

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.372 OF 2017

Shabbir Mohammed Sayed ... Applicant
Vs.
Noor Jehan Mushter Shaikh and others ... Respondents

Mr. Gauraj Shah i/b. Mr. Abhaysingh A. Shinde for Applicant.
Mr. Akbar Ali Nuruddin Nasikwala for Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : JULY 17, 2018

P.C. :

Heard Mr. Shah, learned Counsel for the applicant and
Mr. Nasikwala, learned Counsel for the respondent No.1 at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicant, hereinafter referred to as 'obstructionist', has challenged the judgment and order dated 16.11.2016 passed by the learned Judge, Court Room No.21 of the Court of Small Causes at Bombay below exhibit-14 in Execution Application No.386 of 2016 as also the judgment and order dated 07.04.2017 passed by the learned Appellate Bench of the Court of Small Causes at Bombay in Miscellaneous Appeal No.505 of 2016. By these orders, the Courts below have dismissed the application exhibit-14 taken out by the obstructionist inter alia praying for - (i) holding that warrant of possession taken out by the respondent No.1, hereinafter referred to as 'decree-holder', is beyond the decree, is illegal and unexecutable against the obstructionist and the same be declared as null and void; (ii) the obstruction of the obstructionist in respect of warrant of possession taken out by the decree-holder be recorded and the decree-holder be directed to take action according to the provisions of law; (iii) order

dated 21.09.2016 in Execution Application No.386 of 2016 being beyond decree be declared as null and void.

3. Decree-holder had instituted R.A.D.& E. Suit No.1289/2062 of 2007 against the defendant No.1 - Shamsunnisa Laique Ahmed Ansari, defendant No.2 - Adil Laique Ansari and defendant No.3 - Yugul Vinod Vishnu Pandey (landlord). By judgment and decree dated 09.04.2013, the learned trial Judge dismissed the Suit. Aggrieved by that decision, decree-holder preferred Appeal No.23 of 2013 before the Appellate Court on 24.05.2013. By judgment and decree dated 01.07.2016, the Appellate Court allowed the appeal and quashed and set aside the judgment and decree dated 09.04.2013 passed by the trial Court. The Appellate Court declared that decree-holder is a tenant in respect of Room No.3, ground floor, 98/A, Visheshwar Bhuvan @ Rajkotwala Compound, Pipe Road, Kurla (West), Mumbai 400 070 (for short 'suit premises'). Defendant No.3 / landlord / co-owner was directed to handover possession of the suit premises to the decree-holder within a period of one month and directed to issue rent receipt regularly to her after accepting the monthly rent. The relief sought vide prayer clause (b) was rejected. It is not in dispute that as of today, the said decree is not challenged either by the defendant No.3 landlord or by defendants No.1 and 2 or by anybody else.

4. In pursuance of the decree of the Appellate Court, decree-holder filed Execution Application No.386 of 2016. By order dated 21.09.2016, the learned trial Judge ordered issue of warrant of possession in respect of the suit premises under Order XXI, Rule 35 of C.P.C. The trial Court appointed Shri M. R. Choudhary, Bailiff to execute warrant of possession against the defendant No.3 or any other person found in the suit premises on behalf of defendant No.3.

5. It is at this stage, obstructionist filed application exhibit-14 for the prayers referred hereinabove. The obstructionist contended that he is in exclusive use, occupation and possession of the suit premises on monthly rent of Rs.175/-. He was put in possession of the suit premises by lawful tenant Mr. Akhtar Habibullah Shaikh. Mr. Akhtar Shaikh had executed Agreement of Assignment dated 01.02.2014 in his favour for valuable consideration of Rs.9,40,000/-. Mr. Akhtar Shaikh also executed an affidavit and gave no objection for transferring the rent receipt and electricity bill in his name. The rent receipt and electricity bills were standing in the name of Mr. Akhtar Habibullah Shaikh. Accordingly, rent receipt was transferred by the landlord / defendant No.3 in his name. He is paying electricity bills. On 05.06.2016, two persons posing as Bailiffs came for execution of warrant of possession. When he contacted defendant No.3 landlord, he came to know that landlord had gone to his native place. After making enquiries, he came to know about passing of decree against the defendant No.3. It is his case that decree-holder had obtained decree in collusion with defendant No.3 landlord. Defendant No.3 was never in possession of the suit premises. Defendant No.3 might have issued rent receipt to the plaintiff without possession of the suit premises for creating false evidence. The decree obtained by the decree-holder is not executable against him.

6. The decree-holder resisted the application by filing reply, inter alia contending that the assignment dated 01.02.2014 is prohibited under the provisions of the Maharashtra Rent Control Act, 1999 (for short 'Act'). The obstructionist has no right, title and interest in respect of the suit premises.

7. By order dated 16.11.2016, the learned trial Judge rejected the application. Aggrieved by that decision, obstructionist preferred

Miscellaneous Appeal before the Appellate Court which was dismissed on 07.04.2017. It is against these orders, obstructionist has instituted the present Civil Revision Application.

8. In support of this C.R.A., Mr. Shah strenuously contended that once the obstructionist took out application exhibit-14, the Court is bound to record objection and follow the procedure laid down under Order XXI, Rules 97 to 101 of C.P.C. The obstructionist cannot be non-suited on the ground of locus. He submitted that the obstructionist is claiming independent right, title and interest in the suit premises and is in exclusive possession of the suit premises. The obstructionist is not claiming through defendant No.3 landlord. He submitted that in fact, decree-holder had instituted Suit in collusion with defendant No.3 landlord. He invited my attention to the decision of the Apex Court in the case of ***Babulal Vs. Raj Kumar*, (1996) 3 SCC 154**, and in particular paragraph 6 thereof. In paragraph 6, the Apex Court referred to its earlier decision in *Bhanwar Lal vs. Satyanarain*, **(1995) 1 SCC 6** where it is held that even an application filed under Order XXI, Rule 35(3) or one filed under Section 47 would be treated as an application under Order XXI, Rule 97 and an adjudication is required to be conducted under Rule 98. He submitted that in the present case, the Courts below did not adjudicate the claims / rights of the obstructionist.

9. Mr. Shah submitted that the Appellate Court considered Section 52 of the Transfer of Property Act, 1882 (for short 'T.P. Act') and held that the Deed of Assignment dated 01.02.2014 is hit by the principles of lis pendence. The deed is compulsorily required to be registered as per Section 17 of the Registration Act, 1908. The said document is admittedly unregistered instrument, and therefore, will not create any interest in favour of the obstructionist. He submitted that the Appellate Court did not consider Section 55 of the Act. He also relied upon the

decision of this Court in ***Raj Prasanna Kondur Vs. Arif Taher Khan, 2005 (4) Bom.C.R.383***, which considered the consequences of not registering either leave and licence agreement or tenancy agreement under Section 55(2) and (3) of the Act. He submitted that as the Courts below have not adjudicated the rights or claims of the obstructionist, Application requires consideration.

10. On the other hand, Mr. Nasikwala supported the impugned orders. He submitted that earlier, defendant No.1 - Shamsunnisa Laique Ahmed Ansari and defendant No.2 - Adil Laique Ansari were tenants in respect of the suit premises. On 22.07.2002, they surrendered their tenancy rights in favour of the landlord. Decree-holder, therefore, issued notice dated 11.11.2004 to defendant No.3 and other co-owner requesting them to transfer the rent receipt in her favour. Thereafter, the landlord issued rent receipt dated 01.12.2006 in favour of the decree-holder covering the period from December 2006 to February 2007. Though defendants No.1 and 2 surrendered their tenancy rights, they did not handover vacant and peaceful possession of the suit premises to the landlord. Instead of that, they executed leave and licence agreement in favour of one Haji Hafiz Ahmed for a period from 21.03.2002 to 20.03.2007. He submitted that though rent receipt was issued in favour of the decree-holder in 2006, still, actual physical possession of the suit premises was not given to her. The decree-holder was, therefore, constrained to institute Suit in the year 2007 inter alia praying for declaration of tenancy rights as also possession from defendants No.1 and 2. By order dated 09.04.2013, the trial Court dismissed the Suit. Decree-holder preferred appeal on 24.05.2013. During the pendency of that appeal, Akhtar Habibullah Shaikh executed Agreement of Assignment assigning his right, title and interest in the suit premises in favour of the obstructionist. He submitted that basically, no material is produced on record by the

obstructionist to establish that the landlord had permitted subletting by the tenant.

11. Mr. Nasikwala relied upon Section 26 of the Act which prohibits assigning or transferring in any manner interest of the tenant, whole or in part, of the premises. He submitted that landlord is not party to the said agreement. The landlord thereafter executed tenancy agreement in favour of the obstructionist on 01.02.2014 that is to say during the pendency of the appeal preferred by the decree-holder. The Appellate Court was, therefore, justified in holding that the tenancy agreement is hit by the principle of lis pendence embodied in Section 52 of the T.P. Act. He submitted that obstructionist is claiming through defendant No.3. As defendant No.3 did not challenge the Appellate Court decree dated 01.07.2016, obstructionist is equally bound by the decree passed by the Appellate Court. Obstructionist cannot claim any independent right, title and interest in the suit premises. He, therefore, submitted that no case is made out for interfering with the impugned orders.

12. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute that decree-holder had instituted Suit inter alia praying for declaration that she is a lawful monthly tenant in respect of the suit premises; for decree against defendants No.1 and 2 to forthwith quit and handover vacant and peaceful possession of the suit premises, among other prayers. The Suit was dismissed by the trial Court on 09.04.2013. Aggrieved by that decision, decree-holder preferred Appeal No.23 of 2013 on 24.05.2013. By order dated 10.07.2013, the Appellate Court admitted the appeal and issued notices to the respondents including defendant No.3. The obstructionist has relied upon Agreement of Assignment dated 01.02.2014 executed by

Akhtar Habibullah Shaikh in his favour. Clause 1 thereof recited that obstructionist had paid Rs.9,40,000/- to Mr. Akhtar Habibullah Shaikh and upon receipt of that amount, he has agreed to transfer and assign the premises along with its furniture, fixtures and fittings to the obstructionist. A perusal of this Agreement of Assignment shows that it is executed on 100 Rupees stamp paper and is not a registered instrument. Defendant No.3, landlord is not party to this agreement. Akhtar Shaikh also executed affidavit on 01.02.2014 giving his no objection for transferring tenancy in favour of the obstructionist. The obstructionist has also relied upon the tenancy agreement dated 01.02.2014 executed by defendant No.3 landlord in his favour. Thus, all these transactions are made during the pendency of the appeal preferred by the decree-holder. It is in that context, the Appellate Court rightly observed that the transaction is hit by Section 52 of the T.P. Act. The Agreement of Assignment was required to be registered as per Section 17 of the Registration Act, 1908. The Appellate Court also held that obstructionist is not claiming any independent right, title and interest in the suit premises and is claiming through defendant No.3. As noted earlier, defendant No.3 did not challenge the decree passed by the Appellate Court on 01.07.2016. By this order, the Appellate Court had directed the defendant No.3 to handover possession of the suit premises to the decree-holder within a period of one month. As the obstructionist is claiming through defendant No.3, certainly, he is also bound by the decree passed by the Appellate Court. Even if obstructionist is not party in the appeal, he cannot be heard to contend that he is not bound by that decree.

13. Mr. Shah relied upon Section 47 of C.P.C. to contend that all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge

or satisfaction of the decree, are required to be determined by the Court executing the decree and not by a separate suit. The obstructionist is, in the present case, representative of the defendant No.3, and therefore, the Executing Court is obliged to consider all the questions arising between the parties relating to the execution. Sub-section (3) of Section 47 lays down that where a question arises as to whether any person is or is not the representative of a party, such question, for the purposes of Section 47 is required to be determined by the Court. He submitted that as the obstructionist is representative of the defendant No.3, the Executing Court was obliged to consider the claim / rights claimed by the obstructionist. For the reasons recorded earlier, I do not find any merit in this submission.

14. Mr. Shah relied upon Section 55 of the Act. He also relied upon decision of this Court in **Raj Prasanna Kondur** (*supra*). In paragraph 12, the learned Single Judge of this Court referred to the consequences flowing from sub-sections (2) and (3) of Section 55. In paragraph 16, it was observed that the leave and licence agreement has been specifically made admissible under Clause (b) of the Explanation to Section 24 of the Act which is not in consonance with the provision of law comprised under Section 49 of the Registration Act, 1908. If it was the intention of the legislature that the provision regarding the requirement of registration of leave and license agreement has to be read along with Section 17 of the Registration Act, 1908, nothing would have prevented the legislature to introduce amendment to Section 17 itself or at least to make such agreement inadmissible in the evidence rather than specifically providing for admissibility of such document in evidence as being a conclusive proof of the facts stated therein irrespective of the fact that the agreement is not registered. This fact clearly reveals that the provisions comprised under Section 55(1) of the Act cannot be read with the provisions of Section 17 of the Registration Act, 1908, and for the

same reason, the provisions of Section 49 of the Registration Act, 1908 would not be attracted in relation to the agreement for leave and license. In my opinion, the said decision is not of any assistance to obstructionist. It assists the case of the decree-holder. In the present case, the obstructionist has come out with the case of tenancy agreement as also agreement of assignment, which are admittedly executed during the pendency of the appeal. The deed of Assignment is not registered.

15. Mr. Shah invited my attention to the - (i) rent receipt dated 10.08.2013 issued by defendant No.3; (ii) electricity bill dated 06.04.2013; and (iii) electricity bills dated 18.07.2013 and 18.11.2013. All these documents are in favour of Akhtar Habibullah Shaikh. Electricity bill dated 06.04.2013 issued in the name of Akhtar Habibullah Shaikh thus indicates that he was inducted in the suit premises pending the Suit which was decided on 09.04.2013. Rent receipt dated 10.08.2013, electricity bills dated 18.07.2013 and 18.11.2013 were issued in the name of Akhtar Habibullah Shaikh during the pendency of the appeal. The obstructionist has not explained in what circumstances, Akhtar Habibullah Shaikh was inducted in the suit premises. I have already held that agreement of assignment dated 01.02.2014 executed by Akhtar Habibullah Shaikh in favour of the obstructionist is hit by Section 26 of the Act. Even otherwise, it is not a registered instrument. The said transaction is hit by the principle of lis pendence embodied in Section 52 of the T.P. Act.

16. In the light of the aforesaid discussion, I do not find that the Courts below committed any error in rejecting application exhibit-14. The obstructionist was not in a position to demonstrate that the findings recorded by the Courts below are perverse, being based upon no evidence or that they are contrary to the evidence on record. The obstructionist was also not in a position to demonstrate that no

reasonable person would have arrived at the conclusions other than arrived by the Courts below. Merely because on the evidence on record, another view is possible, that itself is no ground for invocation of powers under Section 115 of the C.P.C. Hence, Application fails and the same is dismissed.

(R. G. KETKAR, J.)

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