

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO. 1069 OF 2022
IN
NOTICE OF MOTION NO. 1645 OF 2021
IN
L.C. SUIT NO. 1273 OF 2021

Trikutta Towers C.H.S. Ltd.

....Petitioner

V/s.

Mrs. Seema Rajaram Gurav &
Ors.

....Respondents

Mr. Pankaj Dubey i/by. Mr. Deepak Pandey, for the Petitioner.

Mrs. Smita Tondwalkar, for the Respondents.

CORAM : SANDEEP V. MARNE, J.

Dated : 19 October 2023.

P.C. :

1. By this Appeal, the Appellant challenges order dated 2 August 2022 passed by the City Civil Court rejecting Notice of Motion No. 1645 of 2021. The Plaintiff-Society has instituted L.C.Suit No. 1273/2021 essentially against Defendant Nos.1 and 2, who are its members and own Flat No.1610 in C-Wing of the Society's building. It appears that there is a terrace adjacent to Flat No. 1610

and Defendant Nos. 1 and 2 have been exclusively using the said terrace. The Society is aggrieved by such exclusive use of terrace by Defendant Nos. 1 and 2 and wants all its members to use the same. It is for this purpose that L.C. Suit No. 1273/2021 is filed seeking a declaration that Defendant Nos.1 and 2 do not have any exclusive right to use and occupy the terrace adjacent to Flat No.1610.

2. In the suit, Plaintiff-Society filed Notice of Motion No. 1645 of 2021 seeking a mandatory injunction against Defendant Nos.1 and 2 to remove the lock placed on the entrance of the said terrace and also for taking appropriate action by the Municipal Corporation against the unauthorised construction erected by Defendant Nos.1 and 2. By order dated 2 August 2022, the City Civil Court has proceeded to reject the Motion.

3. I have heard Mr. Dubey the learned counsel appearing for the Petitioner, Mr. Tembe, learned counsel appearing for Respondent Nos.1 and 2 and Mrs. Tondwalkar, the learned counsel appearing for M.C.G.M.

4. It appears that while selling Flat No. 1610, the Developer had allotted the terrace adjacent to that Flat in favour of Defendant Nos.1 and 2. There is a specific allotment letter dated 30 July 2012 issued in favour of Defendant Nos.1 and 2. It is Society's case that the said terrace is a part of common amenity and could not have been

allotted for exclusive use of Defendant Nos. 1 and 2. This is something which will have to be decided at the time of final hearing of the suit. As of now, there is no dispute to the position that Defendant Nos.1 and 2 have been using the terrace since the year 2012.

5. So far as allegation of erection of unauthorised construction is concerned, there is nothing on record to indicate that Defendants Nos. 1 and 2 have covered the terrace. It is admitted position that the terrace has been kept open to sky. The learned counsel appearing for the Appellant would rely upon judgment of the learned Single Judge of this Court in **Dr. Ramesh Chunilal Hansoti & Anr. V/s. Hansoti Co-operative Housing Society Ltd.**, Writ Petition No. 8270/2004 decided on 6 & 10 February 2017. He would submit that this Court has held in that judgment that terrace is a property of the Society and cannot be used exclusively by any member. The exact applicability of the judgment will have to be taken into consideration by the City Civil Court at the time of final hearing of the suit. As of now, the Society has not objected to the exclusive use of the terrace by Defendant Nos.1 and 2 for the last considerable period of time. In that view of the matter, the Society will have to await the final decision of the City Civil Court. I am therefore of the view that no case was made out by the Society for grant of temporary injunction. The City Civil Court has rightly rejected the Notice of Motion by its order dated 2 August 2022.

6. The Appeal being devoid of merits is dismissed without any order as to costs. However it is clarified that the City Civil Court shall not be influenced by the findings recorded in the order dated 2 August 2022 or in the present order at the time of final hearing of the suit. The City Civil Court shall consider the question as to whether terrace is a part of common amenity and whether it was open for the Developer to sell/allot the terrace for exclusive use of Defendant Nos.1 and 2. Considering the nature of controversy involved, the City Civil Court shall expedite the hearing of the suit and shall make an endeavor to decide the same as expeditiously as possible. Appeal is **disposed of.**

**NEETA
SHAILESH
SAWANT**

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SANDEEP . MARNE, J.