

(2016) 07 BOM CK 0101
In the Bombay High Court
Case No : Writ Petition No. 252 of 2016

Shambhavi Co-op. Housing Society Ltd.	APPELLANT
Vs	
Shri. Shrikrishna Talak	RESPONDENT

Date of Decision : 13-07-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Constitution of India, 1950 — Article 226
Goa Co-operative Societies Act, 2001 — Section 83

Citation : (2016) 5 AIRBomR 51 : (2017) 2 ALLMR 611

Hon'ble Judges : C.V. Bhadang, J.

Bench : Single Bench

Advocate : Mr. Ajit R. Kantak with Ms. Rajas A. Kantak, Advocates, for the Petitioner; Mr. Deep Shirodkar, Advocate, for the Respondent

Final Decision : Partly Allowed

Judgement

C.V. Bhadang, J.—Rule. Rule made returnable forthwith. Mr. Shirodkar, learned Counsel waives service on behalf of the respondent. Heard finally, by consent of the parties.

2. By this petition, the petitioner, who is the disputant before the Nominee of the Registrar of Co-operative Societies, is challenging the judgment and order dated 23.11.2015, passed by the learned President, Co-operative Tribunal, Panaji, Goa in Co-operative Revision Application No. 5/2014, by which the order dated 09.06.2014, passed by the Nominee of the Registrar of Co-operative Societies, allowing the application for amendment of the respondent, has been confirmed.

3. The brief facts are that the petitioner has filed the aforesaid dispute stating that the respondent is staying in a flat on the third floor of the building, bearing Flat No. B/T-1. It is contended that the respondent has constructed an illegal shed, opposite his flat on terrace "B" on 25.05.2010 and fitted a fabricated gate, next to the second floor flat on 30.12.2010. This is done without the consent or the permission of the Society. The Society had taken a decision to remove the

same and a notice was accordingly issued to the respondent. However, the respondent did not comply. The petitioner therefore, prayed to direct the respondent to remove the gate and the shed, thereby restoring rights to the other occupants to terrace "B".

4. The respondent filed reply opposing the claim. It was contended that there is no dispute as such, which can be tried by the said authority. It was contended that the terrace "B" of the said building was "having a defect, resulting in heavy leakage of water" in the flat of the respondent, as well as of one Mr. Santosh Kundaikar. It could have the effect of damaging the entire building. Apart from this, there were trespassers. Considering this, the office bearers after an inspection had agreed to erect the fabricated shed, provided that the respondent should not put permanent lock to the said structure and the shed. It was contended that the respondent erected the shed after spending Rs. 1,10,000/- and as requested by the office bearers, did not put a permanent lock to the shed, however, for safety purpose, a lock is put for "temporary span of period", so that any trespasser should not visit the said terrace. In short, it was contended that the structure was erected with the oral permission and consent of the office bearers and the occupants were always allowed to go on the terrace and the respondent had never obstructed access to the same. It was contended that when, the petitioner demanded Rs. 1,10,000/-, a false dispute has been raised. Thus, while seeking dismissal of the dispute, the respondent simultaneously claimed that he be paid Rs. 1,10,000/- along with interest at the rate of 18% per annum on the said amount.

5. The Nominee of the Registrar of the Cooperative Societies framed the following issues on 18.11.2013.

"1. Whether the Disputant Society prove that the opponent has constructed shed on Terrace B of the Society without the consent of the Disputant Society ?

2. Whether the Disputant Society proves that the opponent has fixed fabricated gate on Terrace B without the consent of the Disputant Society ?

3. Whether the opponent prove that the Disputant Society is liable to pay to him Rs. 1,10,000/- incurred on fabricating and fixing of terrace shed and gate on staircase B with 18% interest from the date of expenditure till the repayment of the said amount?

6. It appears that on 02.04.2014, the respondent filed an application seeking to amend the written statement by addition of paragraphs 3.A to 3.H. The respondent now wants to claim that since, there was only a single flat and open terrace, he has purchased the same from his brother, who was the contractor and builder and the entire consideration has been paid. In short, vide paragraphs 3.A and 3.B, the respondent now wants to plead that he is the owner of the terrace.

7. In paragraphs 3.C, 3.D and 3.E, the respondent wants to plead that other

members/occupants of the society have carried out illegal construction, including conversion of flat and garages to hall/shops and no action has been taken against them and the respondent has been discriminated and singled out. In paragraphs 3.F and 3.H, formal amendment that respondent is harassed and victimised, is made. In paragraph 3.G, the respondent wants to introduce a claim for Rs. 1,10,000/- and it is contended that though, the Society has decided to take up the issue, however, till date no action has been taken to refund the amount.

8. The application is opposed by the petitioner. It was inter-alia contended by the learned Counsel for the petitioner that the evidence has started in the matter and as such, the application would not be maintainable and the respondent is trying to introduce self destructive pleadings.

9. The learned Nominee of the Registrar by an order dated 09.06.2014 found that although, the cross examination of DW-1 Shri. Satyesh Palondicar had started on 10.03.2014, in order to arrive at proper and just decision and to avoid multiplicity of litigation, the amendment was necessary. The Nominee of the Registrar has referred to the judgment of the Supreme Court in the case of Revajeetu Builders and Developers v. Narayanaswamy and sons and Others, (2009) 10 SCC 84. The Nominee of the Registrar has also noticed the judgment of this Court in the case of Mahadeo M. Bhanje v. Balaji Shivaji Pattade, 2012(5) BOM C.R. 777 and has held thus:

"I have perused the citations submitted by the Disputant and the Opponent and heard their arguments and I have come to the conclusion that the proviso of Order 6, Rule 17 is applicable more to pleadings and not written statement, addition of a new ground of defence or submitting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable. Therefore the following order:

ORDER

This application for amendment of Reply/Written Statement is allowed. The opponent to amend the reply/written statement within 14 days and serve an amended copy to the Disputant."

10. This was challenged by the petitioner before the learned Co-operative Tribunal. It appears that it was contended before the Co-operative Tribunal that the Nominee of the Registrar has no power to entertain the application for amendment, which contention was negated by the Co-operative Tribunal. On merits the Co-operative Tribunal found as under:

"10. It is a general principle that the amendment of pleading cannot be allowed so as to alter materially or substitution of cause of action or nature of claim. But this has no counterpart in the principles relating to amend the written statement or reply. Therefore, even the additions of new grounds of defence or substituting

or altering a defence or taking inconsistent pleas in the written statement/reply would not be objectionable. Altering or substituting a new cause of action in the plaint may be objectionable. In the present case, the impugned amendment has been made to the reply of the respondent. There was no additions of new grounds of defence or any substitution or alteration of defence or any inconsistent pleas, changes or alterations. Therefore, the Nominee of the Registrar of the Co-operative Societies has rightly allowed the said amendment."

11. I have heard the learned Counsel for the parties and perused the record.

12. It is submitted on behalf of the petitioner that the amendment, which introduces altogether a new case or inconsistent plea or has the effect of taking away an admission, cannot be allowed, that too after the hearing of the dispute had commenced. The learned Counsel has placed reliance on the decision of the Supreme Court in the case of *Gautam Sarup v. Leela Jetly and Others*, (2008) 7 SCC 85 and *Vidyabai and Others v. Padmalatha and Another*, (2009) 2 SCC 409.

13. On the contrary, it is submitted by the learned Counsel for the respondent that all such amendments, which are necessary for deciding the real controversy in issue, has to be allowed. He submits that such an amendment can be allowed at any stage and once the Nominee of the Registrar has exercised the discretion, this Court would be slow in interfering with the same.

Reliance is placed on the decision of the Supreme Court in the case of *Estralla Rubber v. Dass Estate (P) Ltd.*, (2001) 8 SCC 97.

14. I have carefully considered the circumstances and the submissions made and I find that the impugned orders cannot be sustained.

15. At the outset, it may be mentioned that there is no contention raised about the powers of the Nominee of the Registrar to entertain an application for amendment and I do not propose to examine the same. Similarly, it is also not necessary to examine whether, strictly the provisions of Order 6, Rule 17 of CPC, would apply to the proceedings before the Nominee of the Registrar in a dispute under the Goa Co-operative Societies Act. This is because on merits, I find, that the amendment could not have been allowed.

16. As noticed earlier, initially, the case of the respondent was that on account of leakage of the terrace, the building was getting affected and in order to secure the same and in order to safe guard the terrace from the entry of any trespassers, the shed was erected and the gate was installed putting a lock thereon. It was claimed that this was with the permission of the office bearers, for which the petitioner has incurred an amount of Rs. 1,10,000/-. Now, by virtue of the proposed amendment, the petitioner wants to contend that he has purchased the terrace from his brother, who was the contractor and a builder. The pleas are evidently self destructive in nature. In the case of *Gautam Sarup* (supra), it has been held thus in paragraph 28 of the judgment:

"28. What, therefore, emerges from the discussions made herein before is that a

categorical admission cannot be resiled from but, in a given case, it may be explained or clarified. Offering explanation in regard to an admission or explaining away the same, however, would depend upon the nature and character thereof. It may be that a defendant is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other."

(Emphasis supplied)

17. It can thus be seen that although, alternate pleas can be permitted, such pleas cannot be destructive in nature. The claim that because there was a single flat with terrace, the shed was erected with the permission of the office bearers is diametrically opposite to the claim that the terrace was purchased by the respondent and such amendment, could not have been allowed.

18. As noticed earlier, the Nominee of the Registrar is trying to make distinction between the pleadings and the plaint. It is well-settled that pleadings include the plaint and the written statement. The Nominee of the Registrar has held that addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable, while the same would not be permissible in case of a plaint. It is true that as per the settled legal position, prayer for amendment to the written statement is looked more liberally than an amendment, to the plaint. However, this would not permit, introduction of pleas, which may be self destructive. Incidentally, the case of Gautam Sarup (supra) arose out of the prayer of amendment of the written statement.

In the case of Estralla Rubber (supra), it has been held that an admission in the plea can be allowed to be explained or amplified. Here is the case where, the effect would be taking away of admission.

19. The Co-operative Tribunal in paragraph 10 of the judgment, has found that there was no addition of new grounds of defence or any substitution or alteration of defence. This in my considered view cannot be accepted as the case of permissive use of the terrace and erection of the shed with the permission of the office bearers can hardly be said to be consistent with the case that the terrace has been purchased by the respondent. I therefore find that the Courts below were in error in allowing the amendment to the extent that it sought introduction of the plea, based on the alleged purchase of the terrace.

20. In so far as the allegation that some other members had also made illegal construction, the same would not be strictly relevant. It is trite that, two wrongs do not make a right. It is made clear that this Court has not expressed and it is not necessary to express any opinion as to the legality of any such construction if, it is done by the other members. Suffice it to mention that this may not be relevant for deciding the controversy in issue.

21. I thus find that the amendment seeking introduction of paragraphs 3.A to

3.E, cannot be allowed. The amendment as to paragraphs 3.F to 3.H, can be allowed to be introduced by way of amendment. Thus, the petition is partly allowed. The impugned orders are modified. The application for amendment is partly allowed, to the extent of incorporation of paragraphs 3.F to 3.H.

22. Rule is made absolute in the aforesaid terms, with no order as to costs.