

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

SECOND APPEAL NO. 79 OF 2017

SHAIKH SALIM SHAIKH KHAJA
VERSUS
SHAIKH MAHEBOOB SHAKKARJI CHOUDHARI
DECEASED THROUGH LEGAL REPRESENTATIVES
SHAIKH SHABBIR SHAIKH MAHEBOOB CHOUDHARI AND OTHERS

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Advocate for Appellant : Mr. Mukul S. Kulkarni.

Advocate for Respondent No.1A (Caveator) : Mr. Girish K. Thigale (Naik).

Advocate for Respondent Nos.2A to 2E : Mr. P. D. Dawalkar.

Advocate for Respondent No.3 : Mr. S. V. Nayadhis.

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CORAM : **V. K. JADHAV, J.**

RESERVED ON : 13th April, 2017.

PRONOUNCED ON : 03rd May, 2017.

ORDER:

. Heard finally with consent at admission stage.

2 Being aggrieved by the judgment and order dated 2nd January, 2017 passed by District Judge-4, Beed in Regular Civil Appeal No.115 of 2016, the Appellant / obstructionist before the lower Appellate Court has preferred this second appeal.

3 Brief facts giving rise to the present second appeal are as follows:

- a) One Janmohamad S/o Noormohammad Tamboli had instituted Regular Civil Suit No.484 of 1986 against Sk. Mehboob for redemption of mortgage. The suit property consist of Municipal House No.431(Old) 551(New) situated at Dhondipura, Beed, Taluka and District Beed. The learned Joint Civil Judge Junior Division, Beed by judgment and decree dated 4th May, 1996 dismissed the said suit holding that Defendant Sk. Mehboob is a tenant over the suit property. Being aggrieved by the same, Janmohamad has preferred Regular Civil Appeal No.122 of 1996. In the said appeal, the parties arrived at a compromise on 26th July, 2002. In terms of the said compromise, the parties agreed that two storied building including the suit shop is in dilapidated condition and requires reconstruction. It was agreed that after reconstruction, one shop shall be handed over to Defendant Sk. Mehboob within three months. However, after

reconstruction of the suit premises, said Janmohamad had not handed over the possession of the suit shop to Defendant Sk. Mehboob. Consequently, Defendant Sk. Mehboob had filed Regular Darkhast No.101 of 2003.

- b) During the pendency of Regular Darkhast No.101 of 2003, decree-holder Sk. Mehboob and judgment-debtor Janmohamad died and as such, their legal representatives were brought on record before the Executing Court. At the request of the legal representatives of the decree-holder Sk. Mehboob, the Executing Court has issued a possession warrant under the provisions of Order XXI Rule 35 of the Code of Civil Procedure, which came to be returned ineffective with the Bailiff report alongwith Panchanama dated 15th November, 2011 that execution has been obstructed by the third-party / Appellant herein. The said execution was resisted by the present

Appellant / obstructionist on the ground that he is a tenant over the suit shop, inducted by Antaji Masjid Committee. Thus, the legal representatives of decree-holder Sk. Mehboob preferred the application under the provisions of Order XXI Rule 97 of the Code of Civil Procedure for removal of resistance and obstruction.

- c) Decree-holder Sk. Mehboob has challenged resistance of the decree on the ground that judgment-debtor Janmohamad has admitted his own title to the suit property in the suit itself and also in the compromise decree passed in the appeal. Thus, the adjoining Masjid and its committee has no any right, title and interest, whatsoever, to the suit premises. The judgment-debtor Janmohamad has purchased the property under the registered sale-deed dated 18th July, 1963. According to decree-holder Sk. Mehboob, there is active collusion between judgment-debtors and the Appellant / obstructionist in

resisting and obstructing and the execution of the decree lawfully passed by the Court. The obstructionist and judgment-debtor have no independent right and concern whatsoever to the suit property. The decree under execution binds the judgment-debtor and the obstructionist.

- d) The Appellant / obstructionist resisted the application by filing Say Exhibit 49. It has been contended that Appellant / obstructionist was not a party to the previous proceedings between the decree-holder and the judgment-debtor and therefore, the decree passed in Regular Civil Appeal No.122 of 1996 is not binding upon him. It has been contended that the suit shop is owned and possessed by the Wakf Board and the Masjid committee. The said Masjid committee has given the premises to him on lease and he is running his flower shop therein. It has been also contended that the Masjid committee is the owner and possessor of suit premises and in that

capacity, the committee has given the suit premises to him on lease. According to him, neither the decree-holder nor the judgment-debtor has any right, title or interest over the suit shop. The decree-holder has avoided to make party to Masjid committee as an obstructionist. The Wakf Board or the Masjid committee are the necessary parties to the proceedings. It has been also contended that the consent decree between the decree-holder and judgment-debtor is an agreement and it has no force of decree. The decree-holder is not entitled to file execution petition. The decree-holder has also filed a separate suit for specific performance of contract in respect of the suit property against the judgment-debtor and as such, the present Darkhast is not maintainable. It is also his contention that the city survey record of the suit shop shows the ownership and possession of the Wakf Board, Aurangabad and accordingly, entry

No.2143 came to be effected in PTR.

- e) The learned 2nd Joint Civil Judge Junior Division, Beed by order below Exhibits 39 and 53 in Regular Darkhast No.101 of 2003 allowed the application filed by the decree-holder with a finding that present Appellant / obstructionist failed to prove his lawful right over the suit shop and he is not entitled to retain the possession of the suit shop. The learned Judge has directed to issue warrant of possession under Order XXI Rule 35 of the Code of Civil Procedure and to put the decree-holder in possession of the suit shop by removing the obstructionist. Being aggrieved by the same, the Appellant / obstructionist has preferred Regular Civil Appeal No.115 of 2016 and the learned District Judge by impugned judgment and order dated 2nd January, 2017 as aforesaid, dismissed the appeal with costs. Hence, this second appeal.

4 The learned counsel for Appellant / obstructionist submits that undisputedly, the Appellant is in possession of the suit property and there is no eviction decree passed against him. The alleged decree-holder is not even the owner of the property. The learned counsel submits that admittedly, the property was purchased for the benefit of Antaji Masjid and it was given on rent and the amount of rent was being used for the payment of the salaries of the employees of the said Masjid. Furthermore, in the Government Gazette, the said property is mentioned as Wakf property. Even in the Municipal record, the suit property was mutated in the name of said Masjid.

5 The learned counsel for Appellant / obstructionist submits that the said building bearing Municipal House No.431 (Old) 551 (New), suit property, came to be demolished in the year 2002. There is nothing on record, which demonstrates that new RCC building was constructed by the judgment-debtor Janmohamad. It is a part of record that new construction was undertaken by Atik Ahmed, who is impleaded as Defendant No.2 in the said suit and also judgment-debtor No.2 in the present execution proceedings.

The Appellant / obstructionist also challenged the validity of the compromise on the ground that whether the judgment-debtor Janmohamad could have entered into a compromise without consent of other two co-owners. The learned counsel also submits that the registered owner was the necessary party to the compromise. The learned counsel submits that a Civil Court cannot record a compromise in respect of the Wakf property. Even in terms of the said compromise, the decree-holder / original tenant was to pay Rs.12,950/- by October, 2002 and there is nothing on record to show that he has fulfilled the said condition. The decree-holder has taken a conflicting stand in Darkhast. The learned counsel submits that as per Section 7(15)(d)(ii) of the Maharashtra Rent Act, Respondent No.1A herein cannot be a tenant over the suit property as he was not engaged in the business alongwith original tenant at the time of death of original tenant.

6 The learned counsel for Appellant / obstructionist has raised the following substantial questions of law:

- i) Whether the objection raised on behalf of the present Appellant could have been rejected by restoring to the provisions of the Maharashtra

Rent Control Act?

- ii) Whether the execution instituted at the behest of a legal heir of the then tenant of commercial premises is tenable?
- iii) When the earlier alleged tenant was doing commercial activity in the then property, whether his heir has a right to continue in possession of the same? If no, whether he has a right to re-enter the premises? Whether the said right can be enforced on an entirely new premises?

7 The learned counsel for Appellant / obstructionist submits that both the Courts below have failed to appreciate that the nature of the commercial tenancy is different than the residential tenancy and in case of commercial tenancy, the legal representative does not get right by inheritance. The Courts below have failed to frame proper issues and points for determination and also erred while answering the same. Both the Courts below have failed to appreciate the evidence adduced by the parties in its proper perspective.

8 The learned counsel for Respondent / decree-holder

submits that the appeal is presented in the form of second appeal, which is not tenable in view of the provisions of Section 74 of the Code of Civil Procedure read with Section 52 of the Transfer of Properties Act.

9 The learned counsel for Respondent / decree-holder submits that Appellant / obstructionist allegedly came in possession of the suit property by virtue of lease deed executed on 17th March, 2003 by Sk. Nabi s/o Sk. Ibrahim, whereas the judgment-debtor Janmohamad had executed a general power of attorney on 4th August, 2003. As per the contents of the said general power of attorney executed by Janmohamad in favour of Sk. Nawab Sk. Ibrahim, Amanat Ali, Abdul Malik and Abdul Samad and even if it is assumed that Sk. Nabi @ Sk. Nawab has given property on lease to the Appellant / obstructionist, their right is claimed only through Janmohamad by the Appellant / obstructionist. The learned counsel submits that the issue of tenancy right of the decree-holder and his entitlement of continuation has already been attained the finality in Regular Civil Suit No.484 of 1986 and the ownership of Janmohamad is also conclusive. The scope of execution is limited to restoration of possession as per Section 16(1)(i)(d) read with

Section 16 (7) of the Maharashtra Rent Control Act, 1999. The enquiry of ownership at the instance of present Appellant / obstructionist, who is claiming impliedly through Janmohamad is beyond the scope of execution.

10 The learned counsel for Respondent / decree-holder submits that the said lease deed is alleged to be of 20 years and being unregistered document, cannot be relied being in contravention of the provisions of Section 107 of the Transfer of Properties Act read with Section 49 of the Registration Act. The same is of no assistance to the obstructionist. The very foundation of the claim of Appellant based on legally inadmissible document. The learned counsel submits that the appeal does not involve any question of law much less any substantial question of law. The factual dispute about the identity of the property and raising objection to the decree passed in Regular Civil Appeal No.122 of 1996, on the basis of the contentions raised by the rival parties in Regular Civil Suit No.484 of 1986, does not involve any substantial question of law and as such, the appeal is liable to be dismissed.

11 The learned counsel for Respondent / decree-holder

submits that without prejudice to the aforementioned contentions about the non-existence of any substantial question of law, there is no substance in the contentions raised by the Appellant / obstructionist. Appellant's contention that the suit property was purchased for the benefit of Masjid, has no basis and it is contrary to the finding given by the Trial Court in Regular Civil Suit No.484 of 1986. The learned Judge of the Trial Court in Regular Civil Suit No.484 of 1986 has recorded the finding to issue Nos.2, 4 and 5 in the affirmative and thereby held that Defendant proved that the suit property was leased to him in 1965-66 at a monthly rent of Rs.60/- by Plaintiff and other two co-owners and that the Defendant is the tenant over the suit property. Thus, the decree as regards the suit property attained finality with reference to crystallized rights of Janmohamad and Sk. Mehboob. The status of Respondent / decree-holder as tenant of Janmohamad in respect of suit property has attained finality. The Appellant / obstructionist is incompetent to challenge the same at this juncture. The entire focus of contentions raised by the Appellant / obstructionist is to challenge the correctness of decree passed in Regular Civil Suit No.484 of 1986 and Regular Civil Appeal No.122 of 1996. The Appellant's /

obstructionist's claim is entirely based upon two documents styled as power of attorney and alleged lease deed. The Appellant / obstructionist has thus, failed to demonstrate any concern with the suit property independent of said Janmohamad.

12 The learned counsel for Respondent / decree-holder submits that the rent notes as referred in the judgment passed in Regular Civil Suit No.484 of 1986 denote only a factum of payment at the instance of Janmohamad to various persons authorized from time to time by him. Mere payment of rent at the instance of owner to his agents, who incidentally happened to be concern with the affairs of Masjid, does not amount to any sort of admission much less legal admission about payment of salaries. The payment of amount of rent to some persons at the instance of owner would not alter its status and character. The learned counsel submits that the Gazette publication produced, pertains to different property. These two properties are distinct and the Appellant has no concern with the property claimed by the decree-holder. Mere mutation would not confer any right of ownership on any person. It has been candidly denied by Janmohamad that the suit property is Wakf property. It is neither the case of Janmohamad nor the case of Sk.

Mehboob that the suit property was belonging to Wakf. The contentions raised in Regular Civil Suit No.484 of 1986 involve the issue of mortgage deed dated 29th September, 1967, which is even prior to the alleged Gazette publication in the year 1974 and as such, has no relevance for the purpose of deciding the status and locus of present Appellant / obstructionist. Fulfillment or otherwise of compromise decree dated 26th July, 2002 is already adjudicated vide order below Exhibit 2, which is confirmed by the High Court in Writ Petition No.5400 of 2012. As per the contents of compromise, the construction was to commence and completed on 1st November, 2002. Thus, the amount if any is to be paid in terms of the said compromise, the same being the matter of transaction between decree-holder and the judgment-debtor and obstructionist has no concern to interpret the terms of compromise between the parties to the compromise. The learned counsel submits that there is no dispute about the identity of the property to be put in possession and about the ownership of the property. The contention raised by the Appellant about the nature of property being Wakf property, is only an afterthought contention and has been properly dealt with by the Courts below. Pendency of the suit bearing Regular Civil Suit

No.151 of 2004 for enforcement of compromise is of no avail to the obstructionist and the same is kept in abeyance in view of the pendency of execution proceedings and after enforcement of the decree, the said suit is required to be withdrawn / disposed of as infructuous. The learned counsel submits that the appeal being without any merit much less substantial question of law, deserves to be dismissed by imposing exemplary costs.

13 The learned counsel for Respondent / decree-holder in order to substantiate his contentions placed his reliance on the following cases:

- a) **Lisamma Antony and another Vs. Karthiyayani and another**, reported in, **(2015) 11 Supreme Court Cases 782**,
- b) **Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and others**, reported in, **(1999) 3 Supreme Court Cases 722**,
- c) **Usha Sinha Vs. Dina Ram and others**, reported in, **(2008) 7 Supreme Court Cases 144**,

- d) **Dhanraj Baburam Yadav and another Vs. Ramakant K. Dhanawade and others**, reported in, **2003 (2) Mh.L.J. 58**,
- e) **Kundan Lal and another Vs. Kamruddin and another**, reported in, **(2017) 1 Supreme Court Cases 403**.

14 Deceased Janmohamad had instituted Regular Civil Suit No.484 of 1986 for redemption of mortgage against the decree-holder deceased Sk. Mehboob. The said suit came to be dismissed and as such, deceased Janmohamad had preferred Regular Civil Appeal No.122 of 1996. The said appeal bearing Regular Civil Appeal No.122 of 1996 came to be disposed of in terms of the compromise between the parties. In terms of the said compromise, deceased Sk. Mehboob was to deliver the possession of the suit shop for reconstruction and after dismantling old building and reconstruction thereof, it was agreed to redeliver the possession to deceased Sk. Mehboob. However, after reconstruction of the premises, the landlord deceased Janmohamad did not hand over the possession of the suit shop to tenant deceased Sk. Mehboob

and as such on 14th May, 2003 deceased Sk. Mehboob has issued a legal notice to landlord Janmohamad for handing over the possession of suit shop. Since the landlord deceased Janmohamad had not acted upon, tenant Sk. Mehboob constrained to file Regular Darkhast No.101 of 2003.

15 On the basis of the evidence led by the parties, the Courts below have observed that the Appellant / obstructionist claiming as a tenant of Masjid committee by relying upon the unregistered lease deed Exhibit 70 dated 17th March, 2003. The lease deed came to be executed by one committee member Nabab Bagwan for the period of 20 years. The Appellant / obstructionist contends that on 4th August, 2003, judgment-debtor Janmohamad had executed general power of attorney Exhibit 89 in favour of four persons including Sk. Nabab, who claims to be a member of Antaji Masjid. The Courts below observed that the general power of attorney Exhibit 89 depicts that the suit shop would be vested to Masjid committee only as a caretaker and the powers are conferred of letting it and adjust the usufruts for welfare of Masjid committee. Both the Courts below have observed that judgment-debtor Janmohamad had executed the general power of attorney on 4th

August, 2003 whereas on 17th March, 2003 the Masjid committee member Sk. Nabab had executed a lease deed in favour of Appellant / obstructionist. Thus, on the day of execution of lease deed, the Masjid committee do not have any right, title and interest over the suit shop. The Courts below on the basis of the evidence led by the parties have also observed that the obstructionist is claiming tenant of Masjid committee on the strength of general power of attorney Exhibit 89 and lease deed Exhibit 70. The agreement of general power of attorney Exhibit 89 shows that the Municipal property number of the suit shop as 2.17.111(old) / 2.17.108(new), and as such, the suit shop is distinct and have no concern with C.T.S. No.2143. Even though the PTR extract indicates that the property is owned by judgment-debtor Janmohamad, whereas the city survey extract Exhibit 72 shows that the property belongs to Wakf Board. The Courts below observed that these two properties are different. The Appellant / obstructionist did not lead any evidence to show that the suit shop and the premises shown in the city survey extract Exhibit 72 are one and the same or it is part and parcel of it. I am in agreement with the observations made by the Courts below that the claim of the

Appellant / obstructionist through Antaji Masjid committee is misconceived and the Appellant / obstructionist came to be inducted in the suit shop to create hurdle in execution of the decree.

16 After the compromise arrived at between the parties in Regular Civil Appeal No.122 of 1996, the said premises was reconstructed in the year 2002. It is a part of the record that Respondent / decree-holder had sent a notice to judgment-debtor Janmohamad on 14th May, 2003 and on 4th August, 2003 general power of attorney Exhibit 89 came to be executed by judgment-debtor in favour of Masjid committee. However, on 17th March, 2003 i.e. prior to the execution of the general power of attorney, so-called lease deed came to be executed by Nabab Bagwan in favour of the obstructionist. It is, thus, clear that during the pendency of execution petition third-party interest has been created in favour of Appellant / obstructionist with some ulterior motive.

17 In the case of *Usha Sinha Vs. Dina Ram and others* (supra) relied upon by the learned counsel for Respondent / decree-holder, the Supreme Court by referring the observations made in the case of **Silverline Forum Pvt. Ltd., Vs. Rajiv Trust and another,**

reported in, **(1998) 3 Supreme Court Cases 723**, in agreement with the proposition of law laid down in the said case of *Silverline Forum Pvt. Ltd., Vs. Rajiv Trust and another* (supra) held that the doctrine is based on the principle that the person purchasing property from the judgment-debtor during the pendency of the suit has no independent right to property to resist, obstruct or object the execution of the decree.

18 In the instant case, even if it is assumed that said Sk. Nabab has given the property on lease, the Appellant / obstructionist has claimed the rights only through Janmohamad. Both the Courts below have recorded concurrent finding of fact about the absence of any right / interest of the present Appellant in the suit property independent of Janmohamad (original owner) and as such, the Appellant is not entitled to re-agitate the same. The learned counsel for Respondent / decree-holder has rightly pointed out that the issue of tenancy right of decree-holder and his entitlement has already attained finality in Regular Civil Suit No.484 of 1986. The enquiry of the ownership at the instance of Appellant / obstructionist, who is claiming impliedly through Janmohamad, has no propriety and the same is beyond the scope of execution.

19 I do not find any substance in the appeal. There is no substantial question of law involved in the appeal. Both the Courts below have recorded the concurrent finding. I do not find any fault in the impugned judgment and order passed by the Courts below. Hence, the following order:

ORDER

- I. The second appeal, is hereby dismissed with costs.
- II. Learned counsel for the Appellant requested for suspension of the effect of this order for a period of four weeks from today. Learned counsel for the Respondents opposed this prayer. In the alternate he submits that the Appellant may be directed to submit undertaking that in case if he failed to obtain any order within the said period he will not seek any extension of the stay order.
- III. It appears that the interim order was operating during pendency of the appeal. In view of the

same, the effect of this order stands suspended for a period of four weeks from today and no application seeking further extension will be entertained.

- IV. The second appeal is accordingly disposed of.
- V. Pending civil application stands disposed of.

[V. K. JADHAV, J.]

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