

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

**CIVIL APPLICATION NO.180 OF 2017
IN
APPEAL FROM ORDER (ST) NO.6416 OF 2017**

Shri.Hanif Haroon Lakadwala & Anr. ..Applicants/Appellants

V/s.

Municipal Corporation of Gr. Mumbai ..Respondent

Mr.Sandeep S. Sharma for the Applicants/Appellants.

Mrs.M.M. More a/w Mr. Suneel Sonawane for the Respondent-MCGM.

CORAM : M. S. SONAK, J.

DATE : 15 MARCH 2017.

P.C.

1. Heard Mr.Sandeep Sharma for the Appellant and Ms.Madhuri More for the Municipal Corporation of Greater Mumbai (MCGM).

2. At the request and with the consent of the learned counsel for the parties, the appeal is taken up for final disposal at the stage of admission itself.

3. Mr.Sharma submits that the challenge in this appeal is

to the order dated 28 November 2016 made by the learned City Civil Judge, Mumbai dismissing the appellants Notice of Motion No.1487 of 2015 seeking a restraint upon MCGM from executing itself Notice under Section 354A of the Mumbai Municipal Corporation Act, 1888 (for short 'MMC Act').

4. Although, both the counsels made some submissions on the merit of the matter, Mr.Sharma, the learned counsel for the appellants at the very outset emphasized that the impugned order was made without any offer of opportunity of hearing to the appellants or their advocate. He submits that as per the normal practice before the City Civil Court motions are taken up for the hearing in the afternoon session. Relying upon such bonafide impression, the advocate for the appellants was not present in the early morning session when the matter was called out. The advocate however, did appear at about 1.10 p.m., by which time, the hearing in the Notice of Motion had concluded. Mr.Sharma submits that despite request, the learned Trial Judge, did not grant any further opportunity to the advocate, primarily on the ground that there was a direction from this Court to dispose of the Notice of Motion by 28 November 2016.

5. Mr.Sharma submits that there was sufficient cause for non-appearance and the impugned order, which, if not interfered with, might entail demolition of two floors of the appellant's building which is quite harsh in the aforesaid circumstances. Without prejudice and after obtaining instructions from the appellants, Mr.Sharma states that the appellants are willing to pay costs of Rs.1 lakh, in cash, provided an opportunity is granted to the appellants/their advocate to make submissions in the matter and to pursue the learned Trial Judge that the relief applied for in the Notice of Motion are required to be granted in the facts and circumstances of the present case.

6. Ms.More, the learned counsel for the MCGM points out that the construction which was been undertaken by the appellant is totally illegal and unauthorized. She points out that despite notice, the appellants continued with the illegal and unauthorized construction. She also points out that since, there were directions of this Court for expeditious disposal of the Notice of Motion, there was no justification for the advocate of the appellants not to remain present in the morning session and not to make submissions in support of the Notice of Motion.

7. The learned Trial Judge, in the impugned order, has set out the circumstances in which it was not possible for the learned Trial Judge to adjourn the matter on the ground of absence of the advocate for the appellants. The learned Trial Judge also observed that on the previous date as well, the advocate for the appellant did not remain present, though, the appellants was protected by interim order.

8. In the aforesaid circumstances, it cannot be said that there is any jurisdictional error in the making of the impugned order. However, looking to the consequences and the circumstances that advocate for the appellants did appear before the Court at 1.10 p.m., some indulgence can be extended to the appellants. The extension of such indulgence is necessary, because the appellants should not get a feeling that his advocate was deprived of opportunity to make his submission in favour of the Notice of Motion. Subject to the payment of cost therefore, such indulgence can be granted to the appellants. The interest of MCGM can also be suitably protected by issuing some time bound directions.

9. This appeal is accordingly disposed of with the following order :-

ORDER

(a) The impugned order dated 28 November 2016 is set aside and the ad-interim order which was earlier in operation is restored, pending the disposal of the Notice of Motion No.1487 of 2015. However, even the appellant is directed to maintain status-quo.

(b) The learned Trial Judge is directed to dispose of Notice of Motion No.1487 of 2015 as expeditiously as possible and in any case within a period of eight weeks from today. The disposal shall be in accordance with law and on its own merits.

(c) The learned Trial Judge need not be influenced by any observations in the impugned order dated 28 November 2016 or the circumstance that such order has been set aside by this Court in this Appeal. All contentions of all parties are left open.

(d) The appellants, consistent with their offer to pay cost of Rs.1 lakh, shall pay an amount of Rs.1 lakh to Tata Memorial Cancer and Research Center,

Parel, Mumbai within a period of 10 days from today. The amount shall be paid by means of Demand Draft and necessary receipt/copy of the Demand Draft shall be filed before the learned Trial Judge. Upon ascertaining that such amount has noted be paid, the learned Trial Judge shall proceed to dispose of Notice of Motion No.1487 of 2015. In case the amount of costs are not paid within 10 days, this appeal shall be deemed to have been dismissed and the impugned order dated 28 November 2016 confirmed.

10. All concerned to act on the basis of the authenticated copy of this order.

11. The Appeal From Order and the Civil Applications are disposed of accordingly.

(M. S. SONAK, J.)