IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE CIVIL JURISDICTION
APPEAL FROM ORDER (St) NO.10073 OF 2016

Nanda Dattatraya Walvekar .. Appellant
vs
Mumbai Municipal Corporation .. Respondent

with CIVIL APPLICATION (St) NO.10074 of 2016
in
APPEAL FROM ORDER (St) NO.10073 of 2016

Nanda Dattatraya Walvekar .. Appellant
vs
Mumbai Municipal Corporation .. Respondent

with CIVIL APPLICATION (St) NO.12415 of 2016
in
APPEAL FROM ORDER (St) No.12414 of 2016
Sharad Ramprakash Kapoor .. Applicant
vs
Mumbai Municipal Corporation .. Respondent

Mr.Nirav Shah i/b Mr.V.P.Shastri for Appellant
Mr.S.K.Sonawane for BMC
Mr.K.R.Jadhav Jr.Engineer (B & F) K/W Ward present

CORAM: ***G.S.KULKARNI, JJ***
DATE: **27TH APRIL, 2016**

P.C.

1. Heard learned counsel for the parties.

2. By this appeal, the appellant-plaintiff has challenged the order

dated 18th February 2016 by which ad-interim relief as prayed for in the draft notice of motion in L.C.Suit No.141 of 2016 came to be rejected. In the notice of motion before the trial Court the appellant had prayed for the following reliefs:

> *"(a) that the defendants, their officers, subordinates representatives, servants, agents, contractors, workmen and/or person or persons claiming through them or under them be permanently restrained by an order and inunction of this Hon'ble Court from in any manner demolishing, removing, pulling down and/or or in any manner interfering with and/or initiating any action respect of the suit premises and/or any part/portion thereof viz (I) horizontal extension to the existing structure by using B.M.wall and A.C.Sheet roof admeasuirng3.33 m x 8.57 m x (3.20m + 2.40 m) 2 ht with compound wall in front and back side of the suit premises situated at Plot No.36,Aram Nagar Part II, J.P.Road,Seven Bungalows, Versova, Andheri (W) Mumbai-400 061 and/or from in any manner implementing, executing, acting or enforcing the impugned notice bearing Notice No.KW/BNF/351/176.ARM/SEB-II/MD/JE-VII dated 24.9.2012 being Exhibit E to the Plaint and Order bearing No.KW/BF/361/176/ARAM/SEB-II/MD/JE-VII dated 9/12/2015 passed by the Designated Officer-III Assistant Engineer (B & F) K-West Ward being Exhibit K to the plaint;*
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> *(b) that pending the hearing and final disposal of the above suit, the defendants, their officers, subordinates, representatives, servants, agents, contractors, workmen and/or person or persons claiming through them or under them be permanently restrained by an order and injunction of this Hon'ble Court from in any manner demolishing, removing,m pulling down and/or in any manner interfering with and/or initiating any action in respect of the suit premises and/or any part/portion thereof viz (ia) horizontal*

extension to the existing structure by using B.M.wal and A.C.sheet roof admeasuring 3.33 m x 8.57 m x (3.20m+ 2.40m) 2 ht with compound wall in front and back side of the suit premises situated at Plot no. Plot no.35, Aram nagar Part II J.P Road Seven Bungalows, Versova, Andheri (W) Mumbai-400 061 and/or from in any manner implementing, executing, acting or enforcing the impugned notice bearing Notice No.KW/BF/351/176/ARM/SEB-II/MD/JE-VI dated 24.9.2012 being Exhibit E to the plaint and order bearing NO.KW/BF/351/176/ARAM/SEB-II/MD/JE/VII dated 9/12/2015 passed by the Designated Officer-III Assistant Engineer (B & F) K-West Ward being Exhibit K to the plaint."

3. In the impugned order the learned Judge in para 3 has noted that MHADA is owner of Aram Nagar colony wherein some structures were allotted on tenancy. The said structures were in a dilapidated condition and were required to be re-constructed and redeveloped for providing basic amenities and approach roads and as such entire layout owned by MHADA is undertaken for joint development. It was noticed that there were horizontal as well as vertical unauthorized constructions as carried out by the tenants of MHADA.

4. The appellant was accordingly issued a show cause notice under section 351 of the Mumbai Municipal Corporation Act, 1988 by the Assistant Commissioner, K (W) Ward as regards the unauthorized

horizontal extension to the existing structure by using brick masonry wall and A.C.Sheet roof admeasuring 3.33 metre x 8.56 metre (3.20+ 2.40 metre/2) and also unauthorized construction of compound wall by means of brick masonry wall. A sketch of unauthorized construction was also annexed to the said notice issued to the appellant under section 351 of the Act. The contention of the Corporation is that this construction was unauthorized and illegal and as such it was required to be pulled down.

5. The appellant submitted a reply to the show cause vide letter dated 26th September 2012. This was received by the Assistant Municipal Commissioner on 28th September 2012. It is placed at page 61 of the paper book. The appellant in the reply has submitted that for detailed reason and documents as referred in the said reply the said structures is not unauthorized as complained by the Municipal Corporation in the notice under section 351 of the Act.

6. The Municipal Corporation however passed an order on the said section 351 notice dated 24th September 2012 after a long lapse of time on 9th December 2015, whereby the appellant was directed to remove

the unauthorized construction within 15 days from receipt of the said order failing which the same would be demolished by the office at the risk, costs and charges of the appellants.

7. In this appeal, learned counsel for the appellant in assailing of the rejection of the ad-interim relief by the trial Court submits that the appellant had filed a detailed reply to the show cause notice dated 24th September, 2012 issued by the Municipal Corporation under section 351 of the MMC Act. The reply letter dated 26th September, 2012 of the appellant which is placed at page 67 of the paper book was received by the Municipal Corporation on 28th September,2012. Learned counsel for the appellant submits that in the said reply the appellant has provided requisite details to show that objection as raised on behalf of the Municipal Corporation by issuing section 351 notice was not proper and that in fact the objectionable construction would not be unauthorized.

8. Learned counsel for the appellant submitted that this reply dated 26th September, 2012 filed on behalf of the appellant was not considered at all by the Designated Officer who passed a final order on

section 351 notice namely order dated 9th December, 2015. He submitted that almost for a period of three years and more after the reply came to be submitted by the appellant, orders were not passed by the Municipal Corporation on the said show cause notice dated 24th September, 2012 and suddenly the order dated 9th December 2015 by the Designated Officer -III,Assistant Engineer B/F K W) Ward is passed after such a long lapse of time. It is submitted that the order itself is defective as the appellant's reply which was already on record by the Corporation on 28th September, 2012 is admittedly not taken up for consideration. It is submitted that this is clear from a perusal from the order/ letter dated 9th December, 2015 as placed on record before the trial Court a more legible copy of which is placed for perusal of the Court on behalf of the appellant.

9. A perusal of the order dated 9th December, 2015 clearly shows that in “Reference” portion of the said order there is a clear recording of “no reply” to the show cause notice. In fact the appellant's reply dated 26th September 2012 was on the record of the Designated Officer. The Designated Officer was under a legal obligation to take into consideration the reply dated 26th September,2012 and after considering the same, pass

whatever order he would have thought proper on the facts of the case and as per law. However, it is quite clear that the Designated Officer in the present case has not discharged his legal duties diligently or was callous.

10. Learned counsel for the respondent-Corporation admits that this there is a lapse on the part of the Designated Officer of the Corporation in having not considered the reply though it was on record of the Municipal Corporation, in passing the order dated 9th December, 2015. The learned counsel for the respondent Corporation on instructions of the Officer who is present in Court agrees to withdraw the order dated 9th December, 2015 which has been passed without taking into consideration the reply dated 26th September, 2012 as filed on behalf of the appellant.

11. The Court cannot be unmindful of these facts and what would disturb the court are two aspects. Firstly though the Municipal Corporation issued the show cause notice under section 351 of the Mumbai Municipal Corporation Act on 24th September, 2015 and received by the Designated Officer on 28th September, 2012, surprisingly for a period of more than three years, the Designated Officer-III Assistant

Engineer (B/F) K (West) Ward did not pass any order. This is nothing but, a clear lapse in discharge of the statutory obligation on the part of the concerned Officer. Surely section 351 notice is not required to be issued as a paper formality and it would be an obligation on a Public Officer to take it to the logical conclusion with all expedition. This lapse/delay to pass a final order for more than three years speaks volumes as also is not explained anywhere on behalf of the Municipal Corporation. The second aspect which would disturb the conscience of the Court is that when the order dated 9th December 2015 is passed after such long lapse the same is totally without any application of mind and/or mechanical to the extent that the appellant's reply has not been taken into consideration by making reference column following remark is made:

"Your reply dated.. nil.".

12. All such actions on the part of the concerned Officer of the Municipal Corporation who was under a public duty to discharge his official obligations in accordance with law are expected not to cause any harassment or prejudice to the citizens by such creating a situation to drag citizens into unwarranted litigation. This is a clear case that the Designated Officer-III Assistant Engineer B/F K(W) Ward has not only

acted in complete abuse of the powers which are vested in him but he has failed to discharge his legal duties under the Act. The purpose for which this action was delayed for 3 ½ years is also not justified anywheres. The Court is required to make these observations as the facts are gross and glaring. The appellant-plaintiff in this case is definitely dragged into unwarranted litigation. It is therefore, a case where the concerned officer of the Municipal Corporation is required to be imposed costs for causing this act of harassment to the appellant-plaintiff.

13. In the light of the above observations, following order is passed :

(a) On the statement of the learned counsel for the Municipal Corporation the impugned order dated 9th December, 2015 issued by the Designated Officer -III A/E B/F K(W) Ward stands withdrawn;

(b) The learned Counsel for the Municipal Corporation submits that the appellant-plaintiff would be permitted to file an additional reply with all necessary documents before the Designated Officer. Such a reply if any be filed by the appellant within two weeks from

today;

(c) The Designated Officer-III Assistant Engineer B/F K (W) Ward of the Municipal Corporation shall give a personal hearing to the appellant and pass appropriate order in a accordance with law within a period of two weeks from the submission of the additional reply if any on behalf of the appellant. Needless to observe that if such additional reply is not filed by the Appellant/Plaintiff, then in that case the Designated Officer shall proceed to decide the show cause notice on the basis of the Appellant's/Plaintiff's reply dated 26th September,2012.

(d) In view of the withdrawal of the order dated 9th December, 2015 passed by the Municipal Corporation learned counsel for the appellant seeks leave to withdraw L.C.Suit No.141 of 2006 ;

(e) All contentions of the parties on merits of the matter are expressly kept open.

(f) L.C.Suit No.141 of 2006 is allowed to be withdrawn and is disposed of as such.

(g) The Designated Officer-III Assistant Engineer B/F K(W) Ward, who has passed the order dated 9th December 2015 shall personally

pay costs of Rs.10,000/- (Ten thousand) to the Plaintiff-respondent within a period of two weeks from today failing which the Municipal Corporation shall deduct the same from the monthly salary of the said Officer.

(h) The Appeal from Order is accordingly allowed in aforesaid terms and disposed of as such.

(i) Civil Application (St) Nos. 10074 of 2016 and 12415 of 2016 also does not survive and is disposed of accordingly.

Parties to act on an authenticated copy of this order.

(G.S.KULKARNI, J.)