

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10994 of 2019

M/s. Wrangle Investment Limited,  
a company registered under Indian Companies  
Act having its office at 2<sup>nd</sup> Floor, "CLIFFLET",  
Sir Pochkhanwalla Road, Worli,  
Mumbai – 400 025. ...Petitioner

*Versus*

1. M/s. Mahendra Builders,  
a partnership firm, registered under the  
Indian Partnership Act and having their  
address at "CLIFFLET", Sir Pochkhanwalla  
Road, Worli, Mumbai – 400 025.
2. Mahendra V. Shah (Since deceased)  
Indian Inhabitant, carrying on business  
in the name and style of M/s. Mahendra  
Builders, as sole proprietor having  
Address at "CLIFFLET",  
Sir Pochkhanwalla Road, Worli,  
Mumbai – 400 025.
3. M/s. Bhram Deo Holding & Trading Ltd.  
A company registered under Indian  
Companies Act having its office at  
2<sup>nd</sup> Floor, "CLIFFLET",  
Sir Pochkhanwalla Road, Worli,  
Mumbai – 400 025 ...Respondents

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Mr. G.S. Godbole, Senior Advocate i/by Ms. Eventa A.  
Gonsalves a/w Mr. Reyden L. Gonsalves for the Petitioner.  
Mr. Aspi Chinoy, Senior Advocate a/w Mr. Rohaan Cama, Mr.  
Rohan Dakshini, Ms. Shweta Jaydev, Azraa Millwala i/by  
M/s. Rashmikant and Partners for Respondent No.1.

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**CORAM : RAJESH S. PATIL, J.**

**RESERVED ON : 7 OCTOBER, 2023**

**PRONOUNCED ON : 5 DECEMBER, 2023**

**JUDGMENT :**

1. This Writ Petition filed under Article 227 of the Constitution of India, challenges Judgment and Order dated 26<sup>th</sup> September, 2019 passed by the Court of Small Causes in Interim Notice No. 760 of 2002, thereby permitting the Plaintiff (Respondent No. 1 herein) to carry out the amendment to the plaint i.e. T.E. & R. Suit No.68/73 of 2001, which is pending in the Court Small Causes at Bombay.

**FACTS :-**

2. One Mr. Mahendra V. Shah filed a T.E. & R. Suit No. 68/73 of 2001, in his capacity as proprietor of M/s. Mahendra Builders, against the present Petitioner and Respondent No. 3, on the ground of sub-letting under Section 41 of the Presidency Small Causes Court Act, for eviction of the Petitioner from the premises situated on the Second Floor of the building known as “CLIFFLET”, Worli,

Mumbai, admeasuring around 4000 sq.ft. carpet area, being commercial premises (for short ‘the suit premises’).

3. In the same year of filing the Suit, on 19<sup>th</sup> September, 2001, Mr. Mahendra Shah died. After the death of Mahendra Shah, on 16<sup>th</sup> February 2002, his wife Pratibha and his daughter Shirin filed an Interim Notice No.259 of 2002 in the pending suit, to bring them on record in place of a deceased Mahendra Shah. So also, they preferred an Interim Notice No.626 of 2002, seeking an order of injunction against the Petitioner and Respondent No.3.

4. On 25 October 2002, Pratibha filed an Interim Notice No.760 of 2002, praying therein;

(i) for withdrawal of Interim Notice No.259 of 2002 and;

(ii) also to allow them to Amend the plaint, so as to correct the misdescription of the plaint by deleting name of Mr. Mahendra Shah from the proceedings and the description of original plaintiff as sole proprietor of Mahendra Builders be substituted as Mahendra Builders

Partnership Firm instead.

5. While these Interim Applications were argued on different dates and were pending for disposal, the eviction suit itself got dismissed for default on 12 June 2003, when neither the plaintiff nor the defendants were present in the Court. As soon as Pratibha and Shirin realized that the suit itself was dismissed, while the arguments on interim notices were made on different dates, they preferred an Application being Miscellaneous Notice No.151 of 2004 for Restoration of Suit and Interim Applications.

6. As Interim Notice No.760 of 2002, the plaintiff has prayed for withdrawal of Interim Notice No.259 of 2002. By an Order passed in Interim Notice No.760 of 2002, dated 26 March 2004, the Interim Notice No.259 of 2002 was withdrawn. While the Interim Notice No.760 of 2002 was adjourned for hearing on remaining prayers (Amendment).

7. Miscellaneous Notice No.151 of 2004, was thereafter heard and was made absolute by Order dated 29 March, 2006, thereby the Suit was restored back to file

along with Interim Notice therein. The Petitioner/defendant being aggrieved by the Order dated 29<sup>th</sup> March, 2006 filed a Revision Application before the Division Bench of Small Causes Court challenging the Restoration of Suit. The said Revision Application was heard by the Division Bench of Small Causes Court and by its Order dated 7 December, 2006 the said Revision Application was dismissed. Against the said Order passed by the Division Court, the defendant being dissatisfied, filed a Writ Petition in this Court. The said Writ Petition was dismissed by this Court and SLP filed by the defendant before the Supreme Court was also dismissed.

8. Interim Notice No.760 of 2002 was thereafter taken up for hearing on remaining prayers by the Court of Small Causes. In the meanwhile, the Defendant No.1 (Wrangle) filed Suit, to declare them as a tenant of the suit premises against Mahendra Builders, a Partnership Firm and its partners Pratibha and Shirin.

9. The Single Judge of the Small Causes Court, heard Interim Notice No.760 of 2002 on remaining prayers and by his Order dated 26 September, 2019 allowed the said

Interim Notice thereby permitting the Respondent No.1 to carry out the Amendment as sought in the said Interim Notice.

10. Being aggrieved by the Order dated 26 September, 2019, passed by Single Judge of Small Causes Court, in Interim Notice No.760 of 2002, Petitioner who is the Original Defendant No.1 has filed the present Writ Petition.

11. Mr. G.S.Godbole, learned Senior Advocate made submissions on behalf of the Petitioner.

11.1. Mr. Godbole submitted that after the death of Original Plaintiff/Mahendra Shah, an application to bring on record the legal heirs could have been made within 90 days as per the provisions of Article 120 of the Limitation Act. He further submitted that within a further period of 60 days, an application for condonation of delay could have been preferred under Article 121 of Limitation Act. He submitted that in the present proceedings within the extended period of two months under Article 121, an

Application in the form of Interim Notice No.259 of 2002 was preferred by the legal heirs of the deceased Mahendra Shah. Mr. Godbole further submitted that after the statutory period of 90 days the suit was abated and as within a further period of two months, an application for restoration of suit and setting aside of abatement was made and the same could have been heard on merits and could have been allowed.

11.2. Mr. Godbole further submitted that the legal heirs of Mahendra Shah did not think it proper to argue the Interim Notice No.259 of 2002 for setting aside the abatement and they withdrew the said interim notice, which according to Mr. Godbole has proved to be fatal to them as interim notice to set aside of abatement is withdrawn. The suit is not on the file of the Court and no further application for amendment could have been entertained by the Court.

11.3. Mr. Godbole further submitted that under Section 42(c) of the Indian Partnership Act, once the partnership is at Will and out of the two partners, if one partner dies, the firm automatically results in dissolution. A subsequent

application by so called partners thereafter, to add them as a new partners is not sustainable in law. Even though, it may be stated in the records of the Registrar of Firms (for short “ROF”) that they become partners from a previous date i.e. in the present proceedings on the date of the death of the partner is of no consequence because the firm is not in existence when one of the two partners has died.

11.4. Mr. Godbole submitted that misdescription could have been corrected by the Original Plaintiff i.e. Mahendra Shah, when he was alive which could have been totally different case and in all probables the said Application could have been allowed.

11.5. Mr. Godbole further submitted that this is a total different case where a sole plaintiff files a Suit; and after a period of 90 days from the death of the sole plaintiff, there is an automatic abatement and the suit is no more on records of the Court. And even though the legal heirs or the partners of the firm believe that the suit should be restored, the abatement of the suit must first be set aside and only thereafter it is possible to change the misdescription of the

suit from a Proprietor Firm to a Partnership Firm.

11.6. Mr. Godbole referred to following judgments on Article 120 of the Limitation Act to buttress his submissions.

*i. Anokhe Lal V/s. Radhamohan Bansal And Others*<sup>1</sup>

*ii. Commissioner of Income Tax, Madhya Pradesh and Nagpur and Bhandara V/s. Seth Govindram Sugar Mills.*<sup>2</sup>

*iii. Commissioner of Income Tax V/s. Sherally Meherally and Sons.*<sup>3</sup>

*iv. Mithailal Dalsangar Singh And Others V/s. Annabai Devram Kini And Others*<sup>4</sup>

*v. Gururm Singh (D) Thr. Lrs. And Others V/s. Gurbachan Kaur (D) by Lrs. And Others*<sup>5</sup>.

*vi. Deepak Varma V/s. Daya Nand*<sup>6</sup>.

11.7. Mr. Godbole concluded his arguments by

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1 (1996) 6 Supreme Court Cases 730

2 AIR1966SC24

3 1997 SCC OnLine Bom 744

4 (2003) 10 SCC 691

5 AIR 2017 SC 2419

6 2019 SCC OnLine Del 8951

submitting that this Writ Petition deserves to be allowed, in view of the legal proposition laid down by the Supreme Court.

12. On the other hand Mr. Aspi Chinoy, learned Senior Advocate made his submission on behalf of the Respondent Nos.1 and 2.

12.1. Mr. Chinoy submitted that in this proceedings, the eviction suit was filed by the Original Plaintiff in the year 2001, and even after 22 years, the trial has not started. He further submitted that the Petitioner, who is the Defendant in the eviction suit before the Small Causes Court, has made all endeavours to see that the suit does not see the light of the day. He submitted that even an interim notice for restoration of the suit which was dismissed in default, took two years for restoration.

12.2. Mr. Chinoy submitted that the eviction suit filed in the year 2001, was on the ground of change of user, and *bona fide* requirement and the Petitioner is not entitled to protection under section 3(1)(b) of the Maharashtra Rent

Control Act as the Petitioner and Respondent No.3 companies both have a share Capital of One Crore or above.

12.3. Mr. Chinoy submitted that document of ownership of the suit building is of partnership firm by name “Mahendra Builders” therefore, the suit could only be filed by the partnership firm Mahendra Builders. Hence, the suit filed by Mahendra Shah as proprietor of Mahendra Builders was certainly a misdescribed suit and it was necessary to bring on record the “Real” Plaintiff.

12.4. Mr. Chinoy submitted that once the Petitioner themselves had filed R.A.D. Suit in the year 2018, for declaring them as a tenant and once they themselves had arrayed the partnership firm along with the present partners “Pratibha” and “Shirin”, as party defendant, it does not lie in the mouth of the Petitioner now to say that the partnership firm can’t be brought on record in the present pending suit.

12.5. Mr. Chinoy further submitted that the Amendment once carried out, it relates back to the date of filing of the suit. Mr. Chinoy referred to Sections 59, 60, 61, 62 and 68

of the Indian Partnership Act. Mr. Chinoy submitted that once the “Registrar of Firms” certifies that the new partners are being inducted in the firm, the said entry goes back to an earlier date when Mahendra Shah, died.

12.6. Mr. Chinoy further submitted that the Revisional Court has correctly recorded its finding while dealing with the Order passed in Miscellaneous Notice No.151 of 2004, thereby restoring the suit.

12.7. Mr. Chinoy further submitted that once “Pratibha and Shirin” realized, the mistake committed by the deceased Mahendra Shah while filing the suit, the only option for them was to amend the Plaint by disclosing to the Court that they are the partners of the Firm “Mahendra Builders” and the ownership of the building is with “Mahendra Builders”.

12.8. Mr. Chinoy further submitted that the Petitioner/Defendant was well aware as to who is the owner of the suit building, as the letter dated 5 October 1983, by which the tenancy was created, was signed by Mr. Mahendra Shah in the capacity of Partner of M/s. Mahendra Builders.

He further submitted that therefore, the Petitioner has no case and they could not take a defence that the suit filed in the name of Mahendra Builder as proprietor cannot be now amended.

12.9. Mr. Chinoy further submitted that it is therefore not left to the Defendant to argue that the firm is not in existence after the death of Mr. Mahendra Shah.

12.10. Mr. Chinoy further submitted that there can't be any abatement where the suit itself was misdescribed. Mr. Chinoy submitted that the test in such a case would be "who is the Real Plaintiff".

12.11. Mr. Chinoy submitted that provisions of Order 13 Rule 4 are applicable to the present proceedings. Mr. Chinoy referred to the following three judgments in support of his submissions:

***1. Kurapati Venkata Mallayya and Another Vs. Thondepu Ramaswami and Another*<sup>7</sup>**

***2. Jaijai Ram Manoharlal Vs. National Building Material Supply*<sup>8</sup>**

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<sup>7</sup> AIR 1964 SC 818

<sup>8</sup> "1969 " (1) SCC 169

**3. *Suraj Bhan Abnil Kumar & Anr Vs. Molu Ram Kapoor Chand of Delhi High Court*<sup>9</sup>**

**4. *Fordie Metals Ltd. Vs m.v. "Tibor Szamuely 2003 (3) Mh.L.J. 444".***

**5. *Sumer Singh Galundia & Anr. vs. Jeevan Singh (since deceased through LRs) & Ors. in Civil Appeal No.9292 of 2022 arising out of SLP (C) No.7734 of 2020 dated 16 December, 2022".***

12.12. Mr. Chinoy submitted that the Judgment and Order allowing the Amendment, passed by the Small Causes Court has been correctly passed and no reasons has been put-forward by the Petitioner to entertain the present Writ Petition. Therefore, the Writ Petition should be dismissed.

**ANALYSIS & CONCLUSION :**

13. I have heard the counsel for both the sides, and I have gone through the documents on record.

14. In the present proceedings the suit for eviction was filed in the year 2001. The title of the plaint of the said eviction suit is reproduced herein below:

**IN THE COURT OF SMALL CAUSES COURT AT MUMBAI**

**T.E.& R. SUIT NO. 68/73 OF 2001**

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9 (1999) SCC OnLine Del 589

**MAHENDRA V. SHAH,**

Indian Inhabitant, Carrying on business in the

Name and style of M/S. Mahendra Builders

as sole Proprietor

having address at “CLIFFLET”,

Sir Pochkhanwalla Road, Worli,

Mumbai – 400 025.

..Plaintiff

**VERSUS**

**1. M/S BHRAM DEO HOLDING & TRADING LTD**

A Company registered under Indian Companies Act)

having its office at on the 2<sup>nd</sup> floor, “CLIFFLET” )

Sir Pochkhanwalla Road, Worli, Mumbai – 400 025 )

**2. M/S WRANGLE INVESTMENT LIMITED )**

A Company registered under Indian Companies Act )

having its office at on the 2<sup>nd</sup> floor, “ “CLIFFLET”, )

Sir Pochkhanwalla Road, Worli, Mumbai – 400 025 )

..Defendant

[Emphasis Supplied]

16. Thus undisputably the eviction suit was filed by a proprietorship firm of M/s “Mahendra Builders” through Mahendra Shah as a proprietor. After filing of the suit in the year 2001 itself, Mr. Mahendra Shah died. It is submitted before me that Mr. Mahendra Shah had many such business concern by which he was operating. Few of them were (1) Mahendra Builders, a duly registered Partnership firm. (2) Mahendra containers Pvt. Ltd, etc.

17. In the present proceedings, the only question to be answered is whether a Party to whom a right to sue arises, can they at a subsequent stage be allowed to be added as Plaintiffs on the ground of misdescription. There is no dispute that such a misdescription can be allowed. However, the issue which is raised by the Petitioner (Original Defendant) is that once a suit is filed by a person as a proprietor; after the death of the said person, after the statutory period to bring on record the legal heirs has elapsed and the suit been automatically abated, Whether without setting aside the abatement, there can be amendment to the plaint on the ground of misdescription of the plaintiff ?

18. In my opinion the question would also arise whether any prejudice is caused to the Defendant by the courts allowing the amendment of misdescription of Plaint. It will be pertinent to note here that the Petitioner during the pendency of application for amendment before the Small Causes Court, on their own went ahead and filed a suit being R.A.D. Suit, against the partnership firm and its

partners seeking a declaration that they are ‘Tenant’ of the suit premises. A copy of Plaint along with exhibits was tendered in Court on 4 October, 2023. The title of the Plaint is re-produced hereinbelow:-

**IN THE COURT OF SMALL CAUSES COURT AT MUMBAI**

R.A.D. SUIT NO. 648 OF 2018

STAMP NO. 1455 OF 2018

**M/s. WRANGLE INVESTMENT PVT. LTD.**

A Company registered under Companies Act  
1956, and having its registered office at  
flat no. 301, A Wing, Prakash Kunj, B. P. Road  
Opp. Shrinath Apartments Bhayander (East),  
Thane 401 105 and also having address at  
Clifflet, 2<sup>nd</sup> floor, Sir Pochkhanwala Road,  
Worli, Mumbai 400030.

.. **Plaintiffs**

**Versus**

**1. SMT. PRATIBHA MAHENDRA SHAH,**

Age 81 years, Occ: Business,  
Having address at Clifflet,  
Sir Pochkhanwala Road, Worli,  
Mumbai 400030.

**2. SMT. SHIRIN MAHENDRA SHAH,**

Age 38 years, Occ: Business,  
Having address at Clifflet,

Sir Pochkhanwala Road, Worli,

Mumbai 400030.

**M/S. MAHENDRA BUILDERS**

A Partnership firm, having its office at Clifflet,

Sir Pochkhanwala Road, Worli,

Mumbai 400030.

.. Defendants.

[Emphasis Supplied]

19. Paragraph nos 1,2, and 8 of the Plaint are reproduce  
herein below :-

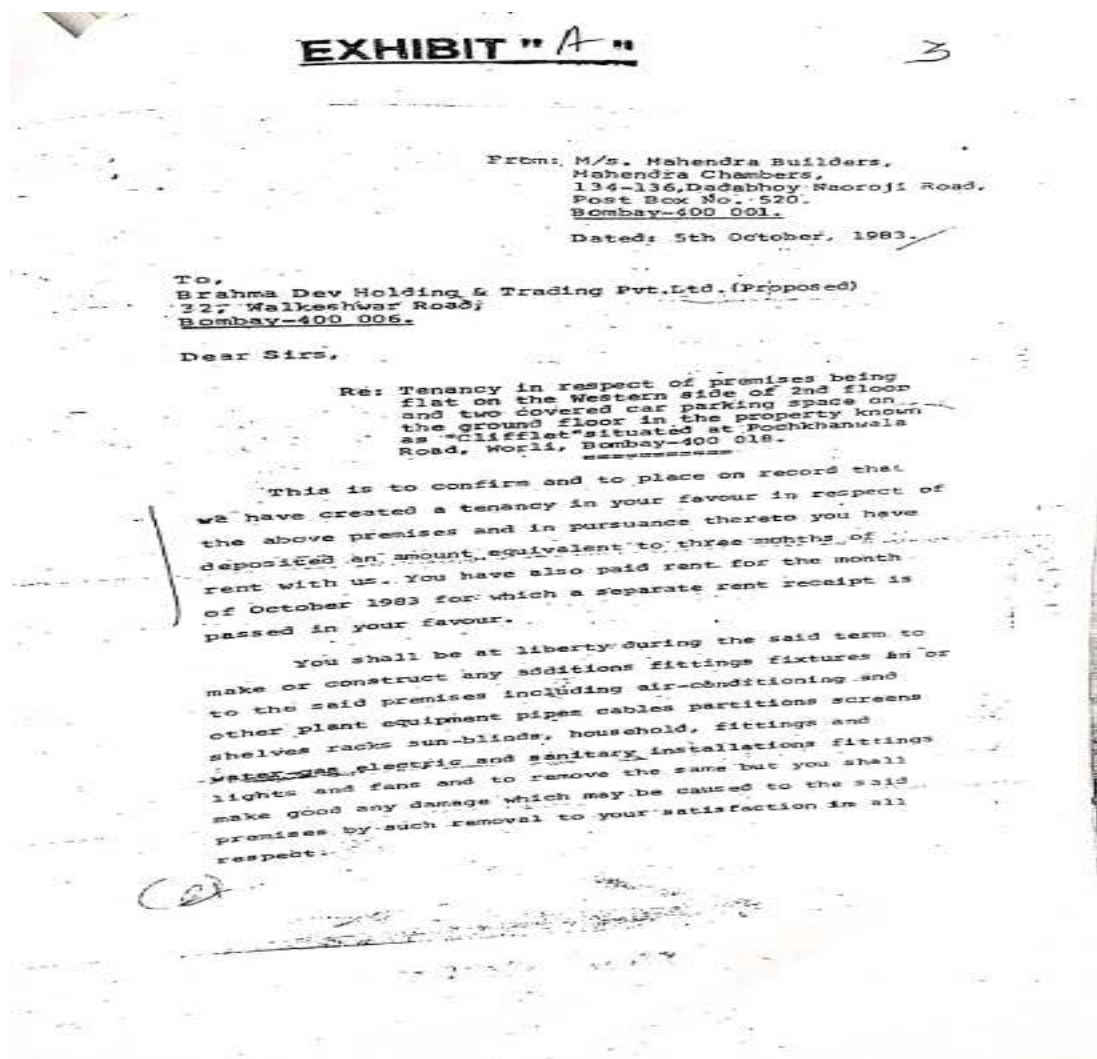
1. One Mr. Mahendra Vithaldas Shah was during his life time the partner of M/s. Mahendra Builders, the third Defendant, the owner and landlord of the building known as Clifflet situated at Sir Pochkhanwala Road, Worli, Mumbai 400030, and situated on land bearing C.S. No. 783-A, Worli Division and hereinafter referred to as "the said Property"

2. The said Mahendra Vithaldas Shah, partner of the third Defendant, passed away on 19.9.2001, leaving behind his widow, the Defendant No.1 and his daughter the Defendant No.2. The Plaintiffs are informed that the Defendants No. 1 and 2 are the partners of the 3rd Defendant. The Plaintiffs have gathered the fact that the Defendants No. 1 and 2 are the partners of M/s. Mahendra Builders, the Defendant No.3, from the correspondence prior to the suit, in respect of the said property and the correspondence addressed by the Defendant No.3. The Plaintiffs have impleaded the Defendants Nos. 1 and 2 abovenamed, as heirs of the deceased landlord Shri Mahendra Shah and also as partners of the Partnership Firm, in the name and style of M/s. Mahendra Builders i.e. the Defendant No.3.

8. As stated herein the said M/s. Mahendra Builders by its then Partner, Shri Mahendra Shah, signed and executed letter dated 5.10.1983, granting to the said Brahmadev Holding & Trading Pvt. Ltd. the permission and entitlement to transfer the tenancy in respect of suit premises.

[Emphasis supplied]

20. In the said declaratory suit, the present Respondent No. 1 (partnership firm) and its two partners i.e., Pratibha and Shirin are arrayed as Defendants. So also, in the said R.A.D. suit, Letter dated 5 October 1983, is enclosed as Exhibit 'A'. For ease of reference the said letter dated 5 October 1983, is scanned and reproduced herein below :



-2-

A cooling tower and a water tank have been installed on the terrace of the out-house for the Central Air-conditioning Plant situated in the above premises. You will have access to the said cooling tower and the water tank but you will pay to us necessary water charges in respect thereof, and you may install a separate water meter in respect thereof.

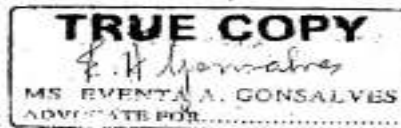
This is further to confirm that you will be entitled to without our consent whether in writing or otherwise to transfer the tenancy in respect of the said flat and garages or any of them whether the tenancy is contractual or statutory or otherwise and your transferee shall also be entitled to the similar rights. This right to yourselves and your transferee etc. shall be absolute and shall not be revoked by us for any reason whatsoever.

In short, we have permitted and/or allowed you and your successors and transferee/ and assignees and so on to have as many transfers of tenancies etc. as you and your transferees etc. may desire from time to time. In other words, any tenant and/or transferee and so on would also in their turn be entitled to assign and let etc. in the same manner as you.

Thanking you,

Yours truly,  
for Mahendra Builders  
YWECH.  
Partner.

(S) [Signature]  
(M) [Signature]



[Emphasis Supplied]

21. From the letter dated 5 October 1983 and the contents of Complaint and cause Title, it can be concluded that Mr. Mahendra Shah as partner of M/s. Mahendra Builders, created tenancy of the suit premises in favour of Respondent No.3 herein. The contents of the said letter dt. 5 October 1983 may not be of much importance at this stage for this court to consider even though some argument was made on the content of the letter before me.

22. The fact that R.A.D. Suit filed is by the Petitioner themselves, seeking a declaration of tenancy against the Partnership Firm M/S. Mahendra Builders in the year 2018, which shows that, the Petitioners were aware who is the landlord/owner of suit premises.

23. As far as present eviction proceedings are concerned, it is the case of the plaintiff in the Complaint that the suit premises is measuring 4000 sq.ft. in a building called as Clifflet, situated at Worli, Mumbai, and the defendant are paying rent of Rs. 425/- per month. The eviction suit has been filed on the ground of subletting, bonafide requirement and no protection under the Rent Act to the

defendant company, as its paid up capital is more than One Crore.

24. Pratibha and Shirin are not only the partners of the firm Mahendra Builders, but are also the legal heirs of deceased Mahendra Shah. Therefore, it is nobody's case that there are two different entities who have approached the Court to add them as Plaintiffs. The only issue would be in what capacity they would be termed as plaintiff whether it will be they, as partners of M/S. Mahendra Builders or they as legal heirs of deceased Mr. Mahendra Shah? This becomes a question to be answered because the suit was filed by Mr. Mahendra Shah mis-describing him as proprietor of M/s. Mahendra Builders.

25. The partners of Mahendra Builders, Pratibha and Shirin have brought on record a copy of conveyance of the suit building 'Clifflet' of the year 1978, in favour of M/s. Mahendra Builders. Therefore, there is no doubt that the ownership of the building was with the firm called as M/s. Mahendra Builders.

26. This coupled with the fact that the Original Tenancy letter dated 5 October, 1983 was addressed by M/s. Mahendra Builders through its partner Mahendra Shah. It is a fact known to the Petitioner/ Original Defendant/Tenant from the date of creation of tenancy. After Maharashtra Rent Act, 1999 came into operation, there is no protection to a company whose share capital is more than One Crore. It is the case of the Plaintiff in eviction suit that Petitioner/Defendant would fall under this category.

27. As far as the issue about death of partner of a partnership firm having two partners is concerned, the Partnership Deed in the present proceeding has not been produced. The Application filed before the Registrar of Firms, states that the Pratibha and Shirin were brought in as partners from 19 September 2001. On the same date, it is shown that Mahendra Shah has been deleted as a partner pursuant to his death.

28. Section 63 of the Indian Partnership Act makes it clear that such a dissolution can be considered. Therefore, a situation does not arise that on death of Mahendra Shah the

partnership firm cease to exist. So also it will be pertinent to note, this entire facts were to the knowledge of the Petitioner/Defendant. However, they have been taking a stand in the Small Causes Court about abatement of eviction suit and even then they went ahead and filed a suit for declaration of tenancy before the Small Causes Court, Bombay from the partnership firm and its partners in the year 2018. Therefore, it would not lie in the mouth of such a Petitioner/Tenant to raise such an issue.

29. According to the Petitioner, if the suit was abated then there could not have been any further dismissal of the suit and further restoration of the suit. The eviction suit in the present proceedings has been filed admittedly in the year 2001; and from 2001 till 2023 it has been pending for Trial.

30. The Provisions of C.P. C., Order 1, Rule 10, reads as under :

**Order 1, Rule 10. Suit in the name of wrong Plaintiff -**

(1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bonafide mistake, and that it is necessary for the

determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

(2) Court may strike out or add parties.—The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3) .....

(4).....

(5).....

Therefore, the court has enough power of satisfied that the suit has been instituted in the name of wrong person as Plaintiff, through a bonafide mistake, order any other person to be substituted as Plaintiff.

31. Mr. Godbole referred to the Supreme Court judgment of Anokhelal (supra) to support his argument. In the said judgment the suit for eviction was filed by landlord against tenant (Partnership Firm). On the death of one partner, his son filed an application under Order 1 Rule 10(2), which was rejected. Thereafter, second application was filed under the provisions of Order 30, Rule 4 of CPC for getting himself impleded. The said second application was allowed, when

infact the suit was already decreed and even the Appeal filed Challenging the decree was disposed of confirming the decree. Hence, in this background, the Supreme Court set aside the order of impleadment.

32. The Second judgment refereed was of Seth Govindra Sugar Mills (supra) decided by the Supreme Court. The facts in the said judgment were that one of the two partners died on 9 December, 1945. The another partner continued business in the name of the firm. For the assessment year 1950-51, the said firm applied for registration on the basis of agreement of Partnership Firm dated 28 September, 1943. The income tax authorities refused registration on the ground that after the death of one partner, the Partnership Firm is dissolved and thereafter another partner, and the minors could be treated only as an association of persons. The Supreme Court answered the two questions referred to as : (i) For the assessment year 1950-51 the status of assesses was that of a firm within the meaning of Section 16(1) (b) of Income Tax Act. (ii)The tribunal misdirected itself in law in reaching the conclusion that the parties could

not be regarded as partners.

33. Therefore the facts in both the judgments are quite different then the facts in the present proceedings, therefore, according to me the ratio laid down by Supreme Court in both the judgments could not be applicable to the present proceedings.

34. Another judgment referred by Mr. Godbole is of Sherally Meharralyy (supra) which was decided by the Division Bench of this Court. The facts in this judgment were that on 27 June, 1977, partner died, and on 5 September, 1977 the sole surviving partner entered into a fresh deed of Partnership with the widow. Therefore, according to Assessee two different firms existed during these two periods. However, the Income Tax Officer did not accept this contention of assessee as he was of the opinion that the firm did not stand dissolved on death of one of the two partners and the old Partnership continued to exist. According to him it was a case of mere change of constitution of firm as contemplated by Section 187 of Income Tax Act.

35.1. Even the fact in Sherally Meharralyy (supra) were quite different than that in the present proceedings therefore, the ratio laid down in the facts of Sherallya Meharralyy (supra) cannot be made applicable to the present proceedings where the facts are quite different.

36.1. In Mithailal Dalsangar (supra) the Supreme Court held that the abatement of suit occurs automatically by operation of law, on failure to move an application for bringing the LR's on record within the prescribed period of limitation.

36.2. In Gurnam Singh (supra) the Supreme Court held that before the Second Appeal could be taken up for hearing, the Appellant and two Respondents had expired, therefore judgment in Second Appeal passed by the High Court against deceased defendant is without jurisdiction and hence nullity.

36.3. In Dipak Varma (supra) Single Judge of Delhi High Court held that after a statutory period as contemplated in Article 120 and 121 of the Limitation Act is over there is an automatic abatement.

36.4. I am bound by the ratio laid down in the above judgments by the Supreme Court. But in the present proceedings, the suit itself was filed by a wrong person therefore, there was a misdescription.

37.1. The judgment referred by the Respondent / landlord of Kurapati V Mallayya (supra), in which the Supreme Court held that where there is a case of misdescription of parties, it is open to the Court to allow the Amendment to the plaint at any time and the question of limitation would not arise in such a case.

37.2. Similarly in the case of Jai Jai Ram Manohar Lal (supra) the Supreme Court held that a party cannot be refused a relief because of some mistake and negligence. The Court always gives relief to Amend pleadings to a party unless it is satisfied that the party applying has acted *malafide*. Further, it was held that since the name in which the action was instituted was merely a misdescription of the Original Plaintiff, no question of limitation arises; the plaint must be deemed on Amendment to have been instituted in the name of real plaintiff, on the date of which it was

originally instituted.

37.3. In the judgment of Surajbhan Anil Kumar (supra) Delhi High Court held that it is established by the record that on the date of the filing of the suit, the plaintiff was a proprietorship firm and not a Partnership Firm. Therefore, it is cannot be said that the suit was instituted by an Unregistered Partnership Firm. At best it is a case of mis-description of a party, mainly the plaintiff and if in order to describe a plaintiff properly, an Application is filed in the Court seeking for Amendment of the plaint such an Application is required to be allowed.

37.4. I am of the opinion that the ratio laid down by the above three judgments is squarely applicable to the facts of the present proceedings.

38. For the reasons recorded above the view taken by the Single Judge of Small Causes Court of allowing the Interim Notice No.760 of 2002, thereby permitting the Plaintiff to carry out amendment in view of the ratio laid down by Supreme Court and on the ground that the

Conveyance is in favour of the Partnership firm, according to me is a correct view. In my opinion there remains no doubt that the proposed amendment is essential for the purpose of determining the real question in controversy between the parties.

39. Therefore, this Writ Petition is dismissed. No cost.

40. The hearing of T.E.&R. Suit No. 68/73 of 2001, is expedited. The Judge of the Court of Small Causes Bombay, to make an endeavour to hear and to dispose of Suit within a period of 12 months from today. All the parties to the suit will co-operate and will not seek unnecessary adjournments.

41. All parties to act on authenticated copy of this Order.

***(RAJESH S. PATIL, J.)***

42. At this stage, advocate for the Petitioner seeks stay to the operation of this order. Request made is rejected.

***(RAJESH S. PATIL, J.)***