

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 824 OF 2014

Amir Beg Kadar Beg (since Deceased)
Through L.R.

...Applicant

Versus

Kurbanhusein M. Pardawalla
and others

...Respondents

....

Mr.P.S. Dani, Senior Advocate i/b. Ms.Jui Nerurkar, Advocate for
the Applicant.

Ms. Eventa Gonsalves, Advocate for the Respondent No.2.

....

CORAM : R. G. KETKAR, J.

DATE : 15th June, 2016

P.C.

1. Heard Mr.P.S. Dani, learned Senior Counsel for the
applicant and Ms.Gonsalves, learned Counsel for respondent
No.2, at length.

2. By this application under Section 115 of Code of Civil
Procedure, 1908 (for short, 'C.P.C.'), the applicant, hereinafter
referred to as 'obstructionist No.2', has challenged the judgment
and order dated 28/29.10.2004 passed by the learned Judge,
presiding over Court room No.5 of the Court of Small Causes at

Mumbai in Obstructionist Notice No.14/1992 in R.A.E. Suit No.189/535 of 1990 as also the judgment and order dated 9.5.2014 passed by the Appellate Bench of the Court of Small Causes at Mumbai in Appeal No.851/2004. By these orders, the Courts below made absolute the obstructionist notice taken out by respondents No.1 and 2, hereinafter referred to as the 'plaintiffs', and held that the plaintiffs are entitled to get removed the obstruction caused by obstructionists No.1 and 2 while taking possession of garage No.2, ground floor of the building known as Marine Chambers, situate on plot No.39, at the corner of 1st Marine Street, Marine Lines, Mumbai (for short, 'suit garage').

3. The plaintiffs had instituted the suit against (1) Jamshed Panthaki, resident of Dena Abad, Kharegat Road, Dadar, Bombay, (2) Ratan Panthaki, resident of East Street, Pune Camp, Pune and (3) heirs and legal representatives of deceased Rhoda S. Panthaki and Soli Panthaki under Section 13(1)(g) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, 'Act'). The suit was in respect of flat No.2 on the 5th floor and the suit garage. The plaintiffs

contended that Ms. Rhoda S. Panthaki was monthly tenant in respect of flat No.2 on the 5th floor and suit garage. Ms.Rhoda S. Panthaki died issueless leaving behind her husband Soli alias Sohrab Panthaki who was staying all alone in flat No.2 and till recently he had a car which was parked in the suit garage. Soli alias Sohrab Panthaki expired at Bombay on or about 27.1.1999. Defendants No.1 and 2 are intermeddling with the estate of the deceased and have been staying separately in their own premises at Dadar and Pune as mentioned in the title of the plaint. They have no right, title or interest of any nature in the suit premises and they have been joined in order to get the effective relief in the suit. It was further contended that none of the defendants are staying in the suit premises for they have ever stayed in the suit premises with the deceased but after the death of the original tenant and subsequent death of her husband, the premises are lying locked and the defendants are trying to break open the lock and they are intermeddling with the estate of the deceased and as such they are not protected under the provisions of the Act.

4. The plaintiffs and defendants No.1 and 2 filed consent

terms on 6th April, 1990. Defendants No.1 and 2 admitted and declared that they are the only surviving heirs and legal representatives of their deceased Soli alias Sohrab Panthaki who expired at Bombay on 27th January, 1990 and that he was staying all alone in flat No.2 and using the suit garage for parking his own car during his life time. Defendants No.1 and 2 submitted to the order and decree of eviction in respect of flat No.2 on the 5th floor and the suit garage on the ground floor and agreed to vacate and hand over peaceful possession of the suit premises to the plaintiffs forthwith.

5. In pursuance thereof, the plaintiffs have obtained possession of flat No.2 situate on the 5th floor. The dispute is in respect of the suit garage. In pursuance of the compromise terms, decree was passed on 6.4.1990. As the plaintiffs could not secure possession of the suit garage, they took out warrant of possession and when they tried to execute the decree on 10.2.1992 obstructionist No.1 Ganesh was found residing in the suit garage and after some time, the obstructionist No.2 came and also obstructed stating that he is in possession of the suit garage. The plaintiffs therefore took out Obstructionist Notice

No.14/1992 on or about 13.2.1992. Obstructionist No.2 filed reply resisting the notice *inter alia* contending that he is in possession of the suit garage much prior to 1.2.1973 as lawful sub-tenant and, therefore, the decree is not executable. Obstructionist No.2 also contended that the consent terms do not indicate existence of any ground as also the consent decree does not prove the satisfaction of the Court as required under Sections 12 and 13 of the Act. In other words, unless the Court was satisfied about the existence of one or more grounds of ejectment either under Section 12 or under Section 13 of the Act, the decree passed by the Court is not legal and valid and would not be executable.

6. The parties led evidence. After considering the evidence on record, the Courts below made absolute the notice as indicated hereinabove. It is against these orders, the obstructionist No.2 has instituted the present C.R.A..

7. In support of this application, Mr. Dani strenuously contended that obstructionist No.2 is in possession of the suit garage prior to 1.2.1973 and thus was a protected sub-tenant under the provisions of the Act. He further submitted that

perusal of the consent terms as also the decree passed in pursuance thereof does not indicate existence of any ground for ejectment under the provisions of the Act. The decree is, therefore, not executable as it was a nullity. He submitted that during pendency of the appeal, application at Exhibit-14 was taken out by obstructionist No.2 for production of additional evidence under Order 41 Rule 27 of C.P.C.. By that application obstructionist No.2 proposed to produce two plans which show that suit garage is shown as Dargah godown along with one notice issued under Section 354 of the Mumbai Municipal Corporation Act, 1888. By order dated 9.5.2014, the appellate Court rejected the application. He submitted that the appellate Court was not justified in dismissing the application. Mr.Dani invited my attention to the consent terms dated 6.4.1990 as also the order passed by the trial Court disposing of the suit by accepting the consent terms. He relied upon the following decisions :

[i] **Ferozi Lal Jain v. Man Mal & Anr.**
1970(3) SCC 181;

[ii] **Nagindas Ramdas v. Dalpatram Ichharam**
alias Brijram & Ors.
(1974) 1 SCC 242

to contend that the jurisdiction of the Court to pass a decree of recovery of possession of any premises depends upon its satisfaction that one or more of the grounds mentioned in the Act have been proved.

8. On the other hand Ms. Gonsalves supported the impugned orders. She relied upon following decisions :

- [i] K.K. Chari v. R.M. Seshadri
(1973) 1 SCC 761;**
- [ii] Nagindas Ramdas v. Dalparam Iccharam
alias Brijram and others.
AIR 1974 SC 471 (V 61 C 90);**
- [iii] Mody Mansukhram Punjiram (deceased)
through L.Rs and Anr. v. Shah Babulal
Dahyabha & Ors.
1989(1) Rent Control Reporter 679.**

9. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. The short question in the present case is whether obstructionist No.2 has proved that he is in possession of the suit premises prior to 1.2.1973 and whether the decree is not executable as it does not indicate existence of one or more grounds of ejection under the provisions of the Act.

10. As far as the first question as to whether obstructionist No.2 was in possession of the suit garage prior to 1.2.1973 is concerned, perusal of the trial Courts order shows that after considering the evidence on record the trial Court has observed that the documents produced by obstructionist No.2 were not pertaining to the suit garage as obstructionist No.2 was tenant in respect of other two premises in the building where the suit garage is situate. Out of two premises, he had taken one premises in the year 1959 where he is doing business in the name and style "Liberty Bidi Shop". Other premises is taken in the year 1969 where he is carrying business in the name and style "Amir Fruit Juice Center". The learned trial Judge held that the documents produced by obstructionist No.2 did not pertain to the suit garage. This is considered by the learned trial Judge from paragraphs-24 to 29. As far as the appellate Court is concerned, the appellate Court has considered this aspect from paragraphs-20 to 33. The appellate Court also dealt with the writing dated 17.11.1969 at Exhibit-2 and ultimately came to the conclusion that the said writing is completely forged document.

11. After considering the evidence on record, I do not find that the Courts below committed any error in holding that the obstructionist No.2 failed to establish his possession prior to 1.2.1973. As far as the other ground, namely, the decree cannot be executed as it does not indicate existence of one or more grounds for eviction, equally I do not find any merit in the said submission. Perusal of the consent terms shows that defendants No.1 and 2 admitted and declared that they are the only surviving heirs and legal representatives of their deceased brother Soli alias Sohrab Panthaki who expired at Bombay on 27th January, 1990 and that he was staying all alone in flat No.2 and using the suit garage for parking his own car during his life time. Defendants No.1 and 2 submitted to the order and decree of eviction in respect of flat No.2 on the 5th floor and the suit garage on the ground floor and agreed to vacate and hand over peaceful possession of the suit premises to the plaintiffs forthwith. The learned trial Judge after going through the application at Exhibit-B passed the decree in terms of the consent terms and more particularly clause (b) of the consent terms i.e. Defendants No.1 and 2 submitted to the order and decree of eviction in respect of flat No.2 on the 5th floor and the

suit garage on the ground floor and agreed to vacate and hand over peaceful possession of the suit premises to the plaintiffs forthwith.

12. In the case of ***Hiralal Moolchand Doshi v. Barot Raman Lal Ranchhoddas (dead) by L.Rs., (1993) 2 SCC 458***, the Apex Court held that the satisfaction of existence of statutory grounds can be inferred impliedly from the compromise. In that case, a suit for eviction was filed by appellant-landlord against respondent-tenant for recovery of possession of the premises on grounds of non-payment of rent for over six months under S.12(3)(a), *bona fide* personal use under S. 13(1)(g) and nuisance under S. 13(1)(e) of the Act. However, on November 30, 1967 the parties presented consent terms before the Court for passing a decree in those terms. Thereunder it was stated that the tenant would hand over actual possession of the premises on August 31, 1971, failing which the landlord would be entitled to execute the decree, that an amount of Rs.372/- had been deposited by the tenant on receipt of which by the landlord 'it shall be considered that the amount of rent and that of mesne profit has been received for the period

up to the date March 21, 1968', that from March 21, 1968 the tenant shall pay to the landlord the amount of sanitation tax and education cess for the period from 1967-68 till the handing over of possession, failing which landlord shall recover possession by executing the decree. As the tenant failed to deliver possession of the premises by the due date, as agreed, the landlord filed an application for execution. On receipt of notice, the tenant filed objections inter alia contending that an eviction decree was not executable as it was a nullity and that there was no material before the Court which passed the decree to show the availability of various grounds of eviction alleged against the tenant. The executing court took the view that the decree was not a nullity and executable. The order of the executing Court was affirmed by the first appellate Court. However, the High Court in revision found that there was nothing in the consent terms or decree to indicate that there was any express satisfaction of the court regarding any of the statutory grounds on the basis of which the landlord was entitled to get possession of the premises either under Section 12 or Section 13 of the Act. It also took the view that it could at the most be possibly said that the tenant might have agreed to

hand over possession as the landlord required the premises reasonably and bona fide for personal use and occupation, but on the basis of this implied admission S. 13(2) was not satisfied. The High Court also held that there was no material to show that the tenant had given up the contention that he had not neglected to pay. Another reason given by the High Court for holding the decree to be nullity on the ground of bona fide personal requirement was that it was for the landlord to prove that greater hardship would be caused to him, rather than to the tenant, before he could get decree for possession on the ground of bona fide personal requirement but the landlord had not pleaded in the plaint to that effect. Accordingly the High Court allowed the revision petition and held that the decree was not executable. The Apex Court held that a decree is said to be a nullity if it is passed by a court having no inherent jurisdiction. Merely because a court erroneously passes a decree or there is an error while passing the decree, the decree cannot be called a nullity. The decree to be called a nullity is to be understood in the sense that it is ultra vires the powers of the court passing the decree and not merely voidable decree. Whenever there is any lawful agreement the court is bound to

record the agreement or compromise. There is no provision in the Act which made Rule 3 of Order 23 of C.P.C. inapplicable to proceedings contemplated by the Act. Nor there is any provision in the Act which prohibits parties entering into a compromise in the suit for eviction filed under the Act. Order 23 Rule 3 of C.P.C. was applicable to the proceedings. If there is a contest the court can pass a decree for eviction only if the court is satisfied about the existence of grounds mentioned in Ss.12 and 13 of the Act. But satisfaction can also be inferred impliedly. On the facts of the case it is clear that the burden was on the tenant to prove the tender of rent before the suit, after service of notice of demand. The admission contained in the compromise shows complete admission of the tenant about the arrears of rent read with the allegation of the landlord in the petition about the existence of arrears of rent after service of notice of demand. In the absence of any material on the record of previous tender of rent it can safely be assumed that there was sufficient material in the light of the agreed terms that the tenant had made himself liable to be evicted on the ground contained in Section 12(3)(a) of the Act. Even on the second ground of eviction, namely - bona fide personal requirement of the landlord, the

very fact that the tenant asked for accommodation of time shows that the claim of the landlord for eviction of the tenant on the ground of his bona fide personal requirement was impliedly admitted by the tenant. Again there is implied admission of comparative hardship as contemplated by Section 13(2) of the Act by the tenant. It is thus clear from the terms of the compromise in the present case that there was an implied admission by the tenant of the grounds contained in Section 12(3)(a) as well as Section 13(1)(g) of the Act.

13. As noted earlier, in the present case the plaintiffs have instituted suit against (1) Jamshed Panthaki, resident of Dena Abad, Kharegat Road, Dadar, Bombay, (2) Ratan Panthaki, resident of East Street, Pune Camp, Pune and (3) heirs and legal representatives of deceased Rhoda S. Panthaki and Soli Panthaki under Section 13(1)(g) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, 'Act'). The suit was in respect of flat No.2 on the 5th floor and the suit garage. The plaintiffs contended that Ms. Rhoda S. Panthaki was monthly tenant in respect of flat No.2 on the 5th floor and suit garage. Ms. Rhoda S. Panthaki died issueless leaving behind her

husband Soli alias Sohrab Panthaki who was staying all alone in flat No.2 and till recently he had a car which was parked in the suit garage. Soli alias Sohrab Panthaki expired at Bombay on or about 27.1.1999. Defendants No.1 and 2 are intermeddling with the estate of the deceased and have been staying separately in their own premises at Dadar and Pune as mentioned in the title of the plaint. They have no right, title or interest of any nature in the suit premises and they have been joined in order to get the effective relief in the suit. It was further contended that none of the defendants are staying in the suit premises for they have ever stayed in the suit premises with the deceased but after the death of the original tenant and subsequent death of her husband, the premises are lying locked and the defendants are trying to break open the lock and they are intermeddling with the estate of the deceased and as such they are not protected under the provisions of the Act.

14. Applying the ratio laid down in Hiralal Doshi's case (supra), if the consent terms and the decree passed in pursuance thereof is perused I am satisfied that on facts defendants No.1 and 2 impliedly accepted existence of statutory

grounds and the decree is executable. The reliance placed by Mr.Dani on decisions in the cases of **Ferozi Lal Jain (supra)** and **Nagindas Ramdas (supra)** does not advance obstructionist No.2's case. The Courts below also concurrently held that the decree passed in favour of the plaintiffs is executable.

15. Mr. Dani submitted that the appellate Court was not justified in rejecting the application at Exhibit-14 taken out under Order 41 Rule 27 of C.P.C.. I do not find any merit in this submission as well. The appellate Court observed that the two plans are prepared by a private person. They were simply forwarded to the Municipal Corporation. The Appellate Court also held that the appeal is pending from 2004 and the application is taken out in 2010. It did not accept the explanation for belatedly producing these plans. It also held that they are not relevant for deciding the controversy between the parties.

16. Obstructionist No.2 was not in a position to demonstrate that the findings recorded by the Courts below are perverse being based on no evidence or that they are contrary to evidence on record. Obstructionist No.2 was not in a position to

demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Courts below. Hence no case for invocation of powers under Section 115 of C.P.C. is made out. Civil Revision Application fails and the same is dismissed. In the circumstances of the case, there shall be no order as to costs.

17. At this stage, Mr. Dani orally applies for stay of this order for a period of six weeks from today. He further states that the applicant and all adult family members using suit garage are ready and willing to give usual undertaking within two weeks from today. Learned Counsel for the respondent opposes said prayer.

18. Having regard to the fact that applicant desires to challenge this order before the Apex Court, in my opinion, ends of justice would be served by staying operation of this order for a period of six weeks from today subject to the applicant and all adult family using the suit garage giving usual undertaking to this Court within two weeks from today incorporating therein: (i) that they are in actual possession of the suit garage and nobody else is in possession; (ii) that they have so far neither

created third party interest nor parted with the possession of the suit garage; (iii) that they will hereafter neither create third party interest nor part with the possession of the suit garage; and (v) that in case the applicant is unable to obtain suitable orders within six weeks from today from the higher Court, they will deliver vacant and peaceful possession of the suit garage to the respondent.

19. In view thereof, notwithstanding dismissal of Civil Revision Application, this order shall remain stayed for a period of six weeks from today, subject to the applicant filing undertaking in the aforesaid terms within two weeks from today, with copy in advance to the other side. In case the applicant does not file undertaking in the above terms within two weeks from today, the interim order shall stand vacated without further reference to the Court. List the application for compliance after three weeks from today. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)