

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

**APPEAL FROM ORDER No. 230 OF 2017
WITH
CIVIL APPLICATION No. 312 OF 2017 IN A.O. NO.230 OF 2017**

Johnson John	... Appellant
Vs.	
The Municipal Corporation of Greater Mumbai	... Respondent

**WITH
CIVIL APPLICATION No. 321 OF 2017 IN A.O. NO.230 OF 2017**

Dunhill Dome Co-op. Housing Scty. Ltd.	... Applicant
in the matter between	
Johnson John	... Appellant/
Vs.	
The Municipal Corporation of Greater Mumbai	... Respondent

**WITH
CIVIL APPLICATION No. 636 OF 2017 IN A.O. NO.230 OF 2017**

The Salsette Catholic Co-op. Hsg. Scty. Ltd.	... Applicant
in the matter between	
Johnson John	... Appellant
Vs.	
The Municipal Corporation of Greater Mumbai	... Respondent

Mr. Owen Menezes with Mr. Ravi Gadagkar i/b. Mr. Rajesh B. Parab,
Advocate for the appellant/applicant.
Mr. J.K. Mitra i/b. K.P. Tiwari and Company, Advocate for applicant in
CAA/321/2017.
Mrs. Madhuri More, Advocate for the respondent/Corporation.
Mr. Clive D'souza, Advocate for the applicant in CAA/636/2017.

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE: **12th December, 2017.**

P.C.:

Admit. By consent, the Appeal is heard finally and disposed of at the stage of admission.

2. Pursuant to the order dated 11th December, 2017, Mr. Ashok Wakade, Executive Engineer (B.P.) WS-'H' Ward is present.

3. The summary of the facts is as follows:

The Corporation gave notice under section 351 on 24th November, 2016 and the designated officer passed an order on 23rd March, 2017 confirming that it is an unauthorized construction. The appellant/plaintiff has entered into unregistered agreement dated 18th April, 1994 wherein the suit structure admeasuring 135 sq.ft. (There is difference in area of suit structure, i.e. 118 sq.ft.). The appellant claimed that he got the possession of the structure on 18th July, 1997. The structure is in the stilt area. The Cooperative Housing Society was registered in December, 1998. The appellant/plaintiff claims that his structure was in existence when OC was granted. He relies on the assessment of the year 1998-99 issued by the Assistant Assessor and Collector on 24th June, 1999 where the suit structure is shown.

4. As per the Corporation, the plans were approved lastly in the

year 1998 and full CC was granted to stilt + Dispensary in stilt + 1st to 6th storied for residential use. It is submitted by the learned counsel for the Corporation that the last approved plan was on 4th May, 1998. It is submitted that when the OC was granted, the suit structure was not in existence but it was constructed from 15th July, 1998 till the first assessment was done in June 1999. The learned counsel for the Corporation has categorically submitted that on the basis of the last approved plan except dispensary admeasuring approximately 100 sq.ft., no other structure was approved and authorized by the corporation.

5. It is submitted by the learned counsel for the Cooperative Society that the Society was dissolved in 2010 due to mismanagement and malpractice by other members of the Managing Committee. The share certificate dated 19th May, 1999 issued by the Society in favour of the present appellant/plaintiff bears three signatures, one is of the Chairman, other is of the Hon. Secretary, they are two different persons and as one of the Members of the Managing Committee, the appellant himself has signed the said share certificate. Thereafter, administrator was appointed and thereafter he handed over the management in 2011 to the present body who found that the suit structure is unauthorized and made

complaint to the Corporation. The learned counsel has also produced a letter dated 18th May, 2011 written by the builder/developer, i.e. Shanad Properties Pvt. Ltd. wherein they have mentioned that they have constructed as per the plan and has denied that they have permitted any unauthorized construction in contravention of the approved plans and the Rules & Regulations for Development of plots of the Corporation.

6. In view of the submissions made and facts placed before me, I am of the view that suit structure is in existence as per the assessment since 1998 and prima facie case is made out by the appellant to grant interim relief. The appellant is running his office and hence it is to be protected till final hearing of the suit.

7. However, at the outset, certain points are to be noted:

- (i) In view of the agreement dated 18th April, 1994, it appears that the builder/developer has entered into an agreement with the appellant in respect of the suit structure;
- (ii) It is necessary to find out when the structure was actually constructed whether prior to O.C. or after O.C.;
- (iii) Letter dated 18th May, 2011 issued by the builder/developer wherein he has stated that he has not

constructed any unauthorized construction. However, it is prima facie contradicted by the existence of the suit structure in view of the last approved plan dated 4th May, 1998 of the Corporation where only dispensary is shown in the stilt and not the suit structure, hence it is for the plaintiff to show his structure is as per the sanctioned plan by the Corporation;

- (iv) The builder/developer is a necessary party to the suit because he has entered into an agreement in respect of this suit structure which is not shown in the approved plan. He be made party to the suit or may be called as a witness, if he is not made party to the suit by the plaintiffs or he is not called as a witness by either of the parties, then the Court to call him as a witness because he is the one who is responsible for such structure and agreement.
- (v) If it is found *prima facie* that he has breached the rules and regulations of the M.M.C. Act, in that event, the trial Court may direct Corporation to take necessary action against him. In many cases, the builder/developer construct without approved plan and sell the unauthorized structure to a purchaser, who bonafide believes the

structure is authorized. Subsequently, if it is revealed that the construction is without sanctioned plan and though notice of demolition is issued to the occupant, the wrongdoer builder/developer goes scot-free and the purchaser has put his fortune, is ruined. Hence, it is the duty of the Corporation to take severe action against such builder by permanently blacklisting or in any other way. This case to be tried as test case.

8. In view of this, the judgment and order dated 11th April, 2017 passed by the learned Judge of the City Civil Court, Mumbai in S.C. Suit No. 1051 of 2017 is hereby set aside. Respondent nos. 2 and 3 are not made party to the suit though their intervention is allowed. In view of this, Chamber Summons is to be decided by the trial Court. The trial Court to proceed with the matter. The defendants to file their written statement thereafter. All the parties to cooperate the trial Court. Thus, the trial Court to try and decide the suit till 30th June, 2018.

9. Appeal from Order is disposed of. Civil Applications are also accordingly disposed of.

(MRIDULA BHATKAR, J.)