

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4736 OF 2015

M/s. Manilal Patel & Co. & Anr.	..	Petitioners
VS.		
Board of Trustees, The Port of Bombay & Ors.	..	Respondents

Mr. P. S. Dani – Senior Advocate i/b. R. D. Vora for Petitioners.
Dr. Abhinav Chandrachud with Ms Jasmine Upadhye i/b. M/s. M.
V. Kini & Co. for Respondents.

CORAM : M. S. SONAK, J.
DATE : 14 JULY 2015

P.C. :-

1] This petition challenges orders dated 10 October 2012 and 22 April 2014 made by the Small Causes Court and the Division Bench of the Small Causes Court, respectively, rejecting, the petitioners application at Exhibit '53' seeking a stay upon further proceedings in obstructionist notice no. 42 of 2002 on the ground of pendency of Reference before the Larger Bench of this Court in the case of *Hussainali Sharif Punjwani vs. The Board of Trustees of the Port of Bombay*¹.

2] The Bombay Port Trust (BPT) had instituted L.E. & C. Suit No. 173/247 of 1980 against respondent nos. 2 to 6 on grounds of

¹ Civil Revision Application No. 193 of 2011 decided on 18 January 2012

non payment of rent / taxes, which was decreed on or about 7 September 1992. The same was put into execution some time in the year 2002. The petitioners, who claim some rights in respect of the suit premises, obstructed the execution. Accordingly, BPT took out obstructionist notice on 14 August 2002, being obstructionist notice no. 42 of 2002. Issues were framed therein on 15 September 2006. Evidence was completed therein, on or about 26 April 2012 and even arguments concluded soon thereafter. On 27 August 2012, the petitioners applied for stay on further proceedings (Exhibit '53'), contending that there is a direct conflict between the decisions rendered by two learned Single Judges of this Court in the case of *Shalan w/o. Narayan Dappal & Ors. vs. Board of Trustees of the Port of Bombay*² and *Hussainali Sharif Punjwani vs. The Board of Trustees of the Port of Bombay* in CRA No. 193 of 2011 decided on 18 January 2012 and during the pendency of Reference before the Larger Bench for resolution of such conflict obstructionist notice no. 42 of 2002 cannot proceed. By the impugned orders dated 10 October 2012 and 22 April 2014, executing Court as well as the revisional Court have rejected the application at Exhibit '53'. Hence, the present petition.

3] Mr. P. S. Dani, the learned Senior Advocate for the petitioners submitted that in the case of *Hussainali Punjwani* (supra), the

2 2009 (3) Mh.L.J. 923

learned Single Judge of this Court has disagreed with the decision in the case of *Shalan* (supra) and therefore, Reference has been made and is pending before the larger Bench. If the decision in the case of *Hussainali Punjwani* (supra) is to be applied, then the eviction decree dated 7 September 1992, on the basis of which the petitioners are sought to be evicted, would be a nullity, being made by Court lacking jurisdiction to make the same. Therefore, pending resolution of the conflict, it is only proper that further proceedings in obstructionist notice no. 42 of 2002 be stayed. Mr. Dani, the learned Senior Advocate submitted that in as much as the two Courts have declined the stay, there is clear failure to exercise jurisdiction, thereby occasioning failure of justice to the petitioners.

4] On the other hand, Dr. Abhinav Chandrachud, the learned counsel for the BPT, relying upon the decision of the Apex Court in the case of *Ashok Sadarangani & Anr. vs. Union of India & Ors.*³ submitted that the pendency of a Reference before the Larger Bench does not imply that all other proceedings involving the same issue remain stayed till the decision was rendered in the Reference. That apart, Dr. Chandrachud submitted that in the peculiar facts and circumstances of the present case, since issues were framed in L.E. & C. Suit No. 173/247 of 1980 on 12 August 1987, even in terms of the decision in the case of *Hussainali Punjwani* (supra) the

3 AIR 2012 SC 1563

competence of the Court which made the eviction decree on 7 September 1992 could not have been questioned. Accordingly, Dr. Chandrachud submitted that the resolution of the conflict has no bearing whatsoever to the facts and circumstances of the present case and the impugned orders were consequently, correctly made.

5] Rival contentions now fall for my determination.

6] In case of *Shalan* (supra) the BPT had instituted suit for eviction on 16 February 1978. During the pendency of said suit w.e.f. 20 December 1980, the Public Premises (Eviction of Unauthorised) Act, 1971 (1971 Act) came to be amended so as to include the premises owned by the BPT in the definition of '*public premises*' under the 1971 Act. In the light of said facts, this Court, in the case of *Shalan* (supra) held that the Small Causes Court or the civil Court as the case may be, would continue to have jurisdiction to dispose of such a suit, since the provisions of section 15 of the 1971 Act are not retrospective in nature. In paragraphs 39 and 40, this Court observed thus :-

"39. The scheme of the Public Premises Act makes it clear that the Legislature in its wisdom has nowhere provided in [section 15](#) that no suit, claim or action pending on the date when [section 15](#) became applicable shall not be proceeded with or shall stand abated. On the contrary, clear Legislative intention is seen from the words "no Court shall entertain" meaning thereby, no such suit claim or action or proceeding shall be permitted to be filed or entertained or admitted to the

portals of any Court for seeking such a relief after application of section 15. It is, thus, clear that the Legislature in its wisdom has not expressly made [section 15](#) retrospective. Then to imply by necessary implication that [section 15](#) would have retrospective effect and would cover pending litigations filed prior to coming into force of the section would amount to taking a view which would run counter to the legislative scheme. The right of the suitor to the extent referred to in [section 15](#) would get affected once [section 15](#) becomes applicable. If no suit is filed based on the cause of action which has arisen prior to coming into operation of [section 15](#), then no suit can be filed because [section 15](#) says no Court shall have jurisdiction to entertain any suit or proceeding to claim relief referred to therein. To that extent, the [section 15](#) may be retroactive. To highlight this aspect I may illustrate, suppose in a given case tenancy is terminated by the Plaintiffs (BPT) in the month of November, 1980 and the suit remained to be filed by 20th December, 1980, then the Plaintiffs (BPT) can only claim eviction of any person, who is in unauthorised occupation of public premises, under section 15(a) of the Public Premises Eviction Act alone. Such suit would not lie in the Small Cause Court or Civil Court on account of the bar created by the provision of [section 15\(a\)](#). Bar against filing, entertaining and admission of such suits would become operative on and from 20th December, 1980 so far as the premises of BPT is concerned and to that extent, [section 15\(a\)](#) would take within its sweep even the action based on the past cause of action, which is sought to be activated after coming into force of prohibitory provision under [section 15\(a\)](#); but that is the only because of retroactive effect of [section 15\(a\)](#) and nothing more than that. From this the conclusion that [section 15\(a\)](#) shall apply even to the pending suits and then existing rights got destroyed even though the suits for eviction from public premises were filed prior to coming into operation [section 15\(a\)](#) does not logically follow.

40. In my considered view, [section 15](#) is prospective. There is no warrant to hold that [section 15](#) is retrospective in operation. It is not open for me to re-write the section."

7] In the case of *Hussainali Punjwani* (supra), the learned Single Judge of this Court, emphasizing upon the expression

'entertain' in section 15 of the 1971 Act has held that if by the date of framing of issues, the remedy under the 1971 Act was available, then the Small Causes Court or the civil Court as the case may be, would cease to have any jurisdiction in the matter and the BPT, would necessarily be required to seek eviction under the 1971 Act itself. The relevant observations are contained in paragraphs 60 to 63, which read thus :

"60. This gives rise to a question as to what is the exact point of time when the Court can be said to have applied its mind to the merits of the controversy involved in a suit. According to me and as held by the Supreme Court, a Court can be said to have "entertained" a suit not only on mere filing of suit but the relevant date for deciding as to when the suit is "entertained" would be the point of time when the Court applies its mind to the merits of the controversy involved in a suit. By a catena of the decisions of the Supreme Court it is now well established that this is the date when the Court first applies its mind to the merits of the controversy involved in a particular suit i.e. the date when the Court considers the rival contentions of the parties, pleadings of the parties and frames issues of fact and law. Hence, the date of framing of issues has always been accepted to be the first date of hearing of a suit.

"61. I am, therefore, unable to agree with the learned single Judge (V. C. Daga,J.), who has decided Shalan (supra), on the second point namely, the date when the Court can be said to have entertained the suit. In my opinion, the date of framing of issues should be considered to be the date when the the Court entertains the suit. I am also of the view that in a suit filed by the BPT before 21.09.1989 if issues have been framed on or before 21.09.1989, the Decree passed in a suit cannot be held to be Decree suffering from inherent lack of jurisdiction. In my opinion, in all those cases where issues are framed on or after 22nd September, 1989, the Decrees passed by the Court of the Small Causes Court in suits for possession filed by the BPT would be Decrees having been passed by the Court suffering from inherent lack of jurisdiction.

62. Since the view which I have taken is contrary to the view taken by the Honourable Justice V. C. Daga in Shalan (supra), according to me this is a fit case for requesting Honourable the Chief Justice to refer this issue to the larger Bench.

63. The issue to be referred to the larger Bench will be as follows :

i. Whether the word "entertain" used in section 15 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 can be equated with the word "lodging/filing" of the Suit or will have to be interpreted to mean "consideration of merits of the Suit" or "the date of framing of issues in the Suit".

8] There is no dispute that though 1971 Act was amended w.e.f. 28 December 1980, so as to include within its sweep the premises belonging to BPT, the notification appointing Estate Officer under the 1971 Act was issued only on 21 September 1989. In the case of *Hussainali Punjwani* (supra) upon which reliance has been placed by Mr. P. S. Dani, the learned Senior Advocate for petitioners, it has been held that until 21 September 1989, the Small Causes Court or the civil Court, as the case may be would retain jurisdiction to entertain a suit seeking eviction from the BPT premises. Relevant observations are contained in paragraph 48, which reads thus :

"48. In my opinion, the Decrees which were passed till 21.09.1989 were the Decrees passed by a court of competent jurisdiction. I am inclined to follow and I am bound by the law laid down by the Supreme Court in the cases of Bhim Sen (supra), Attiq-Ur-Rehman (supra) and the Judgment of the Full Bench of this Court in the case of Raj Vyankatrao Jagjiwanrao Deshmukh (supra). Though the provisions of section 15 of the P. P. Act, 1971 create a bar of the jurisdiction for the Civil Court to entertain any suit relating

to eviction of unauthorized occupants from the premises belonging to the BPT; in the absence of any statutory machinery available for enforcing the special rights conferred on BPT to avail a special remedy before the Special Tribunal (Estate Officer), it cannot be held that the jurisdiction of the Civil Court was barred. The BPT was not empowered to constitute Special Tribunal and though Mr. Anirudha Joshi, Advocate, was justified in contending that a Petition seeking a writ of mandamus would lie for directing the Central Government to comply with its statutory obligations under section 3 of the P.P. Act, 1971, in actual practice it was impossible for the BPT, which is itself under the control of the Central Government; to file a Petition seeking such a mandamus against the Central Government. The appointment of the Competent Authority /Estate Officer being entirely beyond the control of the BPT, the special Tribunal was not available to BPT. If the argument of the learned Advocates for the Applicants/Petitioners to the effect that the Small Causes Court lost jurisdiction w.e.f. 20th December, 1980 (the date of commencement of the Amended Act) is accepted, that would lead to absurd results wherein the forum of the Small Causes Court would not be available on account of the bar contained under section 15 of the PP Act, 1971 and at the same time, even the Special Tribunal, namely, an Estate Officer would not be available. Any interpretation of the statutory provisions which would lead to a situation where a litigant is left without any remedy cannot be accepted. Hence, I hold that the jurisdiction of the Small Causes Court was not lost/ taken away till 21.09.1989 and the Small Causes Court was perfectly competent to permit the BPT to file the suits in that Court and was also competent to entertain such suits in the beginning."

9] As submitted by Dr. Chandrachud, the learned counsel for the BPT, the issues in L.E. & C. Suit No. 173/247 of 1980 were framed on 12 August 1987. This fact was required to be disclosed by the petitioners in the writ petition, which seems to proceed on the basis that no issues were at all framed in L.E. & C. Suit No. 173/247 of 1980. In fact, the application at Exhibit '53' was made on or about 27 August 2012, at a stage when recording of evidence and even

final arguments in the obstructionist notice no. 42 of 2002 had concluded. The application at Exhibit '53' was made on the sole basis of the reasoning in the case of *Hussainali Punjwani* (supra) that the decrees made by the Small Causes Court in a suit where issues were framed after 21 September 1989 are a nullity. This is unfortunate, because no care was taken to find out that the issues in L.E. & C. Suit No. 173/247 of 1980 were in fact framed on 12 August 1987, which is much prior to cut off date laid down in the case of *Hussainali Punjwani* (supra). The application at Exhibit '53', in such facts and circumstances, was indeed misconceived and on the basis of the same, the petitioners have only delayed the progress in obstructionist notice no. 42 of 2002 for a period of about two years.

10] The conflict between the decisions in the case of *Shalan* (supra) and *Hussainali Punjwani* (supra) is not at all relevant in the peculiar facts and circumstances of the present case. In terms of the decision in the case of *Shalan* (supra), L.E. & C Suit No. 173/247 of 1980 having been instituted prior to 20 December 1980 i.e. the date 1971 Act was amended so as to include within its sweep the BPT premises, the Small Causes Court was very much competent to entertain the same and make a decree therein. Similarly, considering the circumstance that the issues in L.E. & C.

Suit No. 173/247 of 1980 were framed by the Small Causes Court on 12 August 1987, even going by the decision in the case of *Hussainali Punjwani* (supra), the Small Causes Court was very much competent to proceed with the said suit and make a decree therein. In such circumstances, no case whatsoever was made out for stay of further proceedings in obstructionist notice no. 42 of 2002. There is no jurisdictional error whatsoever, in making the impugned orders. This petition is devoid of merits and is therefore liable to be dismissed.

11] Besides, in the case of *Ashok Sadarangani* (supra), at paragraph 19 the Apex Court has observed thus:

“19. As was indicated in Harbhajan Singh's case (supra), the pendency of a reference to a larger Bench, does not mean that all other proceedings involving the same issue would remain stayed till a decision was rendered in the reference. The reference made in Gian Singh's case (AIR 2011 SC (Cri) : 2011 AIR SCW 305) (supra) need not, therefore, detain us. Till such time as the decisions cited at the Bar are not modified or altered in any way, they continue to hold the field.”

12] As noted earlier, there was no disclosure in the petition that issues had indeed been framed in L.E. & C. Suit No.173/247 of 1980 on 12 August 1987. The application at Exhibit '53' was made and proceeded with, on the basis that no issues were framed in L.E. & C. Suit No. 173/247 of 1980 prior to the cut off date of 21 September 1989 as indicated in the decision in *Hussainali*

Punjwani (supra). The disposal of obstructionist notice no. 42/2002 was delayed by almost two years, when in fact, even the recording of evidence and the final arguments were concluded therein. In such circumstances, the petitioners must pay costs which are assessed at Rs.50,000/- to the respondent – BPT.

13] Accordingly, this petition is dismissed with costs of Rs.50,000/-. The costs to be deposited before the executing Court within four weeks from today. Upon deposit, the respondent – BPT is at liberty to withdraw the same unconditionally.

14] All concerned to act on basis of an authenticated copy of this order.

(M. S. SONAK, J.)

Chandka