
(1990) 10 BOM CK 0021

In the Bombay High Court

Case No : Writ Petition No. 1491 of 1984

Mani Nariman Daruwala and Others

APPELLANT

Vs

Phiroz M. Bhatena and Others

RESPONDENT

Date of Decision : 05-10-1990

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 15A
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 101, Order 21 Rule 97, Order 21 Rule 99
Easements Act, 1882 — Section 62
Presidency Small Cause Courts Act, 1882 — Section 41

Citation : AIR 1991 Bom 328 : AIR 1991 Bom 308 : (1991) 2 BomCR 370 : (1991) 1 MhLj 376 : (1991) MhLj 376

Hon'ble Judges : Ashok Agarwal, J

Bench : Single Bench

Advocate : M.A. Rane, for the Appellant; C.R. Dalvi, for the Respondent

Judgement

Ashok Agarwal, J.—Where an obstructionist who fails to establish an independent right to possession can resist execution on the ground that the decree under execution is a nullity is the main question which arises for determination in this petition.

2. The premises in dispute consist of Block D, situate on the 3rd floor of Contractor Building at Bai Awabai Kashinath Road, Bombay 400 034. The petitioners are the owners whereas one Nadirshaw P. Bhatena was the tenant on a rent of Rs. 57.30 Ps. per month. The said Nadirshaw died on 15th November 1971 leaving behind his respondents Nos. 1 to 4 as his heirs and legal representatives, During the lifetime of Nadirshaw, the petitioners by a notice dated 6th November terminated his tenancy. On 12th October 1971 the said Nadirshaw permitted respondents Nos. 5 and 6 who are husband and wife to occupy the portion of the aforesaid premises viz. two rooms and the common user of the kitchen and W.C. The said licence was for a period of eleven months. The said licence was on the payment of compensation of Rs. 325/- per month.

The said Nadirshaw, as already pointed out, expired on 15th November 1971, Hence, there was no occasion for the licence being extended after 11th September 1972. The respondents Nos. 5 and 6 continued in use and occupation of the suit premises. On 5th February 1972 the petitioner filed against respondents Nos. 1 to 4 in the Court of Small Causes, Bombay, u/s 41 of the Presidency Small Cause Courts Act, Ejection Application No. 88/2 of 1972. Respondents Nos. 1 to 4 resisted the said application on grounds, inter alia, that the Court had no jurisdiction u/s 41 of the Presidency Small Cause Courts Act. On 14th July 1978 an ex parte order was passed against respondents Nos. 1 to 4 directing them to vacate and hand over possession by 31st August 1978. The said decree was put in execution wherein respondents Nos. 5 and 6, on 12th September 1976, obstructed the delivery of possession. The petitioners, therefore, took out the present obstructionist Notice No. 181 of 1978 for removal of the obstruction.

3. The respondents Nos. 5 and 6 resisted the said notice by raising the contentions :

(i) That they are sub-tenants of protected licensees under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947; and --

(ii) That the order under execution passed u/s 41 of the Presidency Small Cause Courts Act was without jurisdiction and is nullity.

4. The parties did not lead oral evidence but were content with proceeding with the trial on the strength of affidavits. By a judgment order dated 18th February 1982 the Trial Court held that the respondents Nos. 5 and 6 were not the lawful sub-tenants or protected licensees under the Bombay Rent Act. It, however, held that the order under execution was a nullity. Consequent upon the said findings, the Obstructionist Notice was discharged with no order as to costs.

5. Being aggrieved by the aforesaid judgment and order, the petitioners preferred in the Appellate Court of the Court of Small Causes, Bombay, Appeal No. 190 of 1982. By a judgment and order dated 29th November 1983 the Appellate Court held that the respondents Nos. 5 and 6 are protected licensees and were entitled to protection under the Rent Act. It further held that the order under execution was a nullity. Consequent upon the said findings, the appeal of the petitioners was dismissed with no order as to costs. Being aggrieved, the petitioners have preferred the present petition.

6. Shri Rane, the learned Advocate appearing on behalf of the petitioners-decree holders submitted that the lower Appellate Court has erred in holding that respondents Nos. 5 and 6 are protected licensees. He drew my attention to the letter dated 12th October 1971 addressed by respondent No. 5 to Nadirsha Pestonji Bhatena by which a licence was created in favour of respondents Nos. 5 and 6. He pointed out that the said licence permitted respondents Nos. 4 and 5 to occupy along with members of their family, two rooms with common use of the kitchen in the aforesaid premises. The said license was to commence from

12th October 1971 and was to automatically stand terminated on 11th September 1972. Hence, the said licence stood terminated on 11th September 1972 by efflux of time. Reliance was placed on Section 62(c) of the Easements Act which provides that a licence is deemed to be revoked when it has been granted for a limited period on the expiry of the said period. Shri Rane further pointed out that the licensees whose possession is protected are only those who have a subsisting licence on 1st February 1973. On that day, the licensor Nadirshaw had already expired and the licence created by him was deemed to have been revoked by efflux of time. Respondents Nos. 5 and 6 were thus not entitled to protection from eviction.

7. In my judgment, there is considerable merit in the above contentions advanced by Shri Rane. The leave and licence which respondents Nos. 5 and 6 have set up is evidenced by the letter dated 12th October 1971 addressed by respondent No. 5 to Nadirshaw. The Clause 12 of the said letter specifically provides --

"This Agreement will start from 12th October 1971 and will stand automatically determined on 11th September 1972."

It is thus abundantly clear that the said licence expired on 11th September 1972 by efflux of time. It is not the case of respondents Nos. 5 and 6 that the said licence was renewed by respondents Nos. 1 to 4 who were the heirs and legal representatives of Nadirshaw. Since there was no subsisting licence on 1st February 1973, respondents Nos. 5 and 6 cannot claim protection u/s 15A of the Rent Act.

8. The learned Judges of the Appellate Court, however, were persuaded to observe :--

"Admittedly said licence was continued by judgment-debtors/respondents after the death of deceased Bhatena. The licence was not revoked at any time. After the death of deceased Bhatena, the judgment-debtors acquired the right of tenancy protected under the Bombay Rent Act."

In my judgment, the learned Judges of the Appellate Court have erred in making the said observations. It was at no stage admitted that the said licence was continued by the judgment-debtors i.e. respondents. In fact that was not even the case of the respondents Nos. 5 and 6. Though the licence was not revoked by any overt act either on the part of the licensor Nadirshaw or by respondents Nos. 1 to 4, the same stood revoked by efflux of time. Hence, there can arise no question of respondents Nos. 5 and 6 being protected under the Rent Act. The finding of the Appellate Court that the respondents Nos. 5 and 6 are protected licensees is erroneous and is liable to be set aside.

9. The next and the only surviving question that survives for determination is the one which I have mentioned at the commencement of this judgment viz. whether the order under execution is a nullity and whether respondents Nos. 5 and 6 who

have been held not to possess an independent right to possession can set up the plea that the said decree cannot be executed against them. Shri Rane, the learned Advocate appearing on behalf of the petitioners contended that after the Amendment by Act 104 of 1976 of all questions, arising between the practice to a proceeding in an application for removal of obstruction are required to be determined by the Court dealing with the said application and not by a separate suit. He contended that the present proceeding is a lis between the petitioners and respondents Nos. 5 and 6. The petitioners have claimed possession and the respondents Nos. 5 and 6 have claimed protection of the Rent Act. It has now been held that respondents Nos. 5 and 6 are not protected by the Rent Act. Hence, the only course open for the executing Court is to pass an order for removal of the obstructionist. Shri Rane emphasised that the right of respondents Nos. 5 and 6 to prove their independent right was in the present execution proceedings and the same cannot be done by way of an independent suit. Respondents Nos. 5 and 6 having failed to prove the said right were bound to deliver possession.

10. In my judgment, there is no merit in the above contention. The order under execution is passed u/s 41 of the Presidency Small Cause Courts Act. The same was passed against respondents Nos. 1 to 4 who are the heirs and legal representatives of Nadirshaw. The said Nadirshaw was undisputedly the tenant in respect of the said premises. On his death, respondents Nos. 1 to 4 would succeed to the said tenancy. Respondents Nos. 1 to 4 were, therefore, the tenants of the petitioners in respect of the said premises. Once there exists a relationship of landlord and tenant between the petitioners and respondents Nos. 1 to 4 the provisions of the Rent Act will apply and it is only the Court established under the said Act which will have the jurisdiction to entertain and try the suit. Consequently, the application filed u/s 41 of the Presidency Small Cause Courts Act was without jurisdiction. It is that the respondents Nos. 1 to 4 has resisted the said application on grounds, inter alia, that the proceedings u/s 41 were without jurisdiction. It is also true that an ex parte order for possession was passed on 14th July 1978. Even if this be the position, the order, if it is found to be without jurisdiction it would amount to a nullity. The said order can be resisted by any party at any time and at any stage whenever the same is put in execution.

11. Rule 97 of Order 21 of the Code of Civil Procedure, in so far as is relevant for the present discussion, provides that:

"Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction."

12. In my view, the phrase "holder of a decree for possession" which is contemplated under the above Rule postulates that he has to be a holder of valid decree for possession. The said phrase cannot include a person who is a holder

of a decree which is a nullity. Nullity is not a decree at all. Hence, before a decree holder can call upon a Court to hear his complaint in regard to the obstruction to the execution of his decree by a person who has no independent right to possession, he has first to qualify having the status of being the holder of a valid decree for possession. If he holds a decree which is a nullity in law, he cannot be termed as a holder of a valid decree for possession. If he holds a decree which is a nullity in law, he cannot be termed as a holder of a decree which is capable of being put in execution. It follows that an obstructionist can always contend that the decree under execution is a nullity and, therefore, the Courts are refrained from entertaining an application for removal of the obstruction. Once such a contention is raised, it will be for the decree holder to establish that the decree which he has put in execution is a valid decree and the same is capable of being executed. In my view, such above contention can be raised by an obstructionist even if he fails to establish that he has an independent right to possession. The holding of a valid decree is a sine qua non for initiation of proceedings under Rules 97 to 101 of Order XXI of the Code of Civil Procedure. If the decree under execution is a nullity, the decree holder will not be heard to say that the obstructionist is illegally resisting its execution.

13. Prior to the amendment of 1976 it was open to an obstructionist like the respondents Nos. 5 and 6 to file a separate suit and contend that the decree under execution is a nullity and is not liable to be executed as against him. After the said amendment, such a contention is no longer open by filing a separate suit but is required to be raised, entertained and decided in the execution proceedings and this is the purport of Rule 101 of the Code of Civil Procedure. Rule 101 provides as under:--

"All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under Rule 97 or Rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force be deemed to have jurisdiction to decide such questions."

The bracketed portion of the above Rule would show that the question relating to right, title or interest in the property are some of the questions which are required to be determined in the execution proceedings. This is apparent from the words "all questions including". Hence, what follows after the said phrase is merely illustrative and not exhaustive. Hence, the question whether the decree under execution is a valid decree or a nullity would fall under phrase "all questions" arising between the parties to the proceeding of an application under Rule 97 and the said question would be required under the above rule to be decided by the executing Court. Hence, the provisions of rules 97 to 101 of Order 21, if properly construed cannot be held to mean that once a decree is put in execution, it can only be resisted by an obstructionist who has an independent

right to possess. Such a construction would do violence to the term "Holder of a decree for possession". Such a phrase in my view, cannot include a holder of an invalid decree for possession. If this be so, the decree holder has to first establish that the decree which he has put in execution is a valid decree for possession. Consequently, it follows that it will be open to an obstructionist to raise a contention that the said decree being a nullity is not liable to be executed and this is despite the fact that he may be trying to establish his independent right to possession.

14. Shri Rane, the learned Advocate appearing on behalf of the petitioners next contended that the licence which was created in favour of respondents Nos. 5 and 6 was only in respect of two rooms and a common user of the kitchen. The premises in dispute are a larger premises of which the licensed premises form a part. The respondents Nos. 5 and 6 can, therefore, claim protection only in regard to the premises which were the subject matter of the licence. They cannot successfully resist handing over the possession in respect of the portion which was not the subject matter of the agreement of leave and licence. The respondents Nos. 5 and 6 are liable to be removed from the portion of the premises of which they are not the licensees.

15. In my judgment, the above contention is devoid of merit in view of any finding that the decree under execution is a nullity and is, therefore, not liable to be executed at all. In fact I have found that respondents Nos. 5 and 6 have failed to establish that there was a subsisting licence in their favour as on 1st February 1973. Consequently, they do not possess an independent right to possession in respect of any portion of the premises. Even on the said premise, the decree being a nullity be put in execution for the purpose of removing the obstruction set up by the respondents Nos. 5 and 6.

16. In this view of the matter, I am inclined to hold that the decree being a nullity is not liable to be put in execution of the said decree. The findings of both the lower Courts in that behalf are liable to be affirmed, though on grounds different from the once that had appealed to the learned Judges of the lower Courts.

17. In the result, I find the present petition devoid of merit and the same is dismissed. Rule is discharged. In the facts and circumstances of the case, there shall be no order as to costs.

Rule discharged.