

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.1118 OF 2014

Tilottama Vasant Phatak & Ors. ... Appellants

Vs.

Shri Prakash Shantaram Ambike & ors. ... Respondents

Mr.Sushant Karandikar for Appellants

Mr.A.S. Khandeparkar i/b Khandeparkar & Asso. For Resp. No.2

Mr.R.S. Datar for Resp. No.1

CORAM: MRS.MRIDULA BHATKAR, J.

DATE: 31st AUGUST, 2015

P.C.:

1. Admit. By consent of the parties, appeal called out and heard finally at the stage of admission itself.
2. The appeal is filed against the order passed by the learned Civil Judge Senior Division dated 4.8.2014 on exhibit 174 in Suit No.261 of 2013. It is the case of the appellant that they have filed a counter claim in the Special Civil Suit No.261 of 2013. The counter claim was filed by the respondent Nos.1 to 5 i.e., original defendant Nos.1 to 5 for injunction and possession. It is submitted that the plaintiff who is an original plaintiff, did not make any averments about the possession in respect of the premises in Indira Niwas. He submitted that when there are no such averments in

respect of the possession of the premises in the Indira Niwas, no orders can be passed in favour of the plaintiff and the trial Court ought to have considered the prayer of defendant Nos.1 to 5 who are the appellants in this appeal, claiming the possession and ownership in respect of the said suit premises in Indira Niwas. He submitted that earlier, the plaintiff has moved the application for amendment of the plaint seeking permission that the pleadings be allowed to be amended in respect of possession of the premises in Indira Niwas. However, the said application was rejected by the trial Court so also in Writ Petition No.4150 of 2014 challenging the said order was dismissed by order dated 15.4.2014 of this Court. The learned Counsel further submitted that if his prayer for amendment was rejected and as there are no averments in respect of possession of the premises in Indira Niwas, the trial judge ought to have considered the prayer and application under exhibit 174 need to have been allowed.

3. Mr.Datar, appearing for the original plaintiff, submitted that in the written statement filed by defendant Nos.1 to 5, they have admitted in para 7 thereof about the agreement in respect of the premises in Indira Niwas and his possession thereby is also admitted.

4. I have perused the order passed by the learned Judge of the trial Court while rejecting the application under exhibit 174. It appears that the

application for amendment in respect of possessory rights pertaining to the premises in Indira Niwas was rejected by the trial Court and so also this Court. There are no specific averments in respect of possession of the said premises. However, as observed by the trial Court under the order that the appellants i.e., defendant Nos.1 to 5 have stated that the plaintiff has forcefully taken the possession of the premises in Indira Niwas and, therefore, prima facie, it appears rightly or wrongly, the plaintiff is having possession of the said premises in Indira Niwas. Similar observations made in the Court Commissioner's report in respect of the premises in Indira Niwas. The plaintiff for want of proper averments and proof, at the time of final hearing of the suit in respect of the premises in Indira Niwas may show that the plaintiff has forcibly taken the possession of the said premises. However, at this interim stage, the possession cannot be handed over by granting a mandatory injunction in the counter claim. It is also noted that it is not a Suit under section 6 of the Specific Relief Act and therefore, the appeals fails.

5. Accordingly, the appeal is dismissed.

6. However, in the circumstances of the case, the trial Court may expedite the suit and decided it preferably within one year.

(MRIDULA BHATKAR, J.)