
(1999) 07 BOM CK 0021

In the Bombay High Court

Case No : Writ Petition No. 1228 of 1983

Ronak Industries Ltd.

APPELLANT

Vs

The Elphinstone Shipping Wearing Mills Co. Ltd. and Others

RESPONDENT

Date of Decision : 02-07-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144, 151

Citation : (2000) 1 ALLMR 25 : (1999) 101 BOMLR 171 : (2000) 1 MhLj 605

Hon'ble Judges : D.G. Deshpande, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

D.G. Deshpande, J.—Heard Mr. Dharmadhikari for the petitioners and Mr. Abhyankar for respondent No. 1.

2. The petitioners in this case are the tenants and respondent No. 1 is the landlord. The landlord had filed a suit for ejectment before the Small Causes Court, Mumbai. The same was decreed. The Appellate Court also dismissed the appeal confirming the order and decree of the Small Causes Court, Mumbai and hence this petition.

3. When the petition came for hearing Mr. Abhyankar appearing for respondent No. 1 raised preliminary objection to the rights of petitioners to prosecute further this petition or to the rights of petitioners to be heard on merits in this petition. The objection raised by Mr. Abhyankar was of the following nature and based on the following facts:-

According to Mr. Abhyankar this petition was admitted on 5th April, 1983 when rule and interim stay in terms of prayer Clause (g) was granted on usual terms (Emphasis added) Here italicised. According to Mr. Abhyankar on "usual terms" means the petitioners were to go on paying rent regularly and not to create third party rights. However, according to him, the petitioners firstly did not give any undertaking and they committed breach of order of the Court and; secondly, the

petitioners have created third party rights and also committed further breach of order of the Court.

4. Further according to Mr. Abhyankar this petition came to be dismissed by Justice Saraf on 30.11.1995. Consequent upon dismissal of the petition, the interim stay granted in terms of prayer Clause (g) also came to be vacated. Thereafter by their letters dated 18.12.1995 and 21.12.1995, the respondents informed the petitioners about the dismissal of petition. The petitioners thereafter filed an application for restoration of petition in April 1996, but did not move for stay of execution of the decree of Small Causes Court. Thereafter this petition for restoration was also dismissed on 28.11.1996 for non-removal of office objections and it is only in 1998 i.e. on 14.8.1998 petition for restoration of the restoration application was filed and it was allowed on the same day, but prayer for staying the execution was rejected. As a result, application for restoration of the petition came to be allowed, but main Petition No. 1228 of 1983 came to be restored by Justice Saraf on 4.3.1999.

5. According to Mr. Abhyankar from the date of dismissal of the writ petition on 30.11.1995 to its restoration by Justice Saraf on 4.3.1999 at no time any stay to the execution was obtained by the petitioners or not granted by this Court. He pointed out that when Justice Sawant allowed Civil Application No. 678 of 1998 for restoration of restoration application prayer for stay of the execution was considered and rejected by Justice Sawant after observing "I am not inclined to stay the execution of the decree." Mr. Abhyankar also pointed out that in the absence of any stay to the execution of decree, the decree-holder respondent No. 1 had started execution proceedings before the Trial Court in March, 1998, that on 29.6.1998 execution was made absolute, that on 27.7.1998 order for delivery of possession was passed against the petitioners and in favour of the respondents by Executing Court, that on 3.8.1998 four obstructionists obstructed the execution of the decree for possession and this was done independently by the judgment debtors/the petitioners. Thereafter notices were issued to the obstructionists and on 16.10.1998 again decree was sought to be executed on 7.12.1998 consent terms were filed by the obstructionists that they were not claiming any right in the suit property, and on 21st December, 1998 actual physical possession of the suit premises was taken by the respondents /decree holders. According to Mr. Abhyankar this possession was taken from third party i.e. from the obstructionists and not from the judgment debtors/petitioners.

6. Mr. Abhyankar also pointed out that thereafter on 22nd December, 1998 the petitioners filed an affidavit and applied for return of their goods. According to Mr. Abhyankar some time was granted to the petitioners, but on 4.2.1999 they applied for extension of time and finally on 23.2.1999 the goods were removed.

7. In this background it was the contention of Mr. Abhyankar that the petitioners had no right to prosecute the petition firstly because they did not give undertaking to the Court as per the Court order at the time of admission. Secondly, according to him, on the dismissal of writ petition and before its

restoration the decree was executed by the Competent Court by following legal procedure, and therefore, now nothing remain to be heard in this matter. Thirdly, according to Mr. Abhyankar the petitioners had created third party right and that was evident from the obstruction created by the four obstructionists. And therefore, for all these reasons the petitioners had no right to pursue their petition and had no right being heard on merits. Mr. Abhyankar also pointed out that though the period of about three years from dismissal of the petition on 30.11.1995 to its restoration on 4.3.1999 was available to the petitioners and though the petitioners were aware about the execution proceedings started against them, they never seriously tried to obtain stay from the Court to the execution of decree, never represented to the Executing Court, that they have applied to the Executing Court for stay of the decree on any count. But to the contrary, they allowed the execution proceedings to finally culminate in handing over the possession of the suit premises to the decree holders and therefore, the petitioners had lost their rights to challenge the decree. Mr. Abhyankar also pointed out that after the decree was executed and possession was obtained by respondent No. 1, the petitioners created third party rights about which the petitioners had full knowledge and consequently, the petition was liable to be dismissed on all these preliminary objections.

8. As against this, it was contended by Mr. Dharmadhikari that there was nothing on record to show that the possession of the suit premises was obtained by respondent No. 1 from any third party or from the four obstructionists. According to him, the possession was obtained from the petitioners, and therefore, there is no force in the objections raised by Mr. Abhyankar that the petitioners had created third party right. Mr. Dharmadhikari has pointed out that even though execution was obstructed by four obstructionists, they were not independent entities or independent persons exercising their rights. But they were all parties concerned with the petitioners, and this was clear from the consent terms filed by four obstructionists on 7.12.1998 to the effect that they do not claim any right in the suit property. Mr. Dharmadhikari pointed out that from the report of the bailiff prepared at the time of taking possession it was clear that the suit premises were in possession of the petitioners and not in possession of the obstructionists. So far as creating third party rights by respondent No. 1 after the execution of decree was concerned, it was contended by Mr. Dharmadhikari that so called third party is none other than respondent and that could not, therefore, be regarded as a circumstance to deprive the rights of the petitioners to prosecute this writ petition. Mr. Dharmadhikari also contended that since the stay order came to be vacated as a result of dismissal of petition, the petitioners had no option but to go before Executing Court when the execution was started. He further contended that once the petition was restored to file, it was required to be adjudicated on merits. Mr. Dharmadhikari also contended that even if the decree was executed and possession was handed over to respondent No. 1, the decree holders could not prevent the petitioners from pressing for restitution of the suit premises. Mr. Dharmadhikari further pointed out that the petitioners had

filed an affidavit which is to be found in Compilation No. 11.

9. So far as possibility of restitution of the suit property to the petitioners is concerned, Mr. Dharmadhikari relied upon certain authorities in : (1) *Olga Tellis and Others Vs. Bombay Municipal Corporation and Others*, wherein in paragraph Nos. 28 and 29 the Supreme Court has held relying upon earlier decision, that there can be no waiver of the fundamental rights and no individual can barter away the freedoms conferred upon him by the Constitution. It was further held as under:-

A concession made by him in a proceeding, whether under a mistake of law or otherwise, that he does not possess or will not enforce any particular fundamental right, cannot create an estoppel against him in that or any subsequent proceeding. Such a concession, if enforced, would defeat the purpose of the constitution. Were the argument of estoppel valid, an all powerful State could easily tempt an individual to forgo his precious personal freedoms on promise of transitory, immediate benefits. Therefore, notwithstanding the fact that the petitioners had conceded in the Bombay High Court that they have no fundamental right to construct hutments on pavements and that they will not object to their demolition after October 15, 1981. they are entitled, to assert that any such action on the part of the Public Authorities will be violation of their fundamental rights.

10. Mr. Dharmadhikari also relied upon judgment of the Supreme Court in *Mrs. Kavita Trehan and another Vs. Balsara Hygiene Products Ltd.*, wherein the Supreme Court has considered the concept of restitution with reference to Sections 144 and 151 of the Civil Procedure Code. So far as restitution was concerned, in paragraph No. 13 the Supreme Court has observed as under:-

The Law of Restitution encompasses all claims founded upon the principle of unjust enrichment. "Restitution claims are to be found in equity as well as at law". The law of quasi-contract is "that part of restitution which stems from the common indebitatus counts for money paid, and from quantum meruit and quantum valebant claims.

11. Further the Supreme Court has quoted Halsbury's Law of England which states :

Common Law. Any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep.

12. Further in paragraph 14 the Supreme Court has observed:-

...one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors....

13. In paragraph 15 of the said judgment the Supreme Court has quoted:-

The jurisdiction to make restitution is inherent in every Court and will be exercised whenever the justice of the case demands.

14. Mr. Dharmadhikari also relied upon the judgment of the Supreme Court in *Bhau Ram Vs. B. Baijnath Singh and Others*, . In that case a vendee who has filed an appeal before the Supreme Court by a special leave against a pre-emption decree passed against him and he had simultaneously withdrawn the pre-emption price deposited by the pre-emptor in the Court below after the grant of special leave to appeal. Dealing with the objections, the Supreme Court has held that withdrawal of the pre-emption price by the vendee cannot be precluded from the proceedings with the appeal, and principle of estoppel will not come in the way of the vendee in such case. The Supreme Court has observed that statutory rights of appeal cannot be presumed to have come to an end.

15. Mr. Dharmadhikari also relied upon judgment of the Supreme Court in *P.R. Deshpande Vs. Maruti Balaram Haibatti*, to the effect under which It has been held that an undertaking given by the litigant to the High Court cannot prevent him from filing SLP before the Supreme Court.

16. There cannot be any dispute about the proposition of law laid down by the Supreme Court in the aforesaid judgments. However, the questions are whether in the instant case it can be said that the respondents are guilty of unjust enrichment or that whether in the facts and circumstances of the case restitution of the suit property to the petitioners can be ordered by the Court. And my answer to both these questions are in the negative.

17. This is not a case of unjust enrichment by the respondents. Neither this is a case wherein respondents had obtained a decree fraudulently or they had tried to execute a decree surreptitiously behind the back of the petitioners-judgment debtors, or without resorting to process of law. Neither this is a case in which the respondents had any role to play for dismissal of the petition by this Court or that the respondents while executing the decree had suppressed any material or important facts from the Executive Court. On the contrary, the facts reveal that after the writ petition was dismissed in default on 30.11.1995 it was the respondents who gave intimation to the petitioners by their letters or notices dated 18.12.1995 or 21.12.1995 about the dismissal of the suit. It was not at all obligatory on the respondents to give information to the petitioners about the dismissal of the petition. There was no statutory duty cast upon the respondents in that regard nor the contractual duty and even principle of equity and fair manner did not expect or require the respondents to intimate the petitioners about dismissal of their petition. The respondents could have immediately started execution of the decree on dismissal of the petition and consequent vacating of the stay by this Court.

18. However, even though the notices were given by the respondents in December, 1995, the petitioners took four months time to apply for setting aside ex parte decree. But there also the petitioners were callous and negligent, and

they did not even remove the office objections which were of trifling nature resulting in dismissal of their application for restoration of their petition on 28.11.1996. A dismissal in default is prima facie an indication of negligence in prosecuting one's cause. The petitioners were prima facie negligent when the main petition was dismissed in default and they further prove their recklessness and callousness when the application for restoration for removal of office objections came to be dismissed. Further negligence of the petitioners is revealed when they applied for restoration of their restoration application in August 1998 i.e. after one year and nine months of the dismissal of restoration application on 28.11.1996. From this conduct it is clear that negligence of the petitioners was a criminal negligence in the sense that they are totally unconcerned about seriousness of the dismissal of the application, dismissal of the restoration application and in applying for restoration of the restoration application.

19. In fact, if at all the petitioners' claim and contention was bona fide and they had any urgency in the matter, they were supposed to apply for restoration of the petition immediately after they learnt from the respondents about dismissal of the petition. But they took four months time for doing so. Secondly, the petitioners did not remove office objection for seven months, resulting in rejection of their restoration application in November, 1996. Thereafter also the petitioners did not rush to the Court for taking immediate steps in the matter and they waited for about 21 months before applying for restoration of restoration application. The petitioners is a Company who had engaged Advocates for contesting the suit before the Small Causes Court and appeal before the Appellate Court of the Small causes Court. The petitioners knew that vacating of the stay order was bound to result in execution of the decree. However as stated earlier the application for restoration of the petition came to be filed in April 1996. Same came to be dismissed on 28.11.1996 and another application for restoration of restoration application came to be filed on 14.8.1998.

20. In the mean time i.e. in March 1998 the respondents had started execution proceedings before the Trial Court. I specifically asked Mr. Dharmadhikari to point out single document from the record of the Trial Court or from the Executing Court to show that the petitioners had requested the Trial Court to grant them time or opportunity to obtain a stay to the execution from this Court either in the pending writ petition or in the pending application for restoration of restoration application. Mr. Dharmadhikari, could not in spite of his best efforts, point out anything in that regard.

21. This lapse on the part of the petitioners points out two things. Firstly, the petitioners from the date of dismissal of their petition on 30.11.1995 till 14.8.1998 did not make any sincere efforts to see that the petition is restored or that the office objections to the restoration application are removed or stay to the execution is granted or confirmed. A diligent judgment debtor or a diligent

litigant would have moved heaven and earth for getting a stay to the execution from this Court or from the Apex Court, if his application for stay was rejected. But record shows that not only no attempts were made in this regard but that the petitioners were totally callous and negligent in protecting their own interest.

22. Apart from this, the record reveals that when respondent No. 1 filed execution proceedings in March, 1998, the petitioners surrendered to the jurisdiction of the Executing Court and consequently on 29.6.1998 the execution was made absolute and on 27.7.1998 order for possession was passed. In fact, it was open to the petitioners at this juncture to challenge the order of the Executing Court, dated 27.7.1998 for delivery of possession of the suit premises in favour of the respondents and to obtain stay to the execution, but the petitioners did not take any steps in this regard.

23. Thereafter when the warrant for possession was sought to be executed, the same was obstructed by four persons against whom obstructionist notices were taken out. It was urged by Mr. Dharmadhikari that these obstructionists had filed consent terms on 7.12.1998 to the effect that they did not claim any right in the suit property and this was done at the instance of the petitioners. Mr. Dharmadhikari also pointed out that this was done by the petitioners as per the oral directions of Justice Srikrishna. Mr. Dharmadhikari also pointed out that an affidavit was filed by the petitioners in that regard.

24. I am not at all convinced of this submission that the obstructionists did not claim any right or have filed consent terms at the instance of the petitioners, is not a circumstance to be held in favour of the petitioners. The petitioners had no alternative but to get the consent terms from the obstructionists because they knew that unless they obtained those consent terms, their prayer for stay of the execution of the decree would not be entertained at all by this Court.

25. It was also contended by Mr. Dharmadhikari that the possession of the suit premises was taken from the petitioners taut not from the obstructionists. In fact, it is not necessary to go into this controversy. Firstly, because the petitioners, who were given notice of the execution, were present throughout in the execution proceedings and had allowed the proceedings to continue and to tend against their interest. The obstructionists were there at their instance and it was the petitioners who got the consent terms of the obstructionists filed on record to the effect that the obstructionists do not claim any right in the suit property. All these voluntary acts on the part of the petitioners will clearly show that the decree was executed not on account of fraud, misrepresentation or coercive tactics adopted by the respondent, nor does it do so that respondents had taken any undue advantage of the circumstances arising out of vacating of the stay order by this Court, nor it indicates or suggests that the decree was executed behind the back of the petitioners or without any knowledge to them.

26. The Supreme Court in the above cases has held that restitution can be ordered where the case of unjust enrichment is made out. There is absolutely

nothing on record to show that the respondent had made out unjust enrichment in executing the decree. The respondent had executed the decree by adopting proper course after vacating the stay order of this Court. Further that execution of the decree has taken considerable time wherein at each stage the petitioners were heard and being party to the execution not only up to the stage of taking possession back but also there after when the petitioners applied for removal of the goods stored in the suit premises.

26. Apart from these facts, it is crystal clear that the petitioners allowed the execution proceedings to continue, that the petitioners were aware of the consequences of the execution of the proceedings, that the petitioners had full knowledge of the steps which were taken by the respondent in their execution proceedings. Apart from this, the petitioner submitted to all the orders of the Executing Court and did not challenge any of the orders of the Executing Court before any Courts including this Court.

27. This is, therefore, the case where the respondent executed the decree by following all the legal requirements and adhering to the provisions of law and consequently this is not at all a case of unjust enrichment. Further this is not a case where any undertaking or promises were given by the respondent to this Court or to the Executing Court that the decree will not be executed for a certain time or till the happening of any eventuality. Neither this is a case where the respondents had given any undertaking and were subsequently estopped from going behind that undertaking. Therefore, none of the rulings relied upon by the petitioner can come to their rescue.

28. Apart from this, the petitioner had no answer to the strong objection raised by Mr. Abhyankar that when this Court admitted the review petition and granted stay subject to usual terms, it was obligatory on the part of the petitioner to give an undertaking that the petitioner will not create third party right. There is, therefore, serious breach of the stay order granted by this Court. Firstly, in not giving undertaking or secondly in creating third party right who were the obstructionists claiming initial right in the suit premises. The petitioner cannot now be heard to contend that those obstructionists subsequently filed the consent terms. As held by me that filing of the consent terms by the obstructionists was not voluntary act on their part, if the petitioner had succeeded in obtaining the stay from this Court. I have no doubt in my mind that the obstructionists would have contested the execution tooth and nail and would have done every thing in their command to frustrate the execution. The consent terms were filed by the obstructionists because of the tight corner in which the petitioners had placed themselves.

29. The third aspect of the matter which is equally important is that when Justice Sawant allowed the restoration of restoration application by his order dated 14.8.1998 prayer for stay of execution was made by the petitioner. But Justice Sawant refused to grant the stay of execution of the decree as per paragraph 5 of his order. This clearly shows that any steps by the Executing Court, right from

vacating the stay order on 30.11.1995 or in between period of 30.11.1995 to 14.8.1998 or any steps after 14.8.1998, were the steps taken according to law and were the steps necessitated by the circumstances of the case and consequent upon rejection of the prayer for stay. Therefore, none of the steps can be said to be illegal, improper, unjust or outcome of any fraud, misrepresentation or suppression on the part of the respondent.

30. Therefore, when the decree is executed in the aforesaid circumstances with full knowledge of the petitioner-judgment debtor and with his full participation and in the absence of any stay from the High Court and after the rejection of the prayer for stay, then none of the cases cited by Mr. Dharmadhikari will come to the rescue of the petitioner in obtaining restitution order.

31. The last submission made by Mr. Abhyankar in this regard is that after execution of the decree and after taking physical possession of the suit premises, the respondent had created third party right, and therefore, according to Mr. Abhyankar, the Court cannot disturb the rights of the third party. As against this, it was contended by Mr. Dharmadhikari that the third party in whose favour the rights were granted by the respondent after obtaining physical possession of the suit property in execution were none-else than the respondent or they were closely connected with the respondent. This objection of Mr. Dharmadhikari cannot be accepted. Firstly because that will be a separate question of fact which cannot be decided by this Court at this juncture. Secondly, when the possession of the property is with the third party in the circumstances as mentioned above, the same cannot be disturbed by the order of restitution of the property.

32. Mr. Dharmadhikari lastly contended that right of appeal is a right granted by the statute and in view of the aforesaid rulings relied upon by him that right cannot be taken away, the petition should be required to be heard on merits. It is true that, the right of appeal is a statutory right. But in my opinion, the right of appeal is not a fundamental right, but a statutory right and therefore the observations of the Supreme Court in the case of *Olga Tellis v. Bombay Municipal Corporation* regarding relinquish of fundamental right would not apply in the present case.

33. The decree from appeal has been executed and fully satisfied and third party is placed in possession as discussed above and consequently the objection raised by Mr. Abhyankar to the maintainability of petition is required to be upheld. It was lastly contended by Mr. Dharmadhikari that since the stay order was vacated on account of dismissal of the present petition, the petitioner had no alternative but to bow before the Executive Court. In other words, according to Mr. Dharmadhikari, the petitioner was forced to go before the Executing Court and surrender to the proceedings. Even this submission cannot be permitted to be canvassed, because the circumstances pointed out by me are totally contradictory. There is no iota of evidence or circumstance to show that the petitioner was forced to go to before the Executing Court. To the contrary, the conduct of the petitioner as discussed above reveals that he allowed the

execution to be proceeded culminating into delivery of possession and never made any grievance against any of the order passed by Executing Court.

34. This is, therefore, the case where not a single circumstance could be considered in favour of the petitioner and against the respondent. To the contrary, the conduct of the petitioner, throughout right from the stage of filing of the petition and obtaining ad interim stay order till delivery of possession is of most irresponsible, callous and improper. The petitioner/Company is not therefore a litigant in whose favour discretionary scale of balance cannot be tilted nor has it any legal right to press the main petition. I, therefore, upheld the objection raised by Mr. Abhyankar and pass the following order:-

ORDER

The preliminary objection of respondent No. 1 regarding rights of the petitioners to prosecute further this petition or their rights to be heard on merits in this petition is allowed and is held against the petitioners. Consequently the petition is dismissed. Rule is discharged. In the circumstances of the case there will be no order as to costs.

Civil Application is dismissed. Certified copy expedited.