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IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 1041 OF 2014
WITH
CIVIL APPLICATION NO. 175 OF 2015

Metropolis Healthcare Ltd. ... Petitioner

Vs.

Industrial Bhavan (Worli) Ltd. and others ... Respondents

Mr.Rajesh Shah a/w Mr.Chetan Yadav i/b Markand Gandhi & Co.,
Advocates for Petitioner.

Mr.Dileep Balkrishna Nevatia, Respondent in-person.

CORAM : R. G. KETKAR, J.
DATE : 05th AUGUST, 2015

P.C. :

. Heard Mr.Rajesh Shah, learned Counsel for the petitioner and Mr.Dileep Balkrishna Nevatia, respondent who appears in person at length.

2. Mr.Shah seeks leave to delete rest of the respondents as respondent No.1 is the only contesting respondent in this present Application and no reliefs are claimed against respondents No. 2 to 9. Rule. Mr. Nevatia waives service. At the request and by consent of the parties, rule is made returnable forthwith and the Application is taken up for final hearing.

3. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), original defendant No. 5 has

challenged the judgment and order dated 01/09/2014 passed by the learned Judge, City Civil Court of Greater Bombay in Notice of Motion No. 303 of 2013 in L.C.Suit No. 2531 of 2011. By that order, the learned trial Judge dismissed the Motion taken out by the defendants No. 3 to 9 for framing preliminary issue under Section 9-A of C.P.C.

4. In support of this Application, Mr.Shah strenuously contended that respondent No.1, hereinafter referred to as plaintiff instituted Suit inter alia claiming for declaration that the commencement certificate dated 08/02/2001 (Exhibit 'R') and acceptance to the completion certificate dated 14/11/2003 (Exhibit 'S') are illegal, improper, malafide and bad in law; for direction against defendant No.1, hereinafter referred to as Corporation to adopt appropriate proceedings against defendants No. 3 to 9 under the provisions of Development Control Regulations for Greater Mumbai 1991 (for short 'Regulations'), Mumbai Municipal Corporation Act, 1888; for operating a large scale Pathological Laboratory in the plaintiff's suit premises i.e. ground floor (West Wing) and 1st floor of Udyog Bhavan, Worli, Mumbai, more particularly described in schedules Exhibits 'E' & 'F' (for short 'suit premises'); for direction to the defendant No.2- Food and Drug Administration to adopt appropriate proceedings against defendants No. 3 to 9 under the provisions of the Drugs and Cosmetic Act, 1940

and the Rules thereunder for operating a large scale Pathological Laboratory in the suit premises; for perpetual injunction respondents No. 3 to 9 from operating Pathological Laboratory and Super Specialized Research Laboratory or carrying on any other similar activity in the suit premises.

5. He further submitted that on 11/11/2011, the learned trial Judge admitted Suits bearing stamp No. 2405 of 2011 and 2406 of 2011 subject to objection about jurisdiction and limitation if taken in future to be decided on merits by the Court. He submitted that during the pendency of the Suit, the plaintiff took out Notice of Motion No. 115 of 2012 inter alia praying for temporary injunction restraining Corporation from taking any step to regularize and/or to renew any permission to defendants No. 3 to 9 for operating Pathological Laboratory or Super Specialized Research Laboratory or carrying on any other similar activity in the suit premises; restraining defendant No.2 from taking any steps to regularize and/or to renew any permissions to defendants No. 3 to 9 for operating Pathological Laboratory or Super Specialized Research Laboratory or carrying on any other similar activity in the suit premises; directing Corporation to investigate into the activities of defendants No. 3 to 9 of running a large scale Pathological Laboratory in the suit premises; directing Corporation to immediately close and remove all the pipes and other outlets which are being used by defendants No. 3 to 9 for discharging

bio-medical waste from suit premises. He submitted that the said Motion was taken out on 13/02/2012.

6. Mr.Shah submitted that Motion was adjourned from time to time and on 17/07/2012, defendant No.3 tendered reply which was taken on record. He submitted that in paragraph 3 of that reply, it was specifically asserted that Suit is barred by law of limitation. On 21/07/2012, plaintiff tendered rejoinder and matter was thereafter adjourned to 25/09/2012. On 25/09/2012, Motion was adjourned to 08/11/2012 for arguments on framing of preliminary issues and for passing of necessary order for filing written statement. On 08/11/2012, the Court was busy in hearing arguments in Suit No. 5123 of 2012. The board was discharged and the case was adjourned for hearing of preliminary issue to 16/01/2013. On 16/01/2013, plaintiff did not press the Motion. As the plaintiff did not press the Motion, it was dismissed and accordingly, disposed of for want of prosecution. On the same day, defendants No. 3 to 9 tendered draft Notice of Motion along with affidavit. The learned trial Judge granted leave to register the Motion. The copy of the draft Notice of Motion was served on the plaintiff and the draft Notice of Motion was handed over to the advocate for registration purpose. The case was adjourned for filing of reply to the Motion and for registration of draft Notice of Motion to 23/01/2013. On 24/06/2013, the learned trial Judge recorded

the submissions made on behalf of the plaintiffs that defendants No. 3 to 9 did not tender original Notice of Motion which they had tendered for framing issues as regards limitation and for trying the said issue as preliminary issue. It was recorded therein that on last occasion, defendants No. 3 to 9 were directed to tender original Notice of Motion. The original Notice of Motion was not tendered till date. Notice of Motion was not before the Court as also defendants No. 3 to 9 were absent. The learned trial Judge therefore, dismissed the draft Notice of Motion for non- prosecution.

7. Mr.Shah submitted that defendants No. 3 to 9 took out Notice of Motion No. 3563 of 2013 for restoration of Motion taken out under Section 9-A of C.P.C. By the order dated 23/01/2014, Motion was allowed in terms of prayer clause (a) subject to costs of Rs.2,000/- payable to the plaintiff. It was made clear that if the costs is not paid within 3 days, order of restoring the motion will have no effect . Mr.Shah submits that he has complied the conditional order.

8. Mr.Shah submitted that by the impugned order, the learned trial Judge has dismissed the Motion. He submitted that in paragraph 13, the learned trial Judge observed that Suit is not barred in view of Section 149 of the Maharashtra Regional and Town Planning Act, 1966 (for short 'Act') as the plaintiff has not challenged any order or direction either issued by the State Government or Planning Authority or Development Authority. The learned trial

Judge, therefore, held that Section 149 of the Act will not be applicable to the case. In paragraph 15, the learned trial Judge observed that the plaintiff has specifically asserted that unauthorised act of the defendants is continuing one and therefore, Section 22 of the Limitation Act, 1963 would apply to the present case. He submitted that the finding of the learned trial Judge that Section 149 of the Act is not applicable as plaintiff has not challenged the order of the Planning Authority is patently erroneous. He submitted that plaintiff has challenged the commencement certificate dated 08/02/2001 as also acceptance to the completion certificate dated 14/11/2003 at Exhibits 'R' & 'S' respectively. The commencement certificate is issued under Section 45 of the Act. Sub-section (1) of Section 45 lays down that on receipt of an application under Section 44, the Planning Authority may, subject to the provisions of this Act, **by order in writing** grant the permission, unconditionally; grant the permission, subject to such general or special conditions as it may impose with the previous approval of the State Government; or refuse the permission. Sub-section (2) thereof lays down that any permission granted under sub-section (1) with or without conditions shall be contained in a commencement certificate in the prescribed form. Sub-section (3) thereof provides that every order granting permission subject to conditions, or refusing permission shall state the grounds for imposing such conditions or for such refusal. Sub-

section (4) thereof lays down that every order under sub-section (1) shall be communicated to the applicant in the manner prescribed by regulations. He, therefore, submitted that perusal of Section 45 of the Act clearly shows that the Planning Authority is empowered to grant permission with or without condition or refuse permission by passing order in that regard. The learned trial Judge was not justified in observing in paragraph 13 that the plaintiff has not challenged any order or direction issued either by State Government or Planning Authority or Development Authority. He submitted that defendant No.1- Corporation is a local authority as also a Planning Authority within the meaning of clauses (15) & (19) respectively of Section 2.

9. He further submitted that the learned trial Judge was also not justified in observing in paragraph 15 that in view of Section 22 of the Limitation Act, 1963 alleged unauthorised acts of the defendants are continuing one. He submitted that in the facts and circumstances of the present case, Section 22 has no applicability at all. Mr.Shah submitted that the plaintiff has challenged commencement certificate dated 08/02/2001 (Exhibit 'R') and the acceptance to the completion certificate dated 14/11/2003 (Exhibit 'S'). As per Article 58 of the Limitation Act, challenge to Exhibits R & S is clearly barred by limitation. If prayer clause (b) cannot be granted being time barred, the Suit must fail and is liable to be

dismissed.

10. Mr.Shah submitted that plaintiff has taken out Notice of Motion No. 115 of 2012 for interim relief. In the reply, defendants specifically raised objection under Section 9-A of the C.P.C. Once the objection is raised, the Court has to deal with that objection. In support of this proposition, he relied upon decision of this Court in the case of ***Mukund Ltd. Vs. Mumbai International Airport & Ors.***, decided on 15/02/2011 in Appeal No. 1167 of 2010 in Notice of Motion No. 557 of 2010 in Suit No. 516 of 2010 (Coram: Dr.D.Y.Chandrachud and Anoop V.Mohta, JJ.)

11. Mr.Shah also relied upon the decision of this Court in the case of ***Royal Palms (India) Pvt.Ltd Vs. Bharat Shantilal Shah, 2009(2) Bom.C.R. 622*** and in particular, paragraphs 3 & 4 thereof. It was observed in paragraph 4 that when an objection to the jurisdiction of the Court to entertain the suits as the suits are barred by the law of limitation is raised, at the time of hearing of the of notices of motion wherein interim order is claimed, the Court is obliged by the provisions of Section 9-A of C.P.C. to frame preliminary issue as to the ground raised to the jurisdiction of the Court to entertain the suits and proceed to decide that preliminary issue and it is only on decision of that preliminary issue, that the notices of motion can be taken up for final decision.

12. On the other hand Mr. Nevatia supported the impugned

order. He submitted that on 16/01/2013, plaintiff did not press the Notice of Motion. The learned trial Judge dismissed the Motion and accordingly, disposed of for want of prosecution. Defendants No. 3 to 9 did not challenge that order. He submitted that on the same day, defendants No. 3 to 9 tendered the Notice of Motion. The learned trial Judge granted leave to register the Notice of Motion. He invited my attention to paragraph 3 of the affidavit in reply wherein defendants No. 3 to 9 merely asserted that Suit is barred by law of limitation. He submitted that these are nothing but bald allegations. Defendants No. 3 to 9 did not give any particulars as to why the Suit is barred by limitation. There is also no pleadings to the effect that Suit is barred in view of Section 149 of the Act. He submitted that the learned trial Judge passed order in Motion No. 303 of 2013 which is impugned here and not the order passed in Notice of Motion No. 115 of 2012. The order passed in Notice of Motion No. 115 of 2012 was not challenged by defendants No. 3 to 9. In short, he submitted that as the Motion for interim relief was not pending, it is not open to the defendants No. 3 to 9 to raise contentions based on Section 9-A of C.P.C. Mr. Nevatia invited my attention to paragraph 41 of affidavit in reply dated 17/07/2012 filed by Dr.Sushil Kanubhai Shah- defendant No.2. He submitted that assuming for the sake of argument without conceding that prayer clause (b) cannot be granted, that does not ipso facto mean that other prayers are wiped

out. He has invited my attention to conditions 5 & 6 of the commencement certificate dated 08/02/2001 as also acceptance to completion certificate on 14/11/2003. He submitted that the learned trial Judge rightly held that Suit is not barred by limitation. In any case, he submitted that the impugned order may be set aside and the learned trial Judge may be directed to consider the Motion taken out by defendants No. 3 to 9 for framing issues under Section 9-A of C.P.C. by keeping all the contentions of the parties open.

13. In view thereof, by consent of the parties, Application is disposed of in the following terms.

- i) The impugned order dated 01/09/2014 passed by the learned Judge, City Civil Court of Greater Bombay in Notice of Motion No. 303 of 2013 in L.C.Suit No. 2531 of 2011 is quashed and set aside.
- ii) The Notice of Motion No. 303 of 2013 is restored to the file of the trial Court.
- iii) The parties agree that they will appear before the trial Court on 14/08/2015 and for that purpose, fresh notice need not be issued to them.
- iv) The learned trial Judge will deal with the contentions referred in this order as also any other contention that may be raised by the parties and pass order on the basis of the material on record and in accordance of law within 3 weeks from 14/08/2015.

14. All the contentions of the parties on merits are expressly kept open. In view of the disposal of the Application, Civil Application No. 175 of 2015 does not survive and the same is disposed of accordingly.

15. Rule is made absolute in the aforesaid terms. In the circumstances of the case, there shall not order as to costs.

(R. G. KETKAR, J.)