

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CIVIL REVISION APPLICATION NO. 82 OF 2022

1. Smt. Mangala Madhusudan Chandak
Aged 72 years, Occu: Household,
R/o 209, Simran Palace,
Sector 14, Plot No.13, Sanpada,
Navi Mumbai 400 705
2. Smt. Rajkamal Shashikant Khatod, ... Applicants
Age 69 years, Occu: Business & Household
R/o Bilvkunj, prabhat Road,
Lane No.7, Pune

VERSUS

1. Smt. Gulabbai Devichand Gandhi
(Deceased)
2. Shri Mohan Devichand Gandhi,
Age 49 years, Occu: Business,
R/o Dange Galli, Manick Chowk,
Ahmednagar
3. Smt. Maya Dilip Gugale,
Age 57 years, Occu: Household,
r/o c/o Sonali Dresses, Kapad Bajar,
Baramati, District Pune
4. Smt. Sharda Rajendra Bora,
Age 55 years, Occu: Household,
R/o Venus Coop. Hsg. Society,
Near Atlas Capco, 6/14, Dhapoli, Pune
5. Smt. Jyoti Niti Kumar Kataria
Age 53 years, Occu: Household,
R/ LIC Colony, Pound Phata,
Kothrud Road,Pune.

6. Shri Rameshchandra Daulal Soni
Age 59 years, Occu: Lawyer,
R/o 5, New Ram Niwas, Navroji Lane,
Ghatkopar (West), Mumbai
7. Shri Samir Sureshchandra Soni
Age 42 years, Occu: Lawyer,
R/o Adath Bazar, Ahmednagar
8. Mrs. Smita Sunil Tapadia, ... Respondents
Age 58 years, Occu: Household,
R/o Surya Complex, Charwada Road,
GIDC, Wapi (Gujrath)
9. Smt. Swati Sanjay Somani
(Since deceased)

Mr. Anil S. Bajaj, Advocate for the Applicants

Mr. A. M. Gholap, Advocate for respondent Nos. 1 to 5.

CORAM : S. G. MEHARE, J.

DATE : 16th SEPTEMBER, 2022

ORAL ORDER:

1. The present applicants are the sisters of respondent No.6. Respondents Nos. 7, 8 and 9 are the heirs of Sureshchandra Soni, another brother of the present applicants. The applicants, dissatisfied with the order passed by the Executing Court, declined to entertain the application under Order 21 Rule 97 of the Civil Procedure Code (CPC) in regular darkhast and against the dismissal of regular civil appeal passed by the learned District Judge, Ahmednagar, have preferred the present revision.

2. In brief, the case of the applicants is that one Narhar Balkrushna Deshmukh was the owner of the suit premises. He had leased the suit premises to Jagannath Soni, grandfather of the present applicants, by a registered lease deed dated 22.05.1928. At the time of the lease, it was agricultural land. At his cost, the grandfather of the applicants constructed a huge tin shed to be used as a godown for a ginning business he was doing. After the grandfather's death, the only son Daulal Jagannath Soni inherited the tenancy. After the demise of their father, the applicants have claimed that they have a right in the suit premises. The legal heirs of Narhar Balkrishna Deshmukh/original owner, sold and alienated the suit premises in favour of Devichand Hiralal Gandhi by a registered sale deed dated 6th August 1986. After his demise, respondents Nos. 2 to 9 inherited the lease.

3. Devichand Hiralal Gandhi, in his lifetime, has filed a suit for eviction against Rameshchandra Soni and others. The said suit bearing Regular Civil Suit No. 253 of 1989 was decreed by a judgment and decree dated 13th October 1998. The District Judge, Ahmednagar, dismissed the appeal preferred against the said Judgment and decree.

Later, Civil Revision Application No. 112 of 2012 was preferred before High Court by Rameshchandra Daulal Soni, which the High Court also dismissed on 20th July 2015. Thereafter, Navinchandra Soni has preferred Civil Appeal No. 9834/2016 with Civil Appeal No. 8450

of 2019 before the Hon'ble Supreme Court. The Hon'ble Supreme Court was also pleased to dismiss both appeals.

4. Thereafter, the decree-holder has filed execution proceedings bearing Regular Darkhast No. 15 of 2016 for the execution of the Judgment and decree dated 13th October 1998. In the execution proceeding, the present applicants have preferred an application Exh. 168 on 11th November 2019, claiming the relief that it be declared that the Judgment and decree passed in Regular Civil Suit No. 253 of 1989 is not legal and binding on the third person. They should not be dispossessed from the suit premises under the Judgment and decree passed in RCS No. 253/1989. Another application Exh. 178 was also filed before the Executing Court to frame the issue and permit them to lead evidence. The learned Civil Judge, Senior Division dismissed the applications Exh.168, 178 and 189, preferred by the present applicants in Regular Darkhast No.15 of 2016, by order dated 19.12.2019, holding that the issue in respect of a third party/ applicants has already decided. Against the said order, a petition bearing Writ Petition No. 3922 of 2021 was preferred before this Bench. However, it was withdrawn on 2nd March 2021, with liberty to seek expeditious hearing of Regular Civil Appeal No. 13 of 2020 filed against the order dated 19.12.2019. The learned District Judge No.6, Ahmednagar, was pleased

to dismiss the said appeal by order dated 05.05.2022. Against the said order, the present revision has been preferred.

5. The *inter se* relations between the parties are not denied by either side. It is also not in dispute that the Judgment and decree passed by the Court of the first instance had been confirmed up to the Supreme Court. The present applicants claim that they are the tenants in common and were not the party to the suit. Therefore, the Decree holder can not execute the said decree against them. It is also not in dispute that the present applicants have filed a Civil suit bearing Regular Civil Suit No. 516 /2015 regarding the same suit premises, and thereafter they have filed an application under Order 21 Rule 93 CPC resisting the execution of the decree.

6. It has been vehemently argued by the learned counsel Shri Bajaj for the applicants that the Court of the first instance and the first appellate Court did not consider the relevant aspect and the case laws relied upon by them. The learned counsel, Shri Bajaj, relied upon a bunch of case laws. Mainly, his arguments are based upon the case laws. In addition, he has vehemently argued that the suit filed by the original landlord was barred by limitation. The suit ought to have been filed within 12 years of the tenancy termination by efflux of time. He has vehemently argued that the tenant did not pay o the rent after the termination of the tenancy by efflux of time. The applicants were

tenants at sufferance and not the tenants holding over. Therefore, the observations recorded by this Court in the Judgment dated 20th July 2015 passed in Civil Revision application Nos.112, 113 and 114 of 2012 are not binding on the present applicants. He has referred to the findings recorded by this Court in para 31 of the said Judgment and tried to argue that the issue of limitation needs to be considered separately, as raised by the present applicants.

7. The bone of contention of the applicants is that they are tenants in common, and therefore, they cannot be evicted under the decree obtained against a few other tenants in common. The present applicants were not a party to the original suit; therefore, the decree which will be enforced for eviction is not binding on them. The learned counsel Mr. Bajaj, has pointed out Order 21 Rule 102 CPC, which provides for exemption of the matters to be considered under Order 21 Rule 97 CPC, particularly transferee *pendente lite* has no right to claim the protection of possession under Order 21 Rule 97 CPC. He has also raised a serious objection that the appellate Court under Section 96 of CPC has framed the incorrect issues for determination. The issue for remand was not the issue for consideration. It was the consequential relief that ought to have been granted by the District Court. He has argued that the learned District Judge did not touch the facts in issue, much less ignore the issues that ought to have been decided by it. Therefore, the judgement and decree passed by the

learned District Judge-6, Ahmednagar, is erroneous. Lastly, he prayed to allow the revision application and sought directions against the executing Court to allow the applications preferred by the revision applicants, grant permission to lead evidence, and frame the relevant issues.

8. Per contra, the learned counsel Shri Gholap for the contesting respondent Nos. 1 to 5, has vehemently argued that the tenancy does not create a vested right. It gives a right to possess and enjoyment on payment of rent in consideration. The right of enjoyment is heritable. He has placed into service section 5(11)(c) (i) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (the Rent Act, for short) and vehemently argued that the issue that the applicants have raised had been considered in various earlier proceedings. The brother of the present applicants raised the issue of non-joinder of the party, has also been finally adjudicated by the Hon'ble Supreme Court. In view of section 5(11) (c)(i) of the Rent Act, the person who was in possession of the premises by way of inheritance and the property used for the business or residence is the tenant, and the landlord has a right to file a suit against the person in possession only and not against all legal heirs of the original tenant. He has also argued that the notice of eviction is binding to all legal heirs, and attornment notice was served upon the brother who has contested the suit for eviction filed by the present respondent Nos. 1 to 5 i.e. the

purchasers. At no time it was replied to or objected that the person against whom the Judgment and decree was passed, that he is not in exclusive possession of the suit premises, and the present applicants have right and interest in the tenancy. He has also vehemently argued that the issue of limitation was also decided by the High Court and the Hon'ble Supreme Court. Hence the said issue has attained finality. He has referred to the earlier observations recorded by this Court in CRA No.112/2012. He has also argued that if there was against the joint tenant, the Judgment and decree bind all the legal heirs. It was never pleaded that the business done on the suit premises was done jointly, and the rent was also paid jointly. He has also argued that none of the case laws relied upon on behalf of the applicants is applicable to the facts of this case. Therefore, those cannot be considered. The impugned order passed by the learned executing Court and the first appellate Court is legal, proper and correct and, therefore, does not warrant interference.

9. In reply, the learned Counsel Shri Bajaj again referred to some case laws and reiterated that the issue of limitation as decided in the civil revision application is not finally adjudicated. The objection as regards limitation has been specifically raised in para 11 of the objections.

10. The litigation has a chequered history since the year 1989. The legal issue raised before this Court was whether the application under Order 21 Rule 97 CPC would lie where the suit claiming the same relief was pending before the Court.

11. To support the contentions that during the pendency of the suit, such objection under Order 21 Rule 97 can be filed, the learned counsel Shri Bajaj relied upon the Judgment of the Hon'ble Supreme Court in the case of **Tanzeem-E-Sufia Vs. Bibi Haliman & others (2002) 7 SCC 50**. In the said case, a decree for eviction was passed. The petitioner therein had filed a suit for declaration that the decree obtained by the respondents in the eviction suit was not binding on it, and the title was also claimed. An application under Order 21 Rule 97 CPC was also filed; however, it was dismissed for the reason that the petitioner had no locus to raise the objection, as the only remedy available to the applicant is under Order 21 Rule 99. The High Court was pleased to dismiss the revision. The claim of the petitioner Tanzeem-E-Sufia was based on the independent title. The Trust had claimed that the property in question belonged to Sufia Ashram. Hence, till a decision, delivery of possession should not be effected. The appellant/applicant, by claiming independent right over the property and asserts possession thereof. Considering the provisions of Order 21 Rule 101 CPC, the Hon'ble Supreme Court, in para 14, has observed

that "the said provisions clearly provides that all questions relating to right, title or interest in property relevant to the adjudication of the application, shall be dealt with the application and not by a separate suit. In the said petition, the appellant had filed an application under section 148 CPC praying that in case the application under Order 21 Rule 97 is filed by the decree-holder, in that event, the caveator may be heard before passing an order on such application. The decree-holder had filed an application in the petition on 13.03.1995 for the issuance of a writ of delivery of possession. The applicant prayed to treat the application dated 13.03.1995 moved by the decree-holder as a petition under Order 21 Rule 97 CPC. The facts of this case and the said case are distinguishable. In the said case, the appellant has claimed the independent title. Whereas in the case at hand, the applicants are claiming a right as tenants in common. It is not in dispute that the eviction suit was passed under the Rent Act. The Rent Act is complete in itself so far as deciding the tenant in successor under section 5 (11) (c) (ii) of the said Act.

12. Learned Counsel Mr. Bajaj relied on 32 case laws. Before embarking upon the ratio laid down in the case laws relied upon by learned Advocate Shri Bajaj for the applicants, it would be appropriate to examine the right of the applicants in the suit premises. The applicants did not claim that they were in possession of the suit

premises. When the suit for eviction was filed, it was captioned under the Rent Act, 1947, which was applicable to the district and place where the suit premises was situated. The said Act has taken care of who shall be the tenant after the original tenant's death in cases the premises are let for residence or for the purpose of education, business, trade or storage. Section 5 (11) of the said Act defines the term tenant, which reads thus:

"5 (11) 'tenant' means any person by whom or on whose account rent is payable for any premises and includes,

(a) such sub-tenants and other persons as have derived title under a tenant [before the 1st day of February, 1973;]

(aa) any person to whom interest in premises, has been assigned or transferred as permitted or deemed to be permitted, under Section 15;

(b) any person remaining, after the determination of the lease, in possession, with or without the assent of the landlord, of the premises leased to such person or his predecessor who has derived title [before the first day of February, 1973];

(bb) such licensees as are deemed to be tenants for the purposes of this Act by Section 15-A];

(bba) the State Government, or as the case may be, the Government allottee, referred to in sub-clause (b) of clause (1-A), deemed to be a tenant, for the purposes of this Act by Section 15-B];

(c) (i) in relation to any premises let for residence, when the tenant dies, whether the death has occurred before or after the commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Act, 1978 (Mah. 22 of 1978), any member of the tenant's family residing with the tenant at the time of his death, or, in the absence of such member, any heir of the deceased tenant, as may be decided in default of agreement by the Court;

(ii) in relation to any premises let for the purposes of education, business, trade or storage, when the tenant dies,

whether the death has occurred before or after the commencement of the said Act, any member of the tenant's family using the premises for the purposes of education or carrying on business, trade or storage in the premises, with the tenant at the time of his death, or, in the absence of such member, any heir of the deceased tenant, as may be decided in default of agreement by the Court.

Explanation. The provisions of this clause for transmission of tenancy shall not be restricted to the death of the original tenant, but shall apply, and shall be deemed always to have applied, even on the death of any subsequent tenant, who becomes tenant under these provisions on the death of the last preceding tenant."

13. Clauses (c)(i) and (ii) above are relevant to the facts in issue. If the premises were let for the residence, when the tenant dies, then any member of the tenant's family residing with the tenant at the time of his death is the tenant. Further, it has also been provided that in the absence of such member, any heir of the deceased tenant, the tenant may be the person as may be decided by the Court in default of agreement. In case of the premises let for the business, as in the case at hand, the tenant dies, then any member of the tenant's family using the premises for business, trade, or storage is a tenant, and in the absence of such member, any heir of the deceased that the Court may decide in default.

14. The learned counsel Shri Bajaj has relied on the case of **Rajaram Brindavan Upadhyaya Vs. Ramraj Rathunath Upadhyay, 1978 Bom. L.R.12** and vehemently argued that the legal issue was referred to

the larger Bench to decide whether the provisions of section 5(11) (c) of the Rent Act are meant to supersede right of inheritance to the tenancy vesting in the heirs on the death of the tenant, under the personal law of the party. The Hon'ble Division Bench, discussing the relevant provisions of the law, concluded that provisions of section 5 (11) (c) of the Rent Act are not meant to supersede the right of inheritance to the tenancy vesting in the heirs on the death of the tenant under the personal law of the party. It has also been observed in para 29 of the said Judgment that the plaintiffs, having established that they are the heirs of deceased tenant Brindavan, the limited right of defendant No.1 in the suit room, of his being entitled to be declared a tenant under section 5 (11) (c) of the Rent Act will come to an end. The plaintiffs alone will therefore be entitled to the possession of the suit room as tenants.

15. The facts of the said case (**Rajaram Brindavan Upadhyaya**) were that the original tenant was Brindavan Upadhyaya. His sons filed a suit for declaration that they are the tenants of the suit room because they are heirs of the original tenant Brindavan. Defendant No.1 Rajaram in the said suit was nephew Brindavan. The original landlord had sold the suit premises to defendant No. 3. It was a suit between the legal heirs of the original tenants. The Court of the first instance had held that the plaintiffs were entitled to succeed to the right of tenancy which derived on the death of Brindavan, on heirs. Therefore, it was declared

that the plaintiffs are the tenants of the suit room along with defendant No.1, and they have the right to stay on the premises along with defendant No.1. The learned judge dismissed the appeal and allowed the cross objection filed by the defendants who was in possession of the suit room. In this set of facts, section 5 (11)(c) of the Rent Act was considered and held that the said provisions of the section are not meant to supersede the right of inheritance in the tenancy vesting on heirs on the death of the tenant under the personal law of the party. It was a suit between the heirs of Brindavan. Herein the case, the landlord filed the suit against the tenant who was in possession after the death of the original tenant. Most of the case laws relied upon by the applicants are pertaining to provisions of Order 21 Rule 97, 99, 100 and 102 of the CPC. Hence the ratio laid in those cases is not reproduced.

16. As far as the claim of the applicants that they are the tenants in common, the High Court of Allahabad in Second Appeal No. 1661 of 1970, decided on 9.08.1977 has observed that the basic distinction thus between 'joint tenant' and 'tenants in common' is that in the case of a joint tenant, there is a unity of title and possession and while in case of tenants in common, though there is a unity of possession, there is no unity of title. The view, therefore, appears to be reasonable that while the notice served under section 106 of the T.P. Act only on one of the joint tenants is effective in terminating the tenancy of all the joint tenants who have unity of title, no such result follows

where the notice is served only on one of the tenants in common since there is no unity of title as between them in contradistinction to joint tenants.

17. The material issue raised by the applicants about the tenant in common has been discussed in Civil Revision Application No.112 of 2012 in the issue of non-joinder of necessary party. The objection raised by the brother of the applicants that the suit was bad for not joining the present applicants to the suit has been declined by this Court and affirmed by the Hon'ble Supreme Court. There is nothing on record that any time the present applicants tried to apply to Order 1 Rule 10 CPC in the original suit claiming the right of the tenant in common.

18. The learned counsel for respondents Nos. 1 to 5 has correctly pointed out that at no point in time the tenant against whom the decree was passed had a case that he ever had a business in joint with the present applicants, and they were jointly in possession. On the contrary, he went on raising each and every objection which were possible to protract the trial. The issue raised by him about the non-joinder of the present applicants in the eviction suit has been elaborately considered by the High Court and the Hon'ble Supreme Court. The finding to that point has attained finality.

19. So far as the point of limitation is concerned, it has been vehemently argued that the suit ought to have been filed within 12

years of the termination of tenancy by efflux of time. However, the finding recorded by the High Court in Civil Revision Application No.112 of 2012 has been tried to be distinguished, that the High Court has correctly pointed out that the suit for eviction is required to be filed within a period of 12 years from the date of termination of the tenancy. But in the absence of any particulars, as regards limitation in a written statement, the authorities relied upon by the counsel appearing for the original tenant were discarded. Therefore the said issue cannot be examined afresh.

20. Having regard to the chequered history of the litigation and concurrent findings of the four courts from the Court of the first instance till the Hon'ble Supreme Court, the objections which the present applicants have raised were determined, and they have attained finality.

21. The learned counsel for the applicants Mr. Bajaj has rightly pointed out that any person raising obstruction to the possession of the immovable property need not wait until the decree-holder files an application under Order 21 Rule 97 CPC. Order 21 Rule 101 intends to determine the questions to be determined on application under Order Rule 97 or 99 Rule by the parties to the proceedings. All questions include questions relating to the right, title or interest in the property. For deciding such questions, a separate suit need not be filed. The Court

has to determine whether the resistance of the obstruction was just or without any just cause.

22. As discussed above, the suit under the Rent Act, wherein who shall be the tenant after the death of the original tenant has been defined. The brothers of the present applicants, who fought the eviction suit by taking each and every remedy available till the Supreme Court, never came up with the case that the present applicants were the joint tenants.

23. After having gone through the facts of the case and the right claimed by the present applicants, this Court is of the view that applicants cannot claim the right under Order 21 Rule 97 CPC since the decree was passed under the Rent Act against the heirs who were possessing the suit premises after death of the original tenant. The Court has gone through the entire record and the findings recorded in various suits, revisions and appeals and also examined the findings recorded by the learned Court of the first instance and the first appellate Court in the Judgment impugned before this Court and found that neither the executing Court nor the first appellate Court committed the error of law that warrants any interference by this Court.

24. For the reasons stated above, the Court does not find any substance in the revision application. Hence the revision application stands dismissed.

25. At this stage, Mr. Bajaj has requested to stay the execution proceeding for eight weeks. Considering the length of the litigation and nature of the right claimed by the present applicants, this Court is not satisfied that this is a fit case to stay the execution proceeding. Hence the request is declined.

(S. G. MEHARE, J.)

JPChavan