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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 635 OF 2017
WITH
CIVIL APPLICATION NO. 809 OF 2017

Ramashankar Ramdev Pande ...Appellant
Versus
Municipal Corporation of Greater Mumbai & Anr ...Respondents

Mr RP Singh, *i/b Awadhesh R Pandey, for the Appellant.*
Mrs MR Boir, *for Respondent No. 1-MCGM.*
Mr Aderbad Khodadad Irani, *Respondent No. 2, in person.*

CORAM: G.S. PATEL, J
DATED: 28th July 2017

PC:-

1. Leave to amend to delete grounds No. (iii) and (ix).
Reverification dispensed with.
2. Heard.
3. The dispute between the Plaintiff, who is in appeal for the second time, and the 2nd Defendant is centred around inspection to be given by the Plaintiff to the 2nd Defendant. The 2nd Defendant appears in person.

4. On 12th November 2016 the City Civil Court dismissed the Appellant's suit in exercise of powers under Order 11 Rule 11 saying that the Plaintiff had failed to comply with an order for inspection.

5. The order for inspection was dated 14th January 2015 and the Plaintiff was required to give inspection of the original documents referred to in the list of documents. The Plaintiff said that on 17th January 2015 inspection was offered except for the originals of the electricity bills and the certificate of the voter card for the years 1951 onwards. The Appellant said that photocopies were given.

6. In the impugned order, the Trial Court referred to an affidavit dated 12th February 2015 filed by the Plaintiff and held that there was an admission of failure to grant inspection of originals and, therefore, proceeded to dismiss the suit.

7. In appeal before this Court, it was contended that there was no such admission. On the contrary, the affidavit indicates that inspection was granted of all but two documents. These are listed at serial Nos. 4 and 5.

8. The appeal was contested by the 2nd Respondent who appears in person and who denied that any inspection was offered. He also said that inspection given only of few documents and insisted on the documents at serial Nos. 4 and 5, i.e., the electricity bills and the certificate of voter card. He said that if this inspection was not given, the interim relief ought to be vacated.

9. By an order dated 14th February 2017 Mr Justice MS Sonak disposed of this controversy *inter alia* directing inspection, and finding that there was some sort of inspection on 17th January 2015. Paragraph 13 of the order of Mr Justice MS Sonak contains the following directions:

"13. This appeal is accordingly disposed of with the following order:

a] The Appellant to offer inspection of the original documents referred to at Serial Nos.1,2,3 and 6 to 12 (as per list at page No.23 of the paper book) to the Respondents on 18.2.2017 at 4.30 p.m. in Bar Room of the Small Causes Court at Mumbai. Mr. Pandey, learned counsel for the Appellant, states that such inspection will be offered by him personally in the Bar Room to Mr. Irani as well as any Officer/ Advocate of the MCGM;

b] In addition to the aforesaid documents, the Appellant will also give inspection of the applications dated 6.5.2011 and 11.5.2011 referred to in paragraph 8 of the plaint (copies obtained under RTI);

c] It is clarified that in respect of court proceedings certified copies are to be treated as originals. Similarly, in respect of documents obtained by the Appellant from the MCGM, the copies obtained under the RTI should be treated as originals. In respect of rest of the documents, however, inspection of the originals is to be offered;

d] In case, there is any dispute at the stage of offer/taking of inspection, the Appellant is directed to file the originals as explained above before learned Trial Judge on 23 February 2017 along with a memo to that effect. The Respondents can thereafter take inspection before learned Trial Judge, so that, the controversy is minimized;

e] The Appellant has offered to pay and in any case he is directed to pay costs of Rs.10,000/ to Respondent No.2 on 18 February 2017. Such costs to be paid by way of Demand Draft in the name of Respondent No.2 Mr. Irani;

f] In case, there is any breach in the matter of offer of inspection, this appeal shall be deemed to have been dismissed and the impugned order shall be deemed to have been confirmed;

g] The Respondents shall not insist upon inspection of original documents at serial Nos.4 and 5, since, it is the case of the Appellant that such documents are not in his possession. The Appellant is at liberty to take out such proceedings as are available under the law for either securing the production of the original documents or for leading secondary evidence. Such application, if made, will have to be decided, in accordance with law and on its own merits;

h] Respondent No.2 Mr.Irani is at liberty to apply to learned Trial Judge for vacation of interim reliefs, which presently in operation on the ground relating to documents at serial Nos.4 and 5 in the list at page 23 of the paper book. Such application will be considered on its own merits and in accordance with law. This court has expressed no opinion in the matter and therefore, all contentions of all parties are kept open. Such application shall however, be considered on its own merits, notwithstanding the circumstance that the interim reliefs was earlier refused by the Trial Judge, but only granted by this court;

i] Subject to the aforesaid, the impugned order is set aside and L.C. Suit No. 2173 of 2012 is restored to the file of learned Trial Judge;

j] The learned Trial Judge is requested to dispose of the suit as expeditiously as possible and in any case within a period of one year from today; and

k] All concerned to act on the basis of authenticated copy of this order."

(Emphasis added)

10. Then comes the impugned order of 23rd February 2017. The Plaintiff's Advocate filed some documents in original and these were inspected by Defendant No. 2. There was then reference to three rent receipts but of these only one was original. Two were not filed in original, and the Plaintiff's Advocate said that the Plaintiff did not have the originals because they were misplaced.

11. We come now to the applications of 6th May 2011 and 11th May 2011. These are referenced in paragraph 13(b) of Sonak J's order above and correspond to paragraph 8 of the plaint. The reference here is to the applications made by the Plaintiff and other persons to the MCGM and paragraph 8 of the plaint says that an application was also made to the 2nd Defendant. There is no doubt that inspection was offered of the applications made to the MCGM. The complaint is that no inspection was offered of the application said to have been made to the 2nd Defendant. If there was an application made to the 2nd Defendant then the original is with him, and he does not need inspection, and cannot have inspection of the original. If it is his case that no such application was made, then there is no question of giving inspection of a non-existent thing. I can understand the 2nd Defendant losing sight of this small but

important distinction. But I do not see how, with respect, the learned Judge of the City Civil Court could have failed to appreciate this, or could, by the impugned order, have proceeded to once again dismiss the suit under Order 11 Rule 21. There is fact no breach of paragraph 13(a) or 13(b) of Sonak J's order. Specifically, inspection has been given of the applications dated 6th May 2011 and 11th May 2011, both referred to in paragraph 8 of the plaint and as made to the MCGM. This is sufficient. If it is the 2nd Defendant's case that no application was ever made to him, then he cannot be heard to complain about not being given inspection of something that he himself says simply does not exist.

12. The 2nd Defendant also makes a mistake as did the trial court in reading Order 11 Rule 11 as being mandatory. The learned Judge seems to have overlooked the fact that though the first portion of Rule 21 speaks of the liability of a non-complying party, the order of dismissal of the suit is one that "may" be made — not must or shall be made — on an application to the Court for that purpose. In other words, there must be an application, and a Court, in dealing with that application, always has discretion; and that discretion has to be exercised with circumspection. There is no doubt that if the Plaintiff referred to a document but failed to give inspection of it, an adverse inference would follow against the Plaintiff and most certainly the Plaintiff would not be allowed to lead such a document in evidence, or rely on it. But to say that for this so-called failure, the entire suit "must" be dismissed is I think not entirely correct. The provisions of Order 11 Rule 11 are to ensure compliance with disclosure orders and directions; but that posits that the thing or document of which

inspection is ordered actually exists such that inspection can be given in the first place.

13. In the facts of this particular case and given that the non-disclosure complained of is about an application, which, according to the 2nd Defendant, is non-existent, there can be no question of exercising any such discretion.

14. As regards the electricity bills and election card there is no dispute that inspection was in fact given and that there is a compliance with that portion of Sonak J's order, which specifically said that the original of these were not required.

15. Thus there is more than sufficient compliance with the order passed by Sonak J.

16. There was no occasion for the impugned order to be passed. It is set aside. The Appeal succeeds. The suit is restored to file.

17. The appeal is disposed of in these terms with no order as to costs.

18. The civil application does not survive and is disposed of as infructuous.

(G. S. PATEL, J)