

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.346 OF 2018
WITH
WRIT PETITION (ST.) NO.17068 OF 2018

M/s. Sanghvi Reality Pvt. Ltd. ... Applicant/Petitioner
Vs.
Shah Jivanlal Babulal & Co. ... Respondent

Mr. P. S. Dani, Senior Advocate a/w. Mr. Mayur Khandeparkar, Mr. K. Banatwalla i/b. Mr. Tushar Goradia for Applicant / Petitioner.
Mr. Sandip Ghogare for Respondent.

CORAM : R. G. KETKAR, J.
DATE : JULY 11, 2018

P.C. :

Heard Mr. Dani, learned Senior Counsel for the applicant in C.R.A. and for the petitioner in Writ Petition as also Mr. Ghogare, learned Counsel for the respondent in both the proceedings at length.

2. C.R.A.No.346 of 2018 takes exception to the judgment and order dated 13.07.2016 passed by the learned Judge, Court Room No.21 of the Small Causes Court at Mumbai in Execution Application No.546 of 2015. By that order, the learned trial Judge directed the applicant, hereinafter referred to as 'defendant', to provide the respondent-plaintiff a shop as agreed as per the consent terms dated 22.06.2009 filed in the proceedings within next two months. By order dated 05.08.2017, the learned trial Judge rejected the Review Application No.17 of 2016 filed by the defendant seeking review of order dated 13.07.2016. Applicant has also challenged the order dated 27.04.2018 passed by the Appellate Bench of the Small Causes Court in Revision Application No.330 of 2017. By that order, the Appellate Court rejected the Revision Application preferred by the defendant challenging the order dated 05.08.2017 passed by the learned trial Judge in Review Application

No.17 of 2016.

3. Writ Petition takes exception to the order dated 08.11.2017 passed by the learned trial Judge in Execution Application No.546 of 2015 as also the order dated 27.04.2018 passed by the Appellate Bench of the Small Causes Court in Execution Appeal No.392 of 2017. By order dated 08.11.2017, the learned trial Judge rejected the objections filed by way of affidavit at exhibit-22 showing inability to provide the premises as per the consent terms. By order dated 27.04.2018, the Appellate Court dismissed the appeal preferred by the defendant and confirmed the trial Court's order.

4. Since common questions of law and fact arise in these proceedings, the same can conveniently be disposed of by this common order. The relevant and material facts for deciding these proceedings are as follows.

5. Respondent-plaintiff had instituted R.A.D.Suit No.1580 of 2007 against the defendant. The parties entered into compromise on 22.06.2009 and accordingly filed the consent terms. Clauses 2, 4, 6 and 12 read thus,

“2. The plaintiff agrees and confirms that the Defendants are seized and possessed of and / or otherwise well and sufficiently entitled as owners / landlords of all that piece and parcel of the land together with the building standing thereon which is known as “Javeri Building” and further plaintiff agrees to render all co-operation to the Defendants for development of the suit property in terms of these consent terms and as specified under the Agreement for Permanent Alternate Accommodation and the same shall form part and parcel of these consent terms.

4. The Defendant agree and confirm that the Plaintiff as a tenant / occupant of the Defendants in use and occupation of the premises bearing Shop No.1 admeasuring 386 sq.ft. already having Back door entry and / or separate door at rear side consisting Toilet & Bathroom subject to approval situated

on the Ground floor of Javeri Building situated at 12th Khetwadi, Mumbai 400 004 and tenancy rights of the plaintiff will continue and the plaintiff shall continue to pay the monthly rent of Rs.1022/- in respect of the suit premises to the Defendants till the Plaintiff hand over possession of the suit premises i.e. Shop No.1 for demolition.

6. The Defendants agree and undertake to this Hon'ble Court that Defendants shall provide and allot the tenement / permanent alternate accommodation namely commercial shop admeasuring total carpet area of 386 sq.ft. carpet equivalent to 35.89 sq.mtr. having opening face at Khetwadi Back Road, containing toilet, bathroom along with also back door entry subject to approval by the concern authorities absolutely free of all the cost and on ownership basis to the Plaintiff in the proposed new building to be erected on the said plot of land wherein the said property is situated, namely "Javeri Building" in lieu of the suit tenanted premises bearing Shop No.1 of the Plaintiff (hereinafter referred to as "the said Shop").

12. The Defendants shall complete the construction of the new premises within a period of 24 months from the date of handing over the possession of the suit premises by the Plaintiff. If the new premises is not completed, for any reason, within the agreed period of 24 months and if the Defendants fail to give allotment and handover the possession of the Shop to the Plaintiff, the Defendants agree that they shall pay an additional 10% on the compensation for every month for further period till the possession of the new Shop with occupation certificate is handed over to the Plaintiff in terms of Agreement to be executed between the parties."

6. In pursuance thereof, the matter was heard before the learned trial Judge on 25.06.2009. The learned trial Judge passed the following order:

" Proprietor of plaintiff is present with Advocate of plaintiff. Chairman of defendants is present with defendants' Advocate.

On enquiry, they admitted the contents of the consent terms to be true & correct and admissible to them. Hence R & R."

7. On 03.07.2009, the learned trial Judge disposed of the Suit by passing the following order:

" In view of consent terms filed at Exh.21 by the parties

and order passed thereon, suit stands disposed off as compromised between the parties. Decree be drawn up accordingly of which consent terms Exh.21 shall form part and parcel.

Proceeding is thus, closed.”

8. It appears that defendant submitted building plans to the Municipal Corporation of Greater Mumbai (for short 'Corporation'), which was sanctioned on 17.10.2008. In that plan, defendant proposed to give shop admeasuring 35.90 sq.mtrs. In pursuance thereof, on 06.01.2009, Intimation of Disapproval (I.O.D.) was issued by the Corporation. It is not in dispute and is rather a matter of record that on 27.07.2009, Commencement Certificate was issued that is to say post entering into consent terms on 22.06.2009 as also passing of orders on 25.06.2009 and 03.07.2009. On 03.09.2010, defendant submitted revised plans to the Corporation wherein the area offered to the plaintiff was 36.14 sq.mtrs. A perusal of this plan shows that it is not in conformity with clause 6 of the consent terms dated 22.06.2009. As the defendant did not comply clause 6 of the consent terms as also did not provide permanent alternate accommodation, plaintiff filed execution proceedings before the trial Court on 20.11.2015. By order dated 13.07.2016, the learned trial Judge directed the defendant to provide the plaintiff a shop agreed as per the consent terms dated 22.06.2009. Review Petition filed by the defendant against that order was dismissed by the trial Court and the Revision Application preferred by the defendant challenging the order passed in Revision Application was dismissed by the Appellate Court. It is against these orders, defendant has instituted the present Civil Revision Application.

9. In support of this Application, Mr. Dani submitted that though the parties entered into the consent terms, each and every part of the consent terms did not form part of the decree. He submitted that the parties

entered into compromise terms, which is like any other agreement between the parties. The execution proceedings filed by the plaintiff before the Small Causes Court will not be maintainable as it amounts to passing decree for specific performance of agreement. In fact, prior to filing of the execution proceedings, plaintiff has instituted Suit in the City Civil Court being S.C.Suit No.1906 of 2015 inter alia praying for mandatory injunction against the defendant to provide a shop admeasuring 386 sq.ft. carpet area in the reconstructed building alongwith bathroom, toilet and back door entry pursuant to agreement dated 22.06.2009; for declaration that the plaintiff is entitled to one parking space in the reconstructed building constructed in place of Javeri Building; for mandatory injunction against defendant to pay entire maintenance of three years from the period till the plaintiff is put in possession; for mandatory injunction against the defendant to pay monthly compensation of Rs.38,500/- to the plaintiff from April 2015 till plaintiff is put in possession of the newly constructed shop premises.

10. Mr. Dani further submitted that the moment building was reconstructed, the relationship between the parties that of landlord and tenant has come to an end. The plaintiff therefore, rightly approached the City Civil Court by filing Suit in the year 2015. He submitted that defendant does not intend to deceive the plaintiff and in fact made sincere efforts to comply with the consent terms entered into between the parties. He invited my attention to on-line application made by the Corporation on 17.08.2017 and the remarks of the Corporation dated 19.08.2017 to the effect that as per the drawing submitted for proposed rear door, it seems that the opening provided from the front side i.e. road side (from Khetwadi back road) is sufficient in nature and providing rear door as per proposed drawing may cause obstruction to the swift movement of the occupants / visitors approaching the staircase / lift. He

further submitted that even prior thereto Architect addressed a letter dated 08.09.2010 to the defendant setting out therein that the rear wall of shop No.2 does not face the compound of the building but faces into the lift, lobby and stair case area and providing of any rear access by breaking of the wall will result in commercial movement in the lift, lobby and stair case area creating obstruction and hindrance in the event of a fire and would not be permitted on that count by the planning authority. In regard to the provision of bathroom in the shop, there is no drainage line connecting the shops to the main drains as there are underground plinth beams which cannot be punctured. Therefore, a common toilet is provide on the rear side for all shop holders. For all these reasons, he submitted that the impugned orders passed by the Courts below deserve to be set aside.

11. On the other hand, Mr. Ghogare supported the impugned orders. He submitted that admittedly, consent terms were entered into between the parties on 22.06.2009. IOD was issued on 06.01.2009 and commencement certificate was issued on 27.07.2009. If the defendant intended to implement the consent terms, they should have submitted revised plans in conformity with clause 6 of the consent terms dated 22.06.2009. He invited my attention to the revised plans submitted to the Corporation on 03.09.2010, which is not in conformity with the clause 6 of the consent terms. He submitted that in fact, on 12.07.2017, Fire Brigade Department of the Corporation had issued no objection for carrying out the proposed additions / alterations i.e. making exit from rear side in the premises (shop No.2) with Fire Rear Door (F.R.D.) and to construct loft of steel framed ladi coba ladi type on the premises (shop No.2), which is already approved by Execution Engineer Building Permission as per the details shown in the enclosed plan signed in token of approval subject to satisfactory compliance of certain requirements.

He submitted that defendant never intended to implement the consent terms and in fact, intended to get over the consent terms as also undertaking given to the trial Court. All the contentions which are agitated in this Court are agitated for the first time as and by way of after thought and all these contentions were not agitated in the Courts below.

12. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. I have already extracted the relevant clause of the consent terms dated 22.06.2009 and orders dated 25.06.2009 and 03.07.2009. A perusal of clause 6 of the consent terms clearly shows that defendant agreed and undertook to the Small Causes Court that it shall provide and allot tenement / permanent alternate accommodation namely, commercial shop admeasuring total carpet area of 386 sq.ft. carpet area equivalent to 35.89 sq.mtrs. having opening face at Khetwadi Back Road containing toilet, bathroom **along with back door entry subject to approval by the concerned authorities absolutely free of all the cost and on ownership basis to the plaintiff in the proposed new building to be erected on the said plot of land wherein presently Javeri Building is situate.** Thus, the defendant gave unequivocal undertaking ot provide commercial shop along with back door entry subject to approval of the concerned Authorities namely, Corporation. It is not in dispute and is rather a matter of record that after the consent terms, defendant submitted revised plans, which were sanctioned on 03.09.2010.

13. A perusal of this plan clearly shows that defendant did not submit the plans showing back door entry to shop No.2, proposed to be allotted to the plaintiff. During the course of hearing, no explanation, worth a name, is given by the defendant for not showing back door entry to shop

No.2. In fact, if the defendant really intended to implement the consent terms and abide by the undertaking given by them, they should have shown rear back door entry against shop No.2 in the plans submitted to the Corporation. During the course of hearing, Mr. Ghogare submitted that plaintiff will be satisfied if he is permitted to have sliding back door in the suit premises. Apart from that, perusal of the plan submitted by the defendant on 19.08.2017 clearly shows that the door is opening inside shop No.2. It is interesting to note that despite this, the remark is given by the Corporation that providing rear door as per the proposed drawing may cause obstruction to the swift movement of the occupants/visitors approaching the staircase/lift. In my opinion, defendant some how wanted to get over the consent terms as also undertaking given by them and invited this response from the Corporation. In fact, as noted earlier, defendant ought to have shown back door to the existing shop No.2 when plans were approved on 03.09.2010. This is just an attempt on the part of the defendant to get over clause 6 of the consent terms as also the undertaking given to the Court.

14. Mr. Dani submitted that the consent terms constitute agreement between the parties, and therefore, the execution proceedings will not lie before the Small Causes Court. I will deal with aspect later on. That apart, as the relationship of the landlord and tenant came to an end between the parties, even otherwise, the Small Causes Court will have no jurisdiction to entertain and try the execution proceedings. I do not find any merit in either of these submissions. The fact remains that the defendant did not implement the consent terms as also did not abide by the undertaking given by them to the Court. While passing order on 13.07.2016, the learned trial Judge referred to the consent terms dated 22.06.2009, and accordingly directed the defendant to provide a shop as

agreed as per the consent terms. In paragraph 4 of the order dated 05.08.2017, the learned trial Judge extracted clause 6 of the consent terms and observed in paragraph 5 that it was a duty of the defendant to provide the amenities. The learned trial Judge noted that no back door entry was shown and therefore, plaintiff did not take possession. Defendant is bound by the consent terms and he has to provide shop along with the amenities mentioned in the consent terms. In paragraph 6, the learned trial Judge considered the submission that the MHADA Authority or Corporation have not sanctioned the plan and now building is fully constructed. Therefore, at this stage, sanctioning authority will not be permitted to change anything in the building and that is why, he cannot provide the toilet and bathroom. Submission was made to the effect that defendant is unable to provide these amenities because of the sanction of the Competent Authority. The learned trial Judge dealt with these submissions by observing that these submissions are not reliable because it was his duty to submit the plan and design of the proposed building as per the terms and conditions mentioned in the consent terms. The Sanctioning Authority might have raised objections but it shows that defendant has not submitted the plan as per the terms and conditions agreed in the consent terms, which is his own fault.

15. In so far as the order dated 27.04.2018 is concerned, in paragraph 14, the Appellate Court observed that the direction issued by the learned trial Judge is perfectly in accordance with law and it was fault of the defendant in not submitting plans as per the consent terms agreed between the parties.

16. In view thereof, I do not find that the Courts below committed any error in passing the impugned orders in C.R.A.No.346 of 2018. Hence, Application fails and the same is dismissed.

17. In so far as the challenge raised in Writ Petition is concerned, by order dated 08.11.2017, the learned trial Judge overruled the objections raised by the defendant by way of affidavit at exhibit-22 showing inability to provide the premises to the plaintiff as per the consent terms. The learned trial Judge, while overruling the objections, observed that it was a duty of the defendant to submit the plan as per the consent terms. The learned trial Judge in fact observed that defendant is playing mischief not only with the plaintiff but also with the Court. It is the duty of the defendant to act as per the consent terms as per the direction issued on 13.07.2016.

18. In so far as the order of the Appellate Court dated 27.04.2018 is concerned, in paragraph 17, the Appellate Court dealt with the legal impediment pointed out by the defendant and observed that there is no material placed on record showing that prior to sanctioning of the proposed building, any attempt was made by the defendant to the Competent Authority for keeping such back door entry and providing W.C. and bathroom in the newly constructed premises as per the consent terms. Thus, there was negligence on the part of the defendant to act upon the consent terms and defendant intends to take undue advantage of legal impediment as pointed out by them. The Appellate Court also observed that no correspondence was placed on record by the defendant showing efforts made by the defendant for complying the consent terms. On the contrary, all the correspondence in that regard made by the defendant is in the year 2017.

19. In paragraph 18, the Appellate Court observed that defendant has failed to establish that he had made any bonafide effort to act upon the consent terms and comply the consent decree as agreed by them. For the reasons recorded by the Courts below, I do not find that the Courts

below committed any error warranting interference under Article 227 of the Constitution of India. Hence, Petition fails and the same is dismissed.

20. Mr. Dani relied upon letter dated 04.10.2010 addressed by the defendant to their Architect Aparna Consultant setting out therein that they have discussed with the plaintiff about rear access door and a bathroom to be provided to shop No.2 on the ground floor in new constructed building (which shop is to be provided as permanent alternate accommodation to the tenant) and that they would try and provide the same if planning constraints permits. They would like Architect to consider the possibility of providing the rear access door to Shop No.2 and the bathroom without compromising in any manner in the planning layout and the permissions required in the matter.

21. By letter dated 08.10.2010, Aparna Consultant, Architect informed that the rear wall of the shop No.2 does not face the compound of the building but faces into the lift, lobby and staircase area and providing of any rear access by breaking of the wall will result in commercial movement in the lift, lobby and stair case area creating obstruction and hindrance in the event of a fire and would not be permitted on that count by the planning authority. In regard to the provision of bathroom in the shop, there is no drainage line connecting the shops to the main drains as there are underground plinth beams which cannot be punctured. Therefore, a common toilet is provided on the rear side for all shop holders. Mr. Ghogare submitted that the said letters are got up documents. He submitted that this correspondence was not appraised to the defendant and was also not placed on record before the Courts below. Defendant had placed on record all the correspondence in that regard made in the year 2017. Prima facie, I find merit in this submission. A comparison of letter dated 08.10.2010 and

remarks of the Corporation dated 19.08.2017 clearly shows that somewhat identical language is employed in letter dated 08.10.2010 and remarks of the Corporation dated 19.08.2017. This substantiates the case of the plaintiff that letters dated 04.10.2010 and 08.10.2010 are got up documents. The defendant did not appraise this correspondence to the plaintiff and is sought to be relied upon for the first time in this Court.

22. In the case of ***Rama Narang Vs. Ramesh Narang, (2006) 11 SCC 114***, the Apex Court considered somewhat identical controversy. The petitioner had alleged violation of orders of the Apex Court dated 12.12.2001 and 08.01.2002 by respondents No.1 and 2 before the Apex Court. Preliminary objection was raised by the respondents as to the maintainability of the Contempt Petition. Respondents contended that mere imprimatur of the Court to a consent arrangement was not sufficient to attract the contempt jurisdiction. Only such consent orders which are coupled with undertakings or injunctions by the Court could be the subject matter of contempt proceedings. In paragraph 12, the Apex Court referred to the decision of the Calcutta High court in *Nisha Kanto Roy Chowdhury Vs. Smt. Saroj Bashini Goho, AIR 1948 Calcutta 294*. In paragraph 14, reference was made to the Division Bench decision of this Court in *Bajranglal Gangadhar Khemka & Anr. Vs. Kapurchand Ltd., AIR 1950 Bombay 336*. In paragraph 15, the Apex Court noted that the said decision of this Court was approved in *Bank of Baroda Vs. Sadruddin Hasan Daya, 2004 (1) SCC 360*. In paragraph 18, reference was made to Section 2(b) of the Contempt of Courts Act, 1971, which defines the expression “civil contempt”. It was observed that the definition provides for two categories of cases, namely, (1) willful disobedience to a process of Court and (2) willful breach of an undertaking given to Court. As far as the first category is concerned, the word "any" further indicates the wide nature of the power. No

distinction is statutorily drawn between an order passed after an adjudication and an order passed by consent. This first category is separate from the second and cannot be treated as forming part of or taking colour from the second category. In paragraph 23, the Apex Court observed that Section 2(b) of the Contempt of Courts Act provides that willful violation of any order or decree etc. would tantamount to contempt. A compromise decree is as much a decree as a decree passed on adjudication. This Court's view in **Bajranglal Gangadhar Khemka** (*supra*) correctly represents the law that a consent decree is a contract with the imprimatur of the Court. 'Imprimatur' means 'authorized' or 'approved'. In other words, by passing a decree in terms of a consent order the Court authorizes and approves the course of action consented to. In view thereof, I do not find any merit in the submission of Mr. Dani that the parties entered into compromise terms, which is like any other agreement between the parties and the execution proceedings filed by the plaintiff before the Small Causes Court are not maintainable as it will amount to passing of a decree for a specific performance of agreement.

23. In my opinion, in fact defendant is in contempt of orders dated 25.06.2009 and 03.07.2009. The Court satisfied itself about legality of the consent terms and put its seal on the consent terms. In other words, the Court accepted undertaking furnished by the defendant in terms of clause 6 of the consent terms. *Prima facie*, defendant has tried to overreach the decree passed by the trial Court as also have failed to abide by the undertaking given to the trial Court. As the defendant is in contempt, I am inclined to issue suo motu contempt notice on the defendant for not abiding by the undertaking given in the consent terms. Hence, issue notice to the Directors of M/s. Sanghvi Reality Pvt. Ltd., namely, (i) Ashok Sanghvi, (ii) Aatish Sanghvi and (iii) Aaditya Sanghvi, as to why action under the Contempt of Courts Act, 1971 be

not initiated against them for willful disobeying the consent decree as also committing willful breach of the undertaking given to the trial Court, returnable on 25.07.2018.

24. At this stage, Mr. Dani orally applies for stay of this order. Mr. Ghogare opposes the oral application. Having regard to the conduct of the defendant as also the findings recorded by the Courts below, no cause is made out for staying this order. Hence, oral application is rejected.

(R. G. KETKAR, J.)

Minal Sandip
Parab

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Minal Sandip Parab
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