

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER (ST) NO. 3317 OF 2017

Mr. Renton D'souza s/o. Jorge
D'souza

.. Appellant

vs.

Brihan Mumbai Municipal Corporation
(BMC) and ors.

.. Respondents

Mr. A.R.Pai i/b Ms Neuty N. Thakkar for the Appellant.
Mrs. M.M. More, for the Respondents-BMC.

CORAM : M. S. SONAK, J.

DATE : 22 FEBRUARY 2017.

P.C. :-

1] Heard Mr. A.R. Pai, learned counsel for the appellant and Ms More, learned counsel for the Brihan Mumbai Municipal Corporation (BMC).

2] The challenge in this appeal is to the order dated 31 January 2017, by which, the ad-interim relief has been declined.

3] The BMC, by notice dated 14 October 2016, required the appellant to show cause as to why action should not be taken to demolish the suit structure ad-measuring 459.75 sq. ft. situated on ground floor, Rose Minar Building, Rose Minar Cooperative Housing Society Limited , Chapel Road, Bandra (West), Mumbai. The suit structure was described as "*enclosure of stilt parking area with brick masonry wall and using it for office purpose. As also construction of loft with staircase in it.*"

4] The appellant furnished reply and upon consideration of the same, a speaking order was made directing demolition. By the impugned order, the ad-interim relief restraining execution of this order has been declined.

5] Mr. Pai, learned counsel for the appellant, submits that the suit structure was authorised in the year 1966-1967 itself when the original building was constructed. He submits that as per the D.C. Rules 1967, there was a positive prohibition for having any parking facilities on stilts. He submits that several documents were produced from which, it is evident that the suit structure was authorised and further, even permissions were granted for carrying out repairs. This is authorised by the BMC. He submits that notice under section 351 of the Mumbai Municipal Corporation Act, 1888 (MMC Act) was without jurisdiction, because, in this case, there is no breach of provisions of sections 342 and 347 of the MMC Act. For all these reasons, Mr. Pai submits that this was a case where ad-interim relief was required to be granted.

6] Mrs. More, learned counsel for the BMC submits that the suit structure is un-authorised. Despite opportunity, the appellant was unable to satisfy the BMC that the structure has any authorisation or permission. After compliance with principles of natural justice and affording the appellant reasonable opportunity, the order under section 351 of the MMC Act has been made and there is no case made out to interfere with the impugned order.

7] Mr. Pai may be right in his submission that learned Trial Judge may not have adverted to all the documents relied upon by the appellant. However the documents which the appellant seeks to rely upon, have been referred to in the BMC's order dated 16 January 2017. Most of the documents, are indeed, irrelevant to establish that the suit is indeed an authorised structure. There is reference to a plan dated 8 December 1966. However, from the plan it can certainly not be made out that the suit structure is authorised from the year 1966 itself. The documents, which relate to the permission from the society are clearly irrelevant for the purposes of establishing that the suit structure is legal structure. Thus, from the documents produced on record, it is true that there is no *prima facie* case made out that the suit structure is legal or an authorised structure.

8] The contention that 67 DCR prohibited providing of parking spaces at stilts is not acceptable. At the highest, at the relevant time, there may not have any compulsion in the matter of provisions of parking spaces in a particular manner. However, the broad based contention that there was a prohibition on providing parking on stilts cannot be accepted. In this case, there is also no merit in the submission that the notice under section 351 of the MMC Act was without jurisdiction and since the BMC is also the planning authority, it ought to have resorted to the provisions contained in section 53(1) of the Maharashtra Regional and Town Planning Act, 1966 (MRTP Act). This is the case where additions or alterations have been made to the existing building by way of converting stilt parking area into the offices, which are used for commercial

purposes. This is sufficient to indicate breach of section 342 of MMC Act. Similarly, from the nature of constructions made and absence of any permission regards to support such constructions, section 347 of MMC Act is also attracted. If the two sections are attracted then, there is nothing wrong in exercise of powers under section 351 of the MMC Act. That apart, since it is the case of the appellant himself that the correct source of power is under section 53(1) of the MRTP Act and further, the BMC is also the planning authority, there is no question of grant of any ad-interim relief to the appellant. It is settled position in law that if, the power exists then, exercise of such power cannot be restrained merely on the ground that some incorrect provisions of law has been quoted or invoked. In this case, there is however, no infirmity whatsoever in the exercise of powers under section 351 of the MMC Act. Accordingly, there is no case made out to interfere with the impugned order and this appeal is therefore, dismissed. The interim order granted earlier is hereby vacated.

9] It is clarified that the observations in the impugned order or for that matter in the present order are only *prima facie* and the suit, may be disposed of in accordance with law without being influenced by any such *prima facie* finding.

10] At this stage, learned counsel for the appellant seeks for extension of the interim order. At the request of learned counsel for the appellant, the ad-interim order is extended by a period of four weeks from today. The appellant also to maintain *status quo* in respect of suit premises.

(M. S. SONAK, J.)