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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER (STAMP) NO.34895 OF 2015
WITH
CIVIL APPLICATION (STAMP) NO.34897 OF 2015

Thomas A. Antao	...Appellant
V/s.	
Municipal Corporation of Greater Bombay	...Respondent

Mr.S.K. Dubey for the Appellant.

Mr.A.V. Diwate for the Respondent – B.M.C.

CORAM : R.D. DHANUKA, J.
DATE : 23RD DECEMBER, 2015.

P.C. :-

1. By this appeal from order, the appellant has impugned the order passed by the learned trial Court on 15th December, 2015, dismissing the notice of motion filed by the appellant (original plaintiff) by which the appellant had prayed for an injunction against the Municipal Corporation from enforcing the notice under section 351 of the Mumbai Municipal Corporation Act (MMC Act) dated 20th April, 2015 as well as the order dated 9th July, 2015 passed by the designated authority of the Municipal Corporation.

2. Mr.Dubey, learned counsel appearing for the appellant invited my attention to an order passed by this Court on 13th August,

2015 in Appeal From Order (Stamp) No.20625 of 2015 by which this Court had recorded the undertaking of the learned counsel appearing for the Municipal Corporation that the Corporation would file an affidavit in reply to the notice of motion before the learned trial Judge. He submits that in spite of the said undertaking rendered before this Court by the Corporation, no affidavit in reply came to be filed before the learned trial Judge. He submits that though no such affidavit in reply has been filed by the Corporation, the learned trial Judge has once again dismissed the notice of motion filed by the appellant.

3. It is submitted by learned counsel that though there were total 21 sheds, the Municipal Corporation has chosen to issue the notice under section 351 of MMC Act only in respect of the shed owned by the appellant which was discriminatory. He submits that the area in which the suit structure is located is deemed to have been declared as a slum. In respect of this submission, learned counsel invited my attention to a letter dated 11th February, 2014 issued by the Architect Mr.Bhupendra Patrawalla, stating that the property is fully occupied by slum for last more than 30 years and property under reference is already declared as slum. He submits that in near future the same is likely to be declared as a slum.

4. Learned counsel for the Municipal Corporation on the other hand invited my attention to an order dated 9th July, 2015

passed by the designated officer of the Municipal Corporation and would submit that the learned designated officer has dealt with each and every document produced by the appellant before the learned designated officer and has rightly come to a conclusion that the appellant had failed to prove the existence of the work shown in the notice issued under section 351 of the MMC Act prior to the date of 17th April, 1964 and 1st April, 1962 fixed for the toleration of residential and commercial structures respectively. He submits that the appellant had not produced before the learned trial Court or even before this Court any notification issued by the State Government declaring the structure in question as a slum.

5. A perusal of the record clearly indicates that none of the documents produced by the appellant before the designated officer of the Corporation demonstrated that the suit structure in respect of which notice under section 351 of the MMC Act was issued was in existence prior to the datum line of 17th April, 1964, which was the date for toleration for a residential structures.

6. Though this Court rendered an opportunity to the appellant to satisfy this Court from the documents produced by the appellant before the learned trial Court as well as before the learned designated officer of the Corporation that the suit structure was in existence prior to the datum line of 17th April, 1964, the appellant has not produced

any additional document before this Court to prove the existence of the said structure prior to the datum line of 17th April, 1964 or from the documents on record that the suit structure was in existence prior to the datum line. The appellant also could not produce any sanction from the Municipal Corporation for carrying out such construction.

7. A perusal of the impugned order passed by the learned trial Judge indicates that the learned trial Court has made a *prima-facie* observation about insertion of shop no.4 in the affidavit dated 4th November, 1993 on the basis of which the appellant claims certain rights in the said shop. The learned trial Judge has passed a detailed order after considering all the documents referred to and relied upon by the appellant before the learned trial Judge.

8. Insofar as the submission of learned counsel for the appellant that the Municipal Corporation though had rendered an undertaking before this Court, had not filed any affidavit in reply before the learned trial Judge and thus the learned trial Judge could not have dismissed the notice of motion is concerned, in my view, there is no merit in this submission. It was for the original plaintiff to prove before the learned trial Judge that the suit structure was in existence prior to the datum line or that he had obtained sanction from the Municipal Corporation before carrying out any construction, which was the subject matter of the notice under section 351 of the

MMC Act which the plaintiff has failed to prove before the learned trial Court as well as in this appeal. The learned trial Judge was thus justified in dismissing the notice of motion.

9. Insofar as the submission of learned counsel for the appellant that the structure in question was deemed to have been declared as a slum is concerned, the submission is totally devoid of merits. No notification issued by the State Government declaring the structure as a slum was produced before the learned trial Court or before this Court. Insofar as the reliance placed on the certificate issued by the Architect that since the structure was in question for more than 30 years, which was declared as a slum is totally misplaced and cannot be relied upon. There is no substance in the allegation of discrimination made by the appellant.

10. The appeal is devoid of merits and is accordingly dismissed.

11. In view of the dismissal of the appeal from order, the civil application does not survive and is accordingly disposed of. No order as to costs.

(R.D. DHANUKA, J.)