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

FIRST APPEAL NO. 1816 OF 2005

The Municipal Corporation of Greater Mumbai	... Appellant
V/s.	
Smt. Hiraben Motilal Shah and Anr.	... Respondents

Ms. Sheetal Mane Tadke i/by S. H. Ujainwala for the Appellant.

Mr. Kamal Katha along with Mr. Yatin Shah for the Respondent No.1.

CORAM : R.D. DHANUKA, J.

DATE : 31st JANUARY, 2020.

P.C.:

1. By this First Appeal, the appellant (original defendant no.1) has impugned the judgment and order dated 10th June, 2002 passed by the City Civil Court of Greater Mumbai decreeing the suit filed by the respondent no.1 herein (original plaintiff) and declaring the notice dated 22nd July, 1992 and order dated 14th September, 1993 illegal and ineffective as against the suit structure. The Trial Court also passed an order of perpetual injunction against the appellant for causing any obstruction in the peaceful and enjoyment of the suit structure by the respondent no.1. Some of the relevant facts for the purpose of deciding this First Appeal are as under :-

2. The respondent no.1 herein was the original plaintiff. It was the case of the respondent no.1 herein that she was a tenant of the Shop No.3 situated on ground floor, Irla Sadan, 197, S.V. Road, Irla, Vile Parle (West), Bombay – 400 056. The respondent no.2 herein was the landlord in respect of the suit structure. It was her case that she had acquired the premises as far back as in the year 1993 and had started a grain provision store and business of electrical goods. The said premises was made up of two

portions i.e. admeasuring 23 ft. by 10 ft and the other portion admeasuring 24 ft. by 10 ft. The suit structure was made of bricks and having steel girders with ladi coba on roof therein.

3. In the year 1988, the respondent no.2 had filed a suit against the respondent no.1 before the City Civil Court at Bombay. The respondent nos. 1 and 2 filed the consent terms in the said suit on 7th August, 1992. Under the consent terms, the respondent no.2 agreed and accepted the respondent no.1 as a monthly tenant of the open space admeasuring 23 ft. by 10.5 ft. situated beyond shop no.3 in 'Irla Sadan' Building on the Irla Society Road, Vile Parle (West), Bombay – 400 056 on a monthly rent of Rs.150/- net per month. It was provided in the consent terms that the respondent no.1 was given consent by the respondent no.2 to extend the height of the ceiling of the shop premises upto uniform level of 10 feet, which will be the height covering the open space. The respondent no.2 gave consent to the respondent no.1 covering the open space back side of south with a cement sheet as the said open space was already covered by RCC wall from east as well as from west side. The said no objection given by the respondent no.2 was subject to the necessary permission to be obtained from the Municipal Corporation of Greater Mumbai.

4. On 22nd July, 1993, the appellant issued a notice under Section 351 of the Municipal Corporation Act alleging that the respondent no.1 had erected/commenced to erect the building/erected/commenced to execute certain work described in the schedule without requisite permission from the Bombay Municipal Corporation. The schedule provided the description of unauthorized construction as "rare side open space admeasuring 23ft. x 10.5ft. The respondent no.1 responded to the said notice by reply dated 20th July, 1993 and denied the allegations made therein. The appellant by its letter dated 14th September, 1993 informed the respondent no.1 that the Deputy Municipal Commissioner had come to the conclusion that the work

mentioned in the notice was unauthorized as the respondent no.1 had obtained the permission fraudulently by concealing the Court orders in Suit No. 4838 of 1988-90.

5. The respondent no.1 therefore filed a suit before the City Civil Court for impugning the said notice and for various reliefs. The appellant did not file any written statement in the said suit. The suit was however resisted by the respondent no.2. The respondent no.1 examined a witness before the Trial Court. No evidence was led by the appellant. The witness examined by the respondent no.1 was cross-examined by the appellant and the respondent no.2. The Trial Court framed four issues for determination and decreed the said suit by a judgment and decree dated 10th June, 2002. This judgment and decree is impugned by the appellant in this First Appeal.

6. The respondent no.2 had filed a separate appeal impugning the said decree bearing First Appeal No.1285 of 2005. None appeared for the respondent no.2 (appellant in the said First Appeal No. 138 of 2005) though the matter was called on 20th December, 2011. The said First Appeal thus came to be dismissed by default. The respondent no.2 herein has not applied for restoration of the said First Appeal till date. Respondent No.2 is absent today also.

7. Learned counsel for the appellant invited my attention to the averments made by the respondent no.1 in the plaint in Suit No. 4739 of 1993 and also the annexure thereto. She also invited my attention to the consent terms dated 7th August, 1992 filed by the respondent nos.1 and 2 in the said suit filed by the respondent no.2 against the respondent no.1 before the City Civil Court. She submits that the said consent terms itself would indicate that the respondent no.2 had granted permission to the respondent no.1 to cover the open space from the back side of sought with a cement sheet, subject to the permission of the Municipal Corporation.

8. It is submitted by the learned counsel that the respondent no.1 herself applied for permission, as can be seen from letter dated 10th August, 1992. She submits that though the Municipal Corporation had initially granted permission to the respondent no.1 to carry out repairs in the shop, the respondent no.1 had suppressed about the consent decree passed by the City Civil Court in the suit filed by the respondent no.2 against the respondent no.1. The said permission was thus immediately revoked. It is submitted by the learned counsel that the Trial Court has recorded inconsistent findings in the impugned judgment and decree and thus the said judgment and decree warrants interference of this Court.

9. Mr. Kamal Katha, learned counsel for the respondent no1 on the other hand would submit that the alleged unauthorized construction which was subject matter of the notice issued under Section 351 of the Municipal Corporation Act, was already constructed on 27th January, 1997 and was regularized on payment of penalty of Rs.500/-. He submits that in view of passage of time, the roof of the walls of the portion of the rare side of the shop no.3 became open to sky and required necessary repairs. He submits that the respondent no.1 accordingly had applied for permission to carry out requisite repairs. He invited my attention to the correspondence in this regard annexed to the compilation of documents tendered by the learned counsel and more particularly the letter dated 10th August, 1992 addressed by the respondent no.1 to the Municipal Corporation, reply of the Municipal Corporation dated 25th August, 1992 for calling upon the respondent no.1 to submit various documents, letter dated 25th January, 1993 from the Municipal Corporation to the respondent no.1 granting no objection to repair/replaster the walls/replace the tin sheet roof of the shop with conventional material subject to the various conditions. Pursuant to the said permission granted by the Municipal Corporation, respondent no.1 had deposited Rs.1,970/- and Rs.5,000/- by way of security deposit. The

respondent no.1 had thereafter carried out the said repairs. In the meanwhile, the Municipal Corporation revoked the said permission. The respondent no.1 had thus filed the said suit impugning the notice under Section 351 of the Municipal Corporation Act before the City Civil Court.

10. In support of the submission that the said construction was already regularized, learned counsel invited my attention to the receipt dated 24th February, 1997 issued by the Municipal Corporation of Greater Mumbai recovering penalty of Rs.5,00/- vide order of Deputy Municipal Commissioner dated 27th January, 1977. He submits that there was no unauthorized construction carried out by the respondent no.1 of any nature whatsoever. Certain repairs were carried out by the respondent no.1, which were carried out pursuant to the permission granted by the appellant.

11. Learned counsel invited my attention to various portion of the affidavit in lieu of examination-in-chief filed by the respondent no.1 before the Trial Court and also the cross-examination of the said witness by the appellant as well as by the respondent no.2. He submits that there was hardly any cross-examination either by the appellant or by the respondent no.2 to the detailed deposition by way of examination-in-chief tendered by his client. It is submitted that the appellant who has chosen to file this First Appeal, even did not bother to file any written statement nor examined any witness before the Trial Court.

12. Learned counsel invited my attention to some of the findings rendered by the Trial Court in the impugned order and would submit that after considering the documentary and oral evidence led by the respondent no.1, the Trial Court rightly rendered a finding that there was no unauthorized construction carried out by the respondent no.1 and thus no interference is warranted with the said judgment and decree. It is lastly submitted by the learned counsel that the appeal was belatedly filed by the

appellant after delay of 3½ years, which was condoned by this Court.

13. A perusal of the record indicates that it was the case of the respondent no.1 (original plaintiff) that in a separate suit bearing no. 4317 of 1996 between the respondent no.1 and respondent no.2, the City Civil Court had already rendered a finding that the rare portion of shop no.3, which was the subject matter of this suit had a roof since 1973-74 and that the said roof was dilapidated and was given way by 1983-84 and thus rare portion of shop no.3 had become almost open to sky as described in the consent terms dated 7th August, 1992. It is not in dispute that there was no written statement filed by the appellant to controvert any of the averments made by the respondent no.1 in the plaint.

14. A perusal of the affidavit in lieu of the examination-in-chief filed by the respondent no.1 clearly indicates that the respondent no.1 had placed reliance upon various documents including the penalty receipt issued by the Municipal Corporation as far back as in the year 1977. A perusal of the cross-examination of the witnesses examined by the respondent no.1 clearly indicates that the impugned structure was already regularized by the Municipal Corporation as far back as in the year 1977 on receipt of payment. The appellant did not cross-examine the said witnesses on the issue of regularization of the impugned structure. The averments thus made in the plaint and the evidence led by the respondent no.1 remain uncontroverted.

15. In so far as the submission of the learned counsel for the appellant that the consent terms filed by and between the respondent nos. 1 and 2 in the suit filed before the City Civil Court indicates that there was no construction of the impugned structure carried out by the respondent no.1 prior to the date of consent terms mentioned in the notice under Section 351 of the Mumbai Municipal Corporation Act is concerned, a perusal of

the consent terms filed by and between the respondent nos.1 and 2 indicates that by the said consent terms, the respondent no.2 had accepted the respondent no.1 as the monthly tenant of open space admeasuring 23 ft. by 10.5 feet. A perusal of the notice under Section 351 issued by the Municipal Corporation on 22nd July, 1993 which is issued much after the date of filing of such consent terms also refers to the same area admeasuring 23 ft. by 10.5 ft.. It is thus clear that the said portion of the structure which was subject matter of the notice issued under Section 351 already existed on the date of filing consent terms between the respondent nos.1 and 2.

16. There was a specific deposition in the affidavit in lieu of examination-in-chief filed by the respondent no.1 that the suit structure was already regularized by the Municipal Corporation by the payment of penalty as far back as in the year 1977. There was no cross-examination on that part of the deposition by the appellant.

17. A perusal of the finding recorded by the Trial Court thus clearly indicates that after considering the oral and documentary evidence led by the respondent no.1 and after taking cognizance of the fact that no written statement filed by the appellant nor any witness examined by the appellant before the Trial Court, the Trial Court has rightly come to the conclusion that no unauthorized construction was carried out by the respondent no.1, which was subject matter of the notice issued under Section 351 of the Mumbai Municipal Corporation Act. I do not find any infirmity with the judgment and decree passed by the Trial Court.

18. The First Appeal No. 1816 of 2005 is devoid of its merit and is accordingly dismissed. No order as to costs.

(R.D. DHANUKA, J.)