

vai

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER (STAMP) NO.31821 OF 2015
WITH
CIVIL APPLICATION (STAMP) NO. 31822 OF 2011
IN
APPEAL FROM ORDER (STAMO) NO.31821 OF 2015

Kumar Babu Shetty	...Appellant
V/s.	
The Municipal Corporation for Gr. Mumbai	...Respondent

Mr.S.K. Dubey for the Appellant.

Mr.A.V. Diwate for the Respondent – B.M.C.

CORAM : R.D. DHANUKA, J.
DATE : 5TH JANUARY, 2016.

P.C. :-

1. By this appeal from order, the appellant has impugned the order dated 27th October, 2015 passed by the learned trial Judge dismissing the notice of motion filed by the appellant (original plaintiff) inter-alia praying for an injunction against the Municipal Corporation from enforcing the notice dated 12th September, 2012 issued under section 314 of the Mumbai Municipal Corporation Act (MMC Act) in respect of the suit premises.

2. Learned counsel for the appellant submits that though the appellant had produced various documents in response to the notice

issued under section 314 of the MMC Act to demonstrate that the suit premises was not constructed on the road in question, the Municipal Corporation did not pass any order thereon and even did not file any affidavit in reply opposing the notice of motion before the learned trial Judge.

3. Learned counsel for the appellant submits that the learned trial Judge had granted ad-interim protection in favour of the appellant which was in force till the dismissal of the notice of motion.

4. A perusal of the record indicates that the Municipal Corporation did not file any affidavit in reply before the learned trial Judge. The learned trial Judge has however, dismissed the notice of motion by taking a *prima-facie* view that the impugned structure was constructed on the road.

5. In view of this fact, it would be appropriate if the order passed by the learned trial Judge dismissing the notice of motion is set aside and ad-interim order passed by the learned trial Judge is restored.

6. I therefore, pass the following order :-

a). The impugned order dated 27th October, 2015 is set aside. Ad-interim protection granted by the learned trial Judge which was in force during the pendency of the notice of motion is restored. Notice of Motion No.385 of 2013 is restored to file and shall be heard afresh

by the learned trial Judge.

b). The Municipal Corporation is directed to file the affidavit in reply within four weeks from today and shall serve a copy thereof upon the learned advocate for the appellant simultaneously. Ad-interim relief granted by the learned trial Judge shall continue till the disposal of the notice of motion and for a period of two weeks thereafter, in case the same is adverse against the appellant.

c). It is made clear that the learned trial Judge shall decide the matter afresh without being influenced by the observations and the conclusions drawn in the impugned order.

7. The appeal from order is accordingly disposed of in aforesaid terms.

8. In view of the disposal of the appeal from order, the civil application for stay does not survive and is accordingly disposed of. No order as to costs.

(R.D. DHANUKA, J.)