

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO. 90 OF 2015

Shekhar Narayan Shetty	]	
Age: 48 years, Occu:Business	]	
Room D in flat No.E-22, 3 rd floor	]	
Building No.303, Shival Motilal	]	
Mansion, Bellasis Road	]	
Mumbai-400 008.	]	..Applicant

Vs.

1 Madhavlal Pittie	]
Age 68 years, allegedly appointed	]
as Receiver in the Bombay High Court]	
Suit No.224 of 1961, having office	]
at 10 th floor, World Trade Centre	]
Centre No.1, Cuffe Parade, Colaba	]
Mumbai-400 005.	]

2 Vijay Simon Pinto (since deceased)	]
Heir and legal representative of late	]
S. Pinto, age and occupation not	]
known at present residing at	]
Flat No.D-17, 1 st floor, Building	]
No.303, Bellasis Road	]
Mumbai-400 008.	]

2(a) Margarete Vijay Pinto	]
Age and occupation not known	]
Widow of Vijay Simon Pinto	]
at present residing at Flat No.D-17	]
1 st Floor, Building No.303	]
Bellasis Road, Mumbai-400 009.	]

2(b) Maleolm Vijay Pinto	]
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Age and occupation not known	]	
Son of Vijay Simon Pinto	]	
Residing at 303, Shivilal Motilal	]	
Building, 1 st floor, flat no.17	]	
Bellasis Road, Mumbai-400 008.	]	
2(c) Melroy Vijay Pinto	]	
age and occupation not known	]	
Son of Vijay Simon Pinto	]	
Residing at 303, Shivilal Motilal	]	
Building, 1 st floor, flat no.17	]	
Bellasis Road, Mumbai-400 008.	]	
3 Mr. Owen Pinto & Wilma Louis	]	
heirs and legal representatives	]	
of lateMr. Simon Pinto	]	
Age and occupation not known	]	
last known address flat No.D-17	]	
1 st floor, Shivilal Motilal Mansion	]	
Mumbai Central, Mumbai-400 008.	]	..Respondents

....
Mr. A.A. Kumbhakoni, Sr. Advocate i/b Akshay Shinde for Applicant.

Mr. Zal Andyarjuna a/w Haresh Meghani and Ms. Dhun Chhappagar, Advocates i/b Ms. D.J. Kamdin & Co. for Respondents.

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CORAM : N.M. JAMDAR, J.

DATED : 5 MAY 2015

ORAL JUDGEMENT:

Rule. Rule made returnable forthwith. Respondents waives service. Taken up for final disposal by consent.

2. The Respondent No.1 is appointed as a receiver by order of this Court dated 21 July 1967 in respect of property known as Shivilal Motilal Mansion/Compound, comprising of several buildings, bearing Municipal House Nos. 1 to 23 at Dr. Bhadkamkar Marg ,Bombay Central, Mumbai. One Simon Pinto was a tenant of Room No.1, Flat No. E-22 on third floor of the building . Respondent Nos. 2 and 3 are heirs of the said Simon Pinto. Respondent No.1-landlord filed R.A.E. Suit No. 1569/1998 in the Small Causes Court, Mumbai. Suit was filed on the ground that Respondent Nos. 2 and 3 sub-let the suit premises in favour of the applicant. It was also contended that the applicant thereafter carried out various additions and alterations of permanent nature without the consent of Respondent No.1. The learned Small Causes Court by its judgment and decree dated 10 August 2006 decreed the suit. Thereafter the applicant filed an Appeal No. 565/2006 before the Appeal Bench of the Small Causes Court.

3. After the Appeal was heard by the Appeal Bench, on 7 May 2014 ,the Appeal Bench comprising of Mr. S.B. Gabhane, Additional Chief Judge and Mr. H.M. Bhosale, Judge ,gave two differing judgments. Mr. S.B. Gabhane allowed the appeal and set aside the order of the Small Causes Court, while Mr. H.M. Bhosale dismissed the appeal. The matter was refereed to the third judge in view of Section 98 of the Code of Civil Procedure r/w Section 11 of the Presidencies Small Causes Court Act, 1882. Mr. Yogesh Rane,

Additional Chief Judge, as a third judge by judgment and order on 16 December 2014 dismissed the appeal. Thereafter the present revision application is preferred, challenging the judgment and order dated 16 December 2014.

4. Mr. Kumbhakoni, the learned Senior Counsel for the applicant submitted that the entire methodology adopted by the Appeal Bench of the Small Causes Court in dealing with the appeal is bad in law. He submitted that when the two judges deferred, they ought to have crystallized the point of difference and referred that point to the third judge who then should have placed his opinion before the Division Bench for the Division Bench to pronounce the decision. He submitted that both the steps have not been taken there is no decision in the eyes of law, which is resulted in a peculiar position. Mr. Andyarjuna, on the other hand submitted that it is not necessary to frame a point and the matter can be referred to the third Judge and though it is desirable to place the matter before the Division Bench again after the decision of the third Judge is rendered, it is not necessary in all circumstances. According to him, two judges have held that the appeal needs to be dismissed, and in the facts of the present case the two judgments combined should be considered as decision of the Court.

5. The proceedings before the Small Causes Court are governed by the Presidency Small Causes Court Act, 1882. Section

5 of the Act established Small Causes Courts in presidency towns of Calcutta, Madras and Bombay. Small Causes Court is subject to the superintendence of the respective High Courts. Small Causes Court consists of various judges, the Chief Judge being first in rank. The Chief Judge is in charge of distribution of business of the Court. Procedure and practice of Small Causes Court is prescribed by the High Court from time to time by rules having force of law. The Small Causes Court, as far as may be, to the extent or otherwise provided under the Act, would follow the Code of Civil Procedure. The judgment and decree passed by the Small Causes Court Judge is appealable to the Appeal Bench of the Small Causes Court.

6. Section 11 of the Act of 1882 as initially stood, provided that in case there is a difference of opinion between the judges, the chief judge or the senior amongst the two will have the casting vote. By Maharashtra Act of XXXV, 1961, an amendment was made to Section 11, in its application to the State of Maharashtra. Section 2 of the amending Act substituted a part of the Section 11. Section 2 of the amending Act reads as under:

“2. In Section 11 of the Presidency Small Cause Courts Act, 1882 (hereinafter XV of referred to as “the principal Act”), for the portion beginning with the words “and if the Court is equally divided” and ending with the words “casting voice” the following shall be substituted, namely :-

“and if the Court is equally divided, the Judges shall state the point upon which they differ, and the case shall then be heard upon that point by another Judge

nominated by the Chief Judge and the point shall be decided, according to the opinion of the majority of the Judges, who have heard the case, including those who first heard it.”

7. Thus after the amendment so far as State of Maharashtra is concerned, the position is that in case where the two judges differ, they shall set the point on which they differ and the case is to be heard on 'that' point by the third Judge. Thereafter the point is to be decided by majority of the Judges who heard the case. What is contemplated under Section 11 is therefore is that if the two judges of the Appeal Bench do not agree, they shall crystallize the point to be decided and refer that point for adjudication.

8. Similar situation arose learned Single Judge of this Court (D.K. Deshmukh, J.) in Writ Petition No. 903/2004 and 1781/2004. These two petitions were placed before Deshmukh J. pursuant to the reference made by the Hon'ble Chief Justice in view of the difference of opinion amongst two learned Judges of this court constituting a Division Bench. The learned Judges had not crystallized their point of difference. Clause 36 of the Letter Patents of Bombay High Court arose for consideration. Clause 36 is identical to Section 11 (as amended). Clause 36 reads as under:

“Clause 36: Single Judges and Division Courts:- And We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at (Madras), (Bombay), Fort William in Bengal in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any

Division Court thereof, appointed or constituted for such purpose, in pursuance of Section 108 of the Government of India Act, 1915; and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges if there shall be a majority, but if the Judges should be equally divided, they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.”

9. Deshmukh, J relied upon the decision of the Apex Court in the case of **Reliance Industries Ltd. Vs. Pravinbhai Jasbhai Patel**¹. and observed as under:-

“It is clear from the observation of the Supreme Court in paragraph 14 of the Judgment quoted above that in terms of clause 36 of the Letters Patent the course of action required to be adopted is that when the two learned Judges of the Division Bench are unable to concur and are not in a position to make an agreed order they have to state the point on which they are not able to agree and it is that point which is referred to the third Judge for decision. In my opinion as the two learned Judges who were forming the Division Bench in the present case have not indicated the point on which there is difference of opinion, in view of the provision of clause 36 referred to above and judgment of the Supreme Court in the case of Reliance Industries Ltd., the Hon'ble Chief Justice will have to direct the office to place the matter before the same Division Bench so that

¹ 1997 (7) SCC 300

they could make an order to comply with the provisions of clause 36 of the Letters Patent. The office is therefore directed to place the matter before the Hon'ble Chief Justice and secure his order in accordance with law.

10. Deshmukh, J came to the conclusion that since the Division Bench had not crystallized the point, the matter is required to be placed before the same Division Bench so that they can comply with the provisions of Clause 36. Accordingly, the matter was then placed before the same Division Bench and the point of difference was crystallized to be decided by the Single Judge.

11. To my mind, this methodology will have to be adopted even in the case of Section 11 of the Act of 1882. Adopting such procedure in the decision making, the Judge to whom the case is referred to, will then focus only on the point of difference, saving valuable judicial time. If this methodology is not adopted, the third Judge to whom the matter is referred otherwise will have to hear the entire matter. In the present case, two judges gave their judgments and the third Judge to whom the matter is referred, framed issues on all aspects and heard the matter as if the entire appeal was to be heard by him. The procedure adopted by all the three Judges therefore is not in conformity with Section 11 of the Act.

12. Next question therefore arises as to whether, it is

necessary for the third Judge, to whom the matter is referred, to place his opinion before the Division Bench who has differed and the Division Bench thereafter to pronounce the final judgment. According to Mr. Andyarjuna, this is a mere formality and this Court can reconcile all the three judgments and test the validity of the ultimate decision. It is not possible to accept the submission. Such course of action will give rise to various legal and procedural difficulties. Firstly, there cannot be three judgments independent of each other. Reconciliation must be done by the Court to whom the matter was assigned to and they must state the conclusion authoritatively as to what is the ultimate verdict of a Court. It is neither expected of the litigant, general public or the superior Court to reconcile three independent judgments and try to discern the ultimate verdict.

13. A question was referred to the Full Bench of Madhya Pradesh High Court in the case of ***Firm Ladhuram Rameshwardayal Vs. Krishi Upaj Mandi Samiti, Shivpuri***² in Misc. Petition No. 319/1975 dated 7 May 1977 as to when on difference of opinion between two judges constituting the Division Bench and when the matter is referred to the third Judge and the third Judge while expressing his opinion does not refer the matter to Division Bench, what could be the effect thereof. The rules framed by the Madhya Pradesh High Court were considered by the Full Bench. The Full Bench came to the conclusion that in such

² Misc. Petition No. 319/1975, Dt. 7 May 1975

cases there will be no judgments but only opinions, and the Division Bench must pronounce the verdict after the receipt of the opinion of the third judge. In the case of *M/s Shriram Industrial Enterprises Ltd. Vs. Union of India*³, the Full Bench of the Allahabad High Court also had an occasion to deal with a similar situation. The Full Bench considered various decisions of Indian and English Courts and law dictionaries to expound the meaning of the phrase 'judgment' and came to the conclusion that such decisions are not judgments and they remain mere an opinion's.

14. In order to become a judgment, it must decide the question or issue in the case or of the rights of the parties. When the Appeal Bench of Small Causes Court disposes an appeal, there can be only one judgment. There cannot be two contradictory judgments. They will not have the effect of authoritatively deciding the case, or deciding any question or issue or any of the rights of the parties. Even if they are styled as judgment, they remain only differing views, to be reconciled after the receipt of the opinion of the third Judge. When the matter is referred to the third Judge, he also cannot give the final verdict, but can only record his opinion. He cannot decide the matter finally nor can decide the point, as the matter is to be decided by the two Judges' Bench. A third Judge cannot decide the matter as he would be a single Judge in that respect and cannot decide a matter assigned to a two judges bench. It is only after the opinion of third Judge is placed before the Bench,

³ AIR 1996 ALLAHABAD 135

it is two Judges' Bench who will make a final order.

15. In the present case therefore the two Judges who differed, before pronouncing their respective judgments, ought to have framed a point of difference and should have waited till the opinion was received from the third Judge and then pronounced a single judgment. Now there are three opinions available. Such position will create uncertainty in the mind of litigants. Neither the point of difference was framed nor the third judges's opinion was placed before the two Judges' Bench to proclaim the final verdict.

16. Now to find a solution. There is no final order in the appeal. There is no final verdict and all three judgments remain mere opinions. Thus in law the appeal is still pending and has not been disposed of finally. The learned Counsel for the parties have advanced various suggestions. It is informed that two Judges who have rendered the conflicting decisions are no longer available, so the methodology adopted by Deshmukh J in Writ Petition No. 903/2004 cannot be adopted. I am of the opinion that the appropriate solution will be to request the Chief Judge of the Small Causes Court to place the appeal before a two Judges' Bench for de novo consideration.

17. Since I have held that all the three judgments of the Small Causes Court have are only opinions, there is no question of setting

aside the same. Accordingly, the Civil Revision Application is disposed of with this clarification and with a request to the learned Chief Judge of Small Causes Court, Mumbai to assign the Appeal No. 565/2006 to a Appeal Bench of the Small Causes Court.

18. All contentions of the parties on merits are left open. The Appeal Bench so constituted will give priority to dispose of the appeal and make an endeavor to dispose of appeal within period of two months. Since the Small Causes Court, Mumbai will be closed for summer vacation, the period of two months shall commence from 8 June 2015. Registry to communicate the order to the learned Chief Judge of Small Causes Court, Mumbai .

(N.M. JAMDAR, J.)