

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

APPEAL FROM ORDER NO.1011 OF 2015

Shri. Purushottam Shriram Tambe

.. Appellant

Versus

Dipti Sadanand Shriyan and others

.. Respondents

Mr. N. S. Nevshe for the Appellant.

Mr. A. L. Gore for the Respondent No.3.

CORAM : R.M. SAVANT, J.

DATE : 12th JULY 2016

PC.

1 The above Appeal from Order takes exception to the order dated 15/16.04.2015 passed by the Learned Judge of the City Civil Court, Borivali Division, Dindoshi, Mumbai, by which order, the Notice of Motion No.2561 of 2014 filed by the Appellant/original Plaintiff came to be partly allowed to the extent that it was made absolute in terms of prayer clause (a) against the Defendant No.3, but was dismissed against the Defendant Nos.1 and 2.

2 The Appellant is the tenant in respect of residential premises admeasuring 500 sq.ft. comprising of two rooms, kitchen on the second floor 'A' Wing, Brijwasi Apartment, Malad, Mumbai. The Plaintiff has filed

the suit in question for the relief of mandatory injunction directing the Defendants to vacate the suit premises and prohibitory injunction restraining the Defendants from entering and remaining upon the suit premises. The Defendant No.1 is the ex-daughter-in-law of the Plaintiff, the Defendant No.2 is the grandson of the Plaintiff born out of the wedlock between the Defendant No.1 and the Plaintiff's son Avinash, Defendant No.3 is the mother of the Defendant No.1. It seems that the relations between the Defendant No.1 and the Plaintiff's son Avinash were estranged resulting in a Petition for divorce by mutual consent being filed by the Defendant No.1 and the son of the Plaintiff, Avinash. The said Petition was numbered as MJ Petition No.329 of 2006 the Family Court passed a decree in the said MJ Petition on 13.07.2006.

3 The Plaintiff was constrained to file the instant suit in view of the fact that the Defendants were harassing the Plaintiff and his wife both of whom are around 80 years of age. In so far as the Defendant No.3 is concerned, it is the case of the Defendant Nos.1 and 2 that she was permitted to reside in the suit premises as she was looking after the Plaintiff and his wife and was also providing support to the Defendant Nos.1 and 2. The Defendant No.2 it seems is a student and is about 22 years of age. At this stage, it would be relevant to advert to a document which is affidavit-cum-undertaking given by the Plaintiff's son in the

proceedings before the Family Court. The relevant excerpt from the said affidavit-cum-undertaking is reproduced in the impugned order passed by the Trial Court and is therefore reproduced hereinunder for the sake of ready reference :-

“I state that from the day of the Consent Divorce I shall vacate the said flat and I will not re-enter the said flat at any time. I state that whether the said flat is given in the name of my son Aditya or that of the name of Dipti and/or both, I will not claim any right in the said flat and/or I will not claim any tenancy rights in the said flat and I shall have no objection if the right is claimed by son Aditya and/or Dipti and/or both.

I state that at any event I make it very clear that right from the day of Divorce being granted, I shall have no right, title, claim, lien, possession in the said flat either by way tenancy or otherwise and the same shall stand surrendered in favour of my son Aditya and/or Dipty and or both.

I state that my father is at liberty to deal with the said flat as he deems fit and/or execute any writing and he may not take my consent and/or make it to my knowledge in as much I again say that I do not claim any right in the said flat during the life time of my father or any time thereafter. I therefore, doth hereby undertake not to enter the said flat from the day of divorce being granted.”

4 The Defendant Nos.1 and 2 have sought to fortify their entitlement to reside in the suit premises on the basis of what has been stated in the said affidavit-cum-undertaking and also on the ground that they do not have any other shelter. In so far as the Defendant No.3 is concerned, the stand taken is that if the relief sought against the

Defendant No.3 is granted, she would also be shelterless.

5 In so far as the Plaintiff is concerned, it was contended before the Trial Court that what has been stated by his son in the affidavit-cum-undertaking is not binding upon him. The said contention was not countenanced by the Trial Court at the prima-facie stage, on the ground that the Plaintiff was very well aware of the proceedings between the Defendant No.1 and his son Avinash for divorce and therefore implicit in the said fact is the acceptance of the fact that the Defendant Nos.1 and 2 were willingly permitted by the Plaintiff to reside in the premises. The Trial Court has also observed that the Plaintiff has not been able to demonstrate that the Defendant Nos.1 and 2 have any other premises where they can go and reside. The Trial Court considered the judgments cited on behalf of the Plaintiff in the matter of Conrad Dias of Bombay Vs. Joseph Dias of Bombay reported in AIR 1995 Bombay 2010 and S. R. Batra Vs. Smt. Tarun Batra reported in AIR 2007 SC 1118 and did not deem it appropriate to apply them to the facts of the present case in so far as the Defendant Nos.1 and 2 are concerned. The Trial Court accordingly by the impugned judgment and order dated 15/16.04.2015 has made Notice of Motion absolute in terms of prayer clause (a) qua the Defendant No.3, but dismissed the Notice of Motion in so far as the Defendant Nos.1 and 2 are concerned. The Defendant No.3 has filed an

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Appeal being Appeal from Order No.771 of 2015 which would be considered by this Court independently. However, in so far as the Defendant Nos.1 and 2 are concerned, having regard to the reasons mentioned in the impugned order, in my view, the order passed by the Trial Court rejecting the application for the grant of mandatory order against the Defendant Nos.1 and 2 cannot be found fault with. Hence, no case for interference is made out. The above Appeal from Order is accordingly dismissed.

[R.M. SAVANT, J]