

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.42 OF 2016

IN

FIRST APPEAL NO.31 OF 2016

Dr. Dilip B. Raja and Anr.

.... Applicants

V/s.

Shree Arihant Apartment Co-op.

Housing Society, Mumbai & Ors.

.... Respondents

Mr. Venkatesh Dhond, Senior Counsel, a/w. Mr. Rohan Kelkar, I/by
Mr. Sandeep R. Waghmare, for the Applicants.

Mr. R.B. Jain, a/w. Ms. Sneha Pokle, I/by M/s. Legal Juris, for
Respondent No.1.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 23RD OCTOBER, 2018.

P.C. :

1. Heard learned counsel for the respective parties.
2. This application is filed seeking stay to the implementation of the impugned 'Judgment and Decree' passed in L.C. Suit No.1543 of 2009 by the City Civil Court, Mumbai on 28th October 2015.
3. The said Suit was filed by Respondent No.1-Society for a declaration and mandatory injunction. The dispute pertains to the one room constructed on the terrace by the Appellants herein, by utilizing the F.S.I. of 145 sq.ft. As per the case of the Appellants, in view of the terms of the 'Agreement' executed by the Builder-Promoter with the Appellants, they are exclusively entitled to this portion of the terrace to

use and occupy and enjoy possession of the same; they are also entitled to make any construction thereon by utilizing the F.S.I. of 145 sq.ft., if it was permitted as per the D.C. Rules of the Respondent-Municipal Corporation. Accordingly, on the basis of this 'Agreement', the Appellants have constructed one room premises by utilizing this F.S.I. of 145 sq.ft. Subsequently, the construction of the said room is also regularized by the Respondent-Municipal Corporation.

4. Respondent No.1-Society has, however, challenged the construction of the said room by making claim over the entire terrace, on the count that the terrace is meant for common and joint use of all the flat purchasers and the Builder-Promoter cannot sell it without the consent of all the flat purchasers of the Society.

5. It is a matter of record that, in respect of the claim of Respondent No.1-Society over the open terrace, already a separate Suit was filed before the Trial Court and after the 'Decree' of the said Suit, the First Appeal No.1642 of 2012 is preferred in this Court. In that First Appeal, Civil Application No.3774 of 2012 was filed by the Appellants herein, seeking stay to the execution of the said 'Judgment' and this Court has by its order dated 12th February 2014, directed the Appellants herein to deposit in this Court the amount of Rs.10,000/- per month as a condition for continuation of the stay to the impugned 'Judgment and Decree', along with its arrears on or before 10th of every month.

6. Now the question is about the room, which is constructed on this terrace by the Appellants by utilizing the F.S.I. of 145 sq.ft. As regards the legality and validity of the construction of the said room, the Respondent-Municipal Corporation has already regularized the same and as the said room is in existence either from 1994, as contended by the Appellants, or, from the year 2004, as contended by Respondent No.1-Society, the fact remains that the First Appeal, being the substantive right, at this interim stage, before the decision of the First Appeal, it would not be proper, just or legal to direct the Appellants to demolish the said construction and, therefore, to that extent, the stay is necessary to be granted to the execution and implementation of the impugned 'Judgment and Decree' passed by the Trial Court.

7. The question remains as to the amount of maintenance, which the Appellants should deposit in this Court.

8. As, admittedly, the Appellants are depositing Rs.10,000/- per month in this Court towards the use of the terrace, as a matter of fact, there should not be any separate order for payment of maintenance towards the construction of the room. However, considering that the said order is passed in February 2014, it would be proper that, as there is a separate room, which Appellants are enjoying, Appellants should deposit in this Court the amount of Rs.5,000/- per month in this Court from the date of the 'Decree', along with its arrears, from the date of the 'Judgment and Decree' passed by the Trial Court.

9. Needless to state that, it is an interim arrangement made by this Court, which is to operate until further orders.
10. Civil Application stands disposed off in the above terms.

[DR. SHALINI PHANSALKAR-JOSHI, J.]