

Prajakta Vartak

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 232 OF 2022
IN
NOTICE OF MOTION NO. _____ OF 2023

Tajdar Kamal Amrohi ..Appellant
Vs.
DB/Orchid Breeze Condominium & Ors. ...Respondents

Mr. Atul Damle, Senior Advocate with Mr. Vikas Kumbhar i/b. Mr. P. V. Nichani for Appellant.

CORAM : G.S. KULKARNI, J.
DATE : FEBRUARY 08, 2023

Oral Judgment :

1. Heard Mr. Damle, learned senior counsel for the appellant.
2. The grievance of the appellant in assailing an order dated 09 November, 2020 passed by the learned Judge, City Civil Court, Borivali Division, Dindoshi is that the relief in regard to use of common amenities more particularly the lift, has been denied to the appellant on the ground that certain maintenance dues are payable by the appellant for which no proceedings have been initiated by the respondents/defendants against the appellant/ plaintiff to recover such amount. It is his submission that without taking any substantive steps, the legal entitlement of appellant/

plaintiff to use the common amenities like the lift cannot be stopped by respondent no.1. It is submitted that it was categorically averred by the appellant before the Civil Court that the appellant is a senior citizen.

3. It appears that there is no dispute in regard to the ownership of the flat in question. There is some dispute between the appellant/plaintiff in regard to the amounts of the appellant/plaintiff which according to him, are to the credit of the appellant/plaintiff and the developer ought to have paid such amounts to respondent no.1. Such is the nature of the dispute.

4. It is submitted that the reasons as set out in the impugned order to reject the interim protection which was prayed by the appellant/ plaintiff would not stand the test of law and more so considering the legal rights of the appellant/ plaintiff to use the premises namely three flats on the fourth floor. He submits that the appellant is also the owner of three flats on the sixth floor in respect of which, there is no dispute. However, peculiarly respondent no.1 has prevented him from accessing the fourth floor by using the lift in question.

5. The record indicates that earlier notice was issued to the respondents vide an order dated 25 July, 2022. Mr. Damle informs that contesting respondent is respondent no.1. The office report indicates that respondent no.1 is served. The other respondents are office bearers out of

whom respondent nos.1 and 6 are served. It appears that despite service, respondent no.1 is not interested to contest the present proceedings. Mr. Damle, learned counsel for the appellant states that affidavit of service would also be placed on record within one week as according to him, the respondents are served.

6. In the aforesaid circumstances, the present appeal which raises a short issue need not be kept pending. Having heard Mr. Damle, learned counsel for the appellant and having perused the impugned order as also the record, in my opinion, the appellant has made out a prima facie case for grant of a temporary injunction to the extent that the appellant ought not to have prohibited/ restrained respondent no.1 from using the common amenities. There is substance in the contention of Mr. Damle that in the event there were to be certain arrears of maintenance dues and which are stated to be in the tune of Rs.42 Lakhs, respondent no.1 ought to have proceeded to take steps to recover the said amount in the manner known to law, more particularly when such amount was disputed by the appellant/ plaintiff. Admittedly, no such steps were taken and coercive action in the nature of prohibiting the appellant from using common amenities is taken. Such action being taken against the appellant/ plaintiff certainly cannot be recognized in law, more so as the appellant/plaintiff

cannot reach his flat, which deprived him of the enjoyment of his property without following the due process of law.

7. In the aforesaid circumstances, in my opinion, on this limited issue, the appeal needs to succeed. Accordingly, during pendency of the suit, the following interim order shall operate:-

ORDER

- i. The respondents/defendants are directed to permit the appellant/ plaintiff to use all the common amenities and more particularly the lift.
- ii. Needless to observe that all contentions of the defendants on the suit are expressly kept open.
- iii. The respondents/defendants are at liberty to initiate proceedings for recovery of any amount due and payable by the appellant/ plaintiff to the respondents. If such proceedings are initiated, all contentions in that regard are expressly kept open.
- iv. Disposed of. No costs.

[G.S. KULKARNI, J.]