

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO.43 OF 2010

Virginia Correa.	]	
Age abut 70 years,	]	
R/a. C/o. Pladade Rodrigues, Chakala,	]	
Andheri (East), Mumbai-400099.	]	... Appellant / Orig. Petitioner

Versus

Mr. Alexander Florence Correa.	]	
R/a. Royal Vasundhara Building, Flat No.5,	]	
Ground Floor, Dr. Charat Singh Colony,	]	
Kurla Road, Andheri (East), Mumbai-400099.	]	... Respondent / Orig. Respondent

Mrs. Nutan S. Moily for Appellant.
None for Respondent.

**CORAM :- K. K. TATED &
SARANG V. KOTWAL, JJ.**
DATE :- 06 FEBRUARY, 2018

JUDGMENT (PER : SARANG V. KOTWAL, J.) :-

1. This is an Appeal filed by the original Petitioner in Petition No.B-98 of 2003 on the file of the Family Court at Bandra, Mumbai. By the impugned Judgment and Order dated 18/11/2009, the learned Judge, Family Court No.6, Mumbai, was pleased to dismiss the petition. The said petition was filed against the present Respondent who is the husband of the Petitioner, for declaration that, the present

Appellant be declared as the owner of Flat No.5, Ground Floor, Vasundhara Building, Dr. Charat Singh Colony, Kurla Road, Andheri, Mumbai (hereinafter referred to as 'the suit premises'), for possession of the said flat and for injunction restraining the Respondent from dispossessing her.

2. We have heard Mrs. Nutan Moily, learned Counsel for the Appellant. The Respondent – husband though served, did not choose to make any arrangement for putting forth his case at the final hearing of the Appeal and therefore, we are constrained to decide the present Appeal after perusing the record and proceedings and after hearing the arguments advanced only on behalf of the Appellant.

3. Initially, the Appellant had approached the City Civil Court at Mumbai vide Civil Suit No.3088 of 1984. The Respondent herein had entered his appearance and had also filed Written Statement. However, the plaint was returned to the Appellant for presentation to the proper Court and thereafter the aforementioned Petition No.B-98 of 2003 was filed in the Family Court at Bandra, Mumbai. It is the case of the Appellant in the petition that she got married with the Respondent on 16/02/1969 at Chakala, Andheri and they have two daughters from the said wedlock. After marriage, the couple initially resided together at Room No.9, R. R. Kamble Chawl, Kaju Wadi, Chakala Road, Andheri, Bombay. The daughters were born on 06/07/1970 and 16/12/1971.

4. It is pleaded by the Appellant in the petition that during that period, the Respondent was earning Rs.300/- per month and therefore it was difficult to manage the household expenses from the said income. It is further her case that on the suggestion of the Respondent, the Appellant went to Dubai on 10/03/1972 to earn decent living for the entire family, leaving her young daughters in the care of the Respondent. It is pleaded that the Respondent helped her in securing the passport and the employment. It is her case that she was earning a decent salary and from her earning, the Appellant used to send money to the Respondent either in cash or by crediting in the Respondent's bank account no.2678 with the Bank of Baroda, Chakala Branch, Mumbai. The Appellant used to visit Mumbai off and on.

5. It is further pleaded by her that their matrimonial home at Kajuwadi was inadequate and they were looking for a good accommodation and they decided to buy a flat for Rs.25,000/-. It is the Appellant's case that she spent a sum of Rs.10,000/- towards initial payment and the flat was booked using that money in the year 1974 when the flat was under construction. The Appellant has further pleaded that time and again, she remitted the balance amount through bank and by sending cash through the relatives and the flat was secured on 08/12/1975 for the total consideration of Rs.25,000/-. However, the flat was taken in the name of the Respondent. It is further her case that after securing the flat, she came to Mumbai on 24/12/1975 and resided with the Respondent and their daughters in the said flat before leaving for her job.

6. In the petition, the Appellant has further pleaded that the Respondent developed illicit relations with his brother's wife and the relationship between the Appellant and the Respondent started deteriorating. She has further pleaded that the Respondent shifted to Dubai in the year 1996 and thereafter the Appellant came back to India and started residing in the suit premises. After the petition was filed in the Family Court at Bandra, the Appellant claimed that she has been residing in the suit premises on her return to India. The Appellant made the following prayers in her plaint :

- “(a) It be declared that the plaintiff is the owner of the flat No.5, Royal Vasundhara Building, Ground Floor, Dr. Charat Singh Colony, Kurla Road, Andheri (E), Bombay – 400 099, and*
- (b) also for decree and order for possession of the premises viz. flat No.5, Royal Vasundhara Building, Ground Floor, Dr. Charat Singh Colony, Kurla Road, Andheri (E), Bombay – 400 099.*
- (b1) pending the hearing and final disposal of the said suit, the respondent his agent, servants or any other persons claiming through him may be restrained by an order and injunction from dispossessing the petitioner from the suit premises i.e. flat No.5, Royal Vasundhara Building, Ground Floor, Dr. Charat Singh Colony, Kurla Road, Andheri (E), Bombay – 400 099.*
- (c) That pending the hearing and final disposal of the suit, the Court Receiver or some other fit person may be appointed as Receiver of the said flat No.5, with all powers under order XI Rule 1 Code of Civil Procedure, 1908.*
- (d) That pending the hearing and final disposal of the suit, the defendant may be restrained by an order and injunction of this Honourable court from selling, encumbering, alienating, disposing off, parting with*

possession of the said Block No.5, Royal Vasundhara Building, Ground Floor, Dr. Charat Singh Colony, Kurla Road, Andheri (E), Bombay.

- (e) for ad-interim and interim reliefs n terms of prayer (c) and (d) above.*
- (f) Costs, and*
- (g) for such further and other reliefs as the nature and circumstances of the case may require.”*

7. The Respondent resisted the petition and filed his Written Statement. In the Written Statement, he denied all the allegations against him and as far as the suit premises were concerned, he took a stand that the suit premises were purchased out of his own earnings. It is his case that he looked after their two daughters single handedly and paid entirely for the suit premises. According to the Respondent, he was working with I.T.C. till 1988 and was having sufficient income. In fact, around the time of their marriage in the year 1969, he was earning about Rs.600/- per month. According to him, due to the lure of luxurious living, the Appellant herself left for Dubai neglecting the Respondent and their two daughters. He has further claimed that the Appellant totally neglected to look after the daughters and did not spend time with the family whenever she was in Mumbai. He has further denied that the entire amount of Rs.25,000/- towards consideration of the suit premises was paid by the Appellant and thus he prayed that the suit be dismissed.

8. In support of their respective claims, the parties examined themselves as their own witnesses and they were cross-examined by their adversaries. Both the parties gave their evidence in the form of

examination-in-chief on the similar lines as per their respective pleadings.

9. In the cross-examination of the Appellant, she was asked under what circumstances she had entered the flat. The Appellant stated in the cross-examination that the Respondent had given her a wrong key and therefore, she had to break open the lock to enter the suit premises after lodging complaint with the police. On the other hand while answering the questions in the cross-examination conducted on behalf of the Appellant, the Respondent denied that he had received Rs.10,000/- from the Appellant in cash for purchasing the flat. He showed his inability to produce the extract of bank account no.2678 of Bank of Baroda, Chakala Branch, Mumbai and stated that he could not produce the same because all the documents were taken away by the Appellant after she had entered the house. He further denied the allegation of his illicit relationship with his brother's wife. After recording the evidence and hearing the parties, the learned Judge of the Family Court answered the issues before him by observing that the Appellant had failed to prove that she was the owner of the suit premises and she was not entitled to get possession of the same. While arriving at his finding, the learned Judge relied on the fact that the suit premises stood in the name of the Respondent. The learned Judge observed that the Appellant's story that the flat was booked in the year 1974 and was purchased by the agreement dated 14/11/1975, did not appear to be true because she had accepted in her cross-examination that the flat was not under construction when it

was purchased. The Appellant could not give the name of the earlier owner from whom the flat was purchased. The learned Judge took into account that receipt of payment of the price was in the name of the Respondent. The learned Judge observed that the Appellant did not clarify as to what job she was doing in Dubai and what were her earnings and whether she was able to provide for the purchase price of the flat. The learned Judge further observed that the passbook produced along with the list Exh.25/4 was pertaining to the entries from the year 1979 onwards and they could not be linked with the purchase of the flat which had taken place in the year 1975 itself.

10. After perusal of the impugned Judgment, following points arise for our consideration.

SR. NO.	POINTS	FINDINGS
1	Whether the Appellant has made out any case for interference with the findings of the learned Judge ?	The Appellant is partly successful.
2	The Appellant is entitled for what relief ?	As per the Final Order

REASONS

11. After considering the entire evidence on record, the submissions made on behalf of the Appellant and the reasons given by the learned Judge of the Family Court, we are of the opinion that the learned Judge has not committed any error in arriving at his conclusion that the Appellant had failed to prove that the money with

which the suit premises was purchased, was sent by her and the Respondent did not pay the price of the flat. The learned Judge has rightly observed that the Appellant has not produced any documentary evidence to substantiate her claim that she used to send money in the year 1974-1975 when, according to her, the flat was booked and purchased. She has failed to prove that she sent money especially for the purpose of purchasing the flat. The Appellant has not produced any bank statement during the period 1974-1975 to show that certain amount totalling to Rs.25,000/- which was the purchase price of the flat, was remitted by the Appellant - wife from from Dubai to the Respondent's account or she had made any arrangement so that the Respondent would receive the said amount for the purpose of purchase of the flat. The Appellant could not even state the name of the person from whom the flat was purchased. In fact, her case was that the flat was booked in the year 1974 and was purchased in the year 1975. However, this circumstance is belied by the fact that ready-made flat was purchased from the earlier owner. Hence, there is nothing to connect the Appellant with the purchase of the flat. There is no evidence to show that she took any part either in negotiations or acquiring or paying the price of the flat. As observed by the learned Judge, the flat stands in the name of the Respondent and the receipt for paying the purchase price also stands in the name of the Respondent. Therefore, there is not a single document in favour of the Appellant to prove her case that she is the real owner of the flat or that she had contributed either exclusively or partially in the purchase of the said flat. Therefore, to that extent, we do not find

any fault on the part of the learned Judge and therefore, it cannot be declared that the Appellant is the owner of the suit premises. In this view of the matter, the prayer made in the plaint i.e. prayer clause (a), cannot be granted.

12. Prayer clauses (b1), (c), (d) and (e) were interim prayers and therefore, the only prayer which requires our consideration is prayer cause (b) wherein the Appellant has prayed for Decree and Order for possession of the suit premises. In this connection, it can be noted that the Appellant has led sufficient evidence that on her return from Dubai to India in the year 1996 itself, after lodging complaint with the police, the Appellant broke open the lock of the flat and entered the flat, as the Respondent had given her wrong key. She has been residing in the said flat since all these years. The Respondent did not take any steps when the Appellant had taken possession of the flat and she is paying the maintenance charges of flat and the Respondent had not taken any objection.

13. In this view of the matter, it is only just and proper to grant limited protection to the Appellant who is an old lady today and has been residing in the suit premises since past many years. Therefore, she cannot be dispossessed without following the due process of law. In this view of the discussion, the following order is passed.

ORDER

- (i) The Appeal is partly allowed.
- (ii) The Appellant shall not be dispossessed from the suit premises i.e. Flat No.5, Ground Floor, Vasundhara Building, Dr. Charat Singh Colony, Kurla Road, Andheri, Mumbai, without following the due process of law.
- (iii) The finding recorded by the learned Judge, Family Court No.6, Mumbai, that the Decree regarding declaration that the Appellant is the owner of the flat, cannot be granted, is correct and therefore, the said part of the Decree of the Trial Court is upheld.
- (iv) In the aforesaid circumstances, the Appeal is partly allowed and disposed of.
- (v) No order as to costs.

(SARANG V. KOTWAL, J.)**(K. K. TATED, J.)**