

Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.715 OF 2014
WITH
CIVIL APPLICATION NO.865 OF 2014

Pali Hill Tourist Hotel Pvt Ltd ...Appellant
Versus
The Municipal Corporation of Gr Mumbai & Anr ...Respondents

Mr Rahul Rao, with Mr Tushar Dahibawkar i/b Dahibawkar & Co,
for the Appellant.
Mrs M Bhoir, for the Respondent No.1/MCGM.

CORAM: G.S. PATEL, J
DATED: 6th June 2017

PC:-

1. The Appeal is against the order of 10th July 2014 declining the Plaintiff ad-interim relief in its Suit challenging a notice issued by the Mumbai Municipal Corporation Act, 1988 (“**the MMC Act**”). According to the Municipal Corporation Greater Mumbai (“**MCGM**”), the Plaintiff is the proprietor and operator of a residential hotel in Bandra. It put up an unauthorised covering of a terrace and acrylic roofing. The learned Judge came to the conclusion that since the Lease Deed referred to only a ground floor structure there is nothing to show that the structure was in existence before 1964. On the other hand, I am shown a photograph of the

hotel obviously taken at a much earlier time, well before the locality was more crowded and before new restaurants were allowed on the ground floor in this building and in the vicinity. The photographs *prima facie* indicate the existence of the brick masonry wall and also an acrylic sheet roofing. This of course only a *prima facie* view. This, and other material, will need to be placed on Affidavit. Rather than rejecting the ad-interim relief immediately the learned Judge might have considered allowing the Plaintiff to bring forward the additional material.

2. The notice issued on 14th June 2014 has sketch plans but there is nothing to indicate from this that the MCGM has only recently discovered the illegality. There is a reply filed in the Appeal from Order itself. It states that an inspection was carried out on 6th June 2014. The Affidavit alleges that there are no documents to show that the structure is authorised. Hence the action.

3. The notice is far from satisfactory. It proceeds on the assumption, and it is only an assumption, that everything that is noted is entirely new. *Prima facie* this does not seem to be correct. There may in a given case be a very old structure that has been there for decades together. An opportunity must be given to the party involved to show if this is so. A party may not have retained or be able to readily trace the relevant permission. That does not mean that the structure is automatically 'new' or even 'unauthorised'. Whether this satisfies the requirements of the MMC Act must be left open at this stage.

4. The Notice of Motion will need to be finally heard. I am told however that the suit was dismissed for default on account of an inadvertent oversight on the part of the Plaintiff's Advocate. It serves no purpose to send the party back to the Trial Court to agitate the restoration application and then to have to spend more time in pressing the present Notice of Motion. There are sufficient inherent powers in an appellate court under the CPC to permit the restoration. It is settled law that inadvertence on the part of an advocate should not result in prejudice to a party.

5. The Plaintiff has filed Notice of Motion No.132 of 2017 for restoration. That is pending before the City Civil Court. The application for restoration is hereby allowed. The learned Judge will formally pass an order making Notice of Motion No.132 of 2017 absolute. The Suit is restored to the file of the City Civil Court forthwith. The Plaintiff's draft Notice of Motion in which the impugned order was passed is also restored to file. It will be listed before the learned Single Judge in the week of 19th July 2017. On that day the learned Single Judge will pass directions for replies and rejoinders and fix a date for hearing and final disposal of the Motion.

6. In the meantime, there will be an interim order in terms of prayer clause (a) of the Civil Application no.865 of 2014 which reads as follows:

(a) That pending the hearing and final disposal of this Appeal, this Hon'ble Court be pleased to stay the execution, operation, implementation and effect of the impugned order and judgment of the Hon'ble city Civil Court dated 10th July 2014

annexed to the Memo of Appeal as Exh-A thereto, the order dated 7th July 2014 being Exh-B to the Memo of Appeal and impugned notice dated 14th June 2014 under Section 351 of the MMC Act being Exhibit 'C' to the Memo of Appeal.

7. The Appeal and Civil Application are disposed of in these terms with no order as to costs.

8. The Plaintiff agrees and undertakes to file a copy of the photograph that is shown to me, which I have taken on record and marked 'X' for identification with today's date, before the City Civil Court. That will be done on an Affidavit filed by a responsible person on behalf of the Plaintiff attesting to the correctness of the photograph.

(G. S. PATEL, J.)