

Sarnobat

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

**APPEAL FROM ORDER (STAMP) NO. 14949 OF 2018
ALONG WITH
CIVIL APPLICATION (STAMP) NO. 14950 OF 2018.**

Bilkish Hamid Indrapurwalla. ... Appellant.
Vs.
The Designated officer Asst. Engineer, & Ors. ... Respondents.

Mr. Vishal Kanade a/w Mr. Madhur Hiraskar a/w Mr. Vachan Dodke
I/by V. & M. Legal, for the Appellant.
Mrs. Madhuri More, for the Respondent/MCGM.

CORAM : V. M. DESHPANDE, J.

DATE : 22nd JUNE, 2018.

ORAL JUDGMENT :

1. Heard the learned counsel for the appellant and the respondents/Corporation. By consent of both the advocates, the case is taken up for final hearing.
2. **Admit.** Mrs. More waives service on behalf of respondents/Corporation for final disposal.
3. The cause of action arose in favour of the appellant to approach before this Court since, the learned Judge of the Trial Court on 8th May, 2018 refused to grant ad-interim relief as prayed in the draft notice of motion in L.C. Suit No. 1378 of 2018.
4. The appellant is the original plaintiff. He filed a L.C. Suit. It

is registered as L.C.Suit No. 1378 of 2018 for following reliefs;

(a) that this Hon'ble Court be pleased to declare that the impugned order dated 25th April, 2018 is bad-in-law , null and void and cannot be implemented.

(b) that this Hon'ble Court be pleased to permanently restrain the defendants, their agents, servants from in any manner acting upon the impugned order dated 25th April, 2018;

(c) that pending the hearing and final disposal of the present Suit this Hon'ble Court be pleased to restrain the defendants, their agents and servants from in any manner acting in pursuance tot he impugned order dated 25th April, 2018;

(d) for interim and ad-interim reliefs in terms of prayer clause (c) above;

(e) for such further and other reliefs as the nature and circumstances of the case may require and Court may deem fit be granted;

(f) for the costs of this Suit.

5. According to the plaintiff, he is a tenant in respect of the ground floor of the building known as Lilly Villa along with the structure which is a garage. As per plaintiff this garage was constructed in the year 1955 by the then landlord. According to the plaintiff, the garage found its place in the plan which was censused by the Municipal Corporation in census with the development control regulations. Therefore, it is the submission of the plaintiff that it is in existence since

the time of construction of the building in the year 1955. According to the plaintiff, the building Lilly Villa clearly indicates that the building has been constructed prior to 1961-62 i.e. prior to the datum line of the Corporation and the notice structure is assessed by the Corporation prior to 1961-62 and is a tolerated structure. It is the case of the plaintiff that on 28th October, 2016 the Corporation Authority issued notice under Section 351 of the Act. The said notice is in respect of the removal of the garage. The said notice was duly replied on 4th November, 2016 and also sought the personal hearing from the Authority. The designated officer passed the order on 25th April, 2018 directing the removal of the structure in question. On 2nd May, 2018 without wasting any time, the plaintiff approached to the Court with a prayer for ad-interim relief which is refused.

6. Shri Kanade submitted that the documents are filed on record before the Court below which show that the building Lilly Villa is being assessed prior to 1861-62. He invited my attention to page 42 of the compilation of the AO which has reference of the garage. Learned counsel for the respondent Ms. More submitted that in so far as garage is concerned, it was not in existence prior to the datum line. She therefore, submits that the order impugned need not be interfered with.

7. It would be useful to refer the pleadings made by the plaintiff in para 11 of the plaint which are re-produced herein below;

“11. The plaintiff states that at the relevant time representative of the plaintiff has perused the file of the Municipal Corporation bearing No. CHE/WS/1268/H/MISC/342 and after perusal of the same the representative of the plaintiff has seen that the noticed structure is shown in the plan which is present in the file of the Municipal Corporation under the above referred reference number. However, at the relevant time the representative of the plaintiff inadvertently failed to obtain a certified copy of the file from the office of the Municipal Corporation as a result of which the copy of the plan is not available as on date with the plaintiff. It is however clear that the copy of the plan in the file maintained by the Municipal corporation as referred to hereinabove shows the existence of the noticed structure. The plaintiff through this Hon'ble Court calls upon the Municipal Corporation to produce the above referred file being File No. CHS/WS/1268/H/MISC.342 and any such other record with respect to the sanctioned plan of the building. Perusal of the file would clearly indicate that the noticed structure is shown in the plan which is present in the file of the Municipal Corporation. In any event the Municipal Corporation has not produced any plan whatsoever which does not show the noticed structure. In such circumstances it is clear that the noticed structure was constructed way back in the year 1955 when the building known as Lilly Villa was constructed. The structure therefore is not recently constructed.”

8. From the aforesaid a very specific pleading is made by the plaintiff that on perusal of the file of the Municipal Corporation bearing No. CHE/WS/1268/H/MISC/342 notice structure is shown in the plan which is present in the file filed by the Municipal Corporation. Not only that, in that a pleading is also made to call for the said file by the Court.

9. It is the submission of the learned counsel for the appellant Shri Kanade that, though the impugned order is dated 8th May, 2018, as on today the Corporation has not acted and the disputed structure is still standing thereon.

10. Pertaining to note here that till the decision of the claim for ad-interim relief on the part of the appellant, the Corporation did not file its reply before the Court below. Therefore, there is no material to dispute at least prima facie that the averments made in paragraph 11 of the plaint are baseless or groundless. In that behalf it would be useful to refer the observations of this Court in **2006 (1) Bombay C.R. 50 Rafiq Hameed Sayyed Vs. Municipal Corporation of Greater Mumbai**. In my view the learned counsel for the appellant is perfectly justified to buttress his submissions on the basis of the observations made in the said judgment.

11. It is also to be noted that though Section 351 notice was given in the year 2016, the designated officer passed order on 25th April, 2018. Thus, in my view that notice is stale one in nature. In that

view of the matter, the learned Judge of the Court below ought not to have straight way rejected the claim for ad-interim relief of the plaintiff instead ought to have directed the Corporation to file its reply and ought to have decided the application on its own merit.

12. The impugned order therefore, is required to be set aside. Accordingly, I pass the following order;

ORDER

I) The order passed by learned Judge of the City Civil Court, Dindoshi dated 8th May, 2018 in draft notice of motion in L.C. Suit No. 1378 of 2018 is hereby quashed and set aside.

II) The learned Judge of the trial Court is directed to decide the notice of motion within a period of 10 weeks from today.

III) It is open for the Corporation to file suitable reply and the documents before the Court below to substantiate its case in respect of notice dated 28th April, 2016 and order dated 25th April, 2018.

IV) Till the notice of motion is finally decided within the stipulated time by the learned Judge of the Court below, it is directed that the Corporation shall not take any coercive steps in pursuance to the notice dated 28th April,

2016 and the order dated 25th April, 2018 if the structure is still standing on the land.

V) At the same time, the appellant is also directed to maintain status-quo to the disputed structure.

VI) It is made clear that the observations made by this Court are restricted only for the purpose of deciding the present AO and the learned Judge of the Court below shall not get himself influenced while deciding the notice of motion. The notice of motion shall be decided by the learned Judge on its own merit after giving opportunity of hearing to the parties to the said application.

VII) The counsel for the appellant to remove all the office objections within a period of 10 days from today. If the office objections are not removed within a period of 10 days from today, the order dated 8th May, 2018 shall stand restored.

VIII) With this the appeal is allowed and disposed of with no order as to costs.

IX) All Civil Applications are disposed off.

[V. M. DESHPANDE,J.]