

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Appeal from Order NO. 372 OF 2016
with
Civil Application No.486 of 2016

Mr. Ambalal Maganlal Patel

...Appellant

Versus

1.Municipal Corporation Of Greater Mumbai
And Ors.

...Respondents

Ms.R.C.Nichani i/b. Mr.Purav Jitendra Damania, for the Appellant.

*Mr.Sanjay Jain with Mr.Jainish Jain i/b. L.J.Law, for the Respondent
Nos.3,6,7,8,9,11,12,13,14,17,18,19,20,22,23,24,25,26,27,29,36,37,42,43,
48,49 and 52.*

*Mr.Swapnil Shashikant Joshi, Junior Engineer (B & F) 92 Bit, H/West Ward,
present.*

CORAM: G. S. KULKARNI, J.

DATED: 25th April, 2016

PC:-

1. Ms.Nichani, learned Counsel appearing for the Appellant has tendered affidavit of service showing private service of the proceedings on all the Respondents. Respondent No.2 - Gulab Baug Tenants Association which is an association of the tenants has also been served, nonetheless though some members are before the Court, the Association has chosen not to appear, despite being served.

2. By this appeal the Appellant/Original Plaintiff challenges the order dated 19 March 2016 whereby the following ad-interim reliefs as prayed for by the Appellant in the Notice of Motion came to be refused.

“(a) that pending the hearing and final disposal of the present suit, this Hon'ble Court be pleased to pass temporary Order and injunction restraining Defendant No.2 to Defendant No.53, either through themselves, their family members, servants, agents and any person claiming through or under them from causing any obstruction and/or hindrance in Plaintiffs and/or his representatives ingress and egress to and from Gulab Baug situated on all that piece and parcel of land being property bearing CTS No.184, 185 and 186 H West Ward more particularly at Junction of M.G.Road, Tilak Road, Santacruz (West), Mumbai 400054 in any manner whatsoever, including ingress and egress for the purpose of carrying out structural audit of Gulab Baug.

(b) that this Hon'ble Court be pleased to pass necessary order and direction directing Defendant No.1 and its officers to remain present and assist the Plaintiff and his appointed structural auditor in carrying out the structural audit of the building known as Gulab Baug situated on all that piece and parcel of land being property bearing CTS No.184, 185 and 186, H West Ward more particularly at Junction of M.G.Road, Tilak Road, Santacruz (West), Mumbai-400054.

(c) that this Hon'ble Court be pleased to direct Santacruz Police Station to provide necessary assistance and police protection at the time of carrying out the structural audit of the building known as Gulab Baug situated on all

that piece and parcel of land being property bearing CTS No.184, 185 and 186, H West Ward more particularly at Junction of M.G.Road, Tilak Road, Santacruz (West), Mumbai-400054.”

3. The Respondents/Defendants are yet to file their respective replies to the Notice of Motion, however, for the reasons as set out in the order, the learned Trial Judge has thought it appropriate not to grant ad-interim reliefs which are also the final reliefs as claimed in the suit itself.

4. I have heard Ms.Nichani, learned Counsel appearing for the Appellant, Mr.Jain, learned Counsel appearing for Respondent Nos.3,6,7,8,9,11,12,13,14,17,18,19,20,22,23,24,25,26,27,29,36,37,42,43, 48,49 and 52 and Mr.Sonawane, learned Counsel appearing for the Respondent - Corporation.

5. The Appellant is the owner of the suit building named “Gulab Baug” situated on land bearing C.T.S.No.184, 185 and 186, Junction of M.G.Road, Tilak Road, Santacruz (West), Mumbai. Ms.Nichani, learned Counsel for the Appellant submits the suit building is in a dilapidated condition, and it is the case of the Appellant that the building is beyond structural repairs and it may collapse at any time. It is thus required to be urgently demolished/ pulled down. She submits that it is in these

circumstances and as there was repeated resistance on the part of the occupants/respondents, to permit the Appellant to take steps for a structural audit, the Appellant was required to approach the Court and seek the above reliefs in the Notice of Motion. It is submitted that the Appellant being the landlord would definitely be concerned with the safety of the occupants and their properties and, therefore, there is an urgent need of a structural audit of the building. It is submitted that at all the times the Appellant was resisted by the occupants/respondents from setting a structural audit done. It is further submitted that the Municipal Corporation had issued a notice dated 10 June 2013 under Section 354 of the Mumbai Municipal Corporation Act, 1888 to the Appellant as also to the occupiers of the building inter alia stating that the building is in a “ruinous condition likely to fall and dangerous to any person occupying resorting to and passing by same.” It is pointed out that though the notice called upon the Appellant/occupiers to repair the building, nonetheless about two years have passed after the issuance of the said notice nothing has progressed. The present structural condition of the building is thus required to be immediately ascertained by undertaking a structural audit.

6. On the other hand, Mr. Jain, learned Counsel for the Respondents-occupants does not dispute that the structural audit would be necessary. In fact the suggestion of Mr. Jain is that the

occupants/Respondents would approach the Indian Institute of Technology (I.I.T.) for undertaking a structural audit of the building by applying necessary test and can submit a report to the Municipal Corporation for appropriate action as the Corporation may feel appropriate taking into consideration the said report. Mr.Jain placed strong reliance on notice dated 10 June 2013 issued by the Municipal Corporation to submit that the Corporation thought it appropriate not to pull down the building in the said notice but to repair it, as the words “pull down” are specifically erased.

7. Mr.Sonawane, learned Counsel for the Municipal Corporation submits that even attempts on the part of the Officers of the Municipal Corporation to undertake a structural audit of the suit building were resisted by the occupants of the building. Mr.Sonawane has drawn the attention of the Court to an Office Note dated 29 August 2015 whereby the Director(E.S.&P) who is Incharge Chairman of Technical Advisory Committee has opined that there would be no use of fixing a TAC Committee meeting in regard to the suit building, as the structural audit report is not available. Mr.Sonawane was asked to show a copy of this letter to Mr.Jain, learned Counsel appearing for the Respondents-occupants and also Ms.Nichani, learned Counsel appearing for the Appellant. It would be appropriate to extract the contents of the said office

note as it would be relevant for the issue as would arise for consideration in this case and the orders that would be required to be passed. The office report dated 29.8.2015 reads thus:-

“ Sub:- Dilapidated condition of the building known as
“Gulab Baug” at Station Road, Opp.Santacruz
Railway Station, Santacruz (W),Mumbai-400054.
Ref:- H/W/022490/FO-92/Bldg.dt.24.08.2015.

Reference to the above this is to be mentioned here that in the above subject matter the meeting was held in Director (E.S.&P)'s Chamber on 9/07/2015 at 12.30 p.m. Accordingly Director (E.S.& P) has informed Assistant Commissioner, H/West Ward to u/no. Director/E.S.&P/1460/III dt.5/08/2015 that during the Meeting, it was observed that the Consultants had not carried out the necessary N.D.Test, hence the Committee could not come to any conclusion due to incomplete reports, and hence, both the Consultants were directed to conduct the N.D.Tests including core tests and submit the report to the Ward office/TAC and accordingly inform the Owner/Occupier that the tests result/fresh structural audit reports from the consultants on behalf of the owner and Consultants on behalf of the Occupier/Tenants were necessary to carry out the further proceeding of the TAC. Further it was also mention that to confirm whether they have conducted necessary tests and submit the structural audit reports received from both the consultants to TAC Committee at the earliest.

In the above referred note it is mention that in spite of this office intimation to the occupiers/ tenants of Gulab Baug

building, the Structural Audit report along with Non Destructive Test result and Proforma B are not submitted by them till date. This office staff have also assisted to the structural consultant M/s.Conpro/Sardar Patel College of Engineering on behalf of owner to carry out Not Destructive Test along with police protection, however due to non-cooperation and staff resistance from the occupiers/tenants to take fresh Not Destructive Test, the owner is unable to carry out Structural Audit of the building.

In view of the above facts it is to be mention here that unless and until N.D.Tests carry out by owner/occupier from their Structural Consultants along with Proforma 'B' and if the opinion found contradictory on the basis of structural audit report then only TAC Committee comes in the picture to give specific order in such case.

As in this case, structural audit report are not made available along with their opinion and Proforma 'B'. There is no use of fixing up the TAC Committee hence, complete file papers are returned herewith to take necessary action as per provisions of various Acts with help of police force at your end, and resubmit to the TAC after the above mentioned compliance.

In meantime Asstt. Comm. H/West ward is requested to direct the owners/occupier and structural auditor to take necessary preventive measures such as propping etc. to avoid any untoward incident.” (emphasis supplied)

8. On the factual background which is set out hereinabove, it is quite clear that the Appellant and the occupiers have rival versions in respect of the condition/structural stability of the suit building.

Admittedly, an appropriate report of the structural auditor is not on the file of the Municipal Corporation which is the authority under law, which is required to take appropriate action in case it has found that the building is not structurally stable and unfit for being occupied.

9. There also appears to be no dispute on the position that Municipal Authorities as also the structural auditors on behalf of the Appellant were not permitted to undertake structural audit of the suit building by the occupants. This approach on the part of the occupants certainly is not beneficial to either the occupants themselves or to the Appellant and/or the Corporation. The occupants may have certain legal rights to occupy the suit building but certainly actions which are required to be taken in law by the Municipal Authorities or even in that regard by the Appellant who is the owner of the building in the interest of the stability, occupation cannot be resisted. There is no such legal right which would permit the occupants to defeat the attempts on the part of the Authorities or the Appellant to undertake any structural audit of the suit building.

10. Mr.Jain fairly concedes that his clients have their own version about the structural stability of the suit building and therefore, his clients would approach the Indian Institute of Technology in that regard. If the

occupants feel so, they will be free to appoint any structural Engineer of their choice and get a report to that effect and submit the same to the Corporation. However, at the same time, the occupants cannot prevent the structural Engineers/Auditors on behalf of the Municipal Corporation or the Structural Auditors on behalf of the Appellant who would also undertake a structural audit of the suit building.

9. In view of the above position, interference is called for in this Appeal from Order irrespective of the fact that the reliefs which were claimed by the Appellant before the Trial Court in the Notice of Motion were of a mandatory nature and it is wholly in the interest of the occupants of the building as also in the interest all the stake holders. It would have been appropriate on the part of the learned Judge to have taken all these issues under consideration, before passing the impugned order and moreover when the matter is such which directly concerns safety of human lives and property and more particularly in view of the nature of rival claims made by the parties. It is, therefore, in the interest of justice that this appeal be disposed of by the following order:-

ORDER

(i) The Structural Auditors of the Municipal Corporation as also on behalf of the Appellant are permitted to undertake appropriate inspection of the suit building Gulab Baug by carrying out all the requisite

tests so as to ascertain the structural stability of the building and prepare a report thereof, for further action to be taken in accordance with law.

(ii) The respondents – occupants are directed to permit the representatives of the Municipal Corporation as also the representatives on behalf of the Appellant to undertake such inspection and test for the purpose of a structural audit to be undertaken. The occupants are directed to fully co-operate with these representatives on behalf of the Municipal Corporation as also of the Appellant and refrain from in any manner resisting or preventing any inspection/test to be carried out in that regard.

(iii) The occupants/respondents are also permitted to have their own independent assessment by approaching the Indian Institute of Technology as suggested by Mr.Jain, learned Counsel appearing for the occupants and submit a structural audit report to the Municipal Corporation.

(iv) All the parties including the Municipal Corporation are directed to undertake the structural audit and place their respective reports on the file of the Municipal Corporation within a period of six weeks from today. Mr.Jain, learned Counsel for the occupants and Ms.Nichani, learned Counsel for the Appellant fairly agree that the respective reports on behalf of their clients would be submitted to the Municipal Corporation within six weeks from today.

(v) The Municipal Corporation is directed to consider all the

reports which would ultimately come on the record of the Municipal Corporation and take a final decision on the same in accordance with law, within a period of two weeks after all the reports are available on the record of the Corporation and thereafter immediately communicate the decision to all the parties as also their respective Advocates.

(vi) In the meantime, the Respondents who are being represented by Mr.Jain, undertake that they would continue to occupy the building at their own risk and consequences and in the event of any unfortunate incident of a collapse, they would not hold the appellant or any statutory/ Government authority or any officer of the Municipal Corporation or the Municipal Corporation liable in that regard for any reason whatsoever. Undertaking is accepted as also it is ordered accordingly. This direction is also applicable to those occupants of the suit building who are not parties in the present proceedings but who are occupying the said building.

(vii) If the decision of the Municipal Corporation to be taken on the structural reports is adverse to the Respondents/occupants, then, in that event the Municipal Corporation shall not resort to any coercive action for a period of two weeks from the date of communication of the order, however, the occupation shall remain subject to the undertaking and directions as contained in para (vi) above.

(viii) Learned Counsel for the Appellant as also the Respondents – occupants agree that these directions shall remain confined only in regard

to the issue in the present proceedings and that the other proceedings which are pending inter se between the parties shall not be influenced by this orders and the rival claims of the parties in those proceedings shall be considered by the Court on their own merits.

10. Appeal from order is disposed of in the above terms. No order as to costs.

11. In view of the above directions Ms.Nichani, learned Counsel for the Appellant-Plaintiff submits that the Appellant are not required to pursue the suit before the City Civil Court and the Appellant be permitted to withdraw L.C.Suit No.3267 of 2015 pending in the City Civil Court at Mumbai. L.C.Suit No.3267 of 2015 is accordingly allowed to be withdrawn. The suit is accordingly disposed of as withdrawn.

12. A copy of this order be forwarded to the Registrar of the City Civil Court to be placed on the record of the suit.

(G. S. KULKARNI,J.)