

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.114 OF 2015

Mr. Nasim Ahmed Siddique	...	Appellant
Vs.		
Municipal Corp. of Greater Mumbai	...	Respondents
Anand Pande, Adv. for applicant.		
A V Diwate, Adv. for respondent No.1 in MCGM.		

CORAM : MRS. ROSHAN DALVI, J.
DATE : 10th September, 2015.

P.C. :

1. Rule. Made returnable forthwith.
2. The appeal challenges the order of refusal of grant of any relief to the appellant in the Notice of Motion taken out by the appellant which was heard on merits. The appeal is also filed upon the grounds on merits. The appeal is argued before the Court on all the grounds on merits. The merits are as follows :

The appellant (plaintiff in the suit) has been issued a notice under Section 351 of the MMC Act on 11th July, 2014 pursuant to complaints received from one Mr. Mohd. Khalid Badrullah Khan as also one Diamond Samaj Seva Sangh (a service for humanity) through its president M F Mansuri and upon verification of the complaint by inspection of the appellant's premises under the inspection report dated 7th July, 2014.
3. The appellant filed the reply to the notice. The appellant relied upon certain documents. The Assistant Engineer (Building & Factory) the designated officer 'E' ward has passed an order upon the

appellant's reply. The due legal process has been followed. The suit has been filed in the civil court for protection of the suit structure against the demolition as directed in the order.

4. The defendants in the suit (the MMC) filed its affidavit in reply. The MMC set out in paragraph 3 of the affidavit the bar of the suit under Section 527 of the MMC Act and in paragraph 4 of the affidavit the bar of the suit under Section 515 A of the MMC Act. Nevertheless without prejudice to these contentions, the MMC also set out true facts to rebut the facts of the plaintiff and to defend the plaintiff's action on merits.

5. The plaint sets out the plaintiff's case on merits in paragraph Nos.1 to 57 of the suit and thereafter contends that the notice contemplated under Section 527 of the MMC Act has not been given and why the suit would not be barred under Section 515A of the MMC Act and applies for various reliefs in the prayer clause paragraph 71. The learned Judge has considered the Notice of Motion on merits.

6. No party is shown to have raised the plea of jurisdiction or informed the Court to frame the preliminary issue under Section 9A of the CPC. The appellant has challenged the order in the Notice of Motion in this appeal raised in grounds A to L. The appellant contends, after the entire appeal is heard on merits, that the issue of jurisdiction of the Court had to be decided but was not decided. The grounds in the appeal did not take exception to Court not deciding the issue of jurisdiction as the preliminary issue under Section 9A of the CPC.

7. The appellant's counsel was asked by the Court how such an issue, which was raised by the defendant but not pressed and which it would not be able to press in the suit also since it was not pressed at the preliminary stage, had to be framed when the learned Judge was not informed about it. Counsel on behalf of the appellant / plaintiff states that it was informed to the learned Judge but he has no control over the learned Judge and the learned Judge despite the information decided the Notice of Motion on merits. This statement is seen to be false and the attack on the learned Judge is most improper as is apparent not only from a reading of the order but also upon reading the memo of appeal and the act of the advocate of the appellant in this Court also in arguing the entire case on merits. The learned Judge was obviously informed of the facts of the case on merits, shown the documents which the learned Judge has considered and the due process of law which the learned Judge has seen to have been followed which all shows only the merits of the case being argued and considered.

8. The appellant in the appeal has also argued the appeal on merits as shall be seen presently. After arguing appeal on merits when the judgment was to be dictated the plea of jurisdiction has been taken. The time of two courts have been taken up in arguing the case on merits after which the case of jurisdiction is sought be contended.

9. The appellant contends that due legal process is not followed. The case of legal process not being followed is not satisfactory.

10. The appellant contends that the plan which is produced by

the appellant though stated to be approved by MMC, which would show authorisation of the suit structure, has been held to be not an authentic plan. The impugned order of the MMC does not show this aspect. The argument is misleading. This aspect taken up by the appellant and considered by the authority is as follows :

7 Xerox copy of repair permission & xerox copy of the repair plan showing Gr. Floor & mezzanine floor under No.WOE/1187/B&D dated 14 th July, 1972.	This document fails to prove the authorization of the notice work i.e. Unauthorized construction of 1 st floor, B M Walls, M S Angel frame works ladi-coba-ladi adm about 21'00 X 29"00" and ht.10' at Plot No.04, Hiarabai Compound, Ghodapdeo, Cross Road, Mumbai 10, as per the condition in the said permission.
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11. Hence the authority has held that the plan does not show that the structure is authorised. Counsel on behalf of the plaintiff, therefore, referred the court to the plan. He showed the Court the stamp of approval. This was under an application for repairs. The plan is in respect of 'proposed repairs' to the existing shed. The repairs are shown in red. The repairs are, therefore, proved. The structure is, therefore, not proved. The order showing that the structure is not authorised is correct.

12. The appellant has also relied upon a copy of the cadestral survey plan. The plan is issued upon application of the appellant on 9th December, 2014. It is stated to show the structure in dotted lines. The original plan is not produced before this Court. It was not even produced before the authority. The copy of the plan produced by the appellant / plaintiff has been considered. The copy does not show the

colour of the structure on the plan. The colour would show authorisation of the structure. A copy of the plan, therefore, does not show the authorisation of the structure.

13. The other documents produced by the appellant are considered in the order. Each of these documents is on and after 1988.

14. Since the document did not even show that the structure was prior to 1962, the structure is not even tolerable. The appellant's case is that the structure is authorised and / or tolerable. The appellant must make out prima facie case upon the legal process being followed. The appellant must show how it would fall short of legality. That has not been shown to the learned Judge. That has not been shown even to this Court. After extensive arguments it is seen that the structure is neither authorised, nor tolerable.

15. The authority, therefore, gave notice and considered the reply and followed the due procedure and found that the noticed work was unauthorized.

16. Mr. Pandey on behalf of the appellant argued that the appellant has called upon the MMC to produce the authorised plan of the suit structure. The suit structure is a solitary structure in the corner of the survey in the cadastral survey plan shown by the appellant himself. It was a ground floor structure. The MMC has no dispute about the structure. It is the first floor extension which has been challenged as also the extension which causes inconvenience to the passers by.

17. Counsel on behalf of the appellant referred to the judgment in the case of *Ramdas M Suryavanshi Vs. Municipal Corp. of Gr. Mumbai in AO No.919 of 2000 dated 22nd December, 2000* of this Court to make out a case that for all the structures in the city of Mumbai the noticees of notices under Section 351 of the MMC Act can called upon the MMC to produce the plans of their structures which must be produced by the authority failing which all these solitary structures must be protected. The judgment is nothing of the kind.

The judgment relates to the attic floor used by a tenant constructed in a building. The tenant made out a case that he was in occupation since 1940 that the building was 100 years old consisting of ground and two upper floors having 13 tenants. Under those circumstances the Court held that the municipality must produce the plan showing the authorisation of the initial structure which would show any additions which could be termed to be unauthorised. Such a judgment cannot be made applicable to solitary small sheds and structures which mushroom in the city of Mumbai and which would be millions in number. The reliance upon the judgment is wholly misconceived.

The MMC, therefore, is not expected to produce a sanctioned plan of one small shed in the corner of the plot which is solitary structure obviously not constructed in a planned manner upon the authorisation of the planning authority.

18. The appellant claims to be a tenant without production of any record evidencing his tenancy to make out a plea that he would not have the plan which only the landlord or the MMC can provide. In the judgment in the case of *Ramdas (Supra)*, the fact that the plaintiff was a tenant was an admitted fact. The plea of the

appellant's counsel to rely upon the judgment wholly inapplicable to the facts of the case of the appellant is seen from a false statement of his status as a tenant made across the bar.

19. Mr. Pandey also argued that the authority which passed the order was not designated authority. He demanded that that aspect be decided before prima facie case of the plaintiff is considered because that would also go to the root of the matter. The argument is impertinent. It is for the plaintiff who sues to prove his prima facie case first. All other legal contentions can be taken up and considered only if the plaintiff has made out a prima facie case. No plaintiff can come to Court and demand merely by saying that the authority has not authority and expect the Court to consider that aspect first, just as no municipality is bound by the dictates of the plaintiff to produce the plan demanded by the plaintiff before which nothing can be done in the suit.

20. After the appeal was fully heard, as aforesaid, counsel on behalf of the appellant took up the plea of jurisdiction. That, as aforesaid, is improper. After judicial time is taken up for considering merits, no officer of the Court can be heard to say that despite the merits considered, the question of jurisdiction would then have to be decided. Hence that plea is not entertained. Of course, even the MMC shall not be entitled to press the issue of jurisdiction in the suit since it has not been pressed it as a preliminary issue.

21. Upon seeing the merits of the appellant's case made out by the appellant in the Bombay City Civil Court as also in this appeal, it is seen that the suit structure is not shown to be authorised and a prima

facie case in that behalf is not made out. Due legal process is followed. Hence the impugned order is correct. The Appeal is misconceived and false. The Appeal from Order as also Civil Application are, therefore, dismissed.

22. The status quo order granted by this Court (though not by the trial Court) dated 22nd January, 2015 and continued on 17th March, 2015 and 18th April, 2015 shall continue for three weeks.

(ROSHAN DALVI, J.)

C E R T I F I C A T E

Certified to be true and correct copy of the original signed order.