

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FAMILY COURT APPEAL NO.101 OF 2008

Mr. Subhash Shankar Dokre. .. Appellant
Vs
Mrs. Shobha Subhash Dokre. .. Respondent
—
Ms. Pratibha Shelake i/b Shri P.J. Thorat for the Appellant.
None for the Respondent.
—

CORAM : A.S. OKA & A.A.SAYED, JJ
DATED : 7TH OCTOBER 2016

ORAL JUDGMENT (PER A.S. OKA, J)

1. This Appeal arises out of the judgment and decree dated 29th November 2007 passed by the learned Judge of the Family Court at Bandra, Mumbai, on a Petition filed by the Respondent wife. The Petition was filed for claiming dissolution of marriage under Clause (ia) of Sub-section (1) of Section 13 of the Hindu Marriage Act, 1955 (for short “the said Act”). The relief of injunction in respect of a residential flat being Flat No.101, Classic Building, Manjrekar Wadi, M.V. Road, Andheri (East), Mumbai – 400 069 (for short “the suit flat”) was claimed by the Respondent wife. She also prayed for various other reliefs such as permanent alimony, return of jewellery, etc. By the impugned judgment and decree, the marriage between the Appellant

and the Respondent was dissolved by a decree of divorce. There was an injunction granted in respect of the suit flat in terms of Clause (3) of the operative part of the impugned judgment and decree which reads thus:

“3. The respondent is hereby restrained from causing disturbance to the possession of petitioner in any manner over the matrimonial house namely, 101, Classic Building, Manjrekar Wadi, M.V. Road, Andheri (East), Mumbai – 400 069 unless followed due procedure of law.”

2. The challenge in this Appeal is restricted to the aforesaid Clause (3) of the operative part of the impugned judgment and decree.

3. The learned counsel appearing for the Appellant has taken us through the pleadings and notes of evidence. She invited our attention to the averments made in the Petition filed by the Respondent wife as regards the suit flat. She pointed out that the case made out in the examination-in-chief is that for purchasing the suit flat, her father contributed a sum of Rs.5,50,000/- towards the purchase of the suit flat. She invited our attention to the statement of the Respondent wife that she does not remember how much money her father had given to her which she deposited in her account. She submitted that the Respondent wife could not substantiate her case regarding monetary contribution made by her for acquiring the suit flat and, therefore, the prayer for injunction which was founded on title ought not to have been

granted. Her submission is that as the wife has not established any right in respect of the suit flat, the Clause (3) of the operative part of the impugned judgment and decree be quashed and set aside. Lastly, she submitted that in the event this Court is not inclined to interfere with the impugned judgment and decree, a clarification may be issued that the impugned decree of injunction does not prevent the entry of the Appellant in the suit flat.

4. We have perused the pleadings, notes of evidence and the documents on record. As the challenge is limited to the decree of injunction, we are only referring to the relevant part of the pleadings and notes of evidence adduced by the parties. The Petition proceeds on the footing that the Respondent wife is staying in the suit flat. It will be necessary to make a reference to the averments made in the Petition filed by the Respondent wife. In Paragraph 10 of the Petition, it is averred that the Appellant had called upon her to get money from her parents for acquiring the suit flat and accordingly, with great difficulty her parents arranged for payment of a sum of Rs.5,50,000/-. It is alleged that out of the price of the suit flat of Rs.9,50,000/-, the major contribution is made by her. In the further part of the Petition filed by the Respondent wife, on the basis of the apprehension expressed, it is contended that the injunction deserves to be granted. We have perused the written statement of the Appellant. The Paragraph 10 of the

Petition is dealt with in Paragraph 13 of the written statement in which he contended that he has purchased the suit flat out of his hard earned money and he denied the allegation of contribution of Rs.5,50,000/- allegedly made by the Respondent wife. It will be also material to note the averments made in Clause (xvi) of the Paragraph 31 of the written statement. The allegation made therein is that the Respondent wife with the help of her elder son did not allow the Appellant to enter into the suit flat. He has further averred that he contacted Andheri Police Station when he was denied the entry in the suit flat. He was advised by the Police to remain out of the suit flat to avoid any complications. In Clause (xviii) of the same Paragraph of the said written statement, he has pleaded that he has no independent shelter and, therefore, he will be on the street if he is not permitted entry in the suit flat. Thus, in the written statement, there is a clear admission that the Respondent was in possession of the suit flat.

5. In the affidavit-in-lieu of the examination-in-chief of the wife, as stated earlier, she stated that her father had contributed the sum of Rs.5,50,000/- for purchase of the suit flat. She relied upon share certificate issued by the Co-operative Society of flat purchasers in which the suit flat is situated. By producing the said share certificate, she pointed out that the suit flat stood in their joint name. We must note here that there is no oral or documentary evidence adduced by the

Respondent wife of her contribution or contribution made by her parents for acquiring the suit flat. In the cross-examination, she claimed that the amount was paid by her father by issuing five cheques. However, she admitted that she had not produced any documentary evidence to show that her father had issued five cheques.

6. We have perused the affidavit-in-lieu of the examination-in-chief of the Appellant husband. There are no particulars set out in the affidavit-in-lieu of the examination-in-chief about payment made by him for acquiring of the suit flat. In the cross-examination, he was confronted with the entries in the passbook. He denied that the entries were of transfer of the amount by his father-in-law. He denied the correctness of the suggestion that in the share certificate as well as in the agreement for sale in respect of the suit flat, the name of the Respondent wife was mentioned as the first name. However, he admitted that the share certificate at Exhibit-26 was only in the name of the Respondent wife.

7. We have perused the impugned judgment and decree. We must note here that the issue of title to the suit flat was not framed by the learned Judge of the Family Court. We have perused the Paragraph 46 of the impugned judgment which deals with the prayer for injunction. The reason recorded by the learned Judge of the Family

Court is that the Respondent wife was residing in the suit flat with her three children, daughter-in-law and grand son and the Appellant was residing in his father's house which was in the joint name of his father, he himself and his brother. The learned Judge of the Family Court observed that it was necessary to grant relief of injunction for protecting the possession of the Respondent wife.

8. Thus, it appears that the issue of title to the suit flat did not arise before the learned Judge of the Family Court. The possession of the Respondent wife has been ordered to be protected by granting liberty to the Appellant to take proceedings for dispossessing the Respondent wife. The injunction has been granted only on the ground that the Respondent wife was in possession of the suit flat.

9. We have already quoted the Clause (3) of the operative part of the impugned judgment and decree. The whole object of passing the decree of injunction was to ensure that the possession of the Respondent wife is protected. In Paragraph 46 of the impugned judgment, the learned Judge of the Family Court has recorded that the relationship between the parties was very strained and that there are criminal cases between them. If any attempt is made by the Appellant to enter the suit flat, it will be completely contrary to the impugned decree which is operative. Therefore, the submission made in the

alternative by the learned counsel appearing for the Appellant cannot be accepted.

10. Accordingly, we find that there is no merit in the challenge to Clause 3 of the operative part of the impugned judgment and decree.

11. Accordingly, the Appeal is dismissed with no order as to costs.

12. We make it clear that the issue of title to the suit flat has not been decided and it remains open. In the event, any suit is filed by the Appellant for possession of the suit flat in terms of the liberty granted under the impugned decree, the issue of title in such suit shall remain open.

13. Civil Application No.161 of 2008 does not survive and the same is disposed of.

(A.A. SAYED, J)

(A.S. OKA, J)