

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

**APPEAL FROM ORDER NO.261 OF 2014
with
CIVIL APPLICATION NO.305 OF 2014**

Kiritkumar G. Shah & Ors. ... Appellants

Vs.

Zubin Harbin Jhaveri & Ors. ... Respondents

Mr.Rajesh Singh for the Appellants
Ms.Madhuri More for Respondent Nos.3 to 5
Mr.S.P. Thorat for Resp. Nos.6 & 7

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: FEBRUARY 12, 2018**

P.C. :

1. Learned Counsel for the appellants shows service by publication dated 9.2.2018 on respondent Nos.1 and 2 i.e., the original plaintiffs, namely, Zubin Harbin Jhaveri and Sonal Harbin Jhaveri. Mr.Thorat appears for Respondent Nos.5 and 6 / MHADA and Ms.More appears for the Corporation.

2. This Appeal is directed against the order dated 15.2.2014 passed by the learned Judge of the Bombay City Civil Court, Fort, Greater Mumbai. Respondent Nos.1 and 2 have filed a Suit

No.922 of 2012 for injunction and declaration in respect of the suit premises i.e., room No.6, 2nd floor. The trial Court at the time of deciding the Notice of Motion No.1781 of 2012 had appointed a Court Commissioner for local inspection of building No.64/66 at Mirza Street, Mumbai and directed the Commissioner to take inspection and prepare sketch of all the floors of the building and to submit the report. It enjoined respondent Nos.5 to 7 i.e., the present appellants, not to dispossess the plaintiff from the suit premises and not to disturb the possession of the plaintiffs over the suit premises i.e., room No.6. They are also restrained from creating third party interest in respect of suit premises i.e., room No.6 till the disposal of the suit.

3. The learned Counsel for the appellants has submitted that in this appeal, he is not pressing any order in respect of appointment of Court Commissioner but he is mainly aggrieved by the order of injunction which was granted against the appellants that they should not dispossess the plaintiffs and should not create third party right in respect of the said suit premises. The learned Counsel has submitted that the plaintiffs were and are not in possession of room No.6 on 2nd floor. He has submitted that the

plaintiffs have filed RAD Suit No.409 of 2011 which is pending in the Small Causes Court that they be declared as tenants and also in respect of possession of the said suit premises. He relied on the consent terms dated 16.10.2010 filed in RAD Suit No.26 of 2010 which was filed by one Harbin Jhaveri, the father of the present Respondent No.1 i.e., the husband of respondent No.2 alongwith defendant Nos.1 to 3 i.e., appellant Nos.1 to 3. He showed that in the consent terms, the father of the plaintiffs had agreed to accept Rs.5 lakhs in lieu of the premises and the said amount was paid to the father of the plaintiffs and it was accepted by him and surrendered the tenanted premises. He submitted that the plaintiffs have misguided the Court and they are not in possession of the suit room No.6. They have left the premises and, therefore, in their prayers in the suit No.409 of 2011, they have asked for possession.

4. The learned Counsel for the Corporation and the learned Counsel for MHADA submit that the dispute is mainly between the appellants and respondent Nos.1 and 2 and they have nothing to say.

5. On perusal of the prayers and the contents of the Suit No.409 of 2011, which is filed in respect of suit Room No.6 and also the suit No.152 / 235 of 2012 which was filed in respect of room No.9 on 4th floor by the original plaintiffs so also the prayers made therein and the impugned order of the learned Judge of the City Civil Court, it appears that basically the appellants who are the landlords and respondent Nos.1 and 2, the plaintiffs, are disputing the tenancy rights in respect of the suit premises i.e., room No.6 on the 2nd floor. RAD Suit No.26 of 2010 was filed by the father of respondent No.1 and the husband of respondent No.2 wherein the consent terms were filed between the parties on 16.10.2010 in which the father Harbin has accepted Rs.5 lakhs for surrendering the suit room. However, in the said suit, the suit room which was surrendered, was described as room No.9 on the 4th floor. Thus, the consent terms are not in respect of suit premises i.e., room no.6 on 2nd floor. In view of this, the consent terms which are pointed out are not of use in respect of the present suit premises. In prayer clause 26(b) of the Suit No.409 of 2011, the plaintiffs have asked that they are to be given possession and also to be declared as tenant. However, this cannot be read at this stage as pertaining to room No.6 on second floor because the entire

building was repaired and it appears that the landlord was interested in creating rights of other parties by putting them in possession or selling the premises. However, in the present suit i.e., 922 of 2012, prayers made in Notice of Motion No.1781 of 2012 are to be taken into consideration. In the said suit, the plaintiffs have asked for declaration and action in respect of report given by MHADA and also prayed for declaration in respect of tripartite agreement dated 18.1.2018. The plaintiffs have also asked for injunction that defendants should not disturb the possession of the plaintiffs in respect of suit room and asked for creation of third party right. The prayers mentioned in the present suit prima facie disclose that respondent Nos.1 and 2 have maintained the stand that they are in possession of the suit room No.6. However, the fact that they are in actual possession is a matter of evidence and can be tested at the time of the trial. I do not find any reason to set aside the order passed by the trial Court.

6. Hence, the appeal is dismissed. In view of the dismissal of the appeal, Civil Application also stands dismissed.

(MRIDULA BHATKAR, J.)