

(1982) 09 BOM CK 0042

Bombay High Court

Case No: A.F. Court. No. 999 of 1981

Syed Khuwaja Syed Ahmed

APPELLANT

Vs

The Maharashtra Housing and
Area Development Authority

RESPONDENT

Date of Decision: Sept. 20, 1982

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 40 Rule 1, 151

Citation: AIR 1983 Bom 73 : (1982) 2 BomCR 619 : (1983) MhLj 120

Hon'ble Judges: Sharad Manohar, J

Bench: Single Bench

Advocate: K.H. Keswani, for the Appellant; C.D. Shenoy, Asst. Govt. Pleader, for the Respondent

Judgement

1. This Appeal from Order has got to be allowed just for the asking. The simple facts are that there was a building at Grant Road which was in a dilapidated condition. It was acquired by the Maharashtra Housing and Area Development Authority (hereafter referred to as the "Authority") under S. 41 of the Maharashtra Housing and Area Development Act, 1976 (hereafter the "Act"). The occupants of the old building were entitled, as a matter of a right, to have the allotment of a suitable flat in the building to be newly constructed in the place of the old dilapidated building. As a matter of fact; under S. 94 of the Act, an alternative accommodation is required to be given to the occupants even when the building is to be demolished and while the new building is under construction. But it is really speaking, not necessary to go into all those facts and provisions at this stage. It is enough here to state that admittedly, without the Authority's active effort, the building itself decided to co-operate with the Authority and it crumbled down! The occupants had to fend for themselves for some roof over their head. The present petitioner who was the plaintiff in the trial Court was one of the occupants of the building. His grievance is that he has not been given alternative accommodation. But, really speaking, even

that grievance is somewhat irrelevant at this stage. Point is that admittedly the building has been re-constructed by the Authority and according to the plaintiff, he being one of the occupants of the erstwhile building, he is entitled to allotment of one of the flats in the newly constructed building. For reasons to which I need make no reference, the Housing Board had other views and would not comply with the demand made by the petitioner in that behalf, with the result that ultimately the petitioner had to file a suit in the City Civil Court for declaration that he was entitled to allotment of Flat No. 6 in the said newly constructed building, particularly mentioned in the plaint in the suit. Pending the hearing of the suit, he took out a notice of motion for injunction restraining the Authority from allotting said Flat No. 6 to any other person. Ad interim injunction was granted by the court. It is the case of the plaintiff that no reply was filed by the Authority to the said notice of motion. Whatever that may be, the fact remains that the said notice of motion was made absolute by the trial Court on 20-11-1981.

2. The above facts are relevant for appreciating the following position, viz that :---

(a) said Flat No 6 is lying vacant from the date quite some time before 20-11-1981 till this date;

(b) the plaintiff has made out a prima facie case for succeeding in the suit and for getting allotment of the said flat;

The further position is crystal clear that notwithstanding the housing situation in the city of Bombay where millions of people are painfully smarting under the maddening impossibility of having some veritable roof over their heads and when amounts teeming millions there is a person such as the plaintiff clamouring for the flat with at least an established prima facie claim to the same, the flat is allowed by the Authority to remain vacant for year together. At least from 20-11-1981 till this date, the flat is remaining vacant; nobody occupies it and nobody wants to worry about it.

In these circumstances the petitioner- plaintiff took out another notice of motion for appointment of Receiver in respect of the flat and for appointing himself as the Receiver's Agent so that he could go into the occupation of the said flat. The petitioner's contention is so simple that it has got to be accepted by any court without the slightest hesitation and without a second thought. His contention is that he is without roof over his head. There is a flat lying vacant vis-a-vis which he has got at least a prima facie case. The flat is as vacant as anybody would want it to be. There is thus an unnecessary waste of this flat and unnecessary damage being caused to the plaintiff. He, therefore, contends that the court may appoint a Receiver and the plaintiff may be kept as the Receiver's Agent. Implicit in it is the plaintiff's contention that if he ultimately loses in the suit, he will hand over the possession of the flat to the Receiver and implicit in that understanding is the further understanding that the Receiver in that case, when he takes back the

possession from the plaintiff shall hand over the same to the Authority.

3. Probably because the simplicity of this demand was not upon defendants-authority. no affidavit-in-reply was filed by it even to this notice of motion taken out by the plaintiff and the notice of motion came up for hearing without any return before the learned Judge. But, as will be presently pointed out, all the same the learned Judge took a view by taking which he did not documents justice to himself. He took the view that even though there was no return filed to this notice of motion. still the plaintiff had not made good his case for appointment of Receiver. According to the learned Judge, this was not a case where it was just and convenient to appoint the Receiver. He observed further that there was no allegation of waste against the Authority. he, therefore, held that the grounds on which the Receiver could be appointed as mentioned under Order 40, Rule 1 in the Civil P. C. had not been made good by the plaintiff. It was on this ground that the learned Judge dismissed the notice of motion with no order as to costs.

4. As mentioned at the outset, the appeal has got to be allowed just for the asking. I just fail to understand as to how it is not just and not convenient to appoint a Receiver for the purpose of the eminently just utilisation of the flat in question. Whether the condition of justness and convenience is made out or not has got to be appreciated not only with reference to the facts of each case but also in the context of social situation. It is just impossible to conceive of a situation where there can be more of a case of justness and convenience than one where order of at least temporary utilisation of the flat where the flat is lying idle while thousands of people are suffering hardship with no end just because they lack even a small nook to rest their limbs in. On the other hand, it must be held, in the context of such situation, that it is eminently just and convenient in such cases that the Receiver should be appointed of such flat and if the plaintiff has made out a prima facie case for his claim, which admittedly he had made out, then the Receiver can taken possession of the flat and appoint the plaintiff as his agent and, further, it is perfectly just and convenient that the plaintiff should get into the occupation of the flat at least temporarily. If, ultimately, it turns out that he has not made good his case, then he will hand over the possession to the Receiver and the Receiver will, in his turn, hand over the same to the Authority without any necessary of execution as such. As a matter of fact, the plaintiff can be asked to give undertaking that he will hand over the possession to the Receiver if his claim is not made good. Nothing can be as just and as convenient as that.

5. Coming to the question of waste, I would like the courts to be abreast of the fact that contents and imports of expressions have got to be read in the context of the times. The flat lying vacant might not be a waste thirty years ago, but in these days of the acutest housing scarcity it is not a mere waste, it is a case of criminal waste. The courts cannot turn a blind eye to such criminal waste. No more and no longer the courts could or should play the role of a silent and helpless spectator in respect

of this criminal social waste. The court must relies that the Authority is after all constituted for the purpose of seeing to it that the persons who are likely to lose accommodation because the building which accommodates bowed down against the ravages of time should not take to pavements and railway platforms but should have some other reasonably decent accommodation secured for them. If the Authority does not perform that duty and allows the flat to remain vacant, the authority itself commits waste. It is as far as that an nothing less than that. If flat are allowed by the Authority to lie vacant for no avoidable reason, the court should kept their eyes skinned to find some way to avoid this instance waste. A suitable orders as regard underrating to one such way. and when it comes to it, as it were, on a platter, the court should grab such can opportunity,. The law facilitates the court to pass such orders, in the first instance, under Order 40 itself, but if for any reason that Order 40 is inadequate for that purpose. there is that ever present Section 151 of the Code which the court must resort to in order to find ways and means to documents justice between the parties or to administer real social justice to the Society as a whole.

6. But apart from the fact there exists power in the court to pass such order, in the context of times. the courts of justice are under a duty and obligation to follow this courts. As a matter of fact, I would like to go to the extent of saying that if the plaintiff has not asked for such relief, the court has itself to suggest such relief to both the parties. I want to make it clear that the days have gone past the distant times when courts could sit down nonchalantly twiddling its fingers thinking that everybody was for himself and devil for the hindmost. The institution of the court is not meant only for the purpose of doing justice merely in accordance with the grammar of law, without delving into the spirit of it, not worrying, is the process of such administration of justice, whether justice smothered itself to death. Times are changing, t courts must keep abreast of the times, at least must make attempt to be abreast of the times. and these small orders are the matter which give opportunity to the court to have a second though at the old notions.

I do not wish deliver to pious homily on this subject. But I do hope these words will serve at least in a small measure to give some indication to the Court who are required to administer this aspect of justice with everyday frequency, about the manner in which they can seen new content in the expressions such as just and convenient and in the all pervading inherent power u/section 151 C. P. C.

7. It is true that while playing positive role in the administration of justice, the courts can't do anything in respect of situation of injustice which has not been brought by parties themselves before the court. if an illegal order is passed by some office and the judge reads if in the newspaper. He cannot more his small figure against it unless the aggrieved party has come before the court for redressing his grievance. But once the party comes before the court and the court sees the injustice of the matter. the court cannot turn a blind eye and deaf ear to the injustice merely

because an application in that behalf had not been happily made or drafted.

8. I must state that Mrs. Shenoy, the learned Asst. Government Pleader was as fair as the Authority who did not resist the plaintiff claim in the lower court. But she tried to invite my attention to one alleged defect in the suit. According to her, the suit itself suffers from want of jurisdiction for Civil Court. In this connection shall invited my attention to S. 177 of the Act. I do not at all wish to enter into the controversy at this stage. That is not necessary for the simple reason suit earlier notice of motion of relationships injunction was made absolute by the court by its order dated 29-11-1981 which clearly means that the trial Court has considered this particular position and has found that the plaintiff has got a prima facie case for the relief which be claimed. If that is so, it is impossible for any court to say that the second notice of motion will have to face the difficulty of S. 177 raised by Mrs. Shenoy. If ultimately it turnout that the court has no jurisdiction or if it turns out that for any other reason the plaintiff is not entitled to claim the possession which clean he has set up in the suit, he will not be entitled to continue with the possession as the Receiver's agent or in any capacity. He shall have to hand over the possession to the Receiver and the Receiver will hand over the same back to the person concerned. The difficulty suggested b Mrs. Shenoy, therefore, need not be considered at this stage at all.

9. The appeal is, therefore, allowed. The order passed by the Lower Court is set aside and the Court Receiver is appointed in respect of Flat No. 6 in the building more particularly described in the plaint in the suit. The Official Receiver shall give immediate notice to the Authority stating that possession of the said flat shall be taken by the Receiver at 11.00 a.m. tomorrow, that is, on 21st September, 1982 and if there is no one to hand over the possession to the Receiver, the lock, if any, shall be broken open by the Receiver and the possession shall be taken by him. After taking the possession, the Receiver shall hand over the same to the plaintiff subject to the following condition. The plaintiff shall make an affidavit giving and undertaking therein that in case it turns out in the suit or any other proceedings that he is not entitled to the relief that he has claimed in the suit, he shall hand over the possession to the Receiver forthwith without raising any objection. He shall also further given an undertaking in the affidavit that he shall not part with the possession of the flat or shall not create interest in respect of the flat in favour of any other person until further order of the court. It is made clear that the plaintiff shall remain in possession of the flat only and purely as the Receiver's agent and he shall give an undertaking that he shall pay all the lawful expenses including rent claimable by the Authority to the Receiver in the first instance who in turn shall pay the charges to the Authority. The plaintiff shall also execute the requisite agreement with the Receiver mentioning that he would act as the Receiver's agent and shall also give an undertaking as mentioned above on affidavit. He shall not get the possession from the Receiver until he observes the above mentioned indispensable formalities.

10. In view of the very fair and helpful attitude taken by the Asstt. Government Pleader as also by the Authority, there shall be no order as to costs either of this appeal or of the notice of motion.

11. Order accordingly.