

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****APPEAL FROM ORDER (STAMP) NO.10887 OF 2017
WITH
CIVIL APPLICATION (STAMP) NO.10888 OF 2017
IN
APPEAL FROM ORDER (STAMP) NO.10887 OF 2017**

Mrs. Seema Navin Jain And Anr. ...Appellants/Applicants
V/s.

Mrs. Indu Rakesh Jain And Anr. ..Respondents

**WITH
APPEAL FROM ORDER (STAMP) NO.13864 OF 2017**

Mrs. Indu Rakesh Jain ...Appellants/Applicants
V/s.

Mrs. Seema Navin Jain And Ors. ..Respondents

.....

Mr. Roshan S. Tanna, a/w. M.K. Tanna for the Appellants.

Mr. Kalpesh Joshi, a/w. Mr. Arvind Shrivastava, i/b. Kalpesh Joshi Associates, for Respondent No.1.

.....

CORAM : S.C. GUPTE, J.

DATED : 17 APRIL 2018

JUDGEMENT :

. This appeal impugns an interlocutory order passed by City Civil Court at Bombay. By two notices of motion, Respondent No.1 in A.O. (Stamp) No.10887 of 2017 (Original Plaintiff), who claims to be the owner of the suit flat, had prayed for interlocutory injunctions restraining the Appellants (Original Defendants) from (i) preventing the Plaintiff or

her authorized representative from possessing, using and occupying the suit flat, and (ii) causing obstruction to the Plaintiff's putting of a temporary wooden partition wall in the suit flat. The impugned order grants injunction (i), but rejects injunction (ii) referred to above. The grant of injunction (i) is challenged by the Defendants in the present appeal (A.O. (Stamp) No.10887 of 2017). The companion appeal (A.O. (Stamp) No. 13864 of 2017) is filed by the Plaintiff challenging *inter alia* the rejection of injunction (ii).

2. The short facts of the case may be stated as follows :

One Jagat Bhushan Jain (since deceased), father of Appellant No.1 ("Defendant No.1") and her sister, Respondent No.1 ("Plaintiff"), was the owner of two adjoining flats, namely, Flat No.181 ("suit flat") and Flat No.182 ("adjoining flat"). The two flats, which are shown as separate flats in the sanctioned plans, were used for the residence of himself and his family, which originally included both the Plaintiff and Defendant No.1, by late Jagat Bhushan Jain without constructing a separating wall between the two. (Separate doors of the flats were, however, maintained till about 2009.) In 1975, the Plaintiff got married and shifted to her matrimonial house at Delhi and has since been residing there with her family. In or about 1980, Defendant No.1 got married and shifted to her matrimonial house at Juhu in Mumbai. On 4 January 1999, late Jagat Bhushan Jain executed two registered gift deeds gifting the suit flat to the Plaintiff and the adjoining flat to Defendant No.1. The share certificates of the two flats were, in pursuance of the gifts, transferred, respectively, in favour of the Plaintiff

and Defendant No.1. The maintenance bills of the society have since been separately raised on, and paid by, the respective parties. All throughout, i.e. till his death on or about 5 June 2015, late Jagat Bhushan Jain and his wife (Respondent No.2 to the appeal) continued to reside in the two flats as before. It is the Plaintiff's case that, in the meantime, i.e. since about 1990, Defendant No.1 along with her husband, Defendant No.2, came to reside with her parents, i.e. late Jagat Bhushan Jain and his wife. It is the Plaintiff's case that at the time the relations between the parties were cordial and she did not object to the use of the flats by Defendant Nos. 1 and 2 in common with her parents; that sometime in 2009, Defendant Nos. 1 and 2 carried out renovations in the adjoining flat, at which time the separate doors of the two flats were removed and one common main door was made to enter the two flats; that upon coming to know about these changes, the Plaintiff objected to the same but the Defendants assured the Plaintiff that her rights to the suit flat would remain unaffected and her use of the suit flat would not be obstructed thereby; and that sometime in the second half of 2014 and beginning of 2015 the relations between the parties started becoming sour due to the events narrated in the plaint. On 5 June 2015, Jagat Bhushan Jain passed away. After his demise, the Plaintiff claims to have requested Defendant Nos. 1 and 2 to construct a separating wall between the two flats in keeping with the sanctioned plans, so as to make a separate space for her family including her mother; the request, however, was turned down. It is the Plaintiff's case that Defendant Nos. 1 and 2 are trying to create obstructions in peaceful use and occupation of the Plaintiff and her mother of the suit flat. The Plaintiff submits that she, being the owner of the suit flat, is entitled to use and occupy the

same without any disturbance from the Defendants during the pendency of the suit. She, accordingly, prays for construction of a dividing wall between the two flats and creation of a separate entry to the suit flat as before. She also prays for a temporary injunction restraining Defendant Nos. 1 and 2 from preventing her use, occupation and enjoyment of the suit flat.

3. Defendant Nos. 1 and 2 object to construction of a wall and creation of a separate residence as an interim measure, but have no objection to the Plaintiff or her mother occupying or using the suit flat. They also object to the terms of the injunction order, which permits the Plaintiff to use and occupy the suit flat through her authorized representative. This, according to the Defendants, could create problems insofar as their use and enjoyment of the adjoining flat is concerned.

4. The Plaintiff has taken out two notices of motion. Notice of Motion No.123 of 2017 seeks *inter alia* the restraint order, as noted above, whilst Notice of Motion No.627 of 2017 seeks direction to the Defendants to provide necessary assistance and protection to the Plaintiff for entering the suit flat and directions to break open the lock put on the main door of the suit flat and handover one set of keys of the main door to the Plaintiff. By his impugned order dated 6 April 2017, the learned Judge of the City Civil Court dismissed Notice of Motion No.627 of 2017 and granted relief only in respect of prayer clause (a) of Notice of Motion No.123 of 2017. Prayer clause (a) calls for an injunction, as noted above, against the Defendants from causing obstruction to the Plaintiff's

possession of the suit flat. The learned Judge held that both flats were purchased and later on gifted by the late father of the parties with an intention that both his daughters would reside peacefully in adjoining flats even in future. Admittedly, the suit flat was gifted to the Plaintiff and Defendant No.3 society had issued a separate share certificate in respect of the same in the name of the Plaintiff. It was also undisputed that the Plaintiff had mortgaged the suit flat with Punjab and Sindh Bank and availed of an overdraft facility of Rs.1 crore, against which a lien was marked by Defendant No.3 Society on the suit flat. The documentary evidence showed that the Plaintiff had possession of the suit flat and, on the other hand, there was nothing to disclose as to when the Defendants could be said to have obtained exclusive possession of the suit flat. The learned Judge held that, admittedly, the Defendants had carried out material alterations in both flats and the facts of the case prima facie indicated that sometime in the year 2009, the Defendants had closed one door and kept in use one common door for use of the two flats. The learned Judge held that if the documents produced on record were viewed carefully, the only inference to be made was that the Plaintiff was in actual possession of the suit flat though, at some juncture, the Defendants had closed the door of the flat and kept one common door to enter the two flats. The learned Judge held that this could never be held as an act of acquisition of possession of the suit flat. The learned Judge, accordingly, held that prima facie the Plaintiff, being in lawful possession of the suit flat, pursuant to a gift deed executed in her favour, her possession could not be obstructed by the Defendants. The learned Judge, accordingly, held that the Plaintiff had made out a prima facie case for an injunction permitting her to use and occupy the suit flat.

Accordingly, he made Notice of Motion No.123 of 2017 absolute in terms of prayer clause (a). As regards Notice of Motion No.627 of 2017, the learned Judge was of the view that the reliefs prayed for therein could only be granted by an executing court and not by the suit court. Accordingly, the learned Judge dismissed Notice of Motion No.627 of 2017. As mentioned above, both parties are in appeal from this order. The Plaintiff is aggrieved by the fact that the relief granted by the trial court is not adequate to allow the Plaintiff peaceful use and occupation of the suit flat, which she has been held to be entitled to. The Defendants are aggrieved by the fact that the Plaintiff is permitted to use and occupy the suit flat through her authorized representative, which may create obstruction in the Defendants' use and enjoyment of the adjoining flat.

5. At the hearing of the appeal from order, Defendant Nos. 1 and 2 submit that the two flats were and are a common unit since the very inception, having one common kitchen, common drawing room, there being no wall separating the two flats. It is submitted that the electrical wirings of the two flats are also interlinked to the main adjoining electric supply going through the suit flat. It is submitted that the suit flat always had a common entrance. It is submitted that the Defendants have been residing in the suit flat and the adjoining flat (as one unit) since 1999 with parents of the parties, along with their son, daughter-in-law and grandson. It is submitted that the Plaintiff never resided in, or was in possession of, the suit flat. It is submitted that both flats have been maintained and renovated by Defendant Nos. 1 and 2 by themselves in the year 2008. Based on these factual aspects, Defendant

Nos. 1 and 2 contend that though the Plaintiff's title is not disputed, her possession of the suit flat is a matter of dispute and in a case like this the remedy is to file a suit for possession. It is submitted that any injunction granted by the Court on the notice of motion would be difficult to supervise, particularly in the light of the fact that not only the Plaintiff, but even her authorized representative, is permitted to enter the suit flat. It is submitted that this could result in constant disputes, which would be difficult to supervise. It is also submitted that the interim relief claimed in the present suit is in the nature of final relief itself and, thus, ought not to be granted. Besides these legal submissions, the Defendants also allege delay and laches on the part of the Plaintiff dis-entitling her to the equitable relief of injunction.

6. At the very outset, it is important to note that there is no dispute between the parties as regards the title of the suit flat. The Plaintiff is, admittedly, the absolute owner of the suit flat holding title deeds (registered gift deed and share certificate) in her name. It is also an admitted position that after gifting of the suit flat and the adjoining flat, respectively, to his two daughters, that is to say, the Plaintiff and Defendant No.1, late Jagat Bhushan Jain continued to reside in the two flats as one common unit. It is also not in dispute that since the year 1999, Defendant No.1 and her husband, Defendant No.2, came to reside with late Jagat Bhushan Jain and his wife. Insofar as the use of the suit flat by late Jagat Bhushan Jain himself is concerned, it can only be termed as a permissive user, the registered owner of the flat, i.e. the Plaintiff, having permitted him to reside in the suit flat. In that case, the only possible conclusion is that the residence of Defendant Nos. 1 and 2

in the suit flat (as part of the common use of the two flats) can only be termed as permissive and as members of the family of late Jagat Bhushan Jain. Till June 2015, late Jagat Bhushan Jain continued to reside in the suit flat (as part of the common use of the two flats). Merely because she continued to reside in her matrimonial home, it cannot be said that all this while the Plaintiff herself did not have possession of the suit flat. There is ample evidence on record to show that the Plaintiff continued to be in possession of the flat and even visit and stay in the suit flat as and when she came to Mumbai. The conclusion of the learned Judge that there is substantial evidence to prima facie indicate that the Plaintiff continued to be in possession of the suit flat and was never dispossessed of the same, is a pre-eminently probable prima facie conclusion, which cannot be disturbed in an appeal from order. If the Plaintiff has an indefeasible case of title and can prima facie be shown to be even in possession of the suit flat, it is but a foregone conclusion that her use and occupation of the suit flat ought to be protected during the pendency of the suit. An interim order for such protection must in that case follow.

7. The real question is: Should the trial court have stopped at simply protecting permissive use of the suit flat by the Plaintiff through herself or her authorized representative by granting an injunction simplicitor or should it have provided for effective interim measures with a view to actually protect the Plaintiff's use and occupation of the suit flat. The flats do not have a separating wall or separate entrances. If such separation is not caused to be made at site, both parties are likely to suffer grave prejudice. In the first place, given the status of their

current relationship, it is impossible to imagine that the parties could stay together or make common use of the two flats. It is more unthinkable that the suit flat could be conveniently used in common with Defendant Nos. 1 and 2 by anyone else as a representative of the Plaintiff. And yet, as noticed above, it is a forgone conclusion that in view of the admitted ownership of the Plaintiff of the suit flat and the trial court's finding that the Plaintiff even had possession and use of the suit flat, which was not obstructed to by Defendant Nos. 1 and 2 at any time (indeed the Defendants do not propose to do so even now during the pendency of the suit), adequate interim measure had to be ordered to effectively protect the Plaintiff's possession, occupation and use of the suit flat. The only adequate measure that one can possibly think of in such a case is to separate the two flats providing for a separating wall, two separate entrances and equipping each individual flat with a separate kitchen. This is certainly feasible, since originally the flats were proposed and even sanctioned as separate flats and it is even pre-eminently advisable that they should be so separated as an interim measure. After all, all that we are doing by that means is to allow the parties to peacefully use, occupy and enjoy during the pendency of the suit their respective flats, the Plaintiff as owner of the suit flat and Defendant No.1 of the adjoining flat. As for meeting the costs of doing so, the Plaintiff offers to defray the entire costs as of now without prejudice to her rights and contentions; the sharing of such costs finally can be considered at the hearing of the suit.

8. Balance of convenience firmly weights in favour of such separation. If the two flats are not separated, the interim relief in favour

of the Plaintiff allowing her to use the suit flat makes no practical sense. It is nothing less than impossible for the Plaintiff to use her flat so long as the two flats are in common use of the Defendants as one unit. And as for the Defendants, far from inconvenience, it is actually in their interest to have the two flats separated. The Defendants' legal entitlement is to the adjoining flat and it is equally difficult to see how the Defendants can peacefully use and enjoy the adjoining flat, if the Plaintiff, or worse still, an authorized agent of hers, were to occupy the suit flat. The Defendants do not, however, support the partition but are happy to allow the Plaintiff or her mother, though not her authorized representative, to use the suit flat. It is quite obvious that they do so because they know that it is merely a paper order; neither the Plaintiff nor the mother is in fact going to use the flat so long as it is part of one common unit. In other words, the Defendants, who do not have any legal basis to object to the separation of the two flats, want to profit by the law's delay.

9. The only course open, in a case such as this, and which should accord with the conscience of the Court, is to erect a separating wall between the two flats in accordance with the original sanctioned plans and allow each of the two parties to peacefully use and enjoy their respective flats. I am conscious of the fact that such relief would be in the nature of a final relief. But then it is permissible to grant such relief, when no principle or authority can be cited to deny such relief as a final relief. This is not a case, where the suit property forms part of a common property which is to be partitioned between the parties and is sought to be divided pending such suit. The suit flat is a separate property and it

is admittedly owned by the Plaintiff. It was, however, used in common with the adjoining flat with leave of owners of the two flats. Neither of the two owners could be said to be in juridical possession of the other's flat to the exclusion of the other. The two flats, by leave of their owners, were allowed to be used by the father of the owners and one of the owners resided with the father as a member of his family. All this while, the other owner (namely, the owner of the suit flat) could come and reside with the father and do so as a member of his family. There is nothing in the circumstances of the case which could spell out any act of dispossession of this owner. There is, in other words, no case for denying such owner the use and enjoyment of the flat. And the only way in which such use and enjoyment could be effectively permitted is by constructing a partition wall as an interim measure.

10. A.O. (Stamp) No.10887 of 2017 and A.O. (Stamp) No.13864 of 2017 are accordingly disposed of by issuing the following directions in addition to the injunction granted by the City Civil Court at Bombay :

(i) Court Receiver, High Court, Bombay is appointed a receiver of the suit flat for the purposes of constructing a separate wall between the two flats, namely, the suit flat (Flat No.181) and the adjoining flat (Flat No.182), and also separate entrances to the two flats. If septation of the flats involves any change in the electrical installation or wiring, the same may also be carried out by the Receiver.

(ii) Respondent No.1 shall fund the Receiver for this work in

advance and based on such funding, the work may be entrusted to such of the agencies as may be chosen by the parties jointly or in the absence of their agreement, by the Receiver.

(iii) Respondent No.1 will be at liberty to make provision for a kitchen in the suit flat at her own costs. Barring such kitchen, no other permanent structural change shall be made by Respondent No.1 in the suit flat pending the hearing and final disposal of the suit.

(iv) Hearing of the suit is expedited.

11. Learned Counsel for the Appellants submits that since the Appellants' articles are in the suit flat which is used in common with the adjoining flat owned by the Appellants, the order may not be implemented for a reasonable time. The request seems to be in order. This order accordingly shall not be implemented till 15 June 2018.

12. In view of the disposal of Appeal From Order (Stamp) No.10887 of 2017, nothing survives in the Civil Application (Stamp) No.10888 of 2017 and the same is also disposed of.

(S.C. GUPTE, J.)