

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

**APPEAL FROM ORDER (ST) NO.1801 OF 2017
WITH
CIVIL APPLICATION (ST) NO.1803 OF 2017
IN
APPEAL FROM ORDER (ST) NO.1801 OF 2017**

Mrs.Khairunnisa Mohiuddin Sayed
W/o Mohiuddin Sayyed ..Appellant/Applicant
V/s.

Municipal Corporation of Greater
Mumbai Through its
Municipal Commissioner & Anr. ..Respondents

Mr.Ataf Khan for the Appellant/Applicant.

Mrs.M.R. Bhoir for Respondent-MCGM.

CORAM : M. S. SONAK, J.

DATE : 24 JANUARY 2017.

P.C.

1. Heard Mr.Ataf Khan for the appellant and
Ms.M.R.Bhoir for Municipal Corporation of Greater Mumbai
(MCGM).

2. The challenge in this appeal is to the order dated
16-01-2017 and 19-01-2017, by which, the appellant has been
denied ad-interim relief, restraining the MCGM from enforcing its

orders dated 16-12-2016 and 14-01-2017.

3. The appellant instituted Suit Stamp No.11806 of 2016 before the City Civil Court, Mumbai (Trial Court) basically impugning the notice dated 23-08-2016 under Section 229A of the Mumbai Municipal Corporation Act (MMC Act). In the suit, a notice of motion was taken out seeking a restrain upon execution of notice dated 23-08-2016. In the notice, it is alleged that the structure occupied by the appellant is upon a storm water drain and it was causing obstruction in regular desilting of the box drain and to the access of vehicles for the same. The notice also stated that the structure is required to be removed so that new storm water drain to be constructed in public interest.

4. The Notice of Motion was disposed of by the Trial Court by making the following order:

“ORDER (Draft NM)

Draft NM is disposed off by following order

1. *Plaintiff is directed to file written reply along with documents if any within 15 days from today to substantiate her claim before defendant No.1.*

2. *Defendant no.1 is directed to passed appropriate order as per law. If the Defendant found that structure of*

plaintiff, is erected over the drain and order goes against plaintiff then defendant is estoppel from acting upon order for 14 days.”

5. In compliance with the aforesaid order, the MCGM, upon consideration of the documents furnished by the appellant made an order dated 16-12-2016. In this order, it is recorded that the appellant has already been adjust as an “eligible hutment dweller of 'Nisarg CHS” further, the appellant has received from the developer rent in lieu of alternate accommodation in an amount of Rs.48,000/- for six months i.e. Rs.8,000/- per month. The appellants structure was ordered to be demolished. However, consistent with the directions in the order dated 23-10-2016, 14 days time was granted to the appellant to vacate the structure. Since, the appellant did not vacate the structure, on 14-01-2017, the MCGM granted additional 48 hours to the appellant to vacate the structure. At this stage, the appellant, took out the Chamber Summons in the suit, stating there in that the order dated 16-12-2016 was also served upon her only on 14-01-2017 and sought for leave to amend the suit. In this Chamber Summons, the appellant also applied for ad-interim relief. This has effectively been declined by orders dated 16-01-2017 and 19-01-2017. This appeal is directed against the said two orders.

6. Ms.Bhoir submits that since the orders were made in Chamber Summons, proper remedy would be to institute the Writ Petition and not an Appeal From Order. Mr.Altaf Khan however submits that the rejection of the ad-interim relief is a power relatable to Order 39 Rule 1 and 2 of C.P.C. and therefore, an Appeal From Order is very much maintainable.

7. In this case, since, ad-interim relief has been declined, it can be considered that the power has been exercised an Order 39 Rule 1 and 2 and therefore, there is no reason to dismiss this appeal on grounds of maintainability.

8. However, on merits, the appellant has failed to make out any case for grant of any reliefs. At least *prima-facie*, it is established that the structure is upon a storm water drain. That apart, the appellant, has already been adjudged as an eligible hutment dweller and further, the developer also paid to her six months rent in lieu of alternate accommodation. This significant facts were suppressed by the appellant in the suit instituted by her. There is no question of the appellant insisting upon retaining the suit structure upon the storm water drain and obstruct development, not only to the storm water drain but also to the proposed

redevelopment. The issue as to whether the appellant is entitled to twelve months rent and not six months rent or the issue as regards signing of agreements by the developer are really, not issues relevant in the suit. This is because the appellant has chosen not to raise any such issues in the suit and even the developer has not to party in the suit. Assuming that such issues arises, the same will have to be decided before appropriate forum. However, until the decision of such issues, the appellant cannot, insist upon the protection of the suit structure on the storm water drain and on the such basis, delay the construction of new storm water drain or delay redevelopment project.

9. For the aforesaid reasons there is really no case made out to interfere with the impugned orders. The appeal is therefore dismissed. There shall be no order as to costs.

10. Civil Application does not survive and the same is also disposed of.

(M. S. SONAK, J.)