

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

**WRIT PETITION NO.2800 OF 2016
ALONG WITH
CIVIL APPLICATION NO.1393 OF 2016**

**Mona Forging Private Limited : Petitioner/Applicant
versus
Benelon Industries and anr. : Respondents.**

**Mr. R A Thorat, Senior Advocate a/w Ms.Nazia S.A. Shaikh i/by Mr.
Jawahar J Thakkar for the Petitioner.**

**Mr. Shailesh Shah, Senior Advocate a/w Mr. Rushabh Sheth and Ms. Pooja
Batra i/by M S Bodhanwalla for the Respondent No.2.**

**CORAM : R. M. SAVANT, J.
DATE : 19th APRIL 2017**

P.C.

1 The writ jurisdiction of this Court is invoked against the order dated 25/01/2016 passed by the Appellate Bench of the Small Causes Court by which order the Misc. Appeal No.22 of 2014 filed by the Petitioner herein came to be dismissed and resultantly the order dated 20/03/2014 passed by the learned Judge of the Small Causes Court in Misc. Notice No.338 of 2010 setting aside the Consent Decree dated 30/06/2009 in RAD Suit No.562 of 1990 came to be confirmed.

2 The Petitioner herein was the original Plaintiff in RAD Suit No.562 of 1990 filed by it for a declaration of its tenancy in respect of the leased property. The Respondent No.1 herein was the landlord and Defendant No.1

to the said suit, and the Defendant No.2 was the Court Receiver who was appointed in the proceedings before this Court between the Defendant No.1-landlord and the Union Bank of India for recovery of the loan amount. The suit premises was leased out to the Defendant No.1 by the Maharashtra Industrial Development Corporation. During the pendency of the suit, the Plaintiff and the Defendant No.1 entered into a compromise on 30/06/2009 and the suit came to be disposed of in terms of the Consent Decree.

3 In so far as the Respondent No.2 herein is concerned, a few background facts would have to be noted. As indicated above, the Respondent No.1 had taken a loan from the Union Bank of India and had mortgaged the suit premises. The said Union Bank of India had filed Suit No.2118 of 1990 in this Court. The Court Receiver was appointed in the said proceedings. The said suit it seems came to be decreed on 09/02/2016. After the Debt Recovery Tribunal (for short "DRT") was constituted, the said decree was put into execution by the Union Bank of India vide Misc. Application No.125 of 2003 for recovery of the amount of Rs.2,48,06,279.72. The auction was held on 16/06/2008 in respect of the suit property which auction was directed to be held on as is where is basis. The Respondent No.3 in the said proceedings i.e. the Respondent No.2 herein participated in the said auction and since its bid was the highest, the same was accepted. A certificate of sale came to be issued on 02/02/2009. It seems that when the occasion came to hand over the

possession of the auction property, an application was filed by the Petitioner herein for restraining the Respondent No.2 herein from taking over the possession of the suit property. The said application filed by the Petitioner herein came to be dismissed on 15/05/2009 with a direction that symbolic possession of the auction property to be handed over to the Respondent No.2 herein. As indicated herein above, the Petitioner herein i.e. the original Plaintiff and the Respondent No.1 herein i.e. the original Defendant No.1 tendered the Consent Terms evidencing the settlement arrived at between the parties on 04/05/2009 which Consent Terms were accepted on 30/06/2009 and the Consent Decree came to be passed in the said suit.

4 On the said Consent Decree being passed, the Respondent No.2 herein filed an application under Order XXIII Rule 3 read with Section 151 of the Code of Civil Procedure for setting aside the said Consent Decree on the ground that the Respondent No.2 herein i.e. the Applicant was the auction purchaser of the suit property before the DRT and in respect of which a certificate of sale has been issued by the Recovery Officer on 02/02/2009. It was the case of the Respondent No.2 – original Applicant in the said application that the Consent Decree was obtained by fraud, as after the auction sale the Defendant No.1 i.e. the Respondent No.1 herein was not having any right, title and interest in the suit property on 04/05/2009 when the Consent Terms were tendered in the Court. The Petitioner herein filed the Reply

marked as Exhibit 7 to the said application. In the said Reply it was stated that the application was misconceived and not maintainable. It was the case of the Petitioner that the Consent Terms are lawful and the suit has been adjusted wholly so far as it relates to the parties to the suit. It was averred in the said Reply that the suit is based on contract or agreement of tenancy entered into between the Plaintiff and the Respondent No.1 i.e. the Defendant No.1 long back on 07/04/1989 and that the Respondent No.2 herein i.e. the Applicant cannot have any locus in so far as the said agreement is concerned as it has acquired a right in the suit property on 02/02/2009. It was also sought to be contended that the Respondent No.2 herein, if it so desired, should have come on record as an assignee or transferee to defend the suit. The Respondent No.2 herein filed its rejoinder to the reply filed on behalf of the Petitioner herein in the said proceedings.

5 The Trial Court on the basis of the said pleadings of the parties framed issues revolving around the aspect as to whether the Consent Decree passed in RAD Suit No.562 of 1990 was a result of fraud and misrepresentation and the same is not binding on the Applicant i.e. the Respondent No.2 herein, and whether the said Consent Decree suffers from illegality and is liable to be set aside. The Trial Court answered both the issues against the Petitioner herein and in favour of the Respondent No.2 herein. The Trial Court referred to the antecedent fact of the auction having taken place and the Respondent No.2

herein being the auction purchaser. The Trial Court on the basis of the material on record has recorded a finding that both the Plaintiff and the Defendant No.1 were aware of the auction sale having taken place in which the Respondent No.,2 herein had acquired rights. The Trial Court observed that since the Respondent No.2 on the date when the Consent Terms have filed had stepped into the shoes of the Respondent No.1 landlord, the Respondent No.1 landlord on the said day had no right to accept the Plaintiff as a tenant and also to claim future rent from the Plaintiff in respect of the suit property. The Trial Court observed that by filing the Consent Terms, the Defendant No.1 i.e. the Respondent No.1 herein has mis-represented himself as the landlord, and got the Consent Decree passed on the said basis. The Trial Court adversely commented upon the intention of the parties which according to the Trial Court was to obtain a decree in RAD Suit so as to nullify the orders passed by the DRT in which an order was passed subject to the determination of the rights of the plaintiff in the said RAD Suit. The Trial Court observed that the Consent Decree was obtained by concealing vital facts and without the Defendant No.1 having any right, title and interest in the suit property on the date when the Consent Terms were tendered. The Trial Court therefore was of the view that the said Consent Decree suffers from an illegality, and accordingly by the order dated 20/03/2014 allowed Misc.Notice No.338 of 2010 filed by the Applicant i.e. the Respondent No.2 herein and set aside the Consent Decree dated 30/06/2009 passed by the Trial Court.

6 The Petitioner herein who was the original Plaintiff in the said Misc. Notice No.338 of 2010 filed Misc. Appeal No.22 of 2014 before the Appellate Bench of the Small Causes Court and reiterated the findings recorded by the Trial Court and especially the finding that the Petitioner herein was aware of the proceedings between the Respondent No.1 and the Union Bank of India before this Court as well as before the DRT. The Appellate Bench of the Small Causes Court further observed that the Petitioner herein was aware that the Respondent No.2 herein has purchased the suit property in the auction purchase in the recovery proceedings filed by the Union Bank of India in respect of which a sale certificate was issued on 02/02/2009. The Appellate Bench of the Small Causes Court further adversely commented upon the conduct of the Petitioner herein by observing that though the Respondent No.1 was consistently opposed the claim of the Plaintiff in the suit since 1990 but after the interest in the suit property devolved upon the Respondent No.2 herein on 02/02/2009, it has entered into a compromise with the Petitioner herein on 30/06/2009. The Appellate Bench of the Small Causes Court did not deem it appropriate to interfere with the order passed by the learned Judge of the Small Causes Court dated 20/03/2014 and accordingly dismissed the said Appeal.

7 The learned Senior Counsel appearing on behalf of the Petitioner

Shri Thorat would firstly question the maintainability of the application under Order 23 Rule 3 of the CPC at the behest of a party i.e. the Respondent No.2 herein who was not a party to the suit. It was the submission of the learned Senior Counsel that the remedy if any available to the Respondent No.2 herein was to file a separate suit if the allegation of the Respondent No.2 was based on fraud vitiating the Decree. The learned Senior Counsel would contend that the decree was passed in the suit between the Petitioner herein and the Respondent No.1 herein to which the Respondent No.2 herein could not have any grievance. The learned Senior counsel sought to place reliance on the judgment of a learned Single Judge of this Court in **Ramkrishna Shridhar Choube & others v/s. The Court Receiver and others** reported in **2011 1 Bom CR 286.**

8 Per contra, the learned Senior Counsel Shri. Shailesh Shah for the Respondent No.2 herein would contend that the issue as regards the tenability of the application was never raised before the Courts below. The learned counsel would contend that once the Respondent No.2 having acquired the right in the suit property on account of the auction purchase, the Consent Decree has obviously the effect of prejudicing the said right. The learned counsel would contend that the judgment in ***Ramkrishna Shridhar Choube's*** case (supra) on which reliance is placed on behalf of the Petitioner would not aid the Petitioner to question the tenability of the application filed by the

Respondent No.2 for setting aside the decree.

9 Having heard the learned Senior Counsel for the Petitioner and the learned Senior Counsel for the Respondent No.2, I have considered the rival contentions. In so far as the issue of tenability of the application filed by the Respondent No.2 herein is concerned, the record of the proceedings does not disclose that any such objection as regards tenability of the application was taken on behalf of the Petitioner herein in the Courts below. No doubt the maintainability of the application was challenged, but that was on the ground that the decree obtained was lawful. In the context of the ground on which setting aside of the decree was sought by the Respondent No.2 herein, a few facts are required to be revisited. There can be no dispute about the fact that the Respondent No.2 herein participated in the auction of the suit property which auction took place on 16/06/2008 through the Recovery Officer of the DRT. The offer of the Respondent No.2 being the highest was accepted and a certificate of sale came to be issued on 02/02/2009. Thereafter on 04/05/2009 that the Consent Terms came to be tendered before the learned Judge of the Small Causes Court between the Plaintiff and the Defendant No.1 i.e. the Petitioner herein and the Respondent No.1 herein and that the Consent Terms were accepted by the Trial Court on 30/06/2009. Hence what stares us in the face is that the Consent Decree was obtained immediately after the certificate of sale was issued in favour of the Respondent No.2 herein on

02/02/2009. Both the Courts below were therefore right in recording a finding that the Respondent No.1 herein i.e. the original Defendant No.1 – landlord signed the Consent Terms when he did not have the authority to do so as by that time the Respondent No.2 herein had stepped into the shoes of the Respondent No.1. No doubt the suit is based on Agreement dated 07/04/1989, however, the right of the Respondent No.1 is dented by the fact that the the Respondent No.1 has lost his title on account of the auction sale which had taken place in respect of the suit property on 16/06/2008 in favour of the Respondent No.2. Hence the Respondent No.1 on 04/05/2009 when the Consent Terms were tendered had no vestige of right or authority to enter into any compromise with the Petitioner herein. In my view the Courts below were right in allowing the Misc. Notice filed by the Respondent No.2 herein and the Appellate Bench of the Small Causes Court in turn was right in dismissing the Appeal as the Consent Decree can be said to have been obtained by misrepresentation and by playing a fraud on the Court. In my view, the judgment of a learned Single Judge of this Court in ***Ramkrishna Shridhar Choube's*** case (supra) would not further the case of the Petitioner having regard to the facts on record in the instant case, which facts superimpose themselves on any technical plea that the Petitioner is seeking to raise by questioning the tenability of the application filed by the Respondent No.2.

10 Needless to state that the Petitioner herein would be entitled to

take such stand as is available to him in the suit vis-a-vis the Respondent No.2 and the Respondent No.2 would be entitled to raise such defences as are available to it in the suit.

11 In that view of the matter, the concurrent orders passed by the Courts below do not suffer from any error of jurisdiction or any illegality or infirmity for this Court to interfere in its writ jurisdiction. The above Writ Petition is accordingly dismissed. In view of the dismissal of the Writ Petition, the Civil Application No.1393 of 2016 filed by the Petitioner/Applicant for stay of the impugned order does not survive and the same to accordingly stand disposed of as such.

[R.M.SAVANT, J]