

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.1155 OF 2015
IN
APPEAL FROM ORDER NO.944 of 2015

Shri Chandmal D Jain	...	Appellant
Vs.		
Municipal Corporation of Gr. Mumbai	...	Respondent

Mr. Ajay S Patil, Adv. for appellant.

Mr. N V Walavalkar, Sr. Adv. a/w. Mr. A V Diwate, Adv. for respondent No.1.

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

P.C. :

1. Rule. Made returnable forthwith.
2. The appellant has challenged the order of the Bombay City Civil Court dated 17th July, 2015 rejecting the appellant's / plaintiff's Notice of Motion. The learned Judge has considered the question of jurisdiction and disposed of the Notice of Motion on merits. The appellant contends that the Court must decide the issue of jurisdiction after framing it under Section 9A of the CPC and thereafter hear the Notice of Motion if the Court holds that it has jurisdiction. Hence the Notice of Motion could not have been disposed of on merits. The contention is correct.
3. Hence the Appeal from order shall have to be allowed.
4. The appellant applies for extension of the ad interim stay

until the trial Court considers the application before the trial Court for framing and deciding the preliminary issue. No stay can be granted without application of mind of the Court granting stay. The appellant must make out its case for any such stay.

5. The appellant has produced photo pass bearing No.236234. The structure under a photo pass may be required to be protected. The appellant claims that that structure was in existence since prior 1976. The photo pass does not bear any date.

6. The appellant has produced a photograph of the suit structure. The photograph shows tarpaulin sheds on bamboo poles. Such structure cannot be accepted to have weathered decades of monsoons. If the structure in the photograph is the same as the one under the photo pass bearing No.236234 only can it be protected; the structure in the photograph cannot be protected.

7. Hence the following order :

1. If the respondent finds that the structure in the photograph is the structure censused under No.236234, it shall not be demolished pending further orders in the trial Court.
2. If the respondent finds that the structure in the photograph is not the structure which was censused under No.236234, it may be demolished.
3. The Appeal from Order is allowed.
4. The impugned order of the Bombay City Civil Court dated 17th July, 2015 is set aside. The learned Judge shall frame and decided the preliminary issue in the suit.

5. There shall be no extension of the stay against demolition of the suit structure.

(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.