

(2004) 12 BOM CK 0035

In the Bombay High Court

Case No : Writ Petition No. 4984 of 2004

Nirmalabai Jaisingh Patel

APPELLANT

Vs

Poonam Siyaram Maharaj Vyas

RESPONDENT

Date of Decision : 22-12-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 32, Order 21 Rule 32(5), Order 21 Rule 35, 36

Constitution of India, 1950 — Article 226, 227

Citation : (2005) 2 ALLMR 642 : (2005) 2 BomCR 553 : (2005) 2 MhLj 479

Hon'ble Judges : Dharmadhikari B.P., J

Bench : Single Bench

Advocate : R.S. Parsodkar, for the Appellant; M. Shareef, for the Respondent

Final Decision : Dismissed

Judgement

Dharmadhikari B.P., J.—Heard Shri Parsodkar, Advocate for the petitioner and Shri Shareef Advocate for the respondent.

2. Rule, Rule is made returnable forthwith by consent of the parties.

3. By this petition filed under Articles 226 and 227 of the Constitution of India, the petitioner challenges the order dated 14-10-2004 passed by the 2nd Additional District Judge, Nagpur, in Miscellaneous Civil Appeal No. 287 of 2004, whereby the said Court has dismissed the Miscellaneous Civil Appeal No. 287 of 2004 filed before it assailing the order dated 30-8-2004 passed by Small Causes Court, Nagpur, issuing warrant of possession in Regular Civil Suit No. 568 of 2003. The respondent has filed caveat.

4. The present respondent is stated to be a tenant of petitioner and it is the case of the petitioner that respondent voluntarily vacated the suit premises by accepting amount of Rs. 50,000/- for that purpose but after vacation of premises and receipt of amount, the tenant out of greed filed application for restoration of possession and contended that he was dispossessed forcibly.

5. The tenant appears to have filed Regular Civil Suit No 568 of 2003 against the petitioner landlord for declaration and perpetual injunction since the landlord wanted to forcibly evict him. The tenant also moved an application for temporary injunction to restrain the petitioner landlord from so dispossessing. On the ground that tenant has voluntarily surrendered the possession, the petitioner entered into the possession and hence on 2-12-2003, tenant moved an application for restitution of possession of leased premises. On 16-1-2004, the trial Court passed an order and directed the landlord to restore possession of respondent. The landlord challenged said order in M.C.A. and 011 24-2-2004, the 15th Ad hoc Additional District Judge, Nagpur, dismissed it. On 25-2-2004, the tenant moved Small Cause Court, Nagpur, for issuance of warrant of possession. On 15-3-2004, the landlord filed Writ Petition No. 1214 of 2004 challenging the orders of restitution passed by the trial Court and said writ petition was dismissed by the learned Single Judge on 15-3-2004. This dismissal was challenged in Letters Patent Appeal No. 117 of 2004 and it was also dismissed by the Division Bench on 8-7-2004. The respondent points out that one Shivrajsingh instituted Civil Suit No. 366 of 2004 in collusion with landlord (petitioner) and tried to obtain the order protecting his (Shivrajsingh's) possession. However, the tenant-respondent intervened in the said suit and brought this fact to the notice of lower Court. The Small Causes Court, Nagpur, therefore, rejected that application of Shivrajsingh. On 29-7-2004, the petitioner-landlord objected to the issuance of warrant of possession and on 26-8-2004 he also raised objection to the execution of the order dated 16-1-2004. The Small Causes Court on 30-8-2004 passed orders on application for warrant of possession and directed the landlord to comply with it. The landlord challenged said order in appeal before the District Judge and the said Court dismissed the appeal on 14-10-2004. This order is challenged in the present petition.

6. The Advocate for the petitioner contended that the order dated 16-1-2004 is an order of injunction and therefore, it could not be executed by delivery of possession. His contention is that only provisions of Order 21, Rule 32 of CPC can be taken recourse to and said Rule 32 does not contemplate issuance of warrant of possession. The argument is that provisions of Order 21, Rule 35 are not available for execution of said order. The Advocate for the petitioner has placed reliance upon the judgment of this Court in the case of Murlidhar Vaidya and Another Vs. Nababbi Yousufkhan, deceased through legal heirs and Others, and in the case of Venkat Kabade Vs. Kishan Dhumal, . Insofar as this later ruling is concerned, he also points out that provisions of Section 36 of C.P.C. have not undergone any amendment as held by the learned Single Judge in it.

7. As against this, Advocate Shri Shareef for the respondent-tenant contends that the entire argument is misconceived and has rightly been rejected by both the courts below. He contends that here the order of injunction is itself an order by which the possession is ordered to be restored and in such circumstances, the above case law has no application. He contends that the view and findings recorded by the Appellate Court are just and proper and call for no interference.

8. The perusal of judgment reported at Murlidhar Vaidya and Another Vs. Nababbi Yousufkhan, deceased through legal heirs and Others, reveals that there the Aurangabad Bench of this Court was dealing with a decision where there was no order for delivery of possession. In para 18 of this judgment, the Aurangabad Bench has found that decree before it (present decree) is only a prohibitory decree restraining defendants from interfering with peaceful possession of plaintiff and hence the decree cannot be executed by taking recourse to Order 21, Rule 35 by delivery of possession. The Aurangabad Bench has held that manner suggested in the case of Mst. Hajra Vs. Abdul Majeed Matoo and Others, , is not attracted. In the case before the J & K, the decree was for mandatory injunction directing the judgment debtor to vacate the property and for permanent injunction restraining him from causing any interference with the possession of decree holder. The Aurangabad Bench has observed that it shows that when decree was passed, the suit property was in possession of judgment debtor and judgment debtor was directed to vacate the premises. The Aurangabad Bench has therefore, concluded that the decree there was in fact a decree for delivery of possession and thereafter for perpetual injunction. However, instead of directing Judgment Debtor to deliver the possession, the mandate has been issued to vacate the premises and therefore, it has been interpreted that the Court can take every step to do the act which judgment debtor is directed to do either through plaintiff and/or some agency. It has been held that decree for possession has been passed by way of mandatory injunction and therefore, provisions of Rule 32, Sub-rule (5) have been invoked for aid. Even perusal of para 16 of this judgment of Aurangabad Bench shows that if decree is only for injunction and not for possession, it must be executed in a manner provided by Rule 32 and issue of warrant for delivery of possession is not justified. Here, in view of language of order dated 16-1-2004, it is clear that the injunction or decree for injunction specifically directs the petitioner landlord to restore possession and as such said ruling has no application.

9. The judgment reported in Venkat Kabade Vs. Kishan Dhumal, which takes the view in favour of the respondent-tenant has been fairly brought to the notice of this Court by Shri Parsodkar, Advocate for the petitioner. His argument is that the said ruling is not laying down correct law as provisions of Section 36 of CPC have not been amended. He has also supplied xerox copy of a Text Book in which old Section 36 has been printed. The said unamended Section 36 reads as under :

The provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders."

The amended Section 36 after 1976 reads as under :

The provisions of this Code relating to the execution of decrees (including provisions relating to payment under a decree) shall, so far as they are applicable, be deemed to apply to the execution or orders (including payment under an order)."

10. It is thus apparent that there are amendments in 1976 but said amendments have not vitally changed the interpretation of Section 36. The provisions of Code relating to execution of decrees are deemed to apply to even cases for execution of orders. The learned Single Judge of this Court in the case reported in Venkat Kabade Vs. Kishan Dhumal, has held that when there is an application for being restored to possession during pendency of proceedings and it is sought to be executed, the provisions of Order 21, Rule 35 of Civil Procedure Code, laying down mode and manner for execution of decree for possession can be taken recourse to by a trial Court and the contention of other side that such a course was not open and only relief judgment debtor may resort to is either by attachment of movable property or by putting him in jail was negated. Thus, this ruling cannot be distinguished and is in favour of present respondent.

11. Under the circumstances, the objection as raised by the petitioner is misconceived and unsustainable. Writ petition, therefore, fails and is dismissed. Rule is discharged. There shall be no order as to costs.

12. At this stage, Advocate Shri Abhyankar, holding for Advocate Shri Parsodkar, appearing for the petitioner, makes a request that the effect and operation of this judgment should be stayed for a period of four weeks to enable the petitioner to approach the Superior Court. Advocate Shri Shareef, appearing for the respondent opposes this request contending that the respondent/tenant is out of possession since last more than one year.

13. Under the circumstances, the effect and operation of present judgment is stayed for a period of four weeks to enable the petitioner to take further appropriate steps in the matter.