
(2017) 01 BOM CK 0201
In the Bombay High Court
Case No : 1834 of 2014

Anilkumar Shrivallabh Sikchi

APPELLANT

Vs

Bharat Petroleum Corporation Limited, & Ors.

RESPONDENT

Date of Decision : 31-01-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 6 Rule 17](#), [Order 22 Rule 4](#)

Citation : (2017) 01 BOM CK 0201

Hon'ble Judges : Z.A.Haq

Bench : SINGLE BENCH

Advocate : J.J.Chandurkar, Abhay Sambre, R.M.Bhangde

Final Decision : Dismissed

Judgement

1. Heard.

2. RULE. Rule made returnable forthwith.

3. The plaintiff has filed this petition to assail the order passed by the trial Court by which the application (Exh.126) filed by the defendant Nos. 2, 2A to 2C1 under Order 6 Rule 17 of the Code of Civil Procedure seeking permission to amend the written statement is allowed.

4. The plaintiff has filed civil suit against the respondent No.1 i.e. Bharat Petroleum Corporation and the respondent No.2 M/s. S.D. Asoriya praying for decree for ejectment, possession and damages. The respondent No.2/ defendant No.2 is partnership firm and at the time of filing of the civil suit it was represented by Sanktaprasad D. Asoriya. The written statement on behalf of the respondent No.2 firm was filed in 2003. This written statement was verified and affirmed by Sanktaprasad Dwarkaprasad Asoriya. Subsequently, the plaint is amended and defendant Nos. 2A, 2B and 2C came to be impleaded in the capacity as partners of the defendant No.2 firm. In September, 2008 defendant

Nos. 2A, 2B and 2C filed written statement. The defendant No.2C died on 10th January, 2011. After the death of defendant No.2C, defendant No.2(C1) is brought on record as per the order passed by the trial Court on 4th April, 2013. The defendant No.2(D) is brought on record as per the order passed by the trial Court on 4th April, 2013. After defendant No.2(C1) and 2(D) were brought on record, they filed pursis dated 21st August, 2013 (Exh.125) and adopted the written statement filed by defendant No.2(C). On 27th November, 2013 the defendant No.2, 2A, 2B and 2C filed application (Exh.126) seeking permission to amend the written statement. This application is allowed by the impugned order.

5. Shri J.J.Chandurkar, learned advocate for the petitioner/ plaintiff has submitted that the trial Court has committed an error in allowing the application (Exh.126) and permitting the defendant No.2, 2A, 2B and 2C to amend the written statement and take a plea which was not raised earlier. According to the plaintiff, defendant No.2, 2A, 2B and 2C are impleaded, being partners of defendant No.2 firm and they cannot take a plea which was not raised in the written statement filed on behalf of the defendant No.2 firm. It is submitted that the written statement on behalf of the defendant No.2 was filed in 2003 and the matter proceed and affidavit on behalf of the plaintiff in lieu of his evidence came to be filed on 29th March, 2010, that is the trial commence on 29th March, 2010 and the trial Court lost the jurisdiction to permit the amendment in view of the bar created by proviso below Rule 17 of Order 6 of the Code of Civil Procedure. The submission is that the defendant Nos. 2, 2A, 2B and 2C have not been able to show that there was no wilful or deliberate delay on their part in seeking the proposed amendment. It is prayed that the impugned order be set aside and the application filed by the defendants seeking permission to amend the written statement be dismissed.

6. Shri R.M. Bhangde, learned advocate for the defendant Nos.2, 2A to 2D has supported the impugned order. It is argued that the defendant No. 2(C1) is brought on record as legal representative of the defendant No.2C on 4th April, 2013 and he filed pursis dated 21st August, 2013 adopting the written statement filed by the defendant No.2C and this was done in exercise of his right conferred by Order 22 Rule 4(2) of the Code of Civil Procedure. It is argued that once the defendant No.2 (C1) got right of filing the written statement as per the above referred provision, there cannot be any impediment in his way for seeking amendment to the written statement which is done within three months of filing of the pursis dated 21st August, 2013. It is submitted that the affidavit in lieu of the evidence of plaintiff was filed on 29th March, 2010 and defendant No.2(C1) is impleaded on 4th April, 2013 and as per Order 22 Rule 4(2) of the Code of Civil Procedure, the defendant No.2(C1) was entitled to file written statement as of right and in these facts, the bar created by the proviso below Rule 17 of Order 6 of the Code of Civil Procedure will not be attracted. To support the submissions, reliance is placed on the following judgments :

i) Judgment given in the case of Sumtibai vs. Paras Finance Co., reported in

(2007) 10 SCC 82,

ii) Judgment given in the case of Saiyed Sirajul Hasan vs. Sh. Syed Murtaza Ali Khan Bahadur and others, reported in AIR 1992 Delhi 162.

7. Shri Abhay R. Sambre, advocate for the respondent/ defendant No.1 has submitted that the defendant No.1 is not concerned with the point which falls for consideration.

8. Order 22 Rule 4 of the Code of Civil Procedure prescribes for the procedure in case of death of one of the several defendants or of sole defendant. SubRule (2) of Rule 4 of Order 22 lays down that any person who is impleaded as party because of death of the defendant may make any defence appropriate to his character as legal representative of the deceased defendant. In my view, subrule (2) confers a right on the legal representative brought on record after the death of the defendant to raise a defence i.e. to file written statement, however, this right is not unrestricted and is qualified by the clause "appropriate to his character of legal representative". The qualifying clause puts restrictions on the right of the legal representative to raise a defence which is in consonance with the defence of the deceased defendant. Thus, the legal representative can raise the defence which deceased defendant has raised or could have raised and this is obviously because the legal representative steps in the shoes of the deceased defendant. In this background it cannot be said that the defendant No.2(C1) can amend the written statement and raise a plea which his predecessor failed to raise till the trial commenced, unless it is shown that inspite of due diligence the deceased defendant or his legal representative could not bring on record the facts which are sought to be brought on record by the proposed amendment. If the defendant No.2(C) could not have been permitted to amend the written statement without overcoming the bar created by proviso below Rule 17 of Order 6 of the Code of Civil Procedure, defendant No.2(C1) who has stepped into the shoes of defendant No.2C cannot be permitted to amend the written statement. While considering the rival submissions the learned trial Judge has recorded that the application on behalf of the defendant Nos. 2, 2A, 2B and 2C seeking permission to amend the written statement is belated. However, without considering the proviso below Rule 17 of Order 6 of the Code of Civil Procedure, defendant Nos. 2, 2A, 2B and 2C are also permitted to amend the written statement and this is only because according to the trial Court defendant No.2(C1) can raise additional defence. The learned trial Judge has overlooked that the right of defendant No.2(C1) is not unrestricted and restrictions which applied to defendant No.2C would be applicable to the defendant No. 2(C1) also and if the defendant No.2C was precluded from amending the written statement, then the defendant No.2(C1) cannot be permitted to amend the written statement.

9. In the judgment given in the case of Sumatibai and others (supra), the clause "make any defence appropriate to his character as legal representative of the deceased defendant" did not fell for consideration of the Hon"ble Supreme Court.

Similarly, the judgment given in the case of Saiyed Sirajul Hasan is not of any assistance to the defendant Nos. 2, 2A, 2B, 2C, 2(C1) as in this judgment it is laid down that the legal representative can and may as a matter of right raise any defence which is appropriate to his character as legal representative of the deceased defendant.

10. At this stage, the learned advocate for the defendant Nos. 2, 2A, 2B, 2C and 2(C1) has submitted that the trial Court has only permitted the defendants to raise defence and it does not mean that the defence is accepted by the trial Court and the trial Court has consciously left it open to be considered at an appropriate stage. Even if this submission is accepted, the defendants cannot be permitted to amend the written statement in view of the bar created by the proviso below Rule 17 of Order 6 of the Code of Civil Procedure.

11. In view of the above, I find that the trial Court has exceeded its jurisdiction by permitting the above referred defendants to amend the written statement. Hence, the following order :

- i) The impugned order is set aside.
- ii) The application (Exh.126) is dismissed.

Rule is made absolute in the above terms. In the circumstances, the parties to bear their own costs.

The learned trial Judge has sent a communication dated 7th December, 2016 requesting that the time fixed by this Court to dispose the civil suit be extended by six months.

Considering the facts of the case and the explanation given in the communication, the time to dispose the civil suit is extended till 5th May, 2017.