

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.51/2016

IN

FIRST APPEAL NO. 35/2016

Mohan T. Mirchandani

... Applicant

Vs.

The Municipal Corporation of Greater
Mumbai & Anr.

... Respondents

Mr. Milind Sathe, Senior Advocate with Mr. Chetan Kapadia with Purav
Damania for the Appellant

Mrs. M. R. Bhoir for the Municipal Corporation

Mr. Bhavesh Manek i/b. Mr. Ram Prakash Pandey for respondent No.2.

CORAM : K. K. TATED, J.

DATE : FEBRUARY 22, 2016

PC.:

1. Heard. This application is made by the plaintiff for an order of injunction restraining the respondent corporation from taking any action of demolition in respect of the plaintiff's premises as per notice dated 10/02/2007 u/s. 351 of the Mumbai Municipal Corporation Act, 1888 (MMC Act) and the order dated 17/02/2007 passed by the Assistant Municipal Commissioner, A-Ward, Mumbai till hearing and final disposal of the appeal.

2. In the present proceedings, the corporation issued notice u/s. 351 of the MMC Act on 10/02/2007 calling upon the applicant plaintiff to remove the unauthorised construction i.e. Brick Masonry Wall in compulsory open space of staircase block & lift lobby of 11th floor, Elegant Apartments. Thereafter, the Assistant Commissioner, A -Ward

passed order dated 17/02/2007 directing the applicant to remove the said unauthorised construction. Being aggrieved thereby, the plaintiff filed L.C.Suit No.780/2007.

3. After considering the evidence on record, the trial court, by the impugned judgment and decree dated 31/10/2015 dismissed the plaintiff's suit.

4. The learned senior counsel for the plaintiff submits that the trial court erred in coming to the conclusion that the plaintiff has carried out unauthorised construction as described in notice u/s. 351 of the MMC Act dated 10/02/2007. He submits that though the plaintiff placed on record a sanctioned plan exhibit 20, same was not considered by the trial court. He submits that exhibit 20 clearly shows that the plaintiff has not carried out any unauthorised construction as stated in notice u/s. 351 of the MMC Act. He further submits that the trial court in para 13 stated that, it is very difficult to understand which one is the sanctioned plan. He relies on para 13 of the impugned judgment which reads thus:

13. Plaintiff has not filed any sanctioned plan. So many sanctioned plans are filed but those are not finally sanctioned plan. Plaintiff tried to say that he has filed sanctioned plan etc. But the same does not show that it is authorised sanctioned plan. Plaintiff has admitted that he has not obtained sanctioned plan from society. BMC is also not having any sanctioned plan. Therefore, it is very difficult to accept plaintiff's version that said wall is constructed at the time of construction of the building. Defendant No.2 has clearly stated before the Court that he had been to Canada in the year 1976 prior to that there was no such wall. When he returned back in the year 1979 he found that structure was constructed. Admittedly, he is residing in the same building having knowledge about the construction and also existence of the wall. Another very important thing is that defendant No.2 is also professional architect

and his evidence carries more weightage than evidence of the plaintiff. Plaintiff tried to say that he got constructed said wall from building and on his request said wall was constructed. In this case there is no any such sanctioned plan filed on record to show that said structure was authorised and as per sanctioned plan. Therefore it cannot be stated that structure is authorised and may be protected.

5. The learned senior counsel for the plaintiff submits that in the trial court, they had filed notice of motion No.749/2009 for interim relief, which was allowed on 06/07/2009, directing the parties to maintain *status-quo* with regard to the suit wall till hearing and final disposal of the suit. He further submits that the said order was challenged by the respondent - defendant No.2 by preferring Appeal from Order No.927/2009. He further submits that the Appeal from Order as well as civil application came to be dismissed by this court vide order dated 15/09/2009. He further submits that since 2007, the interim relief is running in favour of the plaintiff and the first appeal is admitted. Hence, this Hon'ble Court be pleased to continue the interim protection in favour of the plaintiff till hearing and final disposal of the appeal.

6. On the other hand, the learned counsel for the respondent No.2 defendant vehemently opposed for grant of ad-interim relief. The respondent No.2 filed Affidavit-in-Reply dated 27/01/2016. Same is taken on record. The learned counsel for the defendant No.2 submits that exhibit 20 is not a sanctioned plan. He submits that neither the corporation nor the plaintiff placed on record the final sanctioned plan in respect of the suit structure. He submits that according to the IOD dated 09/04/1973, the wall constructed on the 11th floor is unauthorised. He submits that even in cross-examination of D.W.1 Prakash Koth, it is specifically stated that the plaintiff has carried out

unauthorised construction which is contrary to the sanctioned plan. On the basis of this submission, the learned counsel for the respondent No.2 submits that the plaintiff has not made out any case for interim protection till hearing and final disposal of the appeal. Hence, the civil application is liable to be dismissed.

7. Heard both sides at length. In the present proceedings, the plaintiff has placed on record exhibit 20 – sanctioned plan, which clearly shows the existence of the suit structure i.e. wall on 11th floor. In the entire judgment, the trial court has not made any reference of exhibit 20. What is stated by the trial court in para 13 is that, it is very difficult to understand which one is the sanctioned plan.

8. Considering the fact that the interim relief was granted by trial court on 06/07/2009 and same was confirmed by this court in Appeal from Order, as the first appeal has already been admitted, the applicant plaintiff is entitled to interim relief till hearing and final disposal of the appeal.

9. Hence, following order is passed:

- a. Interim protection granted by this court on 06/07/2009 in notice of motion No.749/2007 to continue till hearing and final disposal of the appeal.
- b. Civil application stands disposed off accordingly.

JUDGE