

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

CIVIL REVISION APPLICATION NO.46 OF 2005

Smita Shantaprasad Kshetramade
nee Smita Babu Prabhudesai & Desai ... Applicant

Vs.

1. Ratnakar P. Desai (deleted)
2. Mahendra Veerji Chheda & Ors. ... Respondents

Mr.P.G. Karande for the Applicant
Mr.S.D. Mogre, for Respondent Nos.2 to 5

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: JULY 1, 2017**

P.C. :

1. This Civil Revision Application is directed against the order dated 4.10.2004 passed by the learned Judge, City Civil Court, Bombay, in S.C. Suit No.4565 of 2001 rejecting the plaint under Order 7 Rule 11(d) of the Civil Procedure Code.

2. The applicant i.e., the original plaintiff, had filed a suit under section 6 of the Specific Relief Act for handing over peaceful possession of the suit premises i.e., tenement No.10 at Veerson Villa, Ranade Road, Dadar, Mumbai, as she was dispossessed in the execution proceedings, taken out by defendant Nos.2 to 5, the

decreeholders i.e., respondent Nos.2 to 5 in the present Civil Revision Application. During the pendency of the suit, the respondents moved the application challenging the jurisdiction of the Court on the ground that the applicant/plaintiff ought to have filed an application in the execution proceedings under Rule 99 of Order 21 of the Civil Procedure Code and not a separate suit. The said application was contested by the present applicant. However, the trial Court held that it is to be accepted that a contention of maintainability was raised by the defendants and therefore, rejected the plaint of the original plaintiff/petitioner under Order 7 Rule 11(d) of the Civil Procedure Code and hence, this Civil Revision Application.

3. A short issue and the law point involved in this case is whether a person who is dispossessed in the process of execution, can take another recourse of filing a separate suit other than taking out the proceedings under Rule 99 of Order 21 of the Civil Procedure Code? As it is strictly a law point, the learned Counsel for both the sides have relied on various judgments of the Supreme Court and also of this Court as follows:

- i) **Noorduddin vs. Dr.K.L. Anand¹**
- ii) **Brahmedo Chaudhary vs. Rishikesh Prasad Jaiswal & anr.²**
- iii) **N.S.S. Narayana Sarma & Ors vs. Goldstone Exports (P) Ltd. & Ors.³**

4. The learned Counsel for the petitioner also relied on judgments in two cases decided by the Bombay High Court as under:

- i) **Baun Foundation Trust & anr. vs. Faredoon Rustom Tirandaz & anr.⁴**
- ii) **Sushila Sadanand Borkar & Ors. vs. Maria Exaltacao Vaz alias Elasso Vaz & anr.⁵**

5. In the case of **Noorduddin vs. Dr.K.L. Anand (supra)**, the scheme of Order 21 Rule 97, Rule 99 and Rule 103 was discussed. It was held that in the preceding Civil Procedure Code (Amendment) Act of 1976, right of suit under Order 21 Rule 103 of the Code of 1908 was available which has been, after the

1 (1995) 1 SCC 242

2 (1997) 3 SCC 694

3 (2002) 1 SCC 662

4 2002(5) Bom.C.R. 438

5 2002 SCC Online Bom 899 decided on 13.9.2002

amendment, taken away and, therefore, with an intent to shorten the litigation between the parties claiming right, title and interest in the immovable property in execution, the Legislature relegated the parties under execution and finally has been accorded to it.

In **Brahmedo Chaudhary vs. Rishikesh Prasad Jaiswal & anr.** (supra), it is held that the executing Court must first adjudicate upon the objects of the appellant on merits under Rule 97(2) r/w Rule 101 and Rule 98 instead of insisting upon first handing over possession and then, moving the application by the appellant under Rule 99. Thus, it again discussed the scheme envisaged by Order 21 Rules 97 to 103 of Civil Procedure Code in respect of removal of obstruction. In fact, the decision in **Brahmedo Chaudhary vs. Rishikesh Prasad Jaiswal & anr.** Supports the case of the respondent. On the contrary, it is held that if a stranger to a decree is dispossessed of the suit property relating to which he claims right, then, his remedy would lie in filing the application under Order 21 Rule 99 of the Civil Procedure Code and no separate suit would lie against such order as clearly enjoined by Order 21 Rule 101.

Also, in the case of **N.S.S. Narayana Sarma & Ors vs. Goldstone Exports (P) Ltd. & Ors.** (supra), it is held that if any person other than the judgment debtor is dispossessed by a decreeholder, then, the Executing Court has jurisdiction to decide all questions raised by such third party.

6. In both the judgments of the Bombay High Court, the three Supreme Court decisions referred to above have interpreted the same. However, in **Baun Foundation Trust & anr. (supra)**, the learned Single Judge has taken a view that the remedy of a suit is not excluded though the recourse is open under Order 21 Rule 99 of the Civil Procedure Code, for the person who is dispossessed of an immovable property during the execution of decree. The learned Judge has stated that he was in agreement with the views expressed by the decisions in the following cases:

- i) **Ahamed vs. Rukmaniammal & anr.**⁶ of Madras High Court
- ii) **Pavan Kumar vs. K. Gopalakrishna**⁷ of Andhra Pradesh High Court
- iii) **V.K. Rama Setty vs. A. Gopinath**⁸ of Karnataka High Court

⁶ AIR 1981 MADRAS 205

⁷ AIR 1998 AP 247

⁸ AIR 1998 KARNATAKA 186 (FB)

7. In the case of **Sushila Sadanand Borkar & anr. (supra)**, the learned Single Judge of this Court has also referred to these three judgements of Madras High Court, Andhra Pradesh High Court and the Karnataka High Court and held that a separate suit is not maintainable, even though no application is filed either under Order 21 Rule 97 or Order 21 Rule 99 of the Civil Procedure Code.

8. The learned Counsel for the respondents has pointed out and relied on the Division Bench judgment of the Bombay High Court in **Byramjee Jeejeebhoy Private Ltd. vs. Govindbhai Appaji Bhatte & Ors.**⁹. In the said judgment, the Division Bench of this Court has discussed the old provision and the effect of the procedure laid down under Rules 97, 98 and Rule 103 of Order 21 of the Civil Procedure Code, which was available to the litigants prior to amendment of Civil Procedure Code in 1976.

9. In the year 1976, Rule 103 was deleted. It was held that the Parliament realised the hardship suffered by the parties in view of multiplicity of the proceedings due to the provisions under Order 21 Rules 99 to 103 as it existed prior to 1976 and by way of

⁹ 1994(1) Bom.C.r. 211

amendment to Rules 99, 101 and 103 in 1976, made it more effective.

10. Both the learned Single Judges of this Court in **Baun Foundation Trust & anr. (supra)** and **Sushila Sadanand Borkar & Ors. (supra)**, was not pointed out the judgment in **Byramjee Jeejeebhoy Pvt. Ltd. (supra)** and hence, it was not relied upon by the learned Single Judges.

11. The Division Bench of this Court in **Byramjee Jeejeenbhoy Private Ltd (supra)** held in para 17 thus:

“17. Shri Chagla pointed out that initially the Chamber Summons taken out by the respondent was made absolute and the appellants were directed to file a separate suit but order dated October 6, 1978 passed by the learned Single Judge. The appellants carried an appeal being Appeal No. 213 of 1978 to the Division Bench of this Court and on December 28, 1978, the order of the learned Single Judge was set aside and the proceedings were remitted back to the Single Judge for disposal in accordance with Rule 101 of Order 21 of the Code of Civil Procedure. Shri Chagla pointed out that before passing of the order by the Division Bench, the appellants instituted Suit No. 1474 of 1978 for title and took out Notice of Motion for interim reliefs. The Motion was disposed of by Single Judge by order dated November 10, 1978 holding that all questions whatsoever between the appellants and the respondent should be decided in the Chamber Summons filed under Rule 99 of Order 21 of the Code of Civil Procedure and the suit was not maintainable. Shri Chagla pointed out that in view of the order

passed by the appellate Court and the order of the Single Judge holding that the suit is not maintainable, it is not permissible for the respondent to re-agitate the identical question. We have examined the question independently of the orders passed earlier about the maintainability of the suit and, in our judgment, separate suit is not maintainable and the question of title was required to be adjudicated by the trial Judge. We are, therefore, not in agreement with the finding of the trial Judge that the remedy of the appellants was by way of a separate suit to evict the respondent because the respondent was claiming possession independently of the judgment-debtor. In our judgment, the trial Judge was in error in directing restoration of possession to the respondent and the order of the trial Judge is, therefore, required to be set aside.

.....”

12. In view of the judgment of Division Bench of this Court in the case of **Byramjee Jeejeebhoy Pvt. Ltd. vs. Govindbhai Appaji Bhatte & Ors.**, reported in 1994 (1) Bom. C.R. 211, the remedy to file a separate suit is not available to the petitioner but he has to move an Application under Rule 99 Order 21 of the Code of Civil Procedure. The said judgment was not pointed out to the Hon'ble Judges of this Court in the cases of **Baun Foundation Trust & Anr. and Sushila Sadanand Borkar**, therefore, they had no opportunity to deal with the said judgment.

13. In view of the ratio laid down in the case of **Byramjee Jeejeebhoy Pvt. Ltd.** (*supra*), Civil Revision Application fails.

14. It is to be noted that the learned counsel for the applicant, after going through the judgment of the Division Bench of this Court in the case of **Byramjee Jeejeebhoy Pvt. Ltd.**, upon taking instructions from the applicant, has submitted that the applicants wants to withdraw this Civil Revision Application, as he intends to file proceedings under Rule 99 Order 21 of the Code of Civil Procedure before the Executing Court. However, as the matter was fully heard and partly dictated, the permission was not granted to withdraw the Civil Revision Application. However, the learned counsel for the applicant has submitted that the applicant may file the necessary proceedings under Rule 99 Order 21 of CPC in the Executing Court and as requested by the learned counsel, for the purpose of the same, earlier interim order granted in the Civil Revision Application that the respondents shall not create any third party interest or part with the possession, is extended till 30th July, 2017.

15. Civil Revision Application stands disposed of accordingly.

(MRIDULA BHATKAR, J.)