

(1999) 07 BOM CK 0120

Bombay High Court

Case No: Chamber Summons No. 376 of 1999 in Suit No. 2434 of 1987

Jawahar Nagar Co-op. Hsg.
Society Ltd.

APPELLANT

Vs

P.T. Mehta and others

RESPONDENT

Date of Decision: July 9, 1999

Acts Referred:

- Bombay High Court (Original Side) Rules, 1980 - Rule 315
- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 10, Order 21 Rule 11(2), Order 21 Rule 16, Order 21 Rule 2, Order 21 Rule 22

Citation: (2000) 3 BomCR 390

Hon'ble Judges: F.I. Rebello, J

Bench: Single Bench

Advocate: N.G. Thakkar, for the Appellant; P.N. Mody, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

F.I. Rebello, J.

By the present chamber summons, the Jawahar Nagar Co-operative Housing Society Ltd., hereinafter referred to as the Co-operative Society has prayed that Court be pleased to set aside the orders passed by the Prothonotary and Senior Master dated 17-3-1997 and 23-8-1998. The matter arises thus:

2. Mr. Prataprai Trambaklal Mehta was the original plaintiff. He filed a suit against Jayant Nemchand Shah and Mrs. Ranjan Jayant Shah, who were the original defendants. The suit bearing No. 2434 of 1987 came to be disposed of in terms of the Minutes of order. The decree holders thereafter applied for execution of the award as the judgment debtors failed to comply with the Minutes of Order. The decree, in so far as the prayers are concerned, has been executed. The decree holders however moved the Prothonotary and Senior Master in the Execution Application for an order against the society. By the impugned order dated 17-3-1997

the Prothonotary and Senior Master ordered the Sheriff of Mumbai to forthwith execute the decree by enforcing the execution of the same upon the Co-operative Society and further ordered to register forthwith the Assignment of Lease for the residuary period of 998 years in favour of the decree holder and to hand over the certificate for the same to the decree holder in pursuance to the decree and conveyance made by this Court etc. Aggrieved by this order, the co-operative society moved the Prothonotary and Senior Master for setting aside the said order by an application lodged at Sr. No. 217 of 1997 on 5-3-1997. The application was supported by an affidavit. After hearing the appellants herein and the decree holders, the Prothonotary and Senior Master rejected the said application. The Prothonotary and Senior Master found favour in the argument advanced on behalf of the holders that the power to execute a decree in the manner as prayed for by the decree holders vested in the Prothonotary and Senior Master by virtue of Rule 315 of the Original Side Rules. Aggrieved by the said order, the society has moved the present chamber summons.

3. At the hearing of the chamber summons, it has been contended on behalf of the society that the Prothonotary and Senior Master acted without jurisdiction in exercising powers not vested in him. It is further contended that if Rule 315 is read in its correct perspective, the conclusions arrived at by the Prothonotary and Senior Master to hold that he has jurisdiction have to be set aside. On the other hand, on behalf of the decree holders, it is contended that the construction as given by the Prothonotary and Senior Master under Rule 315 is a correct interpretation and, consequently, the orders do not require reconsideration or are liable be set aside.

4. The matter has been argued for sometime. I have heard the arguments as it involved the powers of the Prothonotary and Senior Master in proceedings in execution. At the outset, it may be pointed out that the society was not a party to the suit where the decree was obtained by the decree holders against the judgment debtors. The society for the first time approached the Prothonotary and Senior Master when pursuant to the order dated 17-3-1997 they were asked to enter into a lease with the decree holders. The admitted position on record is that the society as lessees of the property have given on lease to its members, parcels of land for period of 998 years.

5. Considering the above, the questions which arise, will now have to be decided. For that purpose, in the first instance, it will be necessary to look at Rule 315 of the Original Side Rules framed by this Court. Rule 315 falls in Chapter XXII pertaining to execution of decrees and orders. The said rule reads as under :

"All applications for the execution of decrees or orders, whether of the High Court or of any other Court (except as otherwise provided by these rules), shall be made by Advocates on record or by parties in person to the Prothonotary and Senior Master, and the transmission of decrees and the issue of all the necessary warrants and notices and all amendments thereof shall be made by him or by any one of his

assistants."

It is clear therefore that what Rule 315 contemplates is that the application for execution of decrees or orders shall be made by the advocates on record or by parties in person to the Prothonotary and Senior Master. This is what is contemplated by the provisions of Order XXI, Rule 11(2). Order XXI, Rule 11(2) as amended by this Court requires an application for execution to be made in a manner prescribed therein to the Court. This is clear from the language of Order XXI, Rule 11(3). Rules framed by this Court on its Original Side are referable to the powers conferred on this Court by virtue of section 129 of the Code of Civil Procedure. Section 129 provides that:

"Notwithstanding anything in this Code, any High Court not being the Court of a Judicial Commissioner may make such rules not inconsistent with the Letters Patent or order or other law establishing to regulate its own procedure in the exercise of its Original Civil Jurisdiction as it shall think fit, and nothing herein contained shall effect the validity of any such rules in force at the commencement of this Code."

6. Two things emerge from the power to make rules and if rules had been framed before the commencement of the Code they would not be affected. These rules further should not be inconsistent with the Letters Patent or order or other law establishing. Section 122 confers a power on the High Court to make rules regulating its own procedure and the procedure of the Civil Courts in a manner prescribed thereon. Section 128 contemplates that such rules shall not be inconsistent with the provisions in the body of this Code but subject thereto, may provide for any matters relating to the procedure of Civil Courts. Rule 121 of the Original Side Rules framed by this Court in the exercise of its powers u/s 129, are set out matters which may be disposed of by a Judge in Chambers. Under Rule 131 are set out these powers in respect of matters which can be disposed of by the Prothonotary and Senior Master as a delegate. Amongst them are applications for execution under Order XXI, Rule 50 of the Code of Civil Procedure. This is a specific power conferred on the Prothonotary and Senior Master by virtue of Rule 131(30). Thereafter, there is a specific Chapter viz. Chapter XXII which deals with execution of decrees and orders. By virtue of Rule 313, it is made clear that the application for execution whether the provision of Order XXI, Rule 22 of the CPC apply or not shall be in Form 45 and shall be in the form set out therein. There are various other rules. I may once again refer to Rule 315. Reference may be made also to Rule 317 wherein it is set out that all notices under sections 73 and 145 and Order XXI, Rules 2, 16, 22, 64 and 37 of the CPC shall be issued by the Prothonotary and Senior Master. There are also other rules which confer certain powers of the Prothonotary and Senior Master. However, what is clear from a construction of all these rules is that provision of Order XXI to the extent that they are not covered by Chapter XXII of the Original Side Rules are not excluded. In fact, if one peruses provisions of order XXI of the Code of Civil Procedure, it will be apparent that the Code itself provides

that certain acts can be done by the officers who are so entrusted. For that purpose, reference may be made to Order XXI, Rule 10 which sets out that, where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer appointed in this behalf. Similar provision would be found under Order XXI, Rule 24(2) as also Order XXI, Rule 25. I have merely illustrated these to point out that certain steps in execution can either be done by the Court or by the officers who are entrusted with the powers in those matters of execution. The Original Side Rules will have to be so interpreted. There is no provision in the Original Side Rules for the Prothonotary and Senior Master to deal with matters which would arise under Order XXI, Rule 58 or for that matter Order XXI, Rule 97. In the absence of rules as framed in the Chapter XXII, one will have to take recourse to Order XXI. These are rules which provide for adjudication of disputes which can be exercised by the Court only.

7. In the instant case, the decree holder has moved the Prothonotary and Senior Master in a pending application to execute a decree against a person who was not a party to the proceedings. As seen earlier, the Prothonotary and Senior Master can proceed to take steps in execution of a decree. However, objections to the decree by an obstructionist, or by the judgment debtors regarding execution of the decree, objections as to attachment and sale, including the power to attach and sell a property, power of appointment of a Receiver and the like cannot be decided by him. Therefore, if a decree holder applied for possession of property and some other person was in possession thereof, then such other person can resist the execution of the decree whereupon the other provisions come into place and the objections have to be decided. Rule 315, therefore found in Chapter XXII of the O.S. Rules cannot be read to mean that all these powers are vested in the Prothonotary and Senior Master.

8. In the instant case, what the decree holders are seeking to execute is requiring the society to execute a lease in favour of the decree holders. The society was not a party to the said proceedings. The society was a stranger, possession of the suit property has been handed over to the decree holder. In other words, the decree has been satisfied. The contention of the decree holders, however, is that, for getting their title protected, certain other acts have to be done which can only be done by executing the decree against the society. To my mind, this is not provided for in the Rules or even in Order XXI of the Civil Procedure Code. Once the decree was satisfied, there was no question of the Prothonotary and Senior Master assuming jurisdiction, to direct a party, not a party to the proceedings and who claims independently of the judgment debtor to direct such a person to do something or compel him to do any act. This, even a Court in proceedings for execution, would not have done against a person who claims no right through the judgement debtor, but on the contrary the judgment debtor claims a right through such person. The Prothonotary and Senior Master proceeded on the footing that it is Rule 315 which confers on him the power. Rule 315 is one of the rules in Chapter XXII pertaining to

execution. Rule 315 only provides that an application for execution can be made by Advocate on record or the party in person by application to the Prothonotary and Senior Master and notice as contemplated therein can be issued by the Prothonotary and Senior Master or by any of his assistant. This rule does not confer on the Prothonotary and Senior Master the power to decide the objections raised by the petitioner herein. This if and at all would be the power of the Chamber Judge hearing and deciding the applications. I am not deciding the issue as to whether the Court could if the application or the objection had been placed before it could call on the applicant to do the acts which the decree holder seeks.

9. Having said so, I am of the opinion that there is great merit in the present chamber summons. The orders of the Prothonotary and Senior Master are without jurisdiction and, consequently, the chamber summons had to be made absolute.

10. Accordingly, chamber summons made absolute in terms of payer Clause (a).

11. Considering the facts and circumstances of the case, each party to bear their own cost.

12. Chamber Summons made absolute.