

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7271 OF 2024

WITH

WRIT PETITION (ST) NO. 16174 OF 2024

Ms. Shabana Niyaz Ahmed Qureshi and Ors

... Petitioners

(Original Obstructionists)

Versus

Quresh Badruddin Ghadiyali (Deleted)

(Since Deceased) and Ors.

... Respondents

Mr. Jayesh Bhatt a/w Mr. Rahul Tiwari for the Petitioners.

Mr. Sajid Shamin a/w Jishan Ansari i/b S. Shamim & Co. for the Respondents.

CORAM : SANDEEP V. MARNE, J.

DATED : 10 JULY 2024.

ORAL JUDGMENT:

1) The challenge in the present Petition is to the Order dated 2 December 2023 passed by the Small Causes Court in Obstructionist Notice No. 291 of 2018 filed in execution proceedings. The Small Causes Court has directed Petitioners/Obstructionist to deposit amount of

Rs.1,39,41,060/- within two months towards interim mesne profits with further direction to deposit monthly amount of Rs.1,00,000/- on 10th day of each succeeding months. The Small Causes Court has passed the Order for deposit of interim mesne profits by holding that the Petitioners/Obstructionist are delaying execution of the decree.

2) I have heard Mr. Bhatt, the learned counsel appearing for Petitioners. He would submit that the impugned order the Small Causes Court is in gross violation of the provisions of the Code of Civil Procedure, 1908 (**Code**) which does not empower the Executing Court to direct deposit of interim mesne profits. Inviting my attention to provisions of Order 21 Rule 98 (as amended by Bombay Amendment), under which the direction for payment of costs and interim compensation can be made only at the end of the decision of obstruction proceedings, he would submit that so long as the obstruction proceedings are not decided, there is no question of directing deposit of interim mesne profits. He would submit that the Small Causes Court has erroneously relied on judgment of the Apex Court in *Marshall Sons & Co. (I) Ltd. Vs. Sahi Oretrans (P) Ltd. and Another*¹ which, according to Mr. Bhatt, is rendered in the light of unique facts and circumstances of the case before the Apex Court.

3) Mr. Bhatt would further submit that the decree is without jurisdiction as the concerned property has been declared as Wakf property by Order dated 10 October 2022 passed by the Maharashtra Board of Wakf. That in view of the said Order passed the Wakf Board, *prima facie* case is

¹ (1999) SCC 325

made out by the Petitioners to prove that the decree is not executable. That in fact the Petitioners wanted to intervene in the pending suit in order to prove that the Plaintiffs are not the owners of the suit property and that the same is a Wakf property. However, Plaintiffs opposed the Intervention application filed by Petitioners and prevented them from pointing out the correct position of law about lack of jurisdiction the Small Causes Court to decide the suit. That the conduct of the Plaintiffs has resulted in passing of a decree without jurisdiction, which is a nullity. That since the decree itself is not executable, there is no question of Petitioners being made to pay any interim mesne profits for presenting valid objection to execution of the decree.

4) *Per contra* Mr. Shamim the learned counsel appearing for original Plaintiffs would oppose the petition and submit that Petitioner No.1 is the sister of contesting Defendant No.15 and execution of the decree is being delayed in collusion between Petitioners and Defendant No. 15. He would submit that the Apex Court in ***Marshall Sons*** has rightly held that in such situation, the Obstructionist cannot continue to delay execution of the decree without inviting consequences. He would submit that the Small Causes Court has directed deposit of only 60% of the total amount of Rs.2,32,35,100/- sought by the original Plaintiffs. He would submit that no interference is therefore warranted in the impugned order of the Small Causes Court. He would pray for dismissal of the Writ Petition.

5) I have considered the submissions canvassed by the learned counsel appearing for the parties. In the present case Petitioner No. 1 is the

sister of original contesting Defendant No. 15. Petitioner No. 2 is the husband of Petitioner No. 1 and Petitioner No. 3 is her son. The decree is passed on 25 April 2018 directing the Defendants to handover possession of the suit premises. When the decree was put in execution, Petitioners objected to the execution of the decree on 28 October 2018 by filing Obstructionist Notice No. 291 of 2018. Thus, for the last six long years execution of the decree is being delayed on account of obstruction presented by Petitioners.

6) Petitioners rely upon Order dated 10 October 2022 passed by Maharashtra State Board of Wakf, Aurangabad claiming that as per the said order, the land on which the suit premises are located has been declared as Wakf land. The title of the landlord is thus sought to be questioned and possible plea of bar of jurisdiction of Civil Court under Section 85 the Wakf Act, 1995 is sought to be raised. It also appears that the Order dated 10 October 2022 is yet to attain finality and appears to have been challenged before the Tribunal by the affected persons.

7) The issue here is about the jurisdiction of Executing Court to direct deposit of interim mesne profits. Under provisions of Order 21 Rule 98 of the Code, the Executing Court is empowered not only to handover possession of the suit property by taking the possession from the obstructionist, but the Court can also direct the person who held the property to pay costs as well as reasonable compensation to the decree holder. Provisions of Order 21 Rule 98 as amended by the Bombay Amendment reads thus:

"98. Orders after adjudication. —

(1) Upon the determination of the questions referred to in rule 101, the Court shall, in accordance with such determination and subject to the provisions of sub-rule (2), —

*(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or
(b) pass such other order as, in the circumstances of the case, it may deem fit.*

(2) Where, upon such determination, the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf, or by any transferee, where such transfer was made during the pendency of the suit or execution proceeding, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation or on his behalf, to be detained in the civil prison for a term which may extend to thirty days. The Court may also order the person or persons whom it holds responsible for such resistance or obstruction to pay jointly or severally in addition to costs, reasonable compensation to the decree-holder or the purchaser, as the case may be, for the delay and expenses caused to him in obtaining possession. Any order made under this rule shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree."

8) According to Mr. Bhatt, sub-rule (2) Rule 98 of Order 21 empowers the Executing Court to make an order for payment of compensation only after the objection presented by the obstructionist is finally decided. According to him, there is no provision in the Code which empowers the Executing Court to pass an order for deposit of interim mesne profits.

9) However, the Apex Court in ***Marshall Sons & Co.*** (supra) has dealt with a situation where obstructionist therein had delayed execution of the decree. The Apex Court has held in para 4, 5, and 6 of the judgment as under:

*"4. From the narration of the facts, though it appears to us, prima facie, that a decree in favour of the appellant is not being executed for some reason or the other, we do not think it proper at this stage to direct the respondent to deliver the possession to the appellant since the suit filed by the respondent is still pending. It is true that proceedings are dragged for a long time on one count or the other and on occasion become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Because of the delay unscrupulous parties to the proceedings take undue advantage and person who is in wrongful possession draws delight in delay in disposal of the cases by taking undue advantage of procedural complications. **It is also known fact that after obtaining a decree for possession of immovable property, its execution takes long time. In such a situation for protecting the interest of judgment creditor, it is necessary to pass appropriate orders so that reasonable mesne profit which may be equivalent to the market rent is paid by a person who is holding over the property.** In appropriate cases, Court may appoint Receiver and direct the person who is holding over the property to act as an agent of the Receiver with a direction to deposit the royalty amount fixed by the Receiver or pass such other order which may meet the interest of justice. This may prevent further injury to the plaintiff in whose favour decree is passed and to protect the property including further alienation.*

5. In the present case, suit was filed in November, 1962 on the ground as stated above including the ground that there was unlawful subletting. The High Court has decreed the suit on that ground. Special Leave Petition filed by M/s. Halda Engineering Co. has dismissed. Now, it is the contention of the respondent that they got possession of the property admeasuring 2500 sq. ft. from M/s. Halda Engineering Co. in or about 1973 and thereafter in 1978 entered into a partnership agreement with M/s. Halda Engineering Co.

6. Having considered the relevant submissions of the parties including the submissions with regard to market rent and without expressing any opinion on the merits of the contentions of the parties in the pending suit, we think it appropriate to dispose of this matter with the following directions:

- (1) That the suit in question be disposed of as expeditiously as possible, preferably within one year from today;*
- (2) The respondents are directed to pay the mesne profits/compensation at the rate of Rs.10/- per sq. ft. from 1984 till today and at the rate of Rs.20/- from today till the disposal of the suit. While making this payment, the payments already made shall be adjusted. So far as the arrears are concerned, it be paid in 12 equal monthly installments."*

10) Thus, in ***Marshall Sons & Co.*** the Apex Court has recognised the principle that in appropriate case, the Court has necessary jurisdiction to pass an Order for deposit of reasonable mesne profits equivalent to the market rent by the person who holds over the property. It appears that, the judgment in ***Marshall Sons & Co.*** is followed by this Court in ***Shri. Dyandev Tukaram Kshirsagar Vs. M/s. Pyramid Corporation and Anr.***² in which it is held as under:

"Per contra, it is the submission of the Learned Counsel appearing for the Respondent No. 1 that though the said area was declared as a slum, the said declaration was set aside by the Slum Tribunal by judgment and order dated 13.12.1995 and the matter came to be remanded back to the Competent Authority for a fresh inquiry. It is not necessary for this Court to enter into the said arena in view of the fact that the obstructionist proceedings adopted by the Petitioner are pending before the Small Causes Court, Mumbai. The arrangement made by the impugned order is pending consideration of the said obstructionist proceedings. It is an undisputed position that the Petitioner is in occupation of the tenanted premises and in terms of the judgment of the Apex Court in Marshall (supra), the obstructionist is liable to pay for such occupation. Prima-facie in absence of any contra material by way of notification produced by the Petitioner to show that the declaration of slum still continues, the submission of the Learned Counsel for the Respondent No. 1 at this stage is required to be accepted. The Learned Counsel appearing on behalf of the Petitioner also sought to question the quantum fixed by the Trial Court by the impugned order. It is required to be noted that the premises are totally admeasuring 600 sq.ft. and that too in a busy commercial area as Dharavi in Mumbai. The Learned Counsel appearing for the Respondent No. 1 also sought to draw this Court's attention to an order passed by a Learned Single Judge of this Court fixing the compensation at Rs. 8000/- for a smaller premises of 150 sq.ft. in the same area (Writ Petition No. 8677 of 2015 by order dated 20th October 2015). In my view, therefore, no interference is called for with the impugned order. The Writ Petition is accordingly dismissed."

(emphasis supplied)

11) The Executing Court in the present case has relied upon the judgment in ***Marshall Sons & Co.*** and ***Dyandev Tukaram Kshirsagar.*** In my view, therefore, it cannot be contended that the Small Causes Court has

² (2015) SCC online Bom. 7928.

committed any jurisdictional error in making an order for deposit of interim mesne profits.

12) Mr. Bhat has submitted that the original Defendants are already made liable to pay mesne profits and therefore making obstructionist to deposit the same would tantamount to double payments in respect of same premises. I am unable to agree. The obstructionists are enjoying possession of the property without making any payment in respect of their use. Usually, a Defendant found in unlawful possession of immovable property is made liable to pay mesne profits till delivery of possession thereof to the Plaintiff. Obstruction Notice take long time for decision (which appears to be the case here), Defendant will suffer and would be made liable to pay mesne profits for use of the property by the obstructionist. This is one more reason why the person actually possessing the property must be liable to bear the amount of compensation for use of the property in the event his obstruction is found to be baseless.

13) The next issue is about the quantum of interim mesne profit fixed by the Small Causes Court. It appears that from 1 January 2024 till disposal of the Obstructionist Notice, the Small Causes Court has directed deposit of interim mesne profits at the rate of Rs.1,00,000/- per month. It must be borne in mind that the suit premises comprise of built-up area of 1080 sq. ft. and usable built-up area of 1440 sq. ft. located at near Grant Road Railway Station. In that view of the matter interim mesne profits of Rs.1,00,000/- per month cannot be considered as excessive so as to warrant interference by this Court.

14) However, in respect of period prior to 1 January 2024, the Executing Court has directed deposit of amount of Rs.1,39,41,060/-. The Obstructionist Notice is presented by the Petitioners on 28 October 2018 and accordingly if the interim mesne profits of Rs.1,00,000/- per month are taken into consideration the amount for the period from 29 October 2018 till 31 December 2023 would obviously not be Rs.1,39,41,060/-. In my view therefore, for period prior to 1 January 2024 also, the interim mesne profits ought to have been directed to be deposited @ Rs. 1,00,000/-. To this limited extent, the order passed by the Small Causes Court needs slight modification.

15) The Writ Petition accordingly partly succeeds. The Order passed by the Small Causes Court on 2 December 2023 on application at Exhibit-25 shall stand modified to the extent that the Petitioners/Obstructionist shall collectively deposit interim mesne profits at the rate of Rs.1,00,000/- per month from 28 October 2018 till disposal of the Obstructionist Notice. The arrears in respect of the interim mesne profits up to July 2024 shall be paid by Petitioners within two months from today. With the above directions the Writ Petition is disposed of.

16) Considering the position that the Obstructionist Notice is pending since the year 2018, the Small Causes Court shall make an endeavor for its expeditious disposal.

WRIT PETITION (ST) NO. 16174 OF 2024

In view of modification of the Order dated 2 December 2023, nothing would survive in Writ Petition (St.) No. 16174 of 2019 and the same is disposed of.

[SANDEEP V. MARNE, J.]

After the Order is pronounced Mr. Bhatt would pray for stay of the Order for a period of four weeks. In fact, partly relief is granted in favour of Petitioners in the order, and it is quite incomprehensible as to why stay of the Order is sought by the Petitioners. Petitioners, being family members of contesting Defendant No. 15, are obstructing execution of decree since 2018 and are holding onto the premises without making any deposit. The request for stay is accordingly rejected.

[SANDEEP V. MARNE, J.]