

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 2977 OF 2008

Shreeji Chambers Premises
C. S. Ltd.

...Petitioner

Versus

Badlu Baldeo Yadav
And others

...Respondents

....

Mr.Uday P. Warunjikar, Advocate for the Petitioner.

....

CORAM : R. G. KETKAR, J.

DATE : 13th JANUARY, 2017

JUDGMENT :

1. Heard Mr.Uday Warunjikar, learned Counsel for the petitioner at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'defendant No.3' has challenged the judgment and order dated 25.3.2008 passed by the learned Judge, City Civil Court, Greater Mumbai below Exhibit-16 in L.C.Suit No.6202/2003. By that order, the learned trial Judge allowed the application Exhibit-16 made by respondent No.1, hereinafter referred to as the plaintiff for withdrawal of the suit with liberty to institute fresh suit in

respect of the very subject matter. By order dated 25.6.2010, this Court admitted the Writ Petition by issuing Rule.

3. In support of this Petition, Mr. Warunjikar strenuously contended that the plaintiff filed application Exhibit-16 for withdrawal of the suit on the ground that he had not issued notice under Section 527 of the Mumbai Municipal Corporation Act, 1888 (for short, 'Act') before instituting the suit. He, therefore, sought permission to withdraw the suit with liberty to file same after giving notice under section 527 of the Act. Mr. Warunjikar submitted that defendant No.3 filed reply opposing withdrawal. In paragraph-3 of the reply, defendant No.3 specifically contended that the notices issued by the Corporation were already acted upon thereby demolishing the offending structure. As the cause of action does not survive, the suit has become infructuous and accordingly deserves to be dismissed with costs. He further submitted that the learned trial Judge allowed the application by observing in paragraph-6 that failure to give notice under Section 527 of the Act before institution of the suit is the formal defect whereby the suit must fail. It was further observed that in view of Rule 1 of Order XXIII of C.P.C., the plaintiff shall be bound by the law of limitation in

respect of filing a fresh suit. Mr. Warunjikar submitted that in the first place, the learned trial Judge committed error in holding that failure to give notice under Section 527 of the Act before instituting the suit is the formal defect. Secondly, as the offending structure was demolished, the cause of action does not survive for filing a fresh suit. In any case if the Court is inclined to dismiss the Petition, all the contentions of defendant No.3 including the contention that the suit is barred by limitation and that the offending structure is demolished and therefore there is no cause of action to file suit may be kept open.

4. Office remark shows that service on respondent No.1 is stated as good service. Respondent No.2 is served and Writ Petition is dismissed against respondent No.3.

5. I have considered the submissions advanced by Mr. Warunjikar. I have also perused the material on record. As noted earlier, the plaintiff has filed application Exhibit-16 for permission to withdraw the suit with liberty to file same after giving notice under section 527 of the Act. The learned trial Judge has allowed that application and observed that failure to

notice under Section 527 of the Act before institution of the Suit is the formal defect.

6. I do not find that the learned trial Judge has committed any error in that regard. The learned trial Judge has permitted the plaintiff to withdraw the suit for instituting the same on same cause of action after giving notice under Section 527 of the Act. At the same time, the learned trial Judge also observed that the plaintiff shall be bound by law of limitation in respect of filing of a fresh suit as per Order XXIII Rule 1 of C.P.C.. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Hence, Petition fails and the same is dismissed. Rule is discharged with no order as to costs. All contentions of defendant No.3 including that no cause of action survives as the offending structure is already demolished as also the suit is barred by law of limitation are kept open.

(R. G. KETKAR, J.)