

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER st. NO.30107 OF 2017
with
CAAST/30110/2017

Mohamed Ayub Gulab Rasul ... Appellant
Vs.
Municipal Corporation of Greater Mumbai ... Respondent

Mr.Vishal Kanade i/b Mr.J.J. Shah for the Appellant
Mrs.Madhuri More for Respondent

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE: **NOVEMBER 3, 2017**

P.C.:

1. This Appeal from Order is filed against the order dated 13.10.2017 passed by the learned Adhoc Judge, City Civil Court, Dindoshi, Goregaon, Mumbai, in the draft Notice of Motion in L.C. Suit No.2752 of 2017 thereby rejecting the ad-interim relief claimed by the plaintiff in respect of protection of the suit structure.

2. The suit structure is a dairy. After hearing the learned Counsel for the appellant and the Respondent Corporation, it is found that the appellant is in possession of the suit premises as a tenant since 1972 and on 21.4.1995, he was served with a notice by the Corporation under section 351 of the Bombay Municipal Corporation Act in respect of the same structure. He filed Suit No.1783 of 1997 against

the Corporation in the Bombay City Civil Court wherein he had challenged the impugned notice which was given under section 351 of the Bombay Municipal Corporation Act and the suit was decreed and the suit structure was protected.

3. After hearing the parties, it is found that the suit structure mentioned in the impugned notice was admeasuring 6.90 metres X 3.30 metres and in the present suit, a notice was given by the Corporation for the suit structure of BM walls and MS angles and AC sheet roof structure admeasuring 13.7 metres X 4.57 metres.

4. The record and the decree passed in the previous suit No.1783 of 1997 is to be taken as a *prima facie* proof of the measurements of the structure, which was protected earlier and, therefore, the plaintiff i.e., the appellant, cannot have protection at this stage for more than the area of 6.90 metres X 3.30 metres. The learned Counsel for the appellant submits that the area mentioned in the suit notice of 13.7 metres X 4.57 metres is the approximate area given by the Corporation, which is incorrect. He submits that he will file an application for appointment of Court Commissioner for getting the area measured so that he can seek protection of his area which is the correct one and protected in the earlier suit.

5. In view of the submissions of the learned Counsel and after hearing the learned Counsel for the Corporation, I am of the view that if at all the area and the measurements of the suit structure are under challenge, then, it is necessary and useful for the Court to get the exact idea of the area of the suit structure after obtaining the report of the Court Commissioner. Accordingly, the Appeal from Order is allowed and the order passed by the learned Judge dated 13.10.2017 is hereby set aside.

6. The learned Counsel for the appellant submits that the hearing of the Motion before the trial Court is scheduled on 29.1.2018. In view of this, the impugned structure is protected and the Corporation not to take any coercive action against the suit structure till 29.1.2018. In the meanwhile, the plaintiff shall move the application for appointment of Court Commissioner and the Court Commissioner shall submit his report on or before 12.12.2017 so that the Motion can be heard on or before 31.1.2018.

7. Appeal from Order and the Civil Application are disposed of accordingly.

(MRIDULA BHATKAR, J.)