

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.500 OF 2022
WITH
INTERIM APPLICATION NO.3159 OF 2022
IN
APPEAL FROM ORDER NO.500 OF 2022

- 1 MOHD. SIDDIK SHAIKH
Aged 72 years, Occ. Retired
having his residence at Room No.702,
7th Floor, Uttam Terrace Building,
132, Zakaria Masjid Street,
Chinchbunder, Pydhonie,
Mumbai – 400 009

- 2 HUSSAIN AHMED KHAN
Aged 72 years, Occ. Retired
having his residence at Room No.601-602
& 707 at 6th & 7th Floor,
Uttam Terrace Building,
132, Zakaria Masjid Street,
Chinchbunder, Pydhonie,
Mumbai – 400 009

....APPELLANTS

VS

- 1 MUNICIPAL CORPORATION OF
GREATER MUMBAI
a body corporate constituted
under the Mumbai Municipal
Act, 1888 having its office at
Mahapalika Marg,
Opp. CSMT Station,
Fort, Mumbai – 400 001.

2 THE EXECUTIVE ENGINEER
(Designated Officer),
B & F Department, B-Ward,
BMC Office Building,
121, Ramchandra Bhatt Marg,
Opp. J.J. Hospital,
Mumbai 400 009

....RESPONDENTS

...

Mr. Sandesh D. Patil i/b Mr. Sandeep S. Sharma for the Appellants/
Applicants.

Mr. Yashodeep Deshmukh a/w Ms. Smita Tondwalkar for Respondents-
MCGM.

Mr. Y.M. Marathe, Assistant Engineer (B&F), 'B' Ward present in Court.

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CORAM	:	SANDEEP V. MARNE, J.
RESERVED ON	:	SEPTEMBER 12, 2023.
PRONOUNCED	:	SEPTEMBER 20, 2023.

JUDGMENT:

1 By this Appeal, Appellants/Plaintiffs challenge order dated 6 May 2022 passed by City Civil Court rejecting grant of ad-interim relief in Notice of Motion filed for seeking temporary injunction to restrain Respondent-Municipal Corporation from demolishing the suit structure in pursuance of Notice dated 21 October 2020.

2 Plaintiffs have instituted L.C. Suit (Stamp)No.5110 of 2022 in City Civil Court challenging the Notice issued by Respondent-Municipal Corporation for Greater Mumbai on 21 October 2020 under the

provisions of section 354-A of the Mumbai Municipal Corporation Act, 1888 (**the Act of 1888**). It is Appellant/Plaintiffs' case in the suit that Plaintiff No.1 has been in use and occupation of Room No.702, situated at 7th floor of the building Uttam Terrace, situated at 132, Zakaria Masjid Street, Chinchbunder, Pydhonie, Mumbai- 400 009. That Plaintiff No.2 has been in use and occupation of Room No.705, situated at 7th floor plus attic floor in the same building Uttam Terrace. It is further stated that prior to August 1996, one Mr. Umar Khan was in use and occupation of Room Nos.601 and 602 on 6th floor and by Agreement dated 5 August 1996, said Umar Khan transferred his right, title and interest in respect of Room Nos.601 and 602 in favour of Plaintiff No.2. This is how Plaintiff No. 2 claims to be in use and occupation of Room Nos.601 and 602 on 6th floor and Room no. 705 on 7th and attic floor at Uttam Terrace building. The premises in occupation of Plaintiffs is together described as suit premises.

3 Appellants/Plaintiffs have relied upon several documents in support of their contentions that the suit premises are in existence prior to the datum line and are thus tolerable structures. That in pursuance of Notice issued by the Municipal Corporation declaring the building as dilapidated, repair works of the building were carried out at the behest and under the directions of Mumbai Building Repairs and Reconstruction Board (**MBRRB**). That despite the suit premises being authorized, the Municipal Corporation issued notice under section 354-A of the Act of 1888 on 21 October 2020 alleging unauthorised construction of the

building using RSJ Section, Ladi Coba slab and Brick Masonry walls. Plaintiffs have therefore instituted L.C. Suit (Stamp) No.5110 of 2022 challenging the said Notice. Since the City Civil Court has refused to grant any ad-interim protection to Plaintiffs, they have filed the present Appeal challenging City Civil Court's order dated 6 May 2022.

4 Mr. Patil would appear on behalf of Appellants/Plaintiffs and contend that the Notice issued by the Municipal Corporation is absolutely vague. That the construction at the building at Uttam Terrace upto 7th floor is undoubtedly authorized. He would place reliance on a plan approved by the Municipal Corporation on 10 October 1960 in support of his contention that construction upto 7th floor plus attic floor has been in existence since the year 1960. Mr. Patil would further rely upon Notice issued by the Municipal Corporation under section 351 of the Act of 1888 on 9 May 1994 and would submit that the said Notice alleged unauthorized construction on 6th floor, but upon submission of reply, the Municipal Corporation held the structures bearing Room Nos.61 and 62 on 6th floor is tolerable and dropped the notice dated 9 May 1994. He would submit that said Room Nos.61 and 62 have been renumbered as 601 and 602 and that the structure on 7th floor is an attic to the structure on the 6th floor and that therefore the structures of both Plaintiffs are already treated as tolerable structures. That the impugned Notice is issued without considering the said documents. He would submit that Plaintiffs had relied upon the Notice dated 9 May 1994 and order dated 12 July 1994 in response to the impugned Notice. But the Respondent-

Municipal Corporation has erroneously ignored the said documents by giving vague reason of file not being traceable. He would further submit that since there are *prima facie* documents to show tolerable nature of structure on 6th and 7th floor, City Civil Court ought to have granted *ad interim* protection to Plaintiffs till decision of the suit. He would rely upon Order dated 6 April 2022 passed by this Court in ***Abdul Qadar Abdul Shakoor vs. the Municipal Corporation of Greater Mumbai*** in Appeal from Order No.305 of 2022. Lastly, Mr. Patil would contend that since *ad-interim* relief has been operational in the present Petition since 10 May 2022, the same is required to be continued by directing the City Civil Court to decide the Notice of Motion finally.

5 *Per contra*, Mr. Deshmukh, the learned Counsel appearing for Respondent-Municipal Corporation would oppose the Petition. He would submit that the residents of the building have unauthorisedly constructed several floors without any permission. That the Respondent-Municipal Corporation has repeatedly taken demolition drive and immediately after the construction is demolished, the residents reconstruct the premises. He would take me through the reports of various demolition drives, under which structures from 6th floor onwards have been demolished by the Respondent-Municipal Corporation. That the said structures have been reconstructed and would invite my attention to photographs taken on 18 July 2023 to show that the unauthorised construction has been re-erected at the site. He would submit that even if it is assumed that the structures upto 5th floor are

authorized, the structures between 6th to 10th floor are undoubtedly unauthorized and deserves to be demolished immediately. He would submit that there is a tendency in the locality to add floors to the existing cessed structures by taking disadvantage of existence of cessed structures prior to datum line. He would submit that the documents in the form of Intimation of Disapproval, plan, Commencement Certificate relied upon by Plaintiffs do not indicate authorized nature of the suit structures. He would dispute genuineness of plan dated 10 October 1960 sought to be relied upon by Plaintiffs. Lastly, he would submit that even if any irregularity is found in the procedure followed by Municipal Corporation, the same would not create any right in favour of person putting up unauthorized construction and in this regard, would rely upon judgment of the Apex Court in ***Municipal Corporation of Greater Mumbai and Others vs. M/s Sunbeam High Tech Developers Private Ltd., (2019) 20 SCC 781.***

6 Rival contentions of the parties now fall for my consideration.

7 Appellants/Plaintiffs have setup a challenge to Notice dated 21 October 2020 issued by the Municipal Corporation under provisions of section 354-A of the Act of 1888. Since the notice is issued under Section 354-A of the Act, the same is in respect of work which had been unlawfully commenced or was being unlawfully carried out. In the Notice description of work is as under:

"1. Schedule (Description of work)

Unauthorised reconstruction of Building by using RSJ section, Ladi Cota slab and brick masonry wall without permission from competent authority."

8 Alongwith the Notice, a sketch is given which indicates only the location of the building. Thus, perusal of the notice creates an impression as if a new building was being constructed at the site as on 21 October 2020. From various documents, placed on record, *prima facie* it appears that the building Uttam Terrace at Zakaria Masjid Street has been in existence prior to the datum line. It appears that the building has been repaired at the instance of the Board/MHADA as the same has been classified as Cessed building. Therefore, I proceed on a presumption (which shall not be treated as a finding) that the structure upto 5th floor could be authorized.

9. The Suit Structures are however located on 6th and 7th floors. It is the case of MCGM that while carrying out repairs to the building at the behest of the Board, five more floors are added to the building from 6th to 10th floor by taking advantage of existence of the original structure upto 5th floor as a cessed and protected structure. In the light of this position, it is for Plaintiffs to prove that the suit structures located on 6th and 7th floors are authorized.

10 Plaintiffs have placed heavy reliance on the Notice dated 9 May 1994 issued under the provisions of section 351 of the Act of 1888

and letter dated 12 July 1994 allegedly issued by the Municipal Corporation. The Municipal Corporation has taken a stand that files relating to the said Notice and letter are not traceable. Authenticity of those documents need to be established. The said documents pertaining to the year 1994 even otherwise cannot establish that 6th floor was in existence prior to the datum line. Also, the plan prepared for repairs of the building by the Board shows only 5 floors. If 6th and 7th floors were indeed in existence, even from 1994, why Plaintiffs did not object to repairs being sanctioned only upto 5 floors is not answered. *Prima facie* therefore it appears that construction beyond 5th floor of the building is totally unauthorized. Even from Order of this Court in ***Abdul Qadar Abdul Shakoore*** (supra) relied upon by Plaintiffs, it clearly appears that the structure could be authorised only upto 5 floors. This Court held in paras 5, 6, 7 and 8 as under:

"5 The learned counsel for the appellant would submit that there is no clarity in the notice that is issued on 21st October 2020 since the schedule of the said notice makes a reference to unauthorized reconstruction of building.

6 The counsel for the appellant would submit that the building in which the appellant is located is declared as a Cess building and MHADA was permitted to carry out repairs to the said building through Mumbai Building Repairs & Reconstruction Board (M.B.R.&R). Pursuant to the same, work order was issued to a private party to carry out the necessary repairs. In the meantime, a speaking order was issued on 15 March 2022 to the owner/occupier of 132, Zakaria Masjid Street, Mumbai. where the Executive Engineer (Designated Officer, Building and Factory Department, B Ward) would clarify, the notice by stating that after going through the work order and repair plan of the Executive Engineer, M.B.R.&R, it may be concluded that construction above 5th floor is unauthorized. It is further clarified that the notice is about the construction above 5th floor and this construction is sought to be removed, within a period of seven days, in absence of which, an action under Section 354 is contemplated.

7 *Learned counsel for the Corporation Mr.Vyas has invited my attention to the plan prepared by MHADA for preparing estimate for structural repairs only, as per the existing building at site and this refers to ground + five floors. Whatever repairs, therefore, to be carried out, are within the permissible limits of ground + five floors, in form of repairs to the building. Relying upon the said document, it is submitted that the speaking order, therefore, clarified that the construction above those floors is unauthorized.*

8 *This resolves the dispute, as far as the appellant is concerned, since he is located on 2nd floor of the building and the unauthorized portion covered by the notice is beyond 5th floor of the building. Learned counsel Mr.Vyas, on instructions of Mr.V. P. Sakharkar, Sub-Engineer, Building, B Ward, who is present in Court, makes a specific statement that Room No.5/B situated on the second floor of the building is not covered within the scope/schedule of the notice dated 21st October 2020."*

11 It is thus held in ***Abdul Qadar Abdul Shakoore*** that the structure upto 5th floor is authorized and since Appellant therein is located on 2nd floor, this court granted protection in his favour. Therefore, reliance of Appellants on Order in ***Abdul Qadar Abdul Shakoore***, far from assisting Appellants' case, actually would militate against them.

12 Various demolition reports placed on record by Municipal Corporation would indicate that the construction put-up from 6th floor onwards has repeatedly been demolished by the Municipal Corporation. The demolition reports dated 24 May 2021, 25 May 2021, 31 May 2021 and 30 June 2021 as well as photographs attached thereto would show that the 6th floor was being added to the building by way of fresh construction and the Municipal Corporation carried out demolition action on those days. It is therefore difficult to believe that the 6th floor structure has been in existence since beginning. Similar is the position

with regard to structures from 7th to 10th floor where the Municipal Corporation has taken demolition action on various dates. On the 10th floor of the building repeated demolition actions were required to be taken as the construction has repeatedly been re-erected after demolition drives. This is thus a gross case where unauthorized construction of as many as 5 floors is being brazenly and repeatedly put up.

13. The Municipal Corporation has placed on record various demolition reports, which indicate sorry state of affairs at the site. It appears that the machinery of the Municipal Corporation was required to be deployed repeatedly for demolition of structures beyond 5th floor. Photograph of the building taken on 18 July 2023 would indicate that all 10 floors are standing today. This means that the time, money and manpower deployed by Municipal Corporation in those demolition drives for demolition 6th to 10th floors has gone in vain and the unauthorised floors have been put up again.

14 Apart from unauthorized nature of construction, the manner in which the same is put up also poses grave danger to the life of occupants. Structures at 6th to 10th floors appear to have been put up by using RSJ section and Ladi Coba slab. This is not a RCC structure. Putting as many as 10 floors on the existing building would put the entire building into precarious condition. The occupants occupying

unauthorised structures from 6th to 10th floors would put the lives of occupants residing in lawful structures both within the building as well as neighboring buildings into danger.

15 I am therefore of the view that no case was made out by the Appellants/Plaintiffs for grant of any ad-interim protection during decision of Notice of Motion. The City Civil Court has rightly rejected *ad-interim* relief in favour of the Appellants/Plaintiffs. Appeal, being devoid of merits, is dismissed without any orders as to costs.

(SANDEEP V. MARNE, J.)