



Shubhada S Kadam

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 479 OF 2019**

Rustom Ginwalla & Anr ...Petitioners
Versus
The Board of Trustees of the Port of Mumbai & ...Respondents
Ors

Mr Vineet B Naik, Senior Advocate, with Sameer Pandit, Sarrah Khambati & Anuj Jain, i/b Wadia Ghandy & Co, for the Petitioners.

Mr Vishal Talsania, with Sneha Pandey, i/b Motiwalla & Co, for the Respondent Nos. 1 and 2.

Mr Premlal Krishnan, with Rehmat Lokhandwalla, Prashant Bothre & Abhishek Thoke, i/b Pan India Legal Services LLP, for the Respondent No. 3.

Mr Mani Thevar, i/b Ganesh & Co, for the Respondent No. 5.

**CORAM G.S. Patel &
S.G. Dige, JJ.**

DATED: 6th January 2023

PC:-

1. It appears to us *prima facie* that there is a very serious issue of maintainability of this Petition.

2. Having briefly heard Mr Naik, learned Senior Counsel for the Petitioners, and even more briefly learned Advocates for the 1st, 2nd

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and 3rd Respondents, we are not satisfied that this Petition is at all maintainable. Mr Naik will need to address this before we even agree to look at the merits.

3. Our reasons are these. The two Petitioners approach this Court in its writ jurisdiction. What is assailed in the Petition is an order dated 6th October 2018 of the 1st Respondent-Board. In other words, plainly, the Writ Petition seeks judicial review of administrative action by an instrumentality of the State. The law in that regard is extremely well settled. There is no possibility of examining the merits of the decision. A Writ Court in judicial review will address itself to the decision-making process. What is actually being sought, is nothing short for the declaration of title to immovable property. We fail to see how this is even remotely possible in our writ jurisdiction.

4. A very brief description of the dispute will suffice to bring the question of maintainability into focus.

5. There lies at Apollo Reclamation Colaba at Garden Road a structure called Rutton Manor. Evidently, this has several apartments or dwelling units, each self-contained. The Petitioners, Rustom and Rashna Ginwalla, are the children of the Respondent No. 4, Farhad. He died after the Petition was filed. The Respondent No. 5-, Cherie is Farhad's daughter, Rustom and Rashna's sister. Zenobia, Respondent No. 3, is also Farhad's daughter. The two Petitioners and the two surviving Respondents are, thus, siblings, one brother and three sisters.

6. There is no dispute that the MBPT is the lessor of the property. There is a long factual narrative. Farhad's late wife, Pervin, ultimately acquired 100% of the leasehold rights in Rutton Manor some time in 1989 or thereabouts. She made a will in the Year 1994, which received probate on 30th December 1997. Under this, Pervin supposedly bequeathed 55% of her leasehold rights to Farhad, her husband, and 45% to their daughter, Zenobia. It is not in dispute that the MBPT recognised both Farhad and Zenobia as tenants. However, the Petitioners say that Farhad and Zenobia were not joint tenants but were tenants in common with defined percentages because MBPT acted upon Pervin's Will and was apparently bound by it.

7. We have every reason to doubt the correctness in law or otherwise of these assertions. MBPT for its part maintains that the tenancy of Farhad and Zenobia was always a joint tenancy.

8. Prima facie, it is difficult to accept that Pervin, a tenant, could have 'created' a tenancy, or could have set the terms or nature of that tenancy, whether by a testamentary disposition or in any other manner. A tenancy can never be created by a tenant. It can only be created by a lessor or a landlord. That is over-stating the obvious. Therefore, it follows that it was the MBPT that created the tenancy in favour of Farhad and Zenobia, and it is only MBPT that could have decided or prescribed the nature of that tenancy or its terms.

9. The consequence in law is straightforward. On the demise of a joint tenant, the other tenants Would succeed by survivorship to the whole of the tenancy and not to any part or percentage of it.

10. What Rustom and Rashna say is that Farhad transferred his alleged share in his tenancy in Rutton Manor to Rustom and Rashna under a gift deed. That only further muddies already turbid waters. For these two Petitioners now also contend that the MBPT is supposedly bound by this gift deed as well. Some circular of the MBPT is invoked which is said to recognize family transfers or transfers by way of family arrangements.

11. What is canvassed before us is a question of operation of law. We are essentially being told that the Pervin's Will is the genesis of the creation of a tenancy by MBPT, although it is contrary to everything that the MBPT itself says. In its impugned decision, the Board has clearly rejected the submission that it was even remotely concerned with any testamentary disposition. It also rejected Farhad's contention that the Will would override the lease and supplementary lease deed. Both those findings prima facie appear to us to be correct in law.

12. The result of this is that there is now a struggle for control of Rutton Manor between Rustom, Rashna, Zenobia and possibly Cherie, all Farhad's children. The real dispute seems to be between Zenobia and the Petitioners. What is certain is that the MBPT has in fact recognized Zenobia as a tenant along with Farhad, as a joint tenant. It is Rustom and Rashna who claim now a right also to be

recognized as tenants of at least a part or a percentage of Rutton Manor building.

13. Cherie has engaged a lawyer but has apparently not given him instructions, so we need not detain ourselves at this stage with speculating what her stand might be.

14. We have noted this because it seems to us quite clear that what Rustom and Rashna seek in this Petition ought really to be the subject matter of a substantive suit in a court of appropriate jurisdiction for suitably framed reliefs. *Prima facie* we are unable to appreciate how a writ court can declare a tenancy which is really the relief that is sought to be canvassed here. It is equally unclear to us how a Petition can be entertained if the merits of the controversy before the Board cannot be examined in the writ jurisdiction since there is no case in the Writ Petition about the failure of any kind of the decision-making process itself.

15. Mr Naik seeks time to take instructions.

16. We have expressed a *prima facie* view. But we have done this so that Mr Naik is not taken unawares, because if his instructions are indeed to proceed, we will insist that he first address the issue of maintainability before we are even prepared to hear him on any other aspect of the matter. Indeed, we would go so far as to say that we would consider rendering judgment on the issue of maintainability before we proceed with any other consideration.

17. We are now told that there are other proceedings between the parties in other Courts. There is also a status-quo order of this Court passed on 23rd June 2020. Since the next date is only a few weeks hence, while we do not disturb that status-quo order, we make it clear that the Petitioners are not entitled to use that status-quo order to obtain any further or substantive relief in any other proceedings. In other words, if in those proceedings, other reliefs are sought by the other parties that do not disturb the possessory status-quo order, those applications may be pursued.

18. In any case, we clarify that the status-quo order will run only until 7th February 2023.

19. List the Petition on 7th February 2023 at 2.30 pm.

(S. G. Dige, J)

(G. S. Patel, J)