

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO. 50 OF 2015

1. Shri Dhirajlal M. Desai, and
Ors.

..Applicants

Vs

1.Narendra Bhaichandra Mantri
and Ors.

.. Respondents

Mr. G.S.Godbole, Senior Advocate, i/b Mr. Bhavin R. Bhatia,
Advocate for Applicants.

Mr. P.K.Dhakephalkar, Senior Advocate, i/b Mr. Krunal Bhange,
Advocate for Respondent no.1.

CORAM :	R.G.KETKAR,J.
RESERVED ON :	22/01/2016.
PRONOUNCED ON:	10/02/2016

PC:

1. Heard Mr. G.S.Godbole, learned counsel for the applicants and Mr. P.K.Dhakephalkar, learned senior counsel for respondent no.1 at length.

2. By this Application under section 115 of C.P.C., the applicants have challenged the Judgment and order dated 23.11.2007 passed by the learned Judge, presiding over Court Room No.32, of the Court of Small Causes at Bombay (Bandra Branch) in Misc.Notice No.398 of 2007 in Execution Application No.45 of 2007 and Misc.Notice No.422 of 2007 in Misc Application

No.195 of 2007 as also the Judgment and order dated 8.12.2014 passed by Appellate Bench of Small Causes Court, Mumbai in Appeal No.251 of 2008. By these orders, the Courts below rejected the proceedings taken out by the applicants under Order 21, Rule 99 of C.P.C. on the ground that the same are not maintainable. The relevant and material facts are as under.

3. In January 1999, the first respondent had instituted R.A.E. & R. Suit No.114/354 of 1998 against one Lakhubhai Gohil, since deceased. The first respondent took out the application, being Interim Notice No.96 of 1999, for joining applicants herein as defendants on the ground that they were in possession of Galas (structures) and, therefore, were necessary or proper parties. The first respondent withdrew that suit.

4. In March 2000, respondent no.1 instituted R.A.E. Suit No. 81/185 of 2000 against the heirs of Lakhubhai. Respondent no.1 asserted that applicants were joined as proper/necessary party as they are occupying the respective galas on the suit land. Respondent no.1 withdrew that suit. Respondent no.1 thereafter instituted T.E.Suit No.41/50 of 2003 for possession against the legal representatives of Lakhubhai. It is the case of the applicants that the first respondent did not implead them as defendants, though the first respondent was very well aware about the applicants being in possession of structures right from 1982-83.

In fact, the first respondent had impleaded the applicants as parties in suits instituted in the year 1998 and 2000.

5. T.E.Suit No.41/50 of 2003 was decreed on 30.8.2005. Legal representatives of Lakhubhai (respondents no. 2 to 5 herein) filed Appeal No.58 of 2006 before Appellate Bench of the Small causes Court. That Appeal was, however, withdrawn unconditionally in 2006. It is the case of the applicants that there was collusion between respondent no.1 and the legal representatives of Lakhubhai to deprive the applicants of their valuable rights in the premises. The decree obtained by the first respondent was as a result of collusion and fraud.

6. Respondent no.1 filed Execution Application No. 45 of 2007 for executing the decree of eviction. On 12.6.2007, respondent no.1 took out Misc. Notice No.195 of 2007, inter alia, contending that though by order dated 11.6.2007 the Court was pleased to issue warrant of possession, they were obstructed. Prayer was, therefore, made for re-issuing warrant of possession with police help. It is the case of the applicants that the first respondent ought to have followed procedure laid down under Order 21, Rule 97 of C.P.C

7. On 20.9.2007 the learned trial Judge ordered re-issuing of warrant of possession with police help. In pursuance thereof, Galas of the applicants were locked on 15.10.2007. The

applicants, therefore, took out Misc. Notice No. 398 of 2007 and Misc Notice No.422 of 2007 under Order 21, Rule 99 of C.P.C. for setting aside the decree, for restoration of possession, among other reliefs.

8. By the impugned order dated 23.11.2007, the learned trial Judge rejected the Misc. Notices, inter alia, on the ground that the proceedings under Order 21, Rule 99 of C.P.C. are not maintainable as the subject matter of the suit was land and the applicants were claiming through judgment debtors the right in respect of structures. Appeal preferred against this order was also dismissed by the Appellate Bench on 8.12.2014. It is against these decisions, the applicants have instituted the present proceedings.

9. Mr. Godbole strenuously contended that the Courts below committed serious error by holding that the proceedings instituted by the applicants under Order 21, Rule 99 are not maintainable. In fact, he submitted that the first respondent ought to have followed procedure laid down under Order 21, Rule 97 of C.P.C. He heavily relied upon the decision of the Apex Court in the case of Brahmdeo Choudhary Vs. Rishikesh Prasad Jaiswal, (1997) 3 SCC 694.

10. Mr. Godbole also relied upon the following decisions:

(1) Vannattankandy Ibrayi Vs. Kunhabudulla Hajee, (2001) 2

SCC 564 and in particulars paragraphs 20 and 23;

(2) T.Lakshmipathi Vs. P Nithyananda Reddy (2003) 5 SCC 150
and in particular paragraphs 20,22 and 24;

(3) Shaha Ratansi Khimji Vs. Kumbhar Sons Hotel Private Ltd,
(2014) 14 SCC 1;

(4) Dinkar S Vaidya Vs. Ganpat S Gore, 1981 Bom C.R. 431.

11. Mr. Godbole submitted that as there was inconsistency in the view taken by the Apex Court in Vannattankandy Ibrayi (supra) and T.lakshmipathi (supra), vide order dated 5.1.2007 the matter was referred to a Bench of three learned Judges. In Vannattankandy Ibrayi (supra), the learned Judges interpreted Section 108(B)(e) of the Transfer of Properties Act, 1882 (for short, T.P. Act) and held that where a premises has fallen down under the circumstances mentioned therein, the destruction of the shop itself does not amount to determination of tenancy under section 111 of the T.P.Act and there is no automatic determination of tenancy and it continues to exist. If the tenancy continues, the tenant can only squat on the vacant land but cannot use the shop for carrying on business as it is destroyed and further he cannot construct any shop on the vacant land. It is, under such circumstances, the tenant who is to suffer as he is unable to enjoy the fruits of the tenancy but he is saddled with the liability to pay monthly rent to the landlord. It is for such a

situation the tenant has been given an option under Section 108(B)(e) of the T.P. Act to render the lease of the premises as void and avoid the liability to pay monthly rent to the landlord. It was held that Section 108(B)(e) cannot be interpreted to mean that the tenant is entitled to squat on the open land in hope that in future if any shop is constructed on the site where the old shop existed he would have right to occupy the newly constructed premises on the strength of original contract of tenancy because lease of a shop is the transfer of the property for its enjoyment and on destruction of the shop the tenancy cannot be said to be continuing since the tenancy of a shop presupposes a property in existence and there cannot be subsisting tenancy where the property is not in existence. It is further laid down that when the tenanted shop has been completely destroyed, the tenancy right stands extinguished as the demise must have a subject matter and if the same is no longer in existence, there is an end of the tenancy.

12. In T. Lakshmipathi case (supra), it was held that under a lease of land there is transfer of right to enjoy that land. If any material part of the property is wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let out because of fire, tempest or flood, violence of any army or of a mob, or other irresistible force, the lease may at the

option of lessee be avoided and that is the rule interpreted under section 108(B)(e) and applies to leases of land, to which T.P. Act applies. In the case of Shah Ratansi Khimji (supra) the Apex Court held that the decision rendered in Vannattankandy Ibrayi (supra) does not correctly lay down law and overruled the said decision and approved the decision in T. Lakshmipathi's case.

13. Mr. Godbole submitted that even if the applicants were tenants of the structures. Still they are entitled to use the land beneath and abutting the structures as licensee and the said license is irrevocable as held by this Court in the case of Dinkar S Vaidya (supra). He, therefore, submitted that the Courts below committed serious error in dismissing the proceedings taken out by the applicants under Order 21, Rule 99 on the ground that they are not maintainable.

14. On the other hand, Mr.Dhakephalkar supported the impugned orders. He submitted that the first respondent had leased out open piece of land to Lakhubhai, since deceased. Lakhubhai, in turn, had carried out construction of structures and inducted the applicants as his tenants. He submitted that there is no privity of contract between the applicants and the first respondent. He submitted that the applicants have no right qua the land under structures. He relied upon the following decisions:

(1) Jamnadas Dharamdas Vs Dr. J. Joseph Farreira, (1980) 3 SCC 569; and

(2) Ramkrishna Vs. Anand, 1999 (1) Mh.L.J.37.

15. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. It is not in dispute that the first respondent had leased out open piece of land to Lakhubhai, since deceased. Lakubhai carried out construction and inducted applicants as his tenants. Admittedly, the applicants are claiming through Lakubhai. There is no privity of contract between the applicants and the first respondent. The applicants cannot claim to be sub-tenants of the first respondent. In the case of Ramkrishna (supra), the dispute was in respect of a plot of land situate at Dadar, Mumbai. Lease was executed in respect of this open land for a period of 50 years commencing from 13.10.1941. Suit was instituted against lessee. The trial Court decreed the suit. Execution of the decree was obstructed. The obstructionist notice was taken out. This Court referred to the earlier decisions in (1) Damji Nansi Vs Omprakash Nathuram Gulathi, 1979 BCR 670; (2) Dinkar S. Vaidya (supra), wherein it was held that where the plot of land was leased by the original owner to the tenant for a period of 15 years, the structure was put up by the tenant and he had inducted a sub-tenant, it was held that the sub-

tenant in respect of the structure had only a right, qua the structure, and not to the land underneath, and (3) Vriji Nathuram Vs. Krishnakumar, AIR 1985 Bom. 429; this Court, after considering the law on the subject exhaustively, held that the original lessee has to be evicted from the entire land which was the subject matter of the lease. Though the original lessee was permitted to erect superstructure, persons so inducted in the superstructure would, at the most, be tenants of the superstructure. However, vis-a-vis the land their position was that of a licensee only and no higher status. The correct legal position was that on determination of the lease or other interests which are created in the land including the superstructure, interest if it can be so called, of the licensee has necessarily to come to an end. Decree of eviction of lessee cannot be properly executed unless the status of the obstructionists as licensees of the land also came to an end. Since the obstructionists are liable to be evicted from the land naturally they were held to be liable to be evicted from the superstructure also. The obstructionists were held to have no right whatsoever to remain in possession of the superstructure. All subsidiary interests which were created, even if legal, by the original lessee pursuant to the lease must necessarily come to an end.

16. Mr. Godbole submitted that in the case of Dinkar Vaidya

(supra) this Court held that the licence created by the tenant in favour of his tenants is irrevocable. It is not possible to accept this submission for more than one reason. In paragraph 46 of that report, this Court specifically observed that it was not concerned with clause (b) of Section 60 and dealt with Section 60(a) of the Indian Easements Act, 1882.

17. In paragraph 47, it was noted that the plaintiff was the owner of the land, the land was let out to defendants no.1 to 8, Defendants no. 1 to 8 constructed structures upon the same and let out those structures to defendants no. 9 to 22. The lease by defendants no.1 to 8 in respect of the structure is transfer of property within the meaning of Section 60(a) of the Easements Act. From the very nature of things defendants no. 9 to 22 could not enjoy the structure in the absence of some kind of right pertaining to the land below the structure. It was, therefore, reasonable nay imperative to presume that tenants of the structure were given licence by defendants no. 1 to 8 in respect of land below the structure. Evidently, the licence is coupled with transfer of property within the contemplation of section 60(a) of the Easements Act. It was clarified that the licence in respect of the land thus became irrevocable meaning thereby that defendants no. 1 to 8 could not revoke the licence given to the tenants of the structure, defendants no. 9 to 22, so long as their

tenancy in respect of the structure was in force, that is to say, was subsisting. In paragraph 47-a, it was observed that so long as the structures were in existence the tenants of the structure would have complete protection under the Rent Act vis-a-vis the structures and would have complete protection regarding the use of the land as licensee by virtue of section 60 of the Easements Act. If the structures were demolished for some reason or the other, it may be that the rights of the tenants of the structure would extinguish. In paragraph 47(b) it was observed that once the transfer in their favour, that is to say, the lease in their favour ceased to be in force, the license would vanish.

18. In paragraph 49, it was observed that on first principles, therefore, the preferable view would be that the tenants of the structure enjoy irrevocable licence in respect of the land below the structure, but their right vis-a-vis the land is coextensive only with their right vis-a-vis the structure. If, for any reason their right pertaining to the structure vanishes, their right pertaining to the land will cease to exist. **In paragraph 50, it was observed that the grant of irrevocability of the licence is a matter exclusively between the tenant of the land on the one hand and the tenant of the structure on the other. It is the tenant of the land, who is the licensor and it is the tenant of the structure who enjoys the irrevocability of**

the licence. Under the general law, it is well settled, that there is neither a privity of contract nor a privity of estate between the owner of the land on the one hand and the tenant of the structure on the other. It was further observed that there exists no jural relationship whosoever, neither privity of contract nor privity of estate between the owner of the land on the one hand and the subtenant of his tenant on the other.

(emphasis supplied)

19. The reliance placed by Mr. Godbole on the decision of Shah Ratansi Khimji (supra) also does not advance the case of the applicants. In paragraph 27, it was observed thus:

“27. It has been further opined in T.Lakshmipathi case (supra) that once a tenancy is created in respect of a building standing on the land it is the building and the land which are both components of the subject-matter of demise and the destruction of the building alone does not determine the tenancy when the land which is the site of the building continues to exist. This interpretation, as we find, is in accord with Section 108 of the Act. It is reflectible that in Vannattankandy Ibrayi’s case (supra), the two-Judge Bench observed that the rights stand extinguished as on the distinction of the demise, for there is destruction of the superstructure and in its non-existence there is no subject matter. Thus, the land has been kept out of the concept of subject matter. In our considered opinion, the Court in the said case failed to appreciate that there are two categories of subject-matters, combined in a singular capsule, which is the essence of provision under the Transfer of Property Act and not restricted to a singular one, that is, the superstructure. In T. Lakshmipathi (supra) the Court took note of the fact that the land and superstructure standing on it as a singular component for the purpose of tenancy. It is in

tune with the statutory provision. Therefore, we agree with the proposition stated therein to the affect that:

“24. in the event of the tenancy having been created in respect of a building standing on the land, it is the building and the land which are both components of the subject-matter of demise and the destruction of the building alone does not determine the tenancy when the land which was the site of the building continues to exist.”.

On the touchstone of this analysis, we respectfully opine that the decision rendered in Vannattankandy Ibrayi (supra) does not correctly lay down the law and it is, accordingly, overruled.”

In the present case, respondent no.1 has leased out open plot of land to Lakubhai and not the structure. In view thereof, the said decision does not advance the case of the petitioner.

20. The Courts below held that the proceedings initiated by the applicants under Order 21, Rule 99 of C.P.C. are not maintainable.

Order 21 Rule 99 (1) reads thus:

“99. Dispossession by decree-holder or purchaser -(1) where any person other than the judgment debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.”

21. Perusal of the extracted portion shows that where any person other than the judgment debtor is dispossessed **of immovable property** by the holder of a decree **for the possession of such property**, he may make an application to

the Court complaining of such dispossession. In the present case, decree is in respect of open plot of land. In other words, the applicants are in possession of the structure in respect of which there is no decree. The Courts below, therefore, rightly held that the proceedings under Order 21, Rule 99 are not maintainable. As the applicants are claiming to be dispossessed from structures and not the subject matter of the decree, namely, open plot of land, the proceedings instituted by them under Order 21, Rule 99 were rightly held to be not maintainable. In view thereof, no case is made out for invocation of powers under section 115 of C.P.C. Application fails and the same is dismissed.

22. At this stage, Ms Ulka Saranjame, learned counsel, states that the respondents-decree holders may be directed not to demolish the structure constructed by Lakhubhi Gohil, deceased, for a period of eight weeks from today. She assures that the applicants will not seek further extension of time.

23. In view thereof, notwithstanding dismissal of Civil Revision Application, for a period of eight weeks from today, the decree holders shall not demolish the structures constructed by Lakhubhai Gohil, deceased, on the open plot. Order accordingly.

(R.G.KETKAR,J.)