

(2013) 08 BOM CK 0067

In the Bombay High Court

Case No : Appeal From Order (ST) No. 19239 of 2013

Dattatraya Shankar Karade

APPELLANT

Vs

Maharashtra Housing and Area Development Authority and
Others

RESPONDENT

Date of Decision : 07-08-2013

Acts Referred:

Maharashtra Housing And Area Development Act, 1976 — Section 2(25), 94(1), 94(5)

Citation : (2013) 5 ABR 1009 : (2013) 6 ALLMR 544 : (2014) ALLMR(Cri) 581 :
(2013) 5 MhLj 897

Hon'ble Judges : Roshan Dalvi, J

Bench : Single Bench

Advocate : S.M. Khaire, for the Appellant; S.P. Thorat for Respondent No. 1 and
Mr. J.P. Patel, for the Respondent

Final Decision : Disposed Off

Judgement

Roshan Dalvi, J.

Rule. Made returnable forthwith.

1. This appeal relates to the alternate accommodation required by the appellant/plaintiff as well as his sister and brother of the premises constructed by MHADA. The appellant sued MHADA, his sister and brother in respect of the permanent accommodation which had to be given by MHADA. The original premises stood in the name of the grandfather of these siblings. After his death their mother became the tenant. The mother has been issued vacation notice as the occupant. The mother shifted in the transit accommodation along with the sister and brother of the plaintiff. The plaintiff did not shift in the transit accommodation due to inconvenience. The plaintiff has claimed a share in the tenanted premises essentially as the heir of his mother. The relationship between the parties is admitted. The fact that the original accommodation was tenanted to the grandfather is admitted. The fact that the mother became a tenant thereafter is admitted. The fact that she was given vacation notice is also admitted.

2. It is the contention of the plaintiff that when the permanent and alternative accommodation was ready and was allotted on 5th may, 1987 all the heirs of the tenants/occupants, their mother would be entitled to permanent alternative accommodation. It is the contention of the sister defendant No. 2/respondent No. 2 of the plaintiff (who is the only contesting defendant/respondent) that she would be entitled to permanent alternative accommodation with her brother defendant No. 3/respondent No. 3 to the exclusion of the plaintiff because the plaintiff did not live in the original premises when it was tenanted as also in the temporary/transit accommodation.

3. Temporary/transit accommodation is required to be given upon humanitarian grounds by MHADA as it deems fit u/s 94(1) & (2) of MHADA, which run thus:

94. Temporary and alternative accommodation to affected occupiers where property is acquired.-

(1) Where the Board requires the occupiers of any building to vacate their premises to enable it to construct a new building on the land acquired under this Chapter, the Board shall allot temporary accommodation to such occupiers in any building maintained by it for such purpose, at such places and to such extent as it deems fit. The accommodation may not be in the same locality or of the same floor area as the premises vacated by the occupier.

(2) If the occupier fails to accept and occupy the accommodation allotted to him within one month from the date of allotment, the responsibility of the Board to provide him with any temporary accommodation shall cease.

4. Consequently a temporary alternate accommodation though a statutory right, being temporary in nature is given only as is convenient and feasible to MHADA. It, therefore, does not require any statutory conditions, obligations or eligibility criteria. Grant or obtaining and availing of temporary accommodation would not entitle the persons who have availed of that facility to be alone entitled to claim permanent accommodation to the exclusion of all other eligible claimants.

5. The right of claiming permanent alternate accommodation is distinct and separate. The eligibility criteria for claiming permanent alternate accommodation would be seen u/s 94(5) of MHADA which run thus:

94. Temporary and alternative accommodation to affected occupiers where property is acquired.-

(5) Subject to the provisions of this section, every occupier, whether or not he accepts temporary accommodation, shall have right to get such accommodation in the new building free of cost. Occupiers of the new building shall be required to form a co-operative housing society under the Maharashtra Co-operative Housing Societies Act, 1960. The ownership of the new building shall then be transferred by the Board in the name of such co-operative housing society of the occupiers.

6. Consequently the plaintiff must show that he was an occupier of the old structure which was vacated in lieu of which permanent alternative accommodation would be constructed and given by MHADA in the new building free of cost to him.

7. Defendant No. 2 sister has claimed that she was occupying the old premises with her mother to the exclusion of the plaintiff. If the plaintiff was not occupying the old premises he would not be an occupier who would have right to get accommodation in the new building free of cost.

8. Occupier is defined u/s 2(25) of MHADA, which runs thus:

Section 2(25) "Occupier" includes-

(a) any person who for the time being is paying or is liable to pay to the owner the rent or any portion of the rent of the land or building in respect of which such rent is paid or is payable;

(b) an owner in occupation of, or otherwise using, his land or building;

(c) a rent-free tenant of any land or building;

(d) a licensee in occupation of any land or building; and

(e) any person who is liable to pay to the owner damages for the use and occupation of any land or building.

9. The mother was liable to pay rent in respect of the old premises as she had become a tenant after the death of the grandfather of the parties. Neither the plaintiff nor his sister or brother, defendant Nos. 2 and 3 respectively, can claim to be paying rent or be liable to pay the rent of the old premises during the life time of the mother. Hence the mother was the occupier of the old premises. She was issued vacation notice. She was offered transit accommodation. She availed of transit accommodation. She expired thereafter. She would be entitled to be granted permanent alternative accommodation also free of cost u/s 94(5) of MHADA. Once she is seen to be the occupant and entitled to get permanent alternate accommodation in the new constructed building free of cost all her heirs who had occupied the old tenanted premises with her would also be equally entitled to that accommodation.

10. Mr. Thorat Counsel on behalf of MHADA stated that since these are the premises of MHADA constructed by MHADA and given by MHADA the Bombay Rent Hotel and Lodging House Rate Control Act, 1947 does not apply. The plaintiff has claimed as one of the heirs of the deceased/tenant/occupier, his mother. The only aspect which may be required to be seen is whether or not the plaintiff occupied the old premises along with the mother before the vacation notice was issued and before the mother vacated the premises and took transit accommodation. The sister claims that he lived separately and did not occupy the premises along with the mother before the vacation notice was issued.

11. The plaintiff claims that he was living along with his mother in the same premises along with his own family also. The plaintiff has shown a letter dated 20th June, 1998 received by MHADA on 14th September, 1998 addressed to MHADA under which he had sent to MHADA the rent receipt of December, 1997, two copies of the ration card and an electricity bill. MHADA issued two letters one addressed to the mother and one addressed to the plaintiff on 22nd September, 1998 under No. 4593 in reply to the letter received on 14th September, 1998. MHADA inquired about the name in which the vacation notice would have to be issued. Thereafter MHADA has addressed yet another letter dated 29th December, 1998 under No. 5762 addressed to the mother as well as the plaintiff. MHADA called upon the parties to vacate within seven days.

12. The plaintiff replied to by his letter dated 8th January, 1999 received by MHADA on 11th January 1999 stating that the vacation notice may be issued in the name of the mother. It is accordingly issued. These documents would show the presence of the plaintiff in the suit premises. It would also show the right and entitlement of the plaintiff to have been corresponding with MHADA.

13. It is shown that the plaintiff made a separate ration card on the same address. This was after the earlier ration card has shown deletion of his name in 1993. The sister, defendant No. 2 claims that the plaintiff's name was deleted because the plaintiff left the suit premises in 1993 itself. The plaintiff has produced the original application signed by the mother dated 7th April, 1993 applying for deletion of the plaintiff's name from the ration card. The name appears to have been accordingly deleted. However the plaintiff has produced a form signed by the mother and an application made by him for a new ration card the very next day along with a receipt dated 8th April, 2003 in his name showing Rs. 20/- paid for new orange ration card and a photocopy of another ration card issued to the plaintiff on 14th July, 1993, one week thereafter, at the same address. This ration card shows the plaintiff as the head of the family and his family consisting of his wife and two children, one aged one year and one aged zero year.

14. The receipt, the photocopy of the ration card and the form signed by the mother for deletion of plaintiff's name have not been produced by the plaintiff in the plaint. These documents have been produced in appeal upon the Court's query with regard to the deletion of the name of the plaintiff.

15. It is thereafter that MHADA has corresponded with the plaintiff under letters dated 22nd September 1998 and 29th December 1998 shown above.

16. The above documents prima facie do show that the plaintiff was in occupation of the old tenanted premises with his mother.

17. It appears that the parties are required to produce a photograph of the family members of the tenant/occupier. Two separate photographs have been furnished in this case. One photograph shows the mother, the sister and the two brothers of the plaintiff, one of whom has since expired. Another photograph

showing the plaintiff, his wife and his two daughters being a separate photograph sent by the plaintiff. MHADA has not produced the file containing these two photographs. However it is an admitted position that one photograph of all the eight family members was not submitted. At best two photographs of four family members each have been submitted to MHADA. The plaintiff claims that that was because there were two ration cards in respect of the old tenanted premises.

18. Mr. Thorat has produced a file in respect of the suit building 22B, Datta Niwas. Mr. Thorat, as the Officer of the Court, drew the Court's attention to one letter addressed by the Datta Niwas Chawl Committee to MHADA dated 20th July, 2003 which was well after the issue of the vacation notice on 19th January, 1999 after the aforesaid correspondence of MHADA with the plaintiff and his mother in September and December, 1998 culminating in the plaintiff's letter dated 8th January 1999. In that letter the Committee has shown the plaintiff as the Secretary. The names of the Treasurer as also the managing committee members are stated. A Co-operative Housing Society would have to be formed of the occupiers of the new building. The new building was ready in 2003. The ownership would have to be transferred by the Board in the name of the Housing Society of the occupiers u/s 94(5) of the MHADA. Hence the Committee members of the new society would have to be shown to MHADA. Even at that late stage the plaintiff and not his sister is shown as the committee member/Secretary. This independent evidence had been shown to Court from the file kept in the normal course of the business of MHADA and is hence seen to be a genuine document.

19. The plaintiff has prima facie shown his entitlement to be allotted the tenement in the new building u/s 94(5) of MHADA. It does not matter that the plaintiff did not avail of the transit accommodation. The defendant No. 2 has sought to show that she has paid the rents and electricity charges. This would be natural because the plaintiff was not in occupation of the transit accommodation. However the plaintiff has prima facie established that he was earlier in occupation of the old tenanted premises and continued in occupation and hence had correspondence with MHADA.

20. The plaintiff's share as an heir of his mother in the new building constructed by MHADA is seen. The plaintiff has not challenged the equal share of his sister and brother. Defendant No. 2/respondent No. 2 has challenged the plaintiff's share and the plaintiff's entitlement to be allotted the new premises along with her and her brother, defendant No. 3/respondent No. 3. In fact defendant No. 3 has not contested the suit or the appeal. It is only defendant No. 2 who has specifically challenged the plaintiff's right. This challenge based upon the occupation in the transit accommodation is misconceived. There is nothing shown by the defendant No. 2 to evidence that the plaintiff did not live in old tenanted premises before the vacation notice was issued.

21. Defendant No. 2 continues her occupation in the transit accommodation. The permanent accommodation has been made ready since 5th May, 2007.

22. Once that accommodation is constructed, made available and offered, equity demands that the occupier of the temporary/transit accommodation must vacate it and take-up the permanent alternative accommodation. In this case the sister, defendant No. 2 has claimed the permanent alternative accommodation. She has been directed to bring the NOC of the other heirs including the plaintiff. This is eminently just. This shows the entitlement of all the other heirs who lived in the suit premises to be allotted the newly constructed premises. The plaintiff has obviously not granted the NOC. The defendant No. 2 in fact makes grievance of that fact. However she has continued to stay in the transit accommodation even after permanent alternative accommodation was offered from May 2007 until today. The permanent alternative accommodation has remained vacant. This is an unjust situation. It appears that the defendant No. 2 has taken advantage of the transit accommodation. The result is that other needy persons who vacate their tenanted premises and whose buildings are being constructed by the MHADA under the provisions of MHADA would be disentitled to such accommodation whilst the permanent alternative accommodation which is the entitlement of the plaintiff, defendant No. 2 and defendant No. 3 as the heirs of the occupier, their mother, is kept vacant.

23. The plaintiff has sued for a declaration that he is entitled to permanent alternative accommodation along with defendant Nos. 2 and 3: The plaintiff has made out a prima facie case for the grant of the declaration. The plaintiff has also applied for an injunction against MHADA from allotting or giving possession of the permanent alternative accommodation to defendant Nos. 2 and 3 to the exclusion of the plaintiff. However the balance of convenience in granting such injunction is against the plaintiff. In fact the party most inconvenienced is the MHADA and consequentially another needy occupant for whom the present transit accommodation required to be vacated for claiming the permanent alternative accommodation is held by defendant No. 2.

24. The plaintiff has applied for a mandatory order and direction to allot and hand over possession of the permanent alternative accommodation to the plaintiff upon such terms and conditions as the Court may deem fit and proper. The learned Judge has held that this mandatory relief though required to be granted in the suit cannot be granted in the Notice of Motion though the plaintiff has applied for such relief in prayer (b) in the Notice of Motion also.

25. It will have to be seen whether the mandatory order of handing over possession to the plaintiff, of course along with defendant Nos. 2 and 3, on even certain terms and conditions can be granted pending the suit. However that would in essence determine the suit itself.

26. It is seen that the correspondence entered into by the plaintiff with MHADA in December 1998 and January 1999 as also the Society's letter shown by the Counsel on behalf of MHADA of 2003 are evidence to show and suggest that the plaintiff's occupation in the old tenanted premises was accepted. However the plaintiff has not produced any separate independent evidence to substantiate his

claim of occupation with his mother and along with his family in the suit premises from the inception until the issue of the vacation notice. It is not known why the mother would have wanted to have his name deleted from the ration card. It is also not known why and how another ration card was issued in the same premises. The plaintiff has only shown this Court a copy of the ration card. That is indeed an old yellowed copy. It is a genuine secondary evidence. However the evidence of occupation by the plaintiff until the date of the vacation notice would have to be specifically seen. It is only then that the plaintiff can contend that though he was entitled to obtain transit accommodation along with his sister, he did not obtain it on account of inconvenience and took up other accommodation in the vicinity. This claim, stated by Counsel on behalf of the plaintiff, would have to be shown by the plaintiff. If the plaintiff shows that he was an occupier on the date of the vacation notice, he would be entitled to be put in possession of the new building constructed by MHADA as every occupier would have a right to get such accommodation free of cost u/s 94(5) of MHADA. If not, the plaintiff would only be entitled to a share in the suit premises as an heir of the occupier, his mother.

27. Of course, the plaintiff claims only a joint entitlement with the other heirs, his sister and brother defendant Nos. 2 and 3. Such a claim can be made upon claiming partition of the property. It would be in the discretion of the Court to grant the plaintiff such share. That share cannot be specifically claimed only by way of handing over possession in the permanent alternative accommodation, given that the plaintiff lives separately with his family consisting of his wife and daughters at least since the vacation notice was issued. Hence balance of convenience cannot be stated to be in favour of the plaintiff. In this case the balance of convenience by MHADA and other needy persons who would be discussed from the dilapidated building and who would be given transit accommodation cannot be lost sight of.

28. The defendant No. 2 would have to shift to the new building constructed by MHADA. She would have to vacate the transit accommodation that has long been delayed causing tremendous prejudice to others. Consequently and for that purpose grant of such permanent alternative accommodation only with the plaintiff or the injunction against such grant to the exclusion of the plaintiff claimed by the plaintiff would be prejudicial to others and for which balance of convenience is not with the plaintiff.

29. The learned Judge in the impugned order dated 14th June, 2013 has considered the plaintiff's case that because the temporary transit accommodation was inconvenient he started residing at other place as also the case of sister defendant No. 2 that when the vacation notice was issued the plaintiff was not residing as an occupant in the old tenanted premises and had left long before the demolition started by MHADA. The learned Judge has considered the documents annexed to the plaint including the correspondence of December, 1998 and January, 1999. The learned Judge, Bombay City Civil Court

has not considered the issuance of a new ration card a week after the plaintiff's name was deleted from the old ration card. That was because that was not then shown by the plaintiff. Though the observation of the learned Judge that only because defendant No. 2 was residing in the transit accommodation she should be given permanent accommodation may not be wholly correct to come to the conclusion that when the vacation notice was issued the plaintiff was not residing in the old premises as observed in para 8 of the order, the learned Judge has reserved the right of the claim of the plaintiff in the suit to be decided on merits and hence observed that the defendant No. 1 MHADA be directed not to insist for the no objection of the plaintiff and is permitted to give possession of permanent alternative accommodation to defendant No. 2 only keeping in view that the transit accommodation was continued to be occupied by her from 2007 though the newly constructed building was ready and that the said accommodation is meant for other needy persons.

30. The impugned order, therefore, cannot be faulted as made upon illegal parameters. However in view of the aforesaid admitted facts, the secondary evidence of the ration card produced by the plaintiff, the primary evidence of the correspondence MHADA had with the plaintiff forming a chain of correspondence and accordingly admissible in evidence, and the further independent genuine evidence of the Committee members/Secretary of the Society of the new building produced by MHADA, the suit deserves to be expedited. It is for the plaintiff to lead the necessary evidence. Hence upon expedition of the suit and upon the issues being framed by the learned Judge the plaintiff must lead his evidence by filing affidavit of evidence. The right of the plaintiff as an heir of the deceased occupant in obtaining either his share or the right of the plaintiff in obtaining the actual accommodation would then be decided in the suit. Consequently the impugned order of the learned Judge, City Civil Court dated 14th June, 2013 is not interfered with.

31. The suit is expedited. The plaintiff shall be entitled to have the suit placed on board for hearing and final disposal. The plaintiff shall offer all his documents for inspection and file his affidavit of evidence expeditiously.

32. The parties shall tender draft issues to the trial Court on the next date of hearing. The trial Court shall frame the issues.

33. The plaintiff shall then file his affidavit of examination-in-chief expeditiously.

34. The plaintiff shall be cross examined on commission. The plaintiff may lead evidence of other witnesses similarly.

35. Since Counsel on behalf of MHADA has drawn the Court's attention to the aforesaid independent evidence contained in the letter dated 20th July, 2003 of Datta Niwas Chawl Committee from one of the files of the MHADA which is produced, that letter is, in the interest of all the parties to the suit, removed and kept in a separate envelope to be kept on the record of the trial Court. The Registrar Judicial shall send the envelope containing the aforesaid letter to the

Registrar, Bombay City Civil Court to be kept in the R & P of the suit papers between the parties filed in the Bombay City Civil Court being Suit No. 1274 of 2013. It may be used as evidence by all the parties. A photocopy of the letter shall be kept in the file of MHADA in the place and stead of that letter.

36. The learned Judge is requested to expedite the hearing of the suit subject to the above directions and otherwise at his convenience.

37. It is clarified that the defendant No. 2/respondent No. 2 sister of the plaintiff shall be handed over the permanent alternate accommodation in the newly constructed building and she shall vacate the transit accommodation forthwith. The accommodation in the newly constructed building given to defendant No. 2/respondent No. 2 shall be subject to the final decree of the suit on merits of the claim of all the parties. Rule is granted to the above extent. Appeal from Order is disposed of accordingly.