

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.3887 OF 2018
IN
FIRST APPEAL (STAMP) NO.30007 OF 2018

Kamlakar Kirankumar Sardar Applicant
V/s.
Kirankumar Kamlakar Sardar and Ors. Respondents

Mr. Girish Godbole, I/by Mr. Sumit S. Kothari and Ms. Ketaki Gadkari, for the Applicant.

Mr. Shreepad Murthy, I/by Mr. Abhishek Patil, for Respondent No.1.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 23RD OCTOBER, 2018.

P.C. :

1. Heard learned counsel for the respective parties.
2. There is a delay of one day in preferring the present Civil Application. Learned counsel for Respondent No.1 has no objection to condone the said delay. Hence, the delay is condoned.
3. This Civil Application is preferred by the Applicant seeking stay to the effect, implementation, execution and operation of the 'Judgment and Decree' dated 21st August 2018, passed by the City Civil Court, Mumbai, in Suit No.2946 of 2012.
4. The said Suit was filed by Respondent No.1 herein, who is father of the present Applicant, for declaration and injunction. The Trial Court

has, after recording the evidence of both the parties, on merits, decreed the Suit partly and passed the following order :-

“Plaintiff No.1 is declared as exclusive and sole owner of the Dadar flat i.e. Flat bearing No.21, admeasuring 600 square feet on 2nd floor of Khush Vihar Co-opeartive Housing Society Ltd., situated at Dr. Babasaheb Ambedkar Road, Dadar (E), Mumbai - 14.

Defendant No.1 and his wife, his children, relatives or anyone are hereby permanently restrained for disturbing the possession of Plaintiff No.1 over the Dadar flat by any means and/or any manner through anyone.

Defendant No.1, his wife and children are hereby directed to remove himself with his family - wife and children and relatives, from Dadar flat within one month from the date of this order.

Defendant No.1, his family and anyone are hereby restrained from giving any type of hindrance, obstruction, interference to Plaintiff No.1 and his second wife Mrs. Rohini Kiran Kumar Sardar in the peaceful leaving and enjoying the possession of Dadar flat by any means and / or in any manner through anyone.”

5. The submissions of learned counsel for the Applicant are three fold. In the first place, it is submitted that, earlier also, Respondent No.1 herein has filed the Suit, being S.C. Suit No.473 of 2008, in which the Notice of Motion No.517 of 2008 was filed, seeking the mandatory relief

of injunction, restraining the present Applicant from entering into or remaining in the suit premises, which is Flat No.21, situate at Khush Vihar Co-operative Housing Society Ltd. at Dadar, Mumbai. The said Notice of Motion came to be dismissed by the Trial Court vide its order dated 5th May 2008 and thereafter, Respondent No.1 herein has withdrawn the said Suit.

6. Thus, it is submitted that, now a fresh Suit on the same cause of action, on which the earlier Suit was filed and which is already withdrawn, suffers from the bar of Order 23 of the Civil Procedure Code, 1908, and this fact is not considered by the Trial Court. This is a legal issue, which needs to be adhered to.

7. Secondly, it is submitted that, the suit flat is not of the sole and exclusive ownership of Respondent No.1, as averred by him and in the plaint. It was purchased in the name of Respondent No.1 and his first wife Chaya, i.e. the mother of the present Applicant, and, therefore, the Applicant is having equal right of ownership and share in the suit flat.

8. Thirdly, it is submitted that, as the 'Judgment and Decree' of the Trial Court is not considering these aspects of the case and as it is the First Appeal and as such, the First Appeal being the substantive statutory right of the present Applicant, till the said Appeal is decided and all these legal questions are considered, it is necessary to stay the execution of the said 'Judgment and Decree'; especially, restraining

Respondent No.1 and his family members therein from enjoying the possession of the suit flat in any manner.

9. However, as rightly submitted by learned counsel for Respondent No.1, at this stage, one need not enter into legal aspects as to the maintainability of the present Suit; especially, considering the factual aspects brought on record through the cross-examination of Respondent No.1-Plaintiff, which clearly go to show that, the Applicant has already shifted his residence to the flat at Bandra and his Ration Card and other documents, namely, the Voter's ID, Passport, etc., all the official documents, are standing at his address in Bandra.

10. Moreover, the evidence of Respondent No.1-Plaintiff at this interim, prima facie, stage, also goes to prove as to what extent, at the age of 73 years, Respondent No.1 is subjected to harassment and ill-treatment at the hands of his own son, who is making his life, at the fag-end and in the twilight years of his life, miserable and unbearable and that too, totally unwarranted, when already he has been given the flat at Bandra; then his wife is given gold ornaments and one more Shop is also given to the Applicant. Therefore, Respondent No.1 has done everything to settle the Applicant in his life. The Applicant is also married, major, having his own independent business, having now his own separate residence and in such situation, there is absolutely no reason to stay the implementation and execution of the impugned 'Judgment and Decree'

passed by the Trial Court. Applicant can live his own life and let Respondent No.1, his father, to live his own life.

11. As regards the submission that the Applicant is also the equal owner of the suit flat, as his mother's share is bound to devolve on him, at this stage, this Court need not enter into that aspect, and otherwise, but even the evidence on record shows that, his mother was not having any independent source of income and, therefore, the purchase price for the said flat was being advanced by Respondent No.1. Moreover, it will be a matter of re-appreciation of evidence, to be considered at the time of hearing of the Appeal.

12. For the present, when Applicant is not residing in the suit flat and he has shifted his residence with his family to the flat at Bandra, which is also given by Respondent No.1 to him, it has become necessary to restrain the Applicant from entering into the suit flat or to remain therein and hence, there is no question of granting stay to the execution and implementation of the impugned 'Judgment and Decree'.

13. Civil Application, therefore, stands dismissed.

[DR. SHALINI PHANSALKAR-JOSHI, J.]