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IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****APPEAL (L) No. 240 of 2015**

IN

NOTICE OF MOTION No.22 of 2015

IN

SUIT No.769 of 2007

ALONG WITH**APPEAL (L) No. 241 of 2015**

IN

NOTICE OF MOTION No. 981 of 2014

IN

SUIT No. 769 of 2007.

ALONG WITH

NOTICE OF MOTION (L) No. 635 of 2015

IN

APPEAL (L) No. 240 of 2015

ALONG WITH

NOTICE OF MOTION (L) No. 641 of 2015

IN

APPEAL (L) No. 241 of 2015

Smt. Saroj M. Bijlani w/o Late Shri
Manohar G. Bijlani, resident of 107
Uday Park, New Delhi, Also R/at Bijlani
Bhawan, 738, Khar Pali Road, Mumbai
400 052. and 2 others

..APPELLANTS/

Orig. Plaintiffs.

Versus

Shri Chandru G. Bijlani son of Late Shri
Girdharilal T. Bijlani, resident of Bijlani
Bhawan, 738, Khar Pali Road, Mumbai
400 052 and 9 others

..RESPONDENTS/
Orig. Defendants.

Dr Birendra Saraf, Senior Counsel a/with Mr Aditya Shiralkar and
Mr Rahul Kedar i/b M/s Shralkar & Co. for the Appellants.

Mr S. Malik a/with Ms Nishtha Malik for Respond Nos. 1 to 4.

CORAM : V.M.KANADE & A.R. JOSHI, JJ.
RESERVED FOR ORDER: 27th April, 2015.
JUDGMENT PRONOUNCED ON :30th April, 2015

JUDGMENT (PER: A.R. JOSHI, J)

1) This is the appeal preferred by original plaintiff Nos. 1 to 3 challenging the order passed on 2nd March, 2015 on the Notice of Motion No. 981 of 2014 and another Notice of Motion No.22 of 2015.

2) Heard rival arguments at length. Perused the impugned order dated 2nd March,2015 passed by a learned Single Judge of this Court. By the said order, Notice of Motion No.981 of 2014 preferred by the present appellants/plaintiffs was dismissed while Notice of Motion No.22 of 2015 filed by the present respondent Nos. 1 to 4 was allowed.

3) Prior to appreciating the rival submissions, the case putforth in the suit filed by the present appellants/plaintiffs can be mentioned in order to ascertain the basic dispute between the appellants and the present respondent Nos. 1 to 4 :-

The present appellants/plaintiffs filed suit No. 769 of 2007 seeking the partition of the immovable house property belonging to the HUF. The said house property is a building with ground plus three upper stories and known as 'Bijlani Bhawan' at 738, Khar Pali Road, TPS- III, Bandra, Mumbai. Without going into much details as to how the HUF was originated, suffice it to say that apparently there was HUF with the head of the family as one Diwan Tota Sing. He had three sons, Chellaram, Girdharilal and Kamal Bijlani. Sometime in the year 1958, there was an oral family partition with respect to the property of M/s Diwan Tota Sing, HUF and then it was reduced into writing in the year 1959 and registered with Sub-Registrar of Assurances at Bandra. As per said partition, the property i.e. building Bijlani Bhawan, 738, Khar Pali Road, TPS III, Bandra came to the share of the branch of M/s Girdharilal Bijlani, HUF comprising said Girdharilal and his four sons, namely, Manohar Chandru, Kumar and Gul. Out of them, Manohar is since deceased and present appellant No.1 is his widow

and appellant Nos. 2 and 3 are his son and married daughter. Present respondent Nos. 1 to 4 are in fact the contesting respondents in the present appeal. Respondent no.2 is wife of respondent no.1 and respondent Nos. 3 and 4 are the sons of respondent No.1. It is the case of the appellants that they had purchased the undivided $1/4^{\text{th}}$ share of one Kumar under the conveyance of March, 2010. According to the appellants, they have half share in the property Bijlani Bhawan and present respondent Nos. 1 to 4 have $1/4^{\text{th}}$ and the legal heirs of one Gul (since deceased), one of the sons of Girdharilal, had remaining $1/4^{\text{th}}$ share.

4) The suit filed by the appellants is pending before the Original Side being Suit No. 769 of 2007 and which is for partition. Without going much into details as to the defence raised in the said suit by the present respondent Nos. 1 to 4, suffice it to say that they have denied the share of the appellants in the said property Bijlani Bhawan.

5) Apart from the above, certain admitted position can be narrated, inasmuch as :

(i) The Appellants, had much earlier, shifted to

Delhi for permanent residence and livelihood;

- (ii) Present respondent Nos. 1 to 4 are residing on the third floor of Bijlani Bhawan and occupied about 1500 sq. feet area;
- (iii) The legal heirs of deceased Gul and who are respondent Nos. 8 to 10 are occupying the second floor of the building and area approximate about 900 sq. ft.;
- (iv) Defendant Nos. 1 to 3 filed eviction proceedings against tenants of Flat No.4 area situate on the first floor of Bijlani Bhawan. Similar such proceeding was filed by present respondent Nos. 1 to 4 against the tenants of Flat No.2 on the ground floor of Bijlani Bhawan. The said suits were compromised and respondent Nos. 1 to 4 got vacant possession flat at ground floor and of 650 sq. ft. area of flat at first floor.
- (v) Apparently, the eviction proceedings as mentioned in clause (iv) above, were prosecuted only by respondent Nos. 1 to 4 and, admittedly, present appellants did not get themselves impleaded as the plaintiffs in

the said eviction proceedings;

- (vi) In Suit No. 769 of 2007 preferred by the present appellants, then plaintiffs, for partition, Notice of Motion No. 533 of 2007 was taken out and at ad-interim stage present respondent Nos. 1 to 4 made a statement that they shall not create third party rights and deal with any premises in the suit property i.e. Bijlani Bhawan;
- (vii) Interim orders were passed in said Notice of Motion No. 533 of 2007, by way of consent terms recorded as Minutes, wherein respondent Nos. 1 to 4 had agreed not to alienate or encumber or part with the possession or create any tenancy or induct any third person in any part of the premises of Bijlani Bhawan, without leave of the Court and further agreed that respondent Nos. 1 to 4 upon receiving the possession of any premises in the suit property and occupy the same only after obtaining the leave of the Court;
- (viii) Sometime in November, 2012 a Contempt Notice of Motion No.515 of 2010 was disposed of thereby directing respondent

No.3 to deposit the keys with the Court;

- (ix) One tenant by name Ahuja vacated the part of the tenanted premises to the extent of 650 sq. ft. on the first floor of Bijlani Bhawan in favour of present respondent Nos. 1 to 4 and for this part of the premises the appellants took out Notice of Motion No. 981 of 2014 for allowing them to use and occupy the said flat mainly for residence of appellant No. 1 original plaintiff No.1 on the premise that now she being a lady of old age, wants to come down to Mumbai as the climatic condition at Delhi is not suitable for her health;
- (x) Present respondent Nos. 1 to 4 took out Notice of Motion No.22 of 2015 praying for leave of the Court for taking possession of the portion of the flat i.e. 650 sq. ft. at the first floor and for possession of the flat on the ground floor for the purpose of using the first floor premises for the separate residence of one of the families of the respondents and use of the ground floor premises to open a medical care centre.

6) During the arguments, learned Counsel for the

appellants submitted that the balance and equity demands that the properties now vacated by the tenants from the first floor and ground floor are required to be given in the custody of the appellants. This is more so, further argued, for the reason that the area of 1500 sq. ft. on the third floor is already in possession of the respondent Nos. 1 to 4 and area of about 900 sq. ft on the second floor is in possession of the legal heirs of deceased Gul. Secondly, it is argued that the appellants also have undivided share in the property known as Bijlani Bhawan and as such they are entitled for proportionate share for their use and occupation till the final adjudication of the shares by way of partition of the property in the main Suit No. 769 of 2007.

7) It is also argued that though there were consent terms recorded by way of minutes in Notice of Motion No. 533 of 2007 and though it was undertaken by the defendants in the suit i.e. the present respondent Nos. 1 to 4 not to take possession of any such vacant premises in the said building without leave of the Court, the respondent No. 3 had taken the possession of the tenement surrendered by one tenant Mira Bhakru. For this high handed activity of respondent no.3, further argued, a contempt notice of motion was filed by the plaintiffs, present appellants, being Motion

No. 515 of 2010 and in the said motion the learned Single Judge of this Court directed respondent No.2 to deposit the keys of the premises with the Court. As such, finally it is argued on behalf of the appellants that the equity demands that the said premises at the ground floor and the first floor are required to be given in the possession of the appellants/original plaintiffs.

8) Counter to the above arguments, learned Counsel for respondent Nos. 1 to 4 stated that there is nothing to interfere with the impugned order by which the Notice of Motion of the original plaintiffs was dismissed and the Notice of Motion of these respondents was allowed. It is submitted that yet the share of the original plaintiffs in the suit building is to be crystallized and moreover the alleged share is required to be established by the plaintiffs and only then the plaintiffs can claim possession of any of the vacant premises in the suit building. This is more so, further argued, as the premises on the ground floor and the first floor are now available only because of the consistent efforts of the present respondent nos. 1 to 4 in pursuing the eviction proceedings against the respective tenants. It is also argued that, admittedly, the present appellants had not participated in the said eviction proceedings and did not pursue the matter, much less expending

any amount for litigation expenses and also for maintaining the said building. It is also argued that for so many years the appellants have shifted to Delhi and had not bothered to look after the property at Mumbai and as such they are not entitled to claim the possession even during the pendency of the suit. More so, when the said position is now available only because of the prolonged proceedings taken out by the present respondent Nos. 1 to 4.

9) On carefully considering the rival submissions and mainly taking into account the admitted position as enumerated in sub-paragraphs (i) to (x) above, in our considered view, till the right of the original plaintiffs present appellants is determined and crystallized in the said Bijlani Bhawan, there cannot be a relief in favour of the appellants so far as the possession of any premises on the ground floor or on the first floor. Needless to mention that the possession as an ad hoc arrangement is given to the present respondents on the ground floor and the first floor premises and is always subject to the final out come of the suit No. 769 of 2007 and apparently the availability of the premises on the ground floor and the first floor is only on account of litigation taken out by the present respondent Nos. 1 to 4 with the respective tenants, at their

own costs, expenses and hardships.

10) In our considered view, whether or not, the climatic condition at Delhi is suitable for appellant no.1 is not the determining factor while dealing with the present appeal and in considering whether the Notice of Motion preferred by the appellants bearing No. 981 of 2014 is to be allowed or not. The question is whether during the pendency of the suit the appellant no.1 i.e. aged woman is allowed to be stayed in any of the premises of the first floor or the ground floor, as, apparently, it is not a case that all the appellants want to come down at Mumbai and occupy the said premises. In our considered view, the better course would be to dispose of the suit expeditiously and ascertain whether the original plaintiffs present appellants have any share in Bijlani Bhawan and to what extent.

11) Consequently, we do not find any merit in the present appeal and as such the same is accordingly dismissed. However, we feel it necessary to modify the impugned order so far as paragraph No.15 (b) is concerned. Here, we would like to mention that the defendant Nos. 1 to 4 are entitled to occupy the flat No.2 on the ground floor and use the same, subject to Rules and Regulations of the local body i.e. the Municipal Corporation of

Greater Mumbai. Other part of the impugned order is maintained.

12) In view of the above, Appeal (L) No. 241 of 2015, Notice of Motion (L) No. 635 of 2015 and Notice of Motion (L) No. 641 of 2015 do not survive and stand disposed of accordingly.

(A.R. JOSHI, J)

(V.M.KANADE,J)