

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Appeal from Order (St) NO. 32944 OF 2016
with
Civil Application (st)No.32945 of 2016

Mohammed Yusuf Shirin Khan ...Appellant
Versus
Municipal Corporation Of Greater Mumbai ...Respondent

Mr.Thorat, Senior Counsel with Mr.Rajesh N.Kachare, for the Appellant.

Mrs.Madhuri More, for BMC -Respondent.

CORAM : G.S.KULKARNI, J.

DATE : 23 DECEMBER 2016

ORDER :

1. Heard the learned Counsel for the parties.
2. The appeal is directed against an order dated 25 November 2016 whereby the learned Judge, City Civil Court at Dindoshi, Borivali Division, Mumbai, has rejected the ad-interim relief as prayed for on behalf of the Appellant-Plaintiff in L.C.Suit No.1516 of 2016. The challenge as raised by the Appellant in the suit was to a notice dated 18 April 2016 under Section 351 of the Mumbai Municipal Corporation Act,1888 (for short “the Act”) issued by the Municipal Corporation. Initially on 9 June

2016 the learned Trial Judge was pleased to pass an order accepting the statement made on behalf of the Municipal Corporation that the Municipal Corporation will pass necessary orders by considering the reply filed by the Appellant-Plaintiff to the notice under Section 351 of the Act, and till passing of such an order the impugned notice under Section 351 of the Act shall not be implemented and for a further period of fifteen days, if the order adverse to the Appellant-Plaintiff is passed.

3. Learned Counsel for the Appellant has pointed out that in pursuance of the said order, the Appellant filed a reply dated 28 September 2016 placing on record certain documents which show that the construction complained is not unauthorised. He has drawn my attention to paragraph 5 of the reply wherein all these documents are set out. It is submitted that it was expected that the designated officer of the Municipal Corporation would consider the said documents and the said written reply. The submission is that the designated officer, however, passed an order dated 4 November 2016 without even referring to the contention as urged in the reply of the Appellant – Plaintiff in the said letter dated 28 September 2016 as also has not considered the several documents which are placed before him. It is further stated that neither there is a reference

to the said documents nor any discussion in the order dated 4 November 2016, and in doing so the designated officer has passed an order that the notice structure is unauthorised and same shall be removed/demolished.

4. The learned Counsel for the Appellant submits that in passing the impugned order, the learned Trial Judge has not considered this aspect that the designated officer of the Municipal Corporation has not applied his mind to the documents and the contentions as put forth before him by the Appellant-Plaintiff in the reply dated 28 September 2016. It is submitted that in paragraph 2, the learned Judge has attempted to accept the submissions as urged on behalf of the Municipal Corporation, without the designated officer himself not applying its mind to this fact. It is, therefore, submitted that the learned Judge ought not to have rejected the ad-interim as prayed in notice of motion in question.

5. On the other hand, the learned Counsel for the Municipal Corporation though supports the impugned order, is not in a position to justify on the said lapse on the part of the designated officer in not considering the contentions as urged on behalf of the Appellant-Plaintiff and consideration of the documents in the said reply. It may be that the

contention as urged on behalf of the Corporation are correct but ultimately there must be an application of mind to the material submitted on behalf of the Appellant-Plaintiff to show that the structure was authorised.

6. Considering the above limited controversy, interest of justice would be served if the designated officer of the Municipal Corporation considers the matter afresh by considering the reply dated 28 September 2016 as submitted by the Appellant-Plaintiff and the documents as contained therein and pass a fresh order after granting an opportunity of a hearing to the Petitioner. This course of action would be appropriate as the order dated 4 November 2016 passed by the designated officer clearly reveal that the documents which are pressed in service on behalf of the Appellant are not considered. If such an inherent defect is revealed, then, there is also no point in keeping the proceedings before the Trial Court pending for any reason. It would not entail to the benefit of any of the parties. Consequently the order dated 4 November 2016 passed by the designated officer cannot remain in operation and is required to be set aside and is accordingly set aside. The designated officer of the Municipal Corporation shall grant a hearing to the Appellant-Plaintiff and pass a fresh order in accordance with law. This exercise be completed within a period

of four weeks from today. All contentions of the parties on merits of the matter are expressly kept open. In the circumstances, the impugned order passed by the trial Court is set aside. The L.C.Suit No.1516 of 2016 and the proceedings thereunder would also not survive and is accordingly disposed of.

7. An intimation of this order be forwarded to the Registrar, City Civil Court, Dindoshi, Mumbai, so that disposal of the suit is recorded.

8. Appeal from order is allowed in the above terms. No costs. In view of the disposal of the appeal, Civil Application does not survive and is accordingly disposed of.

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

(G.S.Kulkarni, J.)