

dik

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

CIVIL APPLICATION NO. 3276 OF 2015

IN

WRIT PETITION NO.12439 OF 2015

WITH

WRIT PETITION NO.12439 OF 2015

M/s Chetan Associates

...Applicant

vs

Abhilasha Co-op.HSG. Society Ltd.

...Respondent

.....

Mr Sharon Jagtiani a/w Mayur Khandeparkar, Mr Zain, Ms Pinky Patel, Gunjan Shah & Sahil Haryani i/b Desai & Diwanji for the Applicant

Mr Shriram Kulkarni a/w Ms Minal Chavan for the Respondent

.....

CORAM : N.M.JAMDAR, J.

21 SEPTEMBER, 2016

P.C. :

Rule. Rule is made returnable forthwith. Learned counsel for the Respondent waives service.

2 By this petition, the Petitioner is challenging the order dated 16 September 2015 passed by the City Civil Court Judge Mumbai in Notice of Motion No.1816 of 2013 in Short Cause

Suit No.6672 of 2001.

3 The Petitioner has filed a Short Cause Suit No.6672 of 2001 against the Respondent in respect of the property admeasuring about 5516.05 square yards being a plot bearing City Survey (C.S.) No. 1/530 of Malabar and Cumballa Hill Division situate at 46, August Kranti Marg, Mumbai. The Petitioner prayed for grant of permanent injunction to restrain the Respondent from encroaching upon the property and from obstructing or interfering with the work of construction stated to be carried out by the Petitioner and also for an injunction to restrain the Respondent, its members, office bearers etc. from using any car parking space and certain other reliefs. In this suit, Notice of Motion No.58 of 2002 was taken out in which by consent, an ad-interim arrangement was arrived at. The Minutes of Consent of order more particularly paragraph 4, which is relevant, reads as follows:

“4. The Defendants declare having carried out only some tiling work in the open portion of the land admeasuring about 2500 sq.ft. as shown in the accompanying plan and coloured in red which portion is a part of the property. The Defendants shall not extend or carry out any further tiling work in the said open portion. The Defendants shall not use the said tiled portion for any other purpose except for manoeuvring and turning of the

motor cars of their members.”

4 The Petitioner making a grievance that the Respondents have violated the consent terms took out the present Notice of Motion No. 1816 of 2013. Three reliefs were sought. Firstly, the order of attachment in relation to building Abhilasha (Wings A and B) and direction that the Chairman, Members of the Managing Committee be detained in civil prison and, secondly directing that the defences of the Respondents be struck off as contemplated under Order VIII Rule 5 of the Code of Civil Procedure and, thirdly mandatory direction to Respondent to remove the tiles from the open portion of the said plot. (A Commissioner was appointed, who submitted a report.) Learned City Civil Court Judge, Mumbai by the impugned order, concluded that no case was made out for attachment of the property or to detain the Chairman and Secretary in civil prison or to struck off the defences of the Defendants nor it was the fit case to direct the Respondent to remove the tiling work done in the open portion.

5 Heard learned counsel for the parties. Learned counsel for the Petitioner submitted that the Respondent in violation of the consent orders have carried out the tiling work and the learned City Civil Court Judge has not given any finding as to whether the work has been carried out is beyond the consent terms, in spite of report of the Commissioner which stated

specifically that the work was carried out by the Respondent outside what was stipulated under the consent terms. He submitted that since the Respondent had given an apology and by way of purging the contempt or removal of offending tiling work ought have been directed. Learned counsel for the Respondent submitted that no work has been carried out in breach of the consent terms and the apology was given by way of abundant caution. He submits that the suit itself is at the stage of hearing and the reliefs sought by the Petitioner can be considered at the time of hearing.

6 Having gone through order of the learned City Civil Court Judge, Mumbai, it appears that learned City Civil Court Judge has not addressed to the crux of the matter as to whether tiling work was done in excess of what is stipulated under the consent terms. Learned City Civil Court Judge, has straightway considered the apology and the affidavit filed and has drawn the conclusion that the case is not fit for ordering imprisonment or for striking off the defence. Though it is settled that an order of directing a party to be committed in civil prison is a drastic order and all reasonable benefit should be given to the party, the order of directing striking out the defence is less so and even further lesser is the relief of removal of offending work, which is by way of purging the contempt, if any. Therefore, a factual finding as to whether the work stated to be carried out by the Respondent was in excess of what is agreed in the

consent terms had to be rendered before proceeding to consider either reliefs. The report of the Commissioner is on record, however learned counsel for the Respondent has disputed the same. If the Respondent was ready to agree and abide by the Commissioner's report which is already on record, the controversy could have been resolved but the report of the Commissioner is put in dispute, which will necessitate factual enquiry. In the circumstances, the appropriate course of action would be to quash and set aside the impugned order, restore the Notice of Motion to the file of the City Civil Court, Mumbai to decide the same after appointing the Commissioner, if so find necessary, in the light of what is stated above. Considering the fact that the suit is pending since 2001, this exercise should be done by the learned City Civil Court Judge as early as possible. Accordingly, the Writ Petition is disposed of by the following directions.

7 The impugned order dated 16 September 2015 is quashed and set aside. Notice of Motion No.1816 of 2013 is restored to the file of City Civil Court, Mumbai. The learned City Civil Court Judge Mumbai will decide the Notice of Motion in the light of what is observed above preferably within a period of three months from the date the writ of this Court reaches it, provided both the parties co-operate with the learned City Civil Court Judge. Learned counsel for parties, on instructions, undertake to do so. The disputes of the parties regarding factual

aspect are kept open to be considered. It is clarified that the learned City Civil Court Judge may consider appointing of Court Commissioner, if necessary. If the parties are ready to abide by the report of the Court Commissioner, then the controversy can be put to rest and the suit can be taken up for consideration. Further, if the parties do not agree to do so, then Notice of Motion should be taken up for consideration first. In view of disposal of Writ Petition, Civil Application does not survive and the same is disposed of.

(N.M.JAMDAR J.)