

(1995) 11 BOM CK 0029

In the Bombay High Court

Case No : Civil Revision Application No. 352 of 1990

Ramchandra Bhikchand Nahar and another

APPELLANT

Vs

Narhar Maruti Udavant and others

RESPONDENT

Date of Decision : 01-11-1995

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 5(11)(C)
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 22, Order 21 Rule 36, Order 23
Rule 3, Order 6 Rule 17
Registration Act, 1908 — Section 17, 49

Citation : AIR 1996 Bom 338 : (1996) 3 BomCR 61 : (1996) 98 BOMLR 433

Hon'ble Judges : N.P. Chapalgaonkar, J

Bench : Single Bench

Advocate : V.S. Bedre, for the Appellant; R.N. Dhorde, for the Respondent

Judgement

1. Heard Shri V. S. Bedre for the petitioners and Shri R. N. Dhorde for respondent No. 4. Rest of the respondents are served.

2. Narhari Maruti Udavant -- respondent landlord had filed a civil suit bearing R.C.S. No. 206/1978 in the Court of Civil Judge, Junior Division, Rahuri for eviction of the tenant from the suit premises. Bhikchand Nahar was the original tenant and Ram- chandra, Kantilal and Shantilal -- sons of Bhikchand, Dhanabai -- wife of Bhikchand and Surjabai -- daughter of Bhikchand were joined as defendants in that suit. On 23rd September, 1981, consent terms were filed by the plaintiff and the defendant No. 1, by which it was agreed by the parties to the consent terms that the suit premises is in possession of defendant No. 1 alone and other defendants have no concern with it and their names may be deleted from the array of the the defendants. It was also agreed that the premises should be continued in possession of defendant No. 1 for a further period of five years on a monthly rent of Rs. 75/-. It was also specifically agreed by the plaintiff and the defendant No. 1 that this concession does not create a new tenancy and should not be interpreted as a new contract and the defendant will handover the vacant possession of the premises on 3rd October, 1986 in

absence of any new contract with the plaintiff.

3. An execution petition was filed on 23rd March, 1988 contending that the defendant did not comply with the terms of the decree and has not vacated the premises on 3rd October, 1986. Therefore, the possession of the premises was sought for. In this Regular Darkhast No. 26 of 1988, the judgment-debtor No. 1 Ramchandra and No. 5 Dhanabai filed different objection petitions and resisted the relief of possession. Ramchandra --Judgment-debtor No. I -- contended that the consent terms recorded, were beyond the scope of the suit and, therefore, no decree could have been passed under Order 23, Rule 3 of the Code of Civil Procedure. The second contention raised was that the consent terms created a fresh lease and that lease has not been terminated by giving a proper notice under the Transfer of Property Act It was also contended that the fresh lease is for a period of five years and, therefore, it is compulsorily registrable under Sections 17 and 49 of the Indian Registration Act. Objection petitioner contended that other defendants who are in possession along with defendant No. 1 have not signed the consent terms and, therefore, decree is inexecutable. The defendant No. 4 Dhanabai contended that the premises was in possession of her husband Bhikchand as a tenant and after his death, his heirs namely; the defendants Nos. 1, 2, 3 and 4 are in possession as tenants. She also contended that she has not signed the consent terms and, therefore, the decree is not binding on her.

4. The learned Judge of the executing Court was pleased to reject the objection petitions and issued warrant of possession under Order 21, Rule 36 of the CPC vide his order dated 21st March, 1990. The said order has been challenged in this Civil Revision Application.

5. Shri V. S. Bedre, learned counsel for the petitioner raised following points for consideration objecting the execution of the decree:--

(i) That there were five defendants in the suit and the consent was filed by only one of the defendants. Therefore, no effective decree could have been passed in the suit.

(ii) Fresh contract of the lease is created by the consent terms which has not been properly terminated and, therefore, the decree is inexecutable.

(iii) The trial Judge should have been allowed the objection of Dhanabai since she was not a party to the consent terms and was very much entitled to protect her possession as a tenant of the suit premises.

(iv) Proper notice was not given by the learned trial Judge under Order 21, Rule 22 of the Code of Civil Procedure.

6. Shri R. N. Dhorde, learned Counsel for the respondent No. 1 -- original landlord -- contended that both the objection petitions were not maintainable.

7. When there are more than one defendants in a suit, the plaintiff can have the settlement with any number of them and such a consent can always be recorded.

However, if some parties file Consent and all others are deleted with the leave of the Court, then decree can be passed in the suit as against the consenting defendants. In the instant case, I find that clause 5 of the consent terms, which was filed by the defendant No. 1 along with the plaintiff, states that the names of rest of the defendants may be deleted from the suit. Impugned decree begins with the words that it is ordered as per the consent terms at Exhibit A. Therefore, it will have to be held that the learned Judge, while passing the decree, ordered the deletion of the defendant from the suit. It is true that the proper course would have been that the plaintiff should have given a separate application for deletion of the defendants Nos. 2 to 5 from the suit and the learned Judge should have passed the orders on the said application and thereafter proceed to pass the decree in terms of the consent filed by the defendant No. 1 in favour of the plaintiff. However, merely because of the absence of such a separate application, it cannot be held that the suit has continued as against the defendants Nos. 2 to 5.

8. Shri Bedre relied on the judgment of this Court (Sharad Manohar, J.) in the case of Trilokchand Kapoorchand Vs. Basubai Vastimal Oswal and Others, to contend that if there is a joint lease given to two persons by the landlord, it cannot be terminated as against one of them only and no eviction can be sought for against one of the lessees. The second case relied by Shri Bedre is Kalyandas Manilal Shah Vs. S.M. Kankaria and Another, . In this case, on the basis of a settlement between the parties, the tenant continued to be in possession and in the meanwhile, he acquired the rights of a statutory tenant. In this case, a suit came to be disposed of on the basis of the consent terms between the landlord and the tenant and the tenant was allowed to continue for a period of 7 years. In the meantime, further proceedings were there between the landlord and the tenant in which the landlord again agreed that the tenant is his statutory tenant from the date of consent. Looking to these peculiar facts, the learned Judge of this Court held that the decree in that suit cannot be executed to oust the tenant.

9. In the case of Jacob David Sopher v. Baldev Phatak, reported in (1975) 77 Bom LR 254, Vimadalal, J, of this Court, pointed out that a consent decree may create a tenancy or a licence and it is not as if a new tenancy or a fresh licence cannot be granted by a consent decree. The question as to whether a consent decree creates a new tenancy or grants a fresh licence is not a matter of authority but is a question which must be decided on the interpretation of the terms of that particular consent decree.

10. Following this judgment, another learned Judge of this Court (Jahagirdar, J.) in the case of Prithvichand Ramchand Sablok Vs. S.Y. Shinde, was pleased to observe that whether a consent decree creates a new tenancy or continues the old tenancy has to be decided on the language of the decree itself. The consent terms record that the arrears of the rent were waived by the landlord and the tenant was asked to pay regularly from 3rd October, 1981 at the rate of Rs. 75/- p.m. It was further agreed by the consenting parties that a new tenancy is not

created by these consent terms and such an objection shall not be taken by the defendant. The relationship between the landlord and the tenant was allowed to be continued for a further period of five years. There was no material change in any of the terms to indicate that any new tenancy is created. In *Bai Chanchal and Others Vs. Syed Jalaluddin and Others*, , somewhat similar facts were considered by the learned Judges of the Supreme Court (At page 1084, para 6) :

"On the basis of it, all that the consent decree envisaged was that though the judgment-debtors were liable to immediate eviction, the decree-holders agreed to let them continue in possession for a period of five years. Since this concession was being granted as a special case, the decree-holders insisted that mesne profits should be paid at a much higher rate so much so that between all the defendants, governed by the two decrees of 8th July, 1946 and 28th January, 1949, the amount payable as mesne profits became Rs. 7,314.8.0 per annum which had no relation with the original rent of Rs. 199/- per annum for the entire land fixed by the lease of 1895. In fact, the decree-holders sought further protection by requiring the judgment-debtors to pay the mesne profits due for five years were to be paid within a period of three years. There was the further clause that, in case of default of payment of the mesne profits, the defaulting judgment-debtors could be immediately called upon to deliver possession. These terms can, in no way, be interpreted as creating a new tenancy constituting the decree-holders as landlords and the judgment-debtors as their tenants. The terms of the consent decree neither constituted a tenancy nor a licence. All that the decree-holders did was to allow the judgment-debtors to continue in possession for five years on payment of mesne profits as a concession for entering into a compromise."

There is nothing in the compromise which can be interpreted in support of Shri Bedre's contention that it contains a new contract. Therefore, this submission will have to be rejected,

2-11-1995.

11. Only two questions are required to be decided in this Revision Application. First one is whether the decree in question is unexecutable since it was passed on the basis of the consent terms signed by only one of the defendants and the second question is whether the objection petition of Dhanabai was properly rejected and, if not, whether her heirs have any right to be adjudicated by the executing Court.

12. So far as first question is concerned, it is clear that no decree can be passed as against all the defendants if the consent is signed by only some and not all of them. But if one or more defendants give consent, then decree can be passed against that or those defendants, as the case may be, and the suit may proceed in respect of rest of the defendants, as was observed by the Supreme Court in the case of *Bai Chanchal and Others Vs. Syed Jalaluddin and Others*, . In the instant case, I find that defendant Ramchandra had signed the consent terms

certified by the Court on 23-8-1991 along with the plaintiff and on the basis of those consent terms, a valid decree can certainly be passed as against Ramchandra. Question would be what is the order of the Court in respect of other defendants. In the consent terms, Clause 5 says that the defendant admits that other defendants have no concern with the suit property and there is no objection for deleting their names. Those consent terms have also been signed by the plaintiff. Therefore, this can very well be treated as an application under Order 6, Rule 17 for the amendment of the plaint so far deletion of the defendants are concerned. While disposing of the suit, learned Judge has ordered:

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and thereafter whole terms of consent including Term No. 5 has been incorporated in the decree. It, therefore, follows that the learned Judge has passed an order in terms of Clause 5 also and has permitted to delete the names of other respondents. The only flaw is that as per this order, the title of the plaint was not corrected but the omission of this ministerial act will not alter the nature of the decree. The decree is passed only against the consenting defendant and the names of other defendants have been deleted from the suit. Merely because some of the parties who were continued in the array of defendants, decree passed against the consecution defendant will not be an invalid decree.

13. Bhickchand was the original tenant of the suit premises and this position is admitted by both the parties. After the death of Bhikchand, the other defendants including defendant No. 5 were residing in the suit premises along with Bhikchand. Therefore, the tenancy rights devolved upon them, as per the provisions of Section 5(11) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. Though Shri Bedre raised dispute that the Bombay Rent Act is not applicable to the present suit, submissions does not appear to be sound. I find mention of the revenue village Rahuri Khurd in Schedule II of the said Act and specifying areas to which Act is applicable. Shri Bedre was unable to show anything in support of his submission. Therefore, I will have to hold that the premises situated in Rahuri Khurd is governed by the provisions of Bombay Rents Act, 1947. Special provisions regarding the devolution of the tenancy rights have been made in the definition clause of the Bombay Rents Act, 1947. Sub-clause (c) (i) of clause (11) of the said Act reads as under :

"(c)(i) in relation to any premises let for residence, when the tenant dies, whether the death has occurred before or after the commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Act, 1978 any member of the tenant's family residing with the tenant at the time of his death or, in the absence of such member, any heir of the deceased tenant, as may be decided in default of agreement by the Court;"

If we consider this provision, we find that the scheme of the Act recognizes only

the person with whom the contract is made as tenant for the purposes of this Act and after his death, if other members of the family are residing with him, then all those family members get tenancy rights and are recognised as tenants. In the absence of any such member residing along with the tenant at the time of his death, then only heirs of the tenant will come into picture and would be entitled to tenancy rights of the premises. When other members of family were residing along with the tenant at the time of his death, and they are available, then no other heir of the tenant can be brought in to bestow upon him the tenancy rights. Similarly, unless all the tenants who were residing at the time of his death are exhausted, question of consideration of rights -of the heirs of tenant does not arise. In the case at hand, it is not in dispute that at the time of death of Bhikchand, the defendants, except defendant No. 5, were residing along with Bhikchand. The decree is passed against Ramchandra who was one of those family members residing at the time of death of Bhikchand. Since decree was submitted for execution, only Ramchandra and Dhanabai came forward to file their objections. Ramchandra's objection was rightly rejected and Dhanabai's objection petition was also rejected by the learned trial Judge. The propriety of the said order would have been considered by this Court in the light of the aforesaid observations. Dhanabai died during the pendency of this revision and her heirs have been brought on record. Though the tenancy rights are heritable, they can be inherited by heirs of the original tenant and not by heirs of other members of the family who were residing: along with the tenant at the time of his death. When Bhikchand died his sons and wife were living along with him and those were entitled for the tenancy rights under the Act and one of them was Ramchandra against whom decree is passed. Another person entitled for tenancy rights was Dhanabai. She is now dead. Therefore, her objection petition has become infructuous.

14. Shri Bedre contended that heirs of Dhanabai namely, Ramchandra, Shantilal, Kantilal and Sarjubai -- petitioners are entitled to tenancy rights. I do not accept this submission. If any other member of the family living at the time of death of Bhikchand is surviving; then heir of Dhanabai will get no right in respect of the tenancy. Shri Bedre submitted that Kantilal is one of the heirs of original tenant Bhikchand and in that capacity, he has got right. I am afraid that this cannot be considered in this revision for the reason that Kantilal has not filed any objection of his own and now Kantilal has been brought before this Court as heir of Dhanabai. As already observed, Dhanabai's heirs have no right to claim tenancy rights and to continue in possession and I do not wish to express any opinion about the rights of any heir who have not filed any objection petition before the executing Court.

15. I, therefore, hold that objection of Ramchandra was properly rejected by the learned trial Judge and the objection of Dhanabai has become infructuous for the reasons stated. Therefore, this Revision Application will have to be rejected. Rule discharged. There be no order as to costs.

Shri Bedre prays for 8 weeks time. Time granted. Decree impugned in the revision be not executed for a period of 8 weeks from today.

Order accordingly.