

(1969) 02 BOM CK 0029

In the Bombay High Court

Case No : Civil Revision Application No. 869 of 1967

Manekshaw Rustomji Mehta and Others

APPELLANT

Vs

A.N. Jijina and Another

RESPONDENT

Date of Decision : 13-02-1969

Acts Referred:

Presidency Small Cause Courts Act, 1882 — Section 30, 41, 42, 43, 44

Citation : AIR 1971 Bom 117 : (1971) 73 BOMLR 629 : (1970) ILR (Bom) 829 : (1971) MhLj 122

Hon'ble Judges : Vaidya, J

Bench : Single Bench

Advocate : C.P. Patel, for the Appellant; A.G. Katki, for the Respondent

Judgement

1. This revision application is filed by the petitioners, who are described in the application as plaintiffs, against an order passed on January 31, 1967 by the Judge in the Court of Small Causes at Bombay permanently staying the execution of the warrant of possession ordered to be issued in an ejectment application filed by the Predecessor in title of the petitioners, one Mrs. Mehroo M. Mehta against the opponents.

2. The ejectment application was filed on November 4, 1963 alleging that the opponents were licensees in respect of one of the rooms in Block No. C on the second floor of Mistry Buildings, Balaram Street, Grant Road Bombay No. 7. It was stated in the application that Mrs. Mehroo Mehta was the daughter of Mr. and Mrs. B. M. Maoji who lived in the said block and that the deceased Maoji had given the room in question to the opponents under an agreement of leave and licence. The said Maoji died on November 8, 1959 and the license was terminated by a letter addressed by an advocate on behalf of Mrs. Mehroo M. Mehta on July 27, 1963. The said application was resisted by the opponents on several grounds and the matter was adjourned from time to time till a compromise was arrived at between the parties.

3. The parties filed the consent terms on August 23, 1966 and on that very day,

an order was passed in terms of the said compromise directing the defendants to vacate the application premises by December 31, 1966, pay half court costs and Rs. 21.25 professional costs, subject to conditions in Cls. 2 and 3 of the consent terms which were as under :--

"(2) Agreed that arrears including compensation upto 31-12-1966 and costs of the application herein and the suit arrears upto 31-12-1966 in respect of the premises in application come to Rupees 1300.37. The defendants agree and undertake to pay in Court the said amount by 30th December 1966. The time is of the essence.

(3) On the defendants paying the said amount of arrears of compensation and costs, etc. on the due date, provided in Clause. 2 hereinabove, without delay and/or default, the warrant of possession to be stayed permanently. In default of payment thereof in time and as provided in Clause (2) herein, warrant of possession herein to issue against the defendants without notice and during vacation."

In pursuance of this order, a formal order described as "Judgment for recovery of tenement" in what is considered as the usual form u/s 43 of the Presidency Small Cause Courts Act, 1882 was issued on October 26, 1966, the material portion of which was as follows :--

"..... and it is ordered that the said defendant do quit and deliver up possession of the said (premises) by 31-12-1966, subject to conditions in clause Nos. 2 and 3 of consent terms to the said plaintiff, and that a Warrant do issue after the 31st day of December 1966 to enforce this adjudication and to direct the Bailiff of the said Court to give possession of the said premises to the said plaintiff within ten days from the date of such warrant....."

4. Before the petitioners applied for warrant of possession, which is admittedly not at all issued even now, on January 6, 1967 opponent No. 1 applied to the Court for stay of execution of the warrant of possession and for extension of the time for payment. In that application which was numbered as Miscellaneous Notice No. 112 of 1967, he stated that he is employed as a jobber in Shriram Mills Ltd. and he had applied to his office for a loan against his provident fund for satisfying the petitioners' claim for arrears of compensation as settled in the consent terms. This loan was sanctioned by his office, but as under the rules it required the sanction of the State Government, in spite of his best efforts, he was unable to secure the loan as the sanction of the State Government was still awaited. In these circumstances, opponent No. 1 borrowed a sum of Rs. 500/- and paid it to the Advocate for the petitioners who accepted it unconditionally on December 17, 1966 and informed the petitioners' Advocate that the balance would be paid as soon as the State Government's sanction was received in respect of the loan sanctioned by his office. The opponents, therefore, requested the petitioners to agree to grant a month's time to pay the amount, but the petitioners by their Advocate's reply dated December 26, 1966 received by the

opponents" Advocate on January 2, 1967 expressed their inability to accede to the opponents' request. It is in these circumstances beyond the control of the opponents that the opponents moved the Court to give them some more time for depositing the balance of the amount due to the petitioners."

5. Notice of this application was given to the petitioners and the petitioners opposed the application. The Court ordered the opponents to deposit the balance on January 28, 1967 and accordingly, the opponents deposited on that very day a sum of Rs. 825.37. After this deposit, on January 31, 1967, the learned Judge of the Small Cause Court heard the Advocates and purporting to exercise his powers u/s 30 of the Presidency Small Cause Courts Act and taking into consideration the difficulties and hardships in which the opponents were placed on account of their poverty and their efforts to satisfy their obligations under the consent decree condoned the delay and the default and granted relief against the forfeiture consequent upon the breach of the consent terms and ordered the execution of the warrant of possession to be stayed permanently.

6. The said order is challenged by the petitioners in this revision application. The first ground on which Mr. C. P. Patel, the learned Counsel for the petitioners, has submitted that the order is illegal and without jurisdiction, is that the learned Judge erred in assuming that Section 30 of the Presidency Small Cause Courts Act applied to the proceedings under Chapter VII of that Act. This contention of Mr. Patel is right. Under the Presidency Small Cause Courts Act, 1882, a clear distinction is made between procedure in suits and the procedure under Chapter VII. Section 30 applies only to suits and not to the summary Proceedings under Chapter VII. It is well established that the proceedings under Chapter VII are not suits and the orders passed u/s 43 are not decrees. In *Govindram Salamatrai and Another Vs. Dharampal Amarnath and Another*, Chagla, C. J. has observed :--

"Applications under Chapter VII of that Act were not suits and the orders passed by the Small Causes Court were not decrees and the parties affected by the order made under that Chapter had the right expressly reserved to them to litigate the question of their title in the High Court."

A similar view has been expressed in *Nalinakhya Bysack Vs. Shyam Sunder Haldar and Others*, where Mr. Justice S. R. Das (as he then was) speaking for the Court observed :--

"Chapter VII of that Act which is intituled "Recovery of possession of Immovable Property" allows the landlord, in certain circumstances, to apply to the Small Cause Court for a summons against the occupant calling upon him to show cause on a day therein appointed why he should not be compelled to deliver up the property. Section 43 provides that if the occupant does not appear at the time appointed or show cause to the contrary, the applicant landlord shall, if the Court is satisfied that he is entitled to apply u/s 41, be entitled to an order addressed to a Bailiff of the Court directing him to give possession of the property to the

applicant on such date as the Court thinks fit to name in such order. Although under the rules framed under the Act this application u/s 41 is initiated by a plaintiff there is no dispute that the proceeding is not a suit and the order for delivery of possession does not strictly speaking amount to a decree for recovery of possession."

The Supreme Court referred, apparently with approval, to an earlier decision of this Court in *Bai Meherbai Sorabji Master v. Pheroazshaw Sorabji Gazdar*, ILR 51 Bom 885 = AIR 1927 Bom 556 where Marten, C. J. stated :--

"On the other hand, when one comes to look at Chapter VII, Sections 41 to 49, it is clear that the summary proceedings there are not a suit. They are begun by a summons, and there are various references in the Sections, e.g., Sections 46, 47 and 49 referring to a suit, and which in my opinion, clearly show that the Legislature was distinguishing there between summary proceedings brought by a summons and what is described in this Act as a suit."

It is thus clear that the learned Judge of the Court of Small Causes erred in exercising his powers u/s 30 in the present proceedings under Chapter VII.

7. But that is not enough to dispose of this matter. The question is whether the Judge had power to condone the delay in payment of the amount due from the opponents under the consent terms and to stay permanently the execution of the warrant of possession. The order in so far as it directs stay of execution of the warrant of possession is misconceived because no warrant of possession was in fact issued in this case. The formal order that was passed on the consent terms, the material portion of which is quoted above only directed: "A warrant do issue after the 31st day of December 1966 to enforce this adjudication and to direct the Bailiff of the said Court to give possession of the said premises." The warrant of possession had to be issued after 31st December 1966. The warrant of possession was not in fact issued; nor was it applied for by the petitioners and hence the order directing a stay of the execution of that warrant is patently wrong.

8. Mr. Patel has further contended that even the order passed by the Judge condoning the delay in depositing the amount under the consent decree was an order passed without jurisdiction inasmuch as the order amounted to variation of the consent terms filed in Court and no Court has jurisdiction to vary the consent terms without the consent of the parties. He relied on a decision in *L.P. Jain Vs. Nandakumar R. Taliwalla*, and contended that once a decree was passed on the basis of the consent terms, the Court became functus officio and no variation of the decree by granting more time for payment of the amount under the decree could be made by the Court. There is a great force in this argument as it is well settled that a consent decree cannot be varied by the Court without the consent of the parties concerned unless there is a power conferred on the Court in the consent decree itself enabling the Court to vary it. Mr. Patel has submitted that in the present case, the consent terms provided that in the event of the defendants

committing default of payment of the compensation and the amount settled between the parties in time, warrant of possession was to issue against the defendants and hence the Court had no power to condone the delay particularly because Clause 2 of the consent terms declared that the time was of the essence of the consent terms.

9. Mr. Katki, the learned Counsel for the opponents, met this argument firstly by distinguishing the facts of the present case from the facts in *L.P. Jain Vs. Nandakumar R. Taliwalla*, . He has rightly pointed out that in that case, an order was passed on a Notice of Motion to set aside an ex parte decree subject to certain conditions and if those conditions were not fulfilled, the Notice of Motion stood dismissed automatically and the decree which was already passed would stand in full force. Secondly, Mr. Katki submitted that in the present case, however, although the consent terms provided for a decree to be passed, no decree could be passed under Chapter VII of the Presidency Small Cause Courts Act and the only way in which the proceedings could terminate was either by granting or refusing an order u/s 43 of that Act. Relying on a decision in *Barjiwandas Gujrati Vs. Mohini Mohan Shah*, decided by Mr. Justice K. C. Das Gupta and Mr. Justice Bachawat (as they then were). Mr. Katki submitted that the proceedings commenced u/s 41 of the Presidency Small Cause Courts Act, remained pending till the relief had been worked out and when the scheme of the legislation in Chapter VII was considered as a whole, it was proper to hold that it was implicit in Section 43 that successive orders fixing different dates of possession could be passed by the Court. Mr. Katki, therefore, submitted that although the defendants' application was an application for stay of execution of the decree and for condonation of the delay, it was in substance an application praying to the Court not to pass an order u/s 43 directing the Bailiff to deliver possession and it was open to the Judge of the Small Cause Court till he actually passed an order for possession u/s 43 to consider whether having regard to all the facts and circumstances of the case, the petitioners were entitled to an order under that section. As the learned Judge in the Small Cause Court has not addressed himself to these questions, it will not be proper in revision to consider whether having regard to all the facts and circumstances, the petitioners are entitled to an order for possession u/s 43.

10. Mr. Patel however, contended that once it is held that the Judge had no jurisdiction to pass the impugned order, this Court in revision ought to pass an order directing the Small Cause Court to issue an order u/s 43, particularly because the defendants have failed to carry out their obligations under the consent terms even assuming that the Court had jurisdiction to refuse the order for possession u/s 43. He has strongly contended that once the Court passed a decree, the Court had no jurisdiction to consider as to whether a further order was necessary. In my judgment, in view of the cases referred to above, no decree could be passed by the Court under Chapter VII and the proceedings under Chapter VII would continue to be pending till an order for possession is passed u/s 43. Hence notwithstanding the consent terms and the orders passed

thereon, it must be held that the proceedings under Chapter VII are still pending and the Judge of the Court of Small Causes has still jurisdiction to consider whether he should issue an order u/s 43. As the Judge in the Small Cause Court has not at all applied his mind to these provisions of law under Chapter VII and to the facts and circumstances of the case in the context of his powers u/s 43, it would not be proper for this Court in revision to exercise those powers.

11. Lastly, Mr. Patel has contended that in any event, under Clause 5 of the consent terms, the defendants had agreed and undertaken to pay future compensation in respect of the premises in ejectment application by the 5th of every month in advance commencing from the 5th day of January 1967 for the month of January 1967 and so on and in spite of this undertaking, the defendants had not cared to pay any amount to the petitioner from the date of the impugned order, i.e. January 31, 1967. Mr. Katki says that the compensation was offered by his clients to the petitioners, but the petitioners refused to take it. Mr. Katki further undertook to pay the entire balance of the said amount due to the petitioners within one week from today in the Court of Small Causes at Bombay. This question again is a question which cannot be decided in revision. If the petitioners refused to take the amount when offered by the defendants, it cannot be said that the defendants have committed a breach of the undertaking. If having regard to the financial condition of the defendants and the efforts which he made to secure a loan and further the obligations of the defendants under the consent terms, the Court is satisfied that no order for possession should be passed u/s 43, it is open to the Court to come to the finding that the defendants did not wilfully commit default of the consent terms. Moreover, as the decree on the consent terms itself was misconceived and the terms which provided for a decree being passed were not authorised by law, and the application u/s 41 must be considered as pending, it is still open to the opponents to satisfy the Court that they were prevented from fulfilling all the obligations on account of circumstances beyond their control; and hence, no order should be passed u/s 43 of the Presidency Small Cause Courts Act.

12. In the result, the revision application is allowed and the order passed by the Judge on January 31, 1967 is set aside and the case is remitted to the Court of Small Causes for disposal in accordance with law in the light of the observations made hereinabove. The opponents shall deposit the compensation payable by them to the petitioner, under Clause 5 of the consent terms, within two weeks from today in the Court of Small Causes. In view of the fact that further time is being given to the defendants to pay the amounts due under Clause 5 of the consent terms, the opponents shall pay the costs of the petitioners. Case remitted to be disposed of as stated above.

13. Order accordingly.