

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

WRIT PETITION NO. 3777 OF 2018

Vinayak Balkrishna Alegaonkar (Since ...Petitioners
Decd.) Through LRs.

Versus

Shree Laxmi Narayan Mandir Trust A ...Respondents
Public Trust & Ors.

Yuvraj P. Narvankar - Advocate for the petitioner.

CORAM : DAMA SESHADRI NAIDU, J.

DATE : 21st AUGUST 2019.

P.C. :

The first respondent Trust is the landlord, and the respondent Nos. 2 to 8 are the trustees. The 2nd respondent, now on record, is the daughter of the original tenant, who was the 1st respondent. After his death, she was brought on record as his legal heir.

2. In the suit for eviction before the trial Court, the respondent-Trust initially filed Exh.30 application under Order 26 Rule 9 and, in August 2013, got an advocate-commissioner appointed. When the commissioner wanted to execute the warrant entrusted to him, the second respondent and her

husband, as the allegation goes, obstructed and threatened. But the 2nd respondent denies it. She maintains that she objected to the commissioner's inspection because of her father's illness and hospitalization.

3. Later, the Trust filed Exh. 89 for the same relief—to have another advocate-commissioner appointed. The first order remaining in force, the trial Court rightly dismissed that application. Yet it was followed by another similar application in Exh.94. That also seems to have met the same fate.

4. Eventually, the Trust filed Ex. 98 application to have the initial order, dated 20.02.2018, implemented with the police aid. On 20th February 2018, the trial Court allowed that application. It was for enforcing the earlier order. Assailing that order, the petitioner, that is the original tenant's daughter, filed this Writ Petition.

5. Shri Yuvraj P. Narwankar, the learned counsel for the petitioner, has submitted that through the impugned order, the trial Court has reviewed its earlier order. To elaborate, he has submitted that the Trust unsuccessfully filed Exh. 89 and 94 earlier. For the third time, it filed a similar application; then, the trial Court misinterpreted that application and passed the impugned order, as if it were executing the order under Exh. 30. But it is, in fact, an order reviewing the previous order, and it is, according to Shri Narwankar, impermissible.

6. Shri Narvankar has also pointed out that the petitioner

has never obstructed the advocate commissioner. She only informed him that her father had been hospitalized; that fact now stands proved because the petitioner's father died later. He also emphasizes that based on the Trust's bald allegations, the trial Court, in the impugned order, allowed police protection as well. Finally, Shri Narvankar has submitted that as the original defendant died, now the petitioner, his daughter, came on record. So she should have every opportunity to challenge the order, dated 29.08.2013, passed under Exh. 30. But the impugned order, he insists, forecloses the petitioner's option in that regard.

7. Heard the learned counsel for the petitioner. The Court does not desire to issue a notice to the respondent, as this Writ Petition has to pass the initial judicial muster and earn admission. Only then will this Court put the other party on notice.

8. Rarely do we come across an order better articulated and more reasoned than the one impugned before this Court now. The Court does appreciate the learned trial Judge for his or her painstaking efforts in passing a judicial order of quality. Yet even that order could not escape the dragnet of the ever-expanding supervisory jurisdiction of this Court under article 227 of the Constitution of India—at least as the petitioner projects the case.

9. The trial Court appointed an advocate commissioner at

the Trust's request. Indeed, that order dated 29.08.2013, under Order 26 rule 9 of CPC, stands unimplemented to this date. It is more than six years. For whatever reasons, justified or unjustified, the advocate commissioner could not execute the warrant entrusted to him. The petitioner maintains that her father's ill health came in the way. The Trust contends otherwise. We may, for the present, disregard the Trust's allegations that the petitioner and her husband forcefully obstructed the advocate commissioner.

10. In my view, the trial Court has, in fact, not paid much attention to the Trust's allegations. Indisputably, the trial Court's order, dated 29.08.2013, appointing an advocate-commissioner remained un-implemented for over five years. The Trust repeatedly tried—through Ex. 89 and 94—to get the same order one more time. Both the applications met the fate they deserved: dismissal. For the trial Court could not have appointed a second advocate-commissioner without its recalling the first order. So, eventually, the Trust applied under Ex.98 seeking the following relief:

A) Passing an appropriate order for completing the Court Commissioner work as per Ex. 30 and give its report within specified time.

B) Passing an order to provide police protection including lady constable to enable to carry out and complete the Court Commissioner Work along with the representatives of the Trust for inspection and measuring area in possession of the Defendant.

C) Passing an order that Defendants daughter Mrs Gauri Gumaste, Son in law Shri Rahul Mohanrao Gumaste, Defendant's family members, servants, agents may please be restrained from obstructing the Court Commissioner work.

D) Any other suitable order in the interest of justice.

11. Then the Trial Court passed the impugned order, with elaborate reasoning. I reckon Exh. 98 application has only wanted the trial Court to implement or execute its previous order. Nothing more. An order remaining un-implemented serves no purpose. It has not been recalled, nor has it been set aside at higher echelons; so its validity remained unaffected. Then perhaps invoking Section 151 of CPC, the Trust wanted that order implemented within a time frame.

12. The trial Court has exercised its inherent discretionary powers and passed the order impugned. A direction to implement or execute an order in force, I reckon, does not amount to its review. On the contrary, it amounts its enforcement. True, the trial Court has granted police protection as well. Perhaps, it has been convinced by the Trust that there was an obstruction on an earlier occasion. Even otherwise, an order remaining un-implemented for close to six years tells its own tale. And that must have made the trial Court wary, and it wanted to enforce its orders, for Rule of Law brooks no trifling with the solemn judicial directives. Even an erroneous one commands compliance unless it is set aside at higher judicial

echelons.

13. At any rate, if the petitioner has no intention to obstruct the advocate-commissioner—who is, in fact, the court’s representative—from executing the warrant, the condition of the police protection is of no consequences.

14. Now, I will address the petitioner’s second plea: the impugned order forecloses the petitioner’s option to challenge the trial Court’s first order, dated 29.08.2013. When the first order was passed, the petitioner was not a party to the suit. It was passed against the original tenant, the petitioner’s father. Later he died. So the petitioner has come on record as the defendant-tenant’s legal representative—a representative, indeed. Once a party to the judicial proceedings dies, and if the cause of action survives for or against that dead person, his or her legal heirs may be brought on record. Thus brought on record, the legal representative can take only those pleas and defences that would have been available to the deceased person. For the legal representative have no independent right or liability of his own. That is, the scope of the litigation does not get expanded merely because somebody else has supplanted the deceased person.

15. Here, the petitioner’s father, the original defendant-tenant, suffered the order, dated 29.08.2013. During his lifetime, he did not challenge it. If at all the petitioner could challenge that order, she could do so only as her father’s representative, not on her own. That apart, even when the Trust

had applied under Exh.98 and invited the impugned order, the petitioner expressed no intention to question the first order, dated 29.08.2013. Not even did she plead that or reserve her right to challenge the order. Viewed from any perspective, the petitioner's contention that she must be allowed to contest the first order fails judicial scrutiny.

Under these circumstances, I find this Writ petition meritless and dismiss with a cost of Rs.10,000/-, to be paid to the respondent Trust. If the petitioner fails to pay the amount in three months, the trial Court will strike the petitioner's defence off the record.

[DAMA SESHADRI NAIDU, J.]