

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

WRIT PETITION NO. 5693 OF 2024

IN

MISC. APPEAL NO. 17 OF 2024

IN

ORDER BELOW EXHIBIT NO.38

IN

R.A.E. & R. SUIT NO. 1706 OF 2017

1. Rashmi wd/o. Ishwar Pratap

2. Amita Sandeep Shah

3. Manisha Sandeep Shah

} **..Petitioners
Orig. Defendants**

:Versus:

Parimal Pramod Shah (Karta and

Manager of Pramod Virchand Shah HUF)

} **..Respondent
Orig. Plaintiff**

Mr. Pradeep Thorat *with Ms. Prakruti Joshi i/by. Dhruve Liladhar & Co. for the Petitioner.*

Mr. Akash Rebello *with Mr. Paras Gopsar and Ms. Swati Chheda, for the Respondent.*

CORAM : SANDEEP V. MARNE, J.

DATED : 24 JUNE 2024.

JUDGMENT :-

1) Petitioners/Defendants have filed this petition challenging the order dated 6 January 2024 passed by the Small Causes Court allowing application at Exhibit-38 filed by the Respondent-Plaintiff for amendment of the plaint. Also challenged is the order dated 15 March

2024 passed by the Appellate Bench of the Small Causes Court dismissing Misc. Appeal No. 17 of 2024 as not maintainable.

2) Petitioners are tenants in respect of the suit premises and the Respondent is the landlord. Respondent-landlord has filed R.A.E.& R. Suit No. 1706 of 2017 for recovery of possession of the suit premises essentially on the ground of non-user. In the plaint, Plaintiff-Parimal Pramod Shah described himself as '*Karta and Manager of Pramod Virchand Shah, HUF*' and pleaded that the said HUF is the owner and landlord of the building named '*Chetan*' situated at 260, Sion Road, Mumbai-400 022. It appears that trial in the suit commenced with framing of issues on 27 June 2019. Plaintiff filed his Affidavit of evidence reiterating the contents of the plaint that he is the Karta and Manager of the HUF and that the HUF is the owner and landlord of the suit building. During cross-examination however, Mr. Parimal Pramod Shah admitted that the HUF is not the landlord of the suit building and that in the year 1990, the HUF transferred the suit property in the individual name of Parimal Pramod Shah. He further admitted that in the year 2017 when the suit was filed, the HUF was not the owner of the suit property. He further admitted that the said HUF is in fact not even in existence. Based on the admissions given in the cross-examination, Defendants filed application for amendment of the Written Statement to incorporate para-4A therein and sought dismissal of the suit on the ground that landlord-tenant relationship did not exist between the Plaintiff and the Defendants. On the other hand, Plaintiff filed application for amendment of the plaint at Exhibit-38 seeking to delete the words '*Karta*' and '*Manager*' of Pramod Virchand Shah, from the title of the suit, as well as,

in various paragraphs of the plaint. Plaintiff instead sought to describe him as co-owner of the suit building. By two separate orders passed on 6 January 2024, the Small Causes Court has allowed both the amendment applications filed by the Plaintiff and Defendants. The Defendants are permitted to incorporate para-4A in the Written Statement. Similarly the Plaintiff is permitted to amend the plaint as per the schedule of amendment. While, the Plaintiff did not challenge the order dated 6 January 2024 allowing amendment in the Written Statement, Defendants got aggrieved by order dated 6 January 2024 permitting amendment of the plaint and filed Misc. Appeal No. 17 of 2024 before the Appellate Bench of the Small Causes Court. The Appellate Bench, has however held the Appeal to be not maintainable on the ground that the order was not revisable. The Defendants have accordingly filed the present petition challenging the orders dated 6 January 2024, allowing amendment in the plaint, as well as order dated 15 March 2024 passed by the Appellate Bench.

3) Mr. Thorat, the learned counsel appearing for the Petitioners would submit that the amendment was introduced after the trial in the suit had commenced. That by the time the application for amendment of the plaint was filed, the evidence of the Plaintiff was recorded. That therefore as per the requirement of Order VI Rule 17 of the Code of Civil Procedure, 1908 (**Code**) it was necessary for Plaintiff to demonstrate due diligence. That the application for amendment filed by the Plaintiff did not contain any averment about any due diligence on the part of the Plaintiff in moving the amendment. That it is settled law that if due diligence is not pleaded or demonstrated, the application for

amendment post commencement of the trial must be rejected. In support of his contentions, Mr. Thorat would upon judgments of the Apex Court in *Vidyabai and Others V/s Padmalatha and Anr.*¹ and *Basavaraj V/s Indira and Others*².

4) Mr. Thorat would further submit that the amendment is otherwise not *bonafide* as rent receipts in the year 2017 are issued by Pramod Virchand Shah (HUF). Mr. Thorat would submit that the amendment is aimed at wriggling out the admissions given in the cross-examination. That on account of admissions given in the cross-examination, valuable defence is created in favour of the Defendants to seek dismissal of the suit on account of non-existence of landlord-tenant relationship. That if the Defendants are permitted to amend the Written Statement to raise such defence and the effect of allowing Plaintiff's application for amendment would be to wash away the said vital defence created in favour of the Defendants. Mr. Thorat would therefore pray for setting aside the impugned order dated 6 January 2024 allowing the application for amendment of the plaint.

5) *Per-contra*, Mr. Rebello, the learned counsel appearing for the Respondent-Plaintiff would oppose the petition and support the impugned order of the Small Causes Court. He would submit that the application filed by the Plaintiff was essentially for correction of *bonafide* mistake in institution of the suit in the name of the wrong Plaintiff. That provisions of Order I Rule 10 sub-rule (1) empowers the Court to substitute the Plaintiff in the correct name. That therefore the application filed by the Plaintiff at Exhibit-38 is infact the one for

¹ (2009) 2 SCC 409.

² 2024 SCC Online SC 208.

carrying out correction in the name of the Plaintiff as per the provisions of Order I Rule 10(1) of the Code. That by way of amendment, the mistake committed in erroneously describing Parimal Pramod Shah as '*Karta*' of HUF is sought to be corrected by correcting the description of the Plaintiff as co-owner in respect of the suit building. That the nature of the suit continues to be the same i.e recovery of possession on the ground of non-user. That mere correction in the capacity as the Plaintiff does not cause any prejudice to the Defendants since the nature of the suit continues to be the same. Relying on the judgment of the Apex Court in *Bal Niketan Nursery School V/s Kesari Prasad*³, Mr. Rebello would contend that if the suit is instituted in the name of the person, who had no competence to file the same, the Court is empowered to set right matters by ordering addition or substitution of the proper Plaintiff for ensuring the due dispensation of justice. He would submit that the objective behind Order I Rule 10(1) is to save suits instituted honestly although in the name of the wrong person as Plaintiff and to ensure that honest Plaintiffs do not suffer. Mr. Rebello would therefore pray for dismissal of the petition.

6) Having considered the submissions canvassed by the learned counsel appearing for the rival parties, it is seen that the suit was initially instituted by Parimal Pramod Shah in his capacity as '*Karta and Manager of Pramod Virchand Shah (HUF)*'. In para-1 of the plaint, Plaintiff contended that he is the Karta and Manager of Pramod Virchand Shah, who are the owners and landlords of the suit building. These averments were repeated in the Affidavit of Evidence filed by the Plaintiff's witness, Parimal Pramod Shah. In the cross-examination, the

³ (1987) 3 SCC 587.

witness deposed that Pramod Virchand Shah, HUF is not the landlord of the suit building as the said HUF transferred the suit property in the year 1990 in the names of himself and his brothers. Thus, in the cross-examination, Parimal Pramod Shah deposed that he and his brothers are the owners of the suit building in their individual capacity and that the suit building is not owned by the HUF. Thus, inconsistency arose between the averments made in the plaint and chief examination on one hand and statements made in cross-examination on the other. Therefore, application for amendment of the plaint was filed contending that on account of oversight, inadvertence and old habit, Parimal Pramod Shah continued describing himself as '*Karta and Manager of Pramod Virchand Shah, HUF*' though at the time of filing of the suit, the suit building belonged to himself and his two brothers and not to the HUF. Plaintiff therefore sought to amend the plaint as per the following schedule :

SCHEDULE-A

Amendment to be carried out as under:-

- a) **In title:**
To delete the words "Karta and Manager of Pramod Virchand Shah and change year of Age delete 74 by adding 80.
- b) **In paragraph of Plaint:**
delete the words "Karta and Manager of Pramod Virchand Shah, HUF who are the Owners and Landlords"
by adding "co-owner and landlord" in place thereof.

7) In my view, what is sought to be done by the Plaintiff was to merely correct the *bonafide* mistake in description of the Plaintiff. Order I Rule 10 empowers the Court to substitute or add correct person as Plaintiff for effective determination of the subject matter in dispute. Sub-Rule (1) of Rule 10 of Order I reads thus :

10. Suit in the name of wrong plaintiff.

(1) Where a suit has been instituted in the name of 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.

8) In *Bal Niketan Nursery School*, the Apex Court has examined the scope of power of Court under Order I Rule 10 and has held as in paragraphs-13 to 22 as under :

13. The last and final ground which needs setting out in some detail is that even if a rigid view is taken and it is to be held that the suits have not been instituted in the name of the proper person viz. the Society, the High Court should have seen that Order I Rule 10 has been expressly provided in the Civil Procedure Code to meet with such situations so that the rendering of justice is not hampered. **The Rule provides that if a suit has been instituted in the name of a wrong person as plaintiff or if there is a doubt as to whether the suit has been instituted in the name of the right plaintiff the court may, at any stage of the suit, if it is satisfied that the suit has been instituted due to a bona fide mistake and that 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.** The scope and effect of Order I Rule 10 has been considered in numerous cases and there is a plethora of decisions laying down the ratio that if the court is satisfied that a bona fide mistake has occurred in the filing of the suit in the name of the wrong person then the court should set right matters in exercise of its powers under Order I Rule 10 and promote the cause of justice. **The courts have gone so far as to hold that even if the suit had been instituted in the name of a person who had no competence to file the suit, the courts should set right matters by ordering the addition or substitution of the proper plaintiff for ensuring the due dispensation of justice.** We may only refer to a few decisions in this behalf.

14. In *Hughes v. Pump House Hotel Co. Ltd. (No.2)*, a dispute was raised regarding the competence of the plaintiff to file a suit because doubts were cast as to whether the plaintiff had made an absolute assignment of his claim against the defendants, or only an assignment by way of charge. Thereupon an application was made under Order XVI Rule 2 (corresponding to Order I Rule 10 CPC) for substitution of another person as plaintiff. The application was allowed and that was upheld by the Court of Appeal and it was pointed out that **the fact that the original plaintiff had no cause of action would**

not take away the jurisdiction of the court to order the substitution of another person as plaintiff.

15. In *Krishna Boi v. Collector and Government Agent, Tanjore* when it was found that a suit for ejectment of a defendant had been brought by the Collector and Government Agent due to a bona fide mistake instead of the beneficiaries of the estate, the court allowed an application for substitution of the correct plaintiff and it was further held that the fact that the Collector had no right to institute the suit would not stand in the way of the court ordering the substitution of the correct plaintiff.

16. In *Sitla Bux Singh v. Mahabir Prasad* it was held that where a person prohibited from dealing in actionable claim under Section 136 Transfer of Property Act obtained an assignment of a bond through a bona fide mistake and instituted a suit on the basis of the same, the provisions of Order I Rule 10 would apply and the assignor can be substituted in place of the assignee as plaintiff and allowed to continue the suit.

17. In *Dinanath Kumar v. Nishi Kanta Kumar* the court allowed an application under Order I Rule 10 CPC and permitted a person who claimed that he was the real owner of the property and the original plaintiff was only a benamidar to be added as plaintiff in order to avoid multiplicity of proceedings and that he was a necessary party to the proceedings.

18. In *Laxmikumar Srinivas Das v. Krishnaram Baldev Bank, Lashkar* it was held that the words **"where a suit has been instituted in the name of the wrong person as plaintiff"** must be construed to include those suits which the instituted by persons who had no right to do so and that the fact that the person instituting the suit had no cause of action would not take away the court's jurisdiction to order substitution of another as plaintiff.

19. In *Karri Somalu v. Thimmalapalli Venkataswamy* it was held that the expression "wrong person" in **Order 1 Rule 10 cannot be confined merely to a person wrongly described but would also extend to include a person whose name ought not to have figures as plaintiff for want of right to file the suit and that the object of the Rule is to save suits instituted honestly although in the name of the wrong person as plaintiff and to ensure that honest plaintiffs do not suffer.**

20. In *Udit Narain Singh Malpaharia v. Additional Member, Board of Revenue, Bihar* it was held that in proceedings for a writ of certiorari it is not only the Tribunal or Authority whose order is sought to be quashed but also the parties in whose favour the said order is issued who are necessary parties and that it is in the discretion of the court to add or implead proper parties for completely settling all the questions that may be involved in the controversy either suo motu or on the application of a party to the writ or on application filed at the instance of such proper party.

21. In *Murari Mohan Deb v. Secretary to the Government of India* the dismissal of a petition under Article 226 of the Constitution by the Judicial Commissioner was challenged by the appellant therein. The Judicial Commissioner found that the appellant who was a forester in the employment of Tripura Government had been wrongly removed from service by an order of compulsory retirement but nevertheless refused to grant relief to the appellant because he had failed to implead the Government of India which was a necessary party to the proceedings. This Court disapproved the dismissal of the writ petition on the technical ground and observed as follows: [SCC p.124, SCC (L&S) pp.891-92, para 10]

Respondent 1 is shown to be the Secretary to the Government of India, Ministry of Home Affairs. If there was technical error in the draftsmanship of the petition by a lawyer, a Forester a Class IV low grade servant should not have been made to suffer. An oral request to correct the description of the first respondent would have satisfied the procedural requirement. By raising and accepting such a contention, after a lapse of six years, the law is brought into ridicule. The court could have conveniently read the cause title as Government of India which means Union of India through the Secretary, Ministry of Home Affairs instead of the description set out in the writ petition and this very petition would be competent by any standard. The contention is all the more objectionable for the additional reason that the appointing authority of the appellant, the Chief Commissioner of the Government of Tripura as well the Chief Forest Officer who passed the impugned order were impleaded and they represented the administration of Tripura Government as well as the concerned officers. Therefore, not only the petition as drawn up was competent but no bone of contention could be taken about its incompetence.

22. Having regard to this settled position of law the High Court ought not to have sustained the objection raised by the tenants regarding the competency of the appellant to file the suits and quashed the orders of eviction concurrently passed by the Small Cause Court and the Appellate Judge and remitted the suits for fresh consideration with directions to consider the merits of the application under Order I Rule 10 CPC but should have itself allowed the petition and added the Registered Society represented by its Secretary Dr. Om Prakash who is already on record, also as a party and disposed of the writ petitions on their merits.

(emphasis supplied)

9) Thus, as held by the Apex Court in *Bal Niketan Nursery School*, even if suit is filed in the name of a person who had no

competence to file the suit, the Court is empowered under Order I Rule 10 to order addition or substitution of proper Plaintiff for ensuring the due dispensation of justice. The Apex Court has particularly referred to its judgment in *Karri Somalu V/s Thimmalapalli Venkataswamy*⁴ wherein it has held that the expression ‘*wrong person*’ under Order I Rule 10 is not confined only to a person wrongly described but would also extend to include a person whose name ought not to have figured as Plaintiff for want of right to file suit. It further held that the object of the Rule is to save the suits instituted honestly in the name of the wrong person as Plaintiff and to ensure that honest Plaintiffs do not suffer. In my view, the Small Causes Court was empowered under Order I Rule 10 of the Code to order substitution of the Plaintiff even if the suit was found to be instituted in the name of wrong person.

10) The objective behind Order I Rule 10 (1) is to ensure that the suit does not suffer due to technicalities where there is a mistake in impleadment of Plaintiff. The provision is aimed at preventing the Defendants from seeking dismissal of genuine suit on technical grounds of error in impleading the Plaintiff. This is exactly what has happened in the present case. Defendants are attempting to defeat the suit on the technical ground that there is no landlord-tenant relationship between the HUF (wrong Plaintiff) and the Defendants. The Suit ought to have been instituted in the name of individual co-owner Parimal Pramod Shah. The nature of suit is for eviction on the ground of tenant’s non-user and mere substitution of the correct Plaintiff from HUF to Parimal Pramod Shah does not change its nature, in any manner. The Trial Court, in my

⁴ (1963) 2 AWR 138.

view, has rightly allowed substitution of Plaintiff, *albeit* by referring to wrong provision of Order VI Rule 16 of the Code.

11) The submission of Mr. Thorat that due diligence was required to be demonstrated for effecting the amendment relating to description of the Plaintiff after commencement of the trial is misplaced. Order I Rule 10(1) uses the expression '*at any stage of the suit*'. Thus for correcting description of the Plaintiff or for his substitution, there is no embargo as the one provided under Order VI Rule 17. In fact in ***Bal Niketan Nursery School*** the Supreme Court had held that even the High Court, at the third level of litigation, ought to have exercised the power under Order I Rule 10(1) by adding/substituting the correct Plaintiff. Therefore mere commencement of trial could not have been the reason for the trial court now to allow correction of description of Plaintiff. Even if the application filed by the Plaintiff was to be treated as the one filed under Order VI Rule 17 of the Code, in my view, the same could not have been rejected once it was noticed that there was *bonafide* mistake in the description of the Plaintiff. Therefore, reliance by Mr. Thorat on the judgments of the Apex Court in ***Vidyabai*** and ***Basavaraj*** (supra), does not assist the case of the Petitioners.

12) Also of relevance is the fact that the amendment effected in the plaint does not change the nature of the suit, which continues to remain suit for eviction on the ground of non-user. On the contrary, the amendment introduced by the Defendant in the Written Statement seeks to take it to a different direction, where additional issues will have to be framed about existence of landlord-tenant relationship and

maintainability of the suit. In fact, the amendment in the plaint bring backs the suit on its original track by restricting the scope of enquiry on to the real issues involved in the suit.

13) After considering the overall conspectus of the case, I am of the view that no patent error can be traced in the impugned order passed by the Small Causes Court. The Writ Petition, being devoid of merits, is **dismissed** without any orders as to costs.

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[SANDEEP V. MARNE, J.]