

Santosh

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**INTERIM APPLICATION NO. 767 OF 2019
IN
SUIT NO. 1930 OF 2009**

SANTOSH
SUBHASH
KULKARNI

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Greenlawns School & anr. ...Applicants
In the matter between
Shivangi Poddar Bansal ...Plaintiff
Versus
1(A) Mohanlal Jhuria & ors. ...Respondents

Mr. Filji Frederick, a/w Vinay Kumar, i/b FF & Asso., for the
Applicant.

Mr. Cherag Balsara, a/w D. V. Deokar, Sachin Pandey,
Jaylaxmi Guad, i/b M/s. Parimal K.Shroff & Co., for
the Applicants/Defendant nos.6 and 7.

Mr. K. Mody, for Defendant no.2.

Mr. Praveen Shetty, i/b Res Legal, for Defendant nos.3 to 5.

Ms. Shreya Shah, i/b P. G. Lad, for MAHADA.

CORAM: N. J. JAMADAR, J.

DATED : 12th DECEMBER, 2022

PC:-

1. Heard the learned Counsel for the parties.
2. Defendant nos.6 and 7 have preferred this application seeking directions to the plaintiff and defendant nos.1(a) to 1(d), 2 to 5 and 8 and 9 to contribute Rs.39,40,785/- towards the cost of the repairs of the proportionate area in the occupation and possession of the plaintiffs and abovenumbered defendants.

3. The applicants – defendant nos.6 and 7 had preferred Notice of Motion No.1167 of 2016 seeking directions for the repairs of the premises known as ‘Poddar Bungalow’ situated at 6, Worli Sea Face, Mumbai 400 030. Defendant nos.6 and 7 run a school in a portion of the said premises. As a concern about the safety of the students studying in the said school arose, defendant nos.6 and 7 were constrained to take out the Notice of Motion seeking structural repairs and enhanced safety measures and contribution from the plaintiffs and abovenumbered defendants for the cost which were to be incurred, proportionate to the area in the occupation of the plaintiff and the defendants.

4. By an order dated 22nd April, 2016 M/s. Shetgiri and Associates, Architects, Engineers, Interior Designers, P.M.C. Valuers, (“M/s. Shetgiri and Associates”) were appointed to inspect the said premise and submit a report as regards the structural condition of the said premises and estimated cost of the repairs. It seems that M/s Shetgiri and Associates inspected the premises and submitted Technical Report on the structural distress of the said premises and the nature of the repairs and restoration work required to be carried out. It was

mentioned that the total block estimated cost towards repairs and restoration works would be to the tune of Rs.48,00,000/-.

5. On 2nd May, 2016, when the Notice of Motion was listed before the Court, the parties tendered Minutes of Order and the Notice of Motion came to be disposed in terms of the Minutes of Order (X).

6. The Minutes of Order, *inter alia*, provided for;

“1) By consent of the parties M/s. Shetgiri & Associates are appointed Architects for supervision of the necessary repair work of the suit property required to be carried out for the safety of the school going children and the occupants of the suit property by the Contractor to the appointed for the same by the Architects in consultation with parties. Architects to measure exact area in occupations of parties.

2) Parties agree and undertake that they will pay the amount required to be paid to the said Architect/Contractor in proportion to the area occupied by them for the purpose mentioned in Clause 1 above.

3) Parties agree that the contractor to carry out structural repairs and all the necessary repairs for water leakage in the premises of the suit property.

.....

6) Agreed that this arrangement is without prejudice to the rights and contentions of the parties.

7) Agreed that parties will not claim any equity for the payment to be made by it to the Architect/Contractor for the repairs of the suit property.”

7. By a further order dated 29th July, 2016 in Notice of Motion (L) No.2165 of 2016, the Court directed that the necessary structural repairs and renovation work be carried out. The Court recorded the statements made on behalf of the parties as under:

“1. The learned Advocate for Defendant Nos.1 & 2 states on instructions that the contractor shall be allowed to carry

out structural repairs and all the necessary repairs for water leakage in the premises of the suit property, as agreed by the parties in paragraph No.3 of the Consent Terms and his clients shall also abide by paragraph No.2 of the Consent Terms, wherein he alongwith the parties have agreed to pay the amount required to paid to the said Architect, contractor in proportion to the area occupies by them and the purpose mentioned in paragraph No.1 of the Consent Terms. The statements/undertakings are accepted.”

8. It transpired that subsequently there was enhancement in the estimated cost of the repairs. In the second estimate, the Architect indicated the estimated cost at Rs.99,91,363/-. On 16th August, 2017, a further order was passed by this Court. The parties were directed to deposit an aggregate amount of Rs.48,00,000/- in proportion to the area occupied by them with M/s. Shetgiri and Associates. The parties were directed not to obstruct the work being carried out by M/s. Shetgiri and Associates.

9. As the controversy revolves around the liability to make contribution beyond the sum of Rs.48,00,000/-, it may be necessary to extract the order dated 16th August, 2017, which reads as under:

“1. The parties shall deposit an aggregate sum of Rs.48 Lakhs in proportion to the area occupied by them. The requisite share of the parties shall be deposited with M/s. Shetgiri on or before 28th August, 2017. Any amount exceeding Rs.48 Lakhs shall be paid by Defendant Nos.6 and 7. Mr. Amol Shetgiri shall not start the work until the amount of Rs.48 Lakhs is deposited. None of the parties shall obstruct the work being carried out by Mr. Shetgiri. In case they have any grievance/s they shall approach this Court.”

(emphasis supplied)

10. Eventually, the repairs and renovation work were carried out and the total expenses incurred towards the repairs and renovation were to the tune of Rs.1,66,65,788.00 plus GST Rs.29,99,841/-. The applicants assert that the liability of the plaintiff and the rest of the defendants to contribute the cost of repairs and renovation was not restricted to the initially estimated cost of Rs.48,00,000/-. It was agreed by and between the parties that they would bear the expenses of repairs in proportion to the area occupied by them. Therefore, defendant nos.6 and 7, who have made an excess payment of Rs.10,83,972/- are required to be reimbursed of the said amount and the plaintiff and rest of the defendants, who have not contributed the sum of Rs.39,40,786/-, are liable to pay the said amount in proportion to the area in their occupation.

11. Affidavits-in-reply are filed on behalf of defendant nos.2 and 9.

12. Defendant nos.2 and 9 have resisted the application contending that in terms of the order dated 16th August, 2017 any amount in excess of Rs.48,00,000/- was to be paid by defendant nos.6 and 7 only. At no point of time defendant nos.6 and 7 approached the Court with a claim that it was entitled to be reimbursed of the amount in excess of the proportionate

liability. It is, therefore, not open for defendant nos.6 and 7 to now claim the amount from the plaintiff and the rest of the defendants.

13. I have heard Mr. Balsara, the learned Counsel for the applicants/defendant nos.6 and 7 and Mr. Frederick, the learned Counsel for the plaintiff, Mr. Mody, the learned Counsel for defendant no.2 and Mr. Shetty, the learned Counsel for defendant nos.3 to 5, at some length.

14. Perused the Minutes of Order dated 2nd May, 2016 and the order dated 16th August, 2017.

15. Mr. Balsara, the learned Counsel for the applicants, invited the attention of the Court to Clause (2) of the Minutes of Order, whereunder and whereby the parties agreed that they would pay the amount required to be paid to M/s. Shetgiri and Associates for carrying out the repairs and renovation proportionate to the area occupied by them for the purpose mentioned in Clause (1) thereof. According to Mr. Balsara, the aforesaid clause bound the parties to contribute to the expenses in proportion to the area in their occupation.

16. In contrast to this, the learned Counsel for defendant no.2 invited the attention of the Court to the order dated 16th August, 2017, wherein it was provided that any amount

exceeding Rs.48,00,000/- shall be paid by defendant nos.6 and 7. The learned Counsel for defendant no.2 further submitted that in Appeal (L) No.327 of 2017 preferred by defendant no.2, the Appellate Court in terms recorded that the financial liability of the appellant was restricted only in respect of the payment of Rs.48,00,000/- on a pro-rata basis, and, on that count also the appeal came to be dismissed.

17. The liability of the parties to make contribution to the cost of repairs and renovation is required to be appreciated in the backdrop of the attendant circumstances. The applicants – defendant nos.6 and 7 approached the Court seeking directions for repairs and contribution as there was a concern about the safety of the children studying in the school. Initially M/s. Shetgiri and Associates were appointed to inspect the premises and submit a report about the structural stability, nature of repairs required to be carried out and the estimated cost thereof. The first estimate was to the tune of Rs.48,00,000/-. It appears that on the strength of the said report, the parties entered into the Minutes of Order. It does not seem that the parties had agreed that the liability of the parties to contribute to the repairs would be unlimited, in the sense that, if the cost of repairs increased multi-fold the parties would be liable to

contribute in proportion to the area in their occupation. In fact, the order dated 16th August, 2017 makes the position abundantly clear.

18. There is not much controversy over the fact that when the said order was passed, the Architect had already submitted a second estimate to the tune of Rs.99,91,363/-. The Court, considering the said position, directed the parties to deposit the aggregate sum of Rs.48,00,000/- in proportion to the area occupied by them. Being cognizant of the possibility of the expenses of repairs, exceeding the estimated cost, the Court directed that any amount exceeding Rs.48,00,000/- would be paid by defendant nos.6 and 7. Thus, at this stage, it would be impermissible to urge that the said direction was by way of a pro-term arrangement.

19. Mr. Balsara, the learned Counsel for the applicants, attempted to salvage the position by canvassing a submission that the order dated 16th August, 2017 can at best be construed as a direction for payment of the amount in excess of Rs.48,00,000/- qua the second estimate to the tune of Rs.99,91,363/-. However, since the total expenses were to the tune of Rs.1,96,65,630/-, the applicants – defendant nos.6 and

7 cannot be precluded from claiming the contribution for the amount exceeding the sum of Rs.99,91,363/-.

20. I am afraid to accede to aforesaid submission. The order dated 16th August, 2017, in a sense, freezes the liability of the rest of the parties to contribute in the aggregate sum of Rs.48,00,000/- only in proportion to the area in their possession. In the circumstances, the application does not merit acceptance.

21. Hence, the application stands rejected.

22. Suit be listed for direction on 30th January, 2023.

23. To be listed along with Suit/3433/1997 alongwith IA/2505/2021, IA/2495/2021, IA/2486/2021, IA/3313/2021 and IA/3433/1997, Suit/4720/1998 alongwith IA/705/2021 and IA/2493/2021, Suit/3933/1998 alongwith IA/555/2021, Suit/1564/2018 alongwith IA/475/2021, Suit/1930/2009 alongwith IA/476/2021, Suit/3099/1999 and Suit/5336/1999.

[N. J. JAMADAR, J.]