
(2019) 06 BOM CK 0073
In the Bombay High Court
Case No : Writ Petition No. 1139 Of 2019

Transcon Sheth Creators Private Limited	APPELLANT
Vs	
State Of Maharashtra And Ors	RESPONDENT

Date of Decision : 25-06-2019

Acts Referred:

Maharashtra Slum Areas (Improvement, Clearance And Redevelopment) Act, 1971 —
Section 3(c), 3(c)(1), 3(c)(2), 4, 45
Code of Civil Procedure, 1908 — Order 23 Rule 1A, Order 23 Rule 2A, Order 1 Rule 10(2)
Constitution of India, 1950 — Article 226

Citation : (2019) 06 BOM CK 0073

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Birendra Saraf, Pratik Kothari, Aditya Nilakantan, Amit Shastri, Jagdish G. Reddy, Arvind Aswani, Prashant P. Jadhav

Final Decision : Allowed

Judgement

1. Rule. Learned counsel appearing for the respondent nos.1 to 7 waive service. The respondent nos.7 to 10 are formal parties and are not contesting the proceedings as recorded in the order dated 8th January, 2019. By consent of the petitioner and the respondent nos.1 to 7, rule is returnable forthwith. Some of the relevant facts for the purpose of deciding this petition are as under :

2. Salsette Catholic Co-operative Housing Society Limited was the original owner of several plots of land including CTS nos.371 and 374. By two registered Deed of Conveyance dated 9th May, 2007 and 29th August, 2007, executed between the said society and the petitioner, various plots including CTS nos.371 and 374 were transferred to the petitioner by the said society. The petitioner claims to be an owner of those lands.

3. Insofar as the plots bearing CTS nos.371 (part) and 374 (part) are concerned, these plots were declared along with few other plots as "Slum Rehabilitation

Area" vide notification dated 18th September, 2010 issued by the Chief Executive Officer of the Slum Rehabilitation Authority under section 3(C)(1) of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 (for short "the Slum Act").

4. The petitioner desired of developing larger property in phasewise manner and submitted the plan for development of the portion of the larger property admeasuring 20,770.70 sq. mtrs. On 26 th October, 2010, the authority issued a letter of intent in favour of the petitioner. It is the case of the petitioner that the majority of the slum dwellers residing on the larger portion gave their consent and entered into individual agreements with the petitioner which was more than 70% consent necessary for application of the slum scheme. Insofar as CTS no.371 is concerned, 34 members / slum dwellers gave their consent and entered into the individual agreements with the petitioner. The petitioner submitted the scheme / proposal in respect of development of that portion and also of the larger property.

5. Some time in the month of December, 2011, an Association of Barretto Compound Welfare Society and its members filed an appeal under section 3C (2) of the Slum Act numbered as Appeal No.4 of 2012 challenging the notification dated 18th September, 2010 insofar as it relates to the plots bearing CTS nos.371 (part) and 374(part) before the Maharashtra Slum Areas (I C & R) Tribunal, Mumbai) for short "Tribunal"). It was the case of the original appellant that they were the tenants of one Ms.Liberata Rodrigues and thereafter of M/ s.Shri Ganesh Enterprises. The appeal was preferred on the ground that the properties bearing CTS nos.371(part) and 374 (part) did not meet the slum criteria specified in section 4 read with 3C(1) of the Slum Act and thus part of the notification was erroneous and illegal.

6. The said Appeal No.4 of 2012 was disposed of by an order and judgment dated 26th February, 2013 passed by the said Tribunal by allowing the said appeal and quashing the notification dated 18th September, 2010. The petitioner challenged the said order and judgment by filing a Writ Petition in this Court (612 of 2013). By an order and judgment dated 23rd December, 2015, this Court disposed of the said writ petition by setting aside the order and judgment dated 26th February, 2013 and remanded the matter back for consideration afresh before the said Tribunal. The respondent nos.3 to 6 also have filed an intervention application in the said Writ Petition No.612 of 2013 by filing a Notice of Motion Nos.270 of 2013 and 323 of 2013. A Special Leave Petition filed by the original appellant impugning the order and judgment passed by this Court on 23rd December, 2015 came to be dismissed by the Supreme Court on 8th August, 2016.

7. On 6th February, 2017, the respondent nos.3 to 6 along with one Juliet D'Souza (nee Menezes) filed an application for intervention / impleadment in the Appeal No.4 of 2012 before the Slum Tribunal. By a detailed order passed by the Slum Tribunal on 18th April, 2017, the said application for intervention /

impleadment filed by the respondent nos.3 to 6 came to be dismissed. It is the case of the petitioner in the application for impleadment / intervention that the entire case of the respondent nos.3 to 6 and the said Juliet D'Souza was confined to two structures which according to them should be excluded from the purview of the notification dated 18th September, 2010. It is the case of the petitioner that the predecessor in title of the respondent nos.3 to 6 never had any right, title or interest in the property bearing CTS nos.370 or 371 or 372 or any part thereof. This fact had been admitted in the consent terms dated 18th October, 2018 executed between the Salsette Catholic Co-operative Housing Society Limited and late Rosy Menezes (through whom the respondent nos.3 to 6 and Juliet D'Souza claimed) and filed a suit (4728 of 1988) before the Bombay City Civil Court.

8. Being aggrieved by the said order dated 18th April, 2017 passed by the said Tribunal, the respondent nos.2 to 6 filed a Writ Petition (2610 of 2017) before this Court. By an order dated 6th March, 2018 passed by this Court, by consent of parties the said order dated 18th April, 2017 passed by the Slum Tribunal came to be set aside. The application for intervention filed by the respondent nos.3 to 6 in Slum Appeal No.4 of 2012 came to be allowed.

9. On 4th May, 2018, the original appellants filed an application before the Slum Tribunal in the said Appeal No.4 of 2012 recording that the members of the original appellant no.1 had already entered into the agreements with the petitioner herein as required under the Slum Act and have agreed to co-operate with the petitioner herein in implementation of the slum rehabilitation scheme and thus all interim orders be vacated for the proper implementation of the said scheme. The original appellants therefore desired of not pursuing the said appeal and prayed for unconditional withdrawal of the said appeal.

10. The respondent nos.3 to 6 and the said Juliet D'Souza filed an application in the said Appeal No.4 of 2012 before the Slum Tribunal for their transposition as the appellants on the ground that their alleged interest in the said appeal was similar to that of the original appellants and the cause of action in the said appeal would subsist even after the original appellants withdraw their appeal. The petitioner filed an affidavit in reply opposing the said application for transposition of the respondent nos.3 to 6 as the appellants on various grounds. On 4th May, 2018 the said Juliet D'Souza also filed an affidavit placing on record that she had entered into an agreement with the petitioner in respect of her structure on the plot bearing CTS no.371 (part) and 374(part) and prayed for deletion of her name as the applicant in the said transposition application. She also confirmed the correctness of the impugned notification in the said affidavit and gave a consent for implementation of the development scheme undertaken by the petitioner.

11. On 4th June, 2018, the Slum Tribunal allowed the application filed by the original appellants for withdrawal and allowed the transposition application filed by the respondent nos.3 to 6 and directed the respondent nos.3 to 6 herein to

carry out the amendment within a fortnight. The petitioner has impugned the said order dated 20th December, 2018 to the extent the same allowing the miscellaneous application of the respondent nos.3 to 6 for their transposition as the appellants.

12. Dr.Saraf, learned counsel appearing for the petitioner invited my attention to some of the annexures to the writ petition including the application for transposition made by the respondent nos. 3 to 6, the impugned order passed by the tribunal on the said application, various orders passed by this court in the earlier writ petition and also to the affidavit filed by his client before the tribunal opposing the application for transposition made by the respondent nos. 2 to 6.

13. It is submitted by the learned counsel that the notification under section 3C(1) of the Slum Act in respect of plot bearing CTS No.371 (part), 374 (part) along with two other plots as slum rehabilitation area was issued as far back as on 18th September,2010. The said notification was challenged by the Barretto Compound Welfare Society and its committee members sometime in the month of December, 2011 by filing an appeal before the Slum Tribunal. The Slum Tribunal had allowed the said appeal by an order dated 26th February, 2013. The said order passed by the Slum Tribunal was set aside by this court on 23rd December, 2015. Special Leave Petition filed by the original appellants came to be dismissed by the Hon'ble Supreme Court on 8th August, 2016.

14. Only on 6th February, 2017, the respondent nos.3 to 6 filed an application for intervention in the said Appeal No.4 of 2012. He submits that the said application for impleadment was rejected by the Slum Tribunal initially. In the writ petition filed by the respondent nos.3 to 6, the petitioner consented for setting aside the said order dated 18th April, 2017 and agreed for impleadment of the respondent nos. 3 to 6 as the respondents. It is submitted that the petitioner had no objection in the original appellants applying before the Slum Tribunal for withdrawing the said Appeal No.4 of 2012. The petitioner however had strongly opposed the transposition of respondent nos.3 to 6 as the appellants.

15. It is submitted that no appeal was admittedly preferred by the respondent nos. 3 to 6 at any point of time impugning the notification dated 18th September, 2010 issued under section 3C(1) of the Slum Act within the time prescribed. He submits that respondent nos. 3 to 6 if aggrieved, could have challenged the said notification dated 18th September, 2010 independently within the time prescribed under the provisions of the Slum Act. He submits that the application for intervention in the said appeal itself was filed for the first time on 6th February, 2017 i.e. after more than six years of the said notification dated 18th September, 2010. He submits that the respondent thus could not have applied for transposition in the appeal preferred by the original appellants (4 of 2012).

16. It is submitted by the learned counsel that in the application for transposition made by the respondent nos.3 to 6, the respondent nos.3 to 6 had claimed ownership by adverse possession. The respondent nos.3 to 6 are not at all

concerned with the plots declared as 'slum rehabilitation area' by notification dated 18th September, 2010. It is submitted that the claim of the respondent nos. 3 to 6 in respect of the title and/or possession of the plot bearing CTS No.371(part) was ex-facie false and misleading. The Slum Tribunal could not have allowed the application for transposition and more particularly in view of the fact that the remedy of an appeal under section 3C(2) to challenge the notification dated 18th September, 2010 by the respondent nos.3 to 6 was already barred by limitation.

17. It is submitted that even according to the pleadings filed by the respondent nos. 3 to 6 before the Slum Tribunal, they have claimed the ownership of the property bearing CTS No.371 and also that the structure was situated on CTS No.370. The pleadings filed by the respondent no.3 and the cause of action existed in the original appeal was totally different and did not disclose the same cause of action. The interest of the original appellants and the respondent nos.3 to 6 was different. The respondent nos.3 to 6 has already filed a civil suit claiming ownership by way of adverse possession. He submits that no interim relief has been granted by the civil court in the notice of motion filed in the said Suit No.193 of 2014 filed by the respondent nos.3 to 6.

18. It is submitted that this court in case of M/s.Maooli Land Developers & Ors. vs. Taukir Ahmed Mohammed Hanif Khan & Ors., 2015 SCC OnLine Bom 3431 has held that the parties can be transposed as plaintiff or appellant if such party shows identical interest in the subject matter of the plaint or appeal. He submits that in this case, the respondent nos. 3 to 6 totally failed to show the identical interest that of the original appellants in the said appeal bearing no. 4 of 2012. Learned counsel appearing for the petitioner also placed reliance on section 45 of the Slum Act in support of the submission that the Slum Tribunal could not have applied the provisions of Order 23 Rule 1A of the Code of Civil Procedure, 1908 to the proceedings filed by the original appellant pending before them.

19. Mr.P.P. Jadhav, learned counsel appearing for the respondent nos.3 to 6 on the other hand invited my attention to the application for transposition filed by his clients and the impugned order passed by the Slum Tribunal. He submits that since the interest of the respondent nos.3 to 6 was identical to the interest of the original appellants in the said slum appeal, with a view to avoid multiplicity of proceedings the Slum Tribunal was right in allowing the application for transposition filed by his clients by applying the provisions of Order 23 Rule 1(A) of the Code of Civil Procedure, 1980. Learned counsel submits that the suit filed by his client for adjudication of title of his clients for the property in question by adverse possession is still pending.

20. Learned counsel appearing for the respondent nos.3 to 6 placed reliance on the following judgments in support of his submission that there being identical interest of the respondent nos.3 to 6 to the interest of the original appellants in the appeal before the Slum Tribunal, the Slum Tribunal was right in allowing the application for transposition of the respondent nos. 3 to 6 as appellants :-

(a) Unreported judgment of the Hon'ble Supreme Court in case of R.Dhanasundari @ R.Rajeswari vs. A.N.Umakanth & Ors., dated 6th March, 2019 in Civil Appeal No.7292 of 2009.

(b) Judgment of Madras High Court in case of R. Dhanasundari @ R.Rajeswari vs. A.N.Umakanth & Ors., (2006) 4 MLJ 1435.

(c) Judgment of the Madras High Court in case of P.S. Mohan Sha & Anr. vs. P.S. Parameswaran Sha & Ors., in C.R.P.(P.D.) NO.925 of 2009 dated 20th April, 2009.

(d) Judgment of Orissa High Court in case of Piyush Hasmukhlal Desai vs. International Society for Krishna Consciousness (ISKON) in W.A. No.99 of 2014 dated 8th January, 2015.

(e) Judgment of Karnataka High Court in case of Irapawwa alias Irawwa and Others vs. Channabasawwa and Others, AIR 2005 Karnataka 84

(f) Judgment of Gujarat High Court in case of Mohanlal Motilal Sevak vs. Bhikhabhai Himatlal Sevak, (1978) 19 GLR 865,

(g) Judgment of Kerala High Court in case of K.K. Abraham vs. Joseph Varghese and Another, AIR 2003 Kerala 1,

(h) Judgment of Karnataka High Court in case of Smt.Gowramma vs. Nanjappa and Others, AIR 2002 Karnataka 76,

(i) Judgment of Patna High Court in case of Basudeb Narayan Singh and Others vs. Shesh Narayan Singh and others, AIR 1979 Patna 73,

(j) Judgment of Punjab High Court in case of Dalbir Singh and Others vs. Lakhi Ram and others, AIR 1979 Punjab and Haryana 10,

(k) Judgment of Orissa High Court in case of Mahitosh Sinha vs. Shyamapada Sinha & Ors., AIR 2006 Orissa 20 and

(l) Judgment of Madras High Court in case of Govinda Iyer vs. Kumar and others, AIR 1980 Madras 232.

21. Dr. Saraf, learned counsel for the petitioner in rejoinder distinguishes the judgments relied upon by the learned counsel for the respondent nos.3 to 6 on the ground that none of the judgments would apply to the facts of this case. All these judgments were delivered considering the dispute arising in the partition suits. The principles applicable for the impleadment and/or transposition in partition suit does not apply in case of such appeal filed under the provisions of the Slum Act.

22. Learned counsel for the petitioner invited my attention to the paragraphs 6 and 7 of the application for transposition filed by the respondent nos.3 to 6 before the Slum Tribunal and would submit that the survey number mentioned by the respondent nos.3 to 6 in the said application and the subject matter of notification declaring the plot as slum rehabilitation area are different. He

submits that one of the applicant who had applied for transposition along with respondent nos. 3 to 6 had withdrawn her application. The order of impleadment of respondent nos.3 to 6 passed by this court by consent of the petitioner would not create any right in favour of the respondent nos. 3 to 6 to seek transposition as appellants. There is no commonality of interest, locus or entitlement of the respondent nos.3 to 6 with the locus, interest or entitlement of the original appellants.

REASONS AND CONCLUSION

23. A perusal of the record and proceedings clearly indicates that the original appellants Barretto Compound Welfare Society and its committee members had filed an appeal as far back as in the month of December 2011 impugning the notification dated 18th September, 2010 under section 3C(1) of the Slum Act declaring the plot bearing CTS NO. 371 (part), 374(part) along with two other plots as slum rehabilitation area. No such appeal was preferred by the respondent nos. 3 to 6 within the period of 30 days or even thereafter till date.

24. In my view, even if the respondent nos.3 to 6 were aggrieved by the said notification dated 18th September, 2010, the appeal ought to have been filed by the respondent nos. 3 to 6 within 30 days from the date of such notification. The appeal of the respondent nos. 3 to 6 having become barred by limitation prescribed under section 3C (2) of the Slum Act, the respondent nos.3 to 6 could not have applied for their transposition as appellants before the Slum Tribunal.

25. A perusal of record further indicates that though the notification was issued on 18th September, 2010, the respondent nos. 3 to 6 applied for impleadment itself for the first time on 6th February, 2017 i.e. more than 6 years after publication of the said notification dated 18th September, 2010. In my view though the petitioner consented for impleadment of the respondent nos. 3 to 6 as the party respondents in the said Appeal No.4 of 2012, that order would not create any right in favour of the respondent nos.3 to 6 to seek transposition as the appellants. It is not in dispute that the original appellants prayed for withdrawal of the said Appeal No.4 of 2012 before the Slum Tribunal. In my view, in view of the withdrawal of the said Appeal No.4 of 2012 filed by the original appellants, the said appeal proceedings came to an end. The respondent nos.3 to 6 could have filed an independent appeal if they were so aggrieved by the said notification dated 18th September, 2010 within the time prescribed under the Slum Act. What cannot be done directly, cannot be done indirectly. The respondent nos.3 to 6 could not have indirectly applied for their transposition as appellants so as to overcome the difficulty of limitation faced by them in filing independent and separate appeal.

26. The said Appeal No.4 of 2012 itself was pending for about three years after restoration of the appeal by an order passed by this court which was filed as far back as in the month of December, 2011. Various findings rendered by the Slum Tribunal while allowing the application for transposition in favour of the

respondents are ex-facie perverse. The Slum Tribunal could not have rendered any findings on the alleged title of the respondent nos.3 to 6 in the impugned order directly or indirectly. The suit for adjudication of title filed by the respondent nos. 3 to 6 on the plea of adverse possession itself is pending. No interim relief has been granted by the civil court in favour of the respondent nos. 3 to 6 in the said suit.

27. In my view, in view of the withdrawal of the said Appeal No.4 of 2012 filed by the original appellants, rights vested in favour of the petitioner cannot be taken away by allowing an application for transposition. The respondent nos.3 to 6 admittedly were not the original parties to the said Appeal No.4 of 2012 and were impleaded on 6th March, 2018. A perusal of the averments made in the application filed by the respondent nos. 3 to 6 clearly indicates that the respondent nos.3 to 6 had failed to establish the commonality of interest, locus or entitlement or that the case of the respondent nos.3 to 6 was identical to the case of the original appellants in the said Appeal No. 4 of 2012.

28. In my view, the cause of action claimed by the respondent nos.3 to 6 in the application for transposition was totally different to the cause of action which arose in the appeal preferred by the original appellants and thus on this ground itself, the Slum Tribunal could not have entertained the said application for transposition made by the respondent nos.3 to 6.

29. Insofar as the judgment of the Supreme Court in case of R. Dhanasundari @ R. Rajeswari (supra) relied upon by the learned counsel appearing for the respondent nos.3 to 6 is concerned, in the said judgment some of the plaintiffs were transposed as the defendant nos.3 to 6 and the suit had remained essentially against the defendant nos.1 and 2 that is the challenge to the sale deed executed by the defendant no.1 in favour of the defendant no.2. It is held by the Supreme Court that in regard to that cause, even if plaintiff nos.5 and 9 to 11 came to be transposed as defendant nos.3 to 6, their claim against defendant nos.1 and 2 did not come to an end ; rather, the interest of the existing plaintiffs as also the defendant nos.3 to 6 had been one and the same as against the defendant nos.1 and 2. The facts before the Supreme Court in the said judgment were totally different and are distinguishable in the facts of this case. The said judgment would not assist the case of the respondent nos.3 to 6.

30. Insofar as the other judgments relied upon by the learned counsel for the respondent nos.3 to 6 referred to aforesaid clearly indicates that all those judgments have been delivered by various Courts dealing with the partition suits. In the partition suits, all the defendants are to be treated as the plaintiffs. It is not in dispute that the proceedings filed before the Slum Tribunal by the original appellants were impugning the notification issued by the Chief Executive Officer declaring some of the plots as Slum Rehabilitation Area. It is also not in dispute that the respondent nos.3 to 6 were not even impleaded as respondents in the said appeal by the original appellants either as necessary or property parties. The respondent nos.3 to 6 were impleaded much later in the said proceedings in

view of the consent order passed by this Court. In my view, none of those judgments thus relied upon by the learned counsel for the respondent nos.3 to 6 would assist the case of the respondents and are clearly distinguishable in the facts of this case.

31. This Court in case of *M/s.Maooli Land Developers & Ors. vs. Shri Taukir Ahmed Mohammed Hanif Khan & Ors.*, (2015) 3 Bom.C.R. 466 has considered the provisions of Order 1 Rule 10(2) and also Order 23 Rule 1-A of the Code of Civil Procedure, 1908 and has held that for identity of cause of action or identity of interest has to be considered qua the defendants in the suit and that there is some dispute between the plaintiffs and the applicants would not be considered while considering the identify of cause of action. It is held that spirit of Order 23 Rule 1-A of the Code of Civil Procedure, 1908 shows that the applicant (defendant applying to be transposed as plaintiff) has a substantial question to be decided as against any of the remaining defendants. Though Courts lean against multiplicity of suits and, therefore, this provision of transposition is made only to avoid another suit, Courts would not, however, permit such transposition just to give a chance to a litigant to avoid filing a suit or permit him to take advantage of the suit filed by his adversary against him claiming a relief against him by becoming a plaintiff and trying to bring out the averments and reliefs which are contrary to those claimed by the original plaintiff. This Court has held that the normal consideration for transposition is that interest of the person to be transposed as the plaintiff must be identical to the interest of the plaintiff who tries to withdraw, would not go away. In my view the principles laid down by this Court in case of *M/s.Maooli Land Developers & Ors.* (supra) would apply to the facts of this case. I am respectfully bound by the said said judgment.

32. In the facts of this case also, the respondent nos.3 to 7 have failed to demonstrate that the interest as well as cause of action of defendant nos.3 to 6 was identical to the interest and cause of action of the original appellants in the said appeal which was withdrawn by them. In my view, this Court cannot give a chance to the defendant nos.3 to 6 to avoid filing of an independent appeal against the notification dated 18th September, 2018 issued by the Chief Executive Officer of the Slum Authority under section 3C(1) of the Slum Act and to become appellants though right of appeal of the respondent nos.3 to 6, if any, to impugn the notification dated 18th September, 2018 is barred by limitation.

33. In my view, the petitioner has thus made out a case for interference with the impugned order passed by the Slum Tribunal by allowing the application filed by the respondent nos.3 to 6 for transposition as the appellants in place of the original appellants in view of the said order being totally contrary to the principles of law laid down by this Court and contrary to section 3(C) of the Slum Act and Order 23 Rule 2-A of the Code of Civil Procedure, 1908. The findings rendered by the Slum Tribunal in the impugned order while allowing the application filed by the respondent nos.3 to 6 being perverse deserves interference by this Court in this petition filed under Article 226 of the

Constitution of India and thus deserves to be set aside.

34. I therefore, pass the following order :-

- a). Writ Petition No.1139 of 2019 is made absolute in terms of prayer clause (a).
- b). The application for transposition dated 24th April, 2018 filed by the respondent nos.3 to 6 is dismissed.
- c). If any amendment is carried out in Appeal No.4 of 2012 by transposing the respondent nos.3 to 6 as appellants by the Slum Tribunal, the Slum Tribunal shall direct the respondent nos.3 to 6 to carry out the amendment and shall re-transpose those respondents to their original position. In view of the original appellants having withdrawn Appeal No.4 of 2012, the said Appeal No.4 of 2012 stands dismissed as withdrawn.
- d). Rule is made absolute on aforesaid terms. There shall be no order as to costs.
- f). All the parties as well as the Slum Tribunal to act on the authenticated copy of this order.