

Bombay High Court

Norman Joseph Ferreira & Anr. vs Arjandas Newandram, Heir & L.R. Of ... on 19 December, 2000

Equivalent citations: 2001 (3) BomCR 475, (2001) 2 BOMLR 731, 2001 (2) MhLj 810

Author: R M Lodha

Bench: R Lodha

ORDER R. M. Lodha, J.

1. By means of this Writ Petition filed under Article 227 of the Constitution of India, the petitioners who are decree holders seek to challenge the order dated 1st March. 1988 passed by the Appellate Bench of Small Causes Court whereby they set aside the order of the Judge, Small Causes Court dated 26.6.73 and discharged obstructionist notice taken out by the present petitioner decree holders against respondent Nos. 1, 2 and 3 herein.

2. Relevant facts first :

Dr. John Joseph Ferreira and Mrs. Matilada John Ferreira were owners of plot Nos. 12 and 13, situate at Sitladevi Temple Road, Mahim. Mumbai. The present petitioners are the legal representatives and heirs of the said owners. The said John Joseph Ferreira and Matilda Ferreira granted lease of the aforesaid plots of land to one Jamnadas Dharamdas for a period of 15 years vide lease deed dated 14th December, 1948. The lease was renewable for a further period of 15 years. Under the lease, the said Jamnadas was permitted to erect buildings on the said plots and also let out such buildings. It was also agreed under the said lease that on determination of lease, the lessee would deliver back possession of the said land to the lessors free of all buildings, erections and the structures. The lessors were also entitled to re-enter the said plots on forfeiture. The lessee Jamnadas after taking the land on lease, constructed three buildings known as Sindhi Nivas. Block A, Block B and Block C and let out tenements of the said buildings to several persons. The respondent Nos. 1, 2 and 3 herein came in possession of the respective tenements on the basis of the agreements between them and the lessee Jamnadas. It appears that the lessee Jamnadas failed to pay rent as per the lease and also did not pay the taxes and charges. The lessors filed suit for ejectment against Jamnadas for possession and arrears of rent- The said suit was registered as RAE & R Suit No. 660/5480 of 1961. On 11th November, 1964, the Trial Court passed a decree for eviction in favour of lessors. According to the decree passed against Jamnadas, the lessors became entitled to possession of the land bearing plot Nos. 12 and 13 and the structures standing thereon. The lessee Jamnadas preferred Appeal against the judgment and decree passed by the Trial Court which was registered as Appeal No. 2 of 1965. The lessors also filed first Appeal which was registered as Appeal No. 563 of 1964. The Appeal Court heard both the Appeals together and modified the decree passed by the Trial Court by directing the lessee Jamnadas to deliver possession of demised land only. The lessors preferred Civil Revision Application No. 1714 of 1965 against the judgment and decree of the Appeal Court while Jamnadas filed Special Civil Application No. 1596 of 1965 before this Court. On 23rd October, 1969 this Court modified the decree passed by the Appeal Court by passing the decree for possession in favour of lessors in respect of demised plots as well as the buildings standing thereon. Jamnadas challenged the judgment and order of this Court before the Apex Court. However, the Apex Court dismissed the Appeal filed by Jamnadas on 7.5.1980 and maintained the judgment and decree passed by this Court. It appears that the petitioners- decree

holders levied execution of the decree for possession of the land and the buildings after the judgment and decree was passed by this Court on 23.10.69. However, the occupants of the said three buildings obstructed the said execution claiming that they were not bound by the decree and that they were occupying respective tenements in their own rights. The decree holders-petitioners accordingly, took out obstructionist notice No. 260 of 1970 against 77 occupants including Newandram Shivalomal, father of the first respondent and respondent Nos. 2 and 3. It is the petitioners'-decree holders' case that they arrived at the settlement with some of the obstructionists. Thereafter, the obstructionist notice proceeded against remaining 60 obstructionists including the father of first respondent and respondent Nos. 2 and 3. The executing Court, vide order dated 26th June, 1973 made the obstructionist notice absolute save and except against the obstructionists with whom settlements were arrived at by the lessors and three obstructionists who died during pendency of obstructionist notice. 26 obstructionists out of the said 60 obstructionists against whom obstructionist notice was made absolute vide order dated 26.6.73 preferred Appeal which was registered as Appeal No. 628 of 1973. The said Appeal was allowed by the Trial Court on 28th January, 1977. It is the case of the petitioners that in respect of these 26 obstructionists, they have filed the declaratory suit which is pending in the Court of Small Causes. Then 34 obstructionists remained against whom obstructionist notice was made absolute by the executing Court on 26th June, 1973 which included the present respondent Nos. 1, 2 and 3. These 34 obstructionists filed six Appeals in all. bearing Appeal Nos. 617 of 1973, 632 of 1973, 2 of 1974, 6 of 1974, 33 of 1974 and 38 of 1974. Appeal No. 38 of 1974 was filed by Newandram Shivalomal, father of respondent No. 1 and the present respondent Nos. 2 and 3. Appeal No. 33 of 1974 and Appeal No. 6 of 1974 were withdrawn by the concerned obstructionists. Appeal No. 617 of 1973, 632 of 1973 and 2 of 1974 were heard together and disposed of by the Appellate Bench of Small Causes Court on 25th November, 1982 whereby the Appellate Bench maintained the order of the executing Judge. Small Causes Court. The order passed by the Appellate Bench on 25th November, 1982 was challenged by some of the obstructionists who were parties in the said Appeals before this Court in Writ Petition Nos. 109 to 119 of 1983. The learned Single Judge of this Court heard the said group of Writ Petitions together and vide order dated 24th March, 1986. dismissed all the Writ Petitions. Thus, the order passed by the executing Judge on 26th June, 1973 and the order passed by the Appellate Bench on 25th November, 1982 were confirmed by this Court vide order dated 24th March, 1986. It appears that Appeal No. 38 of 1974 filed by present respondent Nos. 1 to 3 was not heard along with Appeal Nos. 617 of 1973, 632 of 1973 and 2 of 1974 and remained pending which came up for hearing before the Appellate Bench later on and the Appellate Bench vide its judgment and order dated 1st March, 1988 allowed the Appeal No. 38 of 1974, set aside the order of the executing Judge in respect of the present respondents who were original obstructionist Nos. 4, 7 and 10 and accordingly, discharged the obstructionist notice in respect of the present respondent Nos. 1, 2 and 3. The order dated 1st March, 1988 is under challenge before this Court in this Writ Petition at the instance of the decree holders as already noted above.

3. At the outset, it may be observed that though the impugned judgment and order of the Appellate Bench runs in more than 100 typed pages, most of which is inconsistent with the Judgment of this Court passed on 24th March, 1986 on similar facts and identical situation. It is really strange that the Appellate Bench ventured not to follow the judgment and order of this Court passed on 24th March, 1986 dealing with the same questions and reached the findings and conclusions inconsistent

with the judgment and order of this Court. There cannot be any dispute that the facts, material and documents under consideration before this Court in the group of Writ Petition Nos. 109 of 1983 to 118 of 1983 arising out of the order passed by the Appellate Bench of Small Causes Court in Appeal Nos. 617 of 1973, 632 of 1973 and 2 of 1974 were exactly same and identical which were under consideration before the Appellate Bench of the Small Causes Court in Appeal No. 38 of 1974 preferred by the present respondent Nos. 1 to 3. As a matter of fact as well as in law there was no occasion nor any justification for the Appellate Bench to take the view different and inconsistent with the view of this Court wherein the status of the other obstructionists similarly placed and identically situated in respect of other tenements were considered by this Court in the earlier group of Writ Petition Nos. 109 of 1983 to 118 of 1983. The Appellate Bench appears to have become more philosophical and over-sympathetic in respect of the obstructionists No. 4, 7 and 10 i.e. present respondent Nos. 1 to 3 overlooking the judgment of this Court passed on 24th March, 1986 and also misreading the judgment of the Apex Court whereby the decree for possession in respect of the land and structures in favour of lessors-decree holders attained finality right upto the highest Court. At this stage, it may also be noted that the Appellate Bench has misread and misconstrued the affidavits filed by obstructionist No. 4 on 2nd December, 1970 and 15th March, 1971, the affidavits filed by obstructionist No. 7 on 2.11.1970 and 2.12.1970 and the affidavits filed by obstructionist No. 10 on 2nd December, 1970 and 15.3.1971 and erroneously held that the said affidavits had gone unchallenged and uncontradicted. The Appellate Bench also misconstrued, misread and misinterpreted the writing executed by the present respondents in favour of the original lessee, particularly, para 6 in holding that when these occupants paid ground rent proportionate to their share to the lessee, it shall have to be held that the lessee has prima facie created the sub-tenancy in their favour as regards the land. The inferences drawn by the Appellate Bench about discrimination by the decree holders in respect of some occupants of tenements on the one hand and the present respondent Nos. 1 to 3 on the other hand are highly imaginary. The approach of the Appellate Bench in considering the entire matter was wholly misdirected and that has resulted in erroneous order.

4. Certain facts are not disputed. The predecessors in title of the present petitioners leased out two open plots of land bearing Nos. 12 and 13 situate at Sitladevi Temple Road, Mahim, Mumbai on lease to Jamnadas Dharmadas vide lease deed dated 14th December, 1948. The said lease deed is annexed at Exhibit "A" to the writ petition. The initial term of the lease was 15 years from 1st December, 1948, renewable for a further period of 15 years. The yearly rent was fixed at Rs. 10,200/- payable quarterly at the rate of Rs. 2,550/-. Under the lease, lessee was permitted to erect buildings on the open plots leased to him. The lease prohibited lessee from assigning, subletting or underletting or parting with possession or transfer in any manner the land taken on lease but that did not preclude lessee to let out the buildings constructed by him or any part thereof as monthly tenant or tenants for any period not exceeding three years. The lessee raised three buildings on two plots taken on lease by him and he let out various tenements to different occupants. The lessee committed default in payment of lease amount and other charges and the lessors were constrained to file suit for possession against the lessee in respect of the land as well as the structures. The decree for possession in respect of the land as well as structures was ultimately passed in favour of the lessors and attained finality right upto the Apex Court. The said decree for possession in respect of the land and structure was levied in execution wherein the occupants obstructed the execution. The decree holders had to take out obstructionist notice. The executing Judge, after hearing the

parties, vide his order dated 26.6.73 ultimately made the obstructionist notice absolute save and except certain obstructionists against whom settlement was arrived at. Thus, as against the present respondent Nos. 1, 2 and 3 amongst others the obstructionist notice was made absolute. It was held by the executing Judge that the present respondent Nos. 1 to 3 are bound by the decree passed against the lessee and the obstructionists including the present respondent Nos. 1 to 3 cannot claim any right of tenancy or sub tenancy in respect of the land or the tenements. Six appeals came to be filed by 35 obstructionists including the present respondent Nos. 1 to 3 against whom obstructionist notice was made absolute. Three of such Appeals viz. Appeal Nos. 617 of 1973. 632 of 1973 and 2 of 1974 were heard and disposed of by the Appellate Bench on 25th November, 1982 and the order of executing Judge was maintained. Against that order passed by the Appellate Bench on 25th November, 1982, nine writ petitions came to be filed before this Court which were registered as Writ Petition Nos. 109 of 1983 to 118 of 1983. S. J. Deshpande, J. heard all these petitions and disposed of the same on 24th March, 1986. In para 4 of the said judgment, the learned Judge observed thus-

"In view of the judgment of the Supreme Court the right of the lessor to take possession of the land alongwith the structure thereon is established. It is true that there are numerous structures which are built up on the land. At the most, the said persons who have built up the structures, can claim some compensation....."

5. The learned Judge further observed that obstructionists relied upon provisions of section 14 of the Bombay Rent Act and claimed protection thereunder. The learned Judge in para 17 of the judgment held thus-

"17. The main grievance which is made by the learned counsel for the petitioner is that the obstructionist is entitled to protection which is available to the tenant under section 14 of the Bombay Rent Act. Section 14 as quoted above, provides that when interest of any tenant of a premises is determined for any reason, any sub-tenant to whom the premises or any part thereof has been lawfully sub-let before commencement of the Rent Act, shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms and conditions as he would have held from the tenant if the tenancy had continued. It is clearly provided that there must be transfer of interest in favour of the tenant. Secondly it provides that the sub-tenant becomes tenant of the landlord. Thirdly, there must be relations of landlord and sub-tenant. In my judgment, the fact that the present petitioners are occupying only structures which are not the subject matter of the dispute and it cannot be said that landlord was in any way concerned with the structure at all. If the structure was constructed by the tenant himself, as has happened in this case, the judgment-debtor. Respondent No. 3, who claims to be owner of the structure, would be tenant of the structure. If he was tenant of the structure in an arrangement made by him to transfer of interest of his right of tenancy, transfer of sub-tenancy is quite different than the transfer of tenancy. In this case, there is privity of contract between original landlord and tenant-respondent No. 3, who has suffered a decree for eviction on account of breach of the terms of the lease. In view of the provisions of law. It is not possible to assist the petitioner in regard to his claim of sub-tenancy claimed under Section 14 of the Bombay Rent Act."

6. This Court in para 18 of the judgment further held thus-

"Number of decisions were cited before me. The only question for decision is whether claim of the present petitioners can be accepted on the basis of tenancy at all. First of all he is not a tenant because there are number of judgments of the Supreme Court to the effect that even if he is a tenant he cannot claim sub-tenancy for the simple reason that owner of the structure has let out the premises to him and such dispute between owner and landlord cannot create sub-tenancy within the meaning of Section 14 of the Bombay Rent Act."

7. This Court, therefore, has in unequivocal terms held that the occupants of the tenements constructed by lessee Jamnadas cannot claim any protection under section 14 of the Bombay Rent Act. Section 14 of the Bombay Rent Act upon which also strong reliance was placed by the learned counsel for respondent Nos. 1 and 2 before me reads thus -

"14. [Certain sub-tenants and licensees] to become tenant on determination of tenancy. - (1) When the interest of a tenant of any premises is determined for any reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let [before the 1st day of February, 1973] shall subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms and conditions as he would have held from the tenant, if the tenancy had continued.

(2) Where the interest of a licensor, who is a tenant of any premises is determined for any reason, the licensee, who by section 15A is deemed to be a tenant, shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord, on the terms and conditions of the agreement consistent with the provisions of this Act."

8. Section 14 only confers right of tenancy on certain classes of subtenants and licensees. The present respondent Nos. 1, 2 and 3 by no stretch of imagination, can be said to be sub-tenants because there was no privity of contract between the lessors and them nor the present respondent Nos. 1, 2 and 3 acquired any right of sub-tenancy so far as land was concerned. When the present respondent Nos. 1, 2 and 3 cannot claim any lawful subtenancy, there is no question of their acquiring right as of tenant under section 14 on passing of the decree of eviction against the lessee. I find myself in full agreement with the reasoning of Deshpande, J. in the earlier group of Writ Petitions wherein it has been held that occupants of the tenements who obstructed the execution of decree were not entitled to the benefit and protection under section 14 of the Bombay Rent Act and for the selfsame reasons I hold that present respondent Nos. 1 to 3 are not entitled to the benefit of section 14.

9. It may be noted that original lessee Jamnadas initiated ejectment proceeding against one of the occupants of tenements viz. Motiram Hasmatraj Gidwani in respect of room No. 10 in the building constructed by him on the land leased out by lessors. In the said ejectment proceeding, the question arose whether the occupant was licensee or not. The matter ultimately came up before this Court in Civil Revision Application No. 1304 of 1956. The learned Single Judge of this Court on 2.9.1957 in his judgment observed construing the document of lease whereby lessee was permitted by the lessors to raise construction and the document whereby the occupant was put in possession [both the documents viz., lease deed and document whereby the present respondent Nos. 1 to 3 were put in possession are identical herein) that the document did not amount to sale nor did it amount to

lease of the tenement nor the occupant was licensee. An Appeal was preferred against the judgment and order of the learned Single Judge dated 2nd September, 1957 and the Division Bench of this Court vide order dated 3rd October, 1981 modified the finding of the learned Single Judge and held that occupant of the tenement was a licensee. The present respondent Nos. 1, 2 and 3 are placed in identical situation and accordingly, as held by the Division Bench of this Court in Special Civil Application No. 1034 of 1968, the occupants viz. the respondent Nos. 1 to 3 can only be held to be licensee in the tenement and they cannot claim any better status. On determination of the lease of the lessee and passing of decree of possession against him (lessee), the licence of the present respondents stood revoked and they are bound by the said decree and cannot claim any independent right or interest. The finding of the Appellate Bench that the occupants-respondent Nos. 1, 2 and 3 became tenants of the tenements therefore, is unsustainable in law.

10. Mr. Desai, learned counsel appearing for respondent Nos. 1 and 2 urged that since the contract between the lessors (predecessor in title of present petitioners) and lessee Jamnadas permitted the lessee to raise construction on the open land, the rights created by lessee by letting out such tenements to the occupants are binding upon the lessors. For the reasons which I have already indicated above, the said contention raised by the learned counsel for respondent Nos. 1 and 2 is devoid of any merit. In *Vasant Ramchandra Sharma v. Narayanibai Mulchand Agarwal*,¹ this Court held that if the lessee of plot of land lets out structures built by him upon plot, the occupant of the structure cannot be said to be subtenant. In *Ramchandra Raghunath Shirgaonkar v. Vishnu. Balaji Hindalekar*, it has been held that the ordinary rule of law is that the tenant must give vacant possession of the land demised at the end of the term and that if he builds on the land of the tenancy he builds at his own risk. It was further held that at the end of the term he can take away his building but if he leaves it there, it becomes the landlord's property. In *Khimjee Thakarsee v. Pioneer Fibre Co. Ltd.*, this Court held that after the determination of the lease, lessees were required to deliver over possession of the demised premises to the lessor and the lessees were entitled to remove the structures which they might have erected during the continuance of the tenancy. The lessees, however, failed to remove the structures on the date of determination of the tenancy and on the next date the premises were occupied by other lessees, it was held that the lessees could remove the structures on and not after determination of tenancy and having failed to remove the same on the determination of tenancy, they lost not only their right to remove the structures after the determination of tenancy but also all right, title and interest in those structures. Both the judgments were considered by the Apex Court in the Appeal filed by the lessee Jamnadas, aggrieved by the judgment and decree passed against him for possession in respect of the land as well as super structure. The said judgment is in *Jamnadas Dharmadas v. Dr. J. Joseph Ferreira and another*,² Paras 22 and 23 of the report read thus -

"22. Plot No. 12 has been built upon. There are about three storeys consisting of about 72 flats, shops with carpet area of 13,000 square ft. and the cost of building with superstructures in 1949 was about Rs. 6,00,000/-. We may in this connection note that from the date of the decree passed by the High Court on 23rd Oct.. 1969. the defendant has not paid arrears of rents or the taxes due on the buildings. He is in law bound to pay the arrears of rent and the municipal charges which he had undertaken to pay.

23. On a consideration of the facts of the case, we feel that there are no grounds for interfering with the decree passed by the High Court for possession not only of the vacant plot but also of the superstructure and mesne profits and arrears of rent. The law provides for the tenant to remove the superstructure on the termination of the tenancy. If it is not thus removed the tenant loses all his rights to the superstructure and the landlord becomes entitled to it. But in a case where there is a substantial building, it is only reasonable that the Court should explore the possibility of payment of some compensation to the tenant who had put up this structure. But in the connection we are reminded that for several years neither the arrears of rent nor the taxes amounting to several lacs of rupees had been paid by the tenant. Not only the tenant but several persons who have put up flats at their own costs may press their claim for compensation and it will be difficult to determine as to who are entitled to compensation and proportion of the compensation to which they will be entitled to. We enquired of the parties at the conclusion of the arguments if it was possible to come to some arrangement regarding the superstructure but to our regret the parties informed us that they could not arrive at any settlement. In the circumstances, we have no alternative except to confirm the judgment and decree passed by the High Court. We, therefore, dismiss the Appeal, but in the special circumstances of this case we make no order as to costs in this Court."

11. The Apex Court thus highlighted that if the tenant does not remove the superstructure on termination of tenancy, he loses his rights to the super structure and the landlord becomes entitled to it. In the present case, the landlords-lessors having got decree for possession in respect of the land and superstructure which has attained finality right upto the Apex Court, the present respondent Nos. 1, 2 and 3 are bound by the said decree having no independent right or interest and therefore, there was no justification for Appellate Bench to reverse the order passed by the executing Judge on 26.6.73. The present respondent Nos. 1.2 and 3 who are claiming their rights through the original lessee Jamnadas has to leave the premises once the decree has been passed against the original lessee. They cannot claim any protection under the Bombay Rent Act and are not entitled to occupation by any independent right.

12. Mr. Desai, learned counsel appearing for respondent Nos. 1 and 2 submitted that this Court sitting in writ jurisdiction under Article 227 has very limited jurisdiction of interference and once the evidence has been considered by the Appeal Court and a particular view has been taken, in exercise of jurisdiction under Article 227, such view of Court below cannot be interfered with. In support of his submission, learned counsel for respondent Nos. 1 and 2 relied upon Chandavarkar Sita Ratna Rao v. Ashalata S. Guram, and Bhailal Hukamchand Shan and another v. Narandas Shamji. The powers of this Court under Article 227 are well-known and it need not be overemphasised that while exercising writ jurisdiction under Article 227, this Court doesnot sitasaCourt ofAppeal nor does it reappreciate the evidence. However, in the present case, the situation is entirely different. The Appellate Bench not only committed grave error of law in holding that the respondent Nos. 1, 2 and 3 have prima facie established their Independent right as tenants in the premises in question but also showed gross judicial impropriety in not following the judgment of this Court given on 24.3.86 in group of writ petitions bearing Writ Petition Nos. 109 of 1983 to 118 of 1983 arising out of the same facts, same documents and same legal position. If such gross erroneous order passed by the Appellate Bench is not interfered with in exercise of the jurisdiction of this Court under Article 227 of the Constitution of India, it would be a travesty of justice.

13. Consequently, the Writ Petition is allowed with costs. The judgment and order passed by the Appellate Bench of Small Causes Court dated 1st March, 1988 is quashed and set aside. The order passed by the executing Judge making the obstructionist notice absolute in respect of respondent Nos. 1, 2 and 3 (obstructionist Nos. 4, 7 and 10) is restored. Rule is made absolute accordingly.

14. Mr. Desai, learned counsel for respondent Nos. 1 and 2 prays that for a period of eight weeks, the operation of this order be stayed. He, however, submitted that respondent Nos. 1 and 2 shall abide by Interim injunction granted by this Court during the pendency of Writ Petition. Mr. Sakhardande, learned counsel for the petitioners has no objection if time prayed for by the learned counsel for respondent Nos. 1 and 2 is granted.

15. Accordingly, for a period of eight weeks, operation of this order shall remain stayed as regards respondent Nos. 1 and 2. However, the interim Injunction granted by this Court against the respondent Nos. 1 and 2 restraining them from in any manner parting with the possession of, disposing of, transferring, alienating, encumbering or creating any third party rights or inducting any one in the premises in their respective occupation or any part thereof shall also remain operative for this period as well.

16. Certified copy expedited.