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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.75 OF 2015
WITH
CIVIL APPLICATION NO.89 OF 2015

Mohd. Ismail Gulam Shaikh	...Appellant
V/s.	
Municipal Corporation of Gr.Mumbai & Anr.	...Respondents

Mr.D.H. Mehta with Ms.A. Castellino i/b Mr.Bruno Castellino and Mr.P.R. Yadav for the Appellant.

Mr.R.A. Thorat, Senior Counsel with Mr.S.K. Sonawane and Mr.A.V. Diwate for the Respondent No.1 – B.M.C.

Mr.S.U. Kamdar, Senior Counsel i/b Mr.Alok Bagla for the Applicant in Civil Application No.1334 of 2015.

Mr.Rajesh Bindra for the Applicant in Civil Application No.91 of 2016.

CORAM : R.D. DHANUKA, J.
DATE : 1ST FEBRUARY, 2016.

ORAL JUDGMENT :-

1. By this appeal from order, the appellant has impugned the order passed by the learned trial Judge on 2nd January, 2015 refusing to grant ad-interim relief in favour of the appellant (original plaintiff) in the notice of motion *inter-alia* praying for an injunction against the Municipal Corp[oration (original defendants) from acting upon or from taking any steps pursuant to the notice dated 16th December, 2014

issued under section 55 of the M.R.T.P. Act, 1966 as against the plaintiff and the suit premises being 43-45, Mathuradas Estate Chawl, Ground Floor, Behind Apollo Floweriest, Causeway, Colaba, Mumbai 400 005.

2. Mr.Mehta, learned counsel appearing for the appellant invited my attention to various averments made in the plaint and the documents annexed to the plaint and submits that the impugned structure, which was the subject matter of the notice issued under section 55 of the M.R.T.P. Act is in existence since 1961-1962 and the appellant has been carrying on business in the said premises since then. He submits that since the structure in question was not a temporary structure, notice itself issued under section 55 of the M.R.T.P. Act by the Municipal Corporation was without jurisdiction. He submits that the appellant has been also residing in the suit premises. In support of his submission that the suit structure is not a temporary structure and that the appellant has been carrying out the business in the suit premises since 1961-1962, Mr.Mehta, learned counsel for the appellant invited my attention to the alleged Deed of Declaration dated 11th May, 1949 alleged to have been executed by one Mr.N. Saliyan. He submits that by the said document alleged to have been executed by the said Mr.N. Saliyan, the said Mr.N. Saliyan had given the space between two buildings at Mathuradas Estate

Bombay to Mossa Korachamkandil. The appellant is claiming through the said Mossa Korachamkandil.

3. Learned counsel also placed reliance on a copy of the power of attorney alleged to have been executed in the month of June, 2014. He submits that even the said power of attorney would indicate the address of the suit premises in the month of June, 2014. He also placed reliance on the notice dated 10th November, 2005 issued by the Municipal Corporation under section 381 of the Mumbai Municipal Corporation Act (M.M.C. Act). Reliance is also placed on the notices dated 10th December, 2005 and 14th November, 2005. He also placed reliance on the ration card issued at the suit address.

4. It is submitted by the learned counsel for the appellant that even the telephone bills as well as electricity bills issued by various authorities would clearly indicate the address of the suit premises. He submits that all these documents were produced for perusal of the authorities in respect of which the notice under section 55 of the M.R.T.P. Act has been issued. He submits that though the appellant had demanded oral hearing from the Municipal Corporation, no oral hearing was provided to him. He submits that the entire action on the part of the Municipal Corporation is without jurisdiction.

5. It is submitted that this Court has already taken a *prima-facie* view in favour of the plaintiff and has granted *status-quo* which

is in force for quite some time. It is submitted that the appellant has no objection if hearing of the notice of motion is expedited and is heard within a reasonable period of time after the defendants filing affidavit in reply.

6. Mr.Thorat, learned senior counsel appearing for the Municipal Corporation invited my attention to various documents referred to and relied upon by Mr.Mehta, learned counsel for the appellant. He also invited my attention to the notice issued under section 55 of the M.R.T.P. Act, 1966 and would submit that upon inspection of the suit property, the officers of the Municipal Corporation found that the appellant had erected temporary structure, which was totally unauthorized as described in the notice issued under section 55 of the M.R.T.P. Act. He submits that since the Municipal Corporation found an unauthorized structure of a temporary nature, action under section 55 of the M.R.T.P. Act cannot be challenged. He submits that whether authorized structure is of temporary nature or not, the opinion of the Municipal Corporation under section 55(2) of the M.R.T.P. Act is final and cannot be challenged.

7. It is submitted by the learned senior counsel for the Municipal Corporation that the appellant cannot be granted any discretionary relief in view of the fact that after obtaining *status-quo*

order from this Court, the appellant has violated the said order of *status-quo* and has created further encroachment on the public road and also on the open space and has expanded the unauthorized construction. In support of this submission, learned senior counsel invited my attention to the photographs of the temporary structure taken on the date of issuance of such notice and also recently to indicate that after obtaining the order of *status-quo*, the appellant has created further extension.

8. Mr.Kamdar, learned senior counsel for the intervenor invited my attention to each and every documents referred to and relied upon by the appellant and would submit that none of the documents would indicate that the appellant's suit structure was in existence since 1961-1962 or that the same was permanent in nature. Insofar as the alleged Deed of Declaration dated 11th May, 1949 relied upon by Mr.Mehta, learned counsel for the appellant is concerned, it is submitted that said Deed of Declaration does not indicate any complete address of the suit premises. It also does not indicate whether the alleged predecessor-in-title was carrying on any business in the pacca structure in the said open space.

9. My attention is also invited to various notices issued by the Municipal Corporation and it is submitted that even those notices which were issued in the year 2005 or subsequently, which

documents are relied upon by the appellant, would clearly indicate that even in the year 2005 or even thereafter, the notices were issued in view of the appellant keeping certain wooden boxes in the open space between the two buildings. He submits that even if the Municipal Corporation would have found any pacca structure even in the year 2005, the notices issued by the Corporation would not have indicated any open space between the two buildings. He submits that it was not the case of the appellant that when the notices issued by the Municipal Corporation there was no open space and the entire area between the two buildings was covered by pacca structure. He submits that the order passed by the Criminal Court also would assist the case of the respondents and the intervenor and not the case of the appellant. My attention is also invited to some of the annexures annexed to the civil application filed by the intervenor.

10. Learned senior counsel submits that even in the application made for certificate under Shops & Establishment Act, the appellant has alleged that in the year 2014, the business was commenced by the appellant. He submits that the appellant has suppressed this fact from the trial Court and also from this Court.

11. My attention is also invited to some of the photographs annexed to the civil application and would submit that after obtaining the *status-quo* order from this Court, the appellant has carried out

substantial unauthorized construction in the suit structure.

12. There is no dispute that the Municipal Corporation has issued a notice under section 55 of the M.R.T.P. Act. A perusal of section 55(1) of the M.R.T.P. Act clearly indicates if it is found that any person has carried out any development of a temporary nature unauthorizedly as indicated in section 52 of the M.R.T.P. Act, the Corporation is empowered to order such person to remove or discontinue the use of the land unauthorizedly. The Municipal Corporation has to be satisfied that the authorized construction of a temporary nature is carried out as provided in section 52 of the M.R.T.P. Act. A perusal of section 55(2) of the M.R.T.P. Act clearly indicates that the decision of the planning authority on the question whether the development is a temporary in nature shall be final. In my view, the action taken by the Municipal Corporation under section 55 of the M.R.T.P. Act thus in the facts and circumstances of the case and in view of section 55 read with section 55(2) is final and conclusive.

13. With the assistance of the learned counsel for the parties, I have perused the documents referred to and relied upon by the appellant in support of the submission of the appellant that the suit structure was not of a temporary nature and that the appellant has been carrying on business in the suit structure since 1961-1962.

14. I have given an opportunity to the learned counsel appearing for the appellant to demonstrate before this Court from the documents produced before the learned trial Judge in support of his contention that the suit structure was not temporary structure and that the appellant has been carrying on business in the suit premises since 1961-1962. Pursuant to this opportunity granted by this Court, the learned counsel for the appellant invited my attention to some of the documents which were on record before the learned trial Court, which are dealt with in the later part of the order.

15. Insofar as the alleged Deed of Declaration relied by the appellant dated 11th May, 1949 is concerned, a perusal of the said alleged Deed of Declaration does not indicate any description of the alleged structure between the two buildings. If according to the appellant, the appellant was carrying on business since 1961-1962 in the suit premises, such structure would have been definitely assessed by the Municipal Corporation in last several decades till date. Admittedly the temporary structure of the subject matter of the suit is not assessed between 1961 till date.

16. In my view merely on the basis of the said alleged Deed of Declaration dated 11th May, 1949, this Court cannot accept the submission of the learned counsel for the appellant that the appellant had been carrying on business in the said premises from 1961-1962.

17. Insofar as the notices issued by the Municipal Corporation under different provisions of the M.M.C. Act issued in the year 2005 and thereafter relied upon by the appellant is concerned, a perusal of such notices clearly indicates that the Municipal Corporation in the year 2005 had found that the appellant had stored some of the empty boxes in the open space between two buildings. The said empty boxes were without obtaining permission from the Municipal Corporation. The prosecution was launched against the appellant pursuant to such action initiated by the Municipal Corporation. All such documents which are relied upon by the appellant would clearly indicate that there was no shed found by the Municipal Corporation on its visit in the year 2005. The empty boxes were stored in the open space. It is thus clear beyond reasonable doubt that whatever structures are put up by the appellant were after the year 2005.

18. In my view, none of these documents which are relied by the appellant would indicate that the suit structure which is the subject matter of the notice was a pacca structure or is in existence since 1961-62.

19. It is not the case of the appellant that the appellant had obtained any permission from the Municipal Corporation for erection of such structure.

20. A perusal of the application, which was filed by the

appellant for the purpose of obtaining the license under the provisions of the Shops and Establishment Act, which is annexed to the civil application filed by the intervenor clearly indicates that it was the case of the appellant himself that he started business in the premises some time in the year 2014.

21. Even copy of the passport, electricity bill and telephone bill, produced on record by the appellant would not indicate that the suit premises was a pacca structure or that the appellant was carrying on business in the premises since 1961-1962. If the appellant was carrying on any business in the premises since 1961-1962, the appellant would have in his possession several documents and/or permission from the Municipal Corporation or other authorities to indicate that such business was being carried on since 1961-1962.

22. A perusal of record further indicates that after obtaining ad-interim order of *status-quo* from this Court, the appellant has extended the temporary structure in the suit premises. A perusal of the photographs produced on record by the Municipal Corporation as well as by the intervenor clearly indicates such further extension carried out by the appellant. In my view, the reliefs under the provisions of Order 39 Rule 1 of the Code of Civil Procedure are equitable reliefs and are discretionary and such discretion can be exercised by the Court only when the person has come to the Court

with clean hands and has not suppressed and/or material facts and makes out a *prima-facie* case. In my view if a person violates the order of *status-quo* granted by this Court, cannot be granted any relief by exercising discretionary power by Court. A perusal of the order passed by the learned trial Judge clearly indicates that the appellant was given an opportunity to produce all the documents. The learned trial Judge considered each and every document produced by the appellant before him and has rightly rejected the ad-interim relief. Though this Court has granted sufficient opportunity to the appellant to convince this Court that the suit structure was a pacca structure and that the appellant was carrying on business in the suit premises since 1961-1962. In my view, the learned counsel appearing for the appellant could not demonstrate any of these crucial facts to seek any interim relief from this Court.

23. In my view the appeal is devoid of merits. The appellant has taken law in his hand by committing *prima-facie* violation of the *status-quo* order granted by this Court. It is for the respondents to file appropriate proceedings for contempt of court against the appellant for committing violation of the *status-quo* order passed by this Court. The appeal from order is accordingly dismissed.

24. In view of the dismissal of the appeal from order, the civil application does not survive and is accordingly dismissed. No order

as to costs.

25. Learned counsel for the appellant seeks continuation of the *status-quo* order. In view of the fact that this Court has come to the conclusion that the appellant has violated the order of *status-quo* granted by this Court, the application of Mr.Mehta, learned counsel for the appellant for continuation of the *status-quo* order is rejected.

(R.D. DHANUKA, J.)