

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER (ST) NOS. 30736 AND 30741 OF 2016
AND
CIVIL APPLICATION (ST) NO. 30737 OF 2016
IN
APPEAL FROM ORDER (ST) NO. 30736 OF 2016
AND
CIVIL APPLICATION (ST) NO. 30742 OF 2016
IN
APPEAL FROM ORDER (ST) NO. 30741 OF 2016

Deepak H. Mirchandani .. Appellant
vs.
The Municipal Corporation of
Greater Bombay and anr. .. Respondents

Mr. R.R. Sharma for the Appellant.
Mr. N.V. Walawalkar, Sr. Advocate a/w. Mrs. M.M. More for
Respondent No.-1-MCGM.
Mrs. Sarina E. Lopez, Respondent No.2 in person.

CORAM : M. S. SONAK, J.

Date of Reserving the Order : 15 FEBRUARY 2017.
Date of Pronouncing the Order : 17 FEBRUARY 2017.

COMMON ORDER :-

1] Heard Mr. R.R. Sharma, learned counsel for the appellant, Mr. N.V. Walawalkar, learned senior advocate for respondent No.1-Municipal Corporation of Greater Bombay (MCGM) and Mrs. Sarina E. Lopez, respondent No.2 (in person), in both the appeals.

2] On 15 December 2016, this court, had indicated that the appeals will be disposed of finally, at the stage of admission.

3] The challenge in both these appeals is directed against the orders dated 10 October 2016, which, the parties agree, are virtually

identical in all respect, disposing of notices of motion seeking restraint upon the MCGM from demolishing suit garage (garage No.1) in pursuance of notices issued by MCGM for such purpose. Learned counsel as well as the party appearing in person agree that these two appeals can be disposed of by a common order.

4] Mr. Sharma, learned counsel for the appellant, submits that the suit garage was acquired by Rupwanti Mirchandani, the mother of appellant. Upon obtaining permission/IOD dated 9 February 1982 from the MCGM the suit garage came to be constructed. The appellant has placed on record not only the IOD dated 9 February 1982, but also the Commencement Certificate (CC) dated 9 February 1982, Building Completion Certificate dated 12 August 1982 and permission for enclosure of suit garage dated 12 August 1982. The appellant submits that the municipal property assessment bills in respect of suit garage have also been placed on record. In light of this material as well as other documents already placed on record, Mr. Sharma submits that a *prima facie* case was made out for grant of interim reliefs and even balance of convenience was clearly in favour of grant of such interim reliefs. Mr. Sharma submits that learned Trial Judge, making impugned order, has addressed himself to issues of title or the civil disputes between the appellant and his family members, in order to deny the appellant interim reliefs. Mr.Sharma submits that such matters were quite irrelevant and the impugned orders are therefore, liable to be interfered with.

5] Mr. Walawalkar, learned senior advocate for respondent No.1-MCGM, has defended the impugned orders by submitting that learned Trial Judge, in making the impugned orders, has exercised discretion in accordance with law and therefore, there is no case

made out to interfere with the impugned orders. Mr. Walawalkar pointed out that the appellant's brother Suresh Mirchandani, was party to resolution of the society, to apply for regularisation in respect of suit garage. Mr. Walawalkar submits that this means that the suit garage, is an illegal and unauthorised structure. Mr. Walawalkar submits that the appellant, in breach of permission dated 12 August 1982, which was valid only for one year, unauthorisedly enclosed the suit garage and therefore, the MCGM has constrained to take action. Mr. Walawalkar submitted that in respect of some other garages in the same society complex, similar notices were issued and the challenges to the same were turned down by the Division Bench of this court. For these reasons, Mr. Walawalkar submitted that these appeals may be dismissed.

6] Mrs. Sarina E. Lopez, Respondent No.2, who appears in person, also submitted that the Division Bench of this court, has already rejected the challenges to similar notices, in respect of rest of garages in the society complex. Mrs. Sarina E. Lopez submits that continuance of the suit garage, at its present location, will hinder the movement of Fire Brigade and even the authorities have verified this position and directed the maintenance of clear area/open space for the fire tender to maneuver, in case of any mishap. Mrs. Sarina Lopez, relying upon certain decisions, submitted that since learned Trial Judge has exercised discretion fairly, this court, ought not to interfere, even assuming that some different view was possible in the first instance. Mrs. Sarina Lopez, however, added that in this case no different view is possible and the impugned orders warrant no interference whatsoever.

7] In rejoinder, Mr. Sharma conceded that permission dated 12 August 1982 for enclosing the suit garage was valid for only one year. Mr. Sharma, however, submitted that in matter of removal of enclosures, the MCGM has earlier issued notices and as a consequence thereof, the enclosures have been substantially removed. Mr. Sharma submits that in any case, the enclosures will be removed. However, he submits that enclosures does not mean the roof of garage, which according to him, is permissible, under Development Control Rules for Greater Bombay, 1967. He submitted that in terms of IOD dated 9 February 1982, very clearly the appellant was permitted to provide a roof for the suit garage and therefore, there is nothing illegal in continuance of the suit garage with roof overhead. He submits that the contention raised by Mrs.Sarina Lopez on the aspect of fire tender, have been raised for the first time in this court and in any case, such contention is devoid of merits. He submits that the impugned orders do not advert to these factors and therefore, this court may also not take cognizance of such factors, which in any case, are quite frivolous in the facts and circumstances of the present case.

8] The rival contentions now fall for my determination.

9] In this case, the documents like IOD dated 9 February 1982, CC dated 9 February 1982 and Building Completion Certificate dated 12 August 1982 do indicate that some permission was obtained for construction of the suit garage. However, from the perusal of these documents, it appears that the permission was basically for the purposes of erection of an open garage. This means that the garage was not meant to be enclosed. The permission to enclose the garage temporarily, by way of walls was granted on 12 August 1982 bearing

File No.CE-1130-BS-II. This permission, categorically states that it is temporary and valid for one year only, i.e., up to 31 March 1983 (see clauses 1 and 5). Further, it is stated therein that this permission must be renewed from the Ward Officer H/West every year.

10] Admittedly, neither the appellant nor any person claiming interest in the suit garage bothered to get the permission dated 12 August 1982 renewed beyond 31 March 1983. This position was not even disputed by Mr. Sharma, though, he did attempt to offer some explanation as to why this remained to be done. Despite absence of any renewal, the enclosures in respect of suit garage were never removed. Mr. Sharma states that the shutters on the front side have been removed and this position has been confirmed by Mr. Walawalkar, who appears for MCGM. The two sides of the suit garage are enclosed by compound wall. As such, it cannot be said that the walls on two sides are any enclosures put up by the appellant in pursuance of the permission dated 12 August 1982, which has long since expired. On the remaining side, there is no justification to continue with any enclosures. Finally, Mr. Sharma, on behalf of the appellant, stated that the enclosures on the remaining side will also be removed. He, however, pointed out that a small portion on that side is blocked by a pump and there is no question of treating the pump has any kind of enclosure. This is quite right. However, there is no justification in having any other enclosure on this remaining side and such enclosure will have to be removed forthwith. In case, the same is not removed, MCGM to remove the same in pursuance of the notice, which is impugned in the suit.

11] Insofar as the roof over the suit garage is concerned, it is a debatable issue as to whether the same constitutes an enclosure in pursuance of the permission dated 12 August 1982 or whether, such roof was permitted in terms of IOD dated 9 February 1982 and the CC dated 9 February 1982, Building Completion Certificate dated 12 August 1982. At the *prima facie* stage, some credence is required to be given to the IOD dated 9 February 1982 and Building Completion Certificate dated 12 August 1982. In the plan accompanying the IOD, there are at least five columns indicated for the purposes of construction of the open garage. The contention of Mr. Sharma that open garage means garage without enclosure, i.e., wall on sides, is not a contention which can be rejected at a threshold. He submits that open garage does not mean garage which is open to sky as otherwise, there was no necessity for permitting erection of five columns, which would serve no purpose whatsoever. Mr. Sharma submits that there is dispute pending between the plaintiff and his brother Suresh. Therefore, Suresh's alleged support to the society's resolution seeking regularisation is not a circumstance which can be held against the plaintiff. In any case, the realisation was clearly in the context of enclosures, perhaps realising that the permission dated 12 August 1982 was never renewed beyond one year. Again, all these are debatable issues. Therefore, this is not a fit case where MCGM pending disposal of the suit ought to be allowed to demolish the entire construction, i.e., five columns and the roof over the same.

12] However, there is absolutely no justification on the part of the appellant to continue to enclose the garage by way of any walls, in pursuance of permission dated 12 August 1982, which has, as noted earlier, expired on 31 March 1983. The shutter in front of the garage is already removed. This means that the enclosure on one side

stands removed. On two sides, the garage is enclosed by compound wall, which is constructed by the society and which is valid construction. Therefore, there is no question of breaking down that wall or removing that enclosure. In fact, the notice issued by the MCGM cannot be considered to relate to the compound wall of the society. Insofar as the remaining fourth side is concerned, however, the appellant is entitled to no protection. The statement of Mr. Sharma, on behalf of the appellant, that the wall on fourth side will be brought down is accepted. In any case, consistent with such statement, the appellant is directed to bring down such wall/enclosure on the remaining side within a period of two weeks from today. Failing which, the MCGM to proceed with its actions of demolition, clearance of this wall/enclosure on the fourth side.

13] The suit garage, i.e., five columns which are reflected in the plan appended to the IOD dated 9 February 1982 shall, however, not be proceeded against by MCGM in pursuance of their notice, pending the final disposal of the suit. Similarly, the roof over these five columns need not be disturbed pending final disposal of the suit. Such limited relief is liable to be granted because neither the MCGM nor Mrs. Lopez could really dispute this position in relation to IOD dated 9 February 1982. This IOD, relates to construction of three garages, out of which, the suit garage is one. The plan accompanying the IOD specifically indicates five columns. The IOD, the terms of which are stated in the negative form, provides that the open/lock up garages will not be of R.C.C. framed construction and will not be paved, channelled and drained properly (see clause J). This means that the open/lock up garages as permitted by the IOD will be a R.C.C. framed construction and paved, channelled and drained properly. Some meaning will have to be assigned to this IOD, when it

says that the R.C.C. framed construction, comprising of five columns was permitted on 9 February 1982.

14] The balance of convenience is also in favour of retaining such roof pending disposal of the suit because, no real prejudice as such will occasion Mrs. Sarina Lopez or other residents of the building, if such roof continues pending disposal of the suit. However, serious prejudice will occasion the appellant, if the roof is required to be pulled down pending disposal of the suit.

15] As regards enclosures, the appellant has not made out any *prima facie* case and therefore, no relief can be granted for protection of the enclosures. The decision of the Division Bench, upon which reliance was placed by Mr. Walawalkar and Mrs. Sarina Lopez, dated 9 March 2015 was mainly in the context of permission dated 12 August 1982. The Division Bench noted that such permission was valid only for one year and therefore, continuance of enclosures beyond one year was illegal and dis-entitled to any protection. From the perusal of the decision of the Division Bench, however, it is not clear as to whether the petitioner in the said petition, was armed with any permissions like IOD dated 9 February 1982, Building Completion Certificate dated 12 August 1982 and the effect of such permissions. It is possible that these very permissions also applied to the garage which was the subject of Writ Petition No. 101 of 2015. However, there is no discussion upon the effect of such permissions. In any case, whatever constructions/enclosures which were put up by the appellant in respect of the suit garage, on the basis of permission dated 12 August 1982 are removed/ordered to be removed and no protection is granted to such enclosures/constructions.

16] It is true that this court, in appeals from orders against discretionary reliefs, will not interfere with the exercise of discretion of the court of the first instance and substitute its own discretion, unless, it is established that the court of first instance has exercised its discretion arbitrarily, capriciously or perversely or has ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. The impugned orders, to the extent, they deny protection to the enclosures warrant no interference and are not interfered with. However, the impugned orders, in the present case, have not given any weightage to the IOD dated 9 February 1982 and the Building Completion Certificate dated 12 August 1982. The impugned orders have not considered or discussed the effect of these two documents, which at least *prima facie*, constitute valid permissions for construction of an open garage with R.C.C. framed construction, which was required to paved, channeled and drained properly. The plan accompanying the IOD indicates the construction of five columns. The appellant, in these circumstances, at least to limited extent, has raised a triable issue. The balance of convenience is also in favour of grant of relief. This means that at least to this extent, the impugned orders have not taken into consideration the settled principles of law regulating grant or refusal of interlocutory injunctions. To this limited extent, therefore, interference is warranted.

17] The appeals are, therefore, partly allowed. The MCGM is restrained from demolishing the suit garage, i.e., five columns as reflected in the plan accompanying the IOD dated 9 February 1982 and the roof over the same. However, the impugned orders to the extent, they decline any protection to the enclosures, i.e., the front rolling shutter (which is stated to be already removed) and the

wall/enclosure on the side other than the two sides which get the protection of compound wall, are upheld. Consistent with the statement made, the appellant to pull down such wall/enclosure on the remaining side within fifteen days from today. If this is not done, the MCGM shall proceed with its action for demolition of the enclosure/wall on the remaining side at the costs and consequences of the appellant.

18] It is made clear that all the observations in the impugned orders as well as the present order are only *prima facie*. Therefore, the Trial Court whilst disposing of the suits on merits need not be influenced by any such observations. The suits will have to be disposed of in accordance with law and on their own merits.

19] The civil applications in these appeals do not survive and the same are also disposed of

(M. S. SONAK, J.)