



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL WRIT PETITION NO. 14391 OF 2024

1. Jayanti Vikas Naik

Age 76 years

2. Trupti Vikas Naik

Age 72 years

3. Pankaj Vikas Naik

Age 50 years

(legal heirs of Late Narayan
Laxman Naik being the original
Judgment Debtor)

All residing at Sadaguru Vikas,
Nale Road,
Nallasopara West Taluka Vasai
District Palghar

...Petitioners

Vs.

1. Bibi Begum Fakir Saheb (Since
deceased)

2. Sikandar Sarfuddin Raza (since deceased)

2/1 Tasneem Sikandar Raza

Age 65 years

2/2 Fakruddin Sikandar Raza

Age 62 years

2/1 and 2/2 residing at
D/202, Olive Apartment
Shriprastha Complex, Nallasopara West
Taluka Vasai, District Palghar.

2/3 Sameer Sikandar Raza
 Age 50 years
 M/201, West Avenue CHSL, Station Road,
 Nalasopara West Taluka Vasai District Palghar

2/4 Birjish Shamim Tambe
 (Maiden Name : Birjoos Sikandar Raza)
 Flat No. 203, Fortune tower,
 Sarjene Road,
 Mumbai.

...Respondents

Mr. Anil Dsouza a/w Mark D'Britto i/by Ernest Tuscano	Advocate for the Petitioners
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CORAM : S. M. MODAK, J.

DATE : 10th DECEMBER 2024

ORAL JUDGMENT :-

1. Heard learned Advocate for the Petitioner-Judgment Debtor.
2. There is no dispute about eviction decree passed by the Court of CJJD Vasai in R.C.S. No. 166/76 on 29.09.1984, on page no. 20. There is no dispute that this decree is confirmed by the Appellate Court i.e. Joint District Judge, Thane in Civil Appeal No. 350/84 on 11.03.1986, on page no. 61.
3. There was an Execution application filed by the decree holder for getting possession. It is Regular Darkhast No. 30 of 1984. The reasons

for pendency of this execution for long period is not known. In fact decree holder was expecting the execution of the decree, when the building in which the suit premises is situated is in existence. Whether it is fortune or misfortune of the decree holder to get possession of the room as it was standing prior to demolition, but he could not get possession of actual room. The building in which the suit premises was situated was demolished by Vasai Virar City Municipal Corporation on 29/12/2005. The building was declared as C—I category building. Even the petitioner pleads, the building was demolished by adhering the provisions of Maharashtra Municipal Corporation Act (para no. 4.8). **As the building is demolished, the suit premise is also demolished, as such the suit premise, no more exists.**

4. On this background, the decree holder filed two applications for issuance of possession warrant one under the provisions of Order XXI Rule 35 (this was withdrawn) and another under Rule 36 of the Civil Procedure Code.

5. Still the judgment debtor had a hope that the decree cannot be executed. The judgment debtor opposed for issuance of the warrant. However, the executing Court as per order dated 26.02.2024 has

issued possession warrant for giving **symbolic possession** to the decree holder. This warrant was implemented and there is report of the bailiffs. On page no.79, typed copy is there. The serving officer noted how the possession warrant got executed. He completed the formalities as follows:-

- a) He read the possession warrant for the information of the Public.
- b) The report mentions the judgment debtor was not found at the spot. The serving officer found cement foundation and compound. He has also pasted the warrant at conspicuous place so that general public may view it. That is how the bailiff has mentioned that decree holder got possession of the premises.

Submissions

6. Learned Advocate has invited my attention to the provisions of Order 21 Rules 35 and 36 of the Civil Procedure Code. According to him, the executing Court was wrong in issuing the possession warrant. The bailiff was also wrong in reporting that the possession warrant is executed.

Provisions of Order XXI Rules 35 and 36

7. With his assistance, I have read the provisions of Order 21 Rules 35 and 36 of the Civil Procedure Code. They are as follows:-

(I) **Rule 35** - talks about the execution of the decree for possession.

There are three modes, they are as follows:-

- (a) If decree is for possession of immovable property, the person in possession has to be removed, if he refuses to vacate the premises and handover possession to decree holder.
- (b) If the decree is for joint possession of the immovable property, the decree can be executed by affixing a copy of the possession warrant at some conspicuous place on the property and proclaiming by beat of drum or by other customary mode.
- (c) When person in possession does not afford free access, then with certain compliance, the person in possession can be removed by breaking the lock of that premises.

Rule 35 contemplates the situation wherein suit premises is in existence.

(II) **Whereas Rule 36 provides as follows :-**

It talks about contingency wherein the immovable property is not

in possession of the judgment debtor, but it is in possession of some occupant or tenant. In such cases, the possession warrant can be served by affixing the copy of the warrant at some conspicuous place on the property and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property.

Even though Rule 36 contemplates situations wherein the suit premise is in existence.

8. In nutshell both these provision does not contemplate situation wherein the suit premises, no more exist. Provisions only talks about actual/physical and symbolic possession. Only in two contingencies, symbolic possession can be taken. One when the property is in possession of occupant/tenant. Secondly when decree is in favour joint decree holders. Law permits taking symbolic possession in the manner laid down in those rules. In no other contingency, symbolic possession can be taken. But these rules will be applicable only the structure is in existence.

9. Admittedly, the room is part of the entire building which is demolished. This Court cannot go into issue whether there was

necessity to demolish that building or not. Now what is there at the site is open land.

10. Law on the point of relationship in between landlord and tenant need to be stated. When the provisions of the Bombay **Rent Control Act** are applicable, if there is contractual tenancy, the possession of tenant does not become unlawful once the termination notice is given/suit is filed. In any eventuality, the tenant becomes statutory tenant and he gets protection of the statute. This is applicable onlt when Rent Control Act is applicable. Once decree is passed, the relationship comes to an end. He can hold possession till the time possession is taken over by the order of executing court. When the building containing that room is demolished, even though the judgment debtor **who was possessing that room** no more is having right to hold the possession of that premises. As such his right has come to an end.

11. There is one more reason why I have taken this view. The Petitioner/judgment debtor does not come with the case that the dilapidated nature of the building is in question, and he has taken any steps challenging that claim, and it is for protecting his possession till

removed as per possession warrant issued by the Executing Court.

12. In such a situation, it will be presumed that **the decree holder when in possession of the land**, the eviction decree is executed. Even this court feels that the serving officials have followed proper procedure. The decree holder has not raised any grievance about the procedure followed by the executing court. And in fact, relevant decree holders have filed withdrawal pursis and execution is disposed of by the executing court on 2/4/2024. For the above discussion, there is no merit in the present petition filed by the judgement debtor

13. With these observations writ petition is disposed of.

[S. M. MODAK, J.]