

Judge dismissed Notice of Motion taken out by the plaintiff, *inter alia*, praying for following relief;

“a)that pending the hearing and final disposal of the suit, the Defendants, its members, officers, employees, representatives, agents and all those who claim from/through the Defendants be restrained by a temporary injunction from in any manner acting upon the said impugned notice/letter dt._____and/or taking any demolition action adverse to the plaintiff vis-a-vis the suit premises i.e industrial shed, industrial shed situated at 38/42, Mujibur Rehman S/o. Haji Israr Aalm building, R.S. Nimkar Marg, Faras Road, Mumbai 400 008, or part thereof”

4. In support of this appeal, Dr. Saraf invited my attention to the letter dated 5th March, 1962 addressed by K.T. Kubal & Co. Private Limited to Assistant Engineer, 'D' Ward, Town Planning, Mumbai Municipal Corporation, Grant Road, Mumbai requesting repairs permission for existing factory of plaintiffs M.T. roof at 38-40, Foras Road, Mumbai. In response to this, Corporation granted repair permission on 18th April, 1962 signifying no objection for carrying out repairs subject to conditions 1 to 3 set out therein. He also invited my attention to section which is on the reverse of the permission dated 18th April, 1962 which notes existence of first floor structure upon the ground floor having height of 10'0” x 10'5” above the ground floor. He also invited my attention to the scrutiny report of City Engineering Department of respondent Corporation and in

particular Item No.2 thereof dealing with permission details. In Item No.2 of permission details, the Corporation noted existing structure namely ground + upper floor structure. Relying on these documents, Dr. Saraf submitted that in 1962, the plaintiff's structure consisted of ground + upper floor and M.T. Roof thereof. As the structures are in existence prior to datum line, it is a tolerated structure.

5. Dr. Saraf invited my attention to the order dated 22nd June, 2013 passed by Assistant Commissioner 'D' Ward wherein it is recorded that the site was inspected by the office staff. During inspection, it was observed that premises comprises of Ground + (Part) upper floor wherein the ground floor is used for factory activity and the upper floor (part) is used for dwelling purpose. Thus, even the order records existence of the upper floor.

6. Dr. Saraf invited my attention to the notice dated 9th August, 2018 issued by the respondent-Corporation. Dr. Saraf also invited my attention to the rough sketch forming part of notice dated 9th August, 2018 and the notice dated 19th July, 2019 issued by the Corporation. He submitted that no rough sketch is appended to this notice. It is not clear what portion will be demolished by the respondent-Corporation in pursuance of the notice dated 19th July, 2019. Dr. Saraf submitted that after notice dated 9th August, 2018 was issued, the plaintiff took out Notice of Motion No.2743 of 2019 sometime in August, 2018 prohibiting the Corporation from taking any action in pursuance of the order dated 18th August, 2018. He submitted that the plaintiff took out

Chamber Summons No.1350 of 2019 for amending the plaint in terms of schedule appended to the Chamber Summons. The plaintiff also took out another Chamber Summons No.1351 of 2019. He submitted that for the first time, the Corporation has tendered documents, photographs in this Court which were not before the trial Court. As the structure of the plaintiff is standing prior to datum line, the Corporation be directed to hear the plaintiff and consider all these documents and pass a speaking order. Till such time, this exercise is completed, structure of the plaintiff may be protected by issuing appropriate direction.

7. On the other hand, Mr. Mahadik supported the impugned order. He invited my attention to the particulars furnished by predecessor of the plaintiff M/s. K.T. Kubal & Co. Pvt. Ltd on 7th December, 1957 and in particular at Sr. No.4. Number of rooms in the factory are shown as portion divided in three parts namely Part-I, Part-II and Part-III and number of floors is described as ground floor. In other words, the structure was only ground floor not structure above ground floor. He invited my attention to the orders dated 14th August, 2018 and 23rd August, 2018 declining to grant ad-interim relief as also the order dated 24th August, 2018 passed by this Court and in particular paragraph 6 thereof.

8. Mr. Mahadik has also invited my attention to Panchnama dated 8th August, 2018 drawn by Assistant Engineer, Building and Factory Department of the respondent/Corporation as also the photographs taken by the respondent prior to carrying

out demolition and after demolition. He submitted that the photographs taken by the Corporation show that work of putting slab is in process. The said work is being carried out after demolition was carried out by the Corporation. He submitted that inspection was made on 16th July, 2019 and in pursuance thereof, notice dated 19th July, 2019 was issued to the plaintiff. He submitted that a perusal of the inspection report dated 16th July, 2019 also indicates that even after demolition was carried out, the plaintiff has started work. The respondent, therefore, received several complaints and, therefore, Corporation was constrained to issue notice dated 19th July, 2019. On the query made by the Court, he submitted that the respondent Corporation will implement the notice dated 19th July, 2019.

9. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. The plaintiff has instituted suit, inter alia, challenging the notice dated 9th August, 2018 issued under section 354-A of the Mumbai Municipal Corporation Act, 1888 (for short 'Act'). During pendency of the suit, the plaintiff applied for interim relief. By order dated 14th August, 2018, the learned trial Judge declined to grant ad-interim relief. After the order was dictated at 3.25 p.m, the plaintiff tendered application for ad-interim protection for 10 days so as to enable him to approach this Court. The application was opposed on behalf of the respondent. The plaintiff relied on the decision in **Mehboob Vs. MCGM 1998 (1) Mh. L.J, 244** contending that as the copy of the reasoned order is not made available, protection should be granted. The learned trial Judge

noted that authenticated copy has been made available and, therefore, there is no reason to grant any protection to the plaintiff when earlier there was no order of protection in favour of the plaintiff. It appears that on 23rd August, 2018, again an attempt was made made by the plaintiff for injunction as respondent Corporation had passed order dated 18th August, 2018 directing the plaintiff to demolish unauthorized work immediately. The learned trial Judge considered submission advanced on behalf of the plaintiff as also on behalf of the defendant. Defendant contended that Panchnama was carried on 8th August, 2018 and first inspection report was uploaded on 9th August, 2018. As the work was in progress when the site was inspected, notice under section 354-A of the Act was issued on 9th August, 2018. Ad-interim order was refused on 14th August, 2018. Contention of behalf of the plaintiff that order dated 14th August, 2018 is challenged by filing appeal from order and is kept for admission on 27th August, 2018 was recorded. The learned trial Judge noted that the order dated 18th August, 2018 will not amount to any fresh cause of action as the direction was issued in furtherance of earlier notice. The learned trial Judge accordingly declined ad-interim order on 23rd August, 2018.

10. The appeal from order preferred by the plaintiff was dismissed by this Court on 24th August, 2019. In paragraph 6, this Court observed thus;

“However, as rightly pointed out by learned counsel for the respondent corporation and as can be seen from the impugned order passed by the trial Court and the panchnama along with report therein that the appellant is

carrying out unauthorized construction of vertical extension of industrial shade and construction of mezzanine floor by using MS Sections and GI sheets and unauthorized enclosure of premises by fixing GI sheet was in progress. Apart from the panchnama and report, there are also photographs produced on record to that effect which prima facie show that the appellant has undertaken construction for which admittedly permission is not obtained”.

11. Dr. Saraf submitted that from perusal of the application dated 5th March, 1962 made on behalf of K.T. Kubal & Co. Private Ltd and repair permission granted by the respondent Corporation on 18th April, 1962 as also scrutiny report for renewal of factory permits would clearly reveal that structure above the first floor is existing prior to 1962 and thus is a tolerated structure. It is not possible to accept this submission. A perusal of the particulars furnished on 7th December, 1957 seeking permission to establish factory and in particular Item No.4 thereof shows that existing structure was only ground floor. Items No.4 and 5 read thus;

“(4)Number of rooms in Factory: 1 portion divided in 3 parts, No. of floors: **Ground Floor.**

(5)Dimensions of rooms and number of persons to be employed in each:

Room	Length	Breadth	Area	Height	Cubic contents	No. of persons (approximate)
Part	90	34'-7"	3112 ½	16'	49800C/ Ft	
Part	89'	36'-5"	1056	16'	16896	27
Part	86'	18'	468	16'	7288	
			46531			

(6) Persons to be employed: 27 workers”.

12. A perusal of the letter dated 5th March, 1962 shows that request was made for carrying out repairs for existing factory. The letter reads thus;

“Sub: Request for Repairs permission for existing factory of our M.T. Roof at 38-40, Foras Road.

Dear Sir,

With reference to the above mention subject we request for giving Repairs permission of our Gr.+ upper floor M.T. Roof. It is in very dangerous condition and heavy leakage are there.

Hence, we kindly request you to grant us the necessary permission immediately”.

13. A perusal of the above referred letter clearly shows that permission was sought for repairs of ground + upper floor, M.T. Roof. Thus, the permission dated 18th April, 1962 shows that Corporation gave permission subject imposing conditions. Conditions No.2 and 3 read thus;

“2) The mode of construction is not changed i.e Brick walls and M.T. Roof.

3) The cubical contents are not changed i.e apprx. 4963 Sq. ft. and height (Gr. Is 10'-0” & upper floor Roof is Mid height 10'-5” and slop 8'-6”).

14. A perusal of condition No.3 extracted hereinabove shows that height of the ground floor is 10'-0” and upper floor Roof is Mid height 10'-5” and slope 8'-6”. Thus, prima facie, what is there on the upper floor is merely roof and not structure. Dr. Saraf relied on the order dated 22nd June, 2013 and in particular observations made in that order as regards inspection was carried

out by the office staff which shows that on the ground floor factory activity is carried out and the upper floor (part) is used for dwelling purpose. He, therefore, submitted that existence of structure on the first floor which is used for dwelling purpose is also accepted. It is not possible to accept this submission. While dismissing Appeal from order on 24th August, 2018 this Court after considering the Panchnama report and photographs produced on record observed that the plaintiff herein has undertaken construction for which admittedly permission was not obtained. Even, during the course of hearing, no such permission for erecting upper floor above the ground floor is shown.

15. Dr. Saraf submitted that material is produced by the Corporation for the first time during the course of hearing of this appeal. He, therefore, submitted that Corporation may be directed to furnish this material to the plaintiff and appropriate authority. Appropriate authority may be directed to hear the plaintiff till such time, plaintiff construction may be protected. It is not possible to accede to this request.

16. A perusal of the impugned order shows that the learned trial Judge has referred to photographs placed before the trial Court. In paragraph 8, the learned trial Judge further observed that admittedly construction is carried out by the plaintiff without permission. Thus, photographs and Panchnama, site inspection, notice dated 19th July, 2019 are placed on record before the trial Court. The learned trial Judge has considered the material on record and accordingly passed the impugned order.

17. In the case of **Wander Limited and another Vs. Antox India Private Limited, 1990 (Supp.) SCC 727**, the Apex Court in paragraph 14 has observed as under:

“....., the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. The Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court’s exercise of discretion.”

18. Applying the tests laid down by the Apex Court to the facts of the present case, I do not find that the learned trial Judge has committed any error while declining to grant ad-interim relief. It cannot be said that the learned trial Judge has exercised discretion arbitrarily, capriciously or perversely or that the learned trial Judge has ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. This Court will not reassess the material and seek to reach a conclusion different

from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. Hence, no case is made out for interfering with the impugned order. The appeal fails and the same is dismissed.

19. In view of dismissal of appeal, C.A [St] No.21643 of 2019 for stay does not survive. Mr. Mahadik submitted that the respondent will implement notice dated 19th July, 2019. Statement made by Mr. Mahadik, on instructions, is recorded. It is made clear that the observations made herein are tentative and prima facie and with a view to finding out correctness of the impugned order. The learned trial Judge will decide the suit on the basis of the evidence on record and in accordance with law and un-influenced by the observations made herein. Liberty is reserved to the parties to take out appropriate application in the trial Court for expeditious disposal of the suit. If such application is taken out, the learned trial Judge will pass appropriate order.

[R.G. KETKAR, J.]