

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

**APPEAL FROM ORDER NO.609 OF 2019
WITH
CIVIL APPLICATION NO.689 OF 2019**

The Municipal Corporation for
Greater Mumbai and Ors. ...Appellants

Versus

Lourdes Tower Co-operative Housing
Society Limited ...Respondents

.....

Mr. Ganesh Gole with Mr. R.Y.Sirsikar for the Appellant (MCGM).
Mr. Anuj Narula with Mr. Tarang Jhangiani i/by Jhangiani Narula and
Associates for Respondents.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED: 24th JUNE, 2022.

P.C.:-

1. By this appeal, the appellant-Corporation, the original defendant, has challenged the order dated 30th November, 2017 whereby the learned Judge, City Civil Court at Bombay Borivali Division, Dindoshi (Branch) has allowed the Notice of Motion No.2196 of 2015 in Long Cause Suit No.2244 of 2015 and thereby restrained the appellant-Corporation from demolishing the compound wall of the respondent-society and further from entering into or remaining upon

the suit property or in portion thereof till final decision of the suit.

2 The Respondent (hereinafter referred to as the Plaintiff) is the registered Co-operative Housing Society. One M/s. M & J. Combines, a partnership firm constructed a building named 'Lourdes Tower', in the property, which is re-numbered as CTS No.190/B of Village Valnai. The flat purchasers of the said building formed the plaintiff-Society. The land under CTS No.190/A, which is situated towards the Eastern side of the Plaintiff's property is a Recreational Ground, which was handed over to the Defendant-Corporation by the builder of the plaintiff's society. Plaintiff claims that prior to the development of the Suit Property, the original owner had permitted the Appellant-Corporation to allow the public to pass through the Survey No.190/B (hereinafter referred to as the 'Suit Property') to go to the said Recreational Ground, temporarily for period of one or two years. The Plaintiff claims that the builder had closed the temporary access sometime in the year 2000-2001 with iron fencing.

3. It is the case of the Plaintiff that some people used to illegally and unauthorisedly pass through the Plaintiff-Society to go the recreational ground. Over a period of time the recreational ground was

used by anti-social elements for illegal activities. Hence, the Plaintiff constructed a compound wall to prevent unauthorised entry of the public in the Plaintiff-Society.

4. The grievance of the plaintiff is that on 6th July, 2019, some unknown persons, who claimed to be the residents of nearby slum area, trespassed into the plaintiff's property. They were claiming access to the recreational ground through the Plaintiff's property. While the Plaintiff resisted the attempts of trespass, it received a letter from the Defendant No.2 to show cause why action should not be taken against it for obstructing the access. There was series of correspondence between the Plaintiff and the Corporation. The Plaintiff alleges that the Corporation has threatened to demolish the compound wall and provide access to the recreational ground through their property. Apprehending that the defendant may demolish the compound wall or a portion thereof, the Plaintiff filed a suit for declaration and perpetual injunction with Notice of Motion for interim relief seeking to restrain the defendant from demolishing the compound wall, entering into the Suit Property or using any portion of the suit property as an access or right of way from the D.P.Road to the Recreational Ground.

5. The Defendant-Corporation claims that by Agreement dated 17th June, 1994 the original owner, Mrs. Mina Jitendra Shah had permitted the Corporation to use temporary right of way of 12 meters width to the Recreational Ground, till the recreational ground gets direct access from the Municipal Road i.e. 60' wide D.P. Road through their properties under C.T.S.No.190-A. It is alleged that the said access from Survey No.190-B is used by the public since 1994. It is alleged that sometime in the year 2013 the Plaintiff blocked the only access leading to the recreational ground.

6. Learned Judge upon considering the material on record, recorded a finding that the Respondent-Corporation does not have right of way through the Suit Property. Learned Judge also observed that the Recreational Ground has its own access towards the Northern side of the suit property. The Defendant-Corporation is trying to demolish the compound wall of the plaintiff-society since the said access is blocked by some builders. Based on these findings, the learned Judge allowed the Notice of Motion and restrained the Defendant -Corporation from demolishing the compound and or entering in the suit property. Being aggrieved by this order, the Defendant-Corporation has filed this Appeal.

7. Mr. Gole, learned counsel for Defendant-Corporation submits that the Agreement dated 17th June, 1994, prima-facie, proves that the original owner had granted temporary right of way to the Defendant-Corporation from D.P.Road to Recreational Ground. He submits that the Corporation as well as public in general have right to use the said access, which has been blocked by the Plaintiff by constructing the compound wall.

8. Per contra, Mr. Narula, learned counsel for the Plaintiff, submits that defendant has failed to prove existence of any access through the Suit Property under CTS No.190-B. He submits that the said building was constructed in the year 2000. Development Plan does not show any access from the Suit Property to the Recreational Ground. He further submits that Occupation Certificate dated 6th January, 2000 and building completion plan of the Suit Property given by the Corporation also does not show any access through the Suit Property. On the contrary, letter dated 27th February, 2013 indicates that the Suit Property was enclosed by compound wall. He submits that the Defendant-Corporation having allowed the builder to encroach upon road/access leading to the Recreational Ground is now trying to

provide an access through the Plaintiff's property. He submits that the impugned order is well reasoned and does not warrant interference.

9. I have perused records and considered the submissions advanced by learned counsel for the respective parties. The short point falling for consideration is whether, the Corporation has been able to show existence of access through the Suit Property leading from D.P.Road to Recreational Ground towards the Eastern side of the Suit Property.

10. It is not in dispute that the property was originally owned by Smt. Meena Shah and others. The original owner had by an agreement dated 25th April, 2000 granted to the Corporation temporary right of way of 12' width, till the time direct access was provided to the Recreational Ground from the D.P. Road. The Plaintiff has specifically averred that this temporary access was provided only for about two years. Upon construction of the building in the year 2000, the suit property was enclosed by a compound wall. The Development Plan along with the Completion Certificate do not show existence of any access through the Suit Property. Furthermore, letter dated 27th February, 2013 reveals that Corporation had undertaken

construction of RCC Box drain/nalla from CGPG ground upto Valnai Nalla to prevent flooding in Orlem and Valnai areas during monsoon. By the said letter, the Corporation had requested the Plaintiff to allow them to carry out construction of RCC Box drain and had assured the Plaintiff, that damage, if any caused to the existing pavement, compound wall, while constructing the Box drain would be repaired/re-constructed by the Corporation. This letter, prima-facie, reveals that compound wall was existing in the year 2013.

11. The suit property is owned by the Plaintiff. The erstwhile owner had permitted the Defendant to use the access through the suit property temporarily for a period of two years. Hence, prima facie the Defendant-Corporation cannot claim right of way through the suit property on the basis of such temporary and permissive user. It is on record that the access to the Recreational Ground is towards the Northern side of the Suit Property. It is stated that the said access has been blocked. Instead of removing the encroachment or obstruction on the access, the the Corporation is seeking access through a private Property. Learned Judge has considered all these aspects and has rightly allowed the application. The impugned order is not arbitrary, perverse and does not warrant any interference. In the circumstances,

Appeal is dismissed.

12. Pending Civil Application (s), if any stand (s) disposed of in view of dismissal of the appeal.

(SMT. ANUJA PRABHUDESSAI, J.)