IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.750 of 2018
IN
EXECUTION APPLICATION NO.1499 OF 2017
IN
APPEAL NO.733 OF 1997
IN
SUIT NO.869 OF 1975

2(a) Mana F. Kagalwala & Ors. ...Applicants

In the matter between
1.Shirin Nurruddin & Ors. ...Plaintiffs
vs.
1.Navjivan Chit Fund Pvt.Ltd & Anr. ...Defendants

Mr.Sandeep Parikh with M.S.Shah i/b. Shantilal & co., for Applicants/Orig.Plaintiffs.

Mr.Ibrahim Merchant, for the Defendants.

CORAM : G.S. KULKARNI, J.

DATE : 23 January 2020

P.C.:

1. This is a Chamber Summons filed the Applicants-decree holders in execution praying for the following reliefs:-

> "(a) That this Hon'ble Court be pleae to declare that the Appellant/Org.Defendant or who so ever found in possession of the 1st floor admeasuring about 1177 sq.ft. And balcony attached thereto admeasuring about 317 sq.ft. In the building Nuruddin Chamber situated on plot no.37-E Elphinstone Estate Scheme Broach Street, Lakhand Jatha New Masjid Station, Mumbai 400009, have no right title or interest in the said premises and vacant and peaceful possession be handed over to the Plaintiffs.
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> (b)(i) that Bailiff attached to the Sheriff of Mumbai be directed to remove said Mr.Ramesh Gupta or whosoever found in possession of 1st floor admeasuring about 1177 sq.ft and balcony attached thereto admeasuring about 317 sq.ft in the building Nuruddin Chamber situated on plot no.37-E Elphinstone Estate

> Scheme Broach Street, Lakhand Jatha New Masjid Station, Mumbai 400 009, of the premises or if resisted Bailiff is directed to remove the said person by force with the help of Police of nearby Police Station.
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> (ii) if found the premises locked then brake the lock open and remove the things found inside and handover vacant possession to the Plaintiffs."

2. Heard Mr.Parikh, learned Counsel for the applicants-decreeholders and Mr.Merchant, learned Counsel for the defendants/judgment debtors.

3. Suit no.869 of 1975 was decreed by this Court on 7 May 1997 in terms of prayer clause (a), (b) and (c) of the plaint interalia directing the defendants/judgment debtors to deliver to the applicant/plaintiff quiet, vacant and peaceful possession of the suit property with further directions to pay the applicants/plaintiffs, damages and compensation for the wrongful and illegal use and occupation of the suit premises from 1 March 1973 to 25 July 1975 alongwith interest at the rate of 12% per annum from the date of filing of the suit till judgment, and thereafter at the rate of 6% per annum till payment, as also future damages and compensation for mesne profits at the rate of Rs.2000/- per month from 26 July 1975 till vacant and peaceful possession of the suit premises was delivered to the plaintiffs.

4. Respondents-judgment debtors being aggrieved by the said judgment and decree had filed Appeal no.733 of 1997, in which a compromise decree was entered between the parties in terms of the consent terms. The consent terms are dated 19 January 2006. In the consent terms, the respondents-judgment debtors accepted and confirmed the decree dated 7 May 1997 passed by the learned Single Judge, in terms of prayer clause (a), (b) and (c) of the suit. However, what was agreed in regard to the respondents/judgment debtors vacating the premises, relevant to the relief as prayed in the present chamber summons, is required to be noted. In paragraphs 4 to 7 of the consent terms the parties agreed as under:-

“4. The Respondents shall not be entitled to execute the decree for eviction in Terms prayer (a) till the 31-12-2016 provided the appellants comply with the following:

(i) the appellants shall pay to the respondents on or before the 30/01/2006 a sum of Rs.9000/- and continue to pay to the respondents on or before the 10^{th} of each succeeding month a sum of Rs.9000/- compensation.

(ii) the said sum shall be inclusive all taxes, levies and cess and other charges of every kind and nature whatsoever imposed by the government or the municipal corporation or any other authority as of 1/1/2006.

(iii) provided, however, if the rate at which such taxes, levies, cess or other charges including electric and water charges are hereafter increased the Appellants shall pay to the respondents their proportionate share

(iv) If the appellants commit any two defaults in payment of the monthly sum of Rs.9000/- as stated in 4(i) & (iii) above on or before the due date or within a grace period of 7 days thereafter the respondents shall be entitled to execute the decree after the 2^{nd} of such default.

5. The Appellants hereby declare that the appellants are in occupation and possession of the suit premises along with the following firms / companies partners, proprietors, directors of which are family members of the directors of the appellant company:

1) Navjivan Chit Fund Pvt.Ltd.
- **i) Ramesh Gupta**
- ii) Balraj Gupta
- iii) Jugal Gupta are the Directors of the said company.

2) M/s.Syndicate Finance Corporation
- i) Ramesh Gupta
- ii) Balraj Gupta
- iii) Jugal Gupta are the Partners of the said company.

6. The Appellants through their the Directors/Partners undertake to this Hon’ble Court that they will not create any third party right in suit premises or part with possession of the suit premises to any third party.

7. The Appellants through their Directors/ Partners/ Proprietors undertake to (1) to pay the compensation in time as agreed in 4(i) & (iii), (2) **<u>to not create any third party right or</u>** part with possession of suit premises or any part thereof, (3) **<u>and to hand over the quiet, vacant and peaceful possession of suit</u>**

premises without execution of decree on the expiry of on or before 1/01/2017.”

5. To note the effect of the above consent terms, it is quite clear that the parties agreed that the rights of the applicants/plaintiffs to execute the decree would arise after 31 December 2016 and the judgment debtors complying the terms and conditions as set out in paragraph 4 as agreed between the parties. In paragraph 5 the respondents/judgment debtors declared that they are in occupation of the suit premises through their firms/companies, partners, proprietors, directors. In respect of defendant no.1-Navjivan Chit Fund Pvt.Ltd., the name of Ramesh Gupta has also been mentioned in Clause 5 of the consent terms. It is material to note that in paragraph 6 the Directors/partners of defendant no.1-Navjivan Chit Fund Pvt.Ltd. have given undertakings to the Court that they will not create any third party rights in the suit premises or part with possession of the suit premises, to any third party. In Paragraph 7 they have agreed that they would hand over the quiet, vacant and peaceful possession of the suit premises without execution of decree on the expiry on or before 1 January 2017. Hence, the obligation on the part of the judgment debtors was to hand over quiet, vacant and peaceful possession immediately after 31 December 2016.

6. This Court by an order dated 19 January 2006 (R.M.Lodha and Anoop V.Mohta, JJ., as their Lordships then were) disposed of the said appeal in terms of the consent terms, accepting the undertakings of the respondents/judgment debtors as contained in paragraph 7 of the consent terms. The relevant extract of the said order of the Division Bench reads as under:-

> “3. The appeal is disposed of in terms of consent terms. The undertaking given by the appellants in paragraph 7 of the consent terms is accepted.”

7. It was thus expected that on 1 January 2017 the respondents/judgment debtors would handover possession of the premises in question to the applicants/plaintiffs. However, they did not do so. The judgment debtors did not honour the decree and the undertaking by vacating the premises. In fact it

is quite intriguing to note the method of the judgment debtors adopted to defeat the consent decree. The judgment debtors now approached the Division Bench by filing a Notice of Motion no.44 of 2017 in the disposed of appeal of the year 2006 (supra) praying for variety of reliefs which were all directed to achieve a result, so that the respondent-judgment debtors are not required to vacate the premises in question. The Division Bench by its judgment and order dated 10 July 2018 rejected the said notice of motion. The notice of motion came to be dismissed observing that this was a classic case wherein the respondents/ judgment debtors were openly defying and were abusing the process of law, by taking a position contrary to the consent terms. The Division Bench observed that the plea of the respondents/judgment debtors was highly dishonest and intended only to defeat the decree. Curiously the plea of the judgment debtors in the said notice of motion was that the suit (which came to be decreed and the decree which was confirmed by them against the respondents/judgment debtors in appeal) was itself not maintainable in view of the provisions of Section 5(8) and Section 6(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. It was contended that the Court hence had no jurisdiction to entertain the suit. The Division Bench rejected these contentions of the judgment debtors, observing that in the judgment of the learned Single Judge dated 7 May 1997 (which was then in appeal before the Division Bench) this issue on jurisdiction was specifically answered against the judgment debtors and it was held that the Court had jurisdiction. The judgment debtors/defendants had accepted the said finding and thereafter in appeal also took a position before the Division Bench that the decree passed by the learned Single Judge be confirmed and accordingly entered the consent terms before the Division Bench. The observations of the Division Bench in the order dated 10th July 2018 are required to be noted and more particularly in view of the stand taken by the respondents/judgment debtors in the present proceedings and in my opinion which aggravates their dishonesty, The Appeal Court in paragraphs 15, 16 and 18 observed thus:

> "15. By accepting the judgment of the learned single Judge decreeing the suit and postponing the execution of the decree for

a period of almost 20 years and now, after more than a year of the decree becoming executable, the applicants now intend to defy the decree and retain possession of the suit premises by filing the present notice of motion raising a specious issue that the decree itself needs to be set aside, as there was no adjudication by the Division Bench on the jurisdiction when the Division Bench passed the order on 19th January 2006 disposing of the appeal in terms of consent terms. The applicants cannot approbate and reprobate in the same breath.

16. To our mind, the plea as urged on behalf of the applicants is thoroughly untenable as also dishonest to say the least. As noted above, this is not a case where the learned single Judge has proceeded to adjudicate the suit oblivious of the jurisdiction of the court to adjudicate the suit. The learned single Judge not only had framed the issue as to jurisdiction but also adjudicated on the same and held that the Bombay Rent Act was not applicable to the premises in question. This adjudication was accepted in-totality by the applicants and further the applicants decided to benefit itself, by extending their possession and occupation of the suit premises up to 31st December 2016, by entering into consent terms filed before the Division Bench on 19th January 2006, in terms of which the appeal was disposed of. Accordingly, the applicants by not vacating the suit premises on or before 31st December 2016 the decree had became executable on 1st January 2017. There is no reason whatsoever as spelt out as to why immediately after the Division Bench passed the order disposing of the appeal in terms of the consent terms or during the long period of the applicants enjoying the suit premises till 31st December 2016, the applicants never dreamt or felt that the consent order as obtained by it was illegal and it be set aside on the ground of the court having no jurisdiction. In reality what the applicants want is a second inning and another chance to reopen the decree having accepted the same and in the circumstances as noted by us. The applicants are under an impression and/or are so given to understand that the orders/decree passed by the court can be reopened at any point of time. There appears to be neither a respect for law or for the orders of the Court, but an absolute audacity to act contrary to law on the part of the applicants. Thus, this is a clear case, where even remotely “the justice” of the matter is not in favour of the applicants. Further the plea as urged in this notice of motion is also not bonafide but thoroughly dishonest. It is systematic modus-operandi adopted by the applicants namely, firstly to accept the decree and then to compromise the appeal by bringing about a mechanism by which the applicants would hold on to the suit premises, for a period up to about 31st December 2016 and then not vacate, and when the decree becomes executable raise a contention that the decree is not executable, asserting that the court lacked jurisdiction. Certainly, this is not a plea of a bonafide litigant, more particularly when the litigant has reaped the benefits of the adjudication.

> 17. We are, not at all, impressed by the submission as urged on behalf of the applicants that in the facts of the present case the well settled position in law that the plea of jurisdiction can be raised at any stage of the proceeding becomes available and for this reason the appeal needs to be re-opened. There can be no two opinions on the said proposition that the plea of jurisdiction can be raised at any stage in given facts. The question is whether the applicants can advance such a plea in the facts of the present case. Having noted the facts, we are certain that the said plea is not available to be raised by the applicants.
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> 18. This is a classic case where the applicants are openly defying and abusing the process of law in not only taking a somersault on the consent orders passed by the Division Bench but also violating the solemn undertaking given to the Division bench and accepted by the Court. The applicants have a very weak notion and understanding of the rule of law and the sanctity of the Court orders, even acting with lack of honesty to the agreement in the consent terms. The process of law cannot be left to be abused in this manner. Such category of litigants are required to be dealt sternly and with iron hands of the law.
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> … … … ..
> 21. As sequel to the above discussion, looked from any angle the notice of motion is a gross abuse of the process of the Court which cannot be simpliciter dismissed. It is accordingly dismissed with costs quantified at Rupees Fifty Thousand to be paid to the respondents within two weeks from today Ordered accordingly."

Also with impunity the direction of the Division Bench imposing cost of Rs.50,000/- to be paid to the applicants/plaintiffs within two weeks of the said order, still remains to be complied.

8. It is informed by the learned Counsel for the respondents/judgment debtors that the above order passed by the Division Bench was challenged before the Supreme Court in a Special Leave to Appeal no. 28754 of 2018 which also came to be rejected on 2 November 2018.

9. In the above circumstances, now the applicants/plaintiffs are again before the Court in the present chamber summons praying for orders that the possession of the suit premises be now forcefully taken over from the respondents/judgment debtors and be handed over to the applicants/plaintiffs

by executing the warrant of possession issued by this Court as noted above.

10. Respondent/Judgment debtors have opposed the above prayers by filing reply affidavit of Mr.Ramesh Gupta who was also one of the signatories to the consent terms and bound by the decree passed by the Court. The plea which is taken in the reply affidavit is not a plea different from what urged before the Division Bench in Notice of Motion no.44 of 2017. This time the plea is the same, however, the jugglery is to contend that the respondent/judgment debtor by virtue of judgment debtors paying Rs.9000/- per month as per the consent terms have now become deemed tenants of the suit premises and considering the provisions of Section 116 of the Transfer of Property Act, the judgment debtors cannot be evicted from the said premises in execution of the consent decree dated 19 January 2006 passed by the Division Bench, in the appeal as noted above.

11. This plea of the judgment debtors to say the least in the facts of the case, apart from being patently untenable is highly mischievous. As seen from the earlier orders, the "defence of tenancy" and the applicability of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 as twice asserted by the judgment debtors has failed, as observed as noted above. It has also attained finality as the Supreme Court also has rejected the Special Leave Petition filed by the respondent/judgment debtors on this count.

12. On the above backdrop in my opinion, the contention of the judgment debtors that they have now, by virtue of the consent terms as were paying Rs.9000/- as compensation (as an interim arrangement), have become tenants, is wholly untenable. This for the reason that payment of Rs.9000/- as compensation was admittedly an interim arrangement as agreed between the parties as set out in Clause 4 of the consent terms. It cannot be said that the plaintiffs/decree holders in any manner intended to create tenancy by virtue of the consent terms, in regard to the premises, in favour of the respondents/judgment debtors. The consent terms are clear and

unambiguous that the judgment debtors were to vacate the premises on or before 31 December 2016, the compensation was an interim arrangement till they vacate the premises. In fact paragraph 7 of the consent terms imposed an obligation on the judgment debtors to give vacant, quiet and peaceful possession without execution of a decree on 1 January 2017. As noted by the Division Bench, the respondents/judgment debtors were in brazen violation of the said order even at the time when the Appeal Court dismissed the Notice of Motion no.44 of 2017 by its order dated 10 July 2018. Also no protection whatsoever was granted by the Division Bench in rejecting the said notice of motion, which was dismissed with cost of Rs.50,000/-.

13. From these circumstances, it clearly appears that the intention of the judgment debtors to reiterate these contentions is nothing but to defeat the decree so as to not hand over the premises to the applicant/decree holders which were supposed to be handed over as on 1 January 2017. It is in fact shocking as to how such plea in total disregard to the orders passed by the Division Bench and as confirmed by the Supreme Court can be taken by the judgment debtors.

14. Today we are in January 2020. For two years without any justification whatsoever and in breach of the undertaking as recorded in orders dated 19 January 2006 passed by this Court, the judgment debtors and more particularly Mr.Ramesh Gupta have retained the possession of the premises intentionally in defiance of the orders passed by this Court. This is also clear from the Bailiff's report which is annexed at "Exhibit C" to the Chamber summons. The Bailiff has recorded as under:-

> " When we reached at the suit premises we met one Mr.Ramesh Gupta, Director of the Appellant No.1. We disclosed him our identity and purpose of our visit and showed him the original Warrant of Possession and requested him to vacate the suit premises in order to obey the order of the Hon'ble High Court, Bombay. The said Mr.Ramesh Gupta flatly refused to vacate the suit suit premises in order to deliver the same to the Respondents/ orig.Plaintiff.

> Then, we affixed duplicate copy of the said Warrant of Possession on the conspicuous part of the suit premises and done beat of drum on the opposite side of the suit premises.”

15. From the above conduct of the respondents/judgment debtors, and more particularly of Mr.Ramesh Gupta, it clearly appears that they have no regard for the orders passed by this Court, and even to the solemn undertaking given to this Court and as accepted by the Division Bench as far as back on 19 January 2006. This conduct cannot go unnoticed. The breach of the undertaking given to the Court is required to be dealt in a manner known to law. The Division Bench was at pains to observe that such category of litigants are required to be dealt sternly and with iron hands of law.

16. In the above circumstances, I have no hesitation but to allow this Chamber Summons in terms of prayer clause (a), (b)(i) and (b)(ii).

17. The Sheriff shall, if necessary, avail police help from the local police station so as to execute the warrant of possession in compliance of this order. Ordered accordingly.

18. Considering the conduct of Mr.Ramesh Gupta as noted above, it is clear that he has acted in breach of the undertaking as given to the Court and recorded in the order of the Division Bench dated 19 January 2006 and that too intentionally. His intention appears to consistently defeat the orders passed by this Court. Accordingly, issue notice to Mr.Ramesh Gupta, returnable on 27 February 2020, to show cause as to why contempt proceedings should not be initiated against him for willfully disobeying the orders dated 19 January 2006 passed by the Division Bench of this Court (R.M.Lodha and Anoop V. Mohta, JJ, as their Lordships then were). Reply to the show cause notice be placed on record before the returnable date. Reply affidavit to the show cause notice, if any, be served on the applicants well in advance.

19. Mr.Ramesh Gupta shall remain present in the Court on the returnable date, failing which his presence would be required to be secured as per law.

20. Accordingly, stand over to 27 February 2020. First On Board.

21. Chamber Summons is accordingly allowed and disposed of, in the above terms.

22. Parties to act on the authenticated copy of this order. Office of Sheriff to act on the authenticated copy of this order.

Prashant V. Rane Digitally signed by Prashant V. Rane Date: 2020.02.05 20:22:19 +0530

[G.S. KULKARNI, J.]