

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

WRIT PETITION NO. 11022 OF 2012

Mrs.Fehmida Usman Gani Shaikh ...Petitioner

Versus

Mr Maqbool Munaf Gagan ...Respondent

A. N. Nasikwalla – Advocate for the petitioner.

Dr. Abhinav Chandrachud I/b Ms. J. P. Thakkar – Advocate for
the Respondent 1.

CORAM : DAMA SESHADRI NAIDU, J.

DATE : 28th JUNE 2019.

JUDGMENT

Introduction:

A landlord files a suit for eviction, compromises with the defendants, and secures a consent decree. Later he complains that the defendants have violated the consent terms. So he files an execution petition, gets them evicted, and takes possession—all in one day. The next day, a third party comes to court, claiming to be the original tenant. But before her application gets disposed of, the landlord inducts another person as a tenant. The court, then, finds the decree collusive and allows the

original tenant to recover possession.

2. Now the original tenant and the newly inducted tenant fight it out. Of course, the landlord remains distant and detached—callously.

3. To decide who should possess the property, I must address these issues:

The Questions:

(a) Does the order the original tenant has secured against the landlord bind the subsequent tenant who is entirely unaware of the previous court proceedings?

(b) Does the doctrine of *lis pendens* apply to the post-decree proceedings?

(c) Can an application under Order XXI, Rule 97 or 99 be treated as a suit for applying the *lis pendens* doctrine?

(d) To determine the beginning of a *lis*, what should amount to institution of a suit?

(e) Is the subsequent tenant a *lis pendens* inductee?

(f) Can the subsequent tenant, in this case, resist the original tenant's efforts to regain possession?

Facts:

4. To the machinations of the landlord, it seems two victims fell: one, a dispossessed tenant and the other, a deceived

tenant. They have donned the mantle of tenancy one after another—and the latter without the knowledge of the former. Now, both are before this Court to mitigate their pain and salvage whatever they could. Who should have the succour?

5. Mohammed Usman Shaikh Umar, the landlord, filed RAE Suit No. 89/149 of 2008, before the Small Cause Court, Mumbai, to have his alleged tenants evicted. On consented terms, the Court decreed the Suit in December 2009. But the landlord asserted that the tenants had not honoured those terms: they had not vacated the leased property. Then, in January 2010 the landlord, post haste, laid execution, served notice on the judgment debtors, and the same day he completed the eviction of the alleged tenants, as well.

6. In fact, the very next day, Fehmida Usman Gani Shaikh (Fehmida), claiming to be the original tenant, filed Miscellaneous Application No. 32 of 2010, under order XXI, Rules 99, 100, and 101 of CPC. Of course, there remains a dispute about precisely when she filed the Misc. Application. I will address it later. At any rate, eventually through an order,

dt.16.03.2012, the Trial Court allowed the Misc. Application. It allowed Fehmida to recover possession of the leased property from the landlord.

7. Later, on 22.03.2012, when Fehmida secured a warrant of possession, on the same day Makhbul Munaf Gangan (Gangan) filed a Merji Application No. 250 of 2012, under Order XXI, Rule 97 of CPC. Gangan claimed that once the previous tenants had been evicted, the landlord inducted him as the tenant. But in January 2012 the Trial Court disallowed the application. In fact, it has held that the Merji Application is not maintainable. Aggrieved, Gagan filed Misc. Appeal No.124 of 2012 before the Appellate Bench of the Small Cause Court. It allowed the appeal on 5.12.2012; that is, it has held that Gangan's application under Order XXI, Rules 97 is maintainable, and remanded the matter. Then it was Fehmida's turn to file this Writ Petition.

Petitioner's:

8. In this factual background, Shri A. N. Nasikwalla, the learned counsel for Fehmida, has submitted that the landlord set

up fictitious tenants and secured a fraudulent decree—behind Fehimda's back. According to him, the moment the landlord abused the Court's process and dispossessed Fehmida, she filed Misc. Application No. 32 of 2010 and secured an order to have her possession restored. But before she could have that order executed, Gangan came up with an application. In this context, Shri Nasikwalla contends that the Trial Court has rightly held that Gangan's Marji Application was not maintainable.

9. Besides his advancing arguments on various other aspects, Shri Nasikwalla has strenuously contended that Gangan has no independent right to be a tenant because the landlord had suffered an order on 16.03.2012. And that order has attained finality, too. He, therefore, urges that the Appellant Bench's order suffers from incurable legal infirmities and needs to be set aside.

Respondent's:

10. Per contra, Shri Abhinav Chandrachud, the learned counsel for the respondent, instructed by Adv. Smt. J. P. Thakkar, submits that both Fehmida and Gangan are, perhaps,

the victims of the landlord's fraud. But Gangan, according to him, has better credentials to don the title of a tenant and to remain in possession.

11. To elaborate, Shri Chandrachud has taken me through the entire record and eventually persuaded me to summon the Records and Proceedings (R&P) of the Small Cause Court, to verify firsthand the chronology of the proceedings post the eviction decree the landlord secured. He did succeed. On its production, both the parties perused the record, photocopied the relevant records, and resumed their arguments.

12. Shri Chandrachud has submitted that though Fehmida claims to have filed the Misc. Application on 14.01.2010, the E-Court Website reflects the date of that application as 16.02.2010. According to him, the Small Cause Court registered the Misc. Application only on 16.02.2010. But Gangan signed an agreement of lease with the landlord on 20.01.2010; that is, before 16.02.1010.

13. After drawing my attention to Order XXI, Rules 97 and 100 of CPC., Shri Chandrachud has supplied a supposition.

According to him, under the proviso to Rule 100 of Order XXI, the Court might treat Fehmida's Misc. Application as the foundation for invoking the doctrine of *lis pendens*. But Gangan, by then, secured his lease, became a tenant, and even gained possession. The order Fehmida secured on 16.03.2012 would not affect Gangan's tenancy in any manner.

14. In this context, Shri Chandrachud has also taken me to Section 26 of CPC, besides the definitional nuances of Section 2 (10) of CPC and Section 3 of Limitation Act. Both define what amounts to "institution of proceedings". According to him, the institution of a proceeding has its own shades of meaning. Under Section 3 of the Limitation Act, it may be mere filing, but under Section 26 of CPC, it is, he stresses, much more than that. To hammer home his contention, he has taken me to the Civil Manual, especially Rules 7, 9, and 10 under its Chapter II.

15. With a specific reference to the heading or description of Chapter II of Civil Manual, Shri Chandrachud has submitted that "institution" of a suit or proceeding encompasses presentation, examination, and registration of a plaint.

16. Eventually, Shri Chandrachud has taken me to various stages of the proceedings—especially, what seem to be the contradictory notings on the Misc. Application, which constantly, according to him, reflected 16.10.2010 as the date of filing, though on its face the document also bears another date, that is 14.1.2010.

17. Heard Shri A. N. Nasikwalla, the learned counsel for the petitioner, and Shri Chandrachud, the learned counsel for the respondent, besides perusing the record.

Reasoning:

18. The devil is in detail; thus goes the idiom. The devil of devious devises, if any, in this case, lies in the chronological detail. In 2008 the landlord filed RAE Suit No. 89/149 of 2008, to have his alleged tenants evicted. The dispute compromised, he got the suit decreed on 01.12.2009. In less than a fortnight—perhaps no sooner than he secured a certified copy of the judgment—he complained about the tenants' not honouring the consent terms: handing over the vacant possession. So he laid execution on 13.01.2010. The same day, he took out a notice to

the judgment debtors, served on them, presumably got them set *ex parte*, took the bailiff to the suit property, evicted the tenants, and secured vacant possession. All in less than eight hours. Jet speed is an understatement.

19. The next day, on 14.01.2010, Fehmida filed Misc. Application No. 32 of 2010, under Order XXI, Rules 99, 100, and 101 of CPC. The landlord contested the case, after his initial evasion to receive the notice. Then, on 16.03.2012, Fehmida succeeded in that application; the Trial Court allowed her to recover possession from the landlord. For the Trial Court has found her to be the true tenant, and the defendants in the suits mere imposters set up by the landlord. Later, on 22.03.2012, Gangan filed a Merji Application under Order XXI, Rules 97 and 100 of CPC.

Does Order XXI, Rules 97 and 100 Aid the Third-Party Inductee?

20. Fehmida claims she filed the Misc. Application on 14.01.2010. As Gangan contends, the E-Court Website reflects the date of that application as 16.02.2010, that is the date when

the application is said to have been registered. But between 14.01.2010 and 16.02.2010 came 20.01.2010, when Gangan signed an agreement of lease with the landlord. Then, the question is, has Gangan secured his lease pending Fehmida's application under Order XXI, Rule 99, or before that? Let us examine the statutory position.

21. While taking possession of the immovable property on the strength of a decree, often a decree holder or a purchaser from him faces resistance—resistance either from the judgment debtor or a third party. Then, the decree holder or someone tracing his right to him, such as a purchaser in court auction, can invoke Order XXI, Rule 97 to remove this resistance or obstruction. Though the provision speaks of the decree holder and the purchaser, by judicial interpretation it is applied to the third-party objector, too. In that context, the Supreme Court in *Bhanwar Lal v. Satyanarain*¹ has held that the applicant's dispossession from the property in execution is not a condition precedent for him to invoke this provision. Conversely, if a person in possession, unconnected with the eviction

¹ (1995) 1 SCC 6

proceedings, is dispossessed, he should invoke Order XXI, Rule 99 of CPC.

22. Either provision—Rule 97 or Rule 99—invoked, the Executing Court adjudicates under Order XXI, Rule 98, before it orders the removal of the obstruction or restoration of possession. Post-1976 Amendment, the order is treated as a decree under Order XXI, Rule 103, and is appealable. Thus, the procedure prescribed is a complete code in itself. So holds the Supreme Court in *Babulal v. Raj Kumar*².

23. We may also examine Order XXI, Rule 100. As it applies to State of Maharashtra, it assimilates Rule 102 as well. To elaborate, Rule 102 bars a transferee pending litigation from invoking Rules 98 and 100. But on 01.10.1983, the State of Maharashtra deleted Rule 102; instead, it has engrafted the substance, as I see, of that Rule to Rule 100, as a proviso.

24. Rule 100 of Order XXI deals with the order to be passed on all issues arising under Rule 97 or 99: the questions relating to right, title, or interest in the property. In fact, the Executing Court can order the restoration of possession or

² (1996) 3 SCC 154

dismiss the application. The provision to Rule 100 mandates that if the applicant has secured the property from the judgment debtor “after the institution of the suit” in which the decree was passed, the Court must dismiss the application.

25. On 16.03.2012 Fehmida secured an order for repossession. But by then, Gagan was put in possession of the property. In other words, Fehmida’s order for restoration of possession was against the landlord. And the landlord, before he suffered the order, put Gagan in possession of the property. Can we say Gagan’s possession is independent of the eviction proceedings the landlord had initiated? Or, restrictively, can we say it is, at least, independent of the recovery proceedings Fehmida has initiated? The first question includes the second question; but the second question answered, the first question may remain moot or academic. So let us answer the second question first.

Did Gagan Secure the Lease Before Fehmida filed the Misc. Application?

26. True, as Gagan contends, a judgment debtor can be, as Section 2(10) defines, any person against whom a decree or

an order capable of execution is passed. According to him, in Fehmida's Misc. Application, the Small Cause Court passed an order capable of execution against the landlord. And Gangan claims his right through the landlord, so he must be treated as a judgment debtor under Order XXI, Rule 97 of CPC. But that must be only from the date Fehmida filed the application. In other words, from that date onwards, the *lis pendens* principle can be imported. Precisely for that reason, as Gangan would have us, the date of her filing the application assumes importance. It does.

27. To determine the date of Fehmida's application, we may examine what this filing—or as Gangan puts it, institution—of a suit or a proceeding technically means. Section 26 mandates that every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed. And in every plaint, as the 1999 Amendment requires, facts shall be proved by affidavit. Indeed, under Section 26, the presentation of plaint amounts to the institution of the suit unless any other manner is prescribed.

28. But we may wonder whether Section 26 could be roped in for determining when an interlocutory application is filed! Let us bear in mind that Order IV and Order VI of the Code have also been amended. As per Order 4, the plaint shall not be deemed duly instituted unless it complies with the requirements specified in Rules 1 and 2 of Order IV. And Rule 2 of Order IV says that every plaint shall comply with the rules in Order VI or VII as far as they apply.

29. In *Vidyawati Gupta v. Bhakti Hari Nayak*³, the question was whether a suit has been properly instituted. The Supreme Court, in fact, has found the legal view of three Chartered High Courts consistent on this question: that the requirements of Order VI and Order VII of the Code being procedural, any omission in its compliance will not render the plaint invalid. “The defect or omission will not only be curable but will also date back to the presentation of the plaint.” *Vidyawati Gupta* has also held that “the Original Side Rules cannot be interpreted to limit the scope of such reference to only the provisions of the Code as were existing on the date of such incorporation.” The

³ (2006) 2 SCC 777

judgment, then, signs off observing that the rules of procedure are made, as repeatedly held, “to further the cause of justice and not to prove a hindrance thereto.”

30. Of course, Section 3 of the Limitation Act is plainer than Section 26. It addresses the bar of limitation. For the “purposes of [Limitation Act]”, a suit is instituted in an ordinary case, when the plaint is presented to the proper officer. As rightly pointed out by Gangan, this provision is statute specific and needs no elaboration, as it remains inapplicable here.

31. Chapter II of the Civil Manual concerns “Institution of Suits”. It prefaces the Chapter with what it concerns: “Presentation, Examination and Registration etc., of Plaints” Gangan stresses that we should reckon a suit as filed—properly at that—only if it is presented, examined, and registered. In the same breath he reminds the Court that Fehmida’s Misc. Application was registered on 16.02.2010. So it should be treated as “instituted” on that day. Attractive the submission appears, but it fails judicial muster.

32. As I have already noted, Chapter II at the beginning

synoptically suggests what it deals with. We cannot take it as a substantive statutory command mandating, even suggesting, that unless a suitor exhausts all that is mentioned in that Chapter, he would not have his plaint as properly presented. This Chapter comprising 29 rules deals with much more than a mere institution of a suit. As Gangan has focused on Rules 7, 9, and 10, let me examine them.

33. Rule 9 of Chapter II prescribes how a plaint must be presented. Once “it is presented, the date of presentation shall be endorsed thereon, and an acknowledgment thereof shall be given to the party or Advocate presenting it.” Rule 9 deals with what the Registry should do when it examines the plaint under Rule 8.

34. Indeed, Rule 10 assumes some importance. It declares that if the officer examining the plaint finds it to have fulfilled all requirements, he should endorse on the plaint “examined, and ordered to be registered.” If he thinks the plaint should be returned “for amendment” or for presentation to the proper court, or be rejected under Order VII, Rule II, he should refer the

matter to the Judge. After an early examination, the officer must “obtain first orders of the Court on the plaint.”

35. First, registration of a plaint is not a *sine qua non* for the institution of a suit, but the presentation is. Second, presentation connotes proper presentation. Third, improper presentation is curable, and once the defect is cured, the representation relates back, as *Vidyawati Gupta* has held, to the date of the original presentation. And finally, an interlocutory application is no suit, and the procedural prescription meant for a suit does not affect the interlocutory application.

36. That said, I must add that every interlocutory application does not merely conform to its semantic sense—being just interlocutory. By legal fiction, some are deemed plaints. And an application under Order XXI, Rule 99 has all the trappings of an original proceeding—a suit.

37. At any rate, Order XXI, Rule 101 spells out the nature of the proceedings under Rules 97 and 99, and also employs the legal fiction that “all questions, including questions relating to right, title or interest in the property arising between the parties

must be determined” by, say, the Executing Court. And the Court, for this purpose, is deemed to have jurisdiction to decide all those questions.

38. So I am prepared to treat the application under Order XXI, Rule 97 or 99 attracting the rules that relate to the institution of a “suit.” Yet, with *Vidyawati Gupta*’s holding—that the defects in the presentation are curable and the representation relates back to the date of original filing—guiding the field, Gangan’s efforts could bear no fruit.

39. Now, let us examine what the record reflects, for we have the R & P for perusal. Fehmida filed Misc. Application No.32 of 2010 on 14.01.2010. The Superintendent, Court of Small Causes, Mumbai, acknowledged the presentation and presented the application before the learned Judge on the same day. Then, on the left margin of the application, the Judge endorsed in hand, as both the counsel could decipher, thus:

“Notice be registered. Issue notice to other side to appear on or before 25.01.2010, at 2.30 pm. SS allowed. Sd/-, dt.14.01.2010.”

40. As the notice was ordered on 14.01.2010, the bailiff

seems to have tried to serve the summons or notice. He failed. Then, he filed a “Bailiff Report”. It reveals that, on 18.10.2010 at about 3.30 pm., the Bailiff went to serve the notice. He called out for the landlord, but his wife came out. When he told the purpose of his visit, she told him the landlord had just come back and slept. When the Bailiff requested her to wake the landlord up, she did not pay heed. Then, the Bailiff asked her to accept the notice. She refused. It is one of a few attempts, at that.

41. But on 12th March 2010 the landlord filed his defense; it is a series of denials. Nothing else. He has not even informed the court that he had inducted some other tenant by then.

42. I could see on record another document; that is the typed vakalatnama, signed by Fehmida. It has an endorsement: “filed, 16.02.2010.” The vakalatnama also has another endorsement: “I have no objection to tak[ing] this vakalatnama on file. Sd/- G. M. Zaveri, dt.9.2.2010.” On the same day, one of the respondents, Yunus Inayat Shaikh, too, filed vakalatnama. Had the Misc. Application been formally registered and, thereby,

instituted on 16.02.2010, one of the respondents would not have filed vakalatnama on that day. For, presumably, by then, he had been notified.

43. Besides, as the postal acknowledgments placed in the R&P reveal, most respondents were served in the first week of February 2010. So I am constrained to hold that the E-Court Website's record that the Misc. Application was registered on 16.02.2010 does not materially affect the fact that Fehmida applied on 14.01.2010, on the same day the Court numbered the application, and issued a notice to the other side. Viewed from any perspective, this must amount to proper presentation or institution of the application, for the Judge applied his mind and ordered notice. Before that step, the application was numbered, too. Pithily put, even before Gangan could enter into a lease agreement, the landlord had a deemed service of notice because on 18.01.2010 he refused to take notice from the Court's Bailiff.

So it is time I answered the questions I set out above.

The Answers:

(a) Does the order the original tenant has secured against the landlord bind the subsequent tenant who is entirely unaware of the previous court proceedings?

A: Yes, it does. The subsequent tenant, a victim he may have been, must yield to the previous tenant, whose rights remain unaffected by the landlord's sharp tactics.

(b) Does the doctrine of *lis pendens* apply to the post-decree proceedings?

A: Yet, it does. Even the execution proceedings relate back.

(c) Can an application under Order XXI, Rule 97 or 99 be treated as a suit for applying the *lis pendens* doctrine?

A: Yes. Because of the legal fiction employed, they are deemed original proceedings.

(d) To determine the beginning of a *lis*, what should amount to institution of a suit?

A: Section 26, read with Order IV of CPC and Chapter II of Civil Code, governs the institution the suit. Once the presentation of the plaint is defective, but the defect gets cured in the course of time, the presentation relates back to the original date of filing.

(e) Is the subsequent tenant a *lis pendens* inductee?

A: Yes.

(f) Can the subsequent tenant, in this case, resist the original tenant's efforts to regain possession?

A: No.

Result:

The Writ Petition is allowed. As a result, the impugned order, dt. 05.10.2012, of the Appellate Bench of the Court of Small Causes, Mumbai, is set aside. Thus, the Merji Application No. 250 of 2012 stands dismissed.

[DAMA SESHADRI NAIDU, J.]