

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application No. 744 OF 2015

Zarir Jehangir Nagarwalla

...Applicant

Versus

Dhanraj Girji Rugnalaya

And Anr.

...Respondents

....

Mr. S.S. Patwardhan, Advocate for the Applicant.

Mr. Surel S. Shah, Advocate for Respondent No.1.

....

CORAM : R. G. KETKAR, J.

DATE : 26th APRIL, 2018

PC.

1. Heard Mr.S.S. Patwardhan, learned counsel for the applicant and Mr.Surel S. Shah, learned counsel for respondent No.1, at length.

2. By this application under Section 115 of Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicant, hereinafter referred to as the 'plaintiff', has challenged the judgment and decree dated 26.11.2013 passed by the learned 2nd Jt. Civil Judge, Junior Division, Solapur in Regular Civil Suit No.560/2008 as also the judgment and decree dated 18.11.2015 passed by the learned District Judge-1, Solapur in Regular Civil Appeal No.1/2014. By these orders, the Courts below dismissed the suit instituted by the plaintiff for declaration and

perpetual injunction.

3. The plaintiff claimed to be tenant in respect of Municipal House No.54 admeasuring 1325.87 square meters situate at C.T.S. No.8316/2, Railway Lines Area, Solapur (for short, 'suit property') comprising of ten rooms. The plaintiff instituted suit for declaration that the notice dated 24.6.2008 issued by respondent No.2, hereinafter referred to as 'defendant No.2', under Section 264(1) & (2) of the Bombay Provincial Municipal Corporations Act, 1949 (for short, 'B.P.M.C. Act') and notice dated 16.7.2008 issued under Section 268(1) of the B.P.M.C. Act are illegal and for perpetual injunction restraining the defendants from carrying out demolition of the suit property.

4. The defendant filed written statement resisting the suit. On the basis of the pleadings of the parties, the learned trial Judge framed necessary issues. After considering the evidence on record, the learned trial Judge dismissed the suit. Aggrieved by that decision, the plaintiff preferred appeal which was dismissed by the learned District Judge. It is against these orders, the plaintiff has instituted present C.R.A.

5. In support of this application, Mr. Patwardhan strenuously contended that the Courts below were not justified in dismissing the suit. The notices dated 24.6.2008 and 16.7.2008 were issued by

defendant No.2 Corporation in collusion with defendant No.1. He submitted that before issuing notice under Section 264 of B.P.M.C. Act, defendant No.2 did not comply the requirements laid down therein. In support of this proposition, he relied upon the decision of this Court in **Gajanan Ramraoji Ambagovind and others v. Corporation of the City of Nagpur and others, 2006(4) Mh.L.J. 789.**

6. Mr. Patwardhan submitted that in fact notice under Section 264 of B.P.M.C. Act was not served on the plaintiff. Though it is claimed that the notice was pasted on the suit premises, no evidence was adduced to establish said fact. He submitted that the notices under Sections 264 and 268 of B.P.M.C. Act were issued in the year, 2008 and as on date the building is as it is as it was in the year 2010 except removal of roof and removal of door and window frames.

7. Mr. Patwardhan has invited my attention to the prayers made in the suit, paragraph-4 of the written statement, issues framed by the learned trial Judge and the points framed by the learned District Judge. He invited my attention to the cross-examination of Sunil Neminath Lamkane, working as an Engineer with defendant No.2 Corporation. In the cross-examination the witness admitted that he knew that Prabhakar More was residing in the out-house. He did not make any

enquiry with the office of the Corporation as to who is residing in the suit property. On 2.8.2008, he along with employees of the Corporation, police went along with JCB Machine for demolishing the suit property. He further admitted that the suit property is not facing any main road. Along with him, Shri Chopade who is related with defendant No.1 Trust was also present. He was given suggestion as to whether the suit property can be repaired. He, however, was not in a position to state whether it can be repaired. Mr. Patwardhan submitted that though the Courts below have dismissed the suit, both have held that the plaintiff is a tenant in respect of the suit property. He submitted that as basically the Corporation before issuing notice under Section 264 of B.P.M.C. Act has not recorded satisfaction in terms of Section 264, the Courts below were not justified in decreeing the suit.

8. On the other hand, Mr. Shah supported the impugned orders. He invited my attention to the evidence of Pradip Phatak, Power of Attorney holder of the plaintiff. In cross-examination, he admitted that he does not have any proof to show that rent in respect of the suit property is paid. He has also no material to prove that the plaintiff is residing in the suit property at any point of time. He further admitted that the suit property is in a dilapidated condition.

9. Mr. Shah also invited my attention to the evidence of PW-2 Prabhakar Dattatraya More. In cross-examination, he admitted that he has no documentary evidence to prove that he is working with the plaintiff since 1978.

10. Mr. Shah submitted that the Courts below have held that the plaintiff is a tenant in respect of the suit property and that defendant No.1 has not challenged said finding. Defendant No.1, therefore, accepts the plaintiff as a tenant of the suit property. He further accepts that in view of the decision of Apex Court in **Shaha Ratansi Khimji and Sons vs. Kumbhar Sons Hotel Private Limited and others, (2014) 14 SCC 1** by demolition of the suit property, tenancy of the plaintiff is not extinguished. He states that defendant No.1 will initiate appropriate proceedings for evicting the plaintiff from the suit property.

11. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the plaintiff has instituted suit for declaration that notice dated 24.6.2008 issued under Section 264(1) & (2) as also notice dated 16.7.2008 issued under Section 268(1) of the B.P.M.C. Act are illegal and for perpetual injunction restraining the defendants from demolishing the suit property. Issues No.2, 3 and 4

and the findings recorded against those issues by the learned trial Judge read thus:

	ISSUES	FINDINGS
2.	Whether defendants proves that the suit property is in dilapidated condition ?	In the affirmative
3.	Whether plaintiff proves that notices issued by defendant No.2 Dt. 24.06.2008 and 16.07.2008 under the B.P.M.C. Act are illegal ?	In the negative
4.	Whether defendants prove that notices Dt. 24.06.2008 and 16.07.2008 under the B.P.M.C. Act were duly served to the plaintiff ?	In the affirmative

12. As far as the District Court is concerned, the points No.2, 3 and 4 and the findings recorded against those points by the learned District Judge read thus :

No.	Points	Findings
2.	Whether the appellant/plaintiff proves that the suit house is in good and habitable condition ?	Not proved
3.	Whether the appellant/plaintiff has proved that the suit notices were illegal and not duly served as per law ?	Not proved
4.	Whether respondent/defendant No.2 SMC has proved that the suit house is in dilapidated condition, and dangerous structure and liable for demolition ?	Proved

13. In paragraph-12, the learned District Judge considered the oral evidence adduced by the parties. The learned District Judge

observed that the plaintiff has not produced any evidence or receipt or document to show that since 1979, he had paid any rent to defendant No.1 or that he was residing in the suit property. In paragraph-13, the learned District Judge observed that though the plaintiff is tenant in the suit property, there is no evidence to show that since 1979-80, he was residing in the suit property or had paid any rent to defendant No.1. In paragraph-14, the learned District Judge noted the admission of the plaintiff that he is residing at Mumbai since last many years.

14. In paragraph-15, the evidence of the plaintiff that he appointed Prabhakar More as his care-taker and that he was residing in the suit property since 1996 was noted. In the cross-examination he, however, admitted that he has no document or evidence to show that he was paying any wages or salary to the care-taker Prabhakar More or that since 1996 he was residing in the suit property.

15. In paragraph-16, the learned District Judge considered the evidence of PW-2 Prabhakar More. In cross-examination, he admitted that he is residing in the out-house which is a separate structure from the main bungalow. He further admitted that the main bungalow as well as the out-house has electric connection. Electric connection to the main bungalow was disconnected long back. PW-2 further admitted

that as of date, the building is in a dilapidated condition. He further admitted that the main bungalow is 90 years old structure and load bearing construction.

16. In paragraph-18, the learned District Judge referred to the inspection of the suit property by Shri Pravin Shaha, Government Valuer and Engineer who had prepared report about the structural stability and opined that the suit property is in a stable and good condition and is not required to be demolished. The plaintiff however did not examine Shri Pravin Shaha to prove the contents of the report that the suit property is in a good and stable condition. In paragraph-19, the learned District Judge referred to the DW-1 Jaywant Raut, the Managing Trustee of defendant No.1 Trust . He deposed that the suit property is 80 to 90 years old and it has become dangerous.

17. In paragraph-20, the evidence of DW-2 Sunil Lamkane was referred. He deposed that on 19.6.2008, he has inspected the suit property and found that it was not in a habitable condition. On 24.6.2008, notice was issued under Section 264(1) & (2) of the B.P.M.C. Act and was affixed to the door of the suit property. As notice dated 24.6.2008 was not complied, notice under Section 268(1) of the B.P.M.C. Act was issued on 16.7.2008. As both the notices were not

complied, on 2.8.2008 the major portion of the suit property was demolished with the help of JCB Machine.

18. In paragraph-22, the learned District Judge held that the defendants proved that the suit property is in dilapidated condition and dangerous to the public at large as it was adjacent to the public road. Thus the Courts below after appreciating the evidence on record have concurrently held that the suit property is in a dilapidated condition. The plaintiff is not in a position to demonstrate that the findings recorded by the Courts below are perverse, being based upon no evidence or that they are contrary to the evidence on record. The plaintiff is also not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Appellate Court. Merely because on the basis of evidence on record another view is possible, that itself is no ground for invocation of powers under Section 115 of C.P.C.

19. Mr. Patwardhan relied upon the decision of this Court in **Gajanan Ambagovind** (supra). In that case, in exercise of the powers under Section 289(1) of the City of Nagpur Corporation Act, 1948 notice-cum-order dated 12.8.2005 was issued to 31 occupants. Being aggrieved by that notice, the appellants instituted appeals before the

Deputy Municipal Commissioner. The appeals were dismissed by holding that the demolition could be carried out of the portion which is in dilapidated condition. The matter was carried in Revision before the Additional Commissioner who directed dismantling the dilapidated portion of the building in order to protect the life of the occupants. Aggrieved by those orders, the appellants preferred Writ Petition before the learned Single Judge which was dismissed. Aggrieved by that decision, Letters Patent Appeal was preferred before the Division Bench. In paragraph-10 of that report, the Division Bench observed that the learned Single Judge rejected the Petition solely on the ground that the report of A.D.T.P. was of an expert in the field and the same disclosed need for demolition of the part of the building. In fact that was the only point which was considered by the Authorities below while dealing with the appeal as well as revision application filed by the appellants. The orders impugned nowhere disclosed consideration of the point as to whether the exercise by the authorities while issuing notice under Section 289(1) was bonafide or not. It was also noted that the report of A.D.T.P. was obtained after issuance of the notice-cum-order dated 12.8.2005. In paragraph-12, the Division Bench referred to Section 289(1) of the City of Nagpur Corporation Act, 1948. In paragraph-13, the Division Bench observed thus :

“13. Obviously, therefore, before exercising the powers under the first part of Section 289(1) of the said Act, the authorities must get satisfied as to whether the entire building needs to be demolished or whether any particular portion of the building need to be demolished and that the building or part thereof cannot be allowed to be occupied by merely causing repairs to the same. The provision of law clearly states that only when the authority is satisfied that such building or part thereof is in dangerous state, that he can direct either demolition or removal or order of repairs to be made thereto. In other words, before ordering demolition, it is necessary for the authority to consider whether the building can be allowed to be repaired instead of demolition thereof without any danger to the public safety. Merely because a building appears to be in dilapidated condition that itself cannot be a justification to order of demolition. To arrive at an appropriate finding in that regard, the authorities must have proper materials before them in relation to the factual situation pertaining to the building in question. It is needless to state that such material will have to be furnished by the officers of the Corporation having expertise in the field and further the opinion be formed on the basis of such materials which would be available before issuing the notice/order Under Section 289(1) of the Act.”

20. In the present case, the plaintiff has challenged the notices issued by defendant No.2 under the B.P.M.C. Act *inter alia* on the ground that no notice was served on the plaintiff. The plaintiff was not given any opportunity of filing reply as also he was not heard. Defendant No.2 has issued notices under the political pressure and in collusion with defendant No.1. The plaintiff did not raise any contention in the Courts below to the effect that before issuing notices under the B.P.M.C. Act, no

satisfaction was recorded by the Municipal Commissioner of defendant No.2. In other words, this contention is raised for the first time during the course of hearing of this Civil Revision Application. Had the plaintiff raised this contention, the defendants would have produced the material dealing with this aspect. It is, therefore, not permissible for the plaintiff to agitate this contention for the first time in this Court that too during the course of arguments in this Civil Revision Application.

21. That apart, the learned trial Judge framed issue No.3 and recorded finding against that issue which is already extracted hereinabove. Similarly the trial Court recorded a categorical finding that the notices dated 24.6.2008 and 16.7.2008 issued under the B.P.M.C. Act were duly served on the plaintiff. As far as the District Court is concerned, the District Court framed point No.3 and recorded a finding against that point which is extracted hereinabove. The Courts below after appreciating the evidence on record have concurrently found that the notices were duly served on the plaintiff. The Courts below also found that the suit property is in a dilapidated condition. Even PW-2 Prabhakar More admitted that the suit property is in a dilapidated condition.

22. Mr. Patwardhan submitted that during the course of cross-

examination of DW-2 Sunil Lambkane, he was given suggestion as to whether the suit property can be repaired. He was however not in a position to state that whether it can be repaired. In other words it was sought to be contended that the suit property is not required to be demolished and can be repaired. Having regard to the fact that the suit property is 90 years old and is a load bearing construction and that the Courts below have concurrently found that it is in a dilapidated condition, it is not possible to accept the submission of Mr. Patwardhan that the suit property can be repaired.

23. Having regard to the fact that the suit property is 90 years old and is a load bearing construction, the Courts below have concurrently found that it is in a dilapidated condition. In fact, as the notices dated 24.6.2008 and 16.7.2008 were not complied, the demolition of major portion of the suit property was carried out on 2.8.2008 with the help of JCB machine. This also is a pointer that the building is beyond repairs. Though, the plaintiff alleged that the notices were issued by defendant No.2 Corporation under B.P.M.C. Act in collusion with defendant No.1, no evidence was produced to substantiate that plea. The allegations of malafides are of serious nature. The burden lies upon the person who alleges malafides. He must prove the allegations by leading a cogent and reliable evidence. The Courts below have considered this aspect

also.

24. More importantly the plaintiff, though is a tenant, is not residing in the suit property and is residing in Mumbai. It is in these circumstances, no case is made out for interfering with the impugned orders.

25. As the Courts below have recorded a finding that the plaintiff is a tenant, defendant No.1 will not proceed with the demolition of suit property without obtaining leave of the trial Court and placing on record the sanctioned plans of the suit property showing arrangement made for temporary and permanent accommodation for the plaintiff. Defendant No.1 would be at liberty to pay interim compensation to the plaintiff in lieu of providing temporary accommodation. Defendant No.1 would be at liberty to initiate proceedings for evicting the plaintiff. However, till such time the leave is not obtained from the trial Court, defendants No.1 and 2 will not carry out the demolition. Subject to this clarification, Civil Revision Application fails and the same is dismissed. Order accordingly.

(R. G. KETKAR, J.)