

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER STAMP NO.14967 OF 2016
ALONG WITH
CIVIL APPLICATION STAMP NO.14968 OF 2016**

**Nelson George Wilington @ Downey
Through his Constituted Attorney**

Mrs. Minal Mohan Lokegaonkar

: Appellant/Applicant.

Versus

Mrs. Jyoti Pattam and ors.

: Respondents.

**Mr. P K Dhakephalkar, Senior Advocate, i/by Mr. J N Jayale for the
Applicant/Appellant.**

Ms. Jyoti Chavan a/w Mr. Kunal V Phoolle for the Respondent No.1.

Mr. A V Diwate for the Respondent Nos.2 and 3.

Mr. Sandip Mahadik for the Respondent Nos.4 to 8.

CORAM : R. M. SAVANT, J.

DATE : 14th June 2016

P.C.

1 The above Appeal from Order takes exception to the order dated 10/05/2016 passed by the Trial Court i.e. the learned Judge of the City Civil Court, Borivali Division, Dindoshi, Mumbai by which order Notice of Motion No.2516 of 2015 filed by the Appellant/original Plaintiff came to be dismissed.

2 The Appellant is the original Plaintiff who has filed the suit in question through his Power of Attorney one Minal Lokegaonkar. In the suit in question the principal relief sought is that the Respondent No.1 herein be restrained by a permanent order of injunction from in any manner carrying out

any unauthorized work of addition, alteration, construction, erection and/or in any manner encroaching and/or interfering with the suit property i.e. Room Nos.3, 4 and 5 situated and lying at Survey No.152, Hissa No.2(Pt.), CTS No.1707/1 to 1707/7, Sohan Singh Chawl, Vatsala Niwas, G.W. Downey Chawl, Near Municipal Garden, Khotwadi, T.P.S. VI, Santacruz (West), Mumbai.

3 In the said suit the Plaintiff filed Notice of Motion seeking injunction in the same terms as sought vide prayer clause (a) of the suit. The suit premises are the Room Nos.3, 4 and 5 which are in occupation of the Respondent No.1 herein i.e. the original Defendant No.1 and of which rooms the Respondent No.1 claims to be the tenant. The suit is founded on the fact that the Respondent No.1 is a trespasser. In so far as the said property is concerned, it appears the same has been declared as slum and was sought to be developed through the aegis of a Slum Rehabilitation Scheme. However, the said Scheme it appears has not taken of though Annexure II containing the names of the eligible slum dwellers has been published.

4 In opposition to the relief sought in the Notice of Motion, the Respondent No.1 who is the original Defendant No.1 contended that the structure over a period of time had become inhabitable and the roof had given way, the Defendant No.1 was therefore by way of renovating the structure was putting up new walls and a new roof.

5 Prior to adjudicating upon the said Notice of Motion, the Trial Court appointed a Court Commissioner and the Court Commissioner submitted her report wherein she reported the fact that the construction work was being carried out qua the said Room Nos.3, 4 and 5 which could be seen from the construction material lying in the said rooms. The Trial Court thereafter took upon the adjudication of the said Notice of Motion and by the impugned order dated 10/05/2016, as indicated above, has dismissed the same. The dismissal is inter-alia on the ground that since it was the case of the Plaintiff that the Defendant No.1 was a trespasser, the suit filed by the Plaintiff only for the relief of injunction without claiming possession from the Defendant No.1 was not maintainable having regard to Section 41(h) of the Specific Relief Act. The second ground was that the work that was being carried out by the Defendant No.1 i.e. the Respondent No.1 herein of plastering, painting, replacement of roof would come within the meaning of tenantable repairs under Section 342 of the Mumbai Municipal Corporation Act (for short "the said Act) and therefore the same does not require permission of the Mnicipal Corporation of Greater Mumbai (for short "MCGM"). The third ground was that though the Plaintiff is residing in the adjacent structure, the Plaintiff waited for the Respondent No.1 to remove the roof and once the roof was removed filed the suit in question and the Respondent No.1 therefore cannot be left without a roof over the structure. The fourth ground was that the Respondent No.1 i.e.

the Defendant No.1 has not carried out any construction in so far as Room No.5 is concerned, which is the office, and the last ground was that the Plaintiff had failed to satisfy the pre-requisites for discretion to be exercised under Order XXXIX of the Code of Civil Procedure for the grant of temporary injunction.

6 During the course of the hearing of the above Appeal from Order, the learned Senior Counsel appearing for the Appellant Shri P K Dhakephalkar would contend that the Court Commissioner's report indicates that the height of the structure under construction would be to the extent of 16 ft whereas in the ad-interim order dated 10/05/2016 passed by the Trial Court, the statement made on behalf of the MCGM has been recorded to the effect that if the construction goes above 14 ft. then the MCGM would take action. It was also the submission of the learned Senior Counsel for the Appellant that without the permission of the MCGM that the construction was being put up.

7 On behalf of the Respondent No.1 contentions were sought to be raised as regards the manner in which the suit was filed relying upon the power of attorney of the said Wilington Downey which is of the year 1998. The said power of attorney was sought to be questioned by the learned counsel appearing for the Respondent No.1 on the ground that it is not in terms of the requirements of a valid power of attorney. It was also sought to be contended

that what the Respondent No.1 in fact is doing is only restoring the structure to the same position as it originally stood and not carrying out any additional construction. The learned counsel for the Respondent No.1 Ms. Chavan on instructions stated that the Respondent No.1 would not increase the height of the structure to more than 14 ft. and would not construct the first floor but would construct only the loft within the premises.

8 Having heard the learned counsel for the parties and having regard to the fact that the case of the Respondent No.1 i.e. the Defendant No.1 that she was only restoring the structure to the same position as it originally existed has found acceptance with the Trial Court and considering the fact that the Trial Court has held that the said work which has been carried out are tenantable repairs within the meaning of Section 342 of the said Act, in my view, interference of this Court in its Appellate Jurisdiction is not warranted. However, the statement of the learned counsel appearing on behalf of the Respondent No.1 i.e. the original Defendant No.1 that the height of the structure would not exceed 14 ft. or the first floor would not be constructed except the loft is accepted as an undertaking to this Court. It is also made clear that if the MCGM finds any part of the structure being unauthorized, it would be free to proceed against it in accordance with law. By so accepting the statement made on behalf of the Respondent No.1 and by issuing the clarification as above, the above Appeal from Order is disposed of. In view of

the disposal of the above Appeal from Order, Civil Application Stamp No.14968 of 2016 does not survive and the same to accordingly stand disposed of as such.

[R.M.SAVANT, J]