

(1996) 01 BOM CK 0036

In the Bombay High Court

Case No : Chamber Summons No. 1060 of 1994 in Suit No. 2434 of 1987

Prataprai Trambaklal Mehta

APPELLANT

Vs

Jayant Nemchand Shah and Other etc.

RESPONDENT

Date of Decision : 18-01-1996

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 28
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 100, Order 21 Rule 101, Order 21 Rule 102, Order 21 Rule 103, Order 21 Rule 104
Limitation Act, 1963 — Article 129
Specific Relief Act, 1963 — Section 22
Transfer of Property Act, 1882 — Section 55(1)

Citation : AIR 1996 Bom 296 : (1996) 3 BomCR 373 : (1996) 98 BOMLR 301 : (1996) 2 MhLj 885

Hon'ble Judges : A.P. Shah, J

Bench : Single Bench

Advocate : M.H. Shah and Satish Shah and P.T. Mehta, instructed by M/s. Pimanta Kapasi and Co, for the Appellant; D.V. Merchant, instructed by . M/s. Dhru Liladhar and Co., for the Respondent

Judgement

1. This chamber summons is taken out by the plaintiff/deGREE-holder for possession of flat No. 5 situate on the 1st floor of the building at plot No. 191, Jawahar Nagar Co-operative Housing Society Ltd., Goregaon (West), Bombay, ("suit flat", for short) in execution of the consent decree passed on September 21, 1987.

2. The facts are that the defendants were the owners of the aforesaid building on plot No. 191. On April 15, 1985, the plaintiff and the defendants entered into an agreement of sale in respect of the said building with vacant possession of two flats i.e. flat Nos. 1 and 3 situated on the ground floor of the said building for a total consideration of Rs. 1,00,000/-. By another agreement dated November 15, 1985, the earlier agreement was confirmed. On August 14, 1987, the plaintiff filed suit No. 2434 of 1987 for specific performance of these agreements. The suit property was described in the schedule of the property in Exhibit "A" to the

plaint as follows :

"All that piece or parcel of land or ground together with the Building situate thereon and "lying and being at village Pahadi, Goregaon, Taluka Borivali, in the Registration District and Sub-District of Bombay City and Bombay Suburban, being plot No. 191, Jawahar Nagar, Ward No. 13, Goregaon (West), Bombay -- 400 062, bearing Survey No. 147, Chalta No. 231 of 235, CTS No. 602 admeasuring 502 sq. mtrs. or thereabouts, Municipal Ward No. P-1160. 1160 (1-A), 1160 (1-B)".

Main prayer of specific performance contained in prayer clause (a) of the plaint reads thus:

"That the Defendants may be ordered and decreed to specifically perform the said agreement for sale dated 15th day of April, 1985 and also confirmed by the Agreement of Confirmation dated 15th November, 1985, registered under serial No. 914 dated 5th. March, 1986 in the office of the Sub-Registrar of Documents at Bombay, and to hand over the said property together with the vacant possession of the said flats Nos. 1 and 3 on the ground floor of the said Property at Plot No. 191, Road No. 13, at Jawahar Nagar Cooperative Housing Society, Goregaon (West), Bombay-400062, to the plaintiff and to do all acts, deeds and things as may be required for the purpose of carrying out the said Agreement."

3. On September 21, 1987, the plaintiff and the defendants presented consent terms before the Court and a consent decree was passed in terms of the consent terms. It will be necessary to note some of the relevant terms of the compromise decree, which are reproduced below :

"1. Defendants Nos. 1 and 2 declare that the Agreement dated 15th April, 1985 and 15th November, 1985 are valid, subsisting, and binding and the Defendants are in possession of the suit property and Flats Nos. 1 and 3 on the Ground Floor of the building at Plot No. 191 of the suit property at Road No. 13, Jawahar Nagar Co-operative Housing Society Limited, Goregaon, Bombay 400 062.

2. Decree on admission in terms of prayer (a) of the plaint.

3. Defendants agree and undertake to the Court not to dispose of or create fresh tenancy rights and/or third party rights and/or any charge or encumbrance or obstruction whatsoever upon the said suit property, more particularly described in the Schedule to Ex. "A" to the Plaint and more particularly on or in respect of Flat Nos. 1 and 3 on the Ground floor of the building on the said property at Plot No. 191, Road No. 13, at Jawahar Nagar Co-operative Housing Society Ltd., Goregaon, Bombay 400 062.

4. Defendants agree and undertake to the Court to quit, vacate and handover to the plaintiff the quiet, vacant and peaceful possession of the said Flats Nos. 1 and 3 on or before 31st December, 1988.

5.....

6. In the event of the Defendants Nos. 1 and 2 fail to handover possession on 31st December, 1988, the plaintiff to take possession on or after 9th January, 1989 through Sheriff's Bailiff, in execution of the Decree herein.

7.....

8. Defendants to execute the sale Deed in favour of the plaintiff as agreed and to do necessary deeds and things as now required to effect the sale deed of the suit property, on or before 30th January, 1989.

9.....

4. Thus, under the consent decree, the defendants agreed to specifically perform the agreements and to sell the entire property to the plaintiff. They undertook to handover peaceful possession of the two flats (flat Nos. 1 and 3) on or before December 31, 1988 and they further undertook to the Court not to create any fresh tenancy or to dispose of or create any third party rights, charge, encumbrance or obstruction whatsoever upon the suit property. The decree is duly registered with the Registrar of Documents on January 16, 1989. In execution of the said decree, the plaintiff has recovered possession of flats Nos. 1 and 3 and a conveyance deed is also executed by the prothonotary and Senior Master on November, 1 1993 and the same is lodged for registration in the office of sub-Registrar of Assurances, Bombay, in November, 1993.

5. It appears that the defendants created many hurdles in execution of the decree. They brought diverse proceedings to protract the execution under one pretext or the other. It also transpired that in breach of the undertaking, the defendants created tenancy in favour of the respondent Harish Kawa in respect of flat No. 5, which was vacated by the original tenant Mr. Ramaswami in November, 1989. In view of this breach of undertaking on the part of the defendants, suo motu notice was issued against the defendants under the Contempt of Courts Act. The plaintiff also took out a contempt motion against the defendants and Harish Kawa for taking action against them under the Contempt of Courts Act and restoration of possession of the suit flat. By his order dated August 7, 1992, Variava, J. found both the defendants guilty of the contempt of Court. The first defendant was sentenced, to simple imprisonment for the period of six months and as far as second defendant was concerned, fine of Rs. 2,000/- was imposed. No action was, however, taken against Harish Kawa as Variava, J. held that it was not proved that the said Harish Kawa had knowledge of the consent decree or the undertakings incorporated in the said decree. Variava, J. observed :

"In this Motion at this preliminary stage, only on Affidavits, it is not possible to state whether the 2nd respondent is or is not innocent third party. These are the questions which can only be decided on evidence and can more conveniently be decided either in execution proceedings which may be adopted by the plaintiff or in a separate suit which may be adopted by the plaintiff against the 2nd Respondent".

6. In the meanwhile, the plaintiff had filed chamber summons No. 839 of 1992 for possession of flat Nos. 1 and 3 and for getting conveyance. In view of the subsequent development in respect of flat No. 5 and the liberty given by Variava, J., plaintiff applied for amendment for warrant of possession to claim possession of flat No. 5 from the defendants or any other person or persons claiming through the defendants. The Prothonotary and Senior Master granted the said amendment. However, at the time of hearing of the chamber summons, an objection was raised on behalf of Harish Kawa that the Prothonotary and Senior Master has no jurisdiction to grant amendment. In view of this objection, the learned Advocate, who was then appearing for the plaintiff, applied for withdrawal of the chamber summons. Accordingly, Variava, J. allowed the chamber summons to be withdrawn with liberty to file a fresh chamber summons after first taking appropriate proceedings before the Court for amending the warrant for possession. Variava, J. also directed that the plaintiff must give previous notice of such application to any third party, who is concerned or affected i.e. respondent Harish Kawa or any other tenant.

7. It appears that thereafter a review application was moved before Variava, J. on the ground that under Rule 315 of the Original Side Rules, the Prothonotary and Senior Master has got power to permit amendment to the warrant for possession and that the chamber summons was withdrawn under a mistaken notion of law. A prayer was made that the chamber summons be restored to file. Variava, J., while rejecting the review application, by order dated September 27, 1994, issued a clarification that the last para of his earlier order merely gives plaintiff liberty to adopt appropriate proceedings and what proceedings is to be adopted and what application should be made is for the plaintiff to decide. The relevant portion of the order of Variava, J. reads thus :

"Clarified that the last para of the order merely gives petitioner liberty to adopt appropriate proceedings, what proceedings is to be adopted and what application is to be made is for the petitioner to decide. Clarified that the words "before a Court" in the last para of the order will not preclude the petitioner from adopting proceedings before the Prothonotary and Senior Master, if they are so advised. Any appeal or proceedings taken out by the petitioner will be undoubtedly decided on its merit".

8. Thereafter the plaintiff has taken out the present chamber summons claiming possession of fiat No. 5. Mr. Shah, learned counsel appearing in support of the chamber summons strenuously contended that the tenancy created in favour of Harish Kawa in breach of undertaking is void and a nullity and, therefore, it does not confer any right on the transferee. Mr. Shah urged that the decree is for specific performance of the entire building and, therefore, even if there is no specific direction for possession of flat No. 5, the plaintiff is entitled to recover possession of the said fiat in execution as admittedly the said fiat had fallen vacant after the decree was passed and it has been transferred to Harish Kawa in violation of the undertaking given by the defendants, which is in the nature of an

injunction against the defendants. Mr. Shah further urged that in a decree for specific performance even if the decree is silent as to the relief of delivery of possession, the executing court is still competent to deliver possession. Mr. Shah pointed out that it was clearly intended by the parties that in case any tenement falls vacant after the consent decree, no new interests were to be created in respect of the vacant premises as the possession thereof was to be received by the plaintiff decree-holder. However, in breach of the said undertaking, the defendants have created tenancy in favour of Harish Kawa and for their action, they have been rightly convicted under the Contempt of Courts Act. Mr. Shah urged that" now the plaintiff has become entitled to possession of the said flat and the Court is duty bound to grant such relief to the plaintiff to give complete effect to the rights and obligations of the parties under the agreement of sale of which the specific performance has been granted by the Court.

9. On the other hand, Mr. Merchant, learned counsel for the respondent, raised several objections to the maintainability of the chamber summons. Mr. Merchant contended that there is no decree for possession of fiat No. 5 and, therefore, the executing Court cannot go behind the decree and award possession in the absence of such decree. Mr. Merchant further contended that under the consent decree, the plaintiff was entitled to the vacant possession of only fiats Nos. 1 and 3 and as far as the remaining property is concerned, there is no decree for possession, but at the highest it can be said that there is a decree for injunction in view of the undertakings given by the defendants and such a decree can be enforced only in the manner prescribed by Order 21 Rule 32 (1) and (3) of CPC and in no other manner. Mr. Merchant urged that the plaintiff has no right to dispossess an innocent party, who has not been joined to the suit and who has entered into an agreement of tenancy without any knowledge about the consent decree, Mr., Merchant pointed out that there is a considerable delay on the part of the plaintiff in levying the execution, Learned counsel urged that if in the meanwhile during this period, any third party has bona fide entered in possession without the knowledge of the decree, he cannot be thrown out of the property on the strength of the decree, which, according to the learned counsel, is only a decree for injunction and nothing else. It was pointed out next by Mr. Merchant that whether there is valid tenancy in favour of his client can be decided only by the Small Causes Court, which is competent Court to decide such issue under the Bombay Rent Act. Mr. Merchant next urges that such an issue cannot be determined in execution proceedings contrary to the well established principle that the executing Court cannot go behind the decree. Lastly, Mr. Merchant urged that the present chamber summons for possession is beyond the period of limitation of 30 days and in any event, it ought not have been filed without first moving the prothonotary and Senior Master for obtaining appropriate orders as per the directions given by Variava, J.

10. We have already seen that the decree passed on September 21, 1987 by consent of the plaintiff and the defendants is a decree for specific performance. Under the said decree, the defendants had specifically agreed to perform the

agreements dated April 15, 1985 and November 15, 1985. It is true that the decree contains a specific direction for delivery of possession of only flats Nos. 1 and 3. However, in clause 3 of the decree, an undertaking is recorded on behalf of the defendants that they shall not create third party rights in respect of the suit property. It is fairly conceded by Mr. Merchant that the undertakings of the defendants incorporated in the said clause 3 will amount to an injunction against the defendants from creating third party rights. Moreover, this legal position cannot be disputed in view of the authoritative pronouncement of law by the apex Court in Noorali Babul Thanewala Vs. Sh. K.M.M. Shetty and others, , where, V. Ramaswami, J., speaking for the Bench, observed that when a court accepts an undertaking given by one of the parties and passes orders based on such undertaking, the order amounts in substance to an injunction restraining that party from acting in breach thereof. It was further observed that the breach of an undertaking given to the Court by or on behalf of a party to a civil proceedings is, therefore, regarded as tantamount to a breach of injunction although the remedies were not always identical. In the light of these established principles, I will now deal with the main issue as to whether the warrant for possession can be issued in respect of flat No. 5 in execution of the consent decree.

11. There is no dispute that the decree for specific performance is in respect of the entire building and it is not restricted only to a particular tenement in the said building, although decree contains a direction that the defendants should handover flats Nos. 1 and 3 which were in possession of the defendants. It is now well settled that it is not necessary in a suit for specific performance, either to separately claim possession or for the Court to pass a decree for possession. A decree for specific performance of contract includes everything incidental to be done by one party or another to complete the sale transaction, the rights and obligations of the parties in such a matter Being indicated by Section 55 of the Transfer of Property Act, Clause (f) of Section 55(1) of the said Act provides that :

"The seller is bound

(f) to give, on being so required, the buyer or such person as he directs such possession of the property as its nature admits."

The delivery of possession is thus a necessary ingredient and part of transfer of ownership. Therefore, where a decree for specific performance of contract is silent as to the relief of delivery of possession, the Executing Court is still competent to deliver possession. The Division Bench of Allahabad High Court in Pt. Balmukand Vs. Veer Chand, , ruled that the decree for specific performance, which provides that the property should be sold to the plaintiff by the documents and the sale deed, shall be executed within a certain time, failing which the Court will have the sale deed executed by a person nominated by it, implies that the delivery of possession shall be given in accordance with the provisions of Section 55(1)(f) of the Transfer of Property Act. The Calcutta High Court took a similar view in Kartick Chandra v. Dibakar Bhattacharjee AIR 1952 Cal 363 and Subodh

Kumar Banerjee Vs. Hiramoni Dasi and Others, . In the first case, it was held that the court while allowing the prayer for specific performance vests the executing court with all powers which are required to give full effect to the decree for specific performance. This was followed in the latter case in Subodh Kumar Banerjee's case (supra).

12. In Venkatesh v. Parappa (1966) 1 M LJ 799 , Mysore High Court sustained the order of delivery of possession though the decree for specific performance was passed in general terms. All these decisions were referred to and relied on by single Judge of Kerala High Court in Narayana Pillai Krishna Pillai Vs. Ponnuswami Chettiar Subbalekshmi Ammal, , where the learned Judge held :

"The executing Court can grant delivery of possession of property even where no such relief is granted by a decree for specific performance of the contract of sale."

There is a direct decision of this Court in Lotu Bandu Sonavane Vs. Pundalik Nimba Koli, where, Jamdar, J. held that it is not necessary to specifically claim relief of possession in suit for specific performance and the executing Court is competent to grant such relief. The learned Judge observed with reference to Section 22 of the Specific Relief Act that the requirement to claim the relief under Clause (a) or (b) of Section 22 is qualified by the clause "in an appropriate case". An appropriate case means a case in which the relief does not necessarily flow from the decree for specific performance of the agreement of sale. If such a relief is ancillary to and necessarily flows from a decree for specific performance, then it is not necessary to specifically seek such a relief and the bar of Section 22(2) would not be attracted. The learned Judge further observed that if the defendant is in possession of the property agreed to be sold and the decree directs a specific performance of the agreement of sale, defendant is bound to execute the sale deed as per the decree and to put plaintiff in possession of the property as contemplated under Sections 50 and 55(1)(f) of the Transfer of Property Act. In view of the decided cases, it is clear that most important part of such a decree is the portion where the Court directs that the contract to be specifically performed and the details which follow do not in any way limit the jurisdiction of the executing Court to take particular steps which are mentioned in the decree, but all other steps which ought to be taken for giving full effect to the decree for specific performance are not only within the competence of the Court, but the Court is bound to assist the party to that effect,

13. Matter can be viewed from another angle also. A suit for specific performance of a contract of transfer of immovable property operates as *lis pendens*. In other words, any suit against the vendor of real estate for specific performance, his conveyance of the legal title after suit was brought would not suspend the proceedings or defeat the title under the decree of this Court. This is so ruled in Motilal Pal v. Priya Nath Mitra (1908) 13 C. W.N. 226. Obvious reason for this is that if when the jurisdiction of the Court has once attached, it could not be ousted by the transfer of the defendant's interest, there would be no end to litigation and justice would be defeated. Consequently, when such a suit for

specific performance is ended by a final decree transferring the title, that title relates back to the date of agreement on which the suit is based and the Court will not permit the decree to be rendered nugatory by intermediate conveyances. Once this established legal position is borne in mind, there shall not be any doubt about the competence of the executing Court in granting possession even if the decree is silent as far as delivery of possession is concerned.

14. The question which next arises for consideration is what is the right of Harish Kawa in respect of flat No. 5. Can a transfer in violation of an undertaking which amounts to an injunction confer any right on the transferee? Whether such a transferee is entitled to protection of Rent Statute. In my opinion, these questions are no longer *res Integra* since they have been squarely concluded by a judgment of the apex Court in *Krishna Kumar Khemka Vs. Grindlays Bank P.L.C. and others*, . There the Supreme Court was concerned with a question as to whether a lease created in favour of M/s. Tata Finlay Ltd. in violation of injunction was valid and whether it would protect the said company under the Rent Statute. The Supreme Court cited with approval the judgment of Justice Sabyasachi Mukharji (as he then was) in *Smt. Ashrafi Devi v. Satyapal Gupta*'s case :

"On behalf of the transferee of the said property, it was contended that the West Bengal Tenancy Premises Act, 1956 protects such transferee. If however, a valid lease or a tenancy had been created then of course, such a lease or a tenancy would be protected but that, in my opinion, begs the question. Secondly, it was contended that no party should be made to suffer because of an act of the Court, I have not been able to appreciate this contention. The Court specifically prevented the transfer or creation of the tenancy. The tenancy which is created was in derogation and in violation of the order of the court. Therefore, by acting in violation of the order of the Court, no right, in my opinion, can be created in favour of a third party. Indeed, the Court has not acted. The action was in breach of the order of the Court."

The Supreme Court held that the tenancy created in favour of Tatas was in breach of the order of the Court and consequently, the Tatas cannot claim any protection under the Rent Act and they are liable to be evicted. Applying the said ratio to the facts of the present case, it is clear that Harish Kawa has not derived any right under the tenancy, which is created in derogation and in violations of the express undertaking given by the defendants to the Court. Thus, I have no hesitation in rejecting the argument of Mr. Merchant that Harish Kawa is a protected tenant. The argument of Mr. Merchant that his client is an innocent party and, therefore, his case should be considered sympathetically cannot be accepted. The consent decree, which is passed, cannot be defeated on the ground that a third party has been illegally inducted by the judgment-debtor.

15. Turning then to the argument of Mr. Merchant that this Court has no jurisdiction to decide the issue of tenancy, it must be said at once that Mr. Merchant has completely overlooked the amended provisions of C.P.C. Order 21

of the C.P.C. was amended in 1976 pursuant to the recommendations made by the Law Commission. The provisions with which we are concerned are to be found in Order 21, Rules 99 to 105. It is not necessary to deal with the same in detail, but suffice to make reference to Rule 101, which is material for our purpose :

"Order 21, Rule 101. Question to be determined :--

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".

This rule specifically provides that all 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 shall be determined by the Court dealing with the application and not by a separate suit and this power is conferred on the Court notwithstanding anything to the contrary contained in any other law for the time being in force. Therefore, the executing Court is perfectly justified in deciding the issue of tenancy. Considering the scope of this rule, Jahagirdar, J. observed in *Nusserwanji E. Poonegar and Others Vs. Shirinbai F. Bhesania and Others*, , as under :

"From the rule extracted above, it is easily seen that the language of the rule is peremptory and the powers given to the executing Court under the said rule are plenary. The powers given to the executing Court under Rule 101 are not qualified or hedged by any restrictions. On the other hand it shows that the executing Court is required to adjudicate upon all questions mentioned in the said rule as if it had jurisdiction to deal with every question that may so arise. By a legal fiction, an executing Court which may otherwise have no jurisdiction is invested with the jurisdiction to try all questions under the aforesaid rule."

While summarising the legal position, the learned Judge held that under Rule 101 read with Rule 99 of Order 21 of the C.P.C., all questions including the questions of tenancy under the Bombay Rent Act can be decided by the executing Court and the bar contained u/s 41(2) of the Presidency Small Cause Courts Act or the bar that may be implied by Section 28 of the Bombay Rent Act, does not apply to the field covered by Rule 101 of Order 21 of the Code. Moreover, having regard to the fact that the tenancy created in favour of Harish Kawa is a nullity, the question of protection of a Rent Statute does not arise. Thus the executing Court will be fully justified in ignoring the said transfer as completely null and void. Under the consent decree, the undertakings of the defendants were recorded with a view to see that the property is put in possession of the plaintiff and the spirit of the decree cannot be allowed to be defeated by dubious methods of

creation of third party rights.

16. The bar of limitation argued by Mr. Merchant is devoid of any merit. It is now well settled that although an application for removal of obstruction is required to be taken within thirty days, there is nothing to prevent the decree-holder from making a successive application for possession and in case such an application is resisted, the limitation for filing the application for removal of the obstructions starts from the date of the second obstruction and not from the date of the initial obstruction. This position is sufficiently clarified in *Subhan Bi v. Abdul Samad* 1978 Mh LJ 519.

17. Finally what remains is. the objection of Mr. Merchant that in view of Justice Variava's order, it was obligatory on the part of the plaintiff to approach the Prothonotary and Senior Master for amendment of warrant for possession. It is not disputed before me that under Rule 315 of the High Court (Original Side) Rules, the Prothonotary has the power to grant such an amendment. In my opinion, it would have been a completely empty formality to again approach the Prothonotary since he had power to grant amendment of possession warrant and this fact was later on brought to the notice of Variava, J. and for that reason, clarificatory order was also issued by the learned Judge. Mr. Merchant then contended that on a similar application, no order was passed by Jhunjhunwala, J. and, therefore, it should be held that the amendment by Prothonotary is not legal. The argument is too technical and trivial and, therefore, in my opinion, must be rejected.

18. In the result, chamber summons succeeds and is made absolute in terms of prayer clause (a).

19. In view of the fact that the respondent is occupying flat No. 5, he is directed to pay to plaintiff mesne profits at the agreed rate of rent from November, 1989 till he delivers possession to the plaintiff.

Order accordingly.