

Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 1860 OF 2013
WITH
CIVIL APPLICATION NO. 3848 OF 2015

Anant Govind Tamhankar (since deceased) though his legal heirs & representatives	...Appellants
<i>Versus</i>	
Shilpa Ashok Nayak & Ors	...Respondents

WITH
FIRST APPEAL NO. 199 OF 2014
WITH
CIVIL APPLICATION NO. 4723 OF 2013

Shilpa Ashok Nayak & Ors	...Appellants
<i>Versus</i>	
Anant Govind Tamhankar (since deceased) though his legal heirs & representatives	...Respondents

Ms Shweta Sharma, *i/b M/s. Solicis Lex, for the Appellants in FA/1860/2013 & for the Respondents in FA/199/2014.*
Mr H Toor, *with Mrs Swati Sawant, i/b Ms Ankita Khare, i/b SK Legal Associates, for Respondent No. 1 in FA/1860/2013 & for the Appellant in FA/199/2014.*
Ms Aparna Muralidharan, *i/b PG Lad, for Respondent No. 3 in both the First Appeals.*

CORAM: G.S. PATEL, J
DATED: 23rd June 2017

PC:-

1. This order will dispose of both First Appeals.
2. The Plaintiff (“**Tamhankar**”) brought Suit against Shilpa Ashok Nayak (“**Shilpa Nayak**”), MHADA and Dhanashree Developers Pvt Ltd in respect of Tenement No. 8/284 Industrial Colony, Mitha Nagar, Goregaon (West), Mumbai 400 062.
3. Before the Trial Court, Tamhankar sought a declaration that the allotment made by MHADA in favour of Nayak in respect of premises in the redeveloped building in lieu of the suit tenement was illegal and not binding on her. Tamhankar claimed that Nayak had no right, title and interest in that tenement. Tamhankar also sought possession from Nayak.
4. The City Civil Court rendered judgment on 5th July 2013. The Trial Court granted the declaration but protected Shilpa Nayak’s possession. Both Tamhankar and Nayak are in appeal.
5. The difficulty is that the entirety of Tamhankar’s case was rooted in an averment, repeatedly made, that Shilpa Nayak was a gratuitous licensee. This is stated in paragraph 3 of the plaint and repeated in paragraph 5. In paragraph 3, Tamhankar sets out the circumstances in which he allowed Shilpa Nayak to stay in the premises. Paragraph 5, added by an amendment, contains the following statement:

"The Defendant No. 1 was neither the original allottee nor a tenant of MHADA but was only occupant of the premises as a gratuitous licensee of the premises."

6. This averment alone puts Tamhankar out of Court. His suit was squarely hit by the decision of the Full Bench of this Court in *Prabhudas Damodar Kotecha & Anr v Smt Manharbala Jeram Damodar & Ors*,¹ later affirmed by the Supreme Court.² *Kotecha* held there is no distinction between a licensee and a gratuitous licensee; and that all disputes between licensors and gratuitous licensees are on same level as those between licensors and other licensees. In view of the provisions of the Presidency Town Small Causes Court Act and the Maharashtra Rent Act, it is only the Small Causes Court that has jurisdiction to try such Suits.

7. This goes to the root of jurisdiction. The City Court, on this averment in the plaint, had no jurisdiction at all.

8. The declaration sought is not severable from the relief of possession. I also do not think it was permissible for a Court to merely grant a declaration and do nothing further. In any case, the declaration is wholly irrelevant. For one thing, MHADA was only the intervening statutory authority. The property is now in the hands of the developer. Whether or not that allotment is binding is surely of no consequence. MHADA's allotment confers no title. The allotment is not a document of transfer or recognition of

¹ 2007 (5) Mh LJ 341.

² *Prabhudas Damodar Kotecha & Ors v Manharbala Jeram Damodar & Anr*, (2013) 15 SCC 358.

ownership rights and title. It might, at best, recognize occupancy. Tamhankar can always bring a suit for possession against Shilpa Nayak but that suit has to be brought in a court of competent jurisdiction; that would be the Court of Small Causes.

9. I find in the impugned judgment there is no reference to the decision in *Kotecha* though the Full Bench decision was rendered on 10th July 2007, several years before the judgment under appeal.

10. The impugned judgment will have to be set aside. This is no assessment on the facts or the merits of the case or the defence. Tamhankar will be at liberty to pursue his remedies in the Court of Small Causes. In fairness, and having regard to how long this litigation has been pending, Mr Toor on instructions states that for a period of 90 days from today Shilpa Nayak will not part with possession or create any third party rights in respect of the allotted flat No. 204 on the Second Floor in “B” Wing. The Plaintiff must obtain suitable protective orders within that period. This statement will no longer continue after the expiry of that period unless the Plaintiff has obtained orders of the Court. In any case, any transactions that Shilpa Nayak purports to make will necessarily be subject to the outcome of Tamhankar’s suit for ejectment.

11. Both the First Appeals are disposed of in these terms. The Civil Applications do not survive and are disposed of as infructuous. No costs.

(G. S. PATEL, J.)