

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL (STAMP) NO. 464 OF 2017
WITH
CIVIL APPLICATION NO. 82 OF 2017

Shri Chunilal S. Nagpal .. Appellant
vs.
Mumbai Municipal Corporation of
Greater Bombay .. Respondent

Mr. R. A. Thorat – Senior Advocate i/b. Mr. G. D. Talreja for
Appellant.
Ms M. R. Bhoir for Respondent - MCGM.

CORAM : M. S. SONAK, J.
DATE: 01 FEBRUARY 2017

P.C :

- 1] Heard learned counsel for the parties.
- 2] With the consent and at the request of learned counsel for the parties, this appeal is taken up for final disposal at the stage of admission.
- 3] Reason why this appeal is taken up for final disposal is because the matter will have to be remanded to the trial Judge for reconsideration. This is necessary because in paragraph 7 of the impugned judgment and decree, the documents produced by the parties have been listed out. Further, in paragraph 14, it is recorded that the evidence of the plaintiff is not sufficient to establish that the

structure in question is indeed authorized. Further, in the same paragraph, it is stated that witness Mr. Deepak Bhagwan Bodogire on behalf of the MCGM filed his affidavit in lieu of examination-in-chief, however, the said witness was absent for cross-examination on 3 October 2016 and therefore, his evidence was closed under XVII Rule 3 of CPC.

4] In paragraph 15, learned trial Judge has stated that keeping in view the evidence of both the parties on record, it is obvious that the suit is based on documentary evidence and oral evidence is subsidiary. The suit has been disposed of by making the following observations in paragraph 15:

“15. Keeping in view the evidence of both parties on record, it is obvious that the suit is based on the documentary evidence and oral evidence is subsidiary. It was incumbent on the plaintiff to establish how the suit structure 20 ft. x 32 ft. x 14 ft. height standing on the plot Nos. 737 and 738, Oshiwara, Andheri, Bombay – 400102 is legal and valid. The plaintiff has not produced the approved sanctioned plan issued by the defendant No. 1/MMC to support the suit structure. Further there is no record to show that the plaintiff had taken the permission of the defendant / MMC in respect of the letter dated 11/07/1996 (Exh. 19) to show that the direction of the MHADA has been complied by seeking necessary permission to use the shop No. 737 admeasuring 63 sq. mts. for the commercial purpose. Further the plaintiff has

not produced the notice u/s. 527 of the MMC Act issued to the defendant which is mandatory before filing of the suit. The plaintiff failed to prove the suit structure is legal and constructed on the basis of the sanction granted by the defendant / MMC. The plaintiff failed to prove that the notice dated 07/04/2008 and 25/09/2008 noted hereinbefore are null and void. Therefore, the plaintiff is not entitled for any relief. So I answer issue Nos. 1 to 4 in the negative and I proceed to pass the following order:-

ORDER

- 1. The Long Cause Suit No. 1802/2008 stands dismissed.*
- 2. Both the parties to bear their own cost.*
- 3. The Decree be drawn up accordingly."*

5] This is, not a satisfactory manner in which the suit could have been disposed of. In the first place, there was no reason to hurriedly observe that the suit has to be decided only on the basis of documentary evidence and that the oral evidence is subsidiary. It is unfortunate that Mr. Deepak, who was presumably, employee / officer of the MCGM chose to file his affidavit in lieu of examination-in-chief, but, remained absent when the matter was posted for cross-examination. The officers / employees of the MCGM are not expected to behave in this manner because by the nature of their service, they are trustees in respect of the powers and functions assigned to the MCGM. One of the function is to discourage mushrooming of illegal constructions and when such illegal constructions have come up or alleged to have come up, not only

the MCGM in its legal capacity but also, its officers and employees, by virtue of their position and duty are required to render assistance. In this case, the absence of Mr. Deepak is really shocking because as submitted by Ms Bhoir, learned counsel for MCGM action in this matter was initiated pursuant to directions issued by the Division Bench of this Court in the public interest litigation, where the complaint was that no proper action is being taken in matter of illegal constructions.

6] The order closing the evidence under Order XVII Rule 3 of the CPC is now being specifically set aside. On the date to be appointed by the trial Court, the said witness Mr. Deepak will have to present himself for cross-examination. That apart, it is for the MCGM to consider whether any further witnesses should be examined in support of their case now that the order closing the evidence of MCGM is being set aside. The matter will have to be decided on basis of both oral as well as documentary evidence. Mr. Thorat is right that the attention paid to the documentary evidence in paragraph 15 is almost negligible and that there should have been proper consideration of the documents / documentary evidence on record.

7] The Municipal Commissioner to enquire into the circumstance in which the witness Deepak remained absent or failed to present

himself for cross-examination, even though, he had filed the affidavit in lieu of examination-in-chief. The officers of the MCGM should realise that these are not matters concerning their personal or private property and therefore greater degree of responsibility is expected from them, when they discharge their functions as employees / officers of the MCGM. Accordingly, the Municipal Commissioner is directed to make an enquiry into the circumstances in which the said witness Mr. Deepak failed to present himself for cross-examination. In case, anything is found amiss, it is expected that necessary action will be taken. Needless to add that such action shall be preceded by compliance with principles of natural justice and fair play.

8] The impugned judgment and decree is set aside. The matter is remanded to the learned trial Judge for fresh disposal in accordance with law. The proceedings shall now resume from the stage of cross-examination of witness Mr. Deepak. The suit shall be disposed of on its own merits and in accordance with law as expeditiously as possible and in any case, within a period of six months from the date of production of authenticated copy of this order.

9] The observations in this order need not influence the learned trial Judge, who shall decide the suit, based upon both oral as well

as documentary evidence, in accordance with law and on its own merits. Accordingly, all contentions of all parties are left open.

10] Since, there was an interim order in favour of the appellant during the pendency of the suit, the same shall stand revived, now that impugned decree is set aside and the matter is remanded to the learned trial Judge. However, it is clarified that even the appellant shall maintain *status quo* in respect of the suit structure. Further, the appellant shall co-operate with the expeditious disposal of the suit and not seek any undue or unnecessary adjournments, now that the interim order has been restored. In case this happens, the trial Judge shall be at liberty to make appropriate orders in this regard.

11] Parties to appear before the trial Court on 21 February 2017 at 3.00 p.m. and produce authenticated copy of this order. All concerned to act on basis of authenticated copy of this order.

12] Appeal is disposed of. In view of disposal of appeal, civil application does not survive and is disposed of accordingly.

(M. S. SONAK, J.)