

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO. 9990 OF 2016**

Savita P. Jain & Ors.] Petitioners

Vs.

Michael Rodrigues & Anr.] Respondents

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Mr. N.V. Walawalkar, Sr. Advocate i/b Mr. Nusrat Shah, Ms. Ema Almeida, Mr. Kerin Gala, Ms. Samaa Shah & Ms. Richa Pachon i/b Naazish N. Shah, for Petitioners.

Mr. Nigel Quraishy i/b Mr. Dushyant Krishnan, for Respondent No.1.

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CORAM : R.G. KETKAR, J.

DATE : 4TH APRIL, 2018.

P.C.

Heard Mr. Walawalkar, learned Senior Counsel for petitioners and Mr. Quraishy, learned Counsel for respondent No.1 at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as “plaintiffs” have challenged the judgment and order dated 12th February, 2015 below Exhibit 10 in R.A.D. Suit No.400/765 of 2013 passed by the learned Judge, Court Room No.14 of the Court of Small Causes at Mumbai as also the judgment and order dated 3rd February, 2016 passed by the Appellate Bench of Court of Small Causes at Mumbai in Misc. Appeal No.36 of 2015. By these orders, the Courts below rejected the application made by the plaintiffs, inter alia, praying for:

- [a] appointment of Court Receiver, High Court, Bombay or Registrar of the Small Causes Court, Mumbai or any other fit and proper person with all the powers under Order XL, Rule-1 of the Code of Civil Procedure, 1908 to take symbolic possession of the suit property namely “Madonna” building situate at C.T.S. No.240 of Village Mandpeshwar at Madonna Colony, Borivali (East), Mumbai (for short “suit property”) as *custodia legis* to be handed over to the plaintiffs and other tenants after re-development by inducting the plaintiffs in their respective flats which may be earmarked by the Court Receiver or such other person appointed by the Court;
- [b] for injunction restraining respondent No.1, hereinafter referred to as “defendant No.1” from carrying out any development work in respect of the suit property without submitting a revised plan showing all the tenements of sitting tenants viz; the plaintiffs and other tenants providing them accommodation in the proposed new building “Madonna” formerly known as “Xavier Mansion” ;
- [c] for injunction restraining the defendant from applying/obtaining from the Municipal Corporation of Greater Mumbai (for short “Corporation”), the Commissioner of Corporation and the Executive Engineer of the Corporation (R-Ward) the completion and/or occupation certificate in respect of newly constructed building, unless and until the defendant inducts the plaintiffs and other tenants into their respective premises in the said newly constructed building prior to inducting any purchasers of the flats in the said newly constructed building;

[d] for that order of injunction restraining the defendant from creating any encumbrances, selling or disposing of any flats or third party right in respect of any of the flats in newly constructed building, or inducting any third party by way of tenancy or leave and licence or from disposing of or dealing with any of the flats in the said newly constructed building or any portion thereof to any person in any manner whatsoever, other than the plaintiffs who have preferential right of being inducted first in their respective flats in the said newly constructed building.

3. Rule. Mr. Krishnan waives service on behalf of respondent No.1. Leave to delete respondent No.2 as also leave to annex additional reply dated 21st December, 2013 filed by defendant in the trial Court is granted. Amendment to be carried out forthwith. The relevant and material facts giving rise to the filing of this Petition, briefly stated, are as under.

4. The Plaintiffs have instituted suit, inter alia, contending that they are lawful tenants in respect of Flat Nos. 5,8,10,12,15 and 19. The building where these flats were situate was in dilapidated condition. It is their case that the plaintiffs were discharging their obligations as lawful tenants by paying rent to the landlord Francis Xavier Rodrigues (since deceased) who is father of the present defendant. The plaintiffs relied on several documents to substantiate their claim of tenancy. The plaintiffs contended that there were total twenty tenements being independent flats in the building. Out of which, eighteen flats were let out to the tenants including the plaintiff and other tenants and the remaining two flats were occupied by deceased landlord and his family members.

5. It is the case of the plaintiffs that the original landlord and the defendant who is the present landlord did not keep the building in tenantable condition and allowed the condition of the building to deteriorate and with the passage of time, it became dilapidated, rendering the same unfit for human habitation. The plaintiffs made several complaints to the Ward Office, which carried out inspection after visiting the building and taking inspection, issued notice u/s 257(1) of the Mumbai Municipal Corporation Act, 1888 (for short "Corporation Act") on 9th February, 1999 calling upon the original landlord Francis Rodrigues to carry out repairs i.e to repair the drainage line and chamber and replace drainage, sewer lines and to construct the inspection chambers. The original landlord was further requested to replace the down take pipe to avoid leakages and also repair the existing septic tanks to avoid further nuisance. The original landlord failed to comply with the requisitions of notice dated 9th February, 1999 issued u/s 257 (2) of Corporation Act. It is the case of the plaintiffs that since the condition of the building was deteriorating and dilapidating, the original landlord requested all the tenants to move out for safety reasons so as to enable him to carry out the structural repairs after obtaining permission of the Corporation. The original landlord assured all the tenants that they would not be required to pay the rent from the date of their temporary vacation till the new building was constructed. Relying on the assurances of the original landlord and also keeping in mind the safety of the life and limb of the tenants and their family members and also the precarious and dangerous condition of the building, the tenants including the plaintiffs started moving out from the building from June, 2000 onwards. However, all the personal affects, belongings and documents and other paraphernalia of the plaintiffs were lying in their flats under lock and key of tenants which the tenants had agreed to provide to the original landlord as and when the internal repairs of their flats would be taken up after completing the external repairs.

6. The plaintiffs have contended that under Regulation 33 (b) of the Development Control Regulation for Greater Mumbai, 1991 (for short 'Regulation'), they have legal rights and they are entitled to accommodation in the newly constructed building under the provisions of the Maharashtra Rent Control Act, 1999 (for short 'Act') as well as Regulations. The plaintiffs have referred to the proceedings filed in the City Civil Court. The plaintiffs have instituted suit, *inter alia*, for declaration that they are lawful tenants of the defendant in respect of their respective flats and are entitled to reinstate in the newly constructed building in view of their old tenancies as per Regulation 33 (6) r/w Appendix II of the Regulations as also order dated 24th November, 2010 passed by the Executive Engineer of the Corporation, R-Ward and under the provisions of the Act among other reliefs.

7. During pendency of the suit, the plaintiffs took out application at Exhibit 10 for interim relief. The defendant filed reply on 21st December, 2013 and additional reply on 13th January, 2014. In the additional reply, in para 2, the defendant contended that in pursuance of the notice dated 10th February, 2010 u/s 354 of the Corporation Act, the building (Xavier Mansion) was demolished during the period 10th March, 2010 to 31st March, 2010.

8. By order dated 12th February, 2015, the learned trial Judge rejected the application. Aggrieved by that decision, the plaintiffs filed Misc. Appeal No.36 of 2015 before the Appellate Bench which was dismissed on 3rd February, 2016. It is against these orders, the plaintiffs have instituted the present Petition.

9. Mr. Walawalkar invited my attention to the findings recorded by the learned trial Judge in paragraph 14. In paragraph 14, the learned trial Judge observed thus;

“14. Thus, the plaintiffs have not made out any *prima facie* case in support of their contentions when the plaintiffs have move out from the suit building in the year 2000 and handed over the keys to the father of the defendant, this act itself amounts to surrender of the possession and giving up their rights if any. Moreover, the act was done without entering into any agreement for redevelopment or for providing temporary or permanent alternative accommodation. The defendant is developing his own property and has started developing work and if the prayers of the plaintiffs are allowed, the entire property including newly constructed building which is already constructed as per the sanctioned plan will be waste and deteriorated. Considering these aspects, the balance of convenience tilts in favour of the defendant instead of the plaintiffs and obviously irreparable loss will be caused to the defendant if they are restrained from carrying on constructing work of the building. Thus, I answer Point Nos. 1 to 3 accordingly”.

Mr. Walawalkar submitted that the learned trial Judge recorded finding that the plaintiffs have not made out any *prima facie* case as they moved out from the building in the year 2000 and handed over keys to the father of the defendant which itself amounts to surrendering possession and giving up rights, if any. Moreover, the act was done without entering into any agreement for re-development or for providing temporary or permanent alternative accommodation. He submitted that the said finding is not borne out from record. In fact, this finding is contrary to the case made out by the plaintiffs in paragraph 23 of the plaint. The contentions raised in the plaint and application Exhibit 10 are not denied by the defendant. He submitted that as far as Appellate Court is concerned, in paragraph 10, the Appellate Court observed thus;

“At this stage, there is nothing on record to show that the condition of the suit building so that bad that the plaintiffs could not reside in the same and therefore, they were required to leave the suit premises. **The Municipal Corporation has issued notice to the landlords only for repairs and not for demolition.**”

Mr. Walawalkar submitted that this is factually incorrect and also contrary to the record and in particular paragraph 2 of additional reply dated 13th January, 2014 filed by the defendant. The defendant himself asserted that on 10th February, 2010, Corporation issued notice u/s 354 of the Corporation Act and thus, the said finding is contrary to the record. Mr. Walawalkar relied on the decision of the Apex Court in the case of **Shaha Ratansi Khimji and Sons Vs. Kumbhar Sons Hotel Private Limited and others, (2014) 2 Supreme Court Cases 1**, in support of his submission that demolition of the premises, tenancy is not extinguished.

10. On the other hand, Mr. Quraishy supported the impugned orders. He submitted that the plaintiffs on their own showing had vacated the building in the year 2000. The suit is instituted in the year 2013. The Courts below were, therefore, justified in rejecting the application for appointment of Court Receiver as also for injunction restraining the defendant from carrying out re-development. He submitted that the Courts below have noted that the defendant had already constructed three storey building on the suit property. He, therefore, submitted that no case is made out for interfering with the impugned orders.

11. I have considered the rival submissions of learned Counsel for the parties. I have also perused the material on record. I have already referred to the prayers made by the plaintiffs in their application at Exhibit 10. A perusal of the impugned orders shows that the Courts below considered the prayers for appointment of Court Receiver as also for injunction restraining the defendant from carrying out re-development work. However, the Courts below have not considered the prayers (c) to (e) made by the plaintiffs in application at Exhibit 10. That apart, in paragraph 14, in the trial Court's judgment, the trial Court

recorded a finding that the plaintiffs have handed over keys to the father of the defendant and this act itself amounts to surrendering possession and giving up their rights, if any. The said finding is not borne out from the record. In view thereof, finding recorded by the trial Court in paragraph 14 deserves to be set aside. In paragraph 10, the Appellate Court observed that the Corporation had issued notice to the landlord only for repairs and not for demolition. This observation is also contrary to the material on record as concededly the Corporation had issued notice u/s 354 of the Corporation Act on 10th February, 2010. Section 354 of the Corporation Act reads thus;

354. Removal of structures, etc., which are in ruins or likely to fall.

- (1) If it shall at any time appear to the Commissioner that any structure (including under this expression any building, wall or other structure and anything affixed to or projecting from, any building, wall or other structure) is in a ruinous condition, or likely to fall, or in any way dangerous to any person occupying resorting to or passing by such structure or any other structure or place in the neighbourhood thereof, the commissioner may, by written notice, require the owner or occupier of such structure to pull down, secure or repair such structure, [subject to the provisions of section 342] and to prevent all cause of danger therefrom.
- (2) The Commissioner may also if he thinks fit, require the said owner or occupier, by the said notice, either forthwith or before proceeding to pull down, secure or repair the said structure, to set up a proper and sufficient hoard or fence for the protection of passers by and other persons, with a convenient platform and handrail, if there be room enough for the same and the Commissioner shall think the same desirable, to serve as a footway for passengers outside of such hoard or fence.
- (3) If it shall appear to the Commissioner that any building is dangerous and needs to be pulled down under sub-section (1), the Commissioner shall call upon the owner, before issuing notice thereunder, to furnish a statement in writing signed by the owner stating therein the names of the occupiers of the building known to him or from his record, the area in occupation and location of premises in occupation,

possession of each of the respective occupiers or tenants, as the case may be.

- (4) If he fails to furnish the statement as required by sub-section (3) within the stipulated period, then the Commissioner shall make a list of the occupants of the said building and carpet area of the premises in their respective occupation and possession alongwith the details of location.
- (5) The action taken under this section shall not affect the inter-se rights of the owners or tenants or occupiers, including right of re-occupation in any manner”.

In view thereof, the said finding recorded by the Appellate Court in paragraph 10 also deserves to be set aside.

12. In the case of **Mandali Ranganna & Ors. Vs. T. Ramchandra & Ors**, AIR 2008 Supreme Court 2291, the Apex Court in paragraph 18 observed thus;

“18.While considering an application for grant of injunction, the Court will not only take into consideration the basic elements in relation thereto, viz., existence of a prima facie case, balance of convenience and irreparable injury, it must also take into consideration the conduct of the parties.

Grant of injunction is an equitable relief. A person who had kept quiet for a long time and allowed another to deal with the properties exclusively, ordinarily would not be entitled to an order of injunction. The Court will not interfere only because the property is a very valuable one. We are not, however, oblivious of the fact that grant of refusal of injunction has serious consequence depending upon the nature thereof. The Courts dealing with such matters must make all endeavours to protect the interest of the parties. For the said purpose, application of mind on the part of the Court's is imperative. Contentions raised by the parties must be determined objectively”.

In view thereof, *prima facie*, no case is made out by the plaintiffs for appointment of Court Receiver as also for injunction restraining the defendant from carrying out re-development work as both the Courts below have

concurrently found that the plaintiffs have vacated the building in the year 2000 and the defendant has constructed three storey building.

13. However, in so far as reliefs in prayer clauses (c) to (e) are concerned, the Courts below have not dealt with those prayers at all. It is, therefore, necessary to restore application Exhibit 10 in so far as prayer clauses (c) to (e) are concerned and direct the trial Court to decide the application un-influenced by the observations made in the impugned orders. While considering these prayers, the Court will keep in mind decision of **Shaha Ratansi Khimji and Sons** (supra) and will not reject the application on the ground mentioned in paragraph 14 of the impugned order of the trial Court. The learned Judge will also not reject the prayer on the ground that the plaintiffs approached the Court belatedly. As far as issue of tenancy is concerned, *prima facie*, the plaintiffs were tenants in respect of the suit premises. Whether they have voluntarily handed over possession as claimed by them in paragraph 23 of the plaint or that they have surrendered their tenancy rights as claimed by the defendant will have to be gone into at the stage of final hearing of the suit. At this stage, *prima facie*, the trial Court will proceed on the premise that the plaintiffs are tenants in respect of the suit premises in view of the decision of the Supreme Court in case of **Shaha Ratansi Khimji and Sons** (supra). Hence, the following order.

- [1] The impugned orders are partly upheld to the extent of rejecting prayer for appointment of Receiver and for injunction restraining respondent No.1, from carrying out re-development work.
- [2] Application Exhibit 10 is restored to the file of the trial Court.

- [3] The trial Court will consider prayers (c) to (e) of application Exhibit 10 afresh keeping in mind the decision of the Apex Court in case of **Shaha Ratansi Khimji and Sons** (supra).The trial Court will decide the matter uninfluenced by the impugned order.
- [4] Rule is partly made absolute in the aforesaid terms with no order as to costs.

[R.G. KETKAR, J.]