IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 10478 OF 2016

1.M/s. Mark Constructions and Anr. ..Petitioners.

Vs

1. Narendra D.Dave (HUF Karta) and Ors. .. Respondents

Mr. Surel Shah i/b Mr Vaibhav J. Mehta & Mr J.S.Shukla, Advocates for Petitioners.
Mr. M.L.Palan i/b Mr. V.K.Gupta for Respondents No. 1 and 2.
Mr Anilkumar K. Patil, Advocate for Respondent no.3.

CORAM : R.G.KETKAR,J.
DATE : 05/10/2016

PC:

1. Heard Mr. Surel Shah, learned counsel for the petitioners and Mr.M.L.Palan, learned counsel for respondents no. 1 and 2 at length. Mr. Shah orally seeks leave to delete respondents no. 3 and 4 on the ground that respondents no.1 and 2 being original plaintiffs are the only contesting respondents. On the oral application made by Mr. Shah, leave to delete respondents no.3 and 4 is granted. Amendment shall be carried out forthwith. Rule. Mr. Gupta waives service for respondents no.1 and 2. Having regard to the controversy as also at the request and by consent of the parties, Rule is made returnable forthwith and petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of

India, the petitioners, hereinafter referred to as 'defendants no.1 and 2, have challenged the Judgment and order dated 6.04.2016 passed by the learned Judge presiding over Court room no.2 of the Court of Small Causes at Mumbai in Revision Application No. 51 of 2016. By that order, the learned Appellate Judge dismissed the Revision Application on the ground that it is not maintainable.

3. Mr. Shah submitted that defendants no.1 and 2 have filed revision application challenging the judgment and order dated 6.11.2015 passed by the learned trial Judge below Exhibit 28 in L.E.&C.Suit No.58/65 of 2014. Application Exhibit-28 was filed by the plaintiffs under Order 15A of C.P.C. The learned trial judge partly allowed the application and directed defendants no.1 to 4 to jointly and severally pay Rs.70,000/- per month towards the compensation amount to the plaintiffs. Defendants no.1 to 4 are jointly and severally directed to pay the said amount from 1.11.2012 till 31.10.2015 and continue to pay the amount at the same rate till the disposal of the suit on or before 5th day of every such successive month.

4. Aggrieved by that decision, defendants no.1 and 2 preferred revision application before the Appellate Court. By the impugned order, the Appellate Court dismissed the revision application on the ground that it is not maintainable. Mr Shah

relied upon the decision of this Court in Colaba Central Co-operative Consumer Wholesale and Retail Stores Ltd Vs. Kusumben Kantilal Shah, 2004 (1) Bom C.R. 547 and in particular paragraph 7 thereof and submitted that any order passed under Order 15A affects substantive rights of the parties and it is not a procedural order.

5. Mr. Palan supports the impugned order and submits that the Appellate Court was justified in dismissing the revision application on the ground that it is not maintainable.

6. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. Paragraph 7 of the judgment in Colaba Central Co-op.Stores (supra) reads thus:

> "7. Sub-rule (1) of Order 15-A as amended applies to a suit by a lessor against a lessee or a licensor against a licensee for eviction with or without the arrears of rent or licence fee and future mesne profits. In such a suit, the Court is empowered to direct the defendant to deposit such amount as the Court may direct on account of arrears upto the date of the Order and thereafter to continue to deposit in each succeeding month the rent or licensee fee claimed in the suit as the Court may direct. Sub-rule (1) provides that the defendant shall unless otherwise directed continue to deposit such amount till the decision of the suit. The legislature was clearly conscious of the necessity of requiring the tenant or, as the case may be, a licensee to deposit such an amount as the Court may direct towards arrears payable on account of his occupation and to protect the interest of the landlord by requiring that future deposits of the amount of rent or the licence fee must also be made. In the absence of such a provision, the landlord would have to suffer the hardship of awaiting a final decision of the suit

> for eviction before any amount would be recovered. This was obviated by conferring upon the Court, the power to pass an appropriate interim order. Even in the absence of such a provision, the hardship which was liable to be suffered by the landlord has been sought to be obviated by the decision of this Court in Sangeeta Prints (supra) by taking recourse to the provisions of Order 39, Rule 10 and section 151 of the Code. Having regard to the salutary object underlying the provisions, 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.

7. In view thereof, the Appellate Court was not justified in dismissing the application on the ground of maintainability. The impugned order is, therefore, set aside, thereby, restoring the revision application. The Appellate Court will decide the revision

application on its own merits and shall not dismiss the same on the ground of maintainability. All contentions of the parties on merits are express kept open.

8. At this stage, Mr. Shah prays for continuation of ad-interim order dated 7.9.2016 for a period of two weeks from today so as to enable the petitioners to press for ad-interim order sought in the revision application. He assures that the petitioners will not seek further extension from this court.

9. Parties agree that they will appear before the Appellate Court on 17.10.2016 and for that purpose no fresh notice be issued to them. The Appellate Court is requested to decide the revision application within four weeks from the date of appearance of the parties.

10. In view thereof, notwithstanding disposal of the petition, order dated 7.9.2016 shall remain in force for a period of two weeks from today. Grant of extension shall not be construed as an expression on merits either way. The Appellate Court will consider prayer of interim relief made in revision application.

11. Rule is made absolute in the aforesaid terms with no order as to cost.

(R.G.KETKAR, J.)