

(2002) 07 BOM CK 0012

In the Bombay High Court

Case No : Writ Petition No. 1962 of 1998

Vasaudev Gangaram Sharma and Others

APPELLANT

Vs

Popatlal Prabhudas and Sons

RESPONDENT

Date of Decision : 18-07-2002

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 28

Citation : (2003) 1 ALLMR 572 : (2003) 2 BomCR 859 : (2003) 1 MhLj 569

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : P.S. Dani, for the Appellant; D.C. Mehta and Associates, for the Respondent

Final Decision : Allowed

Judgement

A.M. Khanwilkar, J.—This writ petition under Article 227 of the Constitution of India takes exception to the order passed by the Small Causes Court, Bombay at Bombay Bench at Bandra dated 10th October, 1997 in Appeal No. 752 of 1986 in Execution Application dated 27-6-1985 in R.A.F. Suit No. 842/6916 of 1964.

2. Briefly stated, the predecessor of the petitioners was tenant in respect of the land situated at Goregaon bearing Survey No. 100 Hissa No. 2 Part, Survey No. 101, Hissa No. 3 Part and Survey No. 102 Hissa No. 1 of Mouje Pahadi, Taluka Borivali, Bombay Suburban District. The respondent had filed suit for possession of the demised premises on the ground of default and bona fide requirement against the predecessor of the petitioners under the provisions of Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, being R.A.E. Suit No. 842/6916 of 1964. The said suit was decreed ex parte. As a consequence of ex parte decree the plaintiff took the possession of the demised premises and after taking possession of the suit structure demolished the same. On the other hand, the predecessor of the petitioners filed application for setting aside the ex parte decree and for restoration of possession. That application was allowed and the suit was restored to the file. Since the structure was already demolished, the

Court did not grant the relief of possession thereof. After the suit was restored, to the file, same was dismissed for default. The petitioners had filed Notice No. 145 of 1968 for several reliefs such as restoration of possession and moveable goods in original condition, damages and mesne profits, for committing contempt of Court's order and for perjury for swearing false affidavit. The said notice was heard on merits and the original plaintiff was ordered to pay a sum of Rs. 7,35,000/- by way of damages and interest at the rate of 6 per cent and mesne profits at the rate of Rs. 4500/- per month. In the mean time, respondent plaintiff filed application for setting aside the order dismissing the suit for default. That application was allowed and the suit was proceeded on merits. The Trial Court however, after recording the evidence and hearing the parties was pleased to dismiss the suit on merits. That order has been confirmed by the Appellate Court and the High Court. In other words, the suit instituted by the respondent stands dismissed. The notice filed by the petitioners being Notice No. 145 of 1968 was later on finally heard and decided and the Court held that it had no jurisdiction to grant damages and restoration of possession but has jurisdiction to grant mesne profits only. Being dissatisfied by the said order dated 24-6-1976, the predecessors of the petitioners preferred appeal being Appeal Nos. 328/78, 201/79, 215/79 and 216/79, whereas the respondent plaintiff filed Appeal No. 390/79 and 367/79. All the appeals were heard and decided together by the Appellate Bench of the Small Causes Court. Two appeals preferred by the petitioners being Appeal No. 328/78 and 201/79 were allowed by order dated 20-4-1985 and rest of the Appeals were dismissed. The Appellate bench observed that since restoration of possession of the property in its original form was not possible the petitioners were given value of their factory at Rs. 3/- lacs and compensation of Rs. 3/- lacs for market loss, goodwill and mental agony. Court also directed payment of mesne profits at the rate of Rs. 4500/- per month from the date of dispossession till 25-8-1985, amounting to Rs. 10,62,000/-. The respondent plaintiff being dissatisfied by this order passed in favour of predecessor of the petitioners filed Writ Petition in this Court being W.P. No. 3536 of 1985. That writ petition has been dismissed today by this Court by a separate order. The petitioners on the basis of the order passed by the Appellate bench of the Small Causes Court dated 20-4-1985, filed application for execution of the said order and prayed for attachment of the property and for sale. On this application preliminary objection was raised by the respondent-plaintiff that the Court had no jurisdiction to order attachment. The Trial Court accepted the said preliminary objection taken by the respondent. Being dissatisfied by the said order of the Trial Court dated 8th Oct. 1986, the predecessor of the petitioners filed Appeal before the Appellate Bench of the Small Causes Court being Appeal No. 752 of 1986. During the pendency of the said appeal the original Appellant died and the present petitioners were brought on record as the heirs and legal representatives of the Appellant, The Appellants challenged the view taken by the Executing Court that it has no jurisdiction to attach the immovable property as prayed. According to the Courts below, as per Order 38 Rule 13 of the CPC immovable Property cannot be attached by the Small Causes Court before

Judgment and the Court below have also adverted to Section 8 as well as Section 75 of the CPC and observed that it provides that powers for attachment of immovable property are not invested in the Small Causes Court. The Court below have also adverted to the provisions of Order 21 Rule 82 of CPC which according to them expressly bar the jurisdiction of the Small Causes Court for attachment of the immovable property. These decisions are subject matter of the present petition under Article 227 of the Constitution of India.

3. According to the learned counsel for the petitioners, the question that arise in the present case is answered by the decision of the Division Bench of this Court reported in 1974 Mah.LJ. 812 in the case of Habib Mimed Khudabux v. Abdul Khadar Rehmanji. My attention is invited to Para Nos. 4, 11 and 12 of the said decision, wherein the Division Bench has unequivocally observed that when the Small Causes Court entertains the suit for possession as a Special Court u/s 28 of the Bombay Rent Act, in such a situation the procedure to be followed for executing the decree is one prescribed by the CPC as amended in its application to the State of Maharashtra by High Court u/s 122 of CPC and there would be no bar in respect of provisions contained in Order 21 of the Code of Civil Procedure. The learned counsel has also placed reliance on another decision of this Court reported in Akbarali Husenali Gulamreza Vs. Hotel Rezaliya Private Ltd., Pune, . This decision follows the decision of the Division Bench in Habib Ahmed Khudabux (supra) and the Court has held that the procedure to be followed by the Court invested with exclusive jurisdiction must be as per the provisions of the Act conferring such exclusive jurisdiction, Court of first instance hearing matter u/s 28 of Rent Act must follow procedure prescribed by Rent Rules only.

4. On the other hand, the learned counsel for the respondent submits that the decision of the Division Bench referred to above is not an authority on the proposition that is canvassed in the present petition. According to him, in that case the question was entirely different as to whether appeal was maintainable and other observations made in the said decision would be of no avail to the petitioners.

5. After considering the rival submissions, I have no hesitation in taking the view that since the respondent plaintiff had instituted suit for possession under the provisions of the Bombay Rent Act, it necessarily follows that the Executing Court had all the powers that were available and, was obliged to follow the procedure for executing a decree, as prescribed by the CPC as amended in its application to the State of Maharashtra by the High Court u/s 122. It is not in dispute that the High Court, in exercise of the powers conferred u/s 122, has framed rules. In the present case, Rule 8 was attracted for execution of a decree. The decision of the Division Bench referred to above has held that the term "Proceeding" mentioned in Rule 8 would include the execution proceeding. Understood thus, the decree or any order that was passed by the Small Causes Court in the suit or the notice taken out by the defendant, the procedure for execution of that decree or order was one provided by Rule 8 of the said rules. In the circumstances, the reasons

given by the two Courts below to take the view that it had no jurisdiction to attach the immovable property was wholly without any basis and, to my mind, completely in the teeth of the decision of the Division Bench of this Court referred to above. Even the other decision relied on behalf of the petitioners takes the same view following the decision-of the above said decision of the Division Bench.

6. In this view of the matter, the question raised in this writ petition has been squarely answered in favour of the petitioners. Hence, this writ petition succeeds. The impugned orders are set aside and, instead the Execution Application dated 27-6-1985 is restored to its original number before the first Court and directed to proceed in accordance with law. Rule made absolute as above. No order as to costs. Interim order passed by this Court shall continue till such other or further order to be passed by the Executing Court after hearing both the sides. Ordered accordingly.