

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INTERIM APPLICATION (L) NO. 29900 OF 2021

IN

EXECUTION APPLICATION NO. 356 OF 2021

Rahim Manji Kaba .. Applicant/Respondent

IN THE MATTER BETWEEN:

Moosabhai Gagji Khetani .. Claimant

Vs.

Rahim Manji Kaba .. Respondent

SHEHZAD NAQVI FOR THE APPLICANT IN IA(L)/29791/2021.

NISHA KABA I/B. HAREKRISHNA MISHRA FOR THE APPLICANT IN IA(L)/29900/2021.

VISHAL KANADE A/W. A. M. RAJABALLY FOR THE CLAIMANT.

CORAM:- B. P. COLABAWALLA, J.

Reserved on :5th JULY, 2022.

Pronounced on :13th JULY, 2022.

JUDGEMENT:

1. The above Application has been filed by Rahim Manji Kaba (the Applicant), who is also the Respondent in the above Execution

Application, *inter-alia*, seeking an order for raising the attachment levied on Shop No.2/2, Kazipura, Two Tanks, Mumbai- 400008 (for short “**the said Shop**”) and for restraining the Claimant/Decree Holder from taking out any legal proceedings against any movable property in the said Shop.

2. The principal ground on which the attachment is asked to be lifted is that the Arbitral Tribunal that passed the Award lacked inherent jurisdiction and the same is a nullity as it touches upon the rights of the Applicant as a tenant of the said Shop. This argument is canvassed on the basis that all issues with reference to tenancy, by virtue of Section 41(1) of the Presidency Small Causes Courts Act, 1882 and the provisions of the Maharashtra Rent Control Act, 1999, can only be decided by the Court of Small Causes at Mumbai. Consequently, the Arbitral Tribunal lacked inherent jurisdiction to decide on the issue of tenancy of the said Shop, is the argument canvassed before me.

3. To understand this controversy, it would be necessary to set out some brief facts. Initially, (i) the Claimant/Decree Holder, (ii) one Nasruddin Hashamali Liawalla and (iii) the Applicant above named (Rahim Manji Kaba), entered into a Partnership Deed dated 26th March 1993. They were carrying on business in the name and style of M/s.

Paradise Traders. This business was carried on from the said Shop. Mr. Nasruddin Hashamali Liawalla passed away on 18th October 2010 and thereafter the business was carried on by the Claimant and the Applicant. It is the case of the Applicant that during carrying on the business of the Partnership Firm, disputes arose between the Claimant and the Applicant as regards the tenancy rights with respect to the said Shop. The Claimant therefore invoked the Arbitration Clause in the Partnership Deed, and the disputes were thereafter referred to Arbitration as per the orders of this Court. The Claimant filed his statement of claim before the Arbitral Tribunal and the Applicant filed its statement of defence.

4. It is the case of the Applicant that in the statement of defence, the Applicant opposed the Arbitral proceedings, as being without jurisdiction, as the issues regarding tenancy of the said Shop could only be dealt with by the Small Causes Court at Mumbai. Despite this objection, the Arbitral Tribunal disposed of the Arbitral proceedings by passing an Award dated 11th February 2019 *inter-alia*:

- (i) declaring that the said Shop does not form the assets of the Partnership Firm and that the tenancy rights thereof belong to the Claimant;
- (ii) directing the Applicant herein to stop using the said

Shop and to remove himself along with his belongings therefrom; and

- (iii) restraining the Applicant herein by an order of permanent injunction from entering into and/or retaining the said Shop and/or from creating any third-party rights or interest therein in any manner whatsoever.

5. I must mention that this Award of the Arbitral Tribunal has not been challenged by the Applicant and has therefore attained finality.

6. In this factual backdrop, Ms. Nisha Kaba, the learned advocate appearing on behalf of the Applicant, submitted that the Arbitral Award is a nullity because the Arbitral Tribunal inherently lacked jurisdiction to decide the disputes between the Claimant and the Applicant herein. To substantiate the aforesaid argument, she contended that during the Arbitral proceedings, the Claimant had *inter-alia* sought a declaration regarding the tenancy rights of the Claimant in respect of the said Shop and for removal of the Applicant herein from the said Shop. She submitted that all such claims made by the Claimant in the above Arbitration were not arbitrable under the provisions of the Arbitration and Conciliation Act, 1996 [for short "**the Arbitration Act**"] in view of the express bar created by Section 41(1) of the Presidency Small Causes

Courts Act, 1882 and the provisions of the Maharashtra Rent Control Act, 1999. In this regard, she placed heavy reliance on Section 41 of the Presidency Small Causes Courts Act, 1882. She submitted that if she is correct in her submission, namely, that the disputes raised in the above Arbitration proceedings were not arbitrable because of Section 41 of the Presidency Small Causes Courts Act, 1882, then the Arbitration Award is a nullity and a challenge to the same can be laid even in collateral proceedings, including in execution. If this be the case, then the attachment levied on the said Shop, is wholly illegal and ought to be raised immediately, was the submission.

7. On the other hand, Mr. Kanade, the learned advocate appearing on behalf of the Claimant, submitted that there was no merit in the submission canvassed by Ms. Nisha Kaba. Mr. Kanade took me through the Partnership Deed dated 26th March 1993 and brought to my attention clause 13 thereof, which *inter-alia* records that the said Shop stands in the name of the Claimant, who is the tenant of the said Shop. He submitted that under the said clause, the parties had agreed that the same shall always belong to the Claimant and the other partners of the Partnership Firm shall have no right, title or interest or any claim in the said Shop. He submitted that it is because of this clause in the Partnership Deed that the Arbitral Tribunal declared that the said Shop does not form

a part of the assets of the Partnership Firm and that the tenancy rights thereof belong to the Claimant.

8. Mr. Kanade submitted that the reliance placed by Ms. Nisha Kaba on Section 41 of the Presidency Small Causes Courts Act, 1882 is wholly misplaced. He submitted that the said Section contemplates that the Court of Small Causes shall have jurisdiction to entertain and try all suits and proceedings between a licensor and a licensee or a landlord and tenant, relating to the recovery of possession of any immovable property situated in Greater Bombay, or relating to the recovery of the license fee or charges or rent therefore, irrespective of the value of the subject matter of such suits or proceedings. Mr. Kanade submitted that for Section 41 to apply, it must necessarily be a dispute between a licensor and a licensee or a landlord and tenant. This apart, it also has to be a dispute relating to the recovery of possession of any immovable property situated in Greater Bombay or relating to the recovery of the license fee or charges or rent. He submitted that in the facts of the present case, the disputes in the above Arbitration proceedings were not between a landlord and a tenant at all. He submitted that the Claimant is the tenant of the said Shop, and the landlord is some other third party. He submitted that it is not even the case of the Applicant that the Applicant is the landlord of the said Shop. He, therefore, submitted that the bar under Section 41 of the

Presidency Small Causes Courts Act, 1882 does not come into operation at all. If this be the case, then the entire argument canvassed by Ms. Nisha Kaba has no legs to stand on, because it then cannot be contended that the Arbitral Tribunal inherently lacked jurisdiction to decide the disputes and differences between the Claimant and the Applicant herein. He submitted that admittedly the Arbitral Award has not been challenged by filing any Petition under Section 34 of the Arbitration Act and therefore has attained finality. He, therefore, submitted that the above Application is without any merit and the same ought to be dismissed with compensatory costs.

9. I have heard the learned counsel for the parties at length and have perused the papers and proceedings in the above Interim Application. The Partnership Deed dated 26th March 1993 has also been tendered before me for my perusal. Clause 13 of the Partnership Deed reads thus:

"13. The premises bearing No.2/2 Kazipura, Two Tanks, Bombay - 400 008, stands in the name of the party of the Third Part, Shri Moosabhai Gagji, who is the tenant of the said premises. It has been agreed by and between the partners that the same shall always belong to Shri. Moosabhai Gagji and the party of the First Part and the part of the Second Part shall take no right, title or interest or any claim in the said business premises."

(emphasis supplied)

10. On a bare perusal of the aforesaid clause, it is clear that Moosabhai Gagji Khetani [**the Claimant**], is the tenant of the said Shop. The said clause further stipulates, and in unequivocal terms, that the said Shop shall always belong to the Claimant and the other partners have no right, title or interest or any claim in the said Shop. It is in light of this clause that the Arbitral Tribunal answered the issues before it in favour of the Claimant. In fact, the issue of jurisdiction has been dealt with by the Arbitral Tribunal by given its reasoning and finding under Issue No.6. The Arbitral Tribunal has categorically held that the relief sought by the Claimant is based on clauses 13 and 15 of the Partnership Deed dated 26th March 1993. The Arbitral Tribunal has recorded and given a finding that clause 13 clarifies that the Claimant is the tenant in respect of the said Shop from where the business of the Partnership was to be carried on and that it was agreed by the partners that the same was to belong to the Claimant alone. The Arbitral Tribunal thereafter concluded that it is in this light that a declaration is sought that the said Shop does not form a part of the assets of the Partnership Firm and that the Claimant is the exclusive tenant thereof. The Arbitral Tribunal rejected the argument that such a relief can be considered only by the Small Causes Court and that the Arbitral Tribunal had no jurisdiction to entertain the said claim.

11. Since an argument about the Tribunal inherently lacking jurisdiction is canvassed before me, I have independently examined this argument. This argument canvassed by Ms. Nisha Kaba is on the basis of Section 41(1) of the Presidency Small Causes Courts Act, 1882. Section 41(1) of the Presidency Small Causes Courts Act, 1882 reads as under:

“41(1) Notwithstanding anything contained elsewhere in this Act but subject to the provisions of subsection (2), the Court of Small Causes shall have jurisdiction to entertain and try all suits and proceedings between a licensor and licensee, or a landlord and tenant, relating to the recovery of possession of any immovable property situated in Greater Bombay, or relating to the recovery of the license fee or charges or rent therefore, irrespective of the value of the subject matter of such suits or proceedings.”

(emphasis supplied)

12. As can be seen from the aforesaid Section, for Section 41(1) to apply, the disputes must be between a licensor and a licensee or between the landlord and tenant relating to the recovery of possession of any immovable property situated in Greater Bombay or relating to the recovery of the license fee or charges or rent. In the facts of the present case, the disputes are certainly not between a landlord and a tenant. It is not even the case of the Applicant herein that the disputes in the present case are between the landlord and the tenant. In fact, that was never in issue before the Arbitral Tribunal. The issue before the Arbitral Tribunal

was whether the said Shop [and which was tenanted] belonged to the Claimant and whether the Applicant could (in his capacity as a partner), claim any right title or interest in the said Shop. This being the case, I find that the reliance placed by Ms. Nisha Kaba on Section 41 of the Presidency Small Causes Courts Act, 1882 is wholly misplaced. In fact, in the Arbitral Award, the relief granted to the Claimant is on the basis of clause 13 of the Partnership Deed and which is reproduced by me earlier. This is a relief that the Arbitral Tribunal was certainly entitled to grant as the disputes between the parties under the Partnership Deed were referred to Arbitration. There was no dispute before the Arbitral Tribunal between a landlord and a tenant which would divest it of its jurisdiction.

13. Faced with this situation, Ms. Nisha Kaba, the learned advocate appearing on behalf of the Applicant, now sought to argue that even if there is no relationship of landlord and tenant (between the Claimant and the Applicant), there is certainly a relationship of a licensor and a gratuitous licensee. If this be the case, then Section 41(1) would squarely apply. To support her submission, the learned advocate also placed reliance on a decision of the Hon'ble Supreme Court in the case of **Prabhudas Damodar Kotecha & Ors. vs. Manhabala Jeram Damodar & Anr. [(2013) 15 SCC 358]**. I am afraid, this argument is of no assistance to the Applicant. This argument is canvassed out of sheer

desperation. It has never been the case of the Applicant that the Applicant was a gratuitous licensee of the said shop and of which the Claimant was the licensor. In fact, even before the Arbitral Tribunal, the case of the Applicant was that since the reliefs sought by the Claimant pertains to the declaration of tenancy rights and other related reliefs, the Arbitral Tribunal will have no jurisdiction. It was never the case of the Applicant that he is gratuitous licensee (or for that matter, even a sub-tenant) and therefore, the provisions of Section 41 would be attracted. Whether the Applicant was a gratuitous licensee or otherwise, is a question of fact that has to be first pleaded and thereafter established. This is completely missing in the facts and circumstances of the present case. I am therefore unable to accept the submission made by the Applicant that he was a gratuitous licensee of the said Shop. This being the case, I find that the reliance placed by Ms. Nisha Kaba on the decision of the Hon'ble Supreme Court in the case of **Prabhudas Damodar Kotecha & Ors [Supra]** is wholly misconceived.

14. In view of the forgoing discussion, I find no merit in the above Interim Application. It is accordingly dismissed. However, there shall be no order as to costs.

(B. P. COLABAWALLA, J.)

15. After the judgment was pronounced, the learned counsel appearing on behalf of the Applicant sought continuation of the ad-interim order dated 19th January 2022 passed in the above Interim Application which *inter alia* directed the Decree Holder /Claimant not to take any further steps in execution. The learned counsel appearing on behalf of the Applicant submitted that this order be continued for a period of four weeks to enable the Applicant to test this order in Appeal.

16. Mr. Kanade, the learned counsel appearing on behalf of the Decree Holder/Claimant vehemently opposed the aforesaid request.

17. Having heard the learned counsels on this aspect, so as to not deprive the Applicant an effective right of appeal, I am inclined to grant this request. It is accordingly directed that for a period of four weeks from today, the Decree Holder/Claimant shall not take any further steps in execution. It is, however, clarified that this does not in any way result in lifting the attachment already levied. That shall continue.

18. This order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on

production by fax or email of a digitally signed copy of this order.

(B. P. COLABAWALLA, J.)