

Shephali

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO. 751 OF 2012
IN
EXECUTION APPLICATION NO. 70 OF 2011
IN
WRIT PETITION NO. 2045 OF 2006
WITH
NOTICE OF MOTION NO. 1340 OF 2012
IN
NOTICE NO. 252 OF 2011
IN
EXECUTION APPLICATION NO. 70 OF 2011
IN
WRIT PETITION NO. 2045 OF 2006**

NL Lookmanji Mithaiwala Pvt Ltd

...Plaintiff

Versus

Maharashtra Housing & Area Development &
Ors

...Defendants

Mr Prem Gidwani, *for the Plaintiff/Decree Holder.*

Mr VP Kakade, *i/b VP Sawant, for Respondent No. 1, MHADA.*

Mr Sanjay Jain, *a/w Mr Nishant Sasidharan & Ms Krishna R, i/b LJ Law, for the Respondent No. 3 and for the Applicant in CHS/751/12 and NMS/1340/12.*

CORAM: G.S. PATEL, J
DATED: 15th December 2017

PC:-

1. I have before me a Chamber Summons No. 751 of 2012 along with a Notice of Motion No. 1340 of 2012. The Motion seeks, first, that a delay be condoned, and then that an order of 12th October 2011 allowing Notice No. 252 of 2011 in Execution Application No. 70 of 2011, being a notice under Order XXI Rule 22 of the Code of Civil Procedure 1908, be recalled. The Chamber Summons seeks raising of an attachment levied pursuant to on the residence of the 3rd Respondent and a dismissal of the Execution Application. The delay is condoned.

2. The first curiosity in this matter is that this execution proceeding arises in a Writ Petition. This is not to suggest that an order under Article 226 of the Constitution of India cannot ever be put into execution; it can. But the range of orders in a Writ Petition that lend themselves to execution are, by necessary implication, limited, especially when set against the ambit of the nature of orders in writ petitions invoking Article 226 of the Constitution of India. In other words, it is not every order and every exercise of discretion under that Article nor the issuance of every high prerogative remedy that can be put into execution.

3. There once stood at Lamington Road near Novelty Cinema an old structure known as Alimohammed Mansion. Respondent No. 3, Pervez Khodiyar Raisi (“**Pervez**”) was the owner and landlord.

He still owns the property. The building had many tenants. Over time, the building deteriorated — or so Pervez said. He settled with several tenants. They vacated their tenements until there remained only the Petitioner, a private limited company, which claimed to be a tenant of Shops Nos. 1 and 2 in that building. This claim to tenancy was, and continues to be, disputed. The Petitioner said that from these two shops it ran a sweetmeat or mithai business. There came a time when other than this mithai-vending outlet, the entire building was empty.

4. Respondent No.1 to the Petition is the MHADA and Respondent No. 2 is the Mumbai Municipal Corporation (“MCGM”). The dispute between the Petitioner and Pervez was about the condition of the building. The Petitioner said that the building was not in fact dilapidated and could be repaired. Pervez insisted that the building was beyond repair. It needed to be pulled down and reconstructed in accordance with the provisions of the DCR 33(7) of the DC Regulations 1991. The Petitioner filed this writ petition in which, ultimately, consent minutes of the order were taken on 8th September 2006. These are compiled from page 25 to 29 of the Affidavit in support of Chamber Summons No. 751 of 2012.

5. In clause (1) the Petitioner irrevocably consented to Pervez redeveloping the property (in that clause said to be known as Alimohammed Mansion and Laxmi Niwas). The clause specifically references DCR 33(7). Clause (2) accepts that other than the Petitioner there was nobody in the building, and notes the Petitioner’s claim to tenancy. This clause is important because it

renders the entire minutes expressly without prejudice to the rights and contentions in a suit pending in the Small Causes Court, numbered as RAD Suit No. 225 of 1998. This was the Petitioner's suit for declaration as tenancy. I will only note, moving a little ahead in time, that this suit has been dismissed since. A First Appeal has been filed, admitted and remains pending.

6. Now clause (3) of these minutes is central to the case presented by Mr Jain for Pervez, today's applicant. This is how it reads:

"3. The Petitioners agree and undertake to this Hon'ble Court that they will demolish the 3rd and 4th floor and carry out necessary repairs and replaster of the building Alimohammed Mansion as per the list and nature of work annexed hereto as Annexure A under the supervision of Mr Shrikhande, Architect appointed by this Hon'ble Court at the costs of Respondent No. 3 including the fees of the Architect, Mr Shrikhande to be paid, as and when required by the Contractor appointed to carry out the said demolition as the said floors require immediate demolition and for the said purpose shall apply to the concerned authorities jointly with the Respondent No. 3 and obtain appropriate orders from Respondent Nos. 1 and 2 as per their requirements and shall fully co-operate with the Respondents. However, it is clarified that during the demolition of the 3rd and 4th floors, Respondent No. 3 shall not be responsible for any loss, mishap or damage that may be cause to the premises of the Petitioners or to any person or persons."

(Emphasis added)

The Petitioner's shops were on the ground floor or street level. It was, evidently, the Petitioner's case that with the demolition of the 3rd and 4th floors, the building was, or could be rendered, structurally sound.

7. Moving ahead to clause (5), it is here stated that the demolition by the Petitioner pursuant to that undertaking in clause (3) of the 3rd and 4th floor would not affect Pervez's rights as the NOC holder appointed by MHADA under DCR 33(7).

8. Clauses (7) and (8) should be read together in full:

"7. Respondent No. 3 agrees to this Hon'ble Court that on completing the development of the property in accordance with DCR 33(7) or any other law for time being in force the Respondent No. 3 shall provide the Petitioners with a permanent accommodation of the same carpet area as certified by the Respondent No. 1 in lieu of the premises presently occupied by the Petitioners, on the road facing front side of M.S. Ali on the ground floor in accordance with the provisions of law as may be certified by Respondent No. 1.

8. The Petitioners assure and undertake to this Hon'ble Court to hand over possession of the premises presently occupied within 30 days upon the Respondent No. 3 receiving the IOD from Respondent No. 2 and the Respondent No. 3 entering into an agreement with the Petitioners agreeing to give the permanent accommodation, in the new redeveloped building of the same carpet area presently occupied by the Petitioners irrespective whether the Petitioners will be able arrange for the alternative accommodation or not. **The Respondent**

No. 3 undertakes to this court that he shall pay to the Petitioners a sum of Rs.60,000/- per month by way of compensation to enable the Petitioners to shift to an alternate premises during the period of the redevelopment of the proposed building. The said sum of Rs.60,000/- shall be paid from the date the Petitioners vacate the premises presently occupied by them after receipt of the IOD from Respondent No. 2 till the Petitioners are given one months notice to occupy the permanent alternate accommodation."

(Emphasis added)

9. Obviously what was contemplated by clause (3), the demolition of 3rd and 4th floors followed by repairs and re-plastering, is quite distinct from what was agreed in clauses (7) and (8).

10. The demonstrated position is that the terms of clause (3) were not fully complied with. Mr Shrikhande was not appointed as the architect. I am told that this could not be done because he was out of India. That is no ground. A modification ought to have been sought. Clause (3) contains a direction in the form of an undertaking to the Court. Consequently, the Petitioner could not have proceeded as it did. Mr Gidwani for the Petitioner argues that Pervez appointed his own architect. That is no excuse either. Clause (3) contains no restraint against Pervez independently appointing an architect. What the clause required was the appointment by the Petitioner of Mr Shrikhande and it left no choice in that matter. This question arose in cross contempt petitions, being Contempt Petition No. 151 of 2007 and Contempt Petition No. 51 of 2008,

which AM Khanvilkar J (as he then was) disposed of on 22nd October 2008 (pages 155 to 159). There, Khanvilkar J said in the context of the requirement of appointing Mr Shrikhande that:

"6. Insofar as Contempt Petition filed by Respondent No.3 against the writ Petitioners is mainly on the allegation that the writ Petitioners proceeded with the demolition work of 3rd and 4th floor without appointing the named architect in terms of clause (3) of the minutes of order. The fact that the writ Petitioners proceeded with the demolition work of 3rd and 4th floor without appointing the named architect is not any serious dispute. Indeed, the writ Petitioners have not been able to justify the circumstances in which they unilaterally caused demolition of the 3rd and 4th floor of the building without consulting Mr. Shrikhande, the named architect. Even so in the fact situation of the present case, I see no propriety in precipitating the contempt action merely on account of this lapse."

(Emphasis added)

11. This order has remained unchallenged and has now attained finality.

12. Fates intervened. On 23rd June 2007, in the monsoon of that year, the building collapsed entirely. Two persons lost their lives. Had the building been pulled down earlier, as MHADA and the MCGM required, and as Pervez asked, this tragedy might have been averted. To my mind, this brings into sharp focus the perils of accepting these submissions from occupants and tenants every time such an issue comes up; and the issue comes up with alarming

regularity before this court in matter after matter. We have today fashioned some sort of precautionary failsafe or check, in that we now require the occupants/tenants who oppose reconstruction to give undertakings to bear responsibility for any such loss. But that is always, and necessarily, a post-facto provision, one that operates only *after* the loss occurs. It does nothing to prevent the loss from occurring, and we are yet to evolve any standard, measure or method to prevent such a loss in the first place.

13. For the next five years, there were litigations and cross litigations between the Petitioner and Pervez, including the contempt proceedings to which I have referred, but it was not until 2011 that the Petitioner for the first time sought to “put into execution” clause (8) of the consent minutes of the order saying, in effect, that since the building had now collapsed, it inevitably required reconstruction, and therefore Pervez’s liability to compensate the Petitioner at Rs. 60,000/- per month had arisen, thus constituting an executable order in the hands of the Petitioner. I am told that, in fact, the execution application was filed on 19th June 2008 but remained without office objections being removed and without being moved until 2011, which is why the execution application received a numbering of early 2011. It is also unclear why a notice under Order XXI Rule 22 was thought necessary, if in fact the execution application was lodged in June 2008 seeking execution of a portion of a consent minutes dated 8th/9th September 2006, within the two-year limit specified in Order XXI Rule 22. Perhaps this was on the basis that it received numbering in 2011. Whatever be the case, that notice under Order XXI Rule 22

was issued, and an order obtained making it absolute on 12th October 2011. A copy of that order is at page 47.

14. The notice was said to have been served by publication. This is utterly extraordinary. In 2011, the Petitioner's declaratory suit was still pending in the Small Causes Court. It is inconceivable that in that suit the Petitioner and its principal officers would not know who the landlord was and whose tenancy the Petitioner claimed and where to find the landlord. That suit was being contested and Pervez, the landlord, was represented. Mr Gidwani says that service was attempted on Pervez's lawyer in the Small Causes Court, but he returned the service. It is therefore today contended that *bona fide* attempts at service failed, and hence publication. The argument is not even remotely convincing. Mr Gidwani's submission that there was no reason for his clients to incur the additional expense of publication is not compelling either, when we consider that service was attempted on Pervez at his residence, where he lives alone, during working hours, knowing that his house was then locked as he was at work; and that his work place was known to the Petitioner, as it had served Pervez there in the past; and all this was within the knowledge of the Petitioner. Indeed, it could not possibly have outside its knowledge, given the background and history. Why would the Petitioner spend more on publication is a question that suggests its own answer: it was the only way to slip in the Order XXI Rule 22 notice and get an order on it. *Prima facie*, therefore, the attempt to prove service by publication, one that unfortunately succeeded, was an abuse of process of this Court, and clearly intended to mislead and misdirect. Had Pervez been properly served and been before court, matters might have turned out very

differently. No court could have been expected to know otherwise, or to know what the Petitioner knew, and could not have not known: viz., that Pervez was available at his work place of which the Petitioner was aware, that he lived alone, and that while he was at work, his house was closed. Serving the notice by publication was mischievous, and it was dishonest. If it is Mr Gidwani's case that this is, as he puts it, "contrary to the record", then he is quite simply wrong. It is his instructions that are wanting.

15. Publication of the Order XXI Rule 22 notice was given in the Free Press Journal and the Janmabhoomi on 21st April 2011. There is an affidavit of one Rajan Jadhav on file dated 3rd June 2011 to this effect. This was pursuant to an order obtained departmentally on 24th March 2011 in Chamber Order No. 251 of 2011. This sought leave to serve by publication. It was supported by a joint affidavit of one RJ Tiwari, a Bailiff in the Sheriff's office, and Mohammed Iqbal Khan, a representative of the Petitioner. This says that attempts were made to serve the Order XXI Rule 22 notice on Pervez on 23rd February 2011 at 4:30 pm and on 24th February 2011 at 3:50 pm at Flat No. 8, A Block, 3rd Floor, Rustom Baug, Byculla, Mumbai. The affidavit says that a neighbour said he had not seen Pervez in a long time. Then paragraph 3 says:

3. I further state that it has become very difficult for me to serve the papers and proceedings upon the Respondent No.3 personally **as his present whereabouts are not known.**

16. This is wholly incorrect. Respondent No.3, Pervez, had a business address of which the Petitioners were aware: they had

previously served him there. His whereabouts at the time were most emphatically *not* unknown to the Petitioner. And it is on this representation that everything followed: the publication first, and then the order made on the Order XXI Rule 22 notice, the one now sought to be recalled.

17. It is this order on the notice under Order XXI Rule 22 that is sought to be recalled. Even if improper or mischievous service is not the reason for recall, it is certainly a pointer to the Petitioner's conduct throughout. This conduct runs to a pattern. It cannot be seen in isolation. It must be viewed in context. That context is the filing of this Writ Petition in the first place, the manner in which the Petitioner sought to bypass clause (3) of the consent minutes, the manner in which it is even now sought to be urged that I should re-examine questions (*inter alia* of structural stability) raised in the petition prior to the consent minutes, and then also to ignore altogether the findings of the Khanvilkar J in his order on the contempt motion. A more thoroughly irresponsible approach is hard to conceive. To be plain: who opposed reconstruction? The Petitioner. Who insisted that the building was stable? The Petitioner. Who said that with the 3rd and 4th floors demolished, the building would stand? The Petitioner. Did the Petitioner agree agreed to the appointment of Mr Shrikhande and he alone? Yes. Did the Petitioner abide by that commitment solemnly given to Court? No. This is the background. This is the context. And the final question: can the Petitioner today be permitted to deny any of this? The answer, most emphatically, is no. The Petitioner, and the Petitioner alone, is responsible for everything that ensued. There is simply no other way of looking at it, and there is no question of

giving the Petitioner any benefit of any doubt, simply because there is no doubt at all to begin with.

18. In any view of the matter, the Petitioner then proceeded in execution. On 6th March 2012, it attached Pervez's residence at 36/14 Gulzar CHSL, Flat No.23, 2nd floor old Dadoji Konddeo Marg, near Jijamata Udyan, Byculla 400 027.

19. The entire execution is completely misconceived. Clause (8) of the consent minutes could not have been put into execution in this fashion. As I have noted, it is a clause that only operated when Pervez *chose* to take up redevelopment and not when he was forced, either by events and certainly not on account of the negligence, ineptitude or worse of the Petitioner, to reconstruct his own building. Pervez has no liability to pay any compensation whatever to the Petitioner. Apart from anything else, the Petitioner never "vacated" the premises that it claimed to occupy as a tenant. Everything it said about the condition of the building was proved to be false. Two persons lost their lives. Pervez lost valuable property. The building having collapsed, it cannot now, without doing extreme violence to the language, ever be said that the Petitioner "vacated" the premises. To hold that it did would necessarily imply several things. First, that there was a voluntary act of quitting the premises. Second, that the Petitioner delivered to Pervez possession of tangible and existing premises. Third, and perhaps most important, it implies the continuance in existence of the two shop premises themselves. All three of these conditions would have to obtain. Not one did; not one does. There is simply no executable order whatsoever.

20. Having regard to these circumstances and the manner in which these Petitioner has chosen to conduct itself and the resultant consequences, in my view both the Notice of Motion and the Chamber Summons must be made absolute at once. They are. The order of 12th October 2011 making the notice absolute is recalled and set aside. Notice No. 252 of 2011 is dismissed. Chamber Summons No. 751 of 2012 automatically succeeds. The attachment levied on the Gulzar CHSL property is raised forthwith. The warrant of attachment dated 25th January 2012 is recalled and set aside. Execution Application No. 70 of 2011 is dismissed as being completely incompetent and not maintainable. It is declared as incompetent being impermissibly in pursuance of an order that is incapable of execution and one that is now, and in view of the events noted above, forever incapable of execution.

21. Having regard to the conduct of the Petitioner, there will be an award of costs against the Petitioner in the amount of Rs.5,00,000/- payable within two weeks from today.

22. Mr Gidwani requests for a stay of order and a continuance of the warrant of attachment. The stay is refused. He requests for stay of the order of costs. That is also refused.

(G. S. PATEL, J)