

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

***APPEAL FROM ORDER (ST) NO.4316 OF 2019
WITH
CIVIL APPLICATION (ST) NO. 4317 OF 2019
IN
APPEAL FROM ORDER (ST) NO.4316 OF 2019***

Sajjanraj Borana .. Appellant
vs
Municipal Corporation of Gr.Mumbai .. Respondent

***WITH
APPEAL FROM ORDER (ST) NO.4319 OF 2019
WITH
CIVIL APPLICATION (ST) NO. 4320 OF 2019
IN
APPEAL FROM ORDER (ST) NO.4319 OF 2019***

Ashok Jain .. Appellant
vs
Municipal Corporation of Gr. Mumbai .. Respondent

***WITH
APPEAL FROM ORDER (ST) NO.4321 OF 2019
WITH
CIVIL APPLICATION (ST) NO. 4322 OF 2019
IN
APPEAL FROM ORDER (ST) NO.4321 OF 2019***

Gautam Jain .. Appellant
vs
Municipal Corporation of Gr.Mumbai .. Respondent

***WITH
APPEAL FROM ORDER (ST) NO.4325 OF 2019
WITH
CIVIL APPLICATION (ST) NO. 4326 OF 2019***

IN
APPEAL FROM ORDER (ST) NO.4325 OF 2019

Devendra Kumar Bapna .. Appellant
vs
Municipal Corporation of Gr.Mumbai .. Respondent

WITH
APPEAL FROM ORDER (ST) NO.4330 OF 2019
WITH
CIVIL APPLICATION (ST) NO. 4331 OF 2019
IN
APPEAL FROM ORDER (ST) NO.4330 OF 2019

Surekha P.Landge thr.POA
Sameer P.Landge .. Appellant
vs
Municipal Corporation of Gr.Mumbai .. Respondent

WITH
APPEAL FROM ORDER (ST) NO.4335 OF 2019
WITH
CIVIL APPLICATION (ST) NO. 4337 OF 2019
IN
APPEAL FROM ORDER (ST) NO.4335 OF 2019

Vasudev L. Popat .. Appellant
vs
Municipal Corporation of Gr.Mumbai .. Respondent

WITH
APPEAL FROM ORDER (ST) NO.4340 OF 2019
WITH
CIVIL APPLICATION (ST) NO. 4341 OF 2019
IN
APPEAL FROM ORDER (ST) NO.4340 OF 2019

Chandresh Jain .. Appellant
vs
Municipal Corporation of Gr.Mumbai .. Respondent

WITH
APPEAL FROM ORDER (ST) NO.4345 OF 2019
WITH
CIVIL APPLICATION (ST) NO. 4347 of 2019
IN
APPEAL FROM ORDER (ST) NO.4345 OF 2019

Ranjit Kumar Babulal Kothari .. Appellant
vs
Municipal Corporation of Gr.Mumbai .. Respondent

WITH
APPEAL FROM ORDER (ST) NO.4348 OF 2019
WITH
CIVIL APPLICATION (ST) NO.4351 OF 2019
IN
APPEAL FROM ORDER (ST) NO.4348 OF 2019

Navanath Shinde .. Appellant
vs
Municipal Corporation of Gr.Mumbai .. Respondent

WITH
APPEAL FROM ORDER (ST) NO.4355 OF 2019
WITH
CIVIL APPLICATION (ST) No.4357 OF 2019
IN
APPEAL FROM ORDER (ST) NO.4355 OF 2019

Annie Jacob .. Appellant
vs
Municipal Corporation of Gr.Mumbai .. Respondent

WITH
APPEAL FROM ORDER (ST) NO.4360 OF 2019
WITH
CIVIL APPLICATION (ST) NO.4362 of 2019
IN
APPEAL FROM ORDER (ST) NO.4360 OF 2019

Moti Singh Dwarka Singh ... Appellant
v/s.
Municipal Corporation of Gr.Mumbai ... Respondent

Mr. S.G.Deshmukh with Ms.Priya Patil and Mr.Sanket Deshpande
for Appellant.

Mr. J.Reis, Sr.Advocate with Ms.Madhuri M.More, Ms. Oorja Dhond
for MCGM/Respondent.

CORAM : SMT.ANUJA PRABHUDESSAI, J.

DATED : 21st February, 2019

P.C. :-

1. With consent of the parties, Appeals are heard finally at the stage of admission.

2. The appellants herein have challenged the order dated 15.1.2019 in Notice of motion No.3003 of 2018 in Long Cause Suit No.1196 of 2012. By the impugned order, the learned Judge of the City Civil Court, Mumbai has allowed the notice of motion in terms of prayer clause (a) and has thereby accepted the eligibility reported and vacated the stay granted by order dated 22/04/2016 in Notice of Motion No. 1436/2012.

3. The appellants were the plaintiffs and the Respondent-Corporation was the Defendant and shall be referred to as the

'Plaintiffs and 'Defendant' respectively.

4. The plaintiffs claimed that they were in occupation and possession of the structures situated in CTS No.14 (Old) and present CTS No.552. The Defendant-Corporation had issued notices to the plaintiff to remove the said structures which according to the Corporation, were within the road widening area. The Plaintiffs had disputed that the structures are unauthorized and claimed that the defendant had issued the said notices at the behest of the developer. The plaintiffs further alleged that they cannot be dispossessed without providing permanent alternative accommodation. The plaintiffs therefore, sought a declaration that the impugned notices issued under section 314 of the Bombay Municipal Corporation Act, 1888 are illegal and bad-in-law and also sought interim relief to restrain the Defendant from demolishing and/or removing the subject premises.

5. The Defendant claimed that the said structures were coming in the alignment of sanctioned R.L. of R.C.Marg near PWD Office, Tembe Bridge at the junction of shell colony Road and that notices were issued to the plaintiffs as the land was required for road widening. The Defendant had also made a statement that the

eligibility of the Plaintiffs would be considered and the structures would be demolished by providing alternative permanent accommodation in lieu of the existing structures. It was also stated that in the event the plaintiffs were held to be ineligible for permanent alternative accommodation, the structures would be demolished after issuing notice as per the policy.

6. The learned Judge, after hearing the respective parties and upon considering the material on record, held that the subject structures were existing since long. The Defendant-Corporation had itself given permission to the plaintiffs to repair the structures. The learned Judge held that the Designated Officer of the Defendant-Corporation had not verified the documents nor passed any orders on the eligibility of the plaintiffs for permanent alternative accommodation. The learned Judge therefore, granted interim relief till further orders with liberty to the defendant to consider the reply and the documents furnished by the plaintiffs and to decide eligibility of the plaintiffs and to submit a report about the same.

7. Pursuant to the said order, the Defendant considered the documents, submitted by the plaintiffs and opined that the

plaintiffs are eligible for alternative permanent accommodation. In the light of the said report, the Defendant-Corporation filed an application (Notice of Motion No.3011 of 2018) for varying/discharging the order dated 22.4.2016 in Notice of Motion No.1436 of 2012.

8. While contesting the motion, the plaintiffs once again, claimed that the Defendant was seeking to take action at the behest of the developer. It was alleged that the subject structures are situated on a private land owned by the society and that the same cannot be demolished by taking recourse to Section 314 of the Mumbai Municipal Corporation Act. The grievance of the plaintiffs is that there is difference in the area stated in Annexure - II viz-a-viz factual area stated in the photo-pass. The plaintiffs claim that they are not opposing the road widening, nevertheless, the issues raised by them, including the issue relating to the area of the structures, need to be decided before removal of the structures.

9. The learned Judge, after hearing the learned counsel for the respective parties, held that the plaintiffs were granted protection against coercive action till the decision on their eligibility. The

plaintiffs are now held to be eligible for permanent alternative accommodation. The Defendant requires the said land for road widening and that the public interest would be adversely affected if the subject structures are allowed to remain at site. The learned Judge did not accept the contention of the plaintiffs that it is for the developer / builder or the society to take appropriate steps to hand over possession of the land to MCGM and that the defendant / Corporation has no right to demolish the structures. The learned Judge therefore, vacated the stay granted by order dated 22.04.2016. Being aggrieved by this order, the plaintiffs have filed this appeal.

10. The short point falls for my consideration is whether the learned Judge of the City Civil Court was justified in vacating the stay granted by order dated 22.4.2016 in the previous Notice of Motion No.1436/2012.

11. Mr. S.G.Deshmukh learned senior counsel for the plaintiffs submits that the subject structures are situated on a private property and as such, the defendant was not empowered to invoke powers under section 314 of the Act for removal of the structures.

He submits that the learned Judge of the City Civil Court has granted the relief relying upon an interim order dated 28.04.2016 in *M/s J.Gala Enterprises and Anr. v/s. Municipal Corporation of Greater Mumbai and ors.* in Writ Petition (L) No.1025 of 2016. He submits that the said Writ Petition was finally disposed of by an order dated 18.07.2017 by the Division Bench of this Court (Coram : A.S.Oka and Smt. Vibha Kankanwadi, JJ.).

12. It may be mentioned that in *M/s. J. Gala Enterprises (supra)*, the developer had invoked the writ jurisdiction of the High Court for direction against the Corporation to remove encroachment. This Court while dismissing the petition has held that the petitioners cannot seek a Writ of Mandamus directing the Municipal Corporation to take recourse to the Bottleneck Policy. This decision is not applicable to the facts of the case.

13. Relying upon the decision of this Court in *Navinchandra Shyamji Chhadva & ors vs. State of Maharashtra & ors (Writ Petition No.454 of 2016)*, Mr. S.G. Deshmukh, the learned senior counsel further submits that the provisions of section 314 (a) of the Act cannot be invoked unless the structures are on the property

vesting in the State Government or any other public authority. The learned counsel contends that the notice issued by the Corporation does not indicate that the subject structures were constructed upon any open channel, drain, well or tank. Mr. S.G. Deshmukh, learned senior counsel submits that the said structures which are subject matter of the impugned notices, are in a private property and therefore, the same cannot be demolished by invoking powers under section 314 of the Act and/or without following the due process of law.

14. Shri. Joaquim Reis, the learned senior counsel representing the Defendant submits that the plaintiffs had sought relief in the suit as well as in the motion on a specific plea that the subject structures were not liable to be demolished without providing alternative permanent accommodation. He submits that the plaintiffs had neither questioned the legality of the notice under section 314 of the Act nor claimed that the structures were located in a private property. He has drawn my attention to para 12 of the plaint wherein the plaintiffs have averred that the subject structures are situated on C.T.S.No.14 (Old) which belongs to the Government of Maharashtra and the said CTS numbers reflects on

photo pass issued by the government. He contends that even otherwise powers under Section 314 of the Act can be exercised to remove structures from the private property, if such structures are constructed contrary to the provisions of Sub-section (1) of Section 312 of the Act.

15. Mr. Reis, the learned senior counsel further submits that the notice of motion filed by the plaintiffs was disposed of with liberty to the Defendant to decide the eligibility of the plaintiffs for alternative permanent accommodation. He submits that the Defendant has considered the eligibility of the plaintiffs and has held the plaintiffs to be eligible for alternative permanent accommodation. It is in view of this report, that the Defendant had filed a Notice of Motion to vary or discharge the order dated 22/04/2016 in Notice of Motion No.1436/2012.

16. Mr. Reis, the learned senior counsel for the Defendant further contends that the plaintiffs are not the owners of the land. The subject structures are unauthorized and are within road widening area. The said structures create hindrance in implementing road widening project. He contends that since the plaintiffs have already

been held to be eligible for permanent alternative accommodation, they cannot obstruct the road widening project. He submits that the plaintiffs have prima facie failed to prove that the action of the Corporation is illegal or arbitrary and hence, the same cannot be interfered with. He has relied upon the decision of the Apex Court in *Municipal Corporation of Greater Mumbai and ors. v/s. Rafiqunnisa M. Khalifa (deceased) through his legal heirs Mr. Mohd. Muqueen Qureshi and Anr. in Civil Appeal Nos.1727-1732 of 2019*.

17. It is to be noted that the defendant had issued notice under Section 314 of MMC Act alleging that the structures were unauthorizedly constructed on the sanctioned R.L of municipal road known as Ramkrishna Chemburkar Marg near Tembe Bridge, Chembur. The plaintiffs had challenged the said notice under section 314 of the Act and sought interim relief in Notice of Motion No.1436/2012 mainly on the ground that they are residing / carrying on business in the said structures since long. They have been issued photo-pass and that the structures are protected as per the policy of the Government. The learned Judge had observed that the structures were in existence since long and hence could not

be demolished without deciding the issue of eligibility. The learned Judge, therefore, protected the structures on a limited ground and for a limited period i.e. till the time a decision was taken on the issue of eligibility of the plaintiffs for permanent alternative accommodation.

18. The plaintiffs as well as the defendant accepted the said order. Pursuant to the said order, the defendant considered the issue of eligibility and submitted the report holding the plaintiffs are eligible for permanent alternative accommodation. Though the grievance of the plaintiffs as regards their eligibility for alternative permanent accommodation has been redressed, the plaintiffs have now challenged the notice on the grounds which were not raised in the previous Notice of Motion. One of the grounds now raised is that the Defendant cannot exercise powers under Section 314 of the Act to demolish structures existing in a private property.

19. To appreciate the controversy and contention, it will be appropriate to refer to consider the scope of Section 312 and 314 of MMC Act. Section 312 of MMC Act prohibits construction of structures or fixtures which cause obstruction in streets. This

section provides that no person shall, except with the permission of the Commissioner under Section 310 or 317, erect or set up any wall, fence, rail, post, step, booth or other structure or fixture in or upon any street or upon or over any open channel, drain, well or tank in any street so as to form an obstruction to, or an encroachment upon, or a projection over, or to occupy, any portion of such street, channel, drain, well or tank.

20. Section 314 confers powers on the Commissioner to remove such structures / fixtures erected or set up contrary to the provisions of sub-section 1 of Section 12 of the MMC Act. As it has been held by the Apex Court in the case of ***Rafiqunnisa M. Khalifa (supra)*** :-

“ 20. In other words, in order to exercise the power under Section 314 (1) of the Act, two conditions must be present. First, the disputed wall, fence, rail, post, step, booth or any other type of structure or fixture, as the case may be, is erected or set up on any public street or open channel or drain or well or tank; and Second, any such structure or fixture, as the case may be, is erected or set up in the city or suburbs contrary to the provisions of Section 312(1) of the Act after coming into force the two Acts specified in subsection (1). ”

21. Reverting to the facts of the present case, in paragraph 12 as well as paragraph 15(F) of the plaint, the plaintiffs have averred that the structures are situated in the land belonging to the Government. The plaintiffs have prima facie failed to prove that the said structures were constructed with the permission of the Commissioner. Resultantly, the subject structures are unauthorized. The records also indicate that the subject structures are within the road widening area and are causing obstruction to public at large and further creating hindrance to road widening project. Under the circumstances, the defendant was justified in invoking powers under Section 314 of the MMC Act. For the reasons stated above, the decision in *Navinchandra Shyamji Chhadva (supra)* is distinguishable and not applicable to the facts of the present case.

22. As stated earlier, the main grievance of the plaintiffs was that they have no alternative accommodation and that the defendants had issued notice under section 314 of the Act without considering the reply and the documents furnished by them. The plaintiffs having been held to be eligible, cannot now stall the road widening project on the grounds not raised in the plaint or in the notice of motion. The plaintiffs have prima facie failed to prove that the

action of the defendant is illegal, arbitrary or unreasonable. Under the circumstances, in my considered view, the learned Judge was perfectly justified in discharging the previous order. The impugned order is neither perverse, nor illegal and does not warrant interference. Under the circumstances, appeals are hereby dismissed.

23. At this stage, Mr. S.G.Deshmukh learned counsel for plaintiffs submits that the interim relief is operating since May 2012 and therefore, prays that the said interim relief, be extended for a further period of three weeks so as to enable the plaintiffs/appellants to test the order before the higher Court.

24. Considering the fact that the interim relief has been operating since the year 2012, the same is continued for an another period of three weeks from the date of uploading the order.

(SMT. ANUJA PRABHUDESSAI, J.)