

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

**APPEAL FROM ORDER NO.176 OF 2023
WITH
INTERIM APPLICATION NO.2207 OF 2023**

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Arvind B. Dhakan and Others ...Appellants
vs.
The Municipal Corporation of Greater Mumbai ...Respondent
Mr. Pradeep Thorat i/b. Mr. Ashutosh Shukla, for the Appellants
Ms. Smita Tondwalkar, for the Respondent-MCGM.

CORAM : N. J. JAMADAR, J.
DATE : JULY 12, 2023

P.C.:

1. Heard the learned counsel for the parties.
2. This appeal is directed against an order dated 28th February, 2023 passed in Notice of Motion No. 1021 of 2017 in L.C. Suit No. 812 of 2017 whereby the learned Judge, City Civil Court, Borivali Division, Dindoshi, Mumbai was persuaded to reject the Notice of Motion taken out by the plaintiff seeking to restrain the respondent/ defendant from acting upon and enforcing the notice issued by the respondent under section 351 of the Mumbai Municipal Corporation Act, 1888 in respect of the premises situated at Survey No. 63, CTS No. 275, Mistry Chawl, Near Subway, Dattapada, Borivali (East), Mumbai (the suit structure).

3. In the impugned notice, the unauthorized structure is described as a first floor with loft, ladicoba, BM wall and AC Sheet roof admeasuring 30' x 10' x 7.6' (avg. ht.) over the existing ground floor structure.

4. From the perusal of the impugned order, it becomes evident that the learned Judge, City Civil Court was of the view that the sanction plan issued in the year 1974, indicates that there was ground plus mezzanine structure. However, the impugned notice was in respect of the first floor structure. In any event, the documents placed on record by the plaintiff, do not indicate that the notice structure has been in existence since prior to 1964.

5. When this appeal was listed before this Court on 29th March, 2023 this Court was persuaded to grant ad-interim relief noticing that prima facie there was material to indicate that the suit structure with comparable height has been in existence since 1974.

6. Mr. Thorat, learned counsel for the appellant invited the attention of the Court to the sanction plan issued in the year 1974. It indicates that permission was granted to carry out the construction of mezzanine floor having height of 7.8 ft. The said

permission was granted as some area was acquired in road widening, as a set back benefit.

7. Ms. Tondwalkar, however, urged that the notice structure is a proper first floor and not mezzanine floor as is sought to be projected on behalf of the plaintiff. The area of the said structure exceeds the norms of mezzanine floor and there is an access to the said first floor from outside, which is not permissible for a mezzanine floor.

8. All these issues warrant adjudication. There is positive material to indicate that in the year 1974, the respondent-Corporation has granted permission to construct the mezzanine floor. The height of the said floor is comparable with height of the notice structure. The mere fact that the notice structure has been described as first floor does not change the character of the notice structure. A strong prima facie case indicating the erection of the notice structure with prior permission of the respondent-Corporation has been made out.

9. In the aforesaid view of the matter, the plaintiff could not have been non-suited especially after granting ad-interim relief in

the year 2017 as there is, prima facie, express and specific permission in respect of the notice structure. The balance of convenience tilts in favour of the plaintiff. Evidently, the plaintiff would suffer irreparable loss if the execution and implementation of the impugned notice is not stayed.

10. For the foregoing reasons, the appeal deserves to be allowed.
Hence, the following order.

ORDER

- 1] The appeal stands allowed.
- 2] The impugned order stands quashed and set aside.
- 3] Notice of Motion No. 1021 of 2017 is made absolute in terms of prayer clause (a).
- 4] In view of the disposal of the appeal, the Interim Application stands disposed.
- 5] The learned Judge, City Civil Court, Borivali Division, Mumbai is requested to make an endeavour to decide the suit as expeditiously as possible.
- 6] No costs.

(N. J. JAMADAR, J.)