

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.172 OF 2021
ALONG WITH
INTERIM APPLICATION NO.1080 OF 2021
ALONG WITH
SECOND APPEAL NO.171 OF 2021
ALONG WITH
INTERIM APPLICATION NO.1079 OF 2021

Kisansingh Devisingh Bora] ... Appellant

Vs.

Late Suresh Appaji Shirke]
(since deceased) Through LRs Smita]
Suresh Shirke & Ors.] ... Respondents

...

Mr. Sandesh Patil i/b Mr. Chintan Shah for the appellant/applicant.

Mr. I.R. Kulkarni a/w Mr. Rashikant Thorve for the respondents.

...

CORAM : SMT. BHARATI DANGRE, J.

DATED : 11TH APRIL, 2022.

P.C. :-

1. These two appeals arise out of a common judgment delivered by the appellate court on 04/02/2021, in two distinct

appeals and since the issues involved are common and overlapping and even the trial court has passed a common judgment in the two distinct suits, the appeals are clubbed and the respective counsel are permitted to advance their submissions in the two appeals.

2. Special Civil Suit No.390 of 2001 came to be filed by the plaintiff, Suresh Appaji Shirke, seeking declaration and injunction against Kisansingh Devsingh Bora.

3. The plaintiff pleaded that he himself along with 18 others came together and approached the Maharashtra Housing and Area Development Authority (for short, “**MHADA**”) for a plot of land situated at Thane, to develop a Co-operative Housing Society. In furtherance to the allotment letter dated 10/02/1994, the proposed Society was registered and the agreement of lease was executed between MHADA and the said Society. The plaintiff became the Chief Promoter of the Co-operative Society and the development on the said piece of land resulted in construction of ground plus four storied building.

4. The plaintiff was allotted Flat No.403 (for short, “**the suit flat**”) admeasuring 645 sq. ft. along with a terrace on the 4th floor of Sai Sudama Co-operative Housing Society for a consideration of Rs.5,50,000/-. He even obtained financial assistance from a third party, a Finance Corporation and, upon payment of entire consideration in respect of the suit flat, he pleaded that he was put

in physical, vacant, peaceful and legal possession of the suit flat as the absolute owner. He also became a member of the Society.

5. The defendant also purchased a flat bearing Flat No.003 on the Ground floor of the Society and, on account of cordial relationship shared between them, in the year 1995, the defendant requested the plaintiff to allow him to use the suit flat for himself, his wife and daughter. The request was acceded to by the plaintiff with an assurance that the defendant shall arrange another suitable accommodation for himself and his family members whenever the plaintiff requires his flat for his own purpose. The defendant agreed to pay a sum of Rs.3668/- as charges for occupying the suit flat to the plaintiff and, since the plaintiff was to pay the instalment to the financier, he readily accepted to the offer. However, the case of the plaintiff is that the defendant failed to abide by his promise and from May, 1998, stopped paying the compensation amount and also did not accede to the request of the plaintiff to vacate the premises and kept on buying time on one pretext or the other.

6. In the month of February, 2000, when the plaintiff gained knowledge that the defendant has agreed to sell and dispose off his Flat No.003 for valuable consideration, he requested the defendants to vacate his flat and deliver the possession, but he failed to do so. Instead, the defendant filed Regular Civil Suit No.1528 of 2001 before the Civil Judge, Junior Division, Thane,

seeking a relief of declaration and injunction against the plaintiff, who was sought to be restrained from dispossessing the defendant from the suit premises, without following due process of law.

7. Claiming that the plaintiff is the rightful owner of the suit flat and had permitted the defendant to use and occupy the suit flat on temporary basis only, in good faith and under trust, the plaintiff sought a declaration that the defendant is a trespasser in respect of Flat No.403 situate on the 4th floor of Sai Sudama Co-operative Housing Society and he also sought his eviction out of the suit premises. He prayed for a decree of being put in physical possession of the suit premises.

8. Juxtaposed to this, Regular Civil Suit No.1528 of 2001 is filed by the defendant, seeking declaration and injunction to the effect that his possession over the suit flat is legal and lawful and the plaintiff has no right to disturb and interfere the possession over the suit flat.

9. The plaintiff in the said suit pleaded that he is in possession and occupation of Flat No.403 admeasuring 665 sq. ft. built up area on the 4th floor of Sai Sudama Co-operative Housing Society Limited and it is pleaded that he was initially allotted Flat No.005 on the ground floor in the same building and, thereafter, he was allotted Flat No.003 on the ground floor in the same building by cancelling previous allotment. On payment of consideration, it is

pleaded that, the said plaintiff noticed that the defendant has decided to take possession of Flat No.003 on the ground floor and requested him to take possession of Flat No.403 on the 4th floor. The said plaintiff further pleaded that he was in need of money and wanted to shift somewhere else and, hence, he dealt with Flat No.003 on the ground floor and accepted the consideration amount from the prospective purchaser and the defendant requested him to put his signature on an agreement to make the transaction legal. The said plaintiff, therefore, sought declaration that his possession over the suit property is legal and should be protected.

10. Both the suits came to be tagged by the Civil Judge, Senior Division, Thane and came to be tried together and were disposed off by common judgment.

11. In Special Civil Suit No.390 of 2001 filed by Shirke, the learned Judge framed the following issues.

- “1. Whether the plaintiff proves that the defendant was put in permissive possession / occupation of the suit premises as alleged?*
- 2. Whether the plaintiff proves that the defendant is a trespasser in the suit premises as alleged?*
- 3. Whether the defendant proves that the suit flat is in possession of the defendant on the basis of mutual understanding reached*

between parties in respect of suit flat and flat No.403 as claimed?

4. *Whether the plaintiff is entitled to vacant and peaceful possession of the suit flat as prayed?”*

12. In Regular Civil Suit No.1528 of 2001, the following issues were framed as substantial issues:

- “1. Whether this court is having jurisdiction to try, entertain and decide suit?*
- 2. Whether suit is properly valued?*
- 3. Whether suit is bad-in-law for non-joinder of necessary party?*
- 4. Whether plaintiff prove that he is in possession of suit flat since 1996?*
- 5. Whether plaintiff proves that plaintiff and defendant had amicably and by mutual understanding transferred their allotted flats to each other?*
- 6. Whether plaintiff proves that defendants accepted entire consideration amount from purchaser of flat No.003 and plaintiff was only signatory of documents?”*

13. The learned judge proceeded to determine the said issues in the wake of the evidence brought before him by the two plaintiffs in the two distinct suits.

14. In the suit filed by Suresh Shirke, his son – Samir Shirke filed his evidence affidavit, since the original plaintiff expired and his legal heirs were brought on record. He reiterated the stand in the plaint to the effect that his father was allotted Flat No.403 along with terrace on the 4th floor and he was put in peaceful and vacant possession of the suit premises as an absolute owner. He has produced on record, the original share certificate in respect of the said flat, copy of allotment letter dated 15/10/1995 issued by the Society and copy of loan offer letter issued by Global Housing Finance Corporation Limited and Disbursement Letter dated 15/04/1997. He was cross-examined extensively and he denied the suggestion that the defendant had paid the entire consideration amount to his father by cheque and cash from 1997 to 2000. He specifically admitted that Flat No.003 was sold to Sunita Shrivastav, but he denied that the flat was sold by his father and he received consideration of Rs.6.10 lakhs. In the said suit, the plaintiff examined the Secretary of Sai Sudama Housing Society, who deposed that Flat No.003 on the ground floor stands in the name of Sunita Shrivastav and, earlier it was standing in the name of Kisan S. Bora and it was transferred in the name of Sunita Shrivastava on 30/12/2000. The application for transfer was also exhibited through the said witness. The said witness also deposed that the records of the Society do not disclose that Kisan S. Bora has submitted any application for transfer of the suit flat and the Society records do not disclose exchange of suit flat and Flat

No.003 in respect of the original allottees. He also deposed that it is necessary to obtain Society's No Objection for transfer of flat by the members. The defendant to the said suit also filed his evidence affidavit and was cross-examined.

15. The evidence brought on record, came to be appreciated by the trial court and in Special Civil Suit No.390 of 2001, the learned Judge accepted the claim of the plaintiff that he has put the defendant in possession of the suit flat, but not on leave and licence basis. The defendant's contention that there was interchange of Flat No.003 and Flat No.403 was not accepted. It was held that the possession of the defendant was permissive and, therefore, he cannot be considered as trespasser. Coming to Issue No.5 in R.C.S. No.1528 of 2001 viz. whether the plaintiff has proved that the plaintiff and defendant had amicably and by mutual understanding transferred their allotted flats to each other, the issue has been answered in the negative by making reference to the evidence of the defendant at Exh.-42. In the cross-examination, he admitted that Shirke has not issued any notice for vacating the suit property and except R.C.S. No.1528 of 2001, he has not filed any suit, seeking relief of declaration of ownership in respect of the suit flat. He also admitted that he has been allotted Flat No.003 on the ground floor and the Society has given him membership of the said flat, which he sold to Sunita Shrivastava, who is presently occupying the said flat.

16. The learned Judge considered the deposition of Shirke that he had taken possession of Flat No.403 on the basis of the allotment letter issued to him on depositing the necessary consideration. He categorically deposed that Flat No.003 was standing in the name of defendant in the Society's record and now it is standing in the name of Sunita Shrivastava and even the share certificates is also transferred in her name. Various documents, including the electricity bills, receipts of Housing Society, Income Tax Returns, receipts of Corporation and water charges, etc. were produced on record, which stand in the name of defendant *qua* Flat No.003.

17. Based on the evidence brought before it, the learned Judge decreed the Special Civil Suit No.390 of 2001 filed by Shirke and directed the defendant to handover the vacant and peaceful possession of the suit flat to the plaintiff within a period of three months. The plaintiff was also held entitled for mesne profits inquiry. On the other hand, R.C.S No.1528 of 2001 filed by Bora came to be dismissed, holding that the possession of Bora is permissive possession and not on the basis of leave and licence or any other purpose and Shirke was the owner of the suit flat, he is entitled for possession and defendant has no right, title or interest in the suit flat.

18. The judgment delivered by the learned Civil Judge, Senior Division on 27/02/2013 was assailed in two distinct appeals filed

before the District Judge, Thane. The learned Judge vide his judgment dated 04/02/2021 dismissed both the appeals filed by Kisan Bora, one being aggrieved by dismissal of his own suit and the other cause of action being the suit filed by Shirke came to be decreed against him. The learned appellate court rightly appreciated the evidence placed before the trial court and also considered the issue as to whether a suit for injunction simpliciter was maintainable in absence of prayer for declaration. By referring to the decision of the Hon'ble Apex Court in the case of **Anathula Sudhakar v. T. Buchi Reddy in Appeal (Civil) No.6191 of 2001**, the observations of the Hon'ble Apex Court were held to be applicable in favour of Shirke and against Bora particularly, when Shirke has denied the claim of Bora over the suit flat and title to himself whereas, Bora has never claimed title to the suit flat, but claimed mutual exchange only. The finding returned by the appellate court is to the following effect.

“24] The subsequent fact that Bora has filed suit for declaration of his title on 24/08/2012 by filing Spl. Civil Suit No.512/2012 indicates that his title was not beyond doubt or undisputable and though such relief of declaration was available to be sought by him at the time of filing of present suit, by not claiming the same suit is filed for simplicitor injunction and hence suit filed by Bora is not maintainable.”

19. By upholding the judgments of the trial court, the appeals came to be dismissed.

20. A sincere attempt on behalf of Mr. Sandesh Patil, the learned counsel for the appellant to place a substantial question of law in the present appeals did not yield any result. On factual aspect, the appellate court has rightly appreciated the evidence brought before it and on the substantial question of law, which is sought to be brought on record viz. whether in a suit for simpliciter injunction and possession, without there being any prayer for declaration, is sought on the contention that defendant is a trespasser and upon holding that the defendant is not a trespasser, can he be evicted without following due process of law, it held that the same needs no answer since in **Anathula Sudhakar (supra)**, the Hon'ble Apex Court has considered various aspects and deliberated upon the circumstances, when the suit filed simpliciter for injunction was held not maintainable and the relevant direction of the Hon'ble Apex Court contained in paragraph Nos.13.2 and 13.3, answer the question raised in the present appeals, which is to the following effect:

“13.2 Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

13.3 where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.”

21. As far as the plaintiff-Shirke is concerned, he is in possession of the suit flat and the defendant made an attempt to create a cloud on his title. He has failed to do so and, therefore, it cannot be said that the title of the plaintiff was in cloud. The appellate court has rightly held the principles flowing from the said decision to be in favour of Shirke and against Bora.

22. No substantial question of law arises for determination of the appeals and by upholding the concurrent findings recorded by the courts below, both the appeals are dismissed.

[SMT. BHARATI DANGRE, J.]