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1/6 FA 516/15 aw CA 1609/15-3/5/16

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

**FIRST APPEAL NO. 516 OF 2015
WITH
CIVIL APPLICATION NO. 1609 OF 2015**

Mrs. Kausar Jahan Mohammed Alam ... Appellant
(Ori. Plaintiff)

vs.

Municipal Corporation of Gr. Bombay ... Respondent

Mr. S. S. Kharat a/w Ms. Radhika Samant i/by Pradeep
Havnur, Advocate for the appellant.

Mrs. M. R. Bhoir, Advocate for respondent/B.M.C.

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

Date : 3rd May, 2016

P.C. :

1. This appeal is directed against the judgment and decree dated 13th March, 2015, by which the Bombay City Civil Court dismissed the appellant's suit to challenge the notice dated 30th December, 2008 issued by the respondent – Municipal Corporation under Section 314 of Mumbai Municipal Corporation Act, ('M.M.C. Act', for short).

2. The appellant carries on business in the name and

style of Aftab General Stores in the structure situate at Sonapur road, M/East Ward which joins Madhukar Tukaram Marg and Gautam Nagar road. Sonapur road has sewage water drainage along either side and also the street lights. The respondent in its notice under Section 314 of M.M.C. Act alleged that the appellant had put up her structure on a storm water drain and as such the same is forthwith liable to be removed. According to the respondent, the structure of the appellant is part of a row of the structures constructed by seven other persons. These structures obstruct the maintenance and repairs of the drainage by making the same inaccessible. Further, since the structures spill over on the road, the traffic movement is also affected adversely.

3. The appellant had replied the notice of the respondent contending that her structure is a protected structure as being in existence since prior to 1st January, 1995. She relied upon the documents of her ration card, Election Identity card, registration of her shop under the Shops and Establishment Act, electricity bills and electoral roll to support her claim. The Assistant Municipal

Commissioner, M/East Ward rejected the explanation stating that the appellant had failed to prove the existence of the structure since prior to 1st January, 1995 and by the order dated 3rd December, 2009 directed the appellant to remove the structure within a period of seven days, failing which the same was to be demolished by the respondent at the cost of the appellant.

4. During the course of the trial, the appellant produced the same documents before the Bombay City Civil Court as before the Assistant Municipal Commissioner. The Bombay City Civil Court found that the documents of the ration card, election identity card, the electoral roll and the electricity bills pertained to a residential structure. The case of the appellant has always been that, the structure in dispute is a commercial structure from which she has been carrying on business of General Stores in the name and style of "Aftab General Stores". Therefore, the documents relating to residential premises were not relevant for consideration of the dispute. The Bombay City Civil Court further noted that, the appellant had not produced any documentary evidence to show that, she has been running

her business from the premises since prior to the year 1995. The certificate of registration of establishment produced showed that, Aftab General stores has been registered as a "Shop" under the Bombay Shops and Establishments Act on 28th January, 2004. Therefore, it held that the structure cannot be considered to be a tolerated structure. Admittedly, the structure in dispute is on the road in respect of which the respondent has undertaken the project of widening so as to remove traffic congestion. In the circumstances, the notice issued under Section 314 of the M.M.C. Act, was found to be lawful and correct. With the finding, the Bombay City Civil Court dismissed the suit.

5. Mr. Kharat, the learned Advocate for the appellant submits that, the Bombay City Civil Court has incorrectly appreciated the documentary evidence before it. He also submits that, the Court failed to take note that, there are other structures on both sides of the structure in dispute. Therefore, it cannot be presumed that, the structure in dispute has come into existence subsequently. It is his argument that, the observations of the Bombay City Civil Court indicate that, the structure in dispute, has been

in existence atleast as a residential structure since prior to the year 1995 and hence it ought to have been treated as a protected residential structure. Therefore, the appellant is entitled to permanent residential accommodation, if not, a commercial alternate accommodation.

6. The observations of the Bombay City Civil Court, as regards the documents produced by the appellant, are seen to be completely justified. It has not been the case of the appellant that, the structure in dispute was initially used as residential premises and later as a commercial premises after getting its user changed. It has always been her case that, it is a commercial structure from which she has been carrying on business. Therefore, any document indicating residence of the appellant in the structure in dispute is irrelevant. Therefore, the only document relevant for consideration of the Court was certificate of registration of the establishment of the appellant under the Shops and Establishments Act. The certificate produced by the appellant, discloses that the same was issued to her for the first time in the year 2004. As such, it was of no assistance to the appellant to establish the existence of the structure

prior to 1st January, 1995. In the circumstances, there can be no infirmity in the finding of the Bombay City Civil Court that the structure in dispute does not fall in the category of “tolerated structure”. Besides, undisputedly the structure is located on the drainage line. Therefore, issuance of notice under Section 314 of the M.M.C. Act to the appellant was also correct and proper. The photographs of the structure produced by the appellant, clearly show that, the same spills over the road. In fact, the row of the structures of which the structure in dispute is a part occupies half portion of the road at the relevant place. Therefore, the complaint of the respondent that the structure is also an obstruction to the smooth vehicular traffic is completely justified. In the circumstances, in my opinion, there is no merit whatsoever in the challenge to the impugned judgment and order. The appellant has not been able to point out even a single arguable objection to the same. Hence, the First Appeal is dismissed.

7. In view of dismissal of the appeal, the Civil Application does not survive. The same is accordingly disposed off.

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