

(2001) 06 BOM CK 0054

In the Bombay High Court

Case No : Writ Petition No. 3187 of 1995

Shalini Vyankatesh Puntambekar

APPELLANT

Vs

Jayaprakash R. Agarwal

RESPONDENT

Date of Decision : 27-06-2001

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13(1)
Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17

Citation : (2001) 3 ALLMR 303 : (2002) 2 BOMLR 524 : (2002) 1 MhLj 925

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : S.V. Pitre, for the Appellant; S.P. Deshmukh, for A.V. Anturkar, for the Respondent

Final Decision : Allowed

Judgement

1. This writ petition under Article 227 of the Constitution of India takes exception to the orders passed by the IVth Additional District Judge, Pune dated 16-6-1995 in Civil Revision Application No. 110 of 1994 and of the Small Causes Court Judge, Pune dated 8-8-1994 in Regular Civil Suit No. 1007 of 1989.

2. The petitioner-original plaintiff is the landlord in respect of premises consisting of house bearing City Survey No. 380 of Shaniwar Peth, Pune. The petitioner instituted suit against respondent-tenant for possession of the suit premises before the Small Causes Court, Pune being Civil Suit No. 1007 of 1989. The main ground pressed by the petitioner for eviction is that the respondent-tenant has acquired suitable residence and therefore was liable to be evicted within the meaning of Section 13(1)(l) of the Bombay Rent Act. The petitioner's case proceeded on the premise that the suit premises were let out to the respondent exclusively for residence purpose but the respondent has changed the user and started using it for business purpose. In the circumstances besides claiming eviction u/s 13(1)(l) the petitioner also claimed possession on the ground u/s 13(1)(k) read with 13(1)(a) i.e. nonuser for more than six, months preceding the

institution of the suit for the purpose for which the premises were let out. This suit was resisted by the respondent by filing written statement. In the written statement the specific case made out by the respondent is that the premises were let out for business purpose and the same were being used for that purpose and as such there was no breach committed by the respondent. On the basis of the abovesaid pleadings issues were framed and the parties went for trial. The petitioner entered into witness box and deposed in support of the case made out in the plaint. The examination in chief of the petitioner would clearly indicate that the petitioner asserted that the suit premises were let out for residential purpose and for no other purpose. It is further stated that the suit premises were let out to the respondent for residential purpose almost after eight years after the date on which the shop premises in the same building were let out to the respondent. The petitioner also deposed that the respondent Jayprakash Agarwal had signed on the back side of the counter foil of the rent receipts acknowledging that the premises were let out for residential purpose. The petitioner also deposed that other three tenements in the same building were also let out for residential purpose. The petitioner while adducing evidence has placed on record voters' list as on 1-1-1984 to show that the defendant and his family members were staying in the suit premises. He further stated that the defendant and his family members continued to stay in the suit premises till 1985 but subsequently in the year 1986 the defendant's son acquired sufficient accommodation in 383, Shaniwar Peth and started living separately in that accommodation; and since then the respondent shifted his household articles from the suit premises and started using the suit premises for business purpose. It appears from the record that the petitioner had entered the witness box on 22-2-1994 on which date neither the respondent nor his advocate remained present for cross examination. Instead of cross examining the petitioner, the respondent took out an application which is the subject matter of the present writ petition being Ex. 75 praying for amendment to the written statement. The trial Court by the impugned order dated 8-8-1994 allowed the said amendment. I shall make reference to the nature of amendment a little later. Against the said order the petitioner took up the matter before the District Judge by way of Civil Revision Application No. 110 of 1994 which was eventually dismissed by the impugned order dated 16-6-1995 mainly on the ground that the revision application was not maintainable before the district court against the procedural order. In the circumstances the petitioner has taken except to both the aforesaid orders which in effect allowed the amendment of the written statement as prayed for by the respondent in the present petition.

3. The nature of the amendment sought by the respondent in the written statement in substance is that the Respondent wants to set up plea that the suit premises were originally let out to the respondent for composite purpose of business and residence and not exclusively for business as already contended by him in the written statement. The trial Court was pleased to allow the said amendment. Learned counsel for the petitioner assails the correctness of the said

order and the approach adopted by the Court below in allowing the said amendment. According to the petitioner the Courts below have clearly exceeded the jurisdiction in allowing the said amendment, for it amounts permitting the respondent to take inconsistent pleas and more particularly when the said application was an afterthought and belated one especially being moved after the petitioner had already stepped into the witness box. It is also submitted that the amendment was intended to destroy the case made out by the petitioner in the pleadings as well as during the examination in chief and such amendment ought not to have been permitted as it would cause serious miscarriage of justice. According to the petitioner it is not in dispute that the main ground on which the petitioner had approached the rent court was that the respondent had acquired suitable residence. It cannot be disputed that the said ground can be pressed only when the suit premises are originally let out for residence and the tenant in due course of time acquires suitable residence. If the tenant acquires suitable premises for business, in such a situation, the said ground would be of no avail and cannot be pressed in law. Having regard to this position it is contended that the respondent has moved the present application for amendment. The learned counsel for the petitioner has relied upon the decisions of the Apex Court in the cases of Jagan Nath (Deceased) through Lrs. Vs. Chander Bhan and Others, , Shiromani Gurdwara Prabhandak Committee Vs. Jaswant Singh, , Heeralal Vs. Kalyan Mal and Others, and that of the High Court of Assam in the case of Mt. Subashini Majumdar and Anr. v. Krishna Prasad Mahatoo and Ors. AIR 1956 GUA 79 and of this Court in the case of Balu Appaji Sangaonkar Vs. Rangrao Dattoba Palkar, . On the other hand the learned counsel for the respondent submits that the proposed amendment was only explanatory in nature and did not amount to taking any inconsistent pleas. He submits that there is no dispute that the suit was mainly filed on the ground that tenant having acquired suitable residence, therefore, whether the respondent's claim that the premises were let out for business or for composite purpose would not make any difference as in both situations the ground u/s 13(1)(I) will not be available. The learned counsel also adopts the reasons indicated by the trial Court in allowing the amendment. He submits that no prejudice will be caused to the petitioner if amendment was allowed as ordered by the trial Court. He has placed reliance on the decisions of the Apex Court in the cases of (1994) 2 SCC 29 (SC) and Akshaya Restaurant Vs. P. Anjanappa and Another, .

4. At the outset it needs to be mentioned that the latter judgment of the Apex Court cited by the Respondent in the case of Akshaya Restaurant (supra) has been held to be per incuriam by a subsequent judgment of the Apex Court reported in Heeralal's case (supra) and therefore no useful purpose will be served by making any reference to the said decision.

5. Having considered the rival submissions, it would be essential to first advert to the original stand taken by the respondent in the written statement. On perusal of the written statement it would appear that a specific stand has been taken by the respondent that the suit premises were let out to the respondent for business

purpose and the same was being used for that purpose only. There is not even a remote suggestion that the premises were let out for composite purpose as is being now contended by way of amendment. There is perceptible difference in the nature of use for business purposes and composite use, in contradiction to the residential use. It is not in dispute that the petitioner proceeded with trial on the clear stand taken by the Respondent in the written statement that the suit premises were let out exclusively for residential purpose and adduced evidence in that behalf. Only at such a belated stage did the respondent think it appropriate for moving the Court to seek amendment of the written statement. That no explanation has been offered, which prevented the respondent from taking such a stand in the written statement itself. In that sense the application for amendment was not only belated but also suffer from the vice of being afterthought. This is besides the point that the same also suffered on the ground of taking inconsistent and destructive pleas. The attempt of the respondent was obviously to frustrate the relief which the petitioner could have succeeded on the basis of the pleading and the evidence adduced at the trial. Such attempt cannot be permitted, whereas, in the interest of justice, it would have been appropriate to reject the subject application. As back as in the year 1926 the Privy Council in a decision reported in the case of AIR 1926 18 (Privy Council) observed as under:

"A litigant who has all along maintained a position in support of one branch of his suit cannot be permitted when he fails upon this branch to withdraw from the position and assert the contrary more especially when he thereby places his opponent at a great disadvantage."

In the subsequent decision reported in the case of AIR 1936 264 (Privy Council) the Privy Council observed that:

"that it sometimes happens that persons make statements which serve their purpose or proceed upon ignorance of the true position; and it is not their statements, but their relations with the estate, which should be taken into consideration in determining the issue."

6. The principles underlying the aforesaid decisions would clearly indicate that the party cannot be permitted to change the stand which would frustrate the case of the other side. This is the elementary rule of logic. It is well settled that he is not to be heard who alleges things contradictory to each other. As the maxim goes *Allegans Contraria Non Est Audiendus*. Even the Apex Court in the Decision reported in Heeralal's case (supra) observed that once written statement contains admission in favour of the plaintiff, by amendment such admission of the defendants cannot be allowed to be withdrawn, if such withdrawal would amount to totally displacing the case of the plaintiff and which would cause him irretrievable prejudice. The principle enunciated by the Apex Court squarely applies to the fact situation of the present case. In the present case undoubtedly the petitioner besides the averments in the plaint proceeded with the trial and entered the witness box and gave evidence in the context of the stand taken by the respondent in the written statement that the premises

were let out for business purpose and not for residence. It is at such belated stage that the respondent thought of introducing amendment which would have the inevitable effect of permitting a plea that would frustrate the cause of action of the plaintiff to maintain the suit on the grounds u/s 13(1)(l) read with Sections 13(1)(k) and 13(1)(a) of the Bombay Rent Act. No doubt the Apex Court in a judgment reported in Arundhati's case (supra) has observed that it is open to the parties to raise even mutually inconsistent pleas and if the reliefs could be founded on the alternative plea it could be granted. In the present case the dominant purpose of the proposed amendment was only to protract the trial and frustrate the cause of action of the plaintiff. The proposed amendment is obviously not intended to take a mutually inconsistent plea. Besides, the amendment obviously attempts to take the petitioner-plaintiff by surprise on the stand already taken by him in the evidence. In such a situation, the amendment, as prayed for by the respondent, could not have been granted.

7. In the circumstances, the order passed by the trial Court permitting the amendment of written statement cannot be sustained in law. The same therefore is quashed and set aside and consequently application below Ex. 75 filed by the respondent for amendment of written statement stands rejected.

8. Since the suit pertains to the year 1989 the trial Court is directed to expedite the hearing of the suit and preferably decide the same within a period of six months from the receipt of writ of this Court. It is made clear that the trial Court shall not be influenced by any of the observations made in this order and shall proceed to decide the suit in accordance with law on the basis of evidence adduced by rival parties.

9. This writ petition therefore succeeds and the impugned order is set aside. Rule made absolute in above terms with costs.