

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 6798 OF 2019

Kali G. Shroff

...Petitioner

Versus

Mr. Feroze Cawas Tititna
and others

...Respondents

....

Mr. Jamsheed K. Master i/b. Surel S. Shah, Advocate for the Petitioner.
Mr. Shardul Singh a/w. Ms. Phiroza Khosravi, Advocate for the
Respondents.

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CORAM : R. G. KETKAR, J.

DATE : 20th JUNE, 2019

P.C.

1. Heard Mr. Jamsheed K. Master, learned counsel for the petitioner and Mr. Shardul Singh, learned counsel for the respondents, at length.

2. Leave to convert petition under Article 226 into petition under Article 227 of the Constitution of India is granted. Amendment shall be carried out within one week from today.

3. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'defendant', has challenged the orders dated 14.12.2018 and 16.4.2019 passed by the learned Judge, Court Room No.15 of the Court of Small Causes at Mumbai below Exhibits-28 and 32 in R.A.E. Suit No.455/746 of 2011. By order dated 14.12.2018, the learned trial Judge partly allowed the

application Exhibit-28 made by the defendant. The learned trial Judge permitted the defendant to file copy of the order dated 13.7.2018 passed by the Apex Court in Special Leave Petitions No.15710-15711/2018. The learned trial Judge, however, rejected the prayer made by the defendant for awaiting the proceedings of eviction suit till decision of the Charity Commissioner. By order dated 16.4.2019, the learned trial Judge rejected the application below Exhibit-32 made by the defendant for recalling the order dated 14.12.2018. Application Exhibit-32 was made by the petitioner to recall the order passed below Exhibit-28 on the ground that the order below Exhibit-28 was passed without hearing the defendant. The arguments were heard by the Court on Exhibit-28 on earlier occasion. The Presiding Officer was thereafter transferred. Even the learned Presiding Officer who took over the charge was also transferred and the subsequent Presiding Officer without hearing the defendant rejected the prayer for awaiting the eviction suit till the decision of the Charity Commissioner.

4. In support of this Petition, Mr. Master has taken me through the order dated 14.12.2018 passed by the learned trial Judge and submitted that in the opening paragraph itself the learned trial Judge recorded that none appeared for the defendant. After referring to earlier round of litigation, the learned trial Judge observed that he did not find any proper ground for awaiting the suit till the decision of the

Charity Commissioner as prayed for. He submitted that the defendant was regularly attending the proceedings pending before the trial Court. Application Exhibit-28 was already argued before the learned Presiding Officer. On 14.12.2018 he was delayed in traffic and reached the Court late. As the defendant was not heard, an opportunity of hearing is required to be given to him. He also invited my attention to the order dated 13.7.2018 passed by the Apex Court in S.L.P. Nos.15710-15711/2018. These S.L.P.s were preferred against the order dated 16.3.2018 passed by this Court in Writ Petition Nos.6996/2016 & 6981/2016. The defendant who was the petitioner before the Apex Court sought permission to withdraw the S.L.Ps. with liberty to file appropriate application(s) before the trial Court for deciding the suit after the decision of the Charity Commissioner. The permission sought for was granted. In pursuance of this liberty, the defendant has filed application Exhibit-28. The learned trial Judge was, therefore, not justified in rejecting the prayer without hearing the defendant. Even the order dated 16.4.2019 below Exhibit-32 deserves to be set aside as basically the defendant was not heard while passing the order below Exhibit-28.

5. Mr. Master also invited my attention to the order dated 12.1.2018 passed by the Deputy Charity Commissioner, Greater Mumbai Region, Mumbai in C.R. No.DYCC/2138/2007. He, therefore,

submitted that the petition requires consideration.

6. On the other hand, Mr. Singh invited my attention to the order dated 16.3.2018 passed by this Court in Writ Petition Nos.6996/2016 & 6981/2016. By this order, the orders passed by the Courts below staying the proceedings of the eviction suits were set aside. Aggrieved by this order, the defendant preferred S.L.Ps. No.15710-15711/2018 before the Apex Court and the Apex Court dismissed the S.L.Ps. as withdrawn with liberty as prayed for. He invited my attention to paragraph-5 of the application Exhibit-28 to contend that no reason is given for staying the proceedings before the Small Causes Court. While deciding the application for recalling the order passed below Exhibit-28, the learned trial Judge has also observed that application Exhibit-28 depicts no sufficient ground for staying the further proceedings of the suit till decision of the Charity Commissioner. He submitted that this is another attempt on the part of the defendant to protract the eviction suit and, therefore, exemplary costs may be awarded to the respondents.

7. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As mentioned earlier, the defendant had earlier filed applications under Section 10 of Code of Civil Procedure, 1908 (for short, 'C.P.C.') for staying the proceedings of eviction suits till the

outcome of the Charity Commissioner. The applications filed by the defendant were allowed by the trial Court. Aggrieved by the decisions, Revision Applications were preferred before the Appellate Bench of the Small Causes Court. Revision Applications were dismissed. Aggrieved by these decisions, the plaintiffs preferred Writ Petition Nos.6996/2016 & 6981/2016. By order dated 16.3.2018, Writ Petitions were allowed and the applications made by the defendant for staying the eviction suit were dismissed. It was held that the proceedings before the Charity Commissioner cannot be treated as a suit so that Section 10 of C.P.C. can be invoked. Alternative submission that the applications may be treated under Section 151 was also considered and negated. Aggrieved by that decision, S.L.Ps. were preferred before the Apex Court. By order dated 13.7.2018, S.L.Ps. were dismissed as withdrawn with liberty to the defendant to file appropriate application(s) before the trial Court for deciding the suit after the decision of the Charity Commissioner. In pursuance thereof, the defendant filed application Exhibit-28.

8. In order to appreciate the controversy raised in the petition, application Exhibit-28 is reproduced as under :

**“May it Please Your Honour
Application On Behalf Of The Defendant To
Place on record the Order dated 13 July 2018
passed by the Hon'ble Supreme Court of India in
the above Suit.”**

1. The Defendant states that the stay of the suit granted by this Hon'ble Court on 1st January, 2014 was vacated by the order of the Hon'ble Bombay High Court on 16th of March 2018 in the Writ Petition number 6996 of 2016 with Writ Petition number 6981 of 2016 (Common Order passed).
2. Taking exception to the aforesaid judgment passed by the Hon'ble Bombay High Court, the defendant had preferred an SLP before the Hon'ble Supreme Court at Delhi.
3. The Hon'ble Supreme Court has heard the matter on 13th July 2018 and passed orders therein.
4. The Defendant hereby produces and places on record the photo copy of the certified copy of the Order dated 13 July 2018 passed by the Hon'ble Supreme Court of India. Hereto annexed and marked as Exhibit "A" is a photocopy of the certified copy of the said order passed by the Hon'ble Supreme Court in the said SLP.
5. The Defendant further states that as per the Order of the Hon'ble Supreme Court it is humbly prayed this Hon'ble Court has to await the decision of the Id. Charity Commissioner and thereafter the Defendant will have the liberty to file appropriate application(s) before this Hon'ble Court.
6. The Defendant further submits that he will keep appraised this Hon'ble Court the decision of the charity Commissioner as and when orders are passed."

9. A perusal of the application Exhibit-28, extracted hereinabove, shows that in paragraphs-1 to 4 the defendant has given the details about the earlier round of litigation. In paragraph-5 the defendant prayed that as per the order of the Hon'ble Supreme Court the trial Court has to await the decision of the learned Charity Commissioner

and thereafter the defendant will have the liberty to file appropriate application(s) before the trial Court. A perusal of the application Exhibit-28 shows that apparently no reasons are given by the defendant for staying the eviction suits till the decision of the Charity Commissioner. In my opinion, the defendant should have been more careful in filing application in pursuance of the liberty granted by the Apex Court as the earlier applications filed under Section 10 of C.P.C. were dismissed by this Court.

10. A perusal of paragraph-5 of application Exhibit-28 also gives an impression that the Apex Court has directed the trial Court to stay its hands till the decision is rendered by the Charity Commissioner.

11. It is no doubt true that the order dated 14.12.2018 below Exhibit-28 was passed by the learned trial Judge without hearing the defendant. After perusing the application, the learned trial Judge did not find any proper ground for awaiting the eviction suit till decision of the Charity Commissioner as prayed for. The defendant thereafter filed application Exhibit-32 for recalling the order below Exhibit-28. While rejecting that application Exhibit-32, in paragraph-11 the learned trial Judge also recorded a categorical finding that the application Exhibit-28 did not depict any sufficient ground for staying further proceedings of the suit till decision of Charity Commissioner. The learned Counsel for the defendant was not in a position to show any infirmity in this finding

or for that matter any reason given in the application Exhibit-28 for staying the eviction suits. The only contention of the defendant was that application Exhibit-28 was decided without hearing the defendant. In view thereof, I have heard the learned counsel for the defendant at length.

12. In the case of **S. L. Kapoor Vs. Jagmohan, AIR 1981 SC 136** in paragraph-17 the Apex Court held that whether the failure to observe natural justice does at all matter if the observance of natural justice would have made no difference, the admitted or indisputable facts speaking for themselves. Where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not issue its writ to compel the observance of natural justice, not because it approves the non observance of natural justice but because Courts do not issue futile writs. But it will be a pernicious principle to apply in other situations where conclusions are controversial, however, slightly, and penalties are discretionary. Applying the principles laid down in this decision to the facts of the present case as also in view of paragraph-5 of the application Exhibit-28, extracted hereinabove, I am not inclined to remit the matter for deciding Exhibit-28 afresh for the reasons already recorded.

13. In view thereof, I do not find that any case is made out for

interfering with the impugned orders. In fact, this is a fit case for imposing exemplary costs on the defendant for wasting the trial Court's time as also this Court's time. As the defendant is represented by a young and enthusiastic Lawyer, I refrain myself from imposing exemplary costs. Subject to this, the petition fails and the same is dismissed.

14. It is made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C..

15. Liberty to apply to the trial Court for disposal of the suits in a time bound manner. If such an application is made, the learned trial Judge will pass appropriate order. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)