

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

**FIRST APPEAL NO. 1349 OF 2015
WITH
CIVIL APPLICATION NO. 4206 OF 2015 IN F.A. NO. 1349 OF 2015**

Smt. Sangeeta Rajkumar Shelke ... Appellant/Applicant
Vs.

Vasantrao B. Chavhan (decd.)
through his LR Vimal Vasantrao Chavan ... Respondent

Mr. Amey Deshpande, Advocate for the appellant/applicant.

Mr. Sanjeev Sawant a/w. Mr. S.P. Wakade, Mr. Ketan Joshi, Advocate for the respondent.

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE: **21st January, 2016.**

P.C.:

Admit. By consent, the matter is heard finally and decided at the stage of admission.

2. This Appeal is directed against the judgment and order dated 20th August, 2015 passed by the learned Judge of the City Civil Court, Dindoshi thereby decreeing S.C. Suit No. 557 of 2009. Plaintiff nos. 1 and 2, who are respondents, have filed the suit for simplicitor injunction against the defendant/appellant. Plaintiff no. 1 was the husband of plaintiff no. 2. Plaintiff no. 1 expired in the year 2010 after filing of the suit. The suit pertains to Flat bearing no. A-2 admeasuring 340 sq.ft. situated at Rajbhavan Staff Cooperative Housing Society Ltd., N.S. Phadke Marg,

Koldongri, Andheri (East), Mumbai. The father-in-law of plaintiff no. 2 was a member of Cooperative Society and has purchased the flat. This fact is not disputed. He expired on 19th February, 1995 and plaintiff no. 1 became his legal representative. The share certificate was transferred in the name of plaintiff no. 1. The plaintiffs are regularly paying the maintenance charges of the Society. It is the case that the husband of the appellant, i.e., Rajkumar Shelke, being the close friend of plaintiff no. 1, was allowed to reside with them as a family member. The plaintiffs have another flat at Ghatkopar, however, Rajkumar Shelke died in a road accident on 24th January, 2007. The appellant continued to stay in the suit flat along with her son. The appellant was asked to vacate the flat but she did not vacate the flat inspite of sufficient opportunities.

3. It is the case of the respondent that her husband was in possession of the suit flat and after his death, she is having the possession of the suit flat. However, the appellant is obstructing her possession on different occasions. In October 2008, the appellant put different lock on the flat with an intention to dispossess the respondent of the suit flat. Plaintiff no. 1 gave police station regarding the same and again they were put in possession. But as the respondent apprehends that there is continuous threat of dispossession from the appellant, she filed a suit for injunction simplicitor.

The suit was decreed. Hence this Appeal.

4. Perused the record and notes of evidence. The point of determination is whether the order of injunction granted in favour of the respondent/plaintiff is illegal and bad in law and is to be set aside.

5. The learned counsel for the appellant has submitted that the respondents were not in possession when they filed the suit. The appellant is staying in the suit flat alone and the respondents were removed from the flat in the month of October, 2008 and this fact is admitted by the respondent in her pleadings. He relied on the cross-examination of respondent and submitted that the respondent/plaintiff has given admission that at the time of giving evidence, she is residing at Ghatkopar. She has admitted that the plaintiffs have put the appellant in possession of the suit premises. The learned counsel submitted that the suit simplicitor for injunction is not maintainable as the suit should have been filed for possession or declaration. In support of his submissions, he relied on the judgment of **Anathula Sudhakar vs. P. Buchi Reddy (Dead) by LRs. & Ors., reported in 2008 DGLS (Soft) 388 equivalent to 2008 AIR (SC) 2033.**

6. The learned counsel for the respondent submitted that the respondent/plaintiff is in possession of the suit premises. To that effect, the plaintiff/Vimal has tendered evidence. The learned counsel submitted that the appellant has read the averments in respect of dispossession in the month of October, however, it cannot be appreciated in isolation to further averments are also to be taken into account wherein the plaintiffs/respondents have specifically stated that they were in possession of the suit premises when they filed the suit and continuous threats were given by the appellant and, therefore, under the apprehension that again the defendant/appellant would obstruct and interfere with the possession of the suit flat of the plaintiffs/respondents, the suit was filed. He further submitted that a criminal complaint was given to the concerned police station by deceased plaintiff no. 1 in October, 2010, however, thereafter they were put in possession. He further submitted that the appellant has filed RAD Suit No. 819 of 2008 for simplicitor injunction, however, the trial Court has rejected to grant injunction against the present respondents who are defendants in that suit, as they were having the joint possession. It is further submitted that respondents are the decree holders and also the owners of the suit flat and the suit is rightly decreed. In support of his submissions, he relied on the judgment of Hon'ble Supreme Court in the case of **Maria Margarida Sequeira Fernandes & Ors. vs. Erasmo Jack De**

Sequeira (Dead) through LRs, reported in (2012) 5 SCC 370.

7. I have gone through the record of the case, notes of evidence so also the judgment passed by the learned Judge of the trial Court. The appellant claim joint possession of the suit flat. The respondents are the owners of the suit flat. No document is produced in respect of the title by the appellant/defendant. However, the share certificate stands in the name of deceased plaintiff no. 1 and so also the maintenance charges of the suit premises are paid by the respondent/plaintiff. The defendant does not have any contractual right either or any right out of the title. Thus, it is a clear case of permissive occupier.

8. It is a suit for injunction simplicitor. In the case of **Anathula Sudhakar** (*supra*) the Hon'ble Supreme Court has held that if the plaintiff is out of possession, then appropriate remedy is to seek possession with consequential relief or injunction. However, if at all there is a threat of dispossession or interference by the defendant, then the suit for injunction simplicitor will lie. This is the case where the plaintiff claims that she has not lost the possession but she has the case of joint possession. Thus, it is necessary to ascertain on the basis of evidence whether the plaintiff can prove her possession when she filed the suit.

9. I also place reliance on the decision of Hon'ble Supreme Court in **Maria Margarida Sequeira Fernandes** (*supra*). It is the case of joint possession and fact of joint possession is proved. It is suit for injunction as plaintiff is having the title and also the possession.

10. The learned counsel for the respondent in his submissions had pointed out that a Court Commissioner was appointed by the trial Court and he had submitted the report. His report was not challenged by either of the parties. In paragraph 10 of the judgment, the trial Court has relied on the report. The Court Commissioner's report dated 31st March, 2009 is on record. Thus, it shows that immediately after filing of the suit, the Court Commissioner was appointed and the Court Commissioner has given the report that household articles of both the plaintiff as well as defendant are found in the suit flat. Moreover, the defendant tried to obtain injunction against the plaintiffs/respondents by filing a Civil Suit No. 819 of 2008, however, the injunction was rejected and that order has attained finality, as it is not set aside. That circumstances also supports the case of the respondent/plaintiff. Therefore, I am of the view that the assessment of the evidence of learned trial Court is correct. The order of granting injunction is not bad in law and cannot be faulted with. Hence the Appeal is dismissed. Civil Application is disposed of accordingly.

11. The appellant is hereby directed to vacate the suit flat till 31st May, 2016. Till then, the appellant shall not create third party interest and shall not part with the possession of the property.

(MRIDULA BHATKAR, J.)