(2001) 2 ALLMR 556 : (2001) 3 BomCR 249 : (2001) 2 BOMLR 715 : (2001) 2 MhLj 709

Bombay High Court

Case No: Writ Petition No. 71 of 1993

Balu Appaji Sangaonkar		APPELLANT
	Vs	
Rangrao Dattoba Palkar		RESPONDENT

Date of Decision: Feb. 9, 2001

Acts Referred:
Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 â€" Section 15A#Civil Procedure Code, 1908 (CPC) â€" Order 6 Rule 17#Constitution of India, 1950 â€" Article 227

Citation: (2001) 2 ALLMR 556 : (2001) 3 BomCR 249 : (2001) 2 BOMLR 715 : (2001) 2 MhLj 709

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

Bench: Single Bench

Advocate: Ms. Shankuntala A. Mudbidri, for the Appellant; Shri N.J. Patil, for the Respondent

Judgement

A.M. Khanwilkar, J.
This writ petition, under Article 227 of the Constitution of India, takes exception to the order passed by the 4lh

Additional District Judge, Kolhapur dated 16.12.1992 below Exhibit 35 in Regular Civil Appeal No. 69 of 1992.

2. The preliminary objection raised on behalf of the Respondent is that this writ petition cannot proceed in absence of Kondi Rama Dhinde, original

defendant No. 1. This objection is, however, being raised for the first time across the bar. This writ petition has remained pending since 1993, for it

was admitted as back as on 18.2.1993. Admittedly, the Respondent did not file any reply affidavit or a formal application raising this preliminary

objection, but the same was raised only when the Court was about to dictate the judgment after hearing both the Counsel on merits. In any case I

find no force in the preliminary objection. In my view the presence of Kondi Rama Dhinde, original defendant No. 1, is not essential or necessary

for the adjudication of this petition. It is relevant to point out that, admittedly, the suit proceeded ex-parte against the said Kondi Rama Dhinde,

original defendant No. 1. Moreover, the said Kondi Rama Dhinde, original defendant No. 1, filed purshis before the Trial Court that he had no

concern with the suit premises and he is not interested in contesting the suit. Accordingly, the suit proceeded ex-parte against the said Kondi Rama

Dhinde, original defendant No. 1. Besides this, the application on which the impugned order has been passed by the Court below was taken out

by the Respondent herein only. The Respondent has prayed for amendment of written statement as well as the appeal memo pending before the

Appeal Court. Accordingly, it is only the Respondent herein who can be said to be the interested and contesting party and would be the only

aggrieved party if the order passed below Exh. 35 is to be reversed or modified in any manner. As such the presence of Kondi Rama Dhinde,

original defendant No. 1, cannot be said to be essential or necessary. Therefore, I have no hesitation in rejecting the preliminary objection raised

on behalf of the Respondent.

3. Coming to the merits of the case, the Petitioner plaintiff instituted suit against the Respondent-original defendant No. 2 and said Kondi Rama

Dhinde, original defendant No. 1, for possession of the suit property mainly on the ground of unlawful sub-letting of the suit premises in favour of

the Respondent-defendant No. 2. The averments in the plaint, which was produced before this Court, indicate that the Petitioner went to the Court

with specific case that the Respondent herein was seen in the suit premises some time in 1968 when the Petitioner issued notice dated 6.5.1968 to

the said Kondi Dhinde, original tenant defendant No. 1, calling upon him to explain the circumstances. The Petitioner''s case in the plaint is that that

in response to the said notice the said Kondi Rama Dhinde, original defendant No. 1, replied that Respondent herein - Defendant No. 2, was in

the premises only as his agent and in no other capacity and that the Petitioner verified the said fact and was satisfied with this reply. The plaint, filed

in the year 1983, further asserts that recently it was noticed that the defendant No. 2 - Respondent herein was seen in exclusive possession of the

suit premises and defendant No. 1 had presumably left the suit premises by unlawfully subletting the same to the Respondent herein. Thus the

plaint, at best admits of the exclusive possession of the Respondent as sub-tenant only from 1983. In this background the Petitioner maintained the

suit against the Defendants.

4. As mentioned earlier, Kondi Rama Dhinde, original defendant No. 1, did not contest the suit and allowed the same to go ex-parte, whereas

Respondent herein filed his written statement. In para 3 of his written statement there is vague and general denial of the averments made in paras 4

to 8 of the plaint. Further, the Respondent has taken a specific plea that one Jitkar was running hotel in the suit premises in the name and style of

Mangal Vishranti Griha in the year 1960; and the said Mr. Jitkar inducted the Respondent in the suit premises and also introduced him to the

Petitioner landlord, who in turn accepted the Respondent as his direct tenant in the suit premises. Thus, a specific stand is taken in the written

statement that the Respondent herein was occupying the suit premises in his own right since year 1960 as tenant thereof. In para 7 of the written

statement it is further averred by the Respondent that between 1960 and 12.11.1965 - furniture, goodwill and other articles in the suit premises

were owned by the said Krishna Jitkar; and for the use thereof the Respondent was paying consideration to the said Jitkar and that by agreement

the said Jitkar has made over the furniture and goodwill in favour of the Respondent. Besides this In para 8 of the written statement the

Respondent has also categorically averred that from 1960 till the filing of the written statement. Kondi Rama Dhinde had no concern whatsoever

with the suit premises. The substance of the stand taken in the written statement was that defendant No. 1 had no concern with the suit premises

and that the Respondent was the direct tenant of the petitioner landlord since 1960.

5. In the backdrop of the abovesaid rival stand, the matter went to the trial. The Trial Court after scrutinizing the evidence on record negatived the

stand taken by the Respondent defendant No. 2. The Trial Court rejected the plea of the Respondent that he was inducted as tenant by the

Petitioner in the suit premises since 1960. The Trial Court further proceeded to record a clear finding that the Respondent was in unlawful

occupation of the suit premises. Therefore, the Court decreed the suit in favour of the Petitioner.

6. Against this decision, the matter has been taken in appeal before the District Court. The Respondent filed appeal being Regular Civil Appeal

No. 69 of 1992. After filing the said appeal, the Respondent, for the first time took out application below Exh. 35 praying for permission to amend

the written statement by inserting para 13A therein. By the proposed amendment the Respondent wanted to raise an alternative plea that even

assuming that the Respondent was inducted as the sub-tenant by the defendant No. 1 prior to 1.2.1973 even then the Respondent was protected

by virtue of Section 15A of the Bombay Rent Act. This application has been allowed by the lower Appellate Court by the impugned order.

7. The basis on which the said application has been allowed is mainly that the proposed amendment was not inconsistent with the earlier stand

taken by the Respondent and that if the amendment was allowed it would facilitate the Court to arrive at a proper conclusion and that it was based

on legal question. This order has been taken exception to in the present writ petition.

8. In the writ petition, the Petitioner has challenged the order passed below Exh. 35 as well as Exh. 36, both dated 18.12.1992. However, the

order which has been placed along with the writ petition, being Exh. C to the writ petition, is passed below Exh. 35. In other words, order below

Exh. 36 is not on record of this petition, but, the same was produced at the time of hearing of this writ petition. The correctness of the said order

below Ex. 36 produced before this Court is not doubted. It is not in dispute that the application below Exh. 36 is placed on record, being Exh. B

to the writ petition, which is at page 9 of the paper book. By the said application the Respondent wanted to carry out consequential amendment in

the appeal memo which was pending before the Appellate Court. Therefore, order below Ex. 36 is only a consequential order to the one which

was passed below Exh. 35.

9. The learned Counsel for the Respondent raised a technical objection that the order below Exh. 36 has remained unchallenged, for it is not

annexed to the memo of petition. However, the learned Counsel is not in a position to dispute that prayer clause (b) of the writ petition challenges

the said order passed below Ex. 36 as well. Thus order below Exh. 36 is also subject matter of challenge in this writ petition. The objection raised

at the hearing of this petition across the bar overlooks that if he order below Exh. 35 is held to be unsustainable, the consequential order below Ex.

36, which is rested on order below Exh. 35, will naturally fail and cannot be allowed to stand.

10. The learned Counsel for the Petitioner chiefly contends that the amendment permits the Respondent to take a stand which would be destructive

of his earlier stand taken in the written statement. It is argued that the proposed amendment besides being inconsistent, but would also cause

irreparable prejudice to the Petitioner having regard to the fact that both the parties have led evidence on the basis of pleadings which were on

record at the relevant point of time. The learned Counsel for the Petitioner, to buttress her submission, relied upon the following reported decisions

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(1) Shiromani Gurdwara Committee v. Jaswant Singh,.

(2) Heeralal v. Kalyan Mal and Ors.,

(3) Sant Ram Agarwal v. Civil Judge, Mohanlal Ganj and Ors.,

(4) The Committee of Management of Bhabanand Sanskrit Mahavidyalaya, Azamgar Vs. Education Secretary, U. P. Government, Lucknow and

others,

11. On the other hand, the learned Counsel for the Respondent contends that it was permissible for the Respondent to carry out amendment to the

written statement at any stage, Including before the Appeal Court and that too even when the stand is inconsistent with the earlier stand; and such

amendment will have to be granted to do justice to the parties. In support of his submission reliance has been placed on the following decisions;

(1) Basavan Jaggu Dhobi v. Sukhnandan Ramdas Chaudhary (Dead) through L.Rs. and Ors.,;

(2) Bakshish Singh v. Prithi Pal Singh and Ors.,.

(3) Akshaya Restaurant v. P. Anjanappa and Anr.,.

12. Having considered the rival submissions and upon perusing the original pleadings viz. plaint and written statement as well as the proposed

amendment, I find no hesitation in recording that the Court below was completely in error in concluding that the proposed amendment would be

consistent with the stand already taken by the Respondent. However, I am of the considered view that the proposed amendment would not only

be inconsistent with the earlier stand taken by the defendant, but is destructive of the same. I am persuaded to take this view, for the stand which

was taken in the written statement was very specific that the Respondent was the direct tenant of the Petitioner. At no stage did the Respondent

assert that he was claiming through the defendant No. 1. On the other hand his categorical case was that he was inducted in the suit premises after

he was introduced by one Jitkar to the petitioner in the year 1960 and since then the petitioner had accepted him to be his tenant. This plea, in my

view, is not only inconsistent with the new plea raised in the proposed amendment, but if the proposed amendment is allowed it would be clearly

destructive of the original plea. Inasmuch as, by the proposed amendment, the Respondent, for the first time, wants to assert that he was in

possession of the suit premises prior to 1.2.1973 in the capacity of sub-tenant of the defendant No. 1. There is perceptible difference between the

stand taken in the original written statement and one suggested in the proposed amendment. No doubt the proposed amendment seeks to raise an

alternative plea, but such an alternative plea if permitted would be totally destructive to the original stand. Moreover there is no foundation laid in

the Trial Court to permit such a new plea. Besides that it would take the petitioner/plaintiff by surprise in the appeal. The Respondent cannot be

allowed to take advantage of some averment in the plaint and succeed in this manner. There is nothing on record to show that the Respondent was

in occupation of the suit premises as licensee of the original tenant Kondi Rama Dhinde, original defendant No. 1. To set up a claim of having

protection under the provisions of Bombay Rent Act, the licensee must show that he had a subsisting licence on the relevant date. On the other

hand, the stand taken by the Respondent all throughout the trial has been that the Respondent was paying rent directly to the Petitioner and was the

direct tenant of the Petitioner. Respondent, therefore, cannot be allowed to approbate and reprobate or allowed to deviate from the earlier stand in

the garb of an alternative plea that he is the licensee of defendant No. 1 especially when he had failed to categorically deny the case made out by

the plaintiff and having admitted that the defendant No. 1 had no concern with the suit premises after 1960. The view that I propose to take, the

same is supported by the decisions relied by the Counsel for the Petitioner. Whereas the decisions relied upon by the Respondent be clearly

distinguished, for, in the present case I have no hesitation in concluding that if the proposed amendment is allowed it would permit the Respondent

defendant No. 2 to raise a plea which would be destructive of the original stand taken in the written statement on the basis of which parties went to

the trial. Moreover it would cause irreparable prejudice to the Petitioner herein, inasmuch as by the proposed amendment, the Respondent has for

the first time asserted that he is in possession of the suit premises prior to 1.2.1973 as a licensee of the defendant No. 1. If the Respondent wanted

to take this stand, it was incumbent upon him to do so in view of the express provisions contained in Order VIII of the C.P.C. with regard to the

contents of the written statement. The Respondent having filed general and vague written statement while replying to the assertions in the plaint and

at the same time took a specific stand, now the Respondent cannot be permitted to take the Petitioner by surprise on the stand on which no

evidence has been adduced by either party before the Trial Court. Such an amendment, at the appeal stage, would be wholly inappropriate and

ought not to be permitted in the interest of justice.

13. The learned Counsel for the Respondent however contends that since the parties have acted upon the impugned order by carrying out

necessary amendment in the records, the Court should not entertain this writ petition, I am afraid, this contention is totally misconceived and ill

advised. The amendment, even if carried out in the records, is obviously subject to the outcome of this proceeding. Merely because the same has

been carried out in the record that would not preclude this Court from adjudicating the propriety and efficacy thereof. In the circumstances, this

contention raised by the Respondent is devoid of merits.

14. For the aforesaid reasons this writ petition succeeds and the impugned order passed below Exh. 35 in Civil Appeal No. 69 of 1992 dated

16.12.1992 is set aside. The consequent order passed by the Court below Exh. 36, therefore, is also set aside. Rule made absolute with costs.

15. At this stage it is pointed out that civil appeal which has been filed before the Appeal Court is pending since 1993. District Judge is therefore

directed to expeditiously dispose of the said appeal and preferably within three months from the receipt of the writ of this Court.

Parties to act on the copy of this order duly authenticated by Sheristedar of the Court.