

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER ST.NO.16943 OF 2016
WITH
CIVIL APPLICATION ST.NO.16946 OF 2016**

Urvi Jayesh Ghatalia & Anr. ..Appellants
Vs.
Municipal Corporation of Greater Mumbai & Anr ..Respondents

**Mr. Vishal Kanade a/w Mr. Saket Mone a/w Ms Chaitrika Patki i/b Vidhi
Partners for the Appellants / Applicants**
Mrs. M. R. Bhoir for the Respondent No.1
Mr. Bharat Joshi a/w Mr. Mehul Shah for the Respondent No.2

CORAM : R. M. SAVANT, J.
DATE : 28th JUNE, 2016

P.C.

1 The order dated 10-6-2016 passed by the Learned Judge of the City Civil Court, Mumbai, rejecting the Notice of Motion No.1884 of 2011 filed by the Appellants original Plaintiffs is taken exception to by way of the above Appeal From Order.

2 The Plaintiffs were issued with a notice under Section 351 of the Mumbai Municipal Corporation Act alleging that they have carried out unauthorised construction by covering the open terrace with ladi coba, roofing material and brick masonry walls measuring 7.60m x 2.90m as shown in rough sketch attached to the said notice. The said notice was replied to on behalf of the Plaintiffs vide their Advocates reply dated 14-3-2011. The

Designated Officer of the Municipal Corporation of Greater Mumbai (MCGM for short) considered the said reply and having regard to the documents relied upon by the Plaintiffs held that the said documents do not prove the authenticity of the notice structure. The said documents were the letter dated 28-12-1959 addressed to the City Engineer by the Secretary of the Respondent No.2 society, copy of the letter dated 4-3-1961 addressed by the Secretary of the Respondent No.2 society to one C. C. Kaji, copy of the certificate submitted to the City Engineer dated 4-4-1963 by the society and the copy of the certificate dated 21-12-1976 issued by the Joint Secretary regarding co-partnership tenancy of Flat No.15. The Designated Officer therefore called upon the Plaintiffs to remove the said unauthorised construction and put them to notice that the Plaintiffs on failing to remove the structure, the same would be demolished at the costs and consequences of the Plaintiffs.

3 The issuance of the said notice dated 9-3-2011 and passing of the order dated 5-4-2011 resulted in the Plaintiffs filing the Suit in question being L. C. Suit No.884 of 2011. In the context of the allegations as contained in the said notice dated 9-3-2011, it would be relevant to refer to the averments as contained in paragraph 7 of the plaint. The said paragraph 7 is therefore reproduced hereinunder for the sake of ready reference :

“7. Plaintiffs state that the terrace area admeasures 500 sq.ft. approximately. Plaintiffs

state that the said terrace is open on all three sides i.e. there is no window save and except wall protecting the terrace. There is no window or closing of the terrace in any manner whatsoever. Plaintiffs state that even the said terrace is open to sky save and except windshield or roof protecting the building from rain/sun. The width of the said shade is 7.60m x 2.90m.”

Hence in the plaint it is averred that the terrace is open on all sides and that there is no window save and except a wall protecting the terrace and that there is no closing of the terrace in any manner. It is further averred that the terrace is open to the sky save and except windshield or roof protecting the building from rain / sun.

4 At this stage, it would also be necessary to refer to the Appeal filed by the Plaintiffs before the Divisional Joint Registrar of Co-operative Societies in respect of the membership of the Respondent No.2 society. The Plaintiffs were required to file the said Appeal as the society had rejected their application for membership. In the said Appeal in paragraph 8(c), the Plaintiffs who were the Appellants therein have averred that the Appellants had no point of time claimed the ownership of the terrace save and except that the Appellants were entitled to the user of the terrace adjacent to the flat. It is further averred that the Appellants had covered the terrace only for the better tenantable user and the society could have no objection as they had applied for the necessary permission from the MCGM and the Appellants had claimed

ownership of the terrace was baseless as the Appellants had not by any letter or writing claimed ownership of the terrace.

5 The Plaintiffs in the said Suit had sought a declaration that the notice issued by the Defendants under Section 351 of the MMC Act as also the order dated 5-4-2011 are malafide, illegal, bad-in-law, liable to be revoked, cancelled, set aside and not to be acted upon. The Plaintiffs have by way of prayer clause (b) sought injunction restraining the Defendants from taking action against the Plaintiffs pursuant to the notice issued under Section 351 and the order dated 5-4-2011. In the said Suit, the Plaintiffs filed the instant Notice of Motion being No.1884 of 2011 and the relief sought was of restraining the Defendants from demolishing the construction which was the subject matter of the notice. The said Notice of Motion was replied to on behalf of the Defendants. The Defendant No.1 i.e. the MCGM justified the issuance of the notice as well as the order passed by the Designated Officer. In so far as the Defendant No.2 is concerned, the Defendant No.2 contended in its reply that the Plaintiffs after purchasing the flat have put up unauthorised construction and occupied the part of the terrace and covered it into a room annexing it to their flat No.15. The said construction has been objected to on behalf of the society. The Trial Court i.e. the Learned Judge of the City Civil Court considered the said Notice of Motion and by the impugned order dated 10-6-2016 has rejected the same.

6 The Trial Court held that the Plaintiffs have not placed any document on record as showing the existence of the structure during their predecessor's time. The Trial Court by adverting to a document produced by the Defendant No.2 society which was in the nature of an approved plan observed that at the third floor the terrace has been kept open. The Trial Court also adverted to the fact that other flats are all admeasuring 635 sq.ft. and therefore the Plaintiffs flat also has to admeasure 635 sq.ft. The Trial Court observed that the Plaintiffs have extended the Flat No.15 by covering the open terrace without any lawful permission. The Trial Court therefore came to a conclusion that the Plaintiffs have not made out a case for the grant of discretionary relief of injunction and accordingly dismissed the Notice of Motion by the impugned order.

7 The Learned Counsel appearing on behalf of the Appellants original Plaintiffs would seek to reiterate the case of the Plaintiffs as urged before the Trial Court. The Learned Counsel would seek to substantiate the Plaintiffs case that the structure on the terrace has been existing since prior to the datum line on the basis of the document dated 28-12-1959, letter addressed by the Secretary to Mr. C. C. Kaji dated 4-3-1961, the certificate dated 4-4-1963 as also the certificate dated 24-12-1976 which have already been adverted to hereinabove.

8 In my view, a perusal of the said documents discloses that the said documents do not in any manner substantiate the case of the Plaintiffs that the structure on the terrace has been existing since long past atleast during the period during which the predecessor of the Plaintiffs were in occupation of the said flat No.15. The finding of the Trial Court therefore in that regard cannot be taken exception to.

9 The Learned Counsel appearing on behalf of the Respondent No.2 Mr. Shah draw this courts attention to the reply of the Plaintiffs which was given through their Advocate to the notice under Section 351 as also the averments in the Appeal filed by the Plaintiffs in respect of their membership. A reading of the said averments in fact discloses that the Plaintiffs are not claiming any right over the terrace.

10 Be that as it may, in the facts of the present case where the Plaintiffs have not been able to produce any document to show that the structure on the terrace was put up pursuant to either NOC granted by the society or the permission of the MCGM. The refusal of the Trial Court to grant temporary injunction cannot be faulted with. Hence no case for interference is made out. The Appeal from Order is accordingly dismissed.

11 Needless to state that the findings recorded by the Trial Court as well as by this Court are only for considering the application for temporary injunction, the Suit would undoubtedly be tried on its own merits and in accordance with law.

12 At this stage, the Learned Counsel appearing for the Appellants applies for protective order for limited duration. In the facts and circumstances of the case, the notice as well as the order of the Designated Officer not to be implemented for a period of two weeks.

13 In view of the dismissal of the above Appeal From Order, the Civil Application St. No.16946 of 2016 does not survive and to accordingly stand disposed of as such.

[R.M.SAVANT, J]