

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Appeal from Order (ST) NO. 12620 OF 2016
with
Civil Application (St) No.12621 of 2016

Gopal D. Shetty And Anr

...Appellants

Versus

The Municipal Corporation Of Greater Mumbai

...Respondent

Mr.S.G.Deshmukh, Senior Counsel with Mr.Kanchanpurkar, for the Appellants.

Mr.A.V.Diwate, for the Respondent – BMC.

Mr.G.S.Godbole with Mr.Y.R.Shah, for the Applicant-Intervener.

CORAM: G. S. KULKARNI, J.

DATED: 3rd May, 2016

PC:-

1. Heard Mr.Deshmukh with Mr.Kanchanpurkar, learned Counsel appearing for the Appellant and Mr.Diwate, learned Counsel appearing for the Respondent-Corporation.

2. This appeal is preferred against the order dated 25th April,2016 passed by the learned Judge, City Civil Court at Mumbai on draft Notice of Motion in Long Cause Suit No.846 of 2016 filed by the Appellants-Plaintiffs. By the impugned order, the ad-interim reliefs as prayed by the Appellants in the draft notice of motion have been

refused. The case of the Appellants is that the suit premises being Shop Nos.4 and 5 are not in unauthorised occupation nor the structures of this shops are unauthorised or illegal. Mr.Deshmukh, learned Counsel for the Appellants in support of the Appellants case submits that in these Shop Nos.4 and 5 the Appellants are conducting a licensed business in the name and style of 'Neeraj Country Liquor Bar'. It is submitted that an appropriate inquiry was undertaken by the Excise Department by addressing a letter dated 17th January,2009 to the Assistant Engineer, S-Ward (Vikhroli) of the Municipal Corporation seeking information whether the structures of Shop Nos.4 and 5 are authorised. This query of the State Excise Department was answered by the Assistant Engineer (S-Ward) by letter dated 10th February, 2009 inter alia recording that the structures of Shop Nos.4 and 5 is a construction in Hariyali Village, Vikhroli area and that as per the documents available in the office of the Assistant Engineer, there was no action which was pending against the said structure and thus, there was no objection for the said structures being granted the necessary licence by the Excise Department. Learned Counsel for the Appellants, thereafter, has drawn my attention to the various assessments in respect of the suit structures undertaken by the Municipal Corporation. Mr.Deshmukh would submit that last of such assessment was for the year 2014-15 and the assessment bill to that effect was issued by the Municipal Corporation for an amount of Rs.21,611/- for the suit property which is at

page 116 of the paper book. Mr.Deshmukh would submit that when this was a clear position on record as available with the Corporation, the Corporation could not have regarded the suit structure as unauthorised and resorted to an action of demolition for the purpose of road widening. He submits that the contention of the Appellant is that if the land below the suit structures is required to be utilized for road widening, then, in that case the Appellants are required to be given a permanent alternate accommodation by the Municipal Corporation as per the prevalent policy. He submits that however an attempt of the Corporation is to dis-entitle the Appellants from such a permanent alternate accommodation on the ground that the Appellants are already awarded alternate accommodation by virtue of the Mumbai Metropolitan Region Development Authority (MMRDA) undertaking the expansion of the 5th and 6th railway lines on which land the appellants had another premises namely 805 and 809 for which they were already allotted alternative premises. He, therefore, submits that the act of the Corporation to regard the suit premises as totally unauthorized is defied by the documents placed on record for consideration of the trial Court in the Notice of Motion in question.

3. On the other hand Mr.Diwate, learned Counsel appearing for the Corporation tried to justify the action of the Municipal Corporation to categorise the suit structure as unauthorised and illegal on the ground that

the case of the Appellants is completely false and in fact the Appellants are not entitled to alternate premises as the premises in question are constructed without any permission and authority of the Corporation. It is the case of the Municipal Corporation that the suit premises are situated on the land belonging to the Corporation. It is submitted that it is not the Appellants' case that permission was granted by the Municipal Corporation for construction of these premises and, therefore, the claim of the Appellants is wholly unsustainable.

4. With the assistance of the learned Counsel for the parties, I have perused the documents which are placed on this appeal paper book as also I have extensively heard the learned Counsel for the Appellants and the Municipal Corporation. A perusal of the impugned order dated 25th April, 2016 where by the ad-interim relief is refused would show that the learned Trial Judge has accepted the case as made out on behalf of the Respondent-Corporation that in fact the Appellants were beneficiaries of the alternate allotment in lieu of their shop nos. 805 and 809 which were admittedly surrendered by the Appellants in the year 2006 as the land was to be used for expansion of the railway line. The case of the Municipal Corporation is that after the Appellants vacated their earlier shops which were on railway land, they encroached upon the Municipal land by undertaking illegal construction of the structure of these suit shops which

appears to have been accepted by the learned trial Judge. It prima facie appears from the documents which I have noted above, that the State Excise Department had approached the Municipal Corporation to seek its opinion as to whether the suit structure was authorised. The Municipal Corporation replied to the Excise Department by granting NOC for issuing country liquor licence in favour of the Appellants. Also property tax assessments were undertaken by the Municipal Corporation in respect of the suit structures. All these documents do not find any reference or discussion in the impugned ad-interim order.

5. The facts of the present case prima facie and certainly indicate that this is a case where the learned Trial Judge ought to have called upon the Respondents/Defendant to file their respective replies and then ought to have proceed to adjudicate the notice of motion. This more particularly for the reason that at least prima facie some documents were placed on record on behalf of the Appellants for the consideration of the trial Court. The Respondents may have their own case/contentions and versions on these documents but at the same time it cannot be that these documents can be discarded at the ad-interim stage. Prima facie it does not appear that the nature of the suit structures is such which has come up overnight or is brazenly illegal. The Corporation itself has assessed the suit structure as also permitted licence to be issued by the State Excise Department. If

this be the case, all the documents are required to be gone into by the learned Trial Judge in deciding the notice of motion.

6. In the light of the above observations, the impugned ad-interim order cannot be sustained and is accordingly quashed and set aside.

7. The parties are at liberty to approach the Trial Court with a liberty to request the Trial Court to take up the hearing of the notice of motion to be decided finally. Learned Counsel for the Corporation has submitted that the Municipal Corporation is yet to file reply to the notice of motion as also the MMRDA which is Defendant No.4 in the suit has also not filed a reply.

8. Considering the facts of the case, the Municipal Corporation and the MMRDA shall file their respective replies to the notice of motion within a period of four weeks from today. Rejoinder, if any, be filed by the Appellants within two weeks thereafter. After the pleadings are complete, the parties may request the Trial Judge to take up the hearing of notice of motion which the Trial Court may consider on its own merits. In the meantime, till the Notice of Motion is decided by the Trial Court, the Respondents are directed not to take any coercion action in respect of the suit structure.

9. Needless to observe that the learned Trial Judge shall decide the Notice of Motion without being influenced by any observations which are made in the impugned ad-interim order.

10. The Appeal from order is disposed of in the above terms. No order as to costs. As the Appeal itself is disposed of, the Civil Application would also not survive and the same is accordingly disposed of.

11. At this stage Mr.Godbole, learned Counsel for the Applicants-intervenors submit that his clients have filed a chamber summons seeking intervention in the suit. It is submitted that their intervention is necessary as there is an urgent public necessity of a road widening at the site in question which according to Mr.Godbole is being obstructed by the suit structures. If such a chamber summons is filed, it would be appropriate that the learned Trial Court would consider the same and decide it on its own merits. All contentions of the parties in that regard are expressly kept open.

12. Parties to act on the authenticated copy of this order.

(G. S. KULKARNI,J.)