

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

**APPEAL FROM ORDER NO. 442 OF 2016
ALONG WITH
CIVIL APPLICATION NO. 571 OF 2016
IN
APPEAL FROM ORDER NO. 442 OF 2016**

Archer Vincent Gomes	]	
Age : 55 years, Occupation : Business of	]	
Mumbai Indian Inhabitant, resident at	]	
1 st and attic floor, 83A, Gomes House,	]	
Off 33 rd Road, S.V. Road, Old Khar,	]	
Khar (West), Mumbai 400 052.	]	Appellant

Versus

1. Municipal Corporation of Greater Mumbai	]	
having its office at Mahapalika Bhavan,	]	
Mahapalika Marg, Fort, Mumbai – 400 011.	]	
	]	
2. Eustance James Gomes	]	
Indian Inhabitant of Mumbai, residing at:	]	
83, Gomes House, Ground Floor,	]	
Off. 33 rd Road, Old Khar, Khar (West),	]	
Mumbai – 400 052.	]	 Respondents

Mr.Pradeep J. Thorat, Advocate for appellant.

Ms.Oorja Dhond, Advocate for respondent No.1-MCGM.

CORAM	: N. J. JAMADAR, J.
RESERVED ON	: 11th MARCH 2019
PRONOUNCED ON	: 22nd MARCH 2019

JUDGMENT :

1. This appeal is directed against an order dated 6th April 2016 in Notice of Motion No. 1414 of 2011 in LC Suit No. 913 of 2011, passed by the learned Civil Judge, City Civil Court at Dindoshi, Borivali Division, Mumbai, whereby the said Notice of Motion taken out by the plaintiff-appellant herein for temporary injunction against the Municipal Corporation, Greater Mumbai, the defendant No.1 from demolishing the suit premises or any portion thereof in pursuance of notice dated 28th January 2011 under Section 351 of the Mumbai Municipal Corporation Act, 1888, ('The Act') and order dated 7th April 2011 passed by the Assistant Commissioner, H/West Ward, came to be dismissed.

2. The brief facts leading to this appeal can be summarized as under :-

3. The plaintiff is a co-owner of the house premises bearing 83A, off 33rd Road, S.V. Road, Old Khar, Khar (West), Mumbai. The plaintiff is in occupation of the first floor, along with attic floor admeasuring 18'-8"/9'-8" x 19'/9'- made of B.M. walls with A.C. sheets roof being part of structure consisting of ground floor, 1st floor and attic floor known as Gomes House, at C.T.S. No.F/227 of Village Bandra corresponding to Final Plot No.93 of TPS-III, Bandra.

4. The said structure is in existence since prior to the datum line of 17th April 1964. The defendant No.1 had issued a notice on 11th April 2000 under Section 351 of the Act falsely alleging that the plaintiff has constructed second floor over the existing ground with first plus attic floor. Upon perusal of the reply dated 17th April 2000, and the documents in support thereof, the defendant No.1 did not pursue the action under the said notice dated 11th April 2000. However, on 28th January 2011, the notice came to be issued again alleging that the plaintiff had unauthorisedly constructed the second floor structure. The plaintiff submitted reply on 8th February 2011, pointing out the true facts, including the existence of the structure since prior to 1960. However, in utter disregard to the facts on record, the Assistant Municipal Commissioner, H/West Ward passed the order on 7th April 2011, *inter-alia*, holding that the said structure did not antedate the datum line of 17th April 1964, it was unauthorised and, thus, directed the plaintiff to demolish the same within a period of 15 days therefrom. The plaintiff, thus, instituted LC Suit No.913 of 2011, and took out the Notice of Motion for restraining the defendant No.1 from taking action in pursuance of the said order by way of temporary injunction.

5. The defendant No.1-Municipal Corporation resisted the Notice of Motion and endeavoured to justify the notice dated 11th April 2000 and the

order passed by the Assistant Municipal Commissioner dated 7th April 2011. It was pointed out that the plaintiff had unauthorisedly constructed second floor by rising height of attic floor.

6. The defendant No.2 - the co-owner, opposed the interim relief being granted by filing written statement, and brought to the notice of the trial Court that the plaintiff had suppressed the earlier proceedings, i.e., Suit No.3197 of 2005, wherein a decree for removal of encroachment and unauthorized construction was already passed.

7. The learned Civil Judge, City Civil Court, after evaluation of the material on record, was persuaded to dismissed the Notice of Motion by passing the impugned order. The learned Judge found that, in earlier LC Suit No.3197 of 2005, a categorical finding was recorded that the plaintiff had made construction of second floor without obtaining prior building permission. The said finding attained finality as it was not disturbed, even in First Appeal No.1790 of 2008, preferred by the plaintiff-appellant. Thus, the learned Judge was of the view that neither a *prima-facie* case was made out nor the plaintiff was entitled to a discretionary relief as the plaintiff has suppressed the said fact of passing of decree of removal of unauthorized construction. Being aggrieved by and dissatisfied with the impugned order, the plaintiff has preferred this appeal.

8. I have heard Shri P.J. Thorat, the learned counsel for the appellant and Ms.Oorja Dhond, the learned counsel appearing for respondent No.1-Municipal Corporation. The respondent No.2-original defendant No.2 did not turn up despite service of notice.

9. The learned counsel for the appellant Shri Thorat took a slew of exceptions to the impugned order. At the outset, it was urged that the learned Judge misdirected himself in refusing the interim relief on the sole premise that a decree was passed in LC suit No.3197 of 2005, without examining the facts and nature of controversy in the instant Suit. Secondly, the learned Judge failed to appreciate the glaring inconsistencies in the stand of the defendant No.1-Municipal Corporation as regards the nature of the unauthorized construction, as reflected in the notice dated 11th April 2000 and 28th January 2011. Lastly, in view of the order passed by this Court on 4th May 2016 continuing ad-interim order, granted by the trial Court, and the fact that the suit itself is now ripe for hearing, it was urged that the ad-interim relief be made absolute and the learned Judge be directed to dispose of the suit expeditiously.

10. In contrast to this, Ms.Dhond, the learned counsel for respondent No.1 stoutly submitted that the plaintiff is not entitled to any equitable relief. It was urged that the plaintiff did not approach the Court with clean hands and suppressed the factum of the decree for removal of

unauthorized structure having been passed. There is no material to indicate that the structure in question was either authorized or pre-dated datum line. In this backdrop, Ms. Dhond supported the impugned order as well as the order of removal of unauthorized construction passed by the Assistant Municipal Commissioner, Mumbai on 7th April 2011.

11. Before advertng to deal with the rival submissions, it may be apposite to note that the endeavour of the plaintiff to demonstrate that the dispute in question was essentially between the plaintiff and the Planning Authority is unsustainable. The judgment and order passed by the learned Judge, City Civil Court in LC Suit No.3197 of 2005 indicates that the defendant No.2 herein had instituted the suit alleging that the plaintiff and another co-owner were instrumental in fomenting encroachment over the portion of the house property bearing No.83, 83A (including the suit property), and the plaintiff herein had erected unauthorised construction on the second floor admeasuring 125 sq.ft. The learned Judge found that the plaintiff herein failed to establish that they had either obtained prior permission for development or that the said structure was constructed before the datum line. Thus, the Municipal Corporation was directed to remove the encroachment and demolish the unauthorised construction. The relevant part of the operative order reads as under :

“2. The Defendant No.3 is hereby directed to remove all encroachments namely, stalls, unauthorized construction

constructed, stand for water tank and unauthorized constructed room on second floor, admeasuring 125 sq.ft. Wooden box and other illegal and unauthorized work made on suit site.”

12. It is imperative to note that the plaintiff had assailed the said judgment and decree by preferring First Appeal No.7190 of 2008. This Court, by order dated 26th April 2011, disposed of the said appeal by clarifying that the Corporation, while complying with the said judgment and decree, was required to follow due process of law for removing the unauthorized construction.

13. It is pertinent to note that the notice dated 28th January 2011 was issued by the defendant No.1 in pursuance of the judgment and decree in LC Suit No. 3197 of 2005. The order dated 7th April 2011, which came to be passed by the Assistant Municipal Commissioner was in conformity with the directions of this Court to follow the due process of law.

14. In the backdrop of these facts, the learned Civil Judge was justified in observing that the plaintiff was not entitled to the discretionary relief as the plaintiff had suppressed these material facts. By no stretch of imagination, it can be said that the fact of passing of the decree against the removal of encroachment and unauthorized structure, which was found to be erected by the plaintiff herein, was either insignificant or inconsequential. Yet, the plaintiff approached the City Civil Court as if the

matter was restricted to the issuance of a notice under Section 351 of the Act by the Planning Authority. In this backdrop, the criticism of the conduct of the plaintiff, while seeking an equitable relief, is wholly justified.

15. Shri Thorat, however, urged that the Court could not have rejected the interim relief only on the premise that in LC Suit No. 3197 of 2005, the aforesaid decree was passed. To appreciate this submission, it is necessary to note that the second submission of Shri Thorat regarding the discrepancy in the notices issued by defendant No.1 as regards the nature of the unauthorized construction.

16. The first notice dated 11th April 2010 records the description of unauthorized work as under :-

“Schedule-(Description of unauthorised work):

Unauthorized construction of second floor by raising the height of existing gr.+ one + attic floor with Brick masonry work sheet roof admeasuring 2.70 m. X 3.00 m and 3.35 m x 6.20. The total measurement and location as shown in the sketch.”

Whereas, the notice dated 28th January 2011, records the description of the unauthorised work as under :-

“Schedule-(Description of unauthorised work) :

Unauthorized construction above first floor with brick masonry walls and AC sheets roof admeasuring room in the adjoining sketch.”

17. It appears that there is some discrepancy in the nature of the unauthorized structure, found in terms of the notice dated 11th April 2000 and 28th January 2011. In this backdrop, an endeavour was made to demonstrate that the plaintiff has not carried out any construction on the second floor, as alleged, and the said structure, in the nature of attic, is in existence since long.

18. I am afraid to accede to this submission. As the decree passed by the City Civil Court in LC Suit No. 3197 of 2005 which, *inter-alia*, directed the Municipal Corporation, to demolish the unauthorizedly constructed room on second floor admeasuring 125 sq.ft., has attained finality, the plaintiff cannot be permitted to agitate the said issue so far as an area admeasuring 125 sq.mtrs. The issue as to whether the plaintiff had constructed a room, admeasuring 125 sq. ft. unauthorizedly, was directly and substantially in issue in LC Suit No. 3197 of 2005.

19. It is trite that Section 11 of the Code of Civil Procedure, 1908 not only recognises the general principle of *res judicata* but it also bars the jurisdiction of the Court to entertain such suit in terms of Section 12 thereof. Furthermore, Explanation IV of Section 11 extends the principle of *res judicata* by providing that such a decision would operate as a *res*

judicata, even if some ground of attack or defence, which could or ought to have been taken, was not so taken

20. The submission rested on the premise of the discrepancy in the nature of unauthorized structure is required to be appreciated in the light of the time lag. The second notice dated 28th January 2011 came to be issued after more than ten years of the first notice dated 11th April 2000. The second notice was in pursuance of the directions of this Court to follow due process of law before executing the decree passed in L.C. Suit No.3197 of 2006. The Planning Authority, it is plain, cannot be bound down to the notice issued prior to ten years, especially when there is every possibility of the alternation in the structure in the intervening period. Moreover, if the sketches appended to both notices are carefully perused, it becomes strikingly evident that in the year 2000, the Planning Authority had found an unauthorized structure with the slanted roof. Whereas, during the inspection leading to the notice dated 28th January 2011, it was found that the second floor structure was of full and even height with flat roof. In this view of the matter, much mileage cannot be drawn from the said discrepancy in the description of the unauthorized structure.

21. At this stage, the suppression of the material fact of an adjudication to the effect that the plaintiff had carried out an unauthorized structure of a room admeasuring 125 sq. ft. on the second floor assumes significance. It

is not the case of the plaintiff that the structure in question is beyond the said area admeasuring 125 sq. ft. The plaintiff did not approach the Court by making a clean breast of the facts and circumstances. Had the plaintiff approached the Court with a case that apart from the said structure admeasuring 125 sq. ft. which was ordered to be demolished, there exists some structure, which predates the datum line or otherwise deserves to be protected, different considerations would have come into play. A brazen suppression of the material fact of the passing of the decree in LC Suit No.3197 of 2005 thus disentitles the plaintiff from claiming an equitable relief.

22. A profitable reference in this context can be made to a judgment of the Supreme Court in the case of ***Citadel Fine Pharmaceuticals Vs. Ramaniyam Real Estates Private Limited & Anr.***¹, wherein the equitable relief was denied when the plaintiff therein was found to have suppressed a material fact. The following observations are relevant and thus extracted :

“58. However, the fact remains that prior to the filing of the suit the defendant vendor returned the said amount of Rs.10,00,000/- by its letter dated 4th September, 1996 by an account payee cheque in favour of the plaintiff and the same was sent to the plaintiff under registered post which was refused by the plaintiff on 6.9.1996. The plaintiff suppressed this fact in the plaint and filed the suit on 9.9.1996 with a totally contrary representation before the court as if the amount has not been returned to it by the vendor. This is suppression of a material

1 (2011) 9 SCC 147

fact, and disentitles the plaintiff purchaser from getting any discretionary relief of specific performance by Court.

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59. In this connection we may refer to the Principle of Equitable Remedies by I.C.F. SPRY, Fourth Edition (Sweet & Maxwell, 1990). Dealing with the question of 'Clean Hands' the learned author opined that where the plaintiff is shown to have materially misled the court or to have abused its process, or to have attempted to do so, the discretionary relief of specific performance can be denied to him. In laying down this principle, the learned author relied on a decision of the English Court in the case of *Armstrong v. Sheppard & Short Ltd.* (1959) 2 Q.B. 384 at page 397. (See SPRY Equitable Remedies page 243).

60. This Court has also taken the same view in the case of Arunima Baruah Vs. Union of India & Ors. reported in (2007) 6 SCC 120. At paragraph 12, page 125 of the report, this Court held that it is trite law that to enable the court to refuse to exercise its discretionary jurisdiction suppression must be of a material fact. This Court, of course, held what is a material fact, suppression whereof would disentitle the suitor to obtain a discretionary relief, would depend upon the facts and circumstances of each case. However, by way of guidance this Court held that material fact would mean that fact which is material for the purpose of determination of the lis."

(emphasis supplied)

23. Since the exercise of the discretion to grant an injunction is equitable in nature and the material on record firmly establishes that the plaintiff had suppressed a material fact, and has endeavoured to impress upon the Court that the dispute was between the plaintiff and the Planning Authority, without any litigation history, the learned Judge was justified in exercising the discretion not to grant the injunction. Hence I am persuaded to hold that no interference is warranted in the impugned order..

24. For the foregoing reasons, the appeal stands dismissed.

25. In view of the disposal of the appeal, the Civil Application No.571 of 2016 does not survive and accordingly stands disposed of.

26. In the circumstances there shall be no order as to costs.

27. At this stage, the learned counsel for the appellant seeks continuation of the ad-interim protection for a further period of six weeks. The learned counsel for respondent No.1 vehemently opposes the prayer.

28. It is evident that the protection in the nature of restraint, against the respondent No.1, from demolishing the unauthorized structure is in operation till date, in terms of the ad-interim order passed by this Court on 4th May 2016. The appellant-plaintiff is in the occupation of the suit property for the purpose of residence. To advance the cause of justice, the interim protection, which is in operation till date, is continued for a further period of four weeks from today.

[N.J. JAMADAR, J.]