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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
INTERIM APPLICATION NO.329 OF 2023
IN
FIRST APPEAL NO.1117 OF 2018**

Sushma A Gupta & Anr.

...Appellants

Versus

Minal CHS Ltd.

...Respondents

Mr. Uzair Z. Kazi, i/b. YMK Legal for the Appellants.

Mr. C.M. Lokesh, for the Applicant.

Mr. Mayur Khandeparkar with Mr. Rashmin Khandekar and Karishni Khanna i/b Mr. Bishwajeet Mukherjee and Ms. Humera Syed for Respondent No.1.

Mr. Rajiv Chavan with Priyanka Chavan and Sweta Ghose i/b. Santosh Parad for MCGM.

CORAM : R.I. CHAGLA J.

DATE : 31 January 2023.

ORDER :

1. By this Interim Application, the Applicant No.1 / Original Defendant No.6 and Applicant No.2 have sought recall of the order dated 21st December, 2022 passed in the Interim Application (L) No.30446 of 2022 in First Appeal No.1117 of 2018 and to pass modified order in this Interim Application.

2. Having considered the submissions of the parties and in particular taking note that in the order dated 21st December, 2022, it was clarified in Paragraph 11, that there had been submissions on the merits of the impugned judgment and order which is not required to be go into. It is further relevant to note and had been noted in the said order that the observation of the City Civil Court in the impugned judgment and order was that the Defendant Nos.4 to 7 had failed to prove that the notional connection between Plaintiff – building was made as per approved / sanctioned plan. This observation was also with regard to shifting of the BSES Sub-Station, requiring the necessary permission of the concerned authority.

3. The sole purpose of filing the Interim Application (L) No.30446 of 2022 by the Respondent No.1 Society and which was under consideration in the order dated 21st December, 2022 was to seek clarification / modification with regard to the status quo order passed by this Court which was coming in the way of compliance with the notice issued by the MCGM under Section 354 of the MMC Act dated 12th January, 2022. The said notice had considered the subject structure of the Respondent No.1 society to be in a ruinous and in dilapidated condition and likely to cause damage to the life

and property of the persons occupying and residing or passing by the same. The modification sought by the Respondent No.1 Society of the status quo order dated 22nd March, 2018 passed by this Court was for excluding the applicability of the status quo order to the notional connection which was required to be pulled down for the Applicant – Society to comply with the Notice of the MCGM dated 12th January, 2022.

4. Accordingly, the order dated 21st December, 2022 was passed clarifying that the status quo order dated 22nd March, 2018 passed by this Court shall exclude status quo to be maintained in respect of the notional connection between the subject structure belonging to the original Respondent No.1 Society and the building of the Appellants. It was clarified that the Respondent No.1 Society by demolishing the subject structure in compliance with the notice issued by the Mumbai Municipal Corporation (“MMC”) on 12th January, 2022 under Section 354 of the MMC Act will not be in breach of the status quo order in the event the notional connection between the subject structure and building of the Respondents is pulled down. It was further clarified in the paragraph 13(iii) of the operative part that the said order is without prejudice to the rights

and contentions of the original Appellants, including that they have a legal right to the land appurtenant to the said notional connection between subject structure and building of the Appellants as well as their contention that the construction is beyond FSI of 6550 Sq.ft is authorized.

5. The said order dated 21st December, 2022 has thereafter been acted upon and the Respondent No.1-Society has demolished the subject structure in compliance with the notice issued by the MCGM dated 12th January, 2022 under Section 354 of the MMC Act.

6. Mr. Kazi, the learned Counsel appearing for the Appellants / Applicants in the present Interim Application has submitted that the learned Senior Counsel for MCGM had erroneously placed reliance upon the impugned judgment and order dated 19th January, 2018, wherein it has been held that Defendant Nos.4 to 7 did not produce any documentary evidence on record to prove their pleadings that they have shifted BSES Sub-Station with the necessary permission of concerned authority as well as to prove that notional connection between the Appellants building and the Respondent No.1 Society building is made as per approved / sanctioned plan. He has submitted that the view expressed by the

City Civil Court in the impugned judgment and order that there was earlier such notional connection is not sufficient to hold that the notional connection constructed by the original Defendant Nos.4 to 7 is legal is erroneous and requires to be tested in the First Appeal.

7. There is an Affidavit in Reply filed by the Respondent No.12 MCGM dated 27th January, 2023 which is as per the directions of this Court by the said order dated 16th January, 2023 which had directed the MCGM to clarify as to whether the said notional connection was approved by the MCGM as well as the fact of the notional connection being in existence prior to 1984. It is not necessary to go into the averments in the Affidavit in Reply as the rights and contentions of the parties including the Appellants have been expressly kept open to be considered at the hearing of the First Appeal.

8. In my considered view, the learned Senior Counsel for MCGM was merely referring to the aforementioned observation of the City Civil Court in the impugned judgment and order. The present Affidavit in Reply filed by the MCGM shall be taken into consideration at the hearing of the First Appeal.

9. There are submissions made by Mr. Kazi as to the notional connection being sanctioned by the MCGM and the MCGM have issued prior notice dated 2nd July, 2022 mentioning that the notional connection between the building under reference and Minal CHS Ltd. shall be done before asking for occupation certificate. Further, the notice issued on 28th March, 2003 by MCGM wherein the plan submitted by the Architect included the notional connection and it is further mentioned that the notional connection had been constructed as per the approved plans as the same was in existence prior to 1984.

10. These submissions of the learned Counsel for the Appellants / Applicants have been recorded in the order dated 16th January, 2023 as well as notice taken of documents relied upon. These documents can be considered by this Court at the hearing of the First Appeal.

11. In my view the present Interim Application is misconceived considering that it seeks to recall the order dated 21st December, 2022 in Interim Application (L) No.30446 of 2022 in First Appeal No.1117 of 2018 when the order has infact kept the rights and contentions of the Appellants in the First Appeal expressly open

including the contentions on the legal rights of the Appellants / Applicants to the land appurtenant to the notional connection as well as to their contention that the construction beyond FSI of 6550 Sq.ft. is authorized.

12. In view thereof, the relief sought for in the Interim Application is not granted. Interim Application is accordingly disposed of.

[R.I. CHAGLA J.]