

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.674 OF 2023

Shahbaz Abdulla Patka
Age 54 years, Pirbhoy Mansion,
4th Floor, Room No. 25 A Block,
63 Morland Road,
Mumbai- 400008.

....Appellant

Versus

1. Municipal Corporation of Greater Mumbai,
Mahapalika Bhavan, Mahapalika Marg,
Mumbai- 400001

2. Sameer Abdul Jabbar Patka
Pirbhoy Mansion, 4th Floor,
Room No. 24 A Block, 63 Morland Road,
Mumbai – 400008.

....Respondents

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Mr. Shlok Parekh a/w Ms. Faiza Dhanani i/b M/s. Cue Legal for the Appellant.

Ms. Smita Tondwalkar for Respondent No.1-MCGM.

Mr. Drupad S. Patil for Respondent No.2.

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CORAM : **SANDEEP V. MARNE, J.**
RESERVED ON : **AUGUST 25, 2023.**
PRONOUNCED ON : **AUGUST 29, 2023.**

JUDGMENT:

. By this Appeal, Appellant-Plaintiff challenges order dated 3 August 2023 passed by the City Civil Court at Bombay rejecting Notice of Motion

No.2690 of 2023 filed seeking interim injunction to restrain Respondent-Municipal Corporation from acting on the notice dated 25 July 2018.

2 The dispute in the Appeal relates to four rooms constructed on 4th floor of the building 'Pirbhoy Mansion' situated at 63, Morland Road, Byculla (West), Mumbai. It is Appellant-Plaintiff's case that out of the said four rooms, three rooms are occupied by him whereas the fourth room is occupied by Respondent-Defendant No.2, who is aggrieved by action of the Appellant-Plaintiff in constructing a kitchen and WC in open passage of the fourth floor obstructing his access to the room in his occupation. He filed complaint dated 1 April 2010 with the Respondent-Municipal Corporation complaining about the construction put up by Appellant-Plaintiff. Respondent-Defendant No.2 filed L.C. Suit No.556 of 2011 seeking injunction against the Defendants therein (including Appellant-Plaintiff herein), from carrying out any further construction in the suit property or erecting any structure of permanent nature. In his suit, Respondent-Defendant No.2 filed Notice of Motion No.1073 of 2011 seeking temporary injunction, which came to be rejected by the City Civil Court by its order dated 25 April 2011.

3 It is Plaintiff-Appellant's case that despite denial of any relief of temporary injunction in the suit instituted by Respondent-Defendant No.2, he kept on pursuing his complaints with the Respondent-Municipal Corporation. That acting on complaints of Respondent-Defendant No.2,

the Municipal Corporation issued notice dated 25 July 2018 under provisions of section 351 of the Mumbai Municipal Corporation Act, 1888 alleging that the Appellant-Plaintiff constructed kitchen and WC on terrace of the fourth floor of the building by means of RCC slab, BM walls, etc. Appellant-Plaintiff replied to the notice and thereafter the Municipal Corporation passed speaking order dated 18 August 2018 rejecting Appellant-Plaintiff's Reply. He therefore instituted L.C. Suit No.2237 of 2018 before the City Civil Court challenging the notice dated 25 July 2018 and also filed Notice of Motion No.2690 of 2018 seeking temporary injunction to restrain Municipal Corporation from acting on the notice. The City Civil Court passed order dated 29 August 2018 directing the Municipal Corporation not to take coercive action in pursuance of the notice. The City Civil Court thereafter proceeded to hear and decide the Notice of Motion and by order dated 3 August 2023 impugned in the present Appeal, the Court has dismissed the Notice of Motion thereby declining to grant temporary injunction in Appellant-Plaintiff's favour. The present Appeal is filed challenging order dated 3 August 2023.

4 Appearing for Appellant-Plaintiff, Mr. Parekh the learned Counsel would submit that the suit premises are in existence prior to the datum line. That the plan certified by Maharashtra Housing and Area Development Authority (**MHADA**) and Mumbai Building Repairs & Reconstruction Board (**Board**) clearly show existence of the suit premises. That open kitchen has been created out of the existing flat premises to keep it convenient for the large family to cook. That the

structure consisting of kitchen and WC does not block 1.5 square meters wide passage in any manner. That the kitchen area is not an open area as sought to be contended by the Municipal Corporation and by Respondent-Defendant No.2 and that the same forms part of the Appellant-Plaintiff's flat. The same are merely divided by a soft-wall as is evident from the plan. That Appellant-Plaintiff is ready and willing to construct a permanent wall to substitute the soft-wall.

5 Mr. Parekh would further submit that the impugned notice has been issued by the Respondent-Municipal Corporation to harass Appellant-Plaintiff at the behest of Respondent-Defendant No.2. That the suit of Respondent-Defendant No.2 with regard to very same structure is pending and he was refused any interim injunction in the year 2011. That having failed to secure any restraint orders against Appellant-Plaintiff, Respondent-Defendant No.2 is misusing the machinery of the Municipal Corporation for taking revenge against the Appellant-Plaintiff. He would submit that a *prima facie* case is made out, which warrants grant of an opportunity to the Appellant-Plaintiff to lead evidence in support of legality of the structure. Alternately, he would submit that the Appellant is willing to close the kitchen wall and enclose the kitchen area back into the room after due inspection by the Respondent-Municipal Corporation.

6 Ms. Tondwalkar, the learned Counsel appearing for the Respondent-Municipal Corporation would oppose the Petition and

support the order passed by the City Civil Court. She would submit that Appellant-Plaintiff did not produce any authentic evidence of kitchen and WC being erected in pursuance of any permission issued by Respondent-Municipal Corporation. That though the existence of three rooms on fourth floor prior to datum line is not disputed, Appellant-Plaintiff has unauthorizedly added kitchen and WC in open portion of terrace without any permission.

7 Mr. Drupad Patil would appear on behalf of Respondent-Defendant No.2 and would oppose the Appeal. He would submit that various plans prepared by MHADA and Board would undoubtedly indicate closure of open passage by Appellant-Plaintiff for unauthorized use as kitchen and bathroom. That the premises were set on fire on 3 March 2022 on account of cooking activities in open kitchen, due to which the Executive Engineer of the Municipal Corporation had directed closure of the kitchen and removal of cotton curtains therefrom. What was presented before the City Civil Court was repair plan of the year 1996 and that 2009 plan was never produced. That even in 2009 plan, the disputed portion is not shown as a part of sanctioned premises. He would pray for dismissal of the Appeal.

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

9 Appellant-Plaintiff has challenged notice dated 25 July 2018 issued by the Respondent-Municipal Corporation. The offending structure is described in the notice is as under:

"SCHEDULE

Unauthorized construction of Kitchen & WC admeasuring 3.20 mtr x 1.20 mtr x 2.0 mtr on the terrace on 4th floor of Peerbhoy Mansion, 63, Morland Road, Byculla (W), Mumbai-400008 by means of RCC Slab, BM Walls, etc."

10 It appears that on the terrace of the building, there are total eight rooms, four on each side, divided by a staircase. The structures occupied by Appellant-Plaintiff and Respondent-Defendant No.2 appear to be on western side of the building, which has four rooms. There is no dispute to the position that three out of the four rooms are in occupation of Appellant-Plaintiff whereas the fourth room is in occupation of Respondent-Defendant No.2. There is 1.5-meter-wide passage abutting the three rooms of Appellant-Plaintiff which leads to the room of Respondent-Defendant No.2. Between Appellant-Plaintiff's first room and staircase, there is a open terrace. It appears that a notch is created between passage and the first room of Appellant-Plaintiff's flat which reduces area of Appellant-Plaintiff's first room. The notch also extends to the open terrace. It is in this notch that the Appellant-Plaintiff has been operating kitchen and WC. It is the case of Respondent-Defendant No.2 that the said notch is also part of passage and terrace and is deliberately kept open for easy ingress and access through the passage. On the other hand, it is Appellant-Plaintiff's case that the said notch is also part of Appellant-Plaintiff's flat and that the notch got created on account of Appellant-Plaintiff's action in sub-dividing the first room and keeping the kitchen out of the flat for his own convenience.

11 In support of their respective contentions, Appellant-Plaintiff and Respondent--Defendant No.2 have placed on record two plans prepared by the Board. Mr. Patil relies on 1996 plan of the Board which shows brick wall between Appellant-Plaintiff's first room of the flat and kitchen and WC area. However, there is no wall separating the said kitchen and WC area from the passage. It does appear that there is no separation between passage and kitchen/ WC with any wall. This would *prima facie* indicate that the area in which kitchen and WC is being operated does not fall part of Appellant-Plaintiff's flat.

12 Mr. Parekh has however placed reliance on the plan prepared by the Board in 2009. Though Mr. Patil and Ms. Tondwalkar have raised doubts of authenticity of the said plan, I do not wish to delve further into this controversy about genuineness of the said plan as the said issue would be decided by the City Civil Court at the time of decision of the suit. Momentarily, I proceed on an assumption that even this plan is a genuine document. Perusal of the 2009 plan produced by Mr. Parekh does not make his client's case any better. Even the said plan clearly shows that the area in which Appellant-Plaintiff is operating kitchen and WC is outside Appellant-Plaintiff's flat. The said plan also indicate existence of a similar open space on eastern side of the building.

13 I am also taken through the photographs, which show that there is no separation between passage and the area where kitchen and WC is

being operated. It therefore appears that Appellant-Plaintiff is operating kitchen in the open area. Thus, Appellant-Plaintiff has not been able to *prima facie* prove either before the City Civil Court or before me that the offending structure is authorized by any statutory authority in any manner.

14 Letters dated 12 April 2022 and 3 June 2022 issued by the Executive Engineer of Respondent-Municipal Corporation alleged that a fire occurred on 3 March 2022 on account of operation of kitchen in the open area by Appellant-Plaintiff. Thus, in addition to unauthorized nature of the construction, permitting Appellant-Plaintiff to continue use of the offending structure is also dangerous to the life and property of other occupants in the building.

15 I am therefore of the view that Plaintiff-Appellant failed to make out any *prima facie* case before the City Civil Court for grant of temporary injunction. No fault can be found with the City Civil Court in rejecting his Notice of Motion by the impugned order. The Appeal being devoid of merits is dismissed without any orders as to costs.

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(SANDEEP V. MARNE, J.)