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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER (ST) NO. 22542 OF 2015
ALONG WITH
CIVIL APPLICATION (ST) NO. 22543 OF 2015
IN
APPEAL FROM ORDER (ST) NO. 22542 OF 2015**

Kalpesh Kumar Parmanand Dave ...Appellant

Vs.

The Municipal Corporation of
Greater Mumbai & Anr.

...Respondents

Mr. Mayur Khandeparkar i/b. Tanvir Abdul Hamid Shaikh for
Appellant

Mr. Khan Javed Akhtar for Respondent No.2

Mr. A.V. Divate for Respondent No.1 MCGM

CORAM : MRS. ROSHAN DALVI, J.

DATED : 3RD SEPTEMBER, 2015

P.C. :

Rule. Returnable forthwith.

1. The appeal from order concerns a toilet. The appellant, who was the plaintiff in the suit, has sought a reprieve against demolition of his toilet.
2. The appellant became a tenant of the premises of the respondent No.2 since 1977. The tenancy was in respect of a shop. On the rear of the shop is a room. The appellant lives

there with his 5 family members. On the side of the room is the suit toilet. The appellant claims that it was in existence when the tenancy was created. He does not know how long prior thereto it was constructed.

3. Bearing in mind that the suit premises is only a toilet, its construction would have to be determined. Upon such a premise the appellant sought to show his case initially to the MMC and later to the trial Court upon a notice under Section 351 issued for demolition of the toilet.

4. Courts must bear in mind, and it must be borne in mind in this case, that reference to any law must be made taking into account the ground realities of the facts in that case. Given that it was only a toilet which was the question of contention before the MMC and later before the trial Court, the consideration of the case of the plaintiff must be accounting for the fact that the real structure of the plaintiff was the shop and the rear room; the toilet is only an adjunct thereto.

5. It has been seen by the MMC as also by the trial Court that the plaintiff has not made out a prima facie case. It has to be seen what could be a prima facie case for proving the existence of such a structure. The parameters for proving the existence of a structure would be wholly different from the

parameters of proving only a part of the structure which is merely an adjunct of the structure. The entirety of the situation has to be considered, if not by the municipal authorities, at least by the Court.

6. Accepting that no party who claims to have a structure tenanted to him can make out a prima facie case without showing that the structure was in existence prior to his tenancy as also prior to the datum line, it would be unreasonable and illogical to apply that yardstick to a mere toilet.
7. The existence of the toilet in a property from a specific date would be to find a needle from a hay-stack. The municipality, the plaintiff as also the Court would not be able to dig through records or plans to show a mere toilet.
8. Though plans would be the most feasible way of seeing the existence of a structure such as a tenement or even a hut including an extension thereto it would not be the only way to determine, conclusively at the trial, and prima facie at the ad-interim stage, the existence of a mere toilet.
9. The plaintiff and respondent No.2 appear to be at loggerheads. They are truly in the relationship of a landlord and tenant. Litigations in the Rent Court have been pursued.

Evidence in the Rent Court have been led. The landlord has sought to initiate action only at the fag end of the trial in the Rent Court against the plaintiff. It is after such evidence that the complaint of respondent No.2 has been made to respondent No.1 upon which notice under Section 351 of the MMC Act is issued.

10. The plaintiff's prima facie case is of lack of bonafides and ferocity of action.
11. The plaintiff produced the photographs of the toilet. The photographs do not show a new construction. The photographs show an ill-kept toilet as would be expected of a toilet of the kind.
12. Further case of the plaintiff shows that there are various other tenements adjoining his tenement. The landlord appears to be at daggers' drawn against those tenants also. The plaintiff has shown that several of those tenants have similar toilets.
13. The plaintiff has produced photographs of toilets of his neighbours in the same structure stated to be bearing Nos. 409 – 409A. The landlord's Advocate denied that there were those toilets. The advocates of the parties were appointed Joint Commissioners to report whether or not those toilets

were in fact in existence. They inspected the suit premises. They have submitted the report. The report shows photographs of 3 other toilets, being the toilets of which photographs were produced by the plaintiff. It is, therefore, clear that there are various such toilets all in the same structure and stated to be all in a row. The plaintiff contends that there is yet one more toilet, but it is irrelevant to go further into those details. Prima facie it is seen that all the tenements do have such toilets.

14. The affidavit prepared by the landlord shows that the structures depicted in the photographs have been constructed. It also shows other rooms for which there are no toilets. The affidavit shows that the WC is used by 5 commercial tenants.

15. Counsel on behalf of the plaintiff rightly argued that there is also a drainage line which is given only in respect of the toilets of the structure 409-409A. Counsel on behalf of the landlord would argue that that is for the bathrooms. If the drainage line is for the bathrooms, it would be certainly for toilets also. It would have to be seen when that line was constructed. The factum of the drainage line is not denied. It would be for the municipal authorities to determine at the trial whether it was meant for only bathrooms or for toilets or for both.

16. To counter the case of the landlord that the action has been initiated upon a recent construction, the plaintiff has produced complaints filed by the landlord against his neighbours who are the other tenants. These were filed in 2010 and 2013. There are 3 such complaints for the aforesaid 3 toilets. The landlord has initiated eviction action on various grounds including the fact that those tenants had constructed WC and bathroom inside the suit premises. The construction, if proved, would enure for the benefit of the landlord in showing the ground for issuing notice to determine the tenancies. However the fact remains that those toilets were admitted to have been there at least 2 to 5 years ago. It would have to be seen whether the plaintiff's toilet was constructed before or after the commencement of his tenancy.
17. Mere absence of a municipal plan in respect of a toilet for a structure which is stated to be in a chawl would not be the criteria to determine the lack of case of the plaintiff for the toilet as it would certainly be for an entire structure.
18. The case of the plaintiff would require oral evidence aside from the documentary evidence. It would require the evidence not only of the plaintiff, but also of his neighbours. Such oral evidence would indeed not be required in a suit where the plaintiff would seek to protect a whole structure.

19. The landlord would claim that there are separate toilets for all the tenants in the chawl. There are 168 tenements. There are shown to be about 22 or 35 toilets. The landlord has produced photographs of the toilets. The doors of most of the toilets are locked that is as would be expected for fear of trespassers who trespass for the use of toilets. The photographs of the toilets do not show that any of those toilets are meant for the plaintiff. The locks on the toilets would rule out the plaintiff's use. The plaintiff would certainly require one toilet for himself and his family. Unless a separate toilet being used by the plaintiff is shown, the plaintiff's case that he had a toilet when he was tenanted the premises in 1977 adjoining the premises cannot be rejected at the ad-interim stage.

20. It would augur well for municipal authorities as also Courts to differentiate between distinguishing cases in the acceptance of the evidence and the appreciation and interpretation thereof. It would be not only arbitrary but discriminatory to treat unequals equally and to treat a case of mere toilet on par with a case of a whole structure whether it be a hut or a mansion. The yardstick that would apply must necessarily be different for such wholly different structures.

21. It would do well for the municipality also to initiate action upon thousands of complaints received from the

citizens in respect of wholly illegal and unauthorised structures of which absolutely no evidence is produced and which has made Mumbai, the City of Slums. It would do well for them to allow the citizens the most basic of the requirements of body function.

22. The aforesaid facts, prima facie shown at an ad-interim stage, would require the Court as also the municipality to hold its hands from taking action against such a basic necessity of life.

23. Seen from these parameters the impugned order cannot be sustained. The rejection of the ad-interim relief is improper. Some prima facie case is certainly made out. It deserves to be heard at length in the notice of motion and perhaps thereafter at the trial.

24. Consequently there shall be an order of injunction restraining the respondents from taking any action for demolition of the suit toilet of the plaintiff pending the notice of motion taken out in the trial Court.

25. The appeal as also the civil application are disposed off accordingly.

(ROSHAN DALVI, J.)