

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 9848 OF 2015

Mehmood Ahmed Nazir Ahmed Khan

...Petitioner

Versus

Vazir Ahmed Nazir Ahmed Khan

And others

...Respondents

....

Ms.Eventa A. Gonsalves, Advocate for the Petitioner.

Mr. Kezer Kharawala i/b. Lex Juris, Advocate for Respondent No.1.

Mr. Sachin Mahagavkar, Darshit Shah & Jimish Shah i/b. Divya Shah
Asso. for Respondents No.2 to 5.

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CORAM : R. G. KETKAR, J.

DATE : 14th AUGUST, 2018

P.C.

1. Heard Ms.Eventa Gonsalves, learned counsel for the petitioner, Mr. Kezer Kharawala, learned counsel for respondent No.1 and Mr.Sachin Mahagavkar, learned counsel for respondents No.2 to 5, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'plaintiff, has challenged the judgment and order dated 5.5.2015 passed by the learned Judge, Court Room No.7 of the Court of Small Causes at Bombay below Exhibits-40 and 41 in R.A.D. Suit No.896/2009 as also the judgment and order dated 29.7.2015 passed by the Appellate Bench of the Small Causes Court at Mumbai in Misc. Appeal no.288/2015.

The Courts below rejected the application Exhibit-40 taken out by the plaintiff and observed that as respondent No.1, hereinafter referred to as 'defendant No.1', was in possession of the old premises for last 40 years, he is entitled to occupy the newly constructed premises to be allotted to him by respondents No.2 to 5, hereinafter referred to as 'defendants No.2 to 5'. The option of sole occupancy by defendant No.1 is the most suitable interim arrangement in view of his possession over the old premises and temporary alternate accommodation provided by the developer/defendants No.2 to 5.

3. Rule. The learned Counsel for the respondents waive service. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the petition is taken up for final hearing.

4. It is common ground between the parties that defendant No.1 is in possession. Defendants No.2 to 5 herein had instituted Writ Petition No.10448/2014 in this Court. By order dated 24.3.2015, the Petition was disposed of. Paragraphs-5 and 6 of that order read thus :

“5. To my mind, it would be appropriate if the learned Small Cause Court Judge decides as to what is the equitable interim arrangement as regard permanent accommodation by exploring various options such as sole occupancy of one party, joint occupancy, appointment of receiver and appointing one party as an agent, to give a few illustrations.

6. Accordingly without going into the merits of rival

contentions, the petition is disposed of by directing the learned Small Cause Court Judge to decide the issue of interim arrangement qua the permanent accommodation. The petitioner has already earmarked the allotted permanent premises.”

5. In pursuance thereof, the plaintiff filed application Exhibit-40. Prayer clause (a) thereof reads thus :

“(a) During the pendency of the Suit, the Court Receiver, High Court, Mumbai, may be appointed to take possession of the newly constructed in place of the Suit premises and the Plaintiff and/or the Plaintiff and Defendant No.1 jointly may be appointed as the agents of the Court Receiver;”

6. Defendant No.1 filed application Exhibit-41. Prayer clause (a) thereof reads thus :

“(a) pending the hearing & final disposal of the above Suit I may be put in possession of permanent Alternate Accommodation in lieu of the Transit Accommodation from which I am carrying on my business;”

7. It is common ground that defendant No.1 is in possession of permanent alternate accommodation allotted by defendants No.2 to 5 in lieu of transit accommodation. In view thereof, application Exhibit-41 has become infructuous.

8. I have already extracted paragraphs-5 and 6 of the order dated 24.3.2015 passed by this Court in Writ Petition No.10448/2014. A perusal of the trial Court's order and in

particular paragraph-4 shows that the learned trial Judge considered the option of sole occupancy by defendant No.1 as the most suitable interim arrangement. The learned trial Judge, however, did not consider other options that could be considered in pursuance of this Court's order.

9. Ms. Gonsalves submitted that permanent alternate accommodation admeasures about 450 sq. ft. carpet area and same can conveniently be divided in equal proportion. The plaintiff can occupy 225 sq. ft. carpet area and defendant No.1 can occupy 225 sq. ft. carpet area. Mr. Kharawala submits that this will amount to splitting up of tenancy. Mr. Mahagavkar submitted that the redevelopment was undertaken as per Regulation 33(7) of the Development Control Regulations for Greater Mumbai, 1991 and the permanent alternate accommodation is allotted on ownership basis.

10. The learned trial Judge did not consider the option of appointing the Court Receiver as also did not explore the option of joint-occupancy or division of 450 sq. ft. carpet area in equal proportion.

11. Insofar as the Appellate Court is concerned, the

Appellate Court referred to Order XLIII of Code of Civil Procedure, 1908 (for short, 'C.P.C.') and observed that the order passed by the learned trial Judge does not fall within the ambit of Order XLIII of C.P.C. In my opinion, said finding rendered by the Appellate Court is wholly perverse. As noted earlier, in application Exhibit-40 a prayer for appointment of Court Receiver was made. As the learned trial Judge declined to appoint the Court Receiver, the trial Court has rejected application for appointment of Court Receiver, which is appealable under Order XLIII Rule 1(s) of C.P.C.

12. As the learned trial Judge has not considered the other options, said order deserves to be set aside. As the Appellate Court also committed error in observing that the appeal under Order XLIII of C.P.C. is not maintainable, the said order also deserves to be set aside. As the application Exhibit-41 is rendered infructuous, application Exhibit-40 made by the plaintiff stands revived before the trial Court.

13. In view thereof, Petition is disposed of in following terms:

[i] Judgment and order dated 5.5.2015 passed by the learned trial Judge below Exhibits-40 and 41 in R.A.D. Suit No.896/2009 is set

aside. The judgment and order dated 29.7.2015 passed by the Appellate Bench in Misc. Appeal no.288/2015 is also set aside.

[ii] As application Exhibit-41 is rendered infructuous, application Exhibit-40 made by the plaintiff stands revived before the trial Court.

[iii] The learned trial Judge will consider all the options referred by this Court in the order dated 24.3.2015 as also will explore the possibility of partitioning the premises in equal proportion between the plaintiff and defendant No.1.

[iv] The learned trial Judge is requested to dispose of application Exhibit-40 expeditiously preferably within four weeks from the date of appearance of the parties.

[v] Defendant No.1 shall neither create third party interest nor part with the possession till disposal of application Exhibit-40.

[vi] All contentions of the parties on merits are expressly kept open.

[vii] Rule is made absolute in aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)