned counsel fairly admits that as far as decree regarding Room No.2-B which is only of 100 sq.ft. is concerned, the same has been executed and Respondent No.3 has received possession of the same.

8. In any case, what is significant to note is that when the earlier application under Order XLI Rule 27 of CPC was filed on 7th November 2017, the present Petitioner was aware about the said subsequent events and the same has been mentioned specifically in the said application bearing Exh.22. The present application seeking

amendment (Exh.32) was filed on 22nd November 2021 i.e. after about 4 years. The suit has been filed in 2010. Therefore, proviso to Order VI Rule 17 will be applicable to the present case. The said proviso specifies that no application for amendment shall be allowed after the trial has commenced unless the Court comes to the conclusion that inspite of due diligence, the party could not have raised matter before commencement of trial. Therefore, it is settled legal position that unless the party shows due diligence, the Court will not be having jurisdiction to grant the amendment application after trial has commenced.

9. In the present case, the application was filed at the appellate stage seeking amendment in the written statement *inter-alia*, regarding the events which have taken place in 2014-2017 and most of the events were sought to be brought on record by filing application under Order XLI Rule 27 Civil Procedure Code which was filed on 7th November 2017.

10. Thus, it is clear that the jurisdictional facts regarding due diligence which are necessary to be pleaded in the application seeking amendment are absent in the present case and in any case, this is not a case where due diligence is shown by the Petitioner. In the case of ***Vidyabai & Ors. v. Padmalatha & Ors.***¹, it has been held

1 (2009) 2 SCC 409

that unless the jurisdictional fact, as envisaged therein, is found to be existing, the Court will have no jurisdiction at all to allow the amendment of the plaint.

11. As far as the contention that the Respondent No.2 i.e. the defendant no.2 has passed away on 1st October 2020 and therefore, the requirement of the plaintiff has come to an end, there is no substance in the said contention and therefore, in the amendment to that effect. By no stretch of imagination, it can be held that as the defendant no.2 has passed away the bonafide requirement of the plaintiff has come to an end. The plaintiff, defendant no.2 and 3 have acquired the suit property and therefore, they are the co-owners. The plaintiff has in the plaint, *inter-alia*, stated that the plaintiff requires the suit premises for her bonafide user for herself, her husband, her son and her daughter.

12. Although it is true that at the time of considering the amendment application, the merits of the amendment are not required to be seen, however, this is a case where amendment application is filed just to prolong the hearing of the Appeal and therefore, the said merits are considered only from the point of view of examining the bonafides of the Petitioner in filing amendment application.

13. This is not a case where interference is required in writ

jurisdiction of this court under Article 227 of the Constitution of India. Therefore, Writ Petition is dismissed.

14. As it is the contention of the learned Advocate appearing for the Respondent No.1 that the Exh.32 application in Appeal No.156 of 2016 was filed when the Appeal was scheduled to be heard finally, the learned Appellate Court of Small Causes Courts, Mumbai is requested to dispose of the Appeal No.156 of 2016 expeditiously.

15. It is clarified that all the contentions of both the parties are expressly kept open and the observations made in this order are made only from the point of view of examining the legality and validity of the impugned order.

(MADHAV J. JAMDAR, J.)