

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

APPEAL FROM ORDER NO.499 OF 2017

Abdullah Yusuf Burhan

... Appellant

Vs.

Municipal Corporation of Greater Mumbai

... Respondent

Mr.G.V. Murti with Mohun Rao i/b P.L. Dubey for the Appellant
Mr.F.M. Reis, Senior Advocate, with Ms.Madhuri More for
Respondent

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: AUGUST 28, 2017**

P.C. :

1. This Appeal from Order is directed against the order dated 11.7.2017 thereby rejecting the ad-interim relief in the Notice of Motion No.2290 of 2017 in L.C. Suit No.1459 of 2017.
2. The learned Counsel for the appellant submitted that the owner had received a notice of demolition of the suit building under section 354A of the Mumbai Municipal Corporation Act on 23.4.2011 and pursuant to the same, the suit building was partly demolished on 11.5.2011. He has further submitted that in Suit No.1459 of 2017, the plaintiff has challenged the notices issued by the Corporation in July, 2017 under section 488 of the Mumbai

Municipal Corporation Act. The learned Counsel has submitted that pursuant to the said notice, when partial demolition was carried out in the year 2011, the plaintiff filed a Suit i.e., Suit No.1672 of 2011 and during the pendency of the suit, the plaintiff had got repair permission from MHADA and had repaired the entire building as it was partially demolished. He has further submitted that as now the whole building stands, it was necessary for the Corporation to issue a fresh notice may be under section 351 of the Mumbai Municipal Corporation Act and thus, the notice under section 488 of the Act which was given in 2017 pursuant to the notice of 2011 is not sustainable. He has further submitted that the building is cessed under No.7201 by MHADA repair board and the building is in existence prior to 1950. He further submitted that as on today, the plaintiff being a successive purchaser of the suit building, he is not in a position to produce the original sanction plan of the building but he relies on the repair plan issued by MHADA in the year 27.11.1995. He further submitted that 32 families are staying in the suit building and they be protected by following due process of law.

3. Learned Senior Counsel for the Corporation while opposing the Appeal from Order, has submitted that the suit building is unauthorisedly constructed and already the building was demolished pursuant to the notice under section 354A dated 23.4.2011 and the demolition carried out on 11.5.2011. He further submitted that the plaintiff thereafter filed Suit No.1672 of 2011 in June, 2011 seeking injunction against the Corporation and the said suit was dismissed by judgment and order dated 29.4.2017. The learned Counsel submitted that in the present suit, the same relief is sought by the plaintiff under the garb of due process of law and it is not maintainable and it is *res judicata*. He further submitted that all the issues in respect of unauthorised construction of the said suit building are discussed in the judgment in Suit No.1672 of 2011. The learned Senior Counsel further submitted that the plaintiff is not in a position to produce any document issued by the Corporation to prove that the structure is authorised and legal. He has submitted that the Corporation has never assessed this building and this shows that the building is unauthorised. He further argued that the building was demolished pursuant to the execution of notice on 23.4.2011 under section 354A and such averments are made in the plaint and therefore, the appellant

cannot argue contrary to the pleadings in the plaint. He supported the order passed by the learned trial Judge.

4. Heard submissions. I have perused all the documents and the plaints in Suit Nos.1672 of 2011 and 1459 of 2017. At the time of hearing of this Appeal from Order, a pertinent question was put to the appellant to produce the assessment record of the building which was prepared by the Corporation. The learned Counsel has submitted that all the documents are produced before the trial Court in L.C. Suit No.1672 of 2011 which was dismissed on 29.4.2017 against which the original plaintiff has preferred First Appeal, which is pending before this Court. It appears from the judgment in Suit No.1672 of 2011 that the Corporation has examined their Sub-Engineer, Mr.Thakur and has stated that no record in respect of the said building is available with the Corporation. When the plaintiff claims that the building was constructed as per the permission given by the Corporation and on the basis of the sanction plan of the Corporation, the burden is on the plaintiff to prove this fact. Moreover, even if it is at the stage of hearing for interim relief, it is necessary to produce some documents to show that the building is legal, authorised and was

constructed after obtaining the sanction from the Corporation. The Corporation is required to produce the assessment record in respect of the suit building before the trial Court. As submitted by the learned Counsel that the documents are required to be produced from civil Suit No.1672 of 2011 and the matter is fixed for hearing of the Notice of Motion by the trial Court on 14.9.2017, the following order is passed:

- i) The Corporation not to take coercive action till the Motion is heard.
 - ii) The Corporation to file its affidavit in reply in the trial Court, if not filed already, on or before 7.9.2017 and a copy of the same is to be given to the original plaintiff in advance. Rejoinder, if any, to be filed on or before 11.9.2017 alongwith documents and the matter can be taken up by the trial Court on 14.9.2017, as scheduled.
5. Appeal from Order is disposed of in the above terms.
6. Civil Application also stands disposed of.

(MRIDULA BHATKAR, J.)