IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/LETTERS PATENT APPEAL NO. 1680 of 2019
In R/SPECIAL CIVIL APPLICATION NO. 1642 of 2017
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2019
In R/LETTERS PATENT APPEAL NO. 1680 of 2019
With
CIVIL APPLICATION (FOR AMENDMENT) NO. 1 of 2020
In R/LETTERS PATENT APPEAL NO. 1680 of 2019

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VITHAL BOGRA SHETTY
Versus
BOARD OF TRUSTEES

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Appearance:
for the Appellant(s) No. 1.2,1.3
MR MIHIR THAKORE AND MR D.C.DAVE, SENIOR ADVOCATES WITH MR.D K.PUJ(3836) for the Appellant(s) No. 1,1.1
MR MIHIR JOSHI, SENIOR ADVOCATE WITH MR DHAVAL D VYAS(3225) for the Respondent(s) No. 1
NOTICE SERVED BY DS for the Respondent(s) No. 2,3,4

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CORAM: **HONOURABLE THE CHIEF JUSTICE MR. JUSTICE ARAVIND KUMAR**
and
HONOURABLE MR. JUSTICE ASHUTOSH J. SHASTRI

Date : 24/08/2022
COMMON ORAL ORDER
(PER : HONOURABLE THE CHIEF JUSTICE MR. JUSTICE ARAVIND KUMAR)

1. In this intra-court appeal challenge is made to the order dated 08.08.2019 passed in Special Civil Application No.1642 of 2017 whereunder the petition filed by the appellant (hereinafter referred to as “the petitioner” for the sake of convenience) under Articles 226 and 227 of the Constitution of India challenging the judgment and order dated 30.12.2016 passed by the

Additional District Judge in Regular Civil Suit No.1 of 2006 who had confirmed the order dated 19.01.2005 passed by the Competent Authority under the provisions of the Public Premises (Eviction of Unauthorized Occupation) Act, 1971 (for short "PP Act") came to be affirmed and thereby Special Civil Application came to be dismissed.

2. While issuing notice of this appeal on 21.10.2019, this Court had directed maintenance of status-quo with regard to possession of the plot in question. The order which came to be passed on 21.10.2019 passed by the coordinate Bench reads :

> *"1. We have Shri Mihir Thakore, learned senior counsel, assisted by Shri D.K. Puj, learned counsel for the appellant.*
>
> *2.Issue NOTICE returnable on 27.11.2019. Direct Service is permitted.*
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> *3.Learned senior counsel submitted that during pendency of the petition before learned Single Judge, interest of the appellant was protected. It is further submitted that the respondent- Kandla Port Trust has granted extension to all the lessees who were granted*

lease right from 1960 onwards and who had also failed to make construction as required under the agreement by extending the time in 2017 and 2018. As such, the case of the appellant has been clearly discriminated and more so, when the Division Bench, in earlier round, had observed that the case of the appellant be considered sympathetically, we find that case for interim relief is made out.

4. Hence, till further order of this Court, status-quo, as exists today, shall be maintained with regard to possession of the plot in question. It is made clear that the appellant will not use the plot in question for storage of grains, etc."

3. The maintainability of the appeal has been questioned by the respondents and Shri Mihir Joshi, learned Senior Counsel appearing on behalf of respondent Nos.1 to 3 has contended that the intra-court appeal is not maintainable as the order passed by the Civil Court had been challenged before the learned Single Judge and in the light of plethora of cases including the judgment of the Hon'ble Apex Court in the case of **Life Insurance Corporation of India Vs. Nandini J. Shah,** reported in **(2018) 15 SCC 356**, he would submit that writ application which had been filed before the learned

Single Judge is to be construed as one filed invoking Article 227 of the Constitution of India and as such, no intra-court appeal would lie against the order passed in exercise of power under Article 227. Hence, he prays for rejection of the appeal as not maintainable.

4. Per contra, Shri Mihir Thakore, learned Senior Counsel appearing on behalf of the petitioner namely the original writ applicant would submit that appeal is very much maintainable inasmuch as during the pendency of the writ application before the learned Single Judge, additional affidavits were filed setting out the hostile discrimination meted out to the petitioner by the respondent authorities and while drawing the attention of the Court to the averments made in paragraph 3 of the additional affidavit which refers to the public notice dated 07.01.2017 under which the respondent Trust had directed the plot holders to complete the construction on or before 31.03.2018 was a decision based on the resolution of the Board of Trustees taken on 06.01.2017 and this aspect having been highlighted said contention

had also received the attention of the learned Single Judge and as such, the order passed by the learned Single Judge cannot be construed or held as one falling under Article 227 alone but has to be treated as an order passed under original jurisdiction under Article 226 of the Constitution. He would further elaborate his submissions by contending that in furtherance of the additional affidavit which had been taken note of by the learned Single Judge under the impugned order, is now sought to be further highlighted by bringing about an amendment to the pleadings in the Special Civil Application as well as incorporating additional prayer and as such he prays for the application for amendment of the pleadings being taken up for consideration and consequently he prays for rejecting the plea of the respondents with regard to the maintainability of the appeal. He would rely upon the observations made by the Hon'ble Apex Court in LIC's case referred to supra by drawing the attention of the Court to paragraph 59 of the said judgment to contend that tenability of a plea regarding intra-court appeal will

depend upon as to how the *lis* has gone about before the learned Single Judge and if the issues raised therein would fall within the purview of being examined under Article 226 of the Constitution of India necessarily the intra-court appeal against such an order would be maintainable. By drawing sustenance from the observations made in LIC's case supra by the Hon'ble Apex Court, he would contend that in the instant case, it is not only the order of eviction passed by the Estate Officer which was challenged before the District Judge and thereafter the challenge continued before the learned Single Judge, but also a plea with regard to hostile discrimination had been raised before the learned Single Judge and as such seeking additional prayer in Special Civil Application, an interlocutory application in Civil Application No.1 of 2020 for amendment has been filed and he has prayed for permitting the petitioner to amend the pleadings in the writ application and consequently to hold that the order passed by the learned Single Judge would fall within the four corners of Article 226 and

Article 227 of the Constitution of India and as such he prays for rejection of the contention raised by respondents regarding maintainability of the intra-court appeal and prays for appeal being heard on merits.

5. Having heard the learned advocates appearing for the parties and on perusal of the entire material on record, we are of the considered view that following points would arise for our consideration:

(i) Whether the intra-court appeal is maintainable against the order dated 08.08.2019 passed in Special Civil Application No.1642 of 2017?

(ii) Whether interlocutory application, C.A. No.1 of 2020 filed by writ applicant for amendment of the pleadings in the writ application, SCA No.1642 of 2017 deserves to be allowed or dismissed?

BRIEF BACKGROUND OF THE CASE:

6. Plot No.76, Sector 8, Gandhidham, admeasuring 3383.51 square yards was allotted to the

petitioner by respondent No.1 for the purposes of carrying on business. Petitioner did not commence the construction in the plot allotted to him. Hence, on 12.10.1989, the Estate Officer of respondent No.1 issued a notice to the petitioner and directed the petitioner to complete the construction on the allotted plot. Even after 6 years there being no construction put up by the petitioner, the Estate Officer issued a fresh notice on 25.09.1995 calling upon the petitioner to put up the construction over the allotted plot. Petitioner submitted a revised plan for approval of construction on 25.05.1995 and the statutory authorities are said to have raised certain queries which was duly replied by the petitioner.

7. On 11.03.1996, petitioner received notice from respondent No.1 to vacate and remove the wheat stored in the plot as it was causing nuisance to neighbourhood residents and residents having filed writ petition before this Court.

8. On 29.03.1997, respondent No.1 cancelled the allotment on the ground that construction on the allotted plot having not been put up and also on the ground of breach of condition of allotment as the petitioner had stored wheat by renting out the plot and thereby changing the use of land.

9. Petitioner submitted a representation before respondent No.1 for restoration of the cancelled plot. After issuing notice of personal hearing and fixing the hearing date as 14.10.2003, matter was heard by respondent No.1 and on the said date, petitioner remained present and filed his written submission. Respondent No.1 passed an order on 25.10.2003 (Annexure-K) whereby it was decided not to revoke or modify the notice of cancellation of allotment dated 29.03.1997. In the meanwhile, the proceedings under the Public Premises Act had been commenced by the Estate Officer which continued and an order of eviction dated 19.12.2005 (Annexure-N) came to be passed.

10. Being aggrieved by the same, Regular Civil Appeal No.1 of 2006 was filed before the learned Additional District Judge at Gandhidham, Kutch on 02.01.2006 which ultimately came to be dismissed by order dated 30.12.2006 (Annexure-O).

11. Being aggrieved by the same, Special Civil Application No.1642 of 2012 came to be filed which was heard by the learned Single Judge and came to be dismissed on the ground that there is no material irregularity and the details of rent due of the plot when calculated at single rate was Rs.3,46,22,836/- and when calculated at three times the rate of rent it would be Rs.10,38,68,508/-. It was also observed by the learned District Judge that eviction proceeding was decided in the year 2008 and the statutory appeal filed was pending till 2016.

12. Hence, this intra-court appeal.

RE : POINT NO.1 :

13. Clause 15 of the Letters Patent Act does not provide an appeal against the judgment or order passed

by a learned Single Judge of this Court in a petition under Article 227 and an appeal will lie if the judgment or order is passed in petition under Article 226. Where a petition is filed both under Article 226 and 227 of the Constitution of India, it will have to be considered whether the point raised in the petition arose for adjudication for the first time before the High Court. If the challenge in the petition is with respect to the points already adjudicated upon by the subordinate court or tribunal, then it will have to be held that the supervisory jurisdiction of the High Court was invoked and not the original jurisdiction. The relief prayed for and granted by the court is also a factor that would indicate whether the petition was filed under Article 226 or 227. In case where it can be said that the petition would fall both under Article 226 and Article 227, then it would be proper to consider the petition as the one filed under Article 226 of the Constitution of India and in those cases an appeal would lie under Section 15 of the Letters Patent Appeal Act.

14. The proceeding under Article 226 is an original proceeding and when it concerns civil right, it is an original civil proceeding. The proceeding under Article 227 is not an original proceeding. An intra-court appeal does not lie against the judgment of a learned Single Judge when the power of superintendence is exercised by examining the order of a subordinate court. The Hon'ble Apex Court in LIC's case referred to supra, has held that an appellate officer while exercising the power under Section 9 of PP Act does not act as a *persona designata* but in his capacity as a pre-existing judicial authority in the District (being a District Judge or Judicial Officer designated by the District Judge, possessing essential qualification). Further, the order passed by the District Judge under PP Act is in the capacity of an appellate court and it would part-take the order of the subordinate court, the challenge thereto must ordinarily proceed only under Article 227 of the Constitution of India and not Article 226 thereof. Therefore, the Letters Patent Appeal against the judgment of a learned Single Judge would not

be maintainable. It has been held by the Hon'ble Apex Court in LIC's case as under:

> *"57. Even though the respondents have invited our attention to other decisions of High Courts and also of Supreme Court which have analysed the provisions of other legislations, it is unnecessary to dilate on those decisions as we intend to apply the principles underlying the decisions of three-Judge Bench of this Court in Thakur Das (supra), Asnew Drums Pvt. Ltd. (supra), Maharashtra State Financial Corporation (supra), Ram Chander Aggarwal (supra) and Mukri Gopalan (supra), in particular, to conclude that the Appellate Officer referred to in Section 9 of the 1971 Act, is not a persona designata but acts as a civil court.*
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> *58. In other words, the Appellate Officer while exercising power under Section 9 of the 1971 Act, does not act as a persona designata but in his capacity as a pre existing judicial authority in the district (being a District Judge or judicial officer possessing essential qualification designated by the District Judge). Being part of the district judiciary, the judge acts as a Court and the order passed by him will be an order of the Subordinate Court against which remedy under Article 227 of the Constitution of India can be availed on the matters delineated for exercise of such jurisdiction.*
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> *59. Reverting to the facts of the present case, the respondents had resorted to remedy of writ petition under Article 226 and 227 of the Constitution of India. In view of our conclusion that the order passed by the District Judge (in*

this case, Judge, Bombay City Civil Court at Mumbai) as an Appellate Officer is an order of the Subordinate Court, the challenge thereto must ordinarily proceed only under Article 227 of the Constitution of India and not under Article 226. Moreover, on a close scrutiny of the decision of the learned Single Judge of the Bombay High Court dated 14.08.2012 we have no hesitation in taking the view that the true nature and substance of the order of the learned Single Judge was to exercise power under Article 227 of the Constitution of India; and there is no indication of Court having exercised powers under Article 226 of the Constitution of India as such. Indeed, the learned Single Judge has opened the judgment by fairly noting the fact that the writ petition filed by the respondents was under Articles 226 and 227 of the Constitution of India. However, keeping in mind the exposition of this Court in the case of Ram Kishan Fauji (supra) wherein it has been explicated that in determining whether an order of learned Single Judge is in exercise of powers under Article 226 and 227 the vital factor is the nature of jurisdiction invoked by a party and the true nature and character of the order passed and the directions issued by the learned Single Judge. In paragraph 40 of the reported decision, the Court adverting to its earlier decision observed thus:

> *"40. ... ... Whether the learned Single Judge has exercised the jurisdiction under Article 226 or under Article 227 or both, would depend upon various aspects. There can be orders passed by the learned Single Judge which can be construed as an order under both the articles in a composite manner, for they can co-exist, coincide and imbricate. It was reiterated that it would depend upon the nature, contour and*

character of the order and it will be the obligation of the Division Bench hearing the letters patent appeal to discern and decide whether the order has been passed by the learned Single Judge in exercise of jurisdiction Under Article 226 or 227 of the Constitution or both. The two-Judge Bench further clarified that the Division Bench would also be required to scrutinise whether the facts of the case justify the assertions made in the petition to invoke the jurisdiction under both the articles and the relief prayed on that foundation. The delineation with regard to necessary party not being relevant in the present case, the said aspect need not be adverted to."

Again in paragraphs 41 and 42, which may be useful for answering the matter in issue, the Court observed thus:

"41. We have referred to these decisions only to highlight that it is beyond any shadow of doubt that the order of civil court can only be challenged under Article 227 of the Constitution and from such challenge, no intra-court appeal would lie and in other cases, it will depend upon the other factors as have been enumerated therein.

42. At this stage, it is extremely necessary to cull out the conclusions which are deducible from the aforesaid pronouncements. They are:

42.1 An appeal shall lie from the judgment of a Single Judge to a Division Bench of the High Court if it is so permitted within the ambit and sweep of the Letters Patent.

42.2 The power conferred on the High Court by the Letters Patent can be abolished or curtailed by the competent legislature by bringing appropriate legislation.

42.3 A writ petition which assails the order of a civil court in the High Court has to be understood, in all circumstances, to be a challenge under Article 227 of the Constitution and determination by the High Court under the said Article and, hence, no intra-court appeal is entertainable.

42.4 The tenability of intra-court appeal will depend upon the Bench adjudicating the lis as to how it understands and appreciates the order passed by the learned Single Judge. There cannot be a straitjacket formula for the same." (emphasis supplied)

60. In the case of Radhey Shyam (supra) decided by a three- Judge Bench, this Court after analyzing all the earlier decisions on the point, restated the legal position that in cases where judicial order violated the fundamental right, the challenge thereto would lie by way of an appeal or revision or under Article 227, and not by way of writ under Article 226 and Article 32. The dictum in paragraphs 25, 27 and 29 of this decision is instructive. The same read thus:

"25. It is true that this Court has laid down that technicalities associated with the prerogative writs in England have no role to play under our constitutional scheme. There is no parallel system of King's Court in India and of all other courts having limited jurisdiction subject to supervision of King's Court. Courts are set up under the Constitution or the laws. All courts in the

jurisdiction of a High Court are subordinate to it and subject to its control and supervision under Article 227. Writ jurisdiction is constitutionally conferred on all High Courts. Broad principles of writ jurisdiction followed in England are applicable to India and a writ of certiorari lies against patently erroneous or without jurisdiction orders of Tribunals or authorities or courts other than judicial courts. There are no precedents in India for the High Courts to issue writs to subordinate courts. Control of working of subordinate courts in dealing with their judicial orders is exercised by way of appellate or revisional powers or power of superintendence under Article 227. Orders of civil court stand on different footing from the orders of authorities or Tribunals or courts other than judicial/civil courts. While appellate or revisional jurisdiction is regulated by statutes, power of superintendence under Article 227 is constitutional. The expression "inferior court" is not referable to judicial courts, as rightly observed in the referring order in paras 26 and 27 quoted above.

26. … … …

27. Thus, we are of the view that judicial orders of civil courts are not amenable to a writ of certiorari under Article 226. We are also in agreement with the view of the referring Bench that a writ of mandamus does not lie against a private person not discharging any public duty. Scope of Article 227 is different from Article 226.

28. … … …

29. Accordingly, we answer the question referred as follows:

29.1 Judicial orders of civil court are not amenable to writ jurisdiction under Article 226 of of the Constitution;

29.2 Jurisdiction under Article 227 is distinct from jurisdiction under Article 226.

29.3 Contrary view in Surya Dev Rai is overruled." (emphasis supplied)

61. Similar view has been expressed in Jogendrasinghji (supra). In this decision, it has been held that the order passed by the Civil Court is amenable to scrutiny only in exercise of jurisdiction under Article 227 of the Constitution of India and no intra court appeal is maintainable from the decision of a Single Judge. In paragraph 30 of the reported decision, the Court observed thus:

"30. From the aforesaid pronouncements, it is graphically clear that maintainability of a letters patent appeal would depend upon the pleadings in the writ petition, the nature and character of the order passed by the learned Single Judge, the type of directions issued regard being had to the jurisdictional perspectives in the constitutional context. Barring the civil court, from which order as held by the three-Judge Bench in Radhey Shyam (supra) that a writ petition can lie only under Article 227 of the Constitution, orders from tribunals cannot always be regarded for all purposes to be under Article 227 of the Constitution. Whether the learned Single Judge has exercised the jurisdiction under Article 226 or under Article 227 or both,

needless to emphasise, would depend upon various aspects that have been emphasised in the aforestated authorities of this Court. There can be orders passed by the learned Single Judge which can be construed as an order under both the articles in a composite manner, for they can co-exist, coincide and imbricate. We reiterate it would depend upon the nature, contour and character of the order and it will be the obligation of the Division Bench hearing the letters patent appeal to discern and decide whether the order has been passed by the learned Single Judge in exercise of jurisdiction under Article 226 or 227 of the Constitution or both. The Division Bench would also be required to scrutinize whether the facts of the case justify the assertions made in the petition to invoke the jurisdiction under both the articles and the relief prayed on that foundation. Be it stated, one of the conclusions recorded by the High Court in the impugned judgment pertains to demand and payment of court fees. We do not intend to comment on the same as that would depend upon the rules framed by the High Court."

In the concluding part of the reported judgment in paragraph 44, the Court observed thus:

"44. We have stated in the beginning that three issues arise despite the High Court framing number of issues and answering it at various levels. It is to be borne in mind how the jurisdiction under the letters patent appeal is to be exercised cannot exhaustively be stated. It will depend upon the Bench adjudicating the lis how it understands and appreciates the order passed by the learned

> *Single Judge. There cannot be a straight-jacket formula for the same. Needless to say, the High Court while exercising jurisdiction under Article 227 of the Constitution has to be guided by the parameters laid down by this Court and some of the judgments that have been referred to in Radhey Shyam."*
>
> *62. In paragraph 45.2 of the same judgment, the Court authoritatively concluded that an order passed by a Civil Court is amenable to scrutiny of the High Court only in exercise of jurisdiction under Article 227 of the Constitution of India, which is different from Article 226 of the Constitution and as per the pronouncement in Radhey Shyam (supra), no writ can be issued against the order passed by the Civil Court and, therefore, no letters patent appeal would be maintainable."*

15. Keeping the aforesaid authoritative principles in mind, when we turn our attention to the facts on hand, it would clearly emerge therefrom that order which came to be challenged by the petitioner before the learned District Judge was an order dated 19.12.2005 passed by Estate Officer under Section 5(1) of the PP Act. The said appeal was preferred under Section 9 of the PP Act. The Judicial Officer presiding over the court derives his designation from the nomenclature of the court, even if the appointment is made by designation of the Judicial

Officer. The appellate authority indicated in Section 9 of the PP Act is the court over which he presides, discharging the functions under the relevant Act and placed in the hierarchy of court for the purposes of appeal. A *persona designata* is “a person who is pointed out or described as an individual, as opposed to a person ascertained as a member of a class, or as filling a particular character”. *Persona designata* are “persons selected to act in their private capacity and not in their capacity as Judges.” Same consideration applies also to a well-known officer like the District Magistrate named by virtue of his office and whose powers the Additional District Magistrate can also exercise and who can create other officers equal to himself for the purpose of the Eviction Act vide – **Central Talkies Limited vs. Dwarika Prasad,** reported in **AIR 1961 606** (Paragraph-9).

16. The Hon’ble Apex Court in LIC’s case (supra) having regard to the expression “appellate officer” as

defined in Section 9 of the PP Act has held is not a *persona designata* but acts as a Civil Court. It has been further held that in his capacity as a pre-existing judicial authority in the district, he exercises the power and not as a *persona designata*. It has been further held that the Judge acts as a court and the order passed by him will be an order of the subordinate court against which remedy under Article 227 of the Constitution of India can be availed.

17. It is not doubt true that in the instant case, the petition has been termed as one filed under Articles 226 and 227 of the Constitution. Mere mentioning of the provision of Article 226 and without there being any fundamental and foundation facts specified, which may indicate that original jurisdiction is invoked would not alter the position. It is an undisputed fact that Special Civil Application had been filed in the year 2017 and the only prayer which was sought for was for quashing of the order dated 30.12.2016 passed in Regular Civil Suit No.1

of 2006 under Section 9 of the PP Act dismissing the appeal and confirming the order of the Estate Officer dated 19.12.2005 namely the order of eviction. An interim order was passed in present appeal on 21.10.2019 and it is only after the opponent filed its appearance, an application for seeking amendment came to be filed belatedly after long laspse of time. It is only when present appeal is taken up for hearing a prayer is made for amendment application also being heard. A perusal of the amendment application would indicate the same is filed probably apprehending the issue of maintainability of main appeal and as such has sought an amendment at a much belated stage and to fill up lacuna in the original petition which is already disposed of long back. The subsequent filing of the application for amendment or seeking for additional prayer which was not before the learned Single Judge can be allowed to be raised before the appellate court on account of purported subsequent events. Even otherwise, admittedly, the subsequent developments took place during the pendency of the

proceedings before the learned Single Judge i.e., during 2017. Much reliance has been placed on the additional affidavit to buttress the argument of same having been raised at the earlier point of time. If it were to be so nothing prevented the petitioner to seek for amendment at that point of time itself. Petitioner cannot be allowed to improve his case stage by stage and step by step.

18. The order which was under challenge before the learned Single Judge was the order of the Estate Officer passed under sub-section (2) of Section 5 as well as the order passed by the appellate authority namely the District Judge in exercise of the powers under Section 9 of the PP Act. These two orders having been assailed before the learned Single Judge resulted in dismissal of the Special Civil Application and thereby confirming the orders of the original authority. Thus, order of the authorities which was under scrutiny before the learned Single Judge came up for consideration and the learned Single Judge in exercise of the powers of superintendence

as indicated under Article 227 of the Constitution of India exercised such power.

19. In that view of the matter, a writ petition which questions the order of the Civil Court before the High Court will have to be necessarily construed as one challenged under Article 227 of the Constitution of India and its determination thereof by the High Court would be construed as passed under the supervisory jurisdiction vested under Article 227. Against such orders, intra-court appeal would not be entertainable. It is the contention of Shri Mihir Thakore, learend Senior Counsel appearing for the writ applicant that in view of the observations made by the Hon'ble Apex Court in LIC's case at paragraph 59 to the effect "an order of the subordinate court, the challenge thereto must ordinarily proceed under Article 227 of the Constitution of India" would lay emphasis ordinarily and would defer if the facts obtained are different like the one on hand, by contending that a foundation had been laid by the petitioner before

the learned Single Judge itself, by raising a plea with regard to hostile discrimination and as such the said plea had also been referred to by the learned Single Judge in paragraph 9, though at first blush looks attractive, does not so at a slight deeper scrutiny and we say so for the reasons more than one. Firstly, the learned Single Judge himself in paragraph 9 has held as under:

> *"Moreover, the Court is not inclined to undertake exercise of examining the facts of such plot holders who have been given the benefit of policy of 2017 and conclude finally that the facts of such plot holders are identical to the facts of the present case. More particularly when, what is to be examined by this Court is the challenge made by the petitioner to the proceedings under the Public Premises Act and the order passed therein."*

20. Secondly, we notice that these facts were never under examination, scrutiny, consideration or adjudication before the learned Single Judge. What was challenged and adjudicated by the learned Single Judge was limited to the order dated 19.12.2005 passed by the competent authority under Section 5(2) of the PP Act and its confirmation thereof by the Additional District Judge in

Regular Civil Suit No.1 of 2006 by judgment and order dated 30.12.2016. In other words, there was nothing more or nothing less which came to be adjudicated by the learned Single Judge in Special Civil Application No.1642 of 2017. These additional reasons fortify our view of the fact that what was examined by the learned Single Judge was the order passed by the authorities and such power exercised by the learned Single Judge was the power of superintendence vested under Article 227 of the Constitution of India. We are of the clear view that the order passed by the learned Single Judge is that of the Civil Court which exercised the appellate powers and said order would be amenable to scrutiny only under exercise of jurisdiction vested under Article 227 of the Constitution of India and the pleadings in the writ petition namely Special Civil Application in the instant case leaves no manner of doubt and can never be regarded or held that the learned Single Judge has exercised power under Article 226 of the Constitution of India. By deep scrutiny of the order of the learned Single

Judge, it leaves no manner of doubt that the power exercised by the learned Single Judge is the power of superintendence under Article 227 of the Constitution of India and mere referring the petition as filed under Article 226 would not alter the manner in which the powers have been exercised. A close perusal of the order under challenge is clearly indicating that after due examination of the issues raised, the discretion is exercised under Article 227 of the Constitution of India by the learned Single Judge and view taken is the possible view which we are not inclined to substitute with a different view. Reference may be made to the decision of the Hon'ble Apex Court in **Management of Narendra and Company vs. Workmen of Narendra and Company,** reported in **(2016) 3 SCC 340,** whereunder it has been held to the following effect:

> *"5. Once the learned Single Judge having seen the records had come to the conclusion that the industry was not functioning after January 1995, there is no justification in entering a different finding without any further material before the Division Bench. The Appellate Bench ought to have noticed*

> *that the statement of MW 3 is itself part of the evidence before the Labour Court. Be that as it may, in an intra-court appeal, on a finding of fact, unless the Appellate Bench reaches a conclusion that the finding of the Single Bench is perverse, it shall not disturb the same. Merely because another view or a better view is possible, there should be no interference with or disturbance of the order passed by the Single Judge, unless both sides agree for a fairer approach on relief."*

21. Thus, contention of Shri Mihir Thakore, learned Senior Counsel appearing for the petitioner to the effect that on account of subsequent plea having been raised by way of a proposed amendment would not alter the original situation and as such, plea raised in that regard is not tenable and consequently, we hold Point No.1 in the negative i.e. in favour of the respondents and against the appellant by holding intra-court appeal is not maintainable against order dated 08.08.2019 passed in Special Civil Application No.1642 of 2017.

RE : POINT NO.2 :

22. This application is filed for amendment of the original pleadings namely to incorporate certain facts in

Special Civil Application No.1642 of 2017 and in support of the same, petitioner has sought for incorporating prayer in paragraph 10AA. A perusal of the averments made in the application would indicate that apart from petitioner and other allottees whose allotment had also been terminated on account of breach of condition of letter of allotment namely not making construction had received different treatment namely they had been given time to put up construction till 31.03.2018 and applicants being similarly placed, the respondents ought to have extended similar treatment to them and they cannot be differentiated. It is further contended that this aspect was highlighted by filing an additional affidavit on 19.09.2017 and what is now sought to be incorporated is only highlighting this aspect or amplification of the existing pleadings or incorporating the pleadings already put-forwarded in the Special Civil Application.

23. The reply affidavit has been filed contending that the said application is filed belatedly and it is also

contended that the said issue cannot be adjudicated in the present appeal. For the proposition that belated application for amendment of the plaint is not permissible, the judgments of the Hon'ble Supreme Court in the cases reported in **2019 (5) SCC 360, 2019 (4) SCC 332** and **2019 (19) SCC 415** can be looked up. In the instant case, the Special Civil Application has been filed challenging the order dated 19.12.2005 which is an order passed under Section 5(1) of the PP Act, ordering eviction of all the petitioners from the premises/land as more fully described in the schedule thereunder. The order dated 30.12.2016 passed by the Additional District Judge who confirmed the order of eviction was also challenged in the said Special Civil Application No.1642 of 2017. The petitioner has sought to raise his case based on the pleas put-forwarded and grounds urged therein namely by contending that the said orders are illegal and contrary to the statutory provisions of PP Act. Primarily contending that it was a case of lease and there was no termination of lease amongst other grounds, what is

sought to be put-forwarded by way of the proposed amendment is to incorporate certain subsequent events which had unfolded during the pendency of the Special Civil Application. In fact, an additional affidavit was filed on 19.09.2017 contending *inter-alia* that there was hostile discrimination between petitioners and other similarly placed persons. If it were to be so, it was open for the petitioners to have sought for appropriate amendment including the one now sought for at that point of time itself. Petitioners being in the full know-how of these facts which they propose to bring in by way of amendment to the Special Civil Application cannot plead ignorance of these facts, inasmuch as the additional affidavit filed would belie their stand. Knowing fully well the development which had taken place and having urged before the learned Single Judge and not being able to persuade the learned Single Judge to examine this aspect, they cannot be heard to contend after three years from filing of such additional affidavit to re-agitate the said issue by way of amendment, that too after the

proceedings before the learned Single Judge came to be terminated or came to an end way back on 08.08.2019. To put it differently, through additional facts the petitioners intended to bring it to the notice of the learned Single Judge the proposed amendment way back on 19.09.2017 and having failed in their attempt, at least at the time of filing the appeal, they could have sought for incorporation of this plea they did not choose to do so for reasons best known. On the other hand, they had the benefit of an interim order passed in their favour on 21.10.2019 and it is thereafter on 24.02.2020, the application in question has been filed which facts were never possible to be adjudicated by the learned Single Judge and as such, question of considering, examining or adjudicating the same in an appeal which is continuation of the original proceedings would not arise.

24. It is needless to state that the subsequent events are all giving rise for an independent different cause of action. Petitioners would be at liberty to take

steps as they may choose to do so and without expressing any opinion in that regard, we answer Point No.2 against the appellants and in favour of the respondents. In other words, we are of the view that the application for amendment is liable to be rejected and accordingly it stands rejected.

25. For reasons aforestated, we proceed to pass the following

ORDER

(i) The intra-court appeal is held as not maintainable and consequently, it stands rejected as not maintainable. Civil Application (for Stay) No.1 of 2019 also stands rejected.

(ii) The application for amendment being Civil Application No.1 of 2020 stands rejected.

(iii) We also make it explicitly clear that in the event of petitioner intends to challenge the order of the learned Single Judge dated

08.08.2019 passed in Special Civil Application No.1642 of 2017, they are at liberty to do so and all contentions on merits are kept open.

(ARAVIND KUMAR, CJ)

(ASHUTOSH J. SHASTRI, J)

FURTHER ORDER

Mr.D.C.Dave, learned Senior Counsel seeks for extension of the interim order which was granted by this Court. We do not see any good ground to entertain the said request particularly in the background of this Court having already held that the appeal itself is not maintainable. Hence, said request stands rejected.

(ARAVIND KUMAR, CJ)

(ASHUTOSH J. SHASTRI, J)

GAURAV J THAKER/BHARAT KOSHTI