

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

WRIT PETITION NO. 8828 OF 2004

Damji Devshi Gogari & Anr. ...Petitioners
Versus
Fazal Abbas Ghulam Hussain & Anr. ...Respondents

**WITH
WRIT PETITION NO. 8982 OF 2004**

Fasal Abbas Ghulam Hussain Rajkotwala ...Petitioners
Versus
Shantilal Purshottam Patel & Ors. ...Respondents

P. M. Shah a/w Dishang Shah-Advocate for the petitioner in WP 8828 of 2004 & Respondent in WP 8982 of 2004.
Nawaz Haindaday I/b M. A. Haindaday – Advocate for the respondent in WP No. 8828 of 2004 and Petitioner in WP 8982 of 2004.

CORAM : DAMA SESHADRI NAIDU, J.

DATE : 3rd JULY 2019.

P.C. :

There are two Writ petitions: Writ Petition No. 8828 of 2004 and Writ Petition No. 8982 of 2004. The former was filed by the landlord and the latter by the tenant. Both have assailed the judgment of the Small Cause Court's Appellate Bench, Mumbai.

2. To outline the facts, I may note that Shantilal P. Patel and Dayabhai Shantilal Patel are the co-owners of the leased property. It is a “cupboard” in a shop. And it is part of, as it ought to be, a larger property. True, in the land-starved Mumbai, if anything answers the description of the property, it is subjected to tenancy—a cupboard providing no exception.

3. The co-owners filed ejectment Suit No. 920 E of 1965 in the Small Cause Court, Mumbai, against one Fazal Abbas Ghulam Hussain (Rajkowala). One of these two owners, that is Shantilal Patel, is the second respondent in Writ Petition No. 8828 of 2004. In March 1969, both the landlords and Rajkotwala compromised and filed consent terms before the trial Court. Accordingly, the trial Court disposed of the ejectment Suit No. 920 E of 1965, through Exhibit-A of the judgment.

4. One of the compromise terms allows Rajkotwala enjoyment of the cupboard to continue. It should be until 1979 subject to his paying the rent. Then, Rajkotwala, as undertaken, must vacate the property and handover the possession to the owners.

5. But in September 1973, the original landlords, the two co-owners, sold the building, including the cupboard, to Gordhandas *alias* Gaba. It seems it was an agreement assigning and transferring the rights. Then in August 1978, Govardhandas sold the building and assigned all the rights, title, interest, and claim to

Damji Devshi Gogari and his wife. The legality of these conveyances does not surface here. They were accepted and acted upon.

6. It appears the subsequent purchasers, Damji Devshi Gogari and his wife, were unaware of the terms of compromise the original landlords entered into with Rajkotwala. So Rajkotwala continued to carry on his business in the cupboard, attached to the shop premises beyond 1979. In June 1987, the new owners issued a notice under Section 12(2) of the Bombay Rents, Hotel, and Lodging House Rates Control Act, 1947. They claimed arrears of rent from Rajkotwala. After that, they also came to know about the consent decree and Rajkotwala's obligation to vacate the property by 1979.

7. Nevertheless, in the same month Rajkotwala replied to the notice. And then, he filed Declaratory Suit No. 4121 of 1987. Rajkotwala has sought these reliefs in the suit:

(a) It may be declared that the Plaintiff is a monthly tenant of the suit premises ad measuring about 3' X 6' is Shop No. 1, Shivaji Nagar Co-op. Hsg. Society, Delisle Road, Bombay 400013;

(b) By an order of a permanent injunction the defendant Nos. 2 and 3 be restrained from dispossessing the plaintiff from the aforesaid suit premises;

(c) By an order of temporary injunction, the defendant Nos. 2 and 3 be restrained during

pendency of the suit from executing the decree in 920/E/65;

(d) the Plaintiff may be directed to deposit arrears of rent at the rate of Rs. 60/- per month commencing from year 1987 and the accruing rent in the Court;

(e) Other just and convenient reliefs may be granted;

8. In December 2002, the Trial Court dismissed the suit. Aggrieved Rajkotwala filed Appeal No. 380 of 2003, before the Appellate Bench of the Small Cause Court, Mumbai. Eventually, the Appellate Bench concurred with the trial Court on all issues but one. Thus, the Appellate Bench ruled positively on the maintainability of Rajkotwala's suit but rejected his assertion that he is a tenant and that he should not be evicted. It has also held that the compromise decree is inexecutable. Questioning the Appellant Bench's order, Rajkotwala filed Writ petition No. 8982 of 2004. On the other hand, the owners filed Writ Petition No. 8828 of 2004. The owners' writ petition concerns the Appellate Bench's finding that compromise decree, dated 03.07.2004, could not be executed.

Submissions:

Petitioner in WP No.8828 of 2004 (the Owners):

9. Shri P. M. Shah, the learned counsel for the petitioner in Writ Petition No. 8828 of 2004, has submitted that the cupboard in which Rajkotwala has been carrying on the business has been

very much part and parcel of the leased premises. The owners purchased the entire property. Whatever alleged declaration one of the original landlords issued in Rajkotwala's favour has no sanctity. It was issued, if ever, much after his parting with the property. On this count, Shri Shah has raised two objections: (1) any declaration by one of the two co-owners would be inchoate and remains unenforceable. (2) Once both the co-owners have ceased to have any subsisting interest in the property, their alleged dealings with the property carry no legal force. According to him, the Appellate Bench has rightly denied any relief to Rajkotwala on his alleged right to continue as a tenant.

10. Shri Shah, nevertheless, submits that the Appellate Bench of the Small Cause Court has traveled beyond the scope of the litigation and collaterally sought to nullify a decree which the original landlords secured in 1969.

11. In this context, Shri Shah submits that Section 47 of Civil Procedure Code is comprehensive and lets the party concerned to agitate all the issues relating to execution. According to him, it bars any other proceeding, including suits on that count. Therefore, he urges this Court to allow the owners' writ petition to the extent the Appellate Bench has held that they could not execute the decree secured by their predecessors-in-interest.

Respondent Rajkotwala (the Tenant)

12. *Per contra*, Shri Nawar Haindaday, the learned counsel

for the respondent tenant, submits that what has been leased out to Rajkotwala is “premises” under the Bombay Rents, Hotel, and Lodging House Rates Control Act, 1947. He has also submitted that Rajkotwala continued to be a tenant much after 1979 when he was supposed to have handed over the possession. In that sense, he submits that the decree the original landlord secured was never put to execution. And it has remained un-enforced. He emphasises on Exhibit B declaration, dt.24.08.1978, said to have been issued by one of the original co-owner—Shantilal Patel.

13. Shantila Patel has allegedly declared and recognized Rajkotwala as the tenant and, in fact, accepted rent from him. So the decree he secured along with the other co-owner, Shri Haindaday argues, stood abandoned or disregarded. If at all the present landlords wanted to evict Rajkotwala, they should initiate fresh eviction proceedings. In other words, they could not rely on the alleged consent decree, which the original owners secured in 1969, but on which they did not act.

14. Drawing my attention to the Appellate Bench’s findings, Shri Haindaday has submitted that it has rightly held that the subsequent purchasers have not invoked Order 21 Rule 16 to come on record as the successors of the original decree holders, to execute the decree. Then, the owners’ counsel pointed out Exhibit-C order, dated 27.10.1989. To dispute its legal efficacy, Rajkotwala’s counsel has, however, asserted that the tenant had

never been notified about those proceedings. So Ext-C does not bind the tenant. Eventually, Shri Haindaday has urged the Court to allow the tenant's Writ Petition and dismiss the landlords'.

15. Heard Shri P. M. Shah, the learned counsel for the petitioner in Writ Petition No. 8828 of 2004 and respondent in Writ Petitioner No. 8982 of 2004 (for the owners); and Shri Nawaz Haindaday, the learned counsel for the respondent in Writ Petition No. 8828 of 2004 and Petitioner in Writ Petition No. 8982 of 2004 (for the tenant).

Discussion:

Has the Tenant legitimized his possession, and is he immune from Eviction?

16. I reckon the dispute lies in the narrow compass, and the facts are not disputed. The leased property is a cupboard projecting on to the street. The original owners allowed Rajkotwala to occupy that portion in a building and carry on his business of photo frames. At one stage, they wanted Rajkotwala to vacate, but he did not. Then, they filed ejectment Suit No. 920 E of 1965. Later, both the parties compromised. The Trial Court disposed of the suit, recording the compromise terms.

17. One of the consent terms, as recorded by the trial Court, is that if the respondent would go on paying Rs.51/- as monthly compensation, he could continue his tenancy till March 1979. If he defaulted on paying the rent by two months, he could be

ejected. Besides that, the decree orders Rajkotwala to vacate the property by April 1979 and hand over the possession to the landlords. One of the terms of compromise reads:

“However, in case the respondent goes on paying Rs.51/- as monthly compensation on or before 15th February succeeding month, till the month of March 1979, then the order for possession shall not be executed till 1st April 1979 unless the respondent commits more than two defaults in payment of the compensation as mentioned above.

The respondent has given an undertaking to the Court that he will vacate the premises and shall put anyone else in possession at the time of giving possession to the applicant.”

18. But before 1979, the original landlords sold the property or assigned their rights over the property to one Govardhandas Alias Gaba. It was in September 1973. Five years later, Govardhandas sold the shop premises, including the cupboard, to the present owners. This transfer, too, was before 1979.

19. It has come on record that the present owners were unaware of the compromise decree between Rajkotwala and the original landlords. Perhaps, they treated him as an occupier of the property in default of rents. So they issued a legal notice in June 1987, but Rajkotwala replied rejecting their demands. Then, he filed a suit for declaration that he is the legitimate tenant. It was dismissed. Aggrieved, he filed an intra-court appeal. In the appeal, it was a mixed bag. Rajkotwala did not get his declaration that he could continue as a tenant and that he should not be evicted. But the Appellant Bench held that the trial Judge has ignored Order 21

Rule 16 of C.P.C., which deals with how a transferred decree should be executed. Then, it observed that “even though [the present landlords] became owners of the suit premises,” they could not execute the consent decree passed much before their purchasing the property. For the decree has not been assigned to them under Order 21, Rule 16 of CPC.

20. About the tenant's status, I may note that the original landlords sold the property in October 1973 to one Govardhandas. That purchaser, in turn, sold it to the present owners in 1978. Rajkotwala wanted to legitimize his possession over the property beyond the period mentioned in the consent terms. So he claims to have secured a “declaration of tenancy” from one of the two original co-owners that secured the consent decree.

21. First, the alleged declaration of tenancy was executed by only one of the two tenants. It is inchoate. Second, by the time that co-owner executed the so-called declaration, he had no subsisting interest in the property. And, indeed, his lack of title to the property or his disqualification to execute that alleged declaration is not in question. As rightly contended by the owners, even both the original co-owners could not have conferred any right on Rajkotwala beyond the compromise terms—and after selling away the property, at that. The alleged declaration is an exercise in futility. That co-owner accepting rent after selling away the property, too, does not improve Rajkotwala’s case. So, to the

extent of the Appellant Bench's refusing to declare that Rajkotwala could continue as a tenant needs no interference.

Executability of the Decree:

22. On the question of enforceability and execution of the consent decree, I may note that the present owners seem to have applied under Order 21, Rule 16 of CPC and secured an order on 27.10.1989. Thus, ostensibly they have the decree transferred to their name. But Rajkotwala objects. He contends that he has never been notified about the proceedings the owners took out under Order 21, Rule 16 of CPC. Indeed, the owners have no proof that Rajkotwala, the judgment debtor, was heard before the executing court or the trial Court passed the order on 27.10.1989.

23. We may examine Order 21, Rule 16 of CPC, which reads:

“16. Application for execution by transferee of decree.— Where a decree or if a decree has been passed jointly in favour of two or more persons the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it, or to the Court to which it has been sent for execution, and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder:

Provided that, where the decree or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution:

Provided further that where the transferee Court holds the assignment provided, it shall forthwith communicate its decision in that behalf to the Court which passed the decree, and the latter Court shall make an entry in the Register of Suits indicating that the assignment has been held to be proved:

Provided also that, where the decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others.

Explanation I.—In an application under this rule, any payment of money made under a decree, or any adjustment in whole or in part of the decree arrived at to the satisfaction of the decree-holder, which payment or adjustment has not been certified or recorded by the Court under Rule 2 of this order, shall not be recognised by the Court entertaining the application.

Explanation II.—Nothing in this rule shall affect the provisions of Section 146, and a transferee of rights in the property, which is the subject-matter of the suit, may apply for execution of the decree without a separate assignment of the decree as required by this rule.” (1-10-1983).

(italics supplied)

24. I reckon, going by the record, the owners secured the order, dt.27.10.1989, albeit under Order 21, Rule 16 of CPC without notice to the judgment debtor—Rajkotwala. The order falls foul of the proviso appended to Rule 16. So, the order, dated 27.10.1989, does not bind the respondent.

As a result, I hold that the owners, as the subsequent purchasers of the property, may take fresh steps under Order 21, Rule 16 to have the consent decree transferred to them. It must be

with notice to Rajkotwala as the provision dictates. I must acknowledge that Rajkotwala clearly undertook decades ago that he would vacate the property and put “anyone else” in the property by April 1979. That was forty years ago. Besides, the entire period the parties—the present owners and Rajkotwala—spent litigating should be excluded from reckoning the limitation for enforcing or executing the decree. That is, under Order 21, Rule 16, the litigation period must be excluded. That said, I also clarify, in the proceedings the owners may take under Order 21, Rule 16 of CPC, Rajkotwala is free to take all pleas he is legally permitted to take, save the question of limitation.

[DAMA SESHADRI NAIDU, J.]