

Atul

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.695 OF 1997
WITH
CIVIL APPLICATION NO. 1653 OF 2015
AND
CONTEMPT PETITION NO. 143 OF 2015

Dattaram B Jadhav	...Appellant
<i>Versus</i>	
Municipal Corporation of Greater Mumbai	...Respondent

Mr Dattaram B Jadhav, Appellant in person.
Mrs MR Bhoir, for Respondent No. 1-MCGM.
Mr VC Singh, for Respondents Nos. 3A to 3C, 4, 5, 6A, 7A to 7C & 8.

CORAM: G.S. PATEL, J
DATED: 20th July 2017

PC:-

ARUN
RAMCHANDRA
SANKPAL

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1. This First Appeal was placed on the supplementary board today at the instance of the Appellant who appears in person and is represented by his son. The Appeal is directed against an order dated 10th June 1997. I will turn to that order presently. The Appeal was admitted on 28th July 1997.

2. The Appellant was the original Plaintiff in Suit No. 9566 of 1987. It was lodged on 25th December 1987. The Plaintiff claimed protection against an order passed by the Municipal Corporation of Greater Mumbai (“MCGM”) under Section 351 of the Mumbai Municipal Corporation Act 1888. Defendant No. 1 was the MCGM. The other Defendants Nos. 2 to 8 were the landlords of the premises in question. In the time since, some of the original Defendants have passed away and their legal heirs have been impleaded.

3. It is not in dispute that the Defendants had, by 1997, entered their written statement. The suit had not yet reached the stage of issues although ten years had passed, when, on 10th January 1997, a learned Judge of the Bombay City Civil Court passed the impugned order, best reproduced in full:

“The Suit was lodged in 25th Dec, 1987. The matter was referred to DMC and it is admitted by Mr. Singh that at least DMC passed an order dated 5.4.88. The said order of DMC was not brought on record. According to Mr Singh, the reason for not bringing on record was that the said order was favourable to the Plaintiff. Since it was favourable to him, there was no question of challenging the said order. By incidence that took place between 5.4.88 and March 1993, it was unfortunate that the structure of the Plaintiff did not remain in tact and was demolished on or about 19.3.1993. On and from that date, the Plaintiff slept over his rights. The factors incidental or subsequent facts were not brought on record. It appears that on 6.4.1993, certain orders of statusquo were obtained which thereafter stood dissolved and appeal is filed against the same. According to him, in view of the pendency of the said

appeal, the present suit deserved to be maintained and Notice of Motion deserves to be retained on file. If the structure in question on which the cause of action survives is not in existence as of Monday and effective 19.3.93, the said structure is not in existence, the present notice of motion for contempt and in fact the suit, but do not become necessary to be retained on file. Cause has come to an end, by the action of the Corporation on 19.3.93 and in view thereof suit is dismissed.

In view of the dismissal of the suit Notice of Motion No. 1797 of 1997 would not survive and is accordingly dismissed.

R&P be sent to Record Department."

4. I am at a loss to understand how such an order could ever have been passed in a substantive civil suit. There is no procedure in the Code of Civil Procedure 1908 that contemplates such an order. I am told that the MCGM orally applied for dismissal of the suit on the ground that the structure sought to be protected had been demolished pending the suit; but of any such application there is no mention in the impugned order, and there was certainly no written application by the MCGM. Had there been, the Plaintiff would undoubtedly have had to be given an opportunity to respond. As it happens, the Plaintiff did complain by way of a contempt motion that the demolition of his structure pending the suit was wrongful. The learned Judge, as is evident, proceeded on the wholly erroneous footing that since the structure was demolished, rightly or wrongly, the suit itself was infructuous. In this, the learned Judge was entirely in error. That kind of subsequent event might well have justified an amendment application to seek a mandatory order permitting

reconstruction and perhaps even a claim in damages. The one thing that could not have been done by the Trial Court was to dismiss the suit in this peremptory fashion. At the very least, the Trial Court had to hear the Contempt Notice of Motion, which was pending. In any case, the suit could not have been dismissed like this before issues were framed.

5. This is a substantive first appeal against the dismissal of the suit and the question that fall for consideration is whether a Civil Court can ever dispose of the suit in this fashion. It is sought to be contended on behalf of the landlord-Respondents that where the subject matter of the suit does not exist, the suit itself can be dismissed. The reliance placed on *Dharipakar Madan Lal Agarwal v Rajiv Gandhi*¹ is of no assistance simply because it arose in the peculiar facts of an election petition and in a wholly different context. The reliance on *Shipping Corporation of India Ltd v Machado Brothers & Ors*² is actually against the proposition canvassed. If a suit has been rendered infructuous by subsequent events, an application is required to be filed seeking dismissal of that suit and the Court is required to make the necessary enquiry into the facts and circumstances of the case. This is clearly stated in paragraph 25 of the *Machado Brothers*.

“25. Thus it is clear that by the subsequent event if the original proceeding has become infructuous, ex debito justitiae, it will be the duty of the Court to take such action as is necessary in the interest of justice which includes disposing of infructuous litigation. For the said purpose it

1 AIR 1987 SC 1577.

2 AIR 2004 SC 2093.

will be open to the parties concerned to make an application under Section 151 of CPC to bring to the notice of the Court the facts and circumstances which have made the pending litigation infructuous. Of course, when such an application is made, the Court will enquire into the alleged facts and circumstances to find out whether the pending litigation has in fact become infructuous or not."

6. Here, there was no application. There was no enquiry at all. Indeed the order under appeal is remarkably more for what it does not say rather than for what it does. It mentions, for instance, that on 6th April 1993 "certain orders of *status quo* were obtained". The substance of those orders is not set out. It is then stated that these orders thereafter stood dissolved and an appeal was filed against "the same", presumably meaning against the order vacating the *status quo* order. When that order of vacating the earlier stay was passed we are not told. The fact that an appeal was pending is undisputed, but this leads to another incongruity: the direct result of the dismissal of the suit was that the Plaintiff's appeal from the order vacating the *status quo* was also rendered infructuous and had to be dismissed as withdrawn.

7. It does not end at that. The learned Judge was in complete error in holding that the demolition of structure resulted in the 'cause of action' for the suit being done away with; or, in other words, that the MCGM's demolition of structure also demolished the cause of action and the suit itself. The cause of action was not the structure. The cause of action was the threatened demolition of the structure under a notice under section 351. The Court was bound to investigate whether the demolition carried out pending

suit was in accordance with law or not. If not, it was bound to order the restoration of the *status quo ante*. It was *inter alia* required to do this because it had before it a Contempt Notice of Motion as well, and it was required to hear that.

8. What the learned Judge seems to have done is dismissed the suit and all attendant Notices of Motion including the Contempt Notice of Motion. The result is truly bizarre and borders on the perverse. A party comes to Court saying his structure is authorized and the threatened demolition is illegal. He claims that it has been demolished without authority of law. He files a Contempt Notice of Motion. The Court simply says if the structure does not exist, then there is no basis for the suit and proceeds to dismiss the suit, the Contempt Notice of Motion and the Notice of Motion for interim relief.

9. It is difficult to conceive of a more inequitable and improper approach than this in civil proceedings. There is no known procedure by which this can be done. The Court had before it no application for any such dismissal.

10. Consider the enormity of the tragedy. It is now 30 years since Plaintiff first filed his suit in 1987. The appeal itself has been pending in this Court since 1997. This is nothing if not a complete mockery of justice and the travesty of every known rule or procedure. It is true that our rules or procedure are meant to aid justice, but that does not mean that every canon and rule of procedure and every norm or standard can be jettisoned and

defenestrated like this. There is absolutely no examination on merits.

11. The impugned order cannot be sustained. It has to be set aside, and it is. This is also not a case where in Appeal, the Appellate Court can pass an appropriate decree or modify the decree simply because before the Trial Court the matter was not decided on its own merits at all. To do so would involve taking evidence, considering an amendment and so on, and would also deprive the Plaintiff of his right to a substantive statutory First Appeal on merits, should be fail.

12. The impugned order is quashed and set aside. Long Cause Suit No. 9566 of 1987 is immediately restored to file. The Contempt Notice of Motion No. 1662 of 1993 ***and Notice of Motion No. 1669 of 1993 are*** also restored to file. The learned Judge is requested to dispose of the contempt Notice of Motion first and on a priority basis and preferably before 6th October 2017.

13. In addition, the Plaintiff will be at liberty to file an appropriate application for amendment of the plaint, if so advised.

14. There remains one other pressing issue and that is about arranging appropriate legal representation for the Plaintiff. Throughout these proceedings the Plaintiff have had to rely on free legal assistance. His complaint is that his cause has not been adequately represented.

15. Let a copy of this order and the relevant papers be placed before the Chairman of the District Legal Services Authority with a request to provide appropriate legal representation free of cost to this Plaintiff so that his cause may be represented properly from this point onwards.

16. Parties will appear before the Trial Court on 21st August 2017 with an authenticated copy of this order and will obtain the necessary directions for listing the matter for disposal of the Contempt Notice of Motion, filing a Chamber Summons for amendment, if any, and, in the Suit, framing issues, filing of evidence and documents and fixing a schedule for trial. The Trial Court is requested to endeavour to dispose of the suit itself at the earliest possible, and preferably by December 2018.

17. The first appeal is disposed of in these terms. In the facts and circumstances of the case, there will be no order as to costs.

18. The civil application and the contempt petition in the First Appeal do not survive and are disposed of as infructuous.

(G. S. PATEL, J)

Note: This order is modified by an order dated 9th March 2021. Corrections are shown in bold and italics.