

IN THE COURT OF SMALL CAUSES AT BOMBAY

ORDER BELOW EXH.39

IN

MESNE PROFIT APPLICATION NO.244 OF 2009

IN

T.E. & R. SUIT NO.244/265 OF 2002

Prime Properties Private Limited . . Plaintiffs.

Versus

1. Central Bank of India and ors. . . Defendants.

Coram : N.V. Vireshwar,
Judge, C.R.No.9
Date : 6/5/2016.: **ORDER** :

1. On behalf of defendant No.2 present application is filed seeking permission to amend para 1(a) of affidavit-in-reply Exh.11 contending that defendant No.2 has filed affidavit-in-reply Exh.11 dated 9/3/2010. Defendant No.2 has recently engaged present advocate and made to understand that certain important and relevant defences have not been taken. Defendant No.2 was not aware of said defences. Said defences go to the route of the matter and will assist the Court to decide Mesne Profit Application. Defendant No.1 has lawfully inducted defendant No.2 in use and occupation of suit premises on 7/12/2007. Thereafter defendant No.2 has handed over vacant possession of the suit premises to plaintiffs through defendant No.1 on 7/12/2007. Defendant No.2 has paid market rate of monthly rent to defendant No.1 for the use

and occupation of the suit premises for the period from 1/10/2000 to 30/9/2007 amounting to Rs.49,80,000/-. As such, defendant No.2 is not liable to pay alleged mesne profits. Defendant No.2 intends to give better particulars of defences and/or additional defences. Defendant No.2 could not take present application at earlier point of time. In the interest of justice and equity, defendant No.2 may be permitted to carry out amendment. Proposed amendment is very essential and necessary in order to decide real controversy between the parties. No harm or loss will be caused to plaintiffs as the plaintiffs will take opportunity to cross examine defendant No.2.

2. Application is opposed by reply Exh.40 stating that trial of this proceeding is already started. There is no due diligence on the part of defendant No.2. Suit was filed in 2002. Mesne Profit Application was filed in 2009. Present application is hopelessly barred by limitation. Change of advocate cannot be a ground to grant amendment. It is denied that proposed amendment would resolve real controversy between parties. The defences would have been taken in original suit. Transaction inter-se between defendant No.1 and defendant No.2 was not known to the plaintiffs and it was secrete arrangement between them. Said amount was not paid by defendant No.1 and defendant No.2 to the plaintiffs, therefore, proposed amendment is irrelevant.

3. By letter dated 5/11/2015 plaintiffs through their advocate called upon the defendants to give inspection of the documents and proofs relating to the payment of rent at the market rate. However, till today same is not given. Proposed amendment is not essential to determine real controversy between the parties. On

these grounds, application is sought to be rejected.

4. The learned advocate for plaintiffs has vehemently submitted that evidence of plaintiffs on the point of mesne profit is over. Examination-in-chief on behalf of defendant No.2 is already placed on record. There is no due diligence on the part of defendant No.2. Change of advocate cannot have excuse to grant amendment. I agree with the submissions of Learned Advocate for plaintiffs that trial of the present proceeding has been commenced. Evidence of plaintiffs is over. On behalf of defendant No.2, evidence affidavit is filed. At this stage, it is incumbent on the part of defendant No.2 to show that despite due diligence, proposed amendment was not sought. Even if there are subsequent events, then also to resolve the real controversy, amendment can be considered. By the proposed amendment, defendant No.2 wants to contend that payment at higher rate than market rate claimed by the plaintiffs has been made to defendant No.1 by defendant No.2. As such, it will relieve the liability of defendant No.2 to make double payment. The Learned Advocate for plaintiffs has urged that whatever defences were available ought to have been taken in original suit. After passing of the decree, defendant No.2 cannot go beyond the decree. At this juncture, I would like to mention here that record and proceeding of T.E.& R. Suit No.244/265 of 2002 is tagged with the present proceeding. From the written statement of defendant No.2 Exh.6 particularly para 9 it reveals that it was pleading of defendant No.2 that they made upto date payment of rent payable by them to first defendant and they are not in arrears. It appears that very casual approach was taken while filing affidavit-in-reply to mesne profit

application. There is reference in written statement of defendant No.2 about payment to defendant No.1. What will be the effect of payment by defendant No.2 to defendant No.1 will be the matter of merits and appreciation of evidence. Whether defendant No.2 can have benefit of payment to defendant No.1 will have again question of appreciation. The plaintiffs have filed present mesne profit application putting claim against all defendants. It is well settled that merits of the amendment cannot be taken into account while dealing with the application for amendment. Further contention of plaintiffs that inspection of documents pertaining to payment at market rate was demanded through letter dated 5/11/2015, but it was not given. The effect of not providing inspection will have its own consequences. No doubt, change of advocate cannot be said to be sole ground to grant amendment. However, considering the averments in written statement of defendant No.2 in original suit, proposed amendment excluding the word 'lawfully' appearing in first line can be allowed saddling heavy costs with liberty to plaintiffs to adduce additional evidence pertaining to proposed amendment, if desired. Hence, the order.

: ORDER :

1. Application is partly allowed, subject to costs of Rs.5,000/- to be paid by defendant No.2 to plaintiffs on or before next date.
2. On payment of costs, defendant No.2 shall carry out amendment of para 1(a) as per the schedule annexed to the application excluding the word 'lawfully'

appearing in first line within stipulated period.

3. Plaintiffs will be at liberty to adduce additional evidence pertaining to proposed amendment, if desired.

Date : 6/5/2016.

(N.V. Vireshwar)
Judge
C.R.No.9.

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