IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 1568 OF 2012
WITH
CIVIL APPLICATION NO. 3872 OF 2012
WITH
CIVIL APPLICATION NO. 2697 OF 2013

Nitesh Krishna Shetty ...Appellant
(Ori.Plaintiff)

vs.

The Municipal Corporation of Gr. Bombay ...Respondent
(Ori.Defendant)

Mr. P. J. Thorat, Advocate for the appellant.
Mr. S. A. Sawant a/w Mr. M. R. Bhoir, Advocate for the respondent / BMC.

Coram : Smt. R. P. SondurBaldota, J.
Date : 28th June, 2016

P.C. :

1. This first appeal arises out of the judgment and decree dated 27th September, 2012 by which Bombay City Civil Court dismissed the appellant's suit.

2. The appellant is in possession of a structure admeasuring 3.20 mtrs. X 2.40 mtrs. made up of brick wall and ladi coba with mezzanine floor situate below the foot overbridge, Dadar North-South direction, Dadasaheb Phalke Raod, Dadar (E), Mumbai. The respondent Municipal Corporation served notice dated 22nd April, 2009 under Section

314 of Mumbai Municipal Corporation Act, ('MMC Act', for short) alleging that the suit structure is constructed on a municipal land and calling upon the appellant to remove the same within a period of 7 days from the date of receipt of notice. The appellant replied the notice through his advocate's letter dated 24th April, 2009 stating that the suit structure is not an unauthorized structure. Thereafter, the Assistant Municipal Commissioner by his order dated 29th June, 2010 rejected the cause shown by the appellant to the notice and called upon the appellant to remove the structure. Therefore, the appellant filed the suit herein for a declaration that the notice under Section 314 of the MMC Act and the order of the Assistant Municipal Commissioner passed thereon are illegal and not enforceable in law. He also sought the permanent injunction to restrain the respondent, inter alia, from enforcing the notice and the order.

3. In the plaint, the appellant contended that the suit structure is constructed by the respondent and it was let out to one Danial Abdul Aziz Khatib, who was paying rent to the respondent. Danial Abdul Aziz surrendered his right in the suit structure in favour of the appellant's father, Krishna Shetty and the appellant has been paying rent in respect of the structure to the respondent. According to the appellant, the suit structure is assessed for municipal taxes since 1st April, 1999. In the assessment records the name of the occupant has since been changed from Danial Aziz to Krishna Shetty. The father of the appellant had by his letter dated 27th April, 1997 requested for transfer of the “ground rent” for the “fruit stall below Dadar foot overbridge” from Danial Aziz to himself stating that

he had recently purchased the stall from Danial. Presently the appellant has been using the suit structure as his office.

4. The appellant alleges that the impugned notice and the order passed by the Assistant Municipal Commissioner thereon is bad in law, malafide and perverse as there is no application of mind on behalf of officers of the respondent to the facts of the case and the documents produced by the appellant before the Assistant Municipal Commissioner. He contended that the suit structure being in existence since prior to 1980, the same is protected by the prevailing policy of the respondent and also that the appellant would be entitled to alternate accommodation in view of the existence of premises prior to 1st January, 1995.

5. The respondent raised objection of maintenablity of the suit contending that it is bad for want of statutory notice under Section 527 of the MMC Act. On merits, it contended that the suit structure constructed on a municipal street is an illegal structure for want of specific permission for construction. The respondent states that the assessment extract dated 1st April, 1979 relied upon by the appellant is in respect of C. I. Shed used as juice centre with store and occupied by Danial Abdul Aziz Khatib and it is not in respect of the suit structure. The rent receipt relied upon by the appellant is also not in respect of the suit structure. Thus, none of the documents produced by the appellant before the Assistant Municipal Commissioner establish existence of the structure prior to the datum line. Therefore the order passed by the

Assistant Municipal Commissioner for removal of the suit structure is justified.

6. The appellant examined himself in support of his case and the respondent examined it's Jr. Engineer South Ward. The appellant produced documents of rent receipt, assessment extract, application by the father of the appellant for transfer of the ground rent, the impugned notice, reply to the impugned notice and the impugned order. The Bombay City Civil Court on appreciation of the oral and documentary evidence found that the appellant has failed to establish that the impugned notice and the orders passed thereon are illegal and bad in law. The Bombay City Civil Court had recorded several admissions given by the appellant in his cross-examination. It noted that the agreement between the father of the appellant and Danial Aziz is not produced for perusal of the Court. Though the appellant had in the cross-examination admitted that the suit structure was constructed by Danial Aziz, he immediately changed his version to deny the knowledge as regards the construction of the structure. He admitted that the rent receipt in the name of Danial produced by him was not in respect of the suit structure but it was only for the ground rent. The assessment extract does not refer to a structure made up a brick wall with ladi coba slab. The structure is not transferred to his name and he has no evidence to show that the mezzanine floor was in existence at the time his father acquired the structure. He also admitted that he has no document to show that the suit structure has been in existence since 1979. The suit structure is undisputedly on the road.

7. The witness of the respondent Corporation deposed that on his usual round of inspection he had detected the suit structure as an unauthorized construction municipal road. The enquiries revealed that the unauthorized construction is carried out by the appellant. Upon failure on the part of the appellant to produce permission in respect of the work, the Officers of the respondent took measurements of the suit structure and issued the impugned notice. The assessment record produced by the appellant is in the name of Danial Abdul Aziz Khatib in respect of the C. I. Shed used by him as a juice centre along with the store. He also deposed that the appellant has been carrying on business of ready-made garments from the suit structure without any licence.

8. The location of the structure and it's description as structure made of brick walls with ladi coba with a mazzanine floor is not disputed by the appellant. The appellant claims that the very structure was purchased by his father from Danial Aziz by an agreement of sale which is not produced by him. In the circumstance, the transaction of sale, irrespective of it's validity is not proved. He claims that after the purchase his father had requested for transfer of the rent receipt in his name by his letter dated 4th February, 1994. That letter is produced in evidence at Ex.'10'. The subject of that letter is "Transfer of name as owner in respect of property assessed under Ward No. F/S 540 (1A) and 540 (1AA) at Naigaum Cross Road." In the letter after referring to the purchase, the father of the appellant made a request for transfer of the property in his name and also sent bills of the property to him at the

address stated in the application. If the appellant's contention that the the respondent is the owner of the structure is to be accepted, the father of the appellant could not have purchased it from Danial Aziz. He could have purchased it only from the respondent, which is not his case. The appellant had annexed xerox copy of one more letter of his father dated 27th April, 1997 to the plaint. However he did not produce it in evidence. The two other relevant documents produced in evidence are rent receipt (Ex.8) and the assessment extract (Ex.9). The receipt produced is dated 15th September, 1995. It is in the name of one “A. A. Kalif” for payment by cheque dated 11th September, 1995 of Rs.12,450/- towards “Ground Rent for stall under staircase near Dadar Railway Station”. The payment under the receipt is not towards the structure but is towards the ground rent means rent for the land under the stall. Therefore, this document can also not help the appellant. The next document at Ex.9 is of the assessment extract. It is issued to the father of the appellant in respondent to his letter dated 4th June, 1990. The extract is of the year 1985-1986. It is in respect of Juice Centre at 540(1A)/5A and the attached C. I. Shed at 540(1AA). Both assessments are in the name of Daniel Abdul Aziz Khatib. The first date of assessment of the juice centre is 1st April, 1979 and that of the C. I. Shed is 1st April, 1980. This document is also not in respect of the suit structure.

9. The appellant has failed to establish authorisation of the structure in dispute. The dismissal of the suit was perfectly justified. Hence, the First Appeal is dismissed.

10. In view of dismissal of the appeal, Civil Application No. 3872 of 2012 and Civil Application No. 2697 of 2013 do not survive. The same are accordingly disposed off.

11. At the request of Mr. Thorat, the learned advocate for the appellant, ad-interim order dated 13th February, 2013 is extended for eight weeks from today.

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