

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.11470 OF 2016

Sharifa begum (deleted) Umami Kulsum d/o.
Vali Mohammad Khan ... Petitioner
Vs.
Mohammad Nasim Khan and another ... Respondents

Mr. Y. E. Mooman for Petitioner.

CORAM : R. G. KETKAR, J.
DATE : OCTOBER 15, 2016

P.C. :

Heard Mr. Mooman, learned Counsel for the petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'defendant No.3', has challenged the judgment and order dated 29.04.2016 passed by the learned Judge presiding over Court Room No.17 of the Court of Small Causes at Mumbai below exhibits 76 and 77 in Execution Application No.500 of 2009 arising from R.A.D. Suit No.1643 of 1999 as also the judgment and order dated 06.08.2016 passed by the Appellate Bench of the Small Causes Court in (iii) Revision Application No.162 of 2016. By order dated 29.04.2016, the learned trial Judge allowed the applications exhibit 76 and 77 and ordered re-issuance of warrant of joint possession in respect of the suit premises, returnable on 18.06.2016. The learned trial Judge appointed Mr. B. S. Dabhade, Bailiff to execute the warrant of joint possession. Registrar of small Causes Court was directed to issue letter to J. J. Police Station for police protection to Bailiff for execution of warrant of possession. Respondent-plaintiff was directed to bear the necessary charges for the police protection.

3. Aggrieved by this decision, defendant No.3 preferred Revision Application, which was rejected by the appellate Court after clarifying that the Executing Court shall execute the order dated 19.03.2009 passed in Interim Notice No.1805 of 2005 in R.A.D. Suit No.1643 of 1999 by taking recourse to provisions of Order 21, Rule 35(3) read with Section 15 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') and put the plaintiff in joint occupation of flat No.1, 1st floor, Hasina Khatib Mansion, 43, Underia Street, Chowki Mohalla, Mumbai 400 008 (for short 'suit premises'). The appellate Court also issued direction to the Executing Court to direct the concerned Bailiff to prepare the Panchnama of putting the plaintiff in joint occupation of the suit premises and submit the same in the suit proceedings.

4. Plaintiff instituted Suit for declaration of tenancy rights. During the pendency of the Suit, he took out application for temporary injunction restraining the defendants therein from obstructing his joint possession with the defendants. Application was allowed on 11.07.2000 and defendants No.1 to 3 were restrained from dispossessing the plaintiff from the suit premises, which was jointly occupied by him with defendants No.1 to 3. The learned trial Judge also restrained defendants No.4 and 5 from transferring the rent receipt. Defendants did not challenge that order.

5. Plaintiff came with the case that he was dispossessed from the suit premises in the month of June 2005. He, therefore, filed Interim Notice No.1805 of 2005 for putting him in joint possession of the suit premises. The said notice was allowed on 19.03.2009. Operative part of the order reads thus,

“1. Notice is made absolute.

2. Plaintiff is put back in joint occupation of the suit premises i.e. Flat No.1, 1st floor, Hasina Khatib Mansion, 43, Underia Street,

Chowki Mohalla, Mumbai 400 008.

3. Costs in cause.”

6. Defendants challenged that order by filing Revision Application. Revision Application was dismissed. Aggrieved by this decision, defendants instituted proceedings in this Court and this Court and the Apex Court confirmed the order of the trial Court directing defendants No.1 to 3 to put plaintiff in joint possession of the suit premises.

7. Despite this position, as defendants failed to comply order dated 19.03.2009, plaintiff filed execution proceedings for executing order dated 19.03.2009. Accordingly, warrant of joint possession was issued on 10.03.2011 and warrant of possession was to be executed on 22.03.2011. Bailiff submitted report dated 22.03.2011 setting out therein that in pursuance of the Court's order, he went along with the plaintiff to put him in joint possession of the suit premises on 22.03.2011 between 4.00 p.m. and 5.00 p.m. When he reached the suit premises, door was opened by Ms Umami Kulsum, defendant No.3. Upon explaining his purpose of visit and reading the Court's order, said Ms Umami Kulsum informed the Bailiff that she is residing in the suit premises alone, and as such, no other family member resides there. It is very difficult to deliver possession of the suit premises to the plaintiff. In the circumstances, she refused and denied to deliver possession of the suit premises. Bailiff, therefore, reported that it was difficult to execute the Court's order. It is in these circumstances, plaintiff filed applications exhibit-76 and 77 for police protection to execute the warrant of possession. By the impugned order dated 29.04.2016, the learned trial Judge allowed the application, as indicated earlier. Aggrieved by that decision, defendant No.3 preferred Revision Application, which was also dismissed subject to clarification. It is against this decision, defendant No.3 has instituted the present Petition.

8. In support of this Petition, Mr. Mooman invited my attention to the application filed by the plaintiff under Order 21, Rule 35 of C.P.C. He submitted that under Order 21, Rule 35 provides for execution of decree for immovable property. Sub-rule (2) thereof provides that where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree. Sub-rule (3) thereof provides that where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession. He submitted that in the present case, the procedure laid down under sub-rule (2) of Rule 35 of Order 21 is not followed. That apart, plaintiff did not apply for police protection. Despite that, the Courts below directed execution of warrant of possession under police protection.

9. Mr. Mooman further submitted that defendant No.3 alone resides in the suit premises and being a lady, it is not possible for her to comply the impugned orders. He, therefore, submitted that the impugned orders are not sustainable and therefore, Petition requires consideration.

10. During the course of hearing, I enquired from Mr. Mooman as to whether without intervention of police, defendant No.3 is ready and willing for implementation of the order dated 19.03.2009. Mr. Mooman

expressed inability of defendant No.3 to implement order dated 19.03.2009.

11. As noted earlier, plaintiff came with the case that he was in possession of the suit premises jointly with defendants No.1 to 3. As defendants were obstructing his joint possession, he filed application restraining defendants No.1 to 3 from dispossessing him from the suit premises. By order dated 11.07.2000, application was allowed and defendants were accordingly restrained. The said order was not challenged. It also appears from the record that plaintiff was dispossessed from the suit premises in the month of June, 2005. He, therefore, took out notice, which was allowed on 19.03.2009. I have already extracted the operative part of the order dated 19.03.2009. Aggrieved by that order, defendants preferred Revision Application, which was dismissed and the said order was confirmed by this Court and the Apex Court. Thus, the order dated 19.03.2009 attained finality. Despite that, defendants did not implement order dated 19.03.2009 which impelled the plaintiff to take out applications exhibits-76 and 77. By order dated 29.04.2016, the learned trial Judge allowed the application. The operative part of the order reads thus,

- “1. The applications exhibit-76 and 77 are allowed.
2. Re-issue warrant of joint possession in respect of suit premises r/o 18.06.2016.
3. Bailiff Mr. B. S. Dabhade, is appointed to execute this warrant of joint possession.
4. Registrar of Small Causes Court, is directed to issue letter to J. J. Police Station, for police protection to the bailiff for execution of warrant of possession r/o 18.06.2016.
5. The plaintiff to bear the necessary charges of Police Protection.”

12. Perusal of clause 4 of the operative part of the order clearly shows that the Registrar of Small Causes Court was directed to issue letter to J. J. Police Station for police protection to the Bailiff for execution of

warrant of possession.

13. The learned trial Judge also considered the report dated 22.03.2011 submitted by the Bailiff for executing warrant of joint possession and the fact of defendant No.3 refusing the execution of warrant of possession, and consequently, the warrant of possession remained to be executed. The learned trial Judge thereafter considered provisions of Order 21, Rule 35 and noted that sub-rule (2) thereof does not provide what is to be done if the joint possession warrant is not executed. In view of Section 151 of C.P.C., the learned trial Judge observed that aid of police can be taken for execution of warrant of possession and there is no necessity of filing a separate Suit.

14. In the case of *Nirabai J. Patil Vs. Narayan D. Patil*, AIR 2004 Bom 225, in paragraph 6, the learned Single Judge of this Court reproduced portion of decision in *Ratanabi Vs. Satwarao*, which reads thus,

“6. This Court has observed, in the case of *Ratanabi v. Satwarao* "It is no doubt that the Police help is an extraordinary mode or procedure to implement the execution of the decree of orders. In other words, Police help is to be regarded as an extreme step, and as such it should not be recommended unless the Court is fully convinced of the existence of a grave emergency. Therefore, a decree-holder praying for police help has to state whether such help is required either;

(1) because of apprehension of violence or obstruction from judgment-debtor himself or at his instance by others or; (ii) because of conditions of a general character such as the locality where execution will have to be effected being in a disturbed state or a class of people, similarly situated being likely to make a common cause with judgment-debtor and resist execution.

Thus, the special procedure for police help would not be allowed unless there are reasonable ground to suppose that the execution will not be effected without serious danger to public peace, because of apprehension of violence **or obstruction from the judgment-debtor himself** or because of the conditions of general character as such where the execution will have to be done in disturb stage or a class of people similarly situated being likely to

make common cause that the judgment-debtor can resist the execution.

Besides this, in addition to the circumstances enumerated above to grant police help the Court must be fully convinced of the existing of grave emergency and to prevent commission of cognizable offence by the judgment-debtor or on his behalf by any person or a third party.

(emphasis supplied)"

15. Appellate Court, while dismissing the Revision Application observed that where the execution is obstructed, recourse can be taken to provisions of Order 21, Rule 35(3) read with Section 151 of C.P.C. and put the plaintiff in joint occupation of the suit premises. Thus, despite order of 11.07.2000, plaintiff was dispossessed in June 2005 and since then he is out of possession of the suit premises - for more than 11 years. Defendants have succeeded in keeping plaintiff out of joint possession of the suit premises. In my opinion, the present proceedings are abuse of process of law as also abuse of process of the Court.

16. In the case of In the case of ***Ramrameshwari Devi Vs. Nirmala Devi, (2011) 8 Supreme Court Cases 249***, the Apex Court has observed that time has come for imposing realistic costs for delaying litigation as also for raising frivolous pleas. In paragraphs 52 and 54, it was observed thus:

“52. The main question which arises for our consideration is whether the prevailing delay in civil litigation can be curbed?

In our considered opinion the existing system can be drastically changed or improved if the following steps are taken by the trial courts while dealing with the civil trials.

A. Pleadings are foundation of the claims of parties. Civil litigation is largely based on documents. It is the bounden duty and obligation of the trial judge to carefully scrutinize, check and verify the pleadings and the documents filed by the parties. This must be done immediately after civil suits are filed.

B. The Court should resort to discovery and production of documents and interrogatories at the earliest according to the

object of the Act. If this exercise is carefully carried out, it would focus the controversies involved in the case and help the court in arriving at truth of the matter and doing substantial justice.

C. Imposition of actual, realistic or proper costs and or ordering prosecution **would go a long way in controlling the tendency of introducing false pleadings** and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

D. The Court must adopt realistic and pragmatic approach in granting mesne profits. The Court must carefully keep in view the ground realities while granting mesne profits.

E. The courts should be extremely careful and cautious in granting ex-parte ad interim injunctions or stay orders. Ordinarily short notice should be issued to the Defendants or Respondents and only after hearing concerned parties appropriate orders should be passed.

F. Litigants who obtained ex-parte ad interim injunction on the strength of false pleadings and forged documents should be adequately punished. No one should be allowed to abuse the process of the court.

G. The principle of restitution be fully applied in a pragmatic manner in order to do real and substantial justice.

H. Every case emanates from a human or a commercial problem and the Court must make serious endeavour to resolve the problem within the framework of law and in accordance with the well settled principles of law and justice.

I. If in a given case, ex parte injunction is granted, then the said application for grant of injunction should be disposed of on merits, after hearing both sides as expeditiously as may be possible on a priority basis and undue adjournments should be avoided.

J. At the time of filing of the plaint, the trial court should prepare complete schedule and fix dates for all the stages of the suit, right from filing of the written statement till pronouncement of judgment and the courts should strictly adhere to the said dates and the said time table as far as possible. If any interlocutory application is filed then the same be disposed of in between the said dates of hearings fixed in the said suit itself so that the date fixed for the main suit may not be disturbed.”

54. While imposing costs we have to take into consideration pragmatic realities and be realistic what the Defendants or the Respondents had to actually incur in contesting the litigation before different courts. We have to also broadly take into consideration the prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter affidavit, miscellaneous charges towards typing, photocopying, court fee etc.

(emphasis supplied)”

17. In paragraph 55, the Apex Court observed that the other factor which should not be forgotten while imposing costs is for how long the Defendants or Respondents were compelled to contest and defend the litigation in various courts. The Appellants in the instant case have harassed the Respondents to the hilt for four decades in a totally frivolous and dishonest litigation in various courts. The Appellants have also wasted judicial time of the various courts.

18. In the case of *Maria Margarida Sequeria Fernandes Vs. Erasmo Jack de Sequeria*, AIR 2012 SC 1727, the Apex Court referred to the decision of Ramremeshwari Devi (supra). In paragraphs 84 and 85, it was observed thus: -

“False claims and false defences

84. False claims and defences are really serious problems with real estate litigation, predominantly because of ever escalating prices of the real estate. Litigation pertaining to valuable real estate properties is dragged on by unscrupulous litigants in the hope that the other party will tire out and ultimately would settle with them by paying a huge amount. This happens because of the enormous delay in adjudication of cases in our Courts. If pragmatic approach is adopted, then this problem can be minimized to a large extent.

85. This Court in a recent judgment in Ramrameshwari Devi and Ors (AIR 2011 SC (Civ) 1776: 2011 SCW 4000) (supra) aptly observed at page 266 that unless wrongdoers are denied profit from frivolous litigation, it would be difficult to prevent it. In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that Court's

otherwise scarce time is consumed or more appropriately, wasted in a large number of uncalled for cases. In this very judgment, the Court provided that this problem can be solved or at least be minimized if exemplary cost is imposed for instituting frivolous litigation. The Court observed at pages 267-268 that imposition of actual, realistic or proper costs and/or ordering prosecution in appropriate cases would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases, the Courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.”

19. In the case of **Messer Holding Ltd Vs. Shyam Madanmohan Ruia**, AIR 2010 Supreme Court 1948, in paragraph 44, the Apex Court referred to the decision of **Ramrameshwari Devi** (*supra*) and observed thus:

“44. This case should also serve as proof of the abuse of the discretionary jurisdiction of this Court under Article 136 by the rich and powerful in the name of a 'fight for justice' at each and every interlocutory step of a suit. Enormous amount of judicial time of this Court and two High Courts was spent on this litigation. Most of it is avoidable and could have been well spent on more deserving cases.”

20. In my opinion, the present proceedings are nothing but abuse of process of court as also abuse of process of law. In view of the decision of the Apex Court in **Ramrameshwari Devi** (*supra*), **Maria Margarida Sequeria Fernandes** (*supra*) and **Messer Holding Ltd** (*supra*), this is a fit case for imposing exemplary costs against the defendant No.3. The excuse given by defendant No.3 that “she is residing in the suit premises alone and being a lady, no other family member reside there” is stated to be rejected. In other words, defendant No.3 wants the executing Court to go behind the decree, which is impermissible in law. Accordingly, Petition fails and the same is dismissed with costs quantified at Rs.50,000/-. Costs shall be paid to the plaintiff within four weeks from today failing which the Collector, Mumbai District shall recover the

same as land revenue. Let the authenticate copy of this order be sent to the Collector, Mumbai. In case the petitioner obtains suitable order from the higher Court, the same shall be placed before the Collector. All the parties, including the Collector, Mumbai District, to act on the authenticated copy of this order.

21. At this stage, Mr. Mooman orally applies for stay of this order for the period of 8 weeks. I have already given 4 weeks time to pay the costs. Hence, oral application for stay is rejected. Order accordingly.

(R. G. KETKAR, J.)

Minal Parab