

(1949) 10 BOM CK 0007

Bombay High Court

Case No: Civil Revision Application No. 545 of 1949

Mathuradas Vassanji and
Another

APPELLANT

Vs

Tulsidas Damodar Ganatra

RESPONDENT

Date of Decision: Oct. 5, 1949

Acts Referred:

- Presidency Small Cause Courts Act, 1882 - Section 43, 46, 47

Citation: AIR 1950 Bom 321 : (1950) 52 BOMLR 349

Hon'ble Judges: Rajadhyaksha, J; Chainani, J

Bench: Division Bench

Advocate: A.G. Kotwal and Ashok Setalvad, s 1 and 2, for the Appellant; M.H. Chhatrapati and H.C. Thakor, for the Respondent

Judgement

Rajadhyaksha J.

1. This is an application in revision against an order passed by the Small Cause Court, Bombay, which has been referred to a Division Bench by Shah J. The applicant in this case was a trustee of the late Rao Bahadur Seth Karamsey Damji Sanatorium which is situated near the Wilson College, Chowpatty. The sanatorium has certain rooms which are let out for a period of one month at a time, and according to the rules of the trust no occupant of the room may remain on the premises for more than three months. The opponent Tulsidas applied for one of the rooms on the ground of illness and produced a medical certificate in support of his application. He was thereupon assigned Room No. 26 for one month from 11th July 1948. The period of occupancy was extended first up to 10th September and then up to 10th October 1948. As the opponent failed to vacate the premises on 10th October inspite of his undertaking and the conditions for the use of the sanatorium, a notice was served upon him by the trustees requiring him to vacate. In defiance of this notice, the opponent continued to remain in occupation, and thereupon the trustees

filed an application in the Small Cause Court, being Application No. 11080 of 1948, u/s 41, Small Cause Courts Act, slating that the opponent was in occupation purely by leave and license, and that the license had been revoked both by the undertaking he had given and by the notices served upon him. It appears that when the application came on for hearing on 18th November, the opponent's pleader gave an undertaking that Tulsidas would vacate the premises or come to a settlement with the trustees within on month thereafter. The proceedings were accordingly adjourned to 23rd December 1948, when an adjournment was again asked for and granted on the plea that the opponent would vacate the room before 18th January 1949, or, in the alternative, would submit to a decree to vacate the room on or before 28th February 1949. When the matter came on for hearing on 18th February 1949, an order was passed by the learned Judge of the Small Cause Court directing the opponent to restore possession of the room to the trustees on or before 18th May 1949. Two days before the period was to expire, i. e., on 16th May 1949, the opponent filed an application u/s 47, Presidency Small Cause Courts Act, asking that the proceedings for delivery of possession be stayed as he intended to file a suit as contemplated by that section. Accordingly on 6th June 1949, the order for execution was stayed, and 16 days' time was granted for filing the suit. On 21st June, time for filing the suit was extended, and notice of the application asking for a stay of the proceedings was served upon the trustees. It was contended on behalf of the trustees that the Court had no jurisdiction to stay the proceedings after an order had been passed u/s 43, and in support of this contention the judgment of Shah J. in [Gopal Anant Prabhu Vs. Anandrao Vishnu Phanse](#), was produced. In that judgment Shah J. had expressed grave doubts as to whether after an order had been passed by the Court of Small Causes directing delivery of possession, any suit seeking an injunction for restraining execution of the order of the Small Cause Court could lie, and whether by reason of the intended filing of the suit, a stay of the proceedings could be asked for u/s 47. The learned Judge of the Small Cause Court, however, felt himself bound by a decision of Bavdekar J. in a civil revision application filed against the learned Judge's own judgment in an earlier case. That was in Bai Parvatibai v. Kesurdas, C. R. A. No. 827 of 1918, D/-5th April 1949 by Bavdekar J. In that judgment Bavdekar J. expressed his agreement with the view taken by the Madras High Court in Krishna Iyer v. Subramania Iyer A. I. R 1923 Mad. 323: 72 I.C. 154 that an application u/s 47 for a stay of proceedings could be made even after an order had been passed u/s 43, Small Cause Courts Act. As the observations of Shah J. in [Gopal Anant Prabhu Vs. Anandrao Vishnu Phanse](#), were mere obiter, the learned Judge of the Small Causes Court felt himself bound to follow the decision of Bavdekar J. Accordingly he held that he had no alternative but to stay execution of the warrant of possession until the suit for compensation for trespass intended to be filed by the opponent was disposed of. He accordingly directed that the execution be stayed pending the disposal of the suit by the Bombay City Civil Court. It is against this order that the applicant trustees came in revision. The revision application came on for hearing before Shah J. The advocates at the bar inform us that this application

was not argued on merits before the learned Judge. But the learned Judge, adhering to his earlier views expressed in [Gopal Anant Prabhu Vs. Anandrao Vishnu Phanse](#), has referred the application to a Division Bench for he considered that the question involved was an important one and also because the view which he was inclined to take was in conflict with the decision of Bavdekar J. in Bai Parvatibai v. Kessurdas (C.R.A. No. 827 of 1948 D/- 5-4-1949). In these circumstances the application has come before us for disposal.

In the referring judgment which he delivered on 9th September 1949, Shah J. expressed the view that:

"The right to obtain possession of premises, which are in the possession of an occupant within the meaning of Section 41, Presidency Small Cause Courts Act, must be decided at the original hearing of the summons and that adjudication by the Court u/s 43 must conclude as between the parties the existence or otherwise of such a right. The Court of Small Causes thereafter would be bound to execute the warrant issued in pursuance of the order, if any passed by the Court. The learned Judge thought that it would thereafter not be open to the occupant who has raised or must be deemed to have raised the contention to urge that the applicant was not entitled to obtain possession of the premises in dispute."

Mr. Shah J. was not disposed to accept the view expressed by Bavdekar J. and by the Madras High Court in the case referred to above, viz, that a suit instituted u/s 41 does not terminate on an order passed u/s 43. He thought that an order u/s 48 would be an adjudication in the nature of a decree, which could be enforced by taking proceedings in execution. He also expressed the view that the terms of Section 47, Presidency Small Cause Courts Act, and particularly para. 2 thereof, did not militate against the view which he was inclined to take.

3. In order to decide as to whether an application for a stay of the proceedings u/s 47 must be made before an order is passed u/s 43 (as is the view of Shah J.) or it can be made after such order is passed, (as is the view of Bavdekar J. and of the Madras High Court), we must have regard to the scheme of the Act. Chapter 7, Presidency Small Cause Courts Act provides a summary procedure by which a landlord may obtain possession of the premises in the occupation of a tenant if the conditions requisite for the making of an application are satisfied. These conditions are (1) that the immovable property must be within the local limits of the Small Cause Court's jurisdiction, (2) the annual value must not exceed Rs. 2,000, (3) the person sought to be evicted must be (a) the tenant or (b) in possession of the property by permission of another person or (c) an occupier, i.e., a person claiming under a tenant, or a permissive occupier, (4) the tenancy must have been determined or the permission to occupy must have been withdrawn, and (5) there must have been a request to the occupant to deliver up possession conveyed by means of a notice to quit by a particular date and his refusal to do so. If these conditions are satisfied then u/s 41 it is open to the applicant to ask for a summons against the occupant calling upon

him to show cause why he should not be compelled to deliver up the property. Section 42 describes how such a summons shall be served upon the occupant, and Section 43 lays down that

"If the occupant does not appear at the time appointed and show cause to the contrary, the applicant shall, if the Small Cause Court is satisfied that he is entitled to apply u/s 41, be entitled to an order addressed to a bailiff of the Court directing him to give possession of the property to the applicant on such day as the Court thinks fit to name in such order."

The Explanation to that section says that:

"If the occupant proves that the tenancy was created or permission granted by virtue of a title which determined previous to the date of the application, he shall be deemed to have shown cause within the meaning of this section."

Section 44 gives protection to the Judge who issued the order or to the officer of the Small Cause Court who executed it against any action, criminal or otherwise, on the ground only that the applicant was not entitled to the possession of the property. Section 45 says that the applicant is not to be deemed to be a trespasser merely for the reason that there has been some error, defect or irregularity in the mode of proceeding for obtaining possession; but the section refers to the right of any person aggrieved by an order u/s 43 to bring a suit for the recovery of compensation for any damage which he has sustained by reason of such error, defect or irregularity. Section 46 is an important one and has considerable bearing on the point which we have to decide. The first part of Section 46 says that:

"Nothing herein contained shall be deemed to project any applicant obtaining possession of any property under this chapter from a suit by any person deeming himself aggrieved thereby, when such applicant was not, at the time of applying for such order as aforesaid, entitled to the possession of such property."

The second part of Section 46 reads as follows :

"When the applicant was not, at the time of applying for any such order as aforesaid, entitled to the possession of such property, the application for such order, though no possession is taken thereunder, shall be deemed to be an act of trespass committed by the applicant against the occupant."

If the occupant intends to file a suit as contemplated by Section 46, then Section 47 says :

"Whenever on an application being made u/s 41 the occupant binds himself to institute without delay a suit against the applicant for compensation for trespass and to pay all the costs of such suit in case he does not prosecute the same or in case judgment therein is given for the applicant, the Small Cause Court shall stay the proceedings on such application until such suit is disposed of."

Paragraph 2 of this section lays down that :

"If the occupant obtains a decree in any such suit against the applicant, such decree shall supersede the order (if any) made u/s 43."

Finally Section 49 lays down that:

"Recovery of the possession of any immovable property under this chapter shall be no bar to the institution of a suit in the . . . High Court for trying the title thereto."

4. This being the scheme of the Act, the question arises whether the suit to be filed u/s 46 (by the intended filing of which suit a stay order may be obtained u/s 47), must be filed before or after an order has been passed u/s 43, Presidency Small Cause Courts Act. Mr. Kotwal who appeared on behalf of the applicant argued that Section 43 contemplates an order which has been passed in the absence of the occupant, i.e., an ex parte order, and that it is only the execution of such order that may be stayed by an application u/s 47, but that where an order has been passed after the appearance of the occupant in answer to the summons, then such an order must stand, and the execution of such order cannot be stayed u/s 47. We are not altogether clear as to what difference it should make in the jurisdiction of the Court to issue a stay order u/s 47, whether the order u/s 43 is an ex parte order or an order passed after the opponent has appeared in answer to the summons. The Court has or has not jurisdiction to order a stay u/s 47. But we see nothing in the terms of that section which would justify the distinction which Mr. Kotwal has attempted to draw. In any case, we think that Mr. Kotwal is not correct when he submits that u/s 43 only an ex parte order can be passed. He reads the first sentence of Section 43 as meaning that an order may be passed on the failure of the occupant to appear and show cause. But if that were the construction, then there is apparently no section, according to Mr. Kotwal, which would enable an order being passed after the opponent has appeared in answer to the summons. He argued that by reason of Section 48 of the Act, which directs the Small Cause Court to follow the procedure prescribed for a Court of the first instance by the Code of Civil Procedure, the Small Cause Court gets jurisdiction to pass an order after the opponent has appeared. We do not think that this submission is correct. The Court cannot get jurisdiction merely by reference to Section 48, which directs that the Court of Small Causes should follow the procedure prescribed by the Code of Civil Procedure, and, in our opinion, it must be held that an order u/s 43 may be passed both in the absence of the occupant and after he has appeared in answer to the summons, for there is no other section in this chapter of the Presidency Small Cause Courts Act which authorises the passing of an order after the occupant has appeared. The very explanation to that section makes it clear that it could not have been the intention of Section 43 merely to provide for orders passed in the absence of the occupant, for, that explanation says that if the occupant proves certain circumstances, he shall be deemed to have shown cause within the meaning of that section. This explanation clearly postulates appearance of the occupant in answer to the summons. Apart

from this we have a clear authority of our own High Court for holding that u/s 43 orders may be passed both in the absence of the occupant and after he has appeared. In *Jamshedji Hormusji v. Gordhandas Gokuldas* 45 Bom. 1048 : A. I. R 1921 Bom. 201 it was held that :

"Although the section is not very well worded, it must include cases where the occupant does appear and fails to show cause to the summons or satisfy the Court that there are reasons for not making an order for possession."

We must, therefore, hold that u/s 43 orders for delivery of possession may be passed even after the opponent has appeared in reply to the summons.

5. The main argument which has weighed with Shah J. in coming to the conclusion that the order passed u/s 43 must stand, and that there cannot be any stay of the execution of that order is that the adjudication by the Court u/s 43 must conclude as between the parties the existence or otherwise of the right to obtain possession of the premises. He took the view that such adjudication was in the nature of a decree which has to be enforced by taking proceedings in execution. As against this view, Bavdekar J. has expressed the opinion that the proceedings must still be regarded as pending within the meaning of Section 47, Presidency Small Cause Courts Act, until the possession is delivered or the summons taken out by the applicant is dismissed. This view of Bavdekar J. finds support in the decision of the Madras High Court in *A. S. Krishna Iyer v. N. Subramania Iyer* A. I. R 1923 Mad. 323 : 12 I. C. 154 With respect, we are inclined to take, the view which has been expressed by Bavdekar J. In our opinion, the proceedings do not come to an end after an order has been passed u/s 43. The order u/s 43 is not in the nature of a decree which has got to be executed by a separate application made for the execution of that order. As Bavdekar J. has pointed out in *Bai Parvatibai v. Kesurdas*, (C. R. A. No. 827 of 1918, D/-5-4-1949) the Presidency Small Cause Courts Act does not provide for the making of an application for execution of an order u/s 43. The order u/s 43 itself is an order addressed to the bailiff of the Court directing him to give possession of the property to the applicant on the date named in such order. It is true, as it happened in this case, that the Court may direct the occupant to deliver possession on any particular day, but if possession is not delivered on that day, the fact has got to be brought to the notice of the Small Cause Court, so that an order may be addressed to the bailiff of the Court to give possession of the property to the applicant. But that order addressed to the opponent to deliver up possession to the applicant on any particular day is only a stage of the proceedings before the Judge. The proceedings do not terminate until there is a direction given by the Court to the bailiff to give possession of the property to the applicant, if the necessity for the issue of such order does arise by the failure of the occupant to deliver possession thereof as directed by the Court. Shah J. says that :

"The issue of a warrant for possession would depend" upon an application made by the "applicant" and is not an automatic process of the Court once an order for

delivery of possession is passed."

With respect, we find no provision in the Act for the making of such an application. It cannot, therefore, be said that the making of an application for execution u/s 43 is a separate proceeding and is not a part of the proceedings arising out of the summons taken out by the applicant.

6. Shall J. also appears to have been of the view that once an order is passed u/s 43, on an adjudication made on a summons taken out u/s 41, that order must stand, and the Court which is called upon to execute the order passed by a competent Court after adjudication, of the rights of the parties, must carry out the directions given by the Court which tried the suit or the proceedings. In [Gopal Anant Prabhu Vs. Anandrao Vishnu Phanse](#), he expressed the view as follows (p. 846):

"I have grave doubts whether it is open, after the disposal of an application filed u/s 41, when an order has been passed for delivery of possession, to a person who is bound by that order, to contend that an action taken in furtherance or execution of an order lawfully passed by a Court competent to pass that order is an act of trespass. Bavdekar J. has, no doubt, taken the view that an application may lie u/s 47 even after an order is passed u/s 43. But for the purposes of the present application, I think it is unnecessary for me to go into that question and decide the point"

With respect we think that the learned Judge has not considered the provisions of Section 46 and the consequential provisions of Section 47, under which applications are made for a stay of the order passed u/s 43. The scheme of the Act appears to be this. The proceedings under Chap. 7 are essentially summary proceedings, and an order passed u/s 43 can always be challenged in a regular suit. Section 46 makes it clear that nothing contained in the chapter would protect any applicant obtaining possession of the property under the chapter from a suit by any person deeming himself to be aggrieved when such applicant was not, at the time of applying for such order, entitled to the possession of such property. Therefore, in spite of an applicant being successful in getting an order for possession of the property u/s 43 of the Act, it is fully open to the occupant if he deems himself aggrieved by that order, to file a suit and satisfy the Court that the applicant was not, at the time of applying for a summons u/s 41, entitled to the possession of such property. Second part of Section 46 makes a special concession in favour of the occupant and describes what shall be deemed to be an act of trespass for the purpose of filing the suit. Normally, an act of trespass would postulate dispossession as a result of the order of the Court, but the section says that "the mere filing of an application u/s 41 would be tantamount to an act of trespass even though, no possession is taken thereunder." The implication of the words "though no possession is taken thereunder" clearly is that where possession is taken under an order u/s 43, it would undoubtedly furnish a cause of action to the occupant for an action for trespass. But the section says "even though no possession is taken under an order made u/s 43," the mere act of filing an application would constitute an act of trespass. If then a suit

can be filed u/s 46 by a person who considers himself aggrieved by an order u/s 43, then Section 47 merely provides for an ancillary relief in the shape of a prayer for a stay of the proceedings under Chap. 7. Under that section all that the occupant has to satisfy the Small Cause Court before whom the proceedings are pending is that he is prepared to furnish two sureties, binding himself to institute without delay a suit in the High Court against the applicant for compensation for trespass and to pay all costs of such suit in case he does not prosecute the same or in case the judgment in that case is given against the occupant. If such an undertaking is given and the two sureties are forthcoming, then the Small Cause Court has no alternative but to stay the proceedings on such application until such suit is disposed of. The second part of Section 47 says that: "If the occupant obtains a decree in any such suit against the applicant, such decree shall supersede the order (if any) made u/s 43."

7. It seems to be the view of Bavdekar J. and the Madras High Court that this second part of Section 47 is a clear indication that a suit may be filed u/s 46 and a stay order obtained u/s 47 even after an order is made u/s 43. With respect, we are not altogether satisfied that this is the only conclusion to be drawn from para. 2 of Section 47. As Shah J. has pointed out in his referring judgment, it is possible that such provision had to be made to cover other contingencies also. It may be, as he has pointed out, that an order u/s 43 may have come to be passed in spite of the stay order, and therefore a provision had to be made for an order in the suit superseding the order u/s 43, Presidency Small Cause Courts Act. Further, it is not necessary that in every case the occupant who files a suit u/s 46 must necessarily ask for a stay of the proceedings before the Small Cause Court, and in that event an order may come to be passed u/s 43. Legislature had to provide against such a contingency by stating clearly that an order in the suit shall supersede the order u/s 43, Small Cause Courts Act. Although we think that para. 2 of Section 47 does not definitely lead to the conclusion that a stay can be granted even after an order has been passed under Section. 43, we think that the scheme of the Act clearly contemplates such a stay being granted after an order u/s 43. Section 46 clearly gives an occupant the right to challenge any order passed under chap, VII by means of a suit, and para. 2 of Section 46 makes a special concession in his favour that the mere fact of filing an application would be deemed to be an act of trespass, even though no possession is taken thereunder. If a suit of the kind contemplated by Section 46 can be brought after an order has been passed u/s 43, then clearly the occupant is entitled to ask for the ancillary relief provided by Section 47, viz., that the proceedings before the Small Cause Court may be stayed pending the disposal of the suit which he intends to file. This contingency can of course arise only when an order has been passed u/s 43, but the possession has not been delivered to the applicant. If the possession had been delivered, then clearly there are no proceedings pending before the Small Cause Court, and the application for stay is merely an infructuous application. We therefore think that so long as it is open to an

occupant, who considers himself aggrieved by an order u/s 43, to file a suit even after an order has been passed u/s 43, then clearly a stay of the proceedings before the Small Cause Court can be granted u/s 47, and indeed the Small Cause Court has no alternative but to grant the stay provided he gives the necessary undertakings contemplated by that section. We are fortified in this view by two decisions of the Madras High Court in Abdul Rahim v. Gangathara A. I. R 1918 Mad. 757 : 37 I. C. 436 and A. S. Krishna Iyer v. N. Subramania Iyer A.I.R 1923 Mad. 323: 72 I.C. 154. In Abdul Rahim v. Gangathara A. I. R 1918 Mad. 757 : 37 I. C. 436,

Kriahnan J. has made the following observation (p. 758) :

"In the case of an order passed under Chap. 7, Presidency Small Cause Courts Act, the Legislature has provided the remedy by suit u/s 46 to 49 of the Act and except in the manner therein provided, no suit will lie in any Court to supersede such an order. Section 46 declares in Clause 1, that a person obtaining possession of any property under the chapter, when he was not entitled to such possession at the time he applied for it, shall not be protected from a suit by any person aggrieved thereby and in Clause 2 that the application for an order for possession by such a person even though he had not obtained possession is itself an act of trespass. Section 47 shows that a suit for compensation for such trespass is to be filed in the High Court; it also provides how proceedings in the Small Cause Court may be stayed pending such suit, whether the ejectment order had been passed or not provided it had not been executed and possession given."

Similarly, in A. S. Krishna Iyer v. N. Subramania Ayer A. I. R 1923 Mad. 323: 72 I.C. 154, Schwabe C. J. said (p. 323) :

"As to the point taken as to the proper interpretation of the words "on an application" in Section 47, that these words mean "at some early time during the currency of such proceedings." I can find nothing in the Act to justify such an interpretation. It seems that the idea of the Act was that these proceedings are not to last long and I think it was intended that at any time during the currency of the proceedings, these applications could be made and I am confirmed in this view by the sub-clause to Section 47 which obviously contemplates such an application being made after an order has been made u/s 43 of the Act."

In our opinion, therefore, it is open to an occupant intending to file a suit for compensation for trespass to ask for a stay of the proceedings before the Small Cause Court even if an order for dispossession has been passed u/s 43, so long as that order has not been executed, i. e., while the proceedings are still pending.

8. On the whole the construction that we place upon the provisions of the Small Cause Courts Act is in consonance with what we conceive to be the intention of the Legislature. After all, the proceedings under Chap. VII are summary proceedings intended to give quick relief to an applicant. It is open to an occupant aggrieved by such an order to file a regular suit as contemplated by Section 46 when he finds that

his contentions have been rejected in the summary proceedings. If we were to hold otherwise, it would mean that every occupant must immediately rush to Court as soon as he finds that a summons has been taken out against him and before an order is passed u/s 43. It is conceivable that the occupant may feel that he might be able to persuade the Small Cause Court that he should not be dispossessed, in which case no necessity will arise for filing any suit, and we do not see why an occupant should be driven to filing a suit and asking for a stay order in anticipation of a refusal on the part of the Small Cause Court to accept his contentions. It is true that in some cases, as in the case with which we are dealing, parties may take undue advantage of provisions of the law and stave off the evil day when they would be dispossessed. It is possible for the occupants to raise contentions--perhaps futile ones--and then be served with an order for dispossession. When execution is taken out, they may delay the execution on one pretext or another, and just before actually being dispossessed they may give notice of their intention to file a suit u/s 47 and ask for a stay order. We agree that in such cases the landlords will be put to great inconvenience. On the other hand, we have also got to see that, if the law gives that concession, the occupants are not put to the trouble of filing unnecessary suits when it is possible that they may be able to persuade the Small Cause Court that their possession should not be disturbed. In all cases in which the law provides a summary remedy, a suit can be filed after the summary proceedings have ended, and indeed, in the present case, Section 46 distinctly contemplates a suit being filed against the order of eviction passed u/s 43, Small Cause Courts Act. The fact that processes of law might be abused in some cases would not alter the legal position.

9. We are therefore of opinion that the order for stay granted by the learned Judge of the Small Cause Court is correct in law, and we must therefore discharge the rule.

10. Having regard to the conduct of the parties, we direct that the parties should bear their own costs of this application.