

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

FIRST APPEAL NO. 1020 OF 2013

Somnath Residents Association & ors. ... Appellants

vs.

Municipal Corporation for Gr. Mumbai & ors. ... Respondents

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Mr. Madhav Jamdar i/by M/s. Anoop Sharma, Advocate for the appellants.

Ms. Mamta Bhoir, Advocate for respondent no.1/BMC.

Mr. Mayur Khandeparkar a/w Mr. A. N. Matwani, Mr. S. Das i/by Mahesh Humranwala, Advocate for respondents no.2(a) & 3.

Mr. S. M. Kazi, Advocate for respondent no.4.

Coram : Smt. R. P. SondurBaldota, J.

Date : 15th April, 2016.

P.C.

1. This appeal challenges the judgment and decree of dismissal dated 30th October, 2011 passed by the Bombay City Civil Court in L.C. Suit No.355 of 1988. Pursuant to the direction dated 23rd September, 2015, the appeal is taken up for final hearing at the stage of admission. The appellants have filed private paper-book.

2. The appellants are the original plaintiffs. Appellant no.1 is a Association of Slum Dwellers on Survey No.47, Bandra, Mumbai. It is registered under the provisions of the Public Trust Act as also under the Societies Act. Appellant no.2 is the Chairman of the

Association and appellants no.3 and 4 are its members. According to the appellants there are 57 more members of appellant no.1. Original defendant no.2 was one Harry D'mello on whose death, his widow defendant no.2(a) and his son defendant no.2(b) were brought on record. Defendant no.2(a) has also since expired. Harry D'mello was the owner of plots of land bearing Survey Nos.44, 45/A, 46 and 47 situate at 128 D'mello Compound, Mill Road, Bandra (West). Original defendant no.3 is a Developer and Builder, who is developing the land of Harry D'mello on his instructions. Original defendants no.4 and 6 are owners of the adjoining plot of land and were impleaded to the suit as the necessary parties. During the pendency of the present appeal, they transferred their property to respondent no.4 herein. Hence, they have been deleted from the array of the parties. Respondent no.7 is a Developer of the property at Survey No.45/A. He has constructed a building pursuant to the plans sanctioned by the Municipal Corporation dated 7th January, 1984. The parties shall hereinafter be referred to by their original nomenclature.

3. The suit filed by the plaintiffs was for injunctions simplicitor. The three reliefs of permanent injunctions sought by them at prayers (b), (c) and (d) read as under :

“(b). A permanent order and injunction to the Honourable Court against the Defendants No.1 restraining the Defendants No.1, their servants and agents from according or issuing occupation or completion certificate in respect of construction carried out by Original Defendant No.2 and Defendant no.3 and/or 7 in accordance with the sanctioned plan, a copy whereof is Exhibit-'E' to the plaint and Municipal IOD on property situate at plot

of land bearing CTS No.46 at 128, D'mello Compound, Somnath Lane, Hill Road, Bandra, Bombay-400 051.

(c). Pending the hearing and final disposal of the suit, for a temporary order and injunction of the Honourable Court against the Defendant no.1, restraining the Defendants No.1, their servants and agents from according or issuing Occupation or Completion Certificate in respect of construction carried out by Original Defendants no2 and Defendant No.2(a) and/or 3 and/or 7 in accordance with the sanctioned plan, a copy whereof is Exhibit-E to the plaint and Municipal IOD on property situate at plot of land bearing CTS No.46 at 128 D'mello Compound, Somnath Lane, Hill Road, Bandra, Bombay- 400 501.

(d). In the alternative to prayer (a) hereinabove, for an order and injunction of the Honourable Court against the Defendant No.1 directing the Defendant No.1 to forthwith suspend or cancel occupation or completion certificate issued if any in respect of constructions carried out by the Original Defendants No.2, Defendant No.2(a) and/or 7 and 3 in accordance with sanctioned plan or copy whereof is Exhibit "E" to the Plaint and Municipal IOD on CTS No. 46 at 128, D'mello Compound, Somnath Lane, Hill Road, Bandra, Bombay-400 051."

4. The averments made in the plaint to support the above prayers are that one, Joseph D'mello, the father of original defendant no.2, Harry was the owner of plots of land bearing Survey No.44, 45(A), 46, 47 and 45B. About 40 years prior to filing of the suit, he had erected various structures and tenements over the plots of land bearing survey no.44, 45A and 47 without municipal permission. He had let out the tenements to plaintiffs no.2, 3, 4 and several others. On his demise, the lands at Survey No.44, 45A, 46 and 47 went to the share of original defendant no.2, Harry who started recovering rent

from the tenants in the tenements. The plot of land bearing survey No.45B went to the share of the brother of original defendant no.2. In or about the year 1975, that land was developed and a building constructed thereon.

5. According to the plaintiffs since the beginning a proper underground municipal sewerage line alongwith gutter pipes, manholes and chambers was constructed on the land at Survey no.45(A) and connected to the municipal sewerage line in Somnath lane. Similarly, the water pipeline and electricity connection for the premises on the lands at Survey no. 44, 45(A) and 47 were also laid through and under the land at Survey no.45(A). Also, there always existed an amenity to the occupants of the three plots of land of an access common with original defendant no.2 and his brother over Survey No. 45A opening into the Somnath lane. It is the only lawful access available to the tenants occupying the tenements at Survey No. 44, 45(A) and 47.

6. Because the existing structures, in all numbering about 60, situate on the lands at Survey No. 44(A), 45 and 47 inhabited by 300 persons are old and without proper amenities, the plaintiffs applied to the Competent Authority appointed under the provisions of The Maharashtra Slum Areas (Development, Clearance and Redevelopment) Act, 1971 ("the Slum Act" for short) for declaration of the area as "Slum". Accordingly, the officer of the Deputy Collector and Competent Authority addressed letter dated 9th January, 1996 to plaintiff no.2, original defendant no.2 and defendant no.3 calling upon them to show cause as to why the land be not declared as a "Slum". Eventually, by the State Government Notification dated 30th May, 1986 published in the Government Gazette dated 26th June,

1986, the land at Survey Nos. 44 and 47 was declared as a "Slum". Original defendant no.2 has challenged the order by preferring Appeal No. 161 of 1986 before the Tribunal constituted under the Slum Act. That appeal is pending.

7. On 17th July, 1984 defendant no.3 got plans for construction of buildings at Survey No. 44, 45(A) and 46 sanctioned. The plans were revalidated from time to time. The plaintiffs allege that, the said plans and the I.O.D. issued in respect thereof, shows that, there is an open clear passage to be maintained between the outer walls of the proposed Building on Survey no.46 and the boundary wall of the building on Survey no.45B with the width varying between 22 ft to 26 ft as the common access with an clear entrance gate of atleast 25 ft width opening into Somnath lane. Defendant no.3 and defendant no.7, however, closed that common access which was being used by the plaintiffs by carrying out construction in breach of the sanctioned building plans and the IOD granted to them. The plaintiffs contend that, since they have been in uninterrupted use of that access, original defendant no.2 was duty bound to afford and secure them the access. Therefore, they filed the suit herein as a representative suit with leave under Order 1 Rule 8 Civil Procedure Code seeking reliefs of injunction simplicitor. The first relief is of a permanent injunction to restrain defendant no.1 from issuing occupation or completion certificate to the construction carried out by defendants no.3 and 7. The second relief, which is alternative to the first relief, is for a direction to defendant no.1 to suspend/cancel the occupation or completion certificate, if already issued. The third relief of injunction is an mandatory order directing defendants no.2(a) and 7 to forthwith "afford an uninterrupted, free and full access to the plaintiffs and the residents of the tenements on

plots of land bearing Survey No.44, 45A (rear) and 47 situate at 128, D'mello Compound, Somnath Lane, Hill Road, Bandra, Bombay-400 051 for egress and ingress to their respective tenements through the date and passage on plot of land bearing Survey No.45A (front) and 46, situate at as aforesaid and leading to common access opening or abutting said Somnath Lane, Hill Road, Bandra, Bombay-400 050 for ingress and egress to respective tenements through the gate and passage on plot of land bearing Survey Nos.45A (front) and 46 situate at aforesaid and leading to common access opening and abutting said Somnath Lane, Hill Road, Bandra, Bombay-400 050”.

8. All the defendants have filed their respective statements to contest the suit. Defendant no.3 has adopted the written statement of defendant no.7. After the plaint was amended, the defendants have filed additional written statements to the amended plaint. The contest by the defendants to the suit is to its maintainability, as well as, on merit. The objections taken to maintainability of the suit are (i)the plaintiffs are not entitled to leave under Order 8 Rule 1 Civil Procedure Code, (ii)the suit is bad for non-joinder of parties, mis-joinder of parties and mis-joinder of cause of action, (iii) the suit was not maintainable against defendant no.1 for want of statutory notice under Section 527 of the Bombay Municipal Corporation Act, (iv) the suit was bad for want of sanction from the Controller of Slums and Charity Commissioner, (v) the suit was barred by the law of limitation and (vi) the plaint was liable to be rejected for improper valuation and non-payment of court-fees.

9. On merits, the defendants denied the claim of the plaintiffs of the right of access over the property at Survey no. 45A. They denied that, plaintiffs no.2 to 4 and the other members of

plaintiff no.1 have been continuously and uninterruptedly using the access as claimed. According to them, the building constructed by defendant no.3 is as per the plans sanctioned by defendant no.1 and since then it has been in the occupation of defendant no.8, Society. According to the defendants, the suit filed by the plaintiffs for injunction simplicitor without challenging the plans sanctioned for construction is not maintainable. In any case, according to them, there is another access available to the plaintiffs which they have infact been using ever since the construction by defendants no.3 and 7 of the building for defendant no.8.

10. On the pleadings between the parties, the trial Court framed ten issues out of which six arise out of the contentions as regards the maintainability of the suit and three issues relate to the merits. The plaintiffs examined only one witness i.e. plaintiff no.3. On behalf of the defendants, an employee of defendant no.7 was examined. By the impugned judgment and order, the Bombay City Civil Court held that the plaintiffs are entitled for grant of leave under Order 1 Rule 8 Civil Procedure Code to sue in representative capacity. As regards the objections of maintainability on the ground of non-joinder of necessary parties, mis-joinder of parties, multifariousness, bar of limitation and improper valuation, the Bombay City Civil Court held that the same were without merit. It, however, upheld the objection of maintainability of the suit on the ground of want of statutory notice under Section 527 of the Bombay Municipal Corporation Act to defendant no.1. It has also held that, the suit is barred for want of sanction from the Controller of Slums and Charity Commissioner. The issues on the merits of the case have also been answered in the negative.

11. There is no dispute that the plaintiffs had not served mandatory

notice under Section 527 of the Bombay Municipal Corporation Act upon defendant no.1. At para-16 of the plaint, they aver that the suit filed being for enforcement of the statutory obligations and duty on the part of defendant no.1, notice under Section 527 of the Bombay Municipal Corporation Act was not required to be given. In the alternative, they claimed that, they were unable to address the notice in view of the urgency in filing the suit. The Bombay City Civil Court has observed that, there is no provision in the Bombay Municipal Corporation Act for waiver of the statutory notice. Therefore, it was obligatory on the part of the plaintiffs to serve the statutory notice upon defendant no.1 and therefore the suit against defendant no.1 is bad and not maintainable. Mr. Jamdar, the learned Advocate for the plaintiff submits that, the subsequent conduct on the part of defendant no.1 must be treated as waiver on its part of the statutory notice. The submission cannot be accepted for the same reason as stated by Bombay City Civil Court. If there is no provision for waiver, there can be implied waiver. Since the first two prayers of injunction sought by the plaintiffs are directed against defendant no.1 alone, the suit in respect thereof is liable to be dismissed. Further, admittedly Occupation Certificate was granted to respondent no.8 much prior to filing of the suit. Therefore, there was no question of refusal of Occupation Certificate. Further, in view of grant of Occupation Certificate to defendant no.7 before filing of the suit, there was no question of suspension of the Certificate.

12. With that, the only prayer that remains for consideration against the other defendants is the prayer seeking mandatory order against defendants no.2(a), defendant no.7 and defendant no.8 as regards the access. Defendants no.2(a), defendant no.7 and

defendant no.8 have alleged that, the suit is bad for want of sanction from Controller of Slums and the Charity Commissioner. The Bombay City Civil Court has noted in the impugned order that, the plaintiffs have admitted in clear terms that the property on which their structures are situate has been declared as "Slum". Plaintiff no.1 claims to be a Trust registered under the provisions of the Public Trusts Act. It also claims to be registered with the office of the Charity Commissioner as a Public Trust. Admittedly, before filing the suit the plaintiffs have not taken any sanction from the Charity Commissioner. The plaintiffs in their plaint have offered no explanation for this lapse on their part. Therefore, there cannot be any infirmity in this finding of the Bombay City Civil Court that the suit on this count is not maintainable.

13. The merits of this third relief have been dealt with at paras-19 to 29 of the impugned judgment and order. It is noted that the burden of proving that the construction carried out by defendants no.2(a), defendant no.3 and defendant no.7 is not in accordance with the plans sanctioned by defendant no.1 and the IOD issued in respect thereof, was upon the plaintiffs. Admittedly, defendant no.7 had given inspection of the sanctioned plans and IOD to the members of the plaintiff. P.W.1, in his cross-examination, admitted that the land at which the tenaments of the plaintiffs are situate, is declared as Slum. He claimed that, he was not aware that the members of the plaintiff used the access over the land at Survey no. 42 and 43 to their respective premises, which has been declared as municipal road. The witness of defendant no.7 has deposed in his evidence that, the occupants of plot bearing Survey no.44, 45A (Part) and 47 are having access through Survey No.41, 42 and 43 which is a public road and that they have been using that road only and have never had access

over the Plot No.45(A)(Part). He produced letter dated 21st January, 1998 issued by the Assistant Engineer of respondent no.1 which pertains to the status of the road between Survey No.42, 43 and 41 as “Somnath Lane”. The Bombay City Civil Court, then considered the plans submitted by defendant no.7 for development and construction of Survey No.46 and 45A (Part). The plans show that the building consists of Stilt plus 7 floors. IOD in respect thereof was issued on 19th February, 1983 and the Occupation Certificate was granted as far back as on 12th August, 1984.

14. Besides, P.W.1 in his cross-examination has admitted in clear terms that the building has been constructed strictly as per the sanctioned plans. The Bombay City Civil Court, has further noted that, there is no declaration sought by the plaintiffs of their right of access over Survey No.45A. Also there is no specific pleading about easementary right, if any, acquired by the plaintiffs in any manner. Their claim to access is on the basis of their status as the tenants. In that circumstance, according to the Bombay City Civil Court the only remedy available to the plaintiffs was under the provisions of the Rent Act and the Bombay City Civil Court had no jurisdiction to consider a relief under the Rent Act. There is no infirmity in this view of the Bombay City Civil Court also. The Appeal is therefore dismissed.

[Smt. R. P. SondurBaldota, J.]