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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER (St.) No. 11126 OF 2018
WITH
CIVIL APPLICATION (St.) No. 11128 OF 2018

Shethana Co-operative Housing Society ... Appellant
Vs.
Brihan Mumbai Mahanagar Palika & Ors. ... Respondents

Mr. Mayur Khandeparkar a/w Rajiv Hingu a/w Deepraj Shetye
i/b I. H. Hingu & Co., for the Appellant.

Mr. Rajiv Chavan, Sr. Counsel a/w Ms. Anupama Pawar, Ms.
Madhuri More, for the Respondent Nos. 1 and 2.

Mr. Abhijeet Joshi i/b Dhananjay Deshmukh, for Respondent
No. 3.

Ms. Annie Fernandes, for Respondent No. 4.

CORAM : V. M. DESHPANDE, J.

DATE : JUNE 25, 2018

ORAL JUDGMENT :-

1. Heard. Admit. By consent of all the parties, appeal is
taken up for final hearing. Learned respective counsel waive
notice for their respondents.

2. Present appeal is directed against the order dated

19th March, 2018 passed by the learned Judge of the City Civil Court, Mumbai, by which he dismissed Notice of Motion No. 1811 of 2017, taken out in L. C. Suit No. 1084 of 2017.

3. The facts giving rise to the present appeal, in nutshell, are as under:

4. Appellant is the original plaintiff, Respondents herein are the defendants before the trial court. It is the case of plaintiff that dilapidated tenanted building known as “Shethana House” standing on C.S. No. 1039, Girgaon, Mumbai was redeveloped by the Respondent No. 3 / original owner cum builder under D. C. Regulation 33(7) in between 2002 and 2004.

5. Respondent No. 1 in the year 2004 handed over possession to the old tenants, on ownership basis, permanent alternate accommodation in lieu of the tenanted rooms. It is also the case of plaintiff that Respondent No. 3 without the knowledge and consent of the appellant herein entered into a bogus unregistered development agreement dated 15.7.2010

with Respondent No. 4, who is a builder-cum-developer, and the Respondent No. 4 amalgamated C. S. 1039 with his adjacent plot in order to get benefit of D.C.R. 33(7) in collusion with officers of Respondent Corporation. It is also the case of the plaintiff that officers of the Respondent Corporation are out to demolish the suit boundary wall belonging to the Appellant in order to see that amalgamation takes place.

6. It is the case of the Appellant / plaintiff that on 12.8.2014 Respondent No. 5, who is an architect, unauthorisedly issued a letter to Respondent No. 2 - Assistant Engineer of the Bombay Municipal Corporation to hand over the set back area of plaintiff's land. It is further case of the plaintiff that on 18.11.2016 Respondent No. 4 and Respondent No. 2 executed a document by handing over set back land of the plaintiffs without their consent.

7. It is further case of the plaintiff / appellant that on 12.4.2017 the Assistant Engineer (Maintenance) of "D" Ward,

Respondent No. 2 herein for alleged improvement in the set back area for road widening purposes, issued a letter for demolishing the suit wall. According to the plaintiff, that gave cause of action for approaching them to the court below and they filed L.C. Suit No. 1084 of 2017 with following prayers:

- “(a) That it be declared that by this Hon'ble Court by a decree and order that the Defendant Nos. 1 & 2 cannot act on the alleged (1) Letter dated 12/08/2014 of the Defendant No. 5 and (2) writing dated 18/11/2016 executed between the Defendant No. 2 & 4 and (3) on Defendant No. 2's letter dated 12/04/2017 bearing No. ACD/49/AE(M) and / or demolish the Plaintiffs' Brick Masonry Compound Wall on C.S. No. 1039, Girgaon Division, Mumbai – 400 004 and the adjacent plot of land bearing C.S. No. 1/1041, 1041, 1042, 1034, 1035, 1036, 1037 and 1034 of Girgaon Division Mumbai 400 004 being redeveloped by the Defendant No. 4 is illegal, without any legal authority and not binding upon the plaintiffs.
- (b) That the Hon'ble Court will be pleased to permanently restrain the Defendant No. 1 & 2 and / or their servants, agents and all officers working under them from demolishing the Plaintiffs' brick Masonry Compound Wall situated on C.S. No. 1039, Girgaon Division, Mumbai 400 004 dividing the adjacent plot of land bearing C.S. No. 1/1041, 1041, 1042, 1034, 1035, 1036, 1037 & 1038 of Girgaon Division Mumbai 400 004 being re-developed by the

Defendant No. 4 pursuant to the alleged (1) Letter dated 12/08/2014 of the Defendant No. 5 and (2) writing dated 18/11/2016 executed between the Defendant No. 2 & 4 and (3) on Defendant No. 2's letter dated 12/04/2017 bearing No. ACD/49/AE (M) is illegal, without any authority and not binding upon Plaintiffs.

- (c) Interim and ad-interim reliefs in terms of prayer clause (b) be granted pending the hearing and final disposal of the suit.
- (d) Cost and professional costs of the suit be provided for.
- (e) And such other and further reliefs and such other and further order be granted as this Hon'ble Court may deem fit and proper.”

8. The plaintiffs also filed an application for injunction by taking out Notice of Motion No. 1811 of 2017.

9. Respondent Nos. 1 and 2 – Corporation filed their detailed reply to the application for injunction and objected for grant of injunction. In nutshell, their reply was that, the plaintiffs are not having any cause of action to approach the court and the proposal for amalgamation of plot, C. S. No. 1039 with C.S. No. 1/1041, 1041, 1042, 1034, 1035, 1036, 1037 &

1038 at Khetwadi back road, Girgaon Division has received approval on 6.11.2010 subject to certain terms and conditions and after amalgamation of these plots. Mr. R. R. Chaturvedi, Respondent No. 4 became owner of these amalgamated plots. Said Mr. Chaturvedi handed over the set back land in the name of MCGM for plot bearing C.S. No. 1/1041, 1041, 1042, 1034, 1035, 1036, 1037 & 1038 and 1039 of Girgaon Division Mumbai vide letter dated 18.11.2016, and the said set back land was handed over to MCGM free of charge for FSI purpose or with compensation of the land. It is also stated that by demolition of the wall or handing over plot will not fetch any additional / existing FSI.

10. Learned Judge of the trial Court after hearing the parties to the notice of motion and after appreciating the pleadings and various documents filed on record passed an impugned order. Hence, this appeal.

11. The foremost submission of the learned counsel for

the Appellant / plaintiff is that Respondent No. 5 was not having any authority to issue letter dated 12.8.2014 and document dated 18.11.2016 between the Corporation and Respondent is without consent of the appellant. He therefore, submitted that the order impugned herein is required to be set aside.

12. Per contra, learned senior counsel Mr. Rajiv Chavan took me through the reply filed by the Corporation before the trial court. He submitted that due to the acts on the part of the Appellant, the road widening scheme is stalled. He submitted that since C. S. No. 1039 at which the aforesaid plot is standing is already amalgamated, the Appellants are having no locus standi to file the suit.

13. From the pleadings, it is clear that plaintiffs took out the notice of motion seeking injunction restraining the Corporation from demolishing plaintiff's brick masonry compound wall. The learned trial court has bestowed thoughtful consideration on the various documents, which are filed before

him, which are also filed before this Court. One of the document is Agreement for Permanent Alternate Accommodation dated 28.4.2004 between Respondent No. 3 / defendant No. 3 and the tenants of old “Shethana House” building. Paragraph 20 to 25 of the said agreement is putting certain restrictions on the rights of the tenants. The said agreement is at page 61 of the record of appeal's compilation. It shows that landlord shall have every right to sell, transfer, assign or deal with the same portion of suit land, new building's car parking spaces, etc. and the same shall be the property of Respondent No. 3. That shows that tenants were not having any rights, whatsoever in that behalf. The agreement also stated that the landlord is entitled for entire FSI in respect of the property which is made available at the time of I.O.D. It is also mentioned that the landlord agreed to part 25% of the additional FSI market value amount to old tenant is “Shethana House”. The said agreement further conveys that if any additional FSI available in future before conveying this property

in favour of co-operative society, then 75% would belong to the landlords and 25% of additional FSI amount would belong to the old tenants.

14. It is to be noted that the covenant between defendant No. 3 and defendant No. 4 is not challenged in the suit. Therefore, in my view, the court below was right in holding that at the most the old tenants who are members of the plaintiff society will be entitled for market value of 25% of the alleged FSI.

15. The amalgamation has already taken place. The set back area is already handed over to the Corporation. What is challenged in the suit is, letter dated 12.8.2014 for demolition of the wall, which is the impediment for road widening process. There is no document on record to show that Appellant is in possession of the suit wall. On the contrary, page 133 of the compilation of appeal shows that possession is already taken by the MCGM (Corporation). Now, according to plaintiffs, this is

done without their consent. However, the fact remains that they had already lost possession and there is no prayer for possession in the suit. As to whether the possession was obtained without consent of the plaintiff or surreptitiously, or the development agreement is bad, sham and bogus, is a matter of trial.

16. However, there is no material to show that prima-facie case in favour of the plaintiff. The Appellant, in my view, has failed to demonstrate any prima-facie case in its favour. In my view, the balance of convenience also lies in favour of the Corporation and not in favour of the Appellant. The demolition of the wall is necessary for widening public road which is for the benefit of the public at large. However, in case Appellant succeeds finally after the trial, it can suitably be compensated in terms of money. However, the road widening project of the Corporation cannot be stalled or withheld. I see no merits in the appeal. Appeal is therefore, dismissed with no order as to costs.

17. Needless to state that all pending civil applications

filed in the appeal are disposed of.

18. At this stage, learned counsel for the Appellant urged that the interim order operating in favour of the Appellant may be continued. This submission, in my view, cannot be accepted, as this Court found that there is no prima-facie case in favour of the Appellant. If the said interim order is continued, it will be prejudice to the interest of the public at large, since due to stay, the road widening scheme is withheld. Consequently, I reject the submission made on behalf of the Appellant.

Sd/-
[V. M. DESHPANDE, J.]

Vinayak Halemath