

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

Amk

FIRST APPEAL NO. 1533 OF 2006

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| 1. | Mrs. Nirmala Ramswaroop Makkar
Gaud (since deceased) by heirs |]
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| 1(a) | Rekha Ramswaroop Makkar Gaud
Age-42 years, Occ.- Service,
R/o. Room No. 1950, Chawl No.78,
Group No.7, Tagore Nagar,
Vikhroli (East), Mumbai-400 083. |]
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] | |
| 1(b) | Kamla Ramswaroop Makkar Gaud
Age-38 years, Occ.- Household, |]
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| 1(c) | Chandrashekhar Ramswaroop Makkar
Gaud
Age-37 years, Occ.- Service, |]
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] | |
| 1(d) | Bharat Ramswaroop Makkar Gaud
Age-32 years, Occ.- Service,
Nos. 1(b) to 1(d) R/o. Room No.1950,
Chawl No. 78, Group No.7,
Tagore Nagar, Vikhroli (East),
Mumbai - 400 083. |]
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] | .. Appellant |

Vs.

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| 1. | The Dy. Municipal Commissioner
Brihan Mumbai Mahanagar Palika
Mahapalika Bhavan, Mahapalika
Marg, Fort, Mumbai-400 001. |]
]
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] | |
| 2. | The Secretary
Shanti Co-op. Housing Society
Mogul Lane, Mahim,
Mumbai - 400 016. |]
]
]
] | .. Respondents |

Mr. Madhav Jamdar for the Appellant.

Mrs. M. R. Bhoir for Respondent No.1-BMC.

Mr. G. V. Murti a/w. Mr. Pradip Dubey for Respondent No.2.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.
DATE : 15th OCTOBER, 2016.

ORAL JUDGMENT

1. This appeal is preferred against dismissal of the L. C. Suit No. 5756 of 2000 vide Judgment and order dated 06.05.2005 by the City Civil Court, Mumbai.

2. Facts of the appeal can be stated, in brief, as follows:

The appellant claims that he was residing along with his family in Room No.227/6 in the compound of Shanti Co-operative Housing Society Ltd., Mogul Lane, Mahim, Mumbai - 400 016. According to him, the said room was made of GI Sheet wall and GI sheet roof and was admeasuring about 25' x 9'6". It was situated in the compound of Shanti Co-operative Housing Society. He came into possession of the said room while he was residing along with one Budhram Arjun Singh, who has constructed the said room, much prior to 1960, even before the building of Shanti Co-operative Housing Society came into existence. According to the appellant, there were in all six rooms of the same measurement and same dimension in the compound of Shanti Co-operative Housing Society, including his room.

3. It is further case of the appellant that in the year 1975, as the Budhram, with whom he was residing, decided to go to his native place

permanently, he sold the said room to the appellant and executed the payment receipt dated 20.01.1975 for the amount of Rs.2000/-. It is, thus, case of the appellant that while he was in peaceful possession of the said room, his first daughter was born while he was staying there with Budhram, since much prior to the purchase of the said room. He was also having Ration Card and Identity Card on the address of the said room.

4. In these facts and situation, the appellant received the notice from respondent-Municipal Corporation in the month of April, 1999, specifically on 12.04.1999 under Section 351 of the MMC Act informing him that he has carried out some unauthorized construction of hut with GI Sheet wall and GI sheet roof, taking advantage of the compound wall of the society and hence he should show sufficient cause to prove the legality and validity of the said structure. The appellant, therefore, approached the Trial Court seeking necessary reliefs of declaration and injunction.

5. During pendency of the suit, the appellant received another notice dated 05.11.2004 from the Municipal Corporation, issued under Section 488 of the MMC Act calling upon demolition of the said structure. Hence, the appellant was constrained to amend his suit and to seek necessary consequential reliefs that the said notice under Section 488 of the MMC Act was bad in law and the respondent-Municipal Corporation be restrained from acting in pursuance of the said notice. However before

the order of injunction could be passed by the Trial Court, respondent-Municipal Corporation demolished the suit room, evicting him therefrom. The appellant has, therefore, amended the plaint and sought the relief of mandatory injunction directing the respondent-Municipal Corporation to forthwith reconstruct the suit room which they have demolished illegally and unauthorizedly.

6. This suit came to be resisted by the Municipal Corporation contending, *inter alia*, that the construction of the suit room was illegal, unauthorized and as a result thereof, the notice under Section 351 of the MMC Act dated 12.04.1999 was issued to the appellant. As the appellant failed to prove the legality and validity of the suit structure, despite an opportunity of hearing being given to him, the requisite order was passed and thereafter the necessary action of demolition of the suit room was taken against the appellant. It was denied that the suit structure was in existence since prior to 1960 or before the building of Shanti Co-operative Housing Society was constructed. It was also denied that the suit structure was in existence since prior to datum line of 17.04.1964. According to the Municipal Corporation, out of the six structures, only three structures were found to be in existence, since prior to datum line and they were allowed to be retained. As the entire action was taken in accordance with law, there is no question of directing the respondent-Municipal Corporation to reconstruct the suit structure. Hence, the suit is liable to be

dismissed.

7. Respondent No.2 Shanti Co-operative Housing Society also resisted the suit contending, *inter alia*, that the construction of suit room was unauthorized and was on the property of respondent No.2-Society. It was submitted that when the construction of society's building was in progress in the year 1978, the builder erected some shade type temporary structure in the compound in order to enable the workers to stay there. Some encroachment took place near the said shade. The society, therefore, made complaints to Municipal Corporation. However, as no action was taken, the society filed Writ Petition No. 2128 of 1998 for removal of the unauthorized structure. The said Writ Petition came to be disposed of on 24.11.1998 with direction to the Municipal Corporation to take necessary action. It is submitted that thereafter only, after giving opportunity to the appellant to prove legality of the structure, the order was passed for its demolition in accordance with law. Hence, no case is made out by the appellant to get the relief as sought by him.

8. In support of their case, the appellant No.1 examined her son as Power of Attorney holder, namely, Bharat Ramswaroop Gaud and one witness, by name, Shewanti Nagina Gaud. On behalf of the Municipal Corporation, its officer, namely, Avinash Manohar Ahire, Junior Engineer, was examined, whereas, on behalf of respondent No.2-Shanti Co-

operative Housing Society, its member-the Ex-Chairman, Suresh Shankar Salgaonkar was examined.

9. In the light of this evidence adduced on record, the Trial Court was pleased to hold that the appellant has failed to establish that the suit structure was in existence since prior to datum line. Moreover, the Trial Court also held that the appellant has failed to prove the legality and validity of the said structure as no document was produced on record to show that the construction thereof was legal and authorized. The Trial Court, accordingly, dismissed the suit upholding the action of the Municipal Corporation of demolishing the said structure.

10. This Judgment and order of the Trial Court is challenged in this appeal by learned counsel for the appellant by submitting that there were in all six structures in the form of huts to which the notices were issued by the Municipal Corporation under Section 351 of the MMC Act. Out of the six structures, three structures were protected and only against remaining three structures, it was held that they were not in existence prior to the datum line and, therefore, the action of the demolition of the same was taken against them. It is urged by the learned counsel for the appellant that, if those three structures were held to be in existence, much prior to the building of Shanti Co-operative Housing Society, then there was no reason at all to differentiate them with other three structures. If the

other three structures, which were given protection, were in existence prior to datum line, it follows that the appellant's structure was also in existence prior to the datum line. According to learned counsel for the appellant, therefore, the Trial Court has committed an error in dismissing the suit and hence the impugned Judgment and order is liable to be quashed and set aside.

11. Per contra, learned counsels for respondent Nos.1 and 2 have fully supported the impugned Judgment and order.

12. It need to be stated that the burden was on the appellant to prove that his suit structure was in existence much prior to the datum line of 17.04.1964. However, absolutely no evidence worth the name is produced on record by the appellant to that effect. It is significant to note that in the evidence before the Court, the appellant has made out a totally different case than the one stated in the pleadings. In the plaint he has merely stated that he has purchased the suit structure from Budhram Arjun Singh in the year 1975 by paying amount of Rs.2,000/- on 20.01.1975 and produced the receipt to that effect. He has also stated that he was residing with Budhram, even prior to 1975. However, in evidence before the Court, it is deposed by appellant Bharat that the suit premises belonged to one Kamathi Katlappa and he has sold the said premises to Budhram on 12.11.1958. Thus, the case is tried to be made out that the

suit premises were in existence since 1947 and at that time Kamathi Katlappa was in possession of the suit premises. It is further deposed that Kamathi Katlappa was tenant of Mr. Ahmed Moosa, who had issued rent receipt in respect of the said premises.

13. Now, this case that premises belonged to Mr. Ahmed Moosa and Kamathi Katlappa was tenant of the said premises, till he sold the same to Budhram is not at all pleaded in the plaint. For the first time, it is made out in the evidence before the Court, the reason for the same is because some documents were found showing that one structure out of the six structures was standing in the name of Kamathi Katlappa. However, there is no evidence produced on record to prove that the suit structure of the appellant was the same structure belonging to Kamathi Katlappa. Significantly, there is no explanation as to why this specific case was not put up in the pleading. Therefore, it follows that the said case is made out as an afterthought to take advantage of certain documents. It is without having any foundation in the pleading. Hence, needs to be and has to be ignored.

14. Even the documentary evidence on which the appellant is placing reliance like the voters' list at Exhibit 'D' goes to show that the room number mentioned as standing in the name of Budhram is 820, whereas the room number of Kamathi Katlappa as given in the document

at Exhibit 'B' is 831. The description of the said room as given in the document at Exhibits 'B' and 'C' is also not tallying with the description of the suit room as given in the voters' list, Exhibit 'D'. In one voters' list of the year 1967 to 1972, room number of Kamathi Katlappa is given as 385, whereas the number of Budhram is given in the same voters' list of the same period as 383. Therefore, there is absolutely nothing to show that the room which Kamathi Katlappa was having was purchased by Budhram and from him by the present appellant.

15. In my considered opinion, therefore, the Trial Court has, after considering the entire record, rightly held that there was no evidence, either oral or documentary, to show that the suit structure was in existence prior to the datum line and, therefore, it needs protection. Not only the Trial Court, even the officer of the Municipal Corporation has also considered all the documents produced by the appellant before taking the action of demolition. The documents on record, on which the appellant is placing reliance, clearly reveal that the appellant has failed to prove that his suit structure was the same, which was of Kamathi Katlappa and from Kamathi Katlappa, Budhram has purchased the same, and from Budhram, he has purchased. Merely because some structure was standing in the name of Kamathi Katlappa, since prior to 1958, it cannot be said that the appellant had purchased the same structure, especially, in the absence of any pleading to the effect that the structure of Kamathi Katlappa was

purchased by Budhram and from Budhram, the appellant has purchased the same structure. Hence, the case made up by the appellant as an afterthought cannot be believed upon or accepted.

16. In view of the failure on the part of the appellant to establish the necessary link between these two structures and also on the failure of the appellant to prove that the suit structure was in existence since prior to the datum line, I do not find the Trial Court has committed any error in dismissing the appellant's suit. The appeal, therefore, holds no merits and hence stands dismissed. In the circumstances, the parties to bear their own costs.

[DR. SHALINI PHANSALKAR-JOSHI, J.]