

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2861 OF 2018

Bharat Petroleum Corporation Ltd }
Bharat Bhavan, 4 & 6 Currimbhoy Road }
Ballard Estate, Mumbai-400 038 } **..Petitioner**

Vs.

1. Mr.Fali @ Framji Jalegar Ghaswala }
R/at 3852, South Mission Parkway }
Aurora, Colando 80013, U.S.A. }
Through Constituted Attorney }
Mr.Mahendra Jagannath Yeole }
R/at Model Colony, Pune-411016 }
And }
2, Shrishti Chamber, 1196/B Ghole Road }
Shivaji Nagar, Pune-411 004 }

2. M/s.Everest Automobiles }
A Registered partnership firm }

3. Mr.Angelo Nilus Lobo }
(Angelo Everest Lobo) }

4. Mr.Xavier Anthony Lobo }
No.2,3 and 4 having address at }
828/48, Dastur Meher Road, }
Nirmal Niwas, Pune-411 001 }

5. Shree Bal Estate Pvt. Ltd. }
4, Buona Casa, 2nd Floor }
Opp. Kashmir Arts Emporium, Fort, }
Mumabi-400001 } **..Respondents**

Mr.Shivprasad R. Page for the Petitioner.

Mr.Siddhesh Bhole a/w Ms.Krupashree Sawant i/b S.S.B. Legal for
Respondent No.5.

CORAM : C.V. BHADANG, J.

RESERVED ON : 01st MARCH 2021

PRONOUNCED ON : 05th MARCH 2021

JUDGMENT:

1. Rule made returnable forthwith. The learned counsel for the respondents waives service. Heard finally by consent of parties.

2. The challenge in this petition is to the order dated 28th January 2008 and the judgment and order dated 05th December 2011 passed by the learned District Judge at Pune in Civil Appeal No.722 of 2005. Essentially by the impugned order the appeal filed by the petitioner, has been dismissed for want of payment of paper book charges.

3. Although the challenge appears to be short, the dispute has a chequered history.

4. The respondents are the owners of the suit property more specifically described in the plaint which was leased out to the erstwhile Burmah Shell Oil Storage and Distributing Company of

India Pvt. Ltd. ('Burmah Shell' for short) under a lease deed dated 20th October 1955 for a period of 20 years. The said lease was renewed on 01st October 1974 for a further period of 20 years which expired on 30th September 1994.

5. In the meantime the establishment of Burmah Shell was taken over by Government of India, pursuant to the Burmah Shell (Acquisition of undertaking in India) Act, 1976 and since then the petitioner Bharat Petroleum Corporation Ltd. ('BPCL' for short) has become entitled to the rights in respect of the suit premises, as successors of Burmah Shell.

6. As the petitioner failed to vacate and handover the possession of the suit premises, on expiry of the lease period, the respondent No.1 issued a notice dated 16th July 2003 thereby seeking possession and thereafter filed Civil Suit No.3 of 2004 for possession and other consequential reliefs.

7. The suit was resisted on behalf of the petitioner on the ground that under Section 5(2) of the Act of 1976 the petitioner was entitled to exercise an option of further renewal, which option was exercised by virtue of a letter dated 12th July 1994. In short

according to the petitioner the lease stands renewed till 30th September 2034.

8. The learned trial Court refusing to uphold the defence decreed the suit on 15th September 2005. Feeling aggrieved the petitioner challenged the same before the learned District Judge in RCA No.722 of 2005.

9. The said appeal came to be dismissed on 28th January 2008 with the following order:-

“Order below Exh.1

The appellant and his counsel repeatedly absent. No steps taken for payment of paper book since 13/3/2007. On 25/01/2008 respondent made an application and matter is kept today. Today also appellant is absent. Hence Appeal is dismissed for want of prosecution. Stay stands vacated. R & P be sent back. Inform L.C.C. Applicant to pay costs of respondent.”

10. It appears that the petitioner filed an application Exhibit-20 seeking restoration of the appeal on the ground that the appeal was not fixed on 28th January 2008 but was scheduled to come up on 26th February 2008. In short according to the petitioner

the appeal was wrongly on board on 28th January 2008 on which date it came to be dismissed as aforesaid.

11. The learned District Judge verified the daily boards of 25th January 2008 and 26th February 2008 and refused to accept that it was wrongly on board i.e. on 28th January 2008. In that view of the matter application Exhibit-20 came to be rejected on 05th December 2011. The petitioner challenged the same in Appeal From Order (AO) No.180 of 2013 before this Court presumably on the premise that the order is appealable under Order XLIII Rule 1 of C.P.C. That appeal came to be withdrawn on 12th June 2017 with liberty to file Writ Petition. It is after this that the present petition came to be filed on 04th June 2017. The net result is that the petitioner now wants an appeal instituted in the year 2005 to be restored to file.

12. I have heard the learned counsel for the petitioner and the learned counsel for the respondent No.5. Perused record.

13. The learned counsel for the petitioner has placed reliance on the decision of the Supreme Court in the case of

Kalipada Das V/s. Bimal Krishna Sen Gupta¹, in order to submit that the petitioner is entitled to get the appeal restored, as the same is dismissed on the technical ground of non-payment of the paper book charges.

14. The learned counsel for the respondent has submitted that the petitioner is only trying to prolong the lis. The learned counsel has pointed out the decision of this Court in ***Bharat Petroleum Corporation Ltd V/s. Champalal Vithuram Jajoo***², in order to submit that this Court had found that the petitioner is a “Notorious entity”. It is submitted that this is the usual *modus operendi* engaged into by the petitioner to prolong the lis. It is submitted that the suit property is being used for commercial purpose, which is situated at a strategic location in the Pune city. It is submitted that, even otherwise the defence based on Section 5(2) of the Act 1976 is not acceptable, in view of the decision of this Court in ***Bharat Petroleum Corporation Ltd V/s. Rustom Behramji Colah (Dr.)***³. He therefore, submitted that the petition be dismissed.

1 (1983) 1 Supreme Court Cases 14

2 2020 SCC Online Bom 792

3 2006 SCC Online Bom 706

15. I have given my anxious consideration to the rival circumstances and the submissions made. It is true that the petitioner continues to be in possession of the suit property although according to the respondents the lease has expired on 30th September 1994. It is also pointed out on behalf of the respondent that the defence based on Section 5(2) of the Act of 1976 is not acceptable. However, I am afraid it is not possible to examine the merits of the challenge in the appeal before the learned District Judge the challenge has to be confined to the order dated 28th January 2008 as reproduced above. However, before doing that it is necessary to note that the petitioner could have acted with greater diligence in the matter. The respondent is questioning the *bona fides* of the petitioner in which the matter is prosecuted since inception. However, here again I would confine myself to the challenge to the order dated 28th January 2008.

16. In the case of *Kalipada Das* the appeal was dismissed on a similar ground of non-compliance with the order to supply copies of the paper book within a fixed period. In the present case the appeal is dismissed as the appellant failed to take steps for payment of the paper book charges. It is trite that the Courts would normally lean in favour of a decision on merits than on technicality. Thus

although, strictly, the manner in which the petitioner has prosecuted the appeal cannot be approved still only with a view to ensure that the appeal is decided on its merits, I am inclined to grant indulgence. The Supreme Court in the case of *Kalipada Das* has held that a procedural step is in the aid of justice and such a procedural step which facilitates hearing of the appeal, cannot impede the access to justice.

17. Considering the overall circumstance, and only with a view to give a fair chance to the petitioner, I am inclined to allow the petition. Hence, the following order:-

ORDER

- (i) The petition is allowed.
- (ii) The impugned order is hereby set aside. Civil Appeal No.722 of 2005 is restored back to the file of the learned District Judge at Pune for disposal according to law.
- (iii) The petitioner shall furnish a private paper book within two weeks from today, failing which it will be

open to the respondent to file a private paper book within two weeks thereafter.

(iv) The hearing of the First Appeal is expedited.

(v) The learned District Judge shall hear and dispose of the appeal within a period of eight weeks from receipt hereof.

(vi) Parties to co-operate for the time bond disposal of the appeal.

(vii) The rival contentions on merits are left open.

(viii) Rule is made absolute in the aforesaid terms with no order as to costs.

C.V BHADANG, J.