

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO. 852 OF 2015
WITH
CIVIL APPLICATION NO. 1048 OF 2015

Hemant S. Tank and anr.

.. Appellants

vs.

Darshita R. Tank and ors.

.. Respondents

Mr. Chirag Shah a/w. Mr. Parag Shah i/b M/s. Mahesh Shah and Co.
for the Appellant.

Mr. B.J. Joshi a/w. Mr. P.B. Joshi for Respondent Nos.1 and 2.

CORAM : M. S. SONAK, J.

DATE : 31 MARCH 2017.

P.C. :-

1] Heard learned counsel for the parties.

2] The challenge in this appeal is to the order dated 23 April 2015, by which, learned Trial Judge has allowed the respondents' (plaintiffs) Notice of Motion No. 3562 of 2014 in terms of prayer clause (a).

3] Mr. Chirag Shah, learned counsel for the appellants, submits that there is overwhelming material on record, which establishes that it is the appellants (original defendants) who are the owners in respect of the suit premises. He points out that the respondents, in the plaint, have applied for a declaration that they are the owners in respect of the suit flat and for mandatory orders directing the appellants to execute appropriate documents to complete effectual transfer of the suit flat from the appellants' name to the name of the respondents. Mr. Chirag Shah submits that from this it is clear that

at least at present, there is no dispute or in any case, there is no serious dispute that it is the appellants who are the owners of the suit flat. Mr. Chirag Shah submits that it is settled position in law that there can be no injunction as against the true owner of the property and the impugned order, to the extent, it has ignored this position in law, is quite vulnerable and warrants interference.

4] Mr. Chirag Shah further submits that the building in which the suit premises is situated is likely to go for redevelopment. Mr. Chirag Shah submits that if the observations in paragraph 6 of the impugned order are perused, it appears that the learned Trial Judge, has even gone to the extent by observing that it is the respondents, who would *prima facie* be proper person to be rehabilitated in the alternate accommodation. At the same time, Mr. Shah points out that the relief in this respect, set out in prayer clause (b) of the notice of motion has rightly been rejected by the Trial Judge, at least by way of implication.

5] Mr. Chirag Shah submits that the impugned order was stayed by this court, by way of ad-interim relief. He points out that there is a serious issue of limitation, which has been raised by the appellants by taking out a motion invoking the provisions of section 9A of the Code of Civil Procedure, 1908 (CPC). Mr. Shah submits that the suit has been instituted almost after the period of 23 years from the date of some alleged family arrangement. Mr. Shah, however, points out that there is no such family arrangement. Even assuming that there is any such arrangement, the suit is hopelessly barred by law of

limitation. For all these reasons, Mr. Shah submits that the impugned order is liable to be set aside.

6] Mr. Joshi, learned counsel for the respondents (original plaintiffs), submits that there are documents on record which *prima facie* establish that the entire consideration for the purchase of suit flat was paid by the father of the respondents. He points out that bank passbook showing entries in the year 1966, when agreement in respect of the suit flat was executed. He points out that the agreement was executed in the name of the appellants, who were minors and were nephews of the respondents' father. He points out that there were even blank share transfer forms signed by the appellants' father, in relation to the suit flat itself. He submits that there are also certain other documents, which unmistakably establish that it is really the respondents who are owners of the suit flat. In any case, Mr. Joshi submits that all these materials were more than sufficient for granting interim relief in terms of prayer clause (a) of the notice of motion.

7] The rival contentions now fall for my determination.

8] Mr. Chirag Shah is right that normally, no injunction can be issued to restrain the true owner from exercising rights in respect of the property, which is indicated in his name. However, this is not some absolute proposition. In the present case, there is a dispute with regard to *de facto* ownership of the suit flat. There are documents on record, which warrant an inference that the issue of ownership is required to be decided after a trial. This means that the

respondents have established that there is at least a triable issue in the suit.

9] That apart, there is no dispute whatsoever that it is the respondents, who have through out been in possession of the suit flat. It is the respondents, who have been bearing maintenance charges and other charges related to the suit flat. Mr. Chirag Shah submitted that the appellants have already instituted a suit against the respondents in the Small Causes Court seeking their eviction. Be that as it may. However, it is evident that it is the respondents, who have through out been in possession of the suit flat.

10] The purpose of interim relief is to maintain the *status quo* in respect of suit flat. The purpose of interim relief is not to afford any additional advantage to any party over the other. In this case, the relief has been granted only in terms of prayer clause (a) of Notice of Motion No. 3562 of 2014. The prayer clause (a) of the notice of motion reads thus:

“(a) Pending the hearing and final disposal of the suit, the Defendants their agents and servants be restrained by and order and Injunction of this Honourable Court from dealing with disposing off, alienating or creating third party rights in respect of the suit premises, i.e. flat No. B-16, Shankar Vijay Premises Cooperative Housing Society Limited, Rajawadi, Ghatkopar (East), Mumbai-400 077, consisting of one bedroom, Hall Kitchen situated on 2nd floor of the building known as Shankar Vijay together with share certificate No. 16 of the Shankar Vijay Premises Co-operative Housing Society Limited.”

11] In fact, the respondents, had also applied for additional interim reliefs by way of prayer clause (b) of Notice of Motion No.

3562 of 2014, which reads thus:

“(a) Pending the hearing and final disposal of the suit, the Defendants be restrained by an Order and Injunction of this Honourable Court from obstructing use, occupation possession and/or enjoyment of the suit flat exclusively by the Plaintiffs and be further pleased to prevent the Defendants from participating in the redevelopment of the Shankar Vijay Building, in any manner whatsoever.”

12] Although, the relief has not been granted by learned Trial Judge in terms of prayer clause (b) of the notice of motion, learned Trial Judge has made certain observations particularly in para 6 of the impugned order, which were quite unnecessary and quite unwarranted in the facts and circumstances of the present case. Learned Trial Judge has held that it is the respondents, who would *prima facie* be proper persons to be rehabilitated in the alternate accommodation, should occasion for the redevelopment arise. These observations were entirely unnecessary and unwarranted, particularly because, the issue of redevelopment had not even arisen before the learned Trial Judge at the stage when these observations were made. In any case, learned Trial Judge after having come to the conclusion that the respondents were entitled to interim relief only in terms of prayer clause (a), was not at all justified in making such observations in the context of issues of redevelopment. Accordingly, the observations in the context of redevelopment of the suit flat or the building in which the suit flat is located are set aside. None of these observations will be relied upon by the respondents, when it comes to the issue of redevelopment.

13] However, there is no case made out to interfere with the limited relief granted by the learned Trial Judge restraining the appellants from creating any third party rights in respect of the suit flat. Such a restraint is necessary in order to preserve the *status quo* and in order to avoid multiplicity of the proceedings. From the material on record, it cannot be said that no *prima facie* case has been made out for grant of relief of such nature. The balance of convenience is also in favour of preserving the *status quo* rather than altering the same in a case of this nature. The issue of irreparable prejudice will also have to be decided in favour of the respondents, because admittedly, the appellant No.1 is in UK and appellant No.2 is in Gujarat and therefore, there is no question of any serious prejudice to them if the relief granted by the learned Trial Judge is not disturbed.

14] It is made clear that should any issue of redevelopment arises, both parties will be at liberty to file appropriate applications before the learned Trial Judge and learned Trial Judge shall dispose of such applications, in accordance of law and on its own merits. Nothing contained in the impugned order should be taken as affecting any issue relating to redevelopment of the suit flat or in which the suit flat is located.

15] It is clarified that the motion in which, the preliminary objection has been raised is required to be decided first. Only if the motion are disposed of, learned Trial Judge is to proceed with the suit.

16] If the preliminary objection is overruled, the learned Trial Judge is directed to dispose of the suit as also the other pending notices of motion on their own merits and in accordance with law, as expeditiously as possible.

17] It is made clear that the observations in the impugned order as well as in this order, are only *prima facie*, and for the purposes of deciding the issue of interim relief. In disposing of the suit or pending notices of motion, learned Trial Judge need not be influenced by any such observations. All contentions of all parties are specifically kept open.

18] The respondents are also directed to maintain *status quo* in respect of suit flat.

19] The appeal is partly allowed to the aforesaid extent. However, there shall be no order as to costs.

20] The pending civil application does not survive and the same is also disposed of.

21] All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.)