

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO. 270 OF 2016**

Rizvi Builders

..Appellant

Vs.

Kisan Heeraji Laple (deceased) & Ors

..Respondents

**Mr. P. G. Lad a/w Mr. Mahesh Mishra i/b Mr. Ravi Thankaian the Appellant
Mr. B. Unnikrishnan for the Respondent Nos.1A & 1B**

CORAM : R. M. SAVANT, J.

DATE : 28th JUNE, 2016

P.C.

1 The order dated 27-1-2016 passed by the Learned Judge of the City Civil Court, Dindoshi, Borivli Division, Mumbai, is taken exception to by way of the above Appeal From Order. By the said order, the Notice of Motion filed by the Appellant i.e. Defendant No.3, came to be dismissed.

2 The genesis of the above Notice of Motion lie in the order dated 12-7-2012 passed in Notice of Motion No.2680 of 2010 filed by the Plaintiffs. By the said order the Notice of Motion filed by the Plaintiffs i.e. Respondent Nos.1A and 1 B, being Notice of Motion No.2680 of 2010 came to be made absolute and thereby the Municipal Corporation of Greater Mumbai (MCGM) which is the Respondent No.2 herein was restrained from demolishing the suit structure. The said order dated 12-7-2012 was challenged by way of Appeal From Order No.759 of 2010 in this Court. This Court had dismissed the said

Appeal From Order and thereby confirmed the order dated 12-7-2012. The Defendant No.2 aggrieved by the dismissal of the said Appeal From Order filed by it, filed a Special Leave Petition in the Apex Court. The said SLP came to be disposed of by the Apex Court in view of the statement made by the Learned Senior Counsel appearing for the Petitioner. The order dated 7-10-2013 of the Apex Court reads thus :

“Learned Senior counsel appearing for the petitioner submitted that the petitioner is proposing to file an application for vacating the order, before the Trial Court.

We direct that if the application is filed by the petitioner the same shall be considered by the Trial Court uninfluenced by the observations made by the High Court.

The I.As. are accordingly disposed of.”

3 In terms of the statement made before the Apex Court, the Defendant No.3 filed the present Notice of Motion No.2450 of 2013 for setting aside the said order dated 12-7-2012 passed in Notice of Motion No.2680 of 2010. The setting aside of the said order was sought on the ground that the assessment bill dated 15-12-2010 produced by the Plaintiffs is not genuine but it is a forged and fabricated document to prove that the suit structure is tolerable. The Defendant No.3 sought to rely upon the communication made to it that the said structure is assessed for the first time on 1-4-1975 and the structure assessed was shed and not suit premises. It was the case of the Defendant No.3 that it had obtained copies of assessment extract of the said

structure and it does not show that the said structure assessed was for the first time in the year 1961-62. Hence according to the Defendant No.3 assessment bill dated 15-12-2010 produced by the Plaintiffs is forged and fabricated document.

4 The Trial Court having regard to the fact that an order dated 12-7-2012 had already been passed, allowed the Notice of Motion filed by the original Plaintiffs held that the instant Notice of Motion is referable to Order 39 Rule 4 of the Civil Procedure Code. The Trial Court further observed that it is only if the requisites of the said provisions are satisfied that the order dated 12-7-2012 can be set aside, varied, modified or vacated. Since in the instant case, the Defendant No.3 i.e. the Appellant herein was relying upon the fact that assessment bill dated 15-12-2010 being forged and fabricated document, the Trial Court observed that similar contention was raised in the earlier round when the said Notice of Motion No.2680 of 2010 was adjudicated and therefore no case for vacating the order having regard to Order 39 Rule 4 of the CPC is made out. The Trial Court also adverted to the fact that in so far as material placed on record is concerned, it has already observed in the order dated 12-7-2012 that the contentions as regards the bill dated 15-12-2010 would have to be decided in the trial and cannot be decided at the said stage. The Trial Court lastly observed that in so far as the Plaintiffs are concerned, it was necessary for them to only state the material facts and not evidence and in

the instant case it was the case of the Plaintiffs that the suit premises were in existence since 1942 and disputed assessment bill is one of the document on which the Plaintiffs rely to substantiate their said case. The Trial Court observed that the Defendant No.3 who has become owner in the year 2001 obviously cannot have knowledge as to when the suit structure was constructed by the Plaintiffs. The Trial Court therefore concluded that the Defendant No.3 had failed to make out a case for setting aside of the said order dated 12-7-2012 in terms of sub Rule (4) of Order 39 of the CPC.

5 In my view, having regard to the fact that the application is referable to Order 39 Rule 4 of the CPC, the order passed by the Trial Court rejecting the instant Notice of Motion No.2450 of 2013 cannot be found fault with. No case for interference is therefore made out. The Appeal From Order is accordingly dismissed. However, the hearing of L. C. Suit No.2139 of 2010 is expedited.

[R.M.SAVANT, J]