

(2022) 02 BOM CK 0065
In the Bombay High Court
Case No : Second Appeal No.287 Of 2021

George Kochaveedu Varghese

APPELLANT

Vs

Kailashchandra Kedarnath Agrawal And Others

RESPONDENT

Date of Decision : 26-02-2022

Acts Referred:

Code Of Civil Procedure, 1908 — Order 21 Rule 97, Order 21 Rule 99, Order 21 Rule 101, Order 21 Rule 102
Specific Relief Act, 1963 — Section 6

Citation : (2022) 02 BOM CK 0065

Hon'ble Judges : M.S. Jawalkar, J

Bench : Single Bench

Advocate : S.R. Charpe, S.C. Mehadia

Final Decision : Dismissed

Judgement

M.S. Jawalkar, J

1. Heard. Admit. The matter is taken up for final disposal at the request of and by consent of the parties at the stage of admission.

2. The present second appeal is preferred by the appellant challenging the judgment and decree dated 18/11/2021 passed by the learned Ad-hoc District Judge-01, Nagpur in Regular Civil Appeal No.166/2021 thereby the judgment and decree dated 25/03/2019 passed below Exhibit 45 by the learned Civil Judge, Senior Division, Nagpur in Special Darkhast No.49/2014 was confirmed. The learned Executing Court rejected the objection raised by the appellant under Order XXI Rule 97 of the Code of Civil Procedure, 1908. This Court vide order dated 30/11/2021 framed following two substantial questions of law :

i) Have not both the learned Courts committed a manifest error of law, in rejecting the objection on merits without reading the pleadings in the objection, though as per para 14 of the order dated 31/08/2018 passed by the Hon'ble High Court in W.P. No.2027/2018, the learned executing court was first supposed to

decide whether any dispute as contemplated under Order 21 Rule 97 has been raised without going into the merits?

ii) Can the impugned judgment and decree be sustained in view of procedural lapse in not following the mandatory procedure of Order 21 Rule 101 of CPC read with Para 345, Chapter 21 of Civil Manual, despite the fact that by way of the judgment dated 18/11/2021 the objector is held to be a total stranger and his possession is undisputed?

3. Learned Advocate for objector/appellant submitted that respondent No.1 is a landlord of suit property. The objector/appellant is in lawful possession of the suit premises since 1983 when he along with his father was inducted by landlord/respondent No.1 in the property as a tenant. In the year 1992, the respondent No.1 requested the appellant and his family to temporarily shift to other place as he was intending to construct a building on the suit property. As he assured that he will be re-inducted the appellant, the appellant and his father temporarily shifted to some other place in the month of July, 1994. He along with his father re-inducted in the suit premises by respondent No.1 by way of tenancy right. The appellant paid Rs.800/- monthly rent to respondent No.1/landlord. The amount was then enhanced to Rs.1500/-. In the month of October, 1994 on the day of Dassehra respondent No.1/landlord came along with respondent No.2 who is the brother of the appellant and asked the appellant to pay rent to respondent No.2 as he has sold property in question to respondent No.2. Accordingly, the appellant started paying rent to respondent No.2. In the year 1995, the appellant started new business by name and style "Airtech marketing" a proprietorship of the appellant, with the consent of respondent No.2 who was the purchaser of the suit property. After registration of the said firm, the appellant was smoothly running the business on the said property and used to pay rent to respondent No.2. He came to know about litigation between the respondents in respect of their sale-deed, however, he was not having any concern with the said transaction and was paying rent to respondent No.2 regularly. In December, 2011, respondent No.1 instructed the appellant to pay rent to him as he has succeeded in the litigation against the respondent No.2. As respondent No.1 instructed to pay rent to him even though respondent No.2 is intending to challenge the order in the Supreme Court, he started paying rent to respondent No.1.

4. It is his case that on 04/07/2017 when some person claiming to be bailiff came to the property in question for execution of decree he came to know about passing of decree. Thus, the appellant filed objection dated 06/07/2017 under Order 21 Rule 97 of the Code of Civil Procedure, 1908 wherein he specifically stated that he was not party to that proceeding between respondents inter se. He also claimed that he is having independent right, title and interest in the property in question which is directly accrued to him from the respondent No.1 and not from respondent No.2. The appellant applied for framing of issues vide Exhibit 65. Necessary issues were framed by the learned Court. The order of framing

issues was challenged by respondent No.1 before this Court which came to be allowed. Order of framing of issues was rejected along with objection filed by the appellant. Review application was preferred by the appellant before this Court which came to be partly allowed on 27/11/2018 thereby objections were restored. Directions were issued to the Executing Court to decide the objection on its own merit without being influenced by the observations made by the Court in its previous order.

5. It is the contention of learned counsel for the appellant that learned Executing Court rejected the objection vide order dated 25/03/2019, being completely influenced by the observations made by the High court in its order dated 31/08/2018. Learned counsel for the appellant submitted that there is no independent reasoning at all given by the executing Court. Being aggrieved by the said order he filed R.C.A. No.166/2021. The learned Appellate Court dismissed the appeal mainly on the ground that the appellant is a sub-tenant of respondent No.2. There was no document on record that respondent No.1 inducted to the appellant and his father as a tenant in the suit shop. The appellant failed to prove that this appellant has any independent right and interest as a tenant in the suit property claiming through respondent No.1.

6. Shri Charpe, learned counsel for the appellant relied on the documents that is license under the Bombay Shops and Establishments Act, 1948, his registration therein as sole proprietorship and the name in the said license is recorded as "Airtech marketing". The respondent No.2/judgment debtor granted written permission for obtaining such registration certificate. In the said certificate is of 1995, he also relied on registration of Sales Tax document of 1996 wherein his name and address of suit premises is appearing. The said registration is under the Bombay Sales Tax Act, 1959. He also placed on record registration under the Central Sales Tax Act (Registration and turnover) Rule, 1957 wherein also his name and address of suit premises is appearing.

7. It is his further contention that both the Courts below erred in appreciating that the appellant was having independent rights and not through the judgment debtor. The learned Court below ought to have decided preliminary point that whether there is any dispute which needs adjudication and then to decide objections, however, without considering the observation passed by this Court, the learned trial Court proceeded to decide objections itself. Both the Courts failed to appreciate that he is not claiming any sub-tenancy but he is claiming tenancy from respondent No.1 i.e. landlord.

8. Order 21 Rule 97 and 102 needs to be read with paragraph 345 of Chapter 21 of Civil Manual. Without being allowed to lead any evidence, the learned trial Court as well as Appellate Court recorded conclusive findings. The learned Courts relied on assumptions, conjectures and surmises. The order passed by both the Courts below are cryptic orders and are liable to be set aside. In support of his contention Shri Charpe, learned counsel for the appellant relied upon the following citations :

(i) M/s. Arihant Agrotech Vs. Birla Cotsyn (I) Ltd. & anr. in Writ Petition No.730 of 2011

(ii) Ashan Devi & anr. Vs. Phulwasi Devi & ors. w ith Phulwasi Devi Vs. Ashan Devi & ors. reported in (2003) 12 SCC 219.

(iii) Sharad Gajanan Ambole & ors. Vs. Gauramma Kumarappa Medar & ors. reported in 2007 SCC Online Bom 940.

Those citations will be discussed at proper places.

9. As against this, Shri Mehadia, learned counsel for the respondents submitted that the suit is filed against trespasser under Section 6 of the Specific Relief Act, 1963 for recovery of possession. The stand taken by the objector is same with the stand taken by the respondent in the said suit for recovery of possession. Both have claimed the same date of possession. The respondent No.1 herein succeeded up to Apex Court and it is held that respondent No.2 herein is the trespasser. There was suit filed by respondent No.2 for specific performance which came to be dismissed as barred by limitation. It cannot be believed that a person residing since 1995 in the suit premises and is brother of respondent No.2 is not knowing about litigation between his brother and landlord specifically when both are claiming possession. So far as documents on which appellant is relying on were before this Court in earlier proceeding and were exhibited at the instance of Government authorities. There is no documents to substantiate his claim that he was inducted in the year 1984 by the landlord and he was paying rent to the landlord during the period from 1984 to 1995 or in the year 2011 onward.

10. In view of Order 21 Rule 97 and 101 of the CPC, these provisions are granting jurisdiction to the Courts and is not necessary to proceed with the objections as a suit. It also cannot be believed that when a landlord is seeking recovery of possession and litigating for last 17 years, would litigate against a wrong person knowing that appellant is in possession. It is nothing but abuse of process of law. After all exhausting all remedies said objections were filed in collusion with the brother of appellant to prolong the execution.

11. My attention was also drawn to the judgment in Civil Revision Application No.51/2007 wherein this Court held that brother of appellant/judgment debtor failed to establish that peaceful possession was handed over by owner (Respondent No.1) to brother of appellant (Respondent No.2) and further held that respondent No.2 wrongfully dispossessed respondent No.1 on 12.2.1995 in respect of shop block on mezzanine floor and on 26.3.1995 in respect of shop block on ground floor and basement. This judgment is upheld by Hon'ble Apex Court also. Hence, there is no question of appellant's possession over suit property.

12. In support of his contention Shri Mehadia, learned counsel for the respondents relied upon the following citations :

(i) C.V. Joshi Vs. Elphinstone Spinning and Weaving Mills Co. Ltd. reported in 2001 (2) Mh.L.J.

(ii) Jagdish s/o Motilal Joshi Vs. Chandrapal s/o Tulsiram Bhola & anr. reported in 2007 (1) Mh.L.J. 402.

(iii) Kailashchandra s/o Kedarnathji Agrawal Vs. Kochaveedu Varghese Joseph in Civil Revision Application No.51/2007.

(iv) Som Parkash Vs. Santosh Rani & another reported in AIR 1997 Punjab and Haryana 130.

(v) Rithvik Vs. M.G. Seethaprasad & ors. reported in (2017) 3 CCC 256.

13. Heard both the parties at length. Considered documents and rulings placed on record by the respective parties. The main ground of challenge in this appeal is that the executing Court as well as Appellate Court failed to consider that the appellant is having independent right, title and interest in the suit property accrued to him from respondent No.1 and not through respondent No.2. Both the Courts erred in observing that the appellant is sub-tenant of respondent No.2 and put forth the case of sub-tenancy. It is further submitted that the appellant has never pleaded case of sub-tenancy and has never offered that the right pleaded by the appellant is accrued from respondent No.2. Therefore, application ought to have decided on merit after framing the issue.

14. It is matter of record that the order of framing issues was challenged before this Court by the plaintiff which came to be allowed and thereby rejected the order of framing issues along with objection. However, in view of the review application the objections were directed to be decided on its own merit. Learned counsel for the appellant vehemently argued that in view of the order passed in Writ Petition No.2027/2018 the learned executing Court ought to have record its satisfaction that the dispute as contemplated under Order 21 Rule 97 of the Civil Procedure Code has been raised and such dispute would require an adjudication as amended by Rule 101 of Order 21 read with paragraph 345 Chapter 41 of the Civil Manual.

15. In the present matter the objector is the real brother of judgment debtor. He is not a stranger. It is admitted by the appellant-objector that there is no document to support his contention that he was inducted by original owner as a tenant in the year 1983. It is also admitted that there is no rent receipt or any agreement placed on record to substantiate his claim of tenancy with plaintiff/original owner. Thus, he failed to establish prima facie case that he was paying rent to respondent No.1 since 1983 and in the year 2011 he again started paying rent to the original owner. If pleadings of brother of present appellant is perused in the suit for specific performance as well as suit by original owner for recovery of possession that he was tenant prior to re-construction of the property and there was a agreement between the original owner (respondent No.1) and brother of appellant (respondent No.2) for sell of property. The case of brother of

appellant was rejected upto the Supreme Court it was held that brother of appellant is trespasser. Even his brother's case also was that he was running business in the name and style as "Airtek Marketing" and he was reinducted on Dassehra 1994. The only documents on which appellant is relying on 3 certificates/licenses. It is contended that these documents were not considered by the learned executing Court while deciding his objection. In my considered opinion those documents were before trial Court alone and considered in the Special Civil Suit No.517/1995 filed by the original owner of the suit property. To prove the said document brother of appellant himself examined the witnesses. Thus, brother as well as appellant are claiming the same date of handing over possession, the objector though claiming is having independent right and claiming through original owner, he has not substantiated his case that he was a tenant of original owner at any point of time. So far as permission granted by brother of appellant is concerned to take out licenses from the sales tax, central sales tax etc. is nothing but collusion between the objector and judgment debtor as judgment debtor himself claimed that he was having such licences and also examined the witnesses in support of it. Merely because the appellant raises objection will not be sufficient to hold that there is adjudicable dispute in the matter. Though he is not claiming his right through his brother i.e. judgment debtor it is his pleading that he was paying rent to his brother. In view of the finding recorded by this Court in Civil Revision Application No.51/2007 the respondent No.2 (brother of appellant) forcibly took possession on 12.2.1995 of one shop block and on 26.3.1995 of other shops, no question granting any permission arises in January 1995, to run the business as alleged or in October 1994 respondent No.1 directing appellant/objector to pay rent to respondent No.2 (brother of objector).

16. Thus, the appellant failed to establish that he was at any point of time tenant of respondent No.1. So far as his contention that he was paying rent to the respondent No.2 since October 1994 is false story put up by the appellant as the respondent No.2 obtained forcible possession in the month of February and March 1995. As respondent No.2's status is declared as trespasser. The decree passed is equally binding to the appellant. To resist the execution proceeding the appellant's claim of independent right is not substantiated. The learned executing Court as well as appellate Court rightly appreciated this position and rejected the objection.

17. So far as citation relied on by the appellant is concerned i.e. Sharad Gajanan Ambole and others (supra) facts are distinguishable as in the matter before this Court in Sharad case obstructionists have acquired tenancy rights directly from the landlord who were not party to a suit. The said lease deed has been duly registered and also placed on record along with affidavit in reply to the notice. The obstructionists have been in possession of the said premises since 27.9.2005 i.e. tenancy agreement. In the present matter, it is admitted position that there is neither rent receipt nor any agreement to show that the appellant was put in possession by the landlord.

18. So far as Ashan Devi and another (supra) is concerned, in the said matter possession of question of vacant land was under consideration and it was held that mere physical absence of the third party at the time of execution of the decree was not a relevant fact to reject the application under Order 21 Rule 99 of the Code. It is held by the Hon'ble Apex Court that even though the objector were not in actual and physical possession of the vacant land but as a result of delivery of possession of the land through nazir to the decree holder, loss their right and control over the land to put it to their use, they will have to be treated to have been dispossessed within the meaning of Order 21 Rule 99 of the Code. Citation is of no avail in the present set of facts.

19. Learned counsel for the respondent relied on various citations in support of his contention that it is not necessary to frame issues in all applications under Order 21 Rule 97. In C.V. Joshi (supra) it is held that on plain reading of said provision of Order 21 i.e. Rule 97 and 101 framing of issues by executing Court are not necessary always. In Som Parkash (supra) also it is held that while adjudicating of claim of objector in decree for possession Court is not obliged in every case to frame issues. What is necessary is appreciation of case of objector and document in support of objection. Similar view is taken in Jagdish s/o. Motilal Joshi (supra). In Rithvik (supra) it is held that resistance to execution of decree is only by a person who has an independent right. In absence of any material produced by appellant to show that he is claiming an independent right under any document, he cannot be called as an objector.

20. In the present matter the objector is a real brother of judgment debtor. The judgment debtor entry in the suit property itself is held as forcibly in February 1995. The appellant failed to establish or to place any material on record to show that he was inducted by the decree holder in the suit premises in the year 1983. Thus, his story of possession of the suit property as a tenant since 1983 is falsified.

21. In view of the findings recorded and decree passed in Civil Revision Application No.51/2007 which was confirmed upto the Supreme Court, therefore, it is justified considering the scheme of law to reject the objection without conducting full-fledged inquiry like a suit. Though it is pleaded that their relations between the appellant and his brother were not cordial, there is no substance as he himself submitted that his brother gave permission to seek licence to run the business in the suit premises. Though, it is claimed that the order is passed being influenced order passed by this Court there is no substance in this contention also, learned lower Court though reproduced what observation made by the Hon'ble High Court. It has also discussed the other grounds for rejection of the objection. Thus, there is no any error or illegality in the order passed by the learned Courts below and the order is perfectly legal, valid and justified.

22. The learned executing Court after appreciating the documents and pleadings of the parties rightly held that the objections are frivolous, vexatious and amounts to gross abuse of process of law. The objector has no any independent

right in the suit premises as against the decree holder. Thus, substantial question of law answered accordingly.

23. Accordingly, appeal is dismissed with costs.

(SMT. M.S. JAWALKAR, J.)

1. At this stage learned counsel for the appellant prays for stay of this order for two weeks.
2. Considering the judgment passed I do not see any reason to continue status-quo order passed earlier for another two weeks.
3. Hence, oral prayer made by the learned counsel for the appellant is rejected.