

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 5770 OF 2016

Mrs. Fizzah Navnitlal Shah

...Petitioner

Versus

Aura Alkalies And Chemicals
Pvt Ltd.

...Respondent

....

Ms. Deepti Panda a/w. Ms. Kirtida Chandarana & Ms. Nandini Chittale i/b. Mahernosh Humranwala, Advocate for the Petitioner.

Mr. P.S. Dani, Senior Advocate a/w. Mr. Pralhad Paranjape a/w. Mr. Rushabh Sheth & Ms. Pooja Bafna i/b. M. S. Bodhanwala & Co., for the Respondent.

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CORAM : R. G. KETKAR, J.

DATE : 17th June, 2016

P.C.

1. Heard Ms. Deepti Panda, learned Counsel for the petitioner and Mr. P.S. Dani, learned Senior Counsel for the respondent, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 6.4.2016 passed by the learned Judge, presiding over Court Room No.19 of the Court of Small Causes at Mumbai below Exhibit-14 in T.E. & R. Suit No.60 of 2015. By that order, the learned trial Judge partly allowed the application made by

the petitioner, hereinafter referred to as the 'plaintiff', under Order 15-A of Code of Civil Procedure, 1908 (for short, 'C.P.C.') for fixation of the interim mesne profits/damages. The learned trial Judge directed the respondent, hereinafter referred to as the 'defendant' to pay interim lease rent @ Rs.1,00,000/- per month by deducting 10% TDS from 25.2.2015 till 31.3.2016 directly to the plaintiff or may deposit in the Court. The defendant is directed to pay interim lease rent @ Rs.1,10,000/- per month by deducting 10% TDS from 1.4.2016 onwards directly to the plaintiff or may deposit in the court. The defendant is directed to clear all the arrears upto 30.4.2016 and to continue to deposit the interim lease rent at the said rate on or before 10th day of each succeeding month. The learned trial Judge further directed the defendant to pay or deposit in Court the lease rent of those 24 days i.e. from 1.2.2015 to 24.2.2015 @ Rs.1,00,000/- per month by deducting 10% TDS and it shall be cleared on or before 30.4.2016.

3. Mr. Dani raised preliminary objection on the ground of maintainability of this Petition. He submitted that in view of Section 42(4) of the Presidency Small Cause Courts Act, 1882

(for short,'Act'), the petitioner has equally an efficacious alternate statutory remedy of filing revision application challenging the impugned order. He relied upon a decision of this Court in the case of ***The Colaba Central C-operative Consumer Wholesale and Retail Stores Ltd. v. Smt. Kusumben Kantilal Shah & Ors., 2003(4) ALL MR 304.***

4. On the other hand, Ms. Panda submitted that the order passed in an application under Order 15-A of CPC is a procedural order and does not affect the substantive rights of the parties. She relied upon a decision of this Court in the case of ***Shyam Liladhar Paul v. Ghanshyamdas Tharumal and another, 1985 Mh.L.J. 950*** and in particular paragraph-4 thereof. She submitted that the decision in the case of ***The Colaba Central Co-operative Consumer Wholesale Retail Stores Ltd. (supra)*** is clearly distinguishable as in that case, only the defendant had instituted the petition. As against this, in the present case the plaintiff has instituted the present Petition.

5. As the respondent has raised a preliminary objection of

maintainability of the petition, I have heard the parties at length on this issue. In the case of ***The Colaba Central Co-operative Consumer Wholesale Retail Stores Ltd. (supra)***, the learned Single Judge relied upon Division Bench decision in the case of ***Sangeeta Prints v. Hemal Prints, AIR 1986 Bom. 423.*** In that decision, the learned Single Judge relied upon Division Bench decision in the case of ***1983 Mh. L. J. 88.*** In paragraph-6, it was observed that Order 15-A of CPC came to be amended w.e.f. 11.1.1990. In paragraph-7, after considering the decision in the case of ***Sangeeta Prints (supra)***, it was observed thus :

“Having regard to the salutary object underlying the provision, the proviso to sub-rule (1) envisages certain consequence emanating from a non-compliance of the order of deposit. The proviso stipulates that in the event of a default in making deposit as decided, the Court may, subject to the provisions of sub-rule (2), strike off the defence. Undoubtedly, before striking off the defence, sub-rule (2) provides that a notice has to be issued to the defendant to show cause and the cause, if any, shown has to be considered in order to decide as to whether the defendant should be relieved of a peremptory order striking off the defence. Sub-rule (2) in turn indicates that unless the Court is of the view that there are valid circumstances as to why the defendant should be relieved of an order striking off his

defence, ordinarily the defence would be liable to be struck off upon a failure of compliance with an order of deposit. In these circumstances, there can be no gainsaying the fact that an order passed under sub-rule (1) is an order of moment and is liable to seriously effect the rights of the parties. A defendant who does not comply with the order of deposit, cannot be relieved of the striking off of his defence unless he shows sufficient cause. In these circumstances, it cannot be said that an order under sub-rule (1) of Order 15-A is merely a procedural order and is not subject to a revision under sub-section (4) of section 42 of the Act. In the present case, a revision is maintainable. There is hence no necessity for this Court to go into the challenge urged on behalf of the petitioner on the merits of the order.”

6. Ms. Panda relied upon the decision of this Court in the case of **Shyam Paul (supra)**. In that case, the defendant had challenged the order dated 26.6.1984 passed by the trial Court directing that the occupation charges from 1.3.1980 to 30.6.1984 amounting to Rs.4,980/- at the rate of Rs.95/- per month should be deposited by the defendant, amongst other directions. On the other hand, the defendant's contention was that the rule making power of the High Court is contained in Section 122 read with Section 128 of C.P.C.. By virtue of the power conferred under Section 122 of C.P.C., the High Court has enacted the rules under the newly introduced Order 15-A in

C.P.C.. This Court noted that by the notification of the High Court of Judicature at Bombay No.0182/1977 Order 15-A and other amendments to C.P.C. were brought into force with effect from 1st day of October, 1983.

7. In paragraph-3 of the judgment, it was mainly contended that the provisions of Order 15-A Rule 1 of C.P.C. are substantive provisions. The power which is conferred upon the High Court under Section 122 of C.P.C. is a power to frame the procedural rules. The submission was that the provisions of Order 15-A Rule 1 of C.P.C. which do not indicate that they are procedural rules are outside the scope and power of the High Court under Section 122 of C.P.C.

8. In paragraph-4, learned Single Judge observed that the rule impugned in the revision, namely, Order 15-A Rule 1 of C.P.C. is purely a procedural rule. Relying heavily on the observations made in paragraph-4, Ms. Panda submitted that the learned Single Judge has specifically held that Order 15-A Rule 1 of C.P.C. is a procedural rule. In other words, it does not affect the substantive rights of the parties. The decision of the learned Single Judge in the case of **Shyam Paul** (supra) was

not cited before the learned Single Judge in the case of ***The Colaba Central Co-operative Consumer Wholesale Retail Stores Ltd. (supra)***.

9. I do not find any merit in the submission, for more than one reason. Perusal of paragraphs-2 and 3 of the decision in the case of ***Shyam Paul*** (supra) goes to show that what was contended before the learned Single Judge was that under Section 122 of C.P.C., High Court has power to frame the procedural rules. It was contended that the provisions of Order 15-A Rule 1 are the substantive provisions. It is in that context, the learned Single Judge observed that Order 15-A Rule 1 of C.P.C. is a procedural rule thereby meaning that under Section 122 of C.P.C., the High Court was within its competence to frame the rules. Secondly, before the learned Single Judge, no argument was advanced as to whether order passed under Order 15-A of C.P.C. affects the substantive rights of the parties. No contention was advanced about consequences of not complying order passed in an application made under Order 15-A of C.P.C.. Consequently, no such findings were recorded in the case of ***Shyam Paul*** (supra). As against this, in the case of ***The***

Colaba Central Co-operative Consumer Wholesale Retail Stores Ltd. (*supra*), specific argument was advanced and it has been held that an order passed under Order 15-A Rule 1 of C.P.C. is not merely a procedural order, but, has serious consequences and, therefore, it is revisable under Section 42(4) of the Act.

10. Ms. Panda submitted that the defendant has not challenged the order passed by the learned trial Judge and it is the plaintiff who has challenged the said order. The substantive rights of the plaintiff are not affected by the impugned order. She, therefore, submitted that the plaintiff cannot invoke section 42(4) of the Act and file Revision Application. I do not find any merit in this submission as well. Section 42 of the Act reads thus :

“42. (1) An appeal shall lie from a decree or order made by the Small Cause Court exercising jurisdiction under section 41, to a bench of two Judges of the said Court, which shall not include the Judge who made such decree or order:

Provided that, no such appeal shall lie from a decree or order made in any suit or proceeding in respect of which no appeal lies under the Code

of Civil Procedure, 1908.

(2) Every appeal under sub-section (1) shall be made within thirty days from the date of the decree or order, as the case may be :

Provided that, in computing the period of limitation prescribed by this sub-section, the provisions contained in sections 4, 5 and 12 of the Limitation Act, 1963, shall, so far as may be, apply.

(3) No further appeal shall lie against any decision in appeal under sub-section (1).

(4) Where no appeal lies under this sub-section from a decree or order in any suit or proceeding, the bench of two Judges specified in sub-section (1) may, for the purpose of satisfying itself that the decree or order was according to law, call for the case in which such decree or order was made and pass such order with respect thereto as it thinks fit.”

11. Perusal of Section 42 of the Act shows that an appeal shall lie from a decree or order made by the Small Cause Court exercising jurisdiction under Section 41, to a bench of two Judges of the said Court. Proviso thereto lays-down that no such appeal shall lie from a decree or order made in any suit or proceeding in respect of which no appeal lies under C.P.C. It is

common ground between the parties that the appeal does not lie from an order made in an application under Order 15-A of C.P.C.. In view of sub-section (4) of Section 42 of the act, where no appeal lies under this sub-section from a decree or order in any suit or proceeding, the bench of two Judges specified in sub-section (1) may, for the purpose of satisfying itself that the decree or order was according to law, call for the case in which such decree or order was made and pass such order with respect thereto. In other words, under sub-section (4) of Section 42 of the Act, revisional power is conferred upon the bench of two Judges where no appeal lies from any order made in any suit or proceeding. It, however, does not speak about at whose instance the revision will lie. In other words, aggrieved party, whether the plaintiff or the defendant can file revision.

12. Ms.Panda submitted that the substantive rights of the plaintiff are not affected. Even if the plaintiff does not comply the impugned order, no serious consequences will flow therefrom. I do not find merit in this submission as well. If the plaintiff succeeds in his challenge to the impugned order passed by the trial Court, in that event the defendant will be required to

pay interim mesne profit/damages under Order 15-A of C.P.C. in excess of the amount fixed by the learned trial Judge. Thus it is bound to seriously affect the rights of the parties as held by this Court in ***The Colaba Central Co-operative Consumer Wholesale Retail Stores Ltd. (supra)*** or at any rate rights of the defendant.

13. In view thereof, I do not find any merit in the submissions of Ms. Panda that as the plaintiff's rights are not substantially affected by the impugned order, it cannot maintain revision application. In view thereof, I find merit in the preliminary objection raised by Mr. Dani. Hence, the Petition is dismissed as not maintainable with liberty to the petitioner to file revision application as contemplated under Section 42(4) of the Act. It is expressly made clear that I have not examined the merits of the case. All contentions on merits are expressly kept open. Liberty to apply to trial Court for expeditious disposal is granted. If such an application is made, the learned trial Judge will pass appropriate orders. Order accordingly.

(R. G. KETKAR, J.)