

Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER (ST) NO.19229 OF 2017
WITH
CIVIL APPLICATION (ST) NO. 19235 OF 2017

Arun Savlaram Kashikar ...Appellant
Versus
Municipal Corporation of Greater Mumbai & Anr ...Respondents

Mr Mohit Jadhav, i/b Swati P Gautam, for the Appellant.
Mrs Madhuri More, for Respondent No. 1-MCGM.
Mr DA Joseph, i/b M/s. David & Associates, for the Respondent No. 2.

CORAM: G.S. PATEL, J
DATED: 17th July 2017

PC:-

1. The Plaintiff is in Appeal against an order of 16th June 2017 dismissing his Notice of Motion, in which he sought an injunction against the Defendants from interfering with certain premises and from demolishing the unauthorised construction.

2. The Plaintiff claimed protection for a terrace abutting his Flat No. A-502 on the 5th floor of Marvelink Apartment CHS Ltd., Mithchowki, Malad (West), Mumbai 400 064. According to him, the apartment is 700 sq.ft. in area. So is the terrace. He says he purchased the terrace under a separate agreement.

3. It is not disputed that the Plaintiff has entirely illegally and without any authorisation enclosed the entirety of terrace of “A” Wing. He has constructed a toilet block and has covered the terrace area.

4. A secondary argument is as to whether the Plaintiff is or can be in law the owner of the terrace. It was argued before the Trial Court that an agreement giving a member exclusive rights over a common area is contrary to the Maharashtra Ownership of Flats Act and there could be no such agreement to begin with.

5. Today it is fairly agreed that the observations of the Trial Court in paragraph 10 regarding the unauthorized construction cannot be assailed. What the Plaintiff does seek in Appeal is to continue his right to exclusive user of the terrace.

6. The building’s water tanks are mounted on a level above the terrace. They can be accessed from the “B” wing terrace. It is pointed out that for the terrace of which the Plaintiff claims exclusivity, there is a separate agreement dated 26th April 2002. This is an agreement only in respect of the terrace and nothing else. The Appellant/Plaintiff paid an additional amount of Rs. 20,000/- for this. The terrace is clearly marked in an annexure to the document. The document is registered.

7. *Prima facie* it is not possible to ignore this document. If the society has a grievance and says that such an agreement is contrary to any law, it is for the society to take appropriate proceedings to

have the document cancelled. The society has done nothing to that end. It is not open to the society to simply ask a Court to turn a blind eye to and ignore a registered document in this fashion. It is not open to the society to simply deny the passing of title under that Agreement. The society itself claims only a 'deemed conveyance'.

8. To this extent, therefore, the Appellant will have to be protected. Unfortunately, the prayer in the Notice of Motion is only in respect of the demolition of the unauthorized construction.

9. The Appeal is, therefore, dismissed with these observations, but with a clarification that the possession of the Appellant of the suit terrace admeasuring 700 sq ft abutting the kitchen of Flat No. A-502, 5th floor of Marvelink Apartment CHS Ltd., Mithchowki, Malad (West), Mumbai 400 064 is not to be disturbed.

10. The Suit will be decided on its own merits uninfluenced by the observations in the impugned order.

11. The Appeal is disposed of in these terms with no order as to costs. This is without prejudice to the rights of the society to initiate or to adopt such proceedings as it may be advised in respect of the terrace claimed by the Plaintiff.

12. The Civil Application does not survive and is disposed of as infructuous.

(G. S. PATEL, J)