

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER ST. NO.27348 OF 2017
WITH
CIVIL APPLICATION ST. NO.27349 OF 2017

Nagesh Samar Bahadur Singh
Aged about 37 years, adult of Mumbai
Hindu, Indian inhabitant, residing at
National Dairy Farm, Opposite National
Park, Western Express Highway,
Borivali (East) Mumbai 400 066
Occ. Business

... Appellant.

-vs-

1. Municipal Corporation of Greater Mumbai
Mumbai, Through its Competent Authority,
Assistant Engineer (Building and Factory),
R/Central Ward, Municipal Market Building,
S. V. Road, Borivali (West), Mumbai 400 092.

2. M/s Mulraj Khatau & Sons Ltd.
A Company incorporated under the
provisions of Companies Act, 1956
having its registered office at 6, Laxmi
Building, Shoorji Vallabhdas Marg, Fort,
Mumbai 400 001.

... Respondent

Smt Anjali Helekar, i/b Subhash Achyut Abhyankar, Advocate for appellant.
Shri A. Y. Sakhare, Senior Advocate along with Smt Madhuri More, Advocate
for respondent/MMC.
Ms Sharmila U. Deshmukh, Advocate for applicant.

CORAM : A. S CHANDURKAR, J.

DATE : December 03, 2018

Oral Judgment :

The appellant is the original plaintiff who is aggrieved by the order passed by the trial Court on 13/09/2017 dismissing the notice of motion that was filed seeking temporary injunction for restraining the respondent-defendant from taking any action pursuant to the notice issued under Section 354-A of the Mumbai Municipal Corporation Act, 1888 (for short, the said Act).

2. It is the case of the appellant that he is doing business in milk and dairy products. According to him a stable was constructed in the year 1957 from where he was conducting his business. The roof of the said stable was required to be repaired after twenty years. As the condition of the said roof had deteriorated, the plaintiff in January 2012 had issued a letter to the Corporation-Authority seeking permission to effect the said repairs. There was no response to the aforesaid letter. In the meanwhile as there was a danger to the life and health of the cows and buffalows kept in the stable, the plaintiff carried out tenantable repairs by putting sheets on the structure. However on 22/04/2014 the plaintiff received a notice from the Municipal Corporation in which it was stated that the plaintiff had carried out unauthorised work. Reply was given to the notice but thereafter a final

order was passed calling upon the plaintiff to remove the structure in question. Being aggrieved the plaintiff filed suit seeking a declaration that the notices issued by the Corporation were illegal. A notice of motion was also moved seeking interim injunction so as to restrain the Municipal Authorities from proceeding with the said notices.

3. The Municipal Corporation while opposing the notice of motion took the stand that in the inspection that was carried out on 21/04/2014 it was noticed that fresh work of erection was being undertaken by the plaintiff without there being any necessary permission. Various photographs were also taken which indicated that the old structure was not noticeable and that it was replaced by a new structure.

4. The trial Court by the impugned order found that the plaintiff had failed to make to out any prima facie case as it was found that a new structure was erected by the plaintiff taking advantage of an earlier decree passed in favour of the plaintiff. In absence of any requisite permission for such works as carried out, the trial Court refused to grant any interim relief. Hence this appeal.

5. Smt. Anjali Helekar, the learned counsel for the appellant submitted that initially the plaintiff had filed L.C.Suit No.824/2009 seeking

to challenge a notice issued under Section 351 of the said Act. The said suit was for the same structure and the said suit was decreed on 22/06/2011. The nature of work undertaken by the plaintiff was in the nature of tenantable repairs so as to protect the structure. The learned counsel referred to the photographs on record to indicate that no new structure had been erected. Merely because a new roof had been put on the structure, same would not indicate a new construction being undertaken. It was also submitted that refusal of grant of interim relief would render the suit infructuous.

6. Shri A. Y. Sakhare, learned Senior Counsel for the Municipal Corporation on the other hand supported the impugned order. Referring to the decree passed in the earlier suit it was submitted that the suit property was not described therein. It was merely pleaded that the property comprises of a stable admeasuring about 2000 sq. metres. Referring to the inspection note dated 21/04/2014 it was submitted that the same indicated a much larger structure than the suit property as described in the earlier suit. He then submitted that the photographs placed on record by the Municipal Corporation indicated erection of iron poles and the roof with A.C. sheets. The work undertaken could hardly be said be in the nature of tenantable repairs as contemplated by Section 342 of the said Act. It was thus submitted that it was rightly found by the trial Court that the plaintiff had

failed to make out any prima facie case.

The learned counsel for respondent No.2 supported the submissions as made by the learned Senior Counsel.

7. I have heard the learned counsel for the parties at length and I have considered the respective submissions. The trial Court while refusing to grant any interim relief has found absence of any prima facie case being made out by the plaintiff. The plaintiff had relied upon the judgment in L.C.Suit No.824/2009 passed in his earlier suit and the said judgment indicates that the suit property was admeasuring about 2000 sq. metres. The inspection note dated 21/04/2015 on the basis of which the impugned notice was issued indicates dimensions of the property as 23 metres. x 15.50 metres. The total area therefore would exceed the area which was the subject matter in the earlier suit.

The earlier structure, as described in the previous suit was standing with the help of wooden poles. As per the inspection note dated 21/04/2014 in the place of wooden poles there were now iron poles which could also be seen from the photographs on record. It has thus been found on the basis of aforesaid material that the earlier old structure was replaced by a new structure using fresh material. It has also been found that the height of the old structure was about half of the new structure. The finding therefore recorded by the trial Court as to the nature of the structure is

supported by the documents on record.

8. The case of the plaintiff that an application was moved in January 2012 for seeking permission would not by itself assist the plaintiff especially when there is no permission granted to the plaintiff to carry out the repairs in question. Even if it is assumed that such repairs were required to be carried out they had to be in tune with the provisions of Section 342 of the said Act.

9. It is thus found that the trial Court after considering all the relevant aspects found that no prima facie case was made out by the plaintiff. This conclusion arrived at by the trial Court is based on the material available on record. It cannot be said that the conclusion as drawn is perverse or is not based on any documentary material. Though it is true that refusal of interim relief could prejudice the structure of the plaintiff, but in absence of any prima facie case being made out that factor by itself would not entitle the plaintiff for interim relief.

10. By clarifying that the observations made in the order passed by the trial Court while rejecting the notice of motion as well as the observations made in this order are only for deciding the prayer for grant of interim relief and by further directing the trial Court to decide the suit on its

own merits in accordance with law, the Appeal From Order stands dismissed.

Pending Civil Application is also disposed of.

At the request of learned counsel for the appellant the ad-interim relief that was operating shall continue to operate for the further period of eight weeks from today. Order accordingly.

(A.S.CHANDURKAR, J.)