

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

WRIT PETITION NO. 3898 OF 2016

Shri Rang Maruti & Sons

Petitioner

Vs

1. Suleman Ahmed Botawala
and Ors.

.. Respondents

Mr. V.S.Kapse, Advocate for Petitioner.

Mr. R.V.Govilkar, Advocate for Respondents no. 2 to 6.

CORAM : R.G.KETKAR,J.

DATE : 07/07/2016

PC:

1. Heard Mr. V.S.Kapse, learned counsel for the petitioner and Mr. R.V.Govilkar, learned counsel for respondents no. 2 to 6 at length. The petitioner, hereinafter referred to as 'defendant', has already deleted respondent no.1 as per order dated 12.4.2016.

2. Rule. Mr. Govilkar waives service for respondents no.2 to 6. At the request and by consent of the parties, Rule is made returnable forthwith and Petition is taken up for final hearing.

3. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'defendant', has challenged the Judgment and order dated 29.3.2016 passed by the Appellate Bench of the Court of Small Causes at Mumbai below Exhibit-6 in Appeal No. 18 of 2015. By that order, the Appellate Court rejected the application made by the defendant for injunction restraining the respondents, hereinafter referred to as 'plaintiffs', from acting upon, implementing and executing the

impugned order dated 28.11.2014 passed by the learned Judge, presiding over Court Room no. 19 of Small Causes Court at Mumbai in R.A.E.& R. Suit No.1193/1911 of 2005 on the ground that there is distinction between relief of injunction and relief of stay. The defendant deliberately did not pray for stay with a view to avoiding the payment of compensation which could be ordered at the time of staying the impugned decree.

4. In support of this petition, Mr. Kapse invited my attention to the impugned order and in particular paragraphs 6, 9, 12 and 13 and submitted that in paragraph 6 the Appellate Court recorded the submission that was advanced on behalf of the defendant to treat the application as 'application for stay'. In paragraph 9, the Appellate Court noted that by filing the application for injunction, the defendant is indirectly seeking stay of the trial Court's decree under the guise of injunction. In paragraph 11, the Appellate Court observed that the application for injunction has been filed only with a view to avoiding payment of compensation which could be ordered at the time of staying the trial Court's decree. In paragraph 12, the Appellate Court noted that the plaintiffs filed reply treating the application Exhibit-6 as application for injunction. Had it been the application for stay, the plaintiffs could have filed reply to the stay application and insisted for depositing compensation while granting stay. In paragraph 13, the Appellate Court noted that the prayer made in the application

is nothing but prayer for grant of stay to the effect and operation of the trial Court's decree.

5. Mr. Kapse submitted that though the request was made to the Appellate Court to treat the application Exhibit-6 as stay application, the Appellate Court did not deal with this submission at all and proceeded to dismiss the application on the ground that the application was for injunction and further observed that no prima facie case is made out in favour of the defendant, no balance of convenience lies in favour of the defendant and that no prejudice would be caused to him in case of refusal of injunction as prayed for. Mr. Kapse submitted that he will amend the application Exhibit-6 by substituting prayer clause (a) by prayer for stay and will carry out amendment within two weeks from production of the authenticated copy of the order before the Appellate Court.

6. On the other hand, Mr. Govilkar relied upon the decision of the Apex Court in the case of Shalini Shyam Shetty Vs. Rajendra Shankar Patil, (2010) 8 Supreme Court Cases 329. The Apex Court has considered the scope of petitions under Articles 226 and 227 of India. In paragraph 49 (b), the Apex Court has formulated the principles while exercising jurisdiction under Article 227 and has held that a petition under Article 227 cannot be called a writ petition. In short, Mr. Govilkar submitted that the nomenclature of the petition as writ petition is wholly

misconceived in view of the authoritative pronouncement of the Apex Court's decision. Apart from that, under Article 227 the petitioner cannot seek relief of writ of certiorari.

7. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. It is not in dispute and is rather evident from the record that the suit instituted by the plaintiffs was decreed on 28.11.2014. Aggrieved by that decision, the defendant preferred Appeal No.18 of 2015. Pending Appeal, the defendant took out application Exhibit-6. By prayer clause (a) the defendant prayed for following relief:

“(a) Pending the hearing and final disposal of this Appeal, this Hon'ble Court be pleased to restrain the respondents from acting upon, implementing and executing the impugned order dated 28.11.2014.”

Perusal of prayer clause (a) shows that the defendant prayed for injunction restraining the respondents-plaintiffs from acting upon, implementing and executing the impugned order dated 28.11.2014. The Appellate Court dismissed the application principally on the ground that there is distinction between the relief of injunction and the relief of stay. The Appellate Court was of the view that under the guise of praying for injunction, in effect and in substance, the defendant is praying for stay and prayer for injunction is made with a view to avoiding payment of compensation which could be ordered at the time of staying the

trial Court's decree. In my opinion, the Appellate Court, however, did not deal with the submission specially recorded in paragraph 6 of the impugned order to the effect that the defendant requested the Appellate Court to treat the application Exhibit-6 as application for stay. In my opinion, instead of adopting hyper-technical approach, the Appellate Court should have directed the defendant to amend the prayer made in Application Exhibit-6 and instead of relief of injunction directed the defendant to pray for stay. It is no doubt settled position in law that there is distinction between the relief of injunction and relief of stay. Whereas order of stay operates against order passed by subordinate Courts, injunction operates against a person or body of persons. The Appellate Court instead of going into niceties of difference between order of injunction and order of stay, should have directed the defendant to substitute the prayer for injunction by prayer for stay and proceeded to decide the application for stay on merits. By adopting hyper-technical approach, the Appellate Court has given rise to filing of this petition which could have been certainly avoided, had the prayer made by the defendant been acceded to.

8. Mr. Govilkar relied upon the decision of Shalini Shyam Shetty (supra). The Apex Court has considered the scope of petitions under Articles 226 and 227. In paragraph 49(b), it is observed thus:

“49. On an analysis of the aforesaid decisions of this Court, the following principles on the exercise of High Court's jurisdiction under Article 227 of the Constitution may be formulated:

(b) In any event, a petition under Article 227 cannot be called a writ petition. The history of the conferment of writ jurisdiction on High Courts is substantially different from the history of conferment of the power of Superintendence on the High Courts under Article 227 and have been discussed above.”

It is no doubt true that a petition under Article 227 cannot be called a writ petition. At the same time, the Apex Court has also held that under Article 227, the High Court can exercise power of superintendence for keeping subordinate Courts within the bounds of their jurisdiction. When a subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have, the High Court may step in to exercise its supervisory jurisdiction. Applying the tests laid down, in my opinion, the Appellate court has failed to exercise jurisdiction which it does have which has given rise to present petition. It is, therefore, a fit case to set aside the impugned order by directing the defendant to suitably amend the application Exhibit-6 and substitute the prayer for injunction by prayer for stay.

9. It is the case of the defendant that amount of Rs. 61,152/- is due and payable and it is the case of the plaintiffs that an amount of Rs. 1,06,000/- is due and payable by the defendant.

Instead of going into this controversy, the Appellate Court while considering the application for stay will go into this controversy and pass appropriate orders while considering the relief of stay. All contentions in that regard are expressly kept open. Hence, the impugned order is set aside and the application Exhibit-6 is restored to the file of the Appellate Court.

10. Defendant shall carry out amendment within two weeks from today and serve copy of the amended application during this period on other side. The plaintiffs are at liberty to file their reply within two weeks from service of the amended application Exhibit-6. All contentions on merits are expressly kept open.

11. Subject to the applicant neither creating third party interest nor parting with possession of the suit premises, the ad-interim order granted in this petition shall remain in force during the pendency of hearing of the application Exh.6. The Appellate Court is requested to dispose of the application Exhibit-6 within four weeks from filing of reply by the plaintiffs.

12. Rule is made absolute in the aforesaid terms with no order as to costs.

(R.G.KETKAR, J.)