

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CIVIL APPELLATE JURISDICTION.**

**FIRST APPEAL NO. 365 OF 2015
WITH
CIVIL APPLICATION NO. 1011 OF 2015
WITH
CIVIL APPLICATION NO. 798 OF 2014**

Smt. Rekha Ajaykumar Handa ... Appellant.
V/s.
The Mumbai Municipal Corporation of
Gr. Bombay & Ors. ... Respondents

Mr. R.A. Yadav for the appellant.
Mrs. M. R. Bhoir for the respondent/Corporation

**CORAM : K. K. TATED, J.
DATED : 18/04/2015.**

P.C.:

. Heard learned Counsel for the parties.

2 This First Appeal is preferred by the plaintiff challenging the judgment and decree dated 13.12.2013 passed by the Bombay City Civil Court at Bombay in L.C. Suit No. 1624 of 2009 dismissing the plaintiff's suit.

3 For the sake of convenience hereinafter the nomenclature of the parties are referred as stated in the plaint i.e. appellant as plaintiff and respondent as defendant no.1.

4 The few facts of the matter are as under:

a) The plaintiff filed L.C. Suit no. 1624 of 2009 in the Court of Bombay City Civil Court at Bombay for declaration that the plaintiff is in use/occupation of premises i.e. pitch Hut No. CEN 32(36)341, beside telephone stall, Opp. Kalpak Estate, building no. C-17 CGS colony. Section VI, near Bldg. No. 205, S.M. Road, Antop Hill, Mumbai 400 037 and for other following reliefs:

“a) That Hon'ble Court be pleased to order and decree and declare the plaintiff in use occupation of suit premises pitch Hut No. CEN 32(36)341, beside telephone stall, Opp. Kalpak Estate, building no. C-17 CGS colony. Section VI, near Bldg. No. 205, S.M. Road, Antop Hill, Mumbai 400 037 for area admeasuring 20 sq.ft. X 10 sq.ft. purchase premises as per Transfer Affidavit dated 20.01.2000 and 29.03.2006 protection be granted because premises is since 01.01.1995.

b) That the Hon'ble Court may be pleased to direct defendant to restore the suit premises of plaintiff situated at pitch Hut No. CEN 32(36)341, beside telephone stall, Opp. Kalpak Estate, building no. C-17 CGS colony. Section VI, near Bldg. No. 205, S.M. Road, Antop Hill, Mumbai 400 037 admeasuring are 20' sq.ft. X 10 sq.ft. purchased premises as per Transfer Affidavit dated 20.01.2000 and 29.03.2006 and maintained mandatory injunction.

c) That pending the hearing and final disposal of the suit the Defendants its officer, representatives and agents be restrained by an order of this Hon'ble Court not to create any third party right at pitch Hut No. CEN 32(36)341, beside telephone stall, Opp. Kalpak Estate, building no. C-17 CGS colony. Section VI, near Bldg. No. 205, S.M. Road, Antop Hill, Mumbai 400 037 admeasuring 20' sq.ft. X 10 sq.ft. purchased premises as per Transfer Affidavit dated 20.01.2000 and 29.03.2006 Plaintiffs interest be protected as the suit premises is since 01.01.1995.

d) Ad-interim relief in terms of prayer (a), (b) and (c) may be granted.

e) Cost of the suit be provided;

f) Any other and further relief as this Hon'ble Court may deem fit and proper in the circumstances be

granted.”

b) The plaintiff's case was that she purchased the suit premises from one Mr. K. Varghese Danial. At the time of purchasing the said suit premises, Mr. K. Varghese Danial executed Transfer Affidavit dated 20.01.2000 and since then the plaintiff is in possession of the suit premises.

c) In the present proceeding, the earlier occupant Mr. K. Varghese Danial filed L.C.Suit No. 5195 of 2006 before the Bombay City Civil Court at Bombay restraining respondent corporation from demolishing the suit premises. In that proceeding, the corporation placed on record the report stating that the suit premises was demolished. Hence, the L.C. Suit No. 5195 of 2006 was dismissed. Thereafter, the plaintiff filed L.C. Suit no. 2169 of 2010 in the name of Mr. Danial for the same cause of action. That suit was dismissed by the Trial Court observing that suit premises was already demolished on 21.04.2009 and 27.09.2009 by the corporation. Then the plaintiff filed the present L.C. Suit No. 1624 of 2009 for declaration that she is in possession of the suit premises and respondent corporation be directed to restore the suit premises which was demolished earlier. The Trial Court considering the evidence on record and the report submitted by the corporation held that on the date of filing of the present suit, the suit structure was not in existence because same was demolished on 21.04.2009 and thereafter, again on 27.09.2009. Hence, the present First Appeal.

5 The learned Counsel Mr. Yadav appearing on behalf of the

plaintiff submits that the Trial Court failed to consider that plaintiff was in occupation and owner of the suit premises. He submits that Trial Court has not considered the documents and correspondence placed on record to show that the plaintiff was occupant of the suit premises since 20.01.2000, when she purchased the same from Mr. K. Varghese Danial. He further submits that the Trial Court only on the basis of report submitted by the corporation held that the plaintiff failed to prove the existence of the suit structure on the date of filing of the suit, i.e. 22.07.2009. On the basis of these submissions, the learned Counsel for the plaintiff submits that this Hon'ble Court be pleased to set aside the Judgment and Decree dated 13.12.2013 passed by the Trial Court in L.C.Suit No. 1624 of 2009 and decree to be passed in terms of prayer clauses (a) and (b) of the plaint. He submits that if the impugned Judgment and Decree is not set aside, irreparable loss and injury will be caused to the plaintiff.

6 On the other hand, the learned Counsel Mrs. Bhoir appearing on behalf of the defendant corporation vehemently opposed the present First Appeal. She submits that admittedly, the suit structure was demolished by the corporation on 21.04.2009 and 27.09.2009. To that effect, they placed on record the documentary evidence. Considering the documentary evidence on record, the Trial Court rightly held that plaintiff failed and neglected to prove that on the date of filing of the suit, she was in possession of the suit premises.

7 The learned Counsel for the defendant corporation submits that the plaintiff in L.C. Suit No. 1624 of 2009 made prayer clause (a) for declaration that she is in possession of the suit premises and whereas,

prayer clause (b) is made for direction to the defendant corporation to restore the suit premises and handover the same to the plaintiff. She submits that the prayer clause (b) to the plaint, itself shows that on the date of filing of the suit, the suit premises was demolished by the corporation and same was not in existence. Hence, there is no substance in the present First Appeal and same to be dismissed.

8 I heard both the sides at length. I have gone through the copy of plaint, written statement, deposition of the parties and other documents placed on record by the plaintiff. Hence, it is not necessary to call R & P from the Trial Court.

9 Considering the submissions made by the parties, the issue involved in the present First Appeal is as follows:

Sr. No.	Issue	Findings
1	Whether the plaintiff proves that on the date of filing of the suit, she was in possession of the suit premises i.e. pitch Hut No. CEN 32(36)341, besides telephone stall, Opp. Kalpak Estate, building no. C-17 CGS colony. Section VI, near Bldg. No. 205, S.M. Road, Antop Hill, Mumbai 400 037?	No.

10 In the present proceeding, earlier the suit premises was in possession of Mr. K. Varghese Danial. The corporation issued notices to the earlier occupant Mr. Danial for removing unauthorised

constructions. Those notices were challenged by Mr. Danial by filing L.C. Suit No. 5195 of 2006. In that suit, the corporation pointed out that the suit premises was demolished by them. Hence, that suit was dismissed. Thereafter, again the plaintiff in the name of Mr. K. Varghese Danial filed another suit no. 2169 of 2010 against the corporation for restraining them from demolition of the suit premises. That suit was dismissed by the Trial Court on the ground that suit premises was already demolished by due process of law by the corporation twice on 21.04.2009 and thereafter again on 27.09.2009. These facts are recorded by the Trial Court in paragraph 15 to 17 of judgment. Paragraph nos. 15 to 17 of the impugned Judgment and Decree, read thus:

“15 It is also pertinent to Office note shows that that during the cross examination of plaintiff the vital facts are brought on record by the BMC. Her cross examination shows that she has admitted that after the demolition dated 21.04.2009, the plaintiff himself has filed the suit bearing L.C. Suit No. 2169 of 2010 in the name of Mr. K. Varghese Danial, which is also pending in this court and which is dismissed today, because her lawyer told her that they would get the relief, if the suit is filed in the name of Mr. K. Varghese Danial. This shows that the suit filed by Mr. K. Varghese Danial i.e. L.C. Suit No. 2169 of 2010 and this suit filed by the plaintiff are filed by them by joining hands and in respect of the same property praying the same relief.

16 It is also pertinent to Office note shows that that she has admitted that in the year 2009, the suit structure was demolished and neither she nor Mr. K. Varghese Danial had taken permission to construct that suit structure from the BMC. It is also pertinent to Office note shows that that the present plaintiff had filed an application for restoration of the suit in L.C. Suit no. 2169 of 2010. In paragraph no. 13 of the plaint, she had mentioned that in suit no. 5195 of 2006 she has filed the notice of motion bearing no. 636/2009 on 22.04.2009 for

restoration of the suit structure and the said Notice of Motion was dismissed on 05.07.2009.

17 This clearly shows that the plaintiff had made an attempt to restore the suit no. 5195/2006 in which the same relief which is prayed in this suit was made before the court and that suit was dismissed. However, instead of making efforts for filing an appeal against that dismissal of Notice of Motion no. 636/2009, the present plaintiff had filed this suit and she has also filed another suit bearing no. 2169/2010 in the name of defendant no.2 Mr. K. Varghese Danial. Therefore, this suit is not at all maintainable and it is devoid of any merit. None of the document filed on record, prove that she is in exclusive use and occupation of the suit premises or the suit structure is a protected one. On the contrary, the evidence brought on record by the defendant BMC shows that the suit structure was twice demolished and when the present suit was filed by the plaintiff, the suit structure was not at all in existence. In such circumstances, I record my finding to issue no.1 in the negative.”

11 Bare reading of the plaint and particularly prayer clauses (a) and (b) show that plaintiff herself admitted at the time of filing of the suit, that suit premises was not in existence. Hence, she has made prayer clause (b) directing corporation to reconstruct the suit premises and handover the possession to her.

12 Considering the above mentioned facts, written statement filed by the defendant, the deposition of the parties and the impugned Judgment and Decree passed by the Trial Court, it is crystal clear that on the date of filing of the suit, the plaintiff was not in possession of the suit structure and same was demolished by the corporation on 21.04.2009 and 27.09.2009. Hence, the issue framed by this Court is answered in the negative.

13 In view of the above mentioned facts and reasoning given by the Trial Court, I do not find any substance in the present First Appeal and same is dismissed summarily.

14 In view of the dismissal of First Appeal, pending Civil Applications stand rejected as infructuous.

(K.K.TATED, J.)