

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.4031 OF 2016

Papeyon Developers Pvt. Ltd.	...	Petitioners
Vs.		
Susan Rashid Battiwala and others	...	Respondents

Mr. Prasad Dani, Senior Advocate a/w. Mr. Parimal K. Shroff, Mr. D. V. Deokar, Ms Jaylaxmi C. i/b. M/s. Parimal K. Shroff & Co. for Petitioner.
Mr. G. S. Godbole, Senior Advocate a/w. Ms V. Shah and Mr. Ameya Deosthale i/b. M/s. Hariani & Co. for Respondent No.5.

CORAM : R. G. KETKAR, J.
DATE : AUGUST 31, 2016

ORDER :

Heard Mr. Dani, learned Senior Counsel for petitioners and Mr. Godbole, learned Senior Counsel for the respondent No.5 at length. Mr. Dani orally prays for deletion of respondents No.1 to 4 as they are not the contesting respondents. Leave as prayed for is granted. Amendment shall be carried out forthwith. Rule. Mr. Godbole waives service for respondent No.5. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, petitioners, hereinafter referred to as plaintiffs, have challenged the judgment and order dated 04.02.2016 passed by the learned Judge, presiding over Court Room No.38 of the Court of Small Causes at Mumbai, Bandra Branch, below exhibit-27 in R.A.E.&R. Suit No.408 / 756 of 2010. By that order, the learned trial Judge allowed the application made by the respondent No.5, hereinafter referred to as

'applicants' under Order I, Rule 10 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for impleading them as defendant No.5 by suitably amending the plaint.

3. Mr. Godbole raised preliminary objection on the ground of maintainability of this Petition. He submitted that the impugned order affects substantive rights of the applicants, and therefore, the impugned order is revisable. Plaintiffs have an equally efficacious alternate statutory remedy under Section 34(4) of the Maharashtra Rent Control Act, 1999 (for short 'Act'). Plaintiffs have to file revision before the two-Judge bench of the Small Causes Court. In support of this submission, he relied upon the Full Bench decision of this Court in the case of ***Bhartiben Shah Vs. Gracy Thomas*, 2013 (2) Bom.C.R. 1**, and in particular paragraph 63 thereof. He also relied upon the decision of the Apex Court in the case of ***Shah Babulal Khimji Vs. Jayaben D. Kania*, (1981) 4 SCC 8**, and in particular paragraphs 77 to 80 and 113. In paragraph 113, the Apex Court has held that judgment can be of three kinds, namely, (i) a final judgment, (ii) a preliminary judgment, and (iii) intermediary or interlocutory judgment. While discussing the aspect of intermediary or interlocutory judgment, the Apex Court observed that there may be interlocutory orders, which are not covered by Order 43, Rule 1 of C.P.C. but which also possess the characteristics and trappings of finality in that, the orders may adversely affect a valuable rights of the party in an ancillary proceeding.

4. Mr. Godbole has also taken me through the Writ Petition to contend that in fact in the Petition, plaintiffs have asserted that by impleadment of the applicants as defendant No.5 in the Suit, their rights are substantively affected. For all these reasons, he submitted that plaintiffs have an equally efficacious alternate remedy by way of

Revision under Section 34(4) of the Act, and therefore, this Court may dismiss the Petition on that ground.

5. On the other hand, Mr. Dani submitted that the impugned order is a procedural order and does not affect the substantive rights of the parties. He relied upon paragraphs 84 and 85 of Full Bench decision in **Bhartiben Shah's case** (*supra*) to contend that the impugned order does not affect the rights of the parties under the Act or any other substantive law.

6. As far as the merits of the case are concerned, Mr. Dani submitted that applicants have filed application for impleadment mainly on two grounds namely, respondents No.1 to 4 herein have instituted R.A.D. Suit No.1230 of 1993 against Joseph P. Pereira, since deceased. During the pendency of that Suit, respondents No.1 to 4 took out application exhibit-18 for impleading plaintiffs and applicants herein as defendants. By order dated 22.02.2012, the learned trial Judge allowed the application and ordered impleadment of the plaintiffs and applicants. Plaintiffs have not challenged that order though in fact they had contested that application. The said order attained finality. The other ground is that the applicants are the owners of 1/5th share in the suit premises and claim to have purchased 1/5th share from Horace Pereira vide registered Deed of Conveyance dated 14.11.2005. He has invited my attention to the reply filed by the plaintiffs and in particular paragraphs 6 and 7 thereof. He submitted that while deciding the Suit for eviction, the Small Causes Court is not expected to go into the rival claims of title made by the parties. He submitted that plaintiffs have instituted Suit under Section 16(1)(i) read with sub-section (6) of the Act against respondents No.1 to 4. In that Suit, presence of the applicants is not necessary. Applicants are neither a necessary nor a proper party.

7. On the other hand, Mr. Godbole supported the impugned order. He submitted that during the pendency of the R.A.D. Suit, respondents No.1 to 4 had filed application exhibit-18 for impleadment of plaintiffs and applicants herein. Plaintiffs herein opposed the application by filing reply exhibit-19 *inter alia* contending that the application was made belatedly and that applicants herein have no right, title or interest in the suit property. After hearing both sides, the application was allowed. Plaintiffs did not challenge the said order, and thus, it attained finality. By virtue of order dated 22.02.2012 below exhibit-18, plaintiffs and applicants stand impleaded in R.A.D.Suit No.1230 of 1993 instituted by respondents No.1 to 4.

8. He further submitted that the presence of applicants is necessary before the trial Court for effectively deciding the controversy between the parties. He submitted that in case plaintiffs and defendants collude with each other, in that event, plaintiffs will obtain eviction decree as also possession of the suit premises and proceed with development of the property as the decree will be under Section 16(1)(i) of the Act. In that event, the rights of the applicants herein will be substantially affected. He submitted that plaintiffs have instituted Suit for cancellation of the Conveyance Deed executed in favour of the applicants on 14.11.2005 as also in the alternative, for specific performance of contract on the Original Side of this Court. At the same time, applicants herein have also instituted Suit on the Original Side of this Court for declaration of their ownership over 1/5th share in the suit property. These Suits are pending. Where one of the co-owners institutes Suit against a tenant for eviction and other co-owners do not object, in that case, the Suit is perfectly maintainable and one of the co-owners can institute Suit for himself and on behalf of the other co-owners. However, when there is *interse* dispute among the co-owners, in that

event, presence of the other co-owner is necessary. For all these reasons, he submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

9. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. Insofar as the preliminary objection raised by Mr. Godbole is concerned, I do not find any merit in this submission. In paragraphs 84 and 85, the Full Bench in **Bhartiben Shah's case** (*supra*) has observed thus,

“84. In the result, therefore, our answer to question No.2 referred for our consideration is as under:-

A revision application under Section 34(4) of the Maharashtra Rent Control Act, 1999 is not maintainable in respect of a procedural order passed under the Code of Civil Procedure in a suit arising out of Maharashtra Rent Control Act, if such order does not affect the rights of parties under the Maharashtra Rent Control Act or any other substantive law. While an order to be revisable need not necessarily be an order for possession or fixation or recovery of rent, nevertheless, the order sought to be revised must directly affect the substantive rights and liabilities of parties under the Maharashtra Rent Control Act or any other substantive law, but not merely rights under a procedural law like the Code of Civil Procedure or the Evidence Act.

85. For an order to be revisable under section 34(4) of the Maharashtra Rent Control Act, the order must affect the very existence of the suit or the foundation of the party's case in their pleadings and not merely a procedural order, not affecting the substantive rights of parties, though such procedural order may ultimately affect the strength or weakness of the case of the aggrieved litigant which is to be finally determined at the trial while passing the decree in the suit or final order in the proceeding.”

10. Perusal of the above paragraphs clearly shows that the Full Bench has laid down that a Revision Application under Section 34(4) of the Act is not maintainable in respect of the procedural order passed under the C.P.C. in a Suit arising out of the Act, if such order does not affect the

rights of parties under the Act or any other substantive law. In paragraph 85, it is held that for an order to be revisable under Section 34(4) of the Act, the order must affect the very existence of the Suit or the foundation of the party's case in their pleadings and not merely a procedural order, not affecting the substantive rights of parties, though such procedural order may ultimately affect the strength or weakness of the case of the aggrieved litigant which is to be finally determined at the trial while passing the decree in the Suit or final order in the proceedings.

11. In the present case, the substantive rights of the applicants herein are not at all affected. Applicants have already instituted Suit on the Original Side of this Court and the plaintiffs have also instituted Suit on the Original Side of this Court, which are pending. Having regard to the fact that the jurisdiction of the Small Causes Court is circumscribed by the provisions of the Act and more particularly, in view of Section 35 thereof, the Small Causes Court cannot decide the question of *interse* title between the parties. While deciding the Suit, it may incidentally become necessary for deciding the issue of title. Section 35 of the Act lays down that nothing contained in Sections 33 and 34 shall be deemed to bar a party to the Suit, proceeding or appeal mentioned therein in which a question of title to premises arises and is determined, from suing in a competent to establish his title to such premises. Thus, even if the question of title is decided by the Small Causes Court, the party to that Suit is not precluded from approaching the Competent Court from establishing its title and the findings recorded by the Small Causes Court in its limited jurisdiction will not operate as *res judicata* in a subsequent Suit as contemplated by Section 35 of the Act. In view thereof, it cannot be said that the rights of the applicants are substantially affected. In my opinion, the impugned order is a procedural order under C.P.C., which

does not affect the rights of the parties under the Act or any other substantive law.

12. Insofar as the reliance on the decision in the case of **Shah Babulal Khimji** (*supra*) and in particular paragraph 113 thereof is concerned, in paragraph 113, the Apex Court has observed that there may be interlocutory orders which are not covered by Order 43, Rule 1 but which also possess the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial. I have already held that the impugned order does not adversely affect the valuable rights of the applicants. In view thereof, the reliance placed by Mr. Godbole on the decision of the Apex Court in the case of **Shah Babulal Khimji** (*supra*) does not advance the applicants' case. In view of the Full Bench decision and in particular paragraphs 84 and 85 extracted hereinabove, I do not find any merit in the preliminary objection and the same is overruled.

13. As far as merits of the case are concerned, in paragraph 25 of the impugned order, the learned trial Judge has referred to the letter dated 25.08.2005 addressed by Horace Pereira confirming that his father had sold the property by virtue of agreement dated 28.07.1994 to the plaintiffs. He had also filed affidavit in Appeal No.515 of 2010 confirming the said fact. The learned trial Judge thereafter observed that plaintiffs did not file on record copy of the said agreement and have only filed copy of conveyance dated 05.11.2005 to which Horace Pereira is not a party.

14. In paragraph 26, the learned trial Judge has referred to the case of the applicants that Horace Pereira has sold his 1/5th undivided share to

them by virtue of registered Deed of Conveyance dated 14.11.2005. The learned trial Judge also referred to R.A.D. Suit No.1230 of 1993 filed by the respondents No.1 to 4 herein against the original landlords and plaintiffs and applicants herein and further referred to the order passed below exhibit-18 in that Suit. In paragraphs 28 and 29, the learned trial Judge observed that prima facie, it appears that Horace Pereira had sold his 1/5th undivided share in the suit property in favour of the applicants, and therefore, they are proper and necessary party to the Suit. If they are not joined as a party to the Suit, they are likely to be affected. Even though it is admitted fact that the Small Causes Court cannot decide the title of the parties, as the plaintiffs have sought eviction under Section 16(1)(i) of the Act in the capacity of the owner of the suit property and as the applicants have 1/5th share in the suit property, in their absence, effective decree cannot be passed. In paragraph 30, the learned trial has referred to the fact that the plaintiff is a *dominus litis* and thereafter, proceeded to observe that if the applicants are joined as party to the Suit, all issues arising thereunder can be finally determined and set at rest. In my opinion, the approach of the learned trial Judge was not proper. In fact, the learned trial has misdirected himself while dealing with this aspect. The learned trial Judge has observed that the Small Causes Court cannot decide the title of the parties. Applicants have claimed impleadment on two grounds, namely, the Suit filed by respondents No.1 to 4 being R.A.D. Suit No.1230 of 1993 and the fact that they have purchased 1/5th share in the suit property. For the reasons already indicated, the Small Causes Court cannot decide the issue of *interse* title between the plaintiffs and applicants.

15. Mr. Godbole submitted that plaintiffs and defendants in Suit may collude and obtain eviction decree and possession. Plaintiffs may proceed with the development of the suit property. I do not find any

merit in this submission. It is not as if the applicants are remedy less. In fact, they have already instituted Suit on the Original Side of this Court and can approach this Court for obtaining appropriate relief in that regard. It, however, cannot be said that their presence is necessary for deciding eviction Suit between landlord and tenant. In my opinion, the applicants are neither a necessary party nor a proper party.

16. Lastly, Mr. Godbole submitted that in case the Court is inclined to set aside the impugned order, the Suit filed by the plaintiffs and Suit filed by the respondents No.1 to 4 may be clubbed together and tried together by one and the same Court. Mr. Dani opposes this prayer on the ground that the subject matter of the Suit instituted by the plaintiffs and the subject matter of the Suit instituted by respondents No.1 to 4 is altogether different. I find merit in the submission of Mr. Dani and hence, the request made by Mr. Godbole cannot be acceded to. In the result, Petition succeeds. Rule is made absolute in the following terms:

- a. Impugned order dated 04.02.2016 passed by the learned trial Judge, below exhibit-27 in R.A.E.&R. Suit No.408 /756 of 2010 is quashed and set aside and the application exhibit-27 made by the applicants stands dismissed.
- b. No order as to costs.

(R. G. KETKAR, J.)