

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Amk

FIRST APPEAL NO. 1329 OF 2015
WITH
CIVIL APPLICATION NO. 4163 OF 2015

Smt. Zaverben Mavji Hariya]
of Mumbai, Indian inhabitant,]
aged about 74 years, residing at]
Flat No.310, 3rd Floom, Rajni Mahal,]
Tardeo Road, Mumbai-400 034.] .. Appellant

Vs.

1. The Building Repairs and]
Reconstruction Board]
an Undertaking of Maharashtra]
Government, having its office]
at Griha Nirman Bhavan,]
Bandra (East), Mumbai-400 051.]
2. Maharashtra Housing & Area]
Development Authority]
an Undertaking of Maharashtra]
Government, having its office at]
Griha Nirman Bhavan,]
Bandra (East), Mumbai-400 051.] .. Respondents

Mr. Kiran Jain a/w. Ms. Neeta Solanki i/b Kiran Jain & Co. for the
Appellant.

Mr. V. P. Sawant for Respondents.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.
DATE : 6th OCTOBER, 2016.

ORAL JUDGMENT

1. Admit.
2. Heard learned counsel for both the parties finally at the stage
of admission itself.

3. This appeal is preferred against the Judgment and Order dated 31.10.2015 passed by the City Civil Court, Mumbai in S. C. Suit No. 2498 of 2011. By the impugned Judgment and Order, the Trial Court was pleased to dismiss the appellant's suit on the ground that the appellant has failed to prove her authorized possession in the suit structure.

4. The facts of the appeal can be stated in brief as follows:

The appellant claims herself to be in possession of the suit flat No.310 on the 3rd floor of the building known as "Rajni Mahal" situated at Tardeo Road, Mumbai. The said property belongs to respondent-MHADA and the appellant claims to be a tenant of the said flat. It is her case that the suit flat was allotted to her in the year 1986 by the allotment letter dated 16.07.1986. Since then, she is in lawful possession thereof. The respondent has however earlier also issued two notices on 20.03.1997 and 02.04.1997 to one Mr. Vinod Bafna on the ground that he is in unlawful occupation of the suit flat. According to the appellant, Mr. Vinod Bafna is like her son. He is looking after her and is residing in the suit premises along with her. In view of apprehension, on the receipt of the earlier notices, she replied the said notices and filed suit bearing No. 2422 of 1997 seeking relief of declaration and injunction restraining respondent-MHADA from dispossessing her from the suit flat, without due process of law.

5. In the said suit, respondent-MHADA failed to file written statement. However, the cross-examination of the appellant was conducted therein without written statement. In the light of the evidence adduced in the said case, the Trial Court had found that, in pursuance of the allotment letter dated 16.07.1986, as the appellant is in possession of the suit flat, she cannot be evicted therefrom without due process of law. It was held that respondent-MHADA has not issued any notice to the appellant before evicting her therefrom. The notices were issued to one Mr. Vinod Bafna and not to the appellant. In view thereof, the Trial Court had decreed the suit on 29.09.2004, declaring the notices issued to Mr. Vinod Bafna in relation to the suit premises as illegal and further restraining respondent-MHADA from evicting the appellant from the suit premises without following due process of law. It was held that the respondent-MHADA is at liberty to proceed ahead with such proceedings as per law, if any eviction proceedings are already initiated against the appellant.

6. According to the appellant, subsequent to the decision of the said suit, notice was again issued to Mr. Vinod Bafna threatening the action of eviction. The grievance of the appellant is that, despite the specific observations and the directions given in the earlier Judgment by the Trial Court, the respondent-MHADA has not issued notices to her

before taking any action under Section 95-A(3) of the MHAD Act. She was, therefore, again constrained to file instant suit bearing No. 2498 of 2011 seeking relief of declaration and injunction.

7. It is significant to note that in this suit also, the respondent-MHADA failed to file written statement and as a result, the suit proceeded without written statement. The appellant, then examined herself and relied upon certain documentary evidence like, the allotment letter dated 16.07.1986, various receipts of the payment of the rent and also the photocopy of the Judgment passed in earlier suit No.2422 of 1997. The appellant was cross-examined in this suit on behalf of the respondents and in the light of the same, the Trial Court held that there was no document on record produced by the appellant except the allotment letter dated 16.07.1986 to show that the premises were allotted to her and she was in lawful possession of the same. It was further held by the Trial Court that the appellant has not produced certified copy of the Judgment passed in the earlier suit and the photocopy of the said Judgment cannot be accepted and relied upon. The Trial Court, accordingly, dismissed the suit.

8. While challenging this Judgment and decree of the Trial Court, the submission of learned counsel for the appellant is that the Trial Court has not taken into consideration the allotment letter dated 16.07.1986

issued in the name of the appellant, which categorically goes to prove the appellant's lawful possession over the suit property. It is further submitted that now the appellant is producing on record the certified copy of the Judgment in the earlier suit which clearly goes to indicate that the respondent-MHADA was directed to follow due process of law thereby indicating that the notice under Section 95-A(3) of the MHADA Act should have been issued to the appellant as the allotment letter stands in her name. However, respondent has issued such notice again in the name of one Mr. Vinod Bafna and therefore, no due procedure was followed by the respondents. In view thereof, in consequence of the earlier Judgment and order, the Trial Court should have decreed this suit and restrained the respondent-MHADA from taking any action in pursuance of the said notice.

9. *Per contra*, learned counsel for the respondents has submitted that the appellant has already bequeathed the suit premises to one Mr. Vinod Bafna and she is not at all in possession of the same. To substantiate this submission, reliance is placed on the reply dated 16.08.2011 given by the appellant to the notice dated 06.08.2011, issued by respondent-MHADA to Mr. Vinod Bafna. It is urged that in the reply in para 12, the appellant has categorically admitted that Mr. Vinod Bafna is like her son because he has helped her financially and she has bequeathed her property to Mr. Vinod Bafna since he is taking care of her.

He had also taken care of her deceased husband, Mr. Vijay Hariya. Her only son has disowned her. He is residing separately and thus it was stated that as Mr. Vinod Bafna and his family members are allowed to stay with her in the suit flat as her son and daughter-in-law, they cannot be called as trespassers.

10. According to learned counsel for the respondents, these averments in the reply dated 18.08.2011 sent by the appellant to respondents are more than sufficient to show that the suit flat is bequeathed to Mr. Vinod Bafna and possession of the suit flat is also handed over to Mr. Vinod Bafna. In this situation, it is submitted that, the appellant cannot be entitled to any protection of her possession. Moreover, Mr. Vinod Bafna, being the trespasser, also cannot be entitled for any protection.

11. Learned counsel for the respondents has further submitted that the Trial Court had no jurisdiction also, to entertain and decide the suit in view of Section 177 of the MHADA Act. Even otherwise also, it is submitted that, when the Trial Court has, after considering the evidence of the appellant, dismissed the suit, there is absolutely no case made out for extending any protection to the possession, either to the appellant or to one Mr. Vinod Bafna.

12. I have given my thoughtful consideration to the rival submissions advanced by learned counsel for both the parties. It is undisputed that the allotment letter dated 16.07.1986 was issued by the respondent-MHADA in the name of the appellant. This fact is not challenged by the respondents also. It is also the case of the appellant that since the date of allotment, she is in possession of the suit flat as a tenant. It is also a matter of record that by virtue of Judgment and decree passed in the earlier Suit No.2422 of 1997 dated 29.09.2014, her possession in the suit flat is protected and respondent-MHADA was directed to follow due procedure of law before evicting her from the suit flat. What was meant by the due procedure of law, as can be gathered from the perusal of the said Judgment, is that the notice of eviction was issued to Mr. Vinod Bafna and not to the appellant and hence the Trial Court in that suit held that the proper procedure would be for the respondents to issue notice to the appellant before evicting her from possession of the suit flat. In the said suit, it was also reiterated that respondent-MHADA had liberty to proceed ahead with such proceedings as per law, if any eviction proceedings are already initiated against her.

13. However, it is pertinent to note that, even after this Judgment and decree with these categorical observations and findings therein, the respondent-MHADA has not issued notice to the appellant but again issued notice to Mr. Vinod Bafna on 06.08.2011. In the reply to the said

notice, the appellant has again categorically stated that she is in possession of the suit flat on the basis of the allotment letter issued to her by MHADA and Mr. Vinod Bafna with his family members is residing with her as family members. She has also stated in the reply that Mr. Vinod Bafna and his wife are taking her care as a son and daughter-in-law and hence they are allowed to live in the suit premises. It was also stated that her own son disowned her and therefore she is dependent upon Mr. Vinod Bafna, who is taking care of her.

14. Thus, it can be seen that categorical averment was made in the notice reply, that she continues to be in possession of the suit premises along with Mr. Vinod Bafna, who is her family member. It may be true that in para 12 of the reply, she has stated that she has bequeathed suit property to Mr. Vinod Bafna. However, whether this bequeath of the property is by way of gift deed, will deed or any other mode is yet to be decided. If, it is bequeathed by will deed, then only after her death, the bequeath will take place and not before that. Therefore, till then, it cannot be said that she had unauthorizedly parted with possession of the suit premises.

15. Moreover, if it is case of the appellant that she still continues in possession of the suit premises along with Mr. Vinod Bafna, as a family member, then this case of the appellant is required to be denied by the

respondents by filing written statement before the Trial Court and leading its own evidence to show that the appellant has shifted her residence from the suit premises and she is residing at some other place or proving Mr. Vinod Bafna is in exclusive possession of the suit premises. The respondent-MHADA has not done any of these things either in the earlier suit or this suit. In this suit also, respondent has not filed written statement but only cross-examined the appellant. Needless to state that, mere cross-examination of the appellant without there being any basis in the pleadings, is not sufficient, especially, when in the cross-examination of the appellant also, it is brought on record that she is residing in the premises along with Mr. Vinod Bafna and has not left the possession of the suit premises. In such situation, all these facts, especially, the fact that the appellant has left the possession of the suit premises and Mr. Vinod Bafna alone in exclusive possession of the suit premises is required to be proved by the respondents.

16. Similarly, it is also the case of the respondents that the suit is not maintainable in Trial Court in view of Section 177 of the MHADA Act. Then that contention should have been raised by the respondents before the Trial Court so that the Trial Court could have decided it.

17. As the Trial Court had decided the suit without written statement, however, the possession of the appellant is all along still

protected, as can be seen from the order passed by this Court in this appeal on 08.12.2015, and as a matter of fact, the respondent has not followed the due procedure, as laid down and directed by the Trial Court in its earlier Judgment which was not challenged and hence which has become final, then it is necessary that the impugned Judgment and order passed by the Trial Court of dismissing the suit is set aside and the matter is remanded to the Trial Court, so that the respondents can raise all these contentions, which are raised now, by filing written statement and leading evidence. Till then, the appellant's possession needs to be protected.

18. At this stage, the submission of learned counsel for the respondents is that the possession of the appellant only can be protected but not that of Mr. Vinod Bafna and his family. However, as stated above, if as per the case of the appellant, Mr. Vinod Bafna is residing as a family and she has not left the suit premises and not gone at any other place to reside, and that contention is yet not refuted by producing any contrary evidence on record by the respondents, this Court cannot pass any such order. This Court is only remanding the matter back to the Trial Court for deciding it on its merit, for enabling the respondents to file written statement and contest the suit on merit. Till then, whatever protection granted till date is extended.

19. As a result, the appeal is allowed. The impugned Judgment

and order passed by the Trial Court is set aside. The matter is remanded back to the Trial Court for fresh hearing. The respondent-MHADA is given an opportunity to file written statement therein. Till the decision of the suit, the protection granted by the City Civil Court on 19.09.2014 and continued by this Court vide its order dated 08.12.2015, is extended. Both the parties to appear before the Trial Court on 20.11.2016.

20. All the contentions raised by both the parties are expressly kept open and the Trial Court to decide the matter on merits in accordance with law.

21. Whatever observations are made hereinabove are only for the purpose of deciding this appeal and the Trial Court should not be influenced by them.

22. On the request of learned counsel for the respondents, it is further clarified that the observations made by this Court hereinabove are not amounting to recognition of right of Mr. Vinod Bafna.

23. In view of the disposal of the appeal, the civil application does not survive, hence stands disposed of.

[DR. SHALINI PHANSALKAR-JOSHI, J.]