

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

**APPEAL FROM ORDER NO. 435 OF 2023
WITH
INTERIM APPLICATION NO. 7885 OF 2023**

Dharnendra Sheshmal Jain and Others ...Appellants

Vs.

The Municipal Corporation of Greater ...Respondents
Mumbai and Others

Mr. Sandeep Sharma, for Appellants.

Ms. Smita Tondwalkar, for MCGM- Respondent No. 1 and 2.

Mr. Mayur Faria, for Respondent No. 4.

CORAM:- N. J. JAMADAR, J.

RESERVED ON : 26th JULY, 2023.

PRONOUNCED ON:- 2nd AUGUST, 2023

JUDGMENT:-

1) This Appeal is directed against an order dated 19th April, 2023, passed by the learned Judge, City Civil Court in Notice of Motion No. 4108 of 2022 in L. C. Suit No. 448 of 2023, whereby the learned Judge dismissed the Notice of Motion taken out by the appellants-plaintiffs to restrain the defendant Nos. 1 and 2 from acting upon the notices under Sections 351 and 488 of the Mumbai Municipal Corporation Act, 1888 ("the Act, 1888").

2) Background facts can be stated in brief as under:-

(a) The plaintiffs along with defendant No. 3 claim to have acquired Room Nos. 5A and 14 admeasuring 130 sq. ft. carpet area each located on First Floor of building known as “Modi Building ” (“the subject structure”) in the year 1984 and 1995 respectively, from the landlord, who came to be impleaded as respondent No. 4 in this Appeal. Modi Building, in which the subject structures are situated was constructed around 1940 and it is a Cessed building. Up to March 2018, the plaintiffs regularly paid the rent to the landlords. As dispute arose, the landlord refused to accept the rent.

(b) Eventually, with a view to evict the plaintiffs and defendant No. 3, the landlord initiated proceedings in the Court of Small Causes and also made a false and motivated complaint with the Municipal Corporation. At the behest of the landlord, the defendant No. 1- Municipal Corporation had issued a notice on 24th January, 2018 under Section 351 of the Act, 1888, alleging unauthorised construction of toilet block on the common passage etc. Upon being apprised about true facts, the respondent No. 1 dropped action in respect of the said notice.

(c) Again at the instance of the landlord, according to the plaintiffs, the defendant No. 1- Corporation issued another notice under Section 351 of the Act, 1888, alleging unauthorised construction of lofts in Room Nos. 5A and 14 and opening of a door in between room Nos. 5A and 14. Without considering the reply filed on behalf of the plaintiffs, the Designated Officer passed a speaking order, on 13th September, 2020. Though no action was initiated for a considerable period after the speaking order, the plaintiffs were suddenly served with a notice under Section 488 of the Act, 1888, dated 31st October, 2022, threatening demolition of the subject structures on 3rd November, 2022. Hence, the plaintiffs were constrained to approach the City Civil Court, seeking a declaration that the impugned notices were illegal and bad in law and the consequential reliefs of injunction.

(d) In the said suit, the plaintiffs took out Notice of Motion, seeking to temporarily restrain the defendant Nos. 1 and 2 from acting upon the said notices during the pendency of the suit. The prayers for interim relief were resisted by the defendant Nos. 1 and 2.

(e) By the impugned order, the learned Judge was persuaded to dismiss the Notice of Motion holding, *inter alia*, that there

was no material to show that the subject structures were erected prior to the datum line and, at best, the structures were erected prior to 1996 and were, thus, not entitled to any protection. At any rate, the plaintiffs had not sought regularisation of the subject structures. Thus, holding that the development in question is neither tolerated nor authorised, the learned Judge declined to grant interim relief.

(f) Being aggrieved the plaintiffs are in Appeal.

3) On 14th June, 2023 when the Court was informed that the trial Court had directed the plaintiffs to amend the plaint and implead the landlord as a party defendant to the suit, this Court directed the plaintiffs to first amend the plaint and Appeal Memo and, thereafter, pursue this Appeal. Accordingly, the plaintiffs carried out the necessary amendment in the plaint and also impleaded the landlord as the respondent No. 4 in this Appeal.

4) I have heard Mr. Sandeep Sharma, the learned Counsel for the appellants, Ms. Smita Tondwalkar, the learned Counsel for the respondent Nos. 1 and 2 and Mr. Mayur Faria, the learned Counsel for the respondent No. 4, at some length. The learned Counsel took the Court through the pleadings and material on record.

5) Mr. Sharma submitted that the learned Judge, City Civil Court, did not properly appreciate the plaintiffs case. The nature of the unauthorised development allegedly carried out by the plaintiffs, was lost sight of. Inviting the attention of the Court to the impugned notice under Section 351 of the Act, 1888, especially the schedule of unauthorised work/development, Mr. Sharma laid emphasis on the fact that the unauthorised construction was allegedly of loft admeasuring 2.5 X 2 X 1.2 in Room Nos. 5A and 14 and opening an internal door between Room Nos. 5A and 14.

6) In the backdrop of the said nature of the alleged unauthorised development, according to Mr. Sharma, the learned Judge could not have brushed aside the claim of the appellants-plaintiffs that the said development was eligible for regularisation under the Circular dated 8th August, 2005, issued by the respondent No. 1 Municipal Corporation laying down the guidelines for regularisation of loft/mezzanine floors constructed prior to 15th August, 1997, in existing authorised buildings. Though the learned Judge found that there was material to show that the loft/mezzanine floors were existing since prior 1996 yet, according to Mr. Sharma, the learned Judge misdirected himself in non-suiting the plaintiffs on the

ground that the subject structures could not be shown to have been in existence since prior to the datum line.

7) Mr. Sharma would further urge that the fact that the plaintiffs and the landlord are at loggerhead and the consent of the landlord is necessary to apply for regularisation of the subject structure was also not adequately considered by the trial court. As there is material on record to show that the subject structures have been in existence since prior to 1996, in the least, and clearly eligible for regularisation under 2005 Policy, the plaintiffs could not have been denied the interim relief.

8) As against this, Ms. Tondwalkar supported the impugned order. It was submitted that the learned Judge, City Civil Court committed no error in declining to exercise the discretion in favour of the plaintiffs as admittedly the subject structures are neither tolerated nor authorised.

9) Mr. Faria also supported the impugned order. It was urged that the landlord has already initiated proceedings for eviction of the plaintiffs on statutory grounds. Any order of regularisation of the subject structures would impinge upon the development potential of the building as FSI to the extent of the lofts/mezzanine floors would be reckoned to have been

consumed. It was further submitted that there is no document of unimpeachable character to lend support to the claim of plaintiffs that the subject structures have been in existence since the date of the creation of the tenancy.

10) I have given anxious consideration to the submissions canvassed across the bar. First and foremost, the nature of the unauthorised construction/development. The first count is alleged unauthorised construction of lofts in Room Nos. 5A and 14 admeasuring 2.5 X 2 X 1.2 (height) approximately. The second count is of opening an internal door between Room Nos. 5A and 14, by breaking the wall, admeasuring 0.8 m X 0.2 X 1.5 m (height) approximately. Evidently, the respondent No. 1- Corporation proceeds on the premise that the plaintiffs have constructed lofts.

11) Before adverting to the question of the existence of the lofts, since prior to a particular date, it may be apposite to note that it was not put in context that there is a Policy framed by the respondent No. 1- Corporation for grant of permission for regularisation of mezzanine floors constructed prior to 15th August, 1997 in existing authorised building. It does not seem to be the case of respondent No. 1- Corporation that Modi Building is not an authorised building. In the

said Policy dated 8th August, 2005, there is a reference to the Modified Regulation 38 (6)(1) of the DC Regulations. It reads as under:-

“The aggregate area of mezzanine floor in any room shall not exceed 50% of the built up area of that room. The size of mezzanine floor shall not be less than 9.5 sq. mtr., if it is used as living room. The area of mezzanine floor shall be counted towards FSI. Provided, however, that in existing authorised building having no balance FSI, area of the mezzanine floor constructed prior to 15th August, 1997 without approval may be exempted from FSI with special permission of the commissioner subject to the terms and condition and the payment of premium as may be specified by the Commissioner.

Note: *Lofts having head room more than 1.5 mtrs. Above, it shall be treated as mezzanine floor.”*

12) The policy proceeds to frame revised guidelines for permission for regularisation of lofts/mezzanine floors constructed prior to 15th August, 1997; a detail reference to which is not warranted in the facts of this case. What is of material significance is the fact that the height of the lofts in question, from the own showing of respondent No. 1-Corporation, is 1. 2 meters. The lofts thus do not fall within the definition of mezzanine floors. *Prima facie*, there does not seem

to be any impediment in regularisation of the lofts, subject to fulfillment of the other conditions stipulated in the said circular and upon proof of the fact that the lofts did exist on 15th August, 1997.

13) On the aspect of the existence of the lofts since prior to 15th August, 1997, Mr. Sharma invited the attention of the Court to the inspection extracts in respect of the Modi Building wherein the existence of lofts had been shown. In respect of room, in the occupation of Mr. S. B. Jain, additional loft is specifically mentioned. Whereas in respect of another room, retable value is shown more in comparison to other rooms. These inspection extracts, according to Mr.Sharma, indicate the existence of the lofts during the period of 1st April, 1994 and 31st March, 1996.

14) Evidentiary, value to be attached to the inspection extracts, which were primarily prepared for assessment of tax, is a matter for trial. However, it is pertinent to note that the learned Judge proceeded on the premise that there was indeed material to show the existence of the lofts since prior to 1996. However, since the plaintiffs failed to establish that the lofts/subject structures, were in existence since prior to the datum line, the

plaintiffs were not entitled to the interim protection, held the learned Judge.

15) I find substance in the submission of Mr. Sharma that the case of the plaintiffs was not appreciated in a correct perspective. It was the specific case of the plaintiffs that they were inducted into the subject premises in the year 1984 and 1995. The lofts have been in existence since they were inducted in room Nos. 5A and 14. Since the lofts were in existence prior to 15th August, 1997, the subject structures were eligible for regularisation. In the backdrop of this nature of the claim of the plaintiffs, they could not have been non-suited at an interim stage on the ground that there was no material to show that the subject structures were tolerated structures. Prima facie, there is material to show that the lofts, being of the height of 1.2 meters only, are eligible for regularisation under the Policy of respondent No. 1-Corporation.

16) It is true in the absence of the consent of the landlord, the tenants endeavour to seek regularisation may face impediments. Conversely, the landlord having instituted the suit to evict the tenants on the statutory grounds can not be expected to give consent for regularisation, to the prejudice of

the landlord's interest. In a situation of this nature, the inability on the part of the plaintiffs to apply for regularisation could not have been arrayed as a ground for rejecting the prayer for interim relief as the plaintiffs have succeeded in making out a *prima facie* case that the alleged unauthorised construction/development is eligible for regularisation. In my view, the plaintiffs deserve protection during the pendency of the suit, lest they would suffer an irreparable loss. In the intervening period, the plaintiffs may work out their remedies to seek regularisation of the subject structures by resorting to appropriate proceedings. I am, therefore, persuaded to partly allow the Appeal.

17) Hence, the following order.

ORDER

- i) The Appeal stands partly allowed.
- ii) The impugned order in Notice of Motion No.4108 of 2022 stands quashed and set aside.
- iii) The Notice of Motion stands partly allowed.
- iv) The respondent Nos. 1 and 2 are restrained from acting upon the notice dated 4th February, 2020 under Section 351 of the Act, 1888, the speaking order dated

13th September, 2020 and the notice under Section 488 of the Act, 1888, for a period of nine months or till the disposal of the suit, whichever is earlier.

v) In the meanwhile, the appellants-plaintiffs are at liberty to seek appropriate remedies in appropriate proceedings for regularisation of the subject structures.

vi) In view of the disposal of the Appeal, the Interim Application also stands disposed.

vii) No order as to costs.

[N. J. JAMADAR, J.]