

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

**APPEAL FROM ORDER STAMP NO.9485 OF 2016
WITH
CIVIL APPLICATION STAMP NO.9486 OF 2016**

Mr. Mohamedali Abdul Kader Patel and Anr. ...Appellants
V/s.
Municipal Corporation of Greater Mumbai ...Respondent

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Mr. Pradeep J. Ramchandani, Advocate for the
Appellants/Applicants.
Mr. S.K.Sonawane, Advocate for the Respondent-BMC.

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**CORAM : N.M.Jamdar, J.
DATE : 6th April, 2016.**

PC.:

By this appeal, the Appellants challenge the order dated 5.2.2016 passed by the City Civil Court, Greater Bombay rejecting the Notice of Motion. When the appeal was called out, query was put to the learned counsel for the Appellants as to whether the Appellants wish to apply for regularisation or wishes to contest the Appeal on merits. The learned counsel for the Appellants submitted that the Appellants will challenge the legality of the notice and is not

desirous of applying for regularisation and has challenged the impugned order on merits.

2 Notice was issued by the Mumbai Municipal Corporation on 6.1.2011 as regards the unauthorised construction of brick masonry wall over existing parapet and fixing M.S. pipes over existing parapet with an intention to provide roof over existing terrace above first floor of building. Reply was filed by the Appellants stating that the he had not carried out any unauthorised construction of brick masonry wall and M.S. Pipes and they were not of recent origin and were in existence. The Appellants produces certain photographs to demonstrate since long that the structure was old and he has only done plastering of the said walls. The Assistant Commissioner, 'A' Ward passed an order on 12.1.2011 holding that the Appellants failed to prove that the structure was in existence prior to 1.4.1962 and called upon the Appellants to remove brick masonry wall and the M.S. Pipes. The Appellants filed L.C.Suit No.164 of 2011 and took out Notice of Motion in which initially the ad-interim relief was granted and by the impugned order, notice of

motion was dismissed.

3 The learned counsel for the Appellants submitted that the structure that is the wall and M.S. Pipes are right from the inception and this fact is even admitted by the Assistant Commissioner by referring to the photographs. This submission is misconceived. The Assistant Commissioner has mentioned that the photographs which were produced by the Appellants do not prove existence of the structure prior to datum line. It is nowhere conceded by the Municipal Corporation that the photographs show the structure is in existence prior to the datum line of 1962. Either the Appellants ought to prove that the structure was with due permission, or it was in existence prior to 1962. The Appellants have failed to prove both these requirements.

4 The learned counsel for the Appellants then submitted that the notice issued under Section 354(A) of the Mumbai Municipal Corporation Act, 1888 is incorrect as the structure has already been completed. He relied upon the order passed by the

learned Single Judge of this Court in Appeal From Order No.257 of 1999 on 15.4.1999. This submission also cannot be accepted. The decision is not applicable as the inspection report shows that the Appellants had carried out the construction and the next step was to cover the said structure with an intention to create another floor. Structure in question was preparatory structure for further construction. Therefore, there was no legality in the Municipal Corporation issuing notice under Section 354A.

5 The learned counsel for the Appellants then submitted that the assessment records would show that the structure is prior to the datum line. Assessment record only shows that the structure as regards the ground plus first floor is assessed to taxes. The learned counsel submitted that the order passed by the Assistant Commissioner also brings a question of legality of the entire structure, that is the entire structure, that is Qadri Guest House consisting of ground plus one. However, the impugned notice does not call upon the appellants to demolish the structure. The Assistant Commissioner has only asked the Appellants to show cause, which

proceedings will be an independent proceedings to which the Appellants can always respond.

6 In the circumstances, since no material is produced by the Appellants to show that either structure is legal or existed prior to the datum line, keeping in mind limited jurisdiction available to the Civil Court in view of Section 515A of the Mumbai Munnicipal Corporation Act, 1888, the Appeal From Order cannot be entertained and is dismissed.

7 The learned counsel for the Appellants states that the Appellants want to take up the challenge further. If the Appellants file the affidavit within a period of one week from today that the Appellants will remove structure within a period of four weeks from today, the structure will not be demolished for a period of four weeks from today. However, if no affidavit is filed and no order is passed after a period of four weeks, the Corporation will proceed to take action without further notice.

(N.M.Jamdar, J.)