

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

APPEAL FROM ORDER NO.504 OF 2017

Shri Rajkumar L. Pahuja ... Appellant

Vs.

Shri Deepak L. Pahuja & anr. ... Respondents

Mr.Sandeep Maurya for the Appellant
Mr.Akhilesh Singh, for Respondent No.1

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: SEPTEMBER 18, 2017**

P.C. :

1. This Appeal from Order is directed against the order dated 12.4.2017 passed by the learned Adhoc Judge, Greater Bombay in Notice of Motion st. No.43202 of 2015 in S.C. Suit No.2288 of 2015. The appellant is the original plaintiff, who filed the suit for declaration and mandatory injunction against the respondents i.e., the original defendants, pertaining to the suit flat No.801 i.e., terrace flat, Easter Side, 8th floor, Jasmine Apartment CHS Ltd., Mistry Building, Dadasaheb Phalke Road, Dadar (East), Mumbai-400014. The appellant i.e., the plaintiff and respondent No.1 are the brothers and respondent No.2 is the sister. It is an undisputed fact that the father of the parties was the owner of the suit flat and

after his death, a temporary family arrangement was made by a family settlement dated 25.7.1987, by which the parties agreed that the suit flat was to be sold and the parties i.e., two brothers and their deceased mother Mohini, who was also a party to the settlement, were to have 1/3rd right in the suit flat or 1/3rd share in the sale proceeds of the suit flat. Thereafter, the mother Mohini and the respondent filed a Suit No.8714 of 1991 and against that suit, Appeal from Order NO.612 of 1992 was filed before the High Court. All the three parties filed consent terms wherein it was agreed that respondent No.1 mother is entitled to sell and dispose of the suit flat and after or before the sale of the said suit flat, the mother shall pay a sum of Rs.14 lakhs by Pay Order or Demand Draft to her son, i.e., the present appellant against his claim in the suit flat and thus, his claim can be satisfied by payment of the said amount. However, the suit flat was never sold and the said amount was never paid and thus, in the event of failure of this sale, the contingent consent terms, today at present, have no value. However, it shows that the parties agreed that the two brothers, mother have equal 1/3rd undivided right in the suit flat. The parties have very strange settlement in respect of suit flat and the residence. This being a terrace flat, the present appellant agreed

to stay on the terrace under the water tank and he has been staying there since 1987 and it was agreed that the other brother and mother will occupy and reside in the suit flat. In the year 2015, the Corporation issued notice to Mohini that she should vacate whatever temporary structure she has constructed on the terrace and nobody shall reside under the water tank as it is dangerous and it is not permissible under the Corporation laws. Mohini, the mother, thereafter expired on 24.5.2015 leaving behind two sons and one daughter i.e., respondent No.2, who is a divorcee. Thereafter, the appellant filed the present Suit No.2288 of 2015 before the City Civil Court and prayed for declaration that the settlement of the terrace occupation below the water tank was not binding and illegal. He also prayed for a mandatory injunction that he be given keys of the suit flat and be allowed to use the suit flat and reside in one bedroom exclusively and kitchen jointly with the respondent brother. The said Notice of Motion was dismissed. Hence, this Appeal from Order.

2. The learned Counsel for the appellant has submitted that the order passed by the learned Judge is erroneous especially the finding given by the learned Judge that the flat cannot be sold if at

all the application for mandatory injunction allowing the plaintiff to occupy one room and kitchen is granted as it will frustrate the claim of the bank as the suit flat was mortgaged with the bank by the respondent brother who obtained loan against it. He submitted that these observations are erroneous when the plaintiff has 1/3rd undivided right in the suit flat. He submitted that he wants only one room and joint occupation and use of the kitchen. He submitted that such arrangement is workable. The respondent brother can lock one room and even if he wants, the living room that is the hall. He further submits that the suit flat is in a dilapidated condition, however, the appellant/plaintiff will reside in the said suit flat at his own risk and will repair the portion of the said suit flat at his cost and he is also ready to pay the maintenance charges of the society. The learned Counsel also submitted that the appellant is ready to use one bedroom exclusively and kitchen jointly and that can be locked. This is considering the layout of the suit flat, which is workable.

3. Per contra, the learned Counsel for Respondent No.1 submits that the parties are bound by the family settlement of 1987. As per the said arrangement, the suit flat was to be sold.

However, it is not sold. Therefore, he cannot occupy the suit flat. He has further submitted that the appellant has an alternative accommodation at Mira Road and, therefore, he can go and stay there. He submitted that a proceeding is pending in respect of the suit flat under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, before the civil Court.

4. None appears for respondent No.2 – sister. However, it appears that the main contesting party is respondent No.1 the brother and therefore, it is heard and decided in the absence of respondent No.2. The learned Counsel submitted that the suit flat belongs to the respondent-brother by virtue of a registered will executed by the deceased Mohini.

5. Heard submissions. Read the impugned order, family settlement, consent terms dated 25.2.1999 filed in the Appeal from Order (Stamp) No.612 of 1992 in Suit No.8714 of 1991. The terms of the family settlement are not disputed by either of the parties. However, as per the settlement, the arrangement of the residence which was made on the terrace itself is illegal and as the Corporation has issued the notice, that arrangement has no legal

sanctity and therefore, that is not workable at all. The sum and substance of the submissions and the facts of the case of that both the brothers have 1/3rd right in the suit flat. This Court does not want to go into the genuineness of the will which is not probated. As on today, considering the family settlement of 1987, two brothers have 1/3rd right in the suit flat and the deceased mother had 1/3rd right in the suit flat. However, she expired in 2015 and therefore, as per the Hindu Succession Act, her three children i.e., the appellant, respondent Nos.1 and 2 have 1/3rd right equally in her share. However, that is subject to either the agreement by all the parties or subject to proof of facts before the court. However, as on today, the plaintiff or the appellant's 1/3rd undivided share in the suit flat cannot be denied. The mortgage of the suit flat by the respondent cannot also come in between his 1/3rd right in the suit flat. The bank may have a good claim against the right of the respondent/brother in the suit flat.

6. In these circumstances, I allow the appeal with the following order:

- i) The impugned order of the trial Court dated 12.4.2017 passed in the Notice of Motion is set aside.

ii) Respondent No.1 shall hand over the keys and shall allow the appellant to use and occupy one bedroom exclusively and the kitchen jointly alongwith him.

iii) Respondent No.1 may lock the other portion of the premises.

7. Appeal from Order is disposed of in the above terms.

8. The learned Counsel for the appellant submits that the appellant wants to challenge the order before the hon'ble Supreme Court and hence, this order be stayed. Accordingly, this order is stayed upto 31st October, 2017.

(MRIDULA BHATKAR, J.)