

Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER (ST) NO. 14707 OF 2017
WITH
CIVIL APPLICATION (ST) NO. 14710 OF 2017

Jyotshana Chhabildas Bhayani	...Appellant
<i>Versus</i>	
The Municipal Corporation of Greater Mumbai	...Respondent

Mr PG Lad, a/w Sayli Apte, for the Appellant.
Mrs Madhuri More, for the Respondent-MCGM.

CORAM: G.S. PATEL, J
DATED: 16th June 2017

PC:-

1. The order under Appeal of 2nd June 2017 is now available.

2. The Plaintiff challenged a notice dated 6th January 2017 issued by the Municipal Corporation of Greater Mumbai (“MCGM”) under Section 351 of the Mumbai Municipal Corporation Act 1888 (“the MMC Act”). The MCGM contended in this notice that certain commercial ground floor premises had been subdivided and a brick masonry wall erected with a rolling shutter on road frontage of the premises at Modi Street, Mumbai.

3. The learned Judge found that the documents produced did not show this sub-division prior to 1961-62. Paragraph 7 of the impugned order seems to record that the sanctioned plans show cabins but without a rolling shutter. It is a matter of debate whether the addition of a rolling shutter can justify this kind of notice or a demolition. The fact that the Plaintiff has a license is not in dispute.

4. Mr Lad draws my attention to page 32 of the compilation. This structure is on a busy commercial street. There is a Medical Centre or outlet in the middle and on either side of it are two commercial units with rolling shutters. It seems — and we are left to speculate — that both these units with rolling shutters are illegal. The notice only speaks of a single rolling shutter and I do not today know whether this is the one to the left or to the right of the Medical Centre. We also do not know if, by necessary implication, it is the MCGM's case that the Medical Centre is also illegal. For all we know, when it is closed, it will also have a rolling shutter.

5. It is difficult to appreciate the basis on which the impugned order was passed. Even more curious is that there was no reply filed or called for to the Notice of Motion and yet by the impugned order, the Plaintiff's Notice of Motion, till then only at a lodging or stamp number was dismissed. That was not proper. The MCGM ought to have been directed to place its documents and say on Affidavit and, until then, a temporary order of restraint was justified. There was no urgency to demolish the structure and this is apparent from paragraph 6 where the Trial Court notes the submission by the MCGM that the Executive Engineer noticed this construction in 1993. Why the MCGM waited for 24 years is unknown. If it could

wait then long, then surely the demolition could wait until the MCGM filed a return Affidavit and explained, *inter alia*, its stand and this delay.

6. Also, the Court seems to have relied on documents that are no part of the record. I have had an occasion to say this repeatedly. This practice of accepting documents across the Bar and referring to them in order now must stop. The reason is that when the Trial Court does this, the documents on which the Trial Court bases its judgment or reasoning do not form part of the Appeal Paperbook or compilation. This causes delay, confusion and misunderstanding. Whatever is shown to the Trial Court must be placed on Affidavit so that it forms part of the record and can legitimately be included in any compilation in Appeal or reference at further hearings.

7. Let a copy of this order be placed before the learned Principal Judge of the City Civil Court for appropriate directions in this regard. The impugned order dated 2nd June 2017 is set aside. The Notice of Motion is restored to file.

8. Affidavit in Reply will be filed and served on or before 17th July 2017. Affidavit in Rejoinder, if any, to be filed and served on or before 28th July 2017. Parties will appear before the Trial Court on 4th August 2017 and obtain directions for fixing the date for the hearing and final disposal of the Notice of Motion.

9. The Motion will be disposed of by the Trial Court at its earliest convenience. Till then, there will be an ad-interim

injunction in terms of prayer clause (a) of the Notice of Motion. This stay will continue for a period of three weeks after the final order on the Notice of Motion, if it is decided against the Plaintiff.

10. The Appeal is disposed of in these terms. The Civil Application does not survive and is disposed of as infructuous.

(G. S. PATEL, J.)