

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.8083 OF 2021

Anilkumar Gulabchand Jain @
Anil Rathod

..

Petitioner

Vs.

Municipal Corporation of Greater
Mumbai & Ors.

..

Respondents

...

Mr. Vikhil Dhoka with Ms. Sushma Soni i/b CM Legal for the
petitioner.

Mr. Santosh Parad for MCGM.

...

CORAM : SMT. BHARATI DANGRE, J.

DATED : 29TH NOVEMBER, 2021.

P.C:-

1. Taken for production.
2. The petitioner, who is the original plaintiff has instituted a suit in the City Civil Court at Dindoshi in the year 2020 being aggrieved by the notice issued by the Corporation on 08/12/2020 under Section 351 of the Mumbai Municipal Corporation Act

AJN

(“MMC Act”) in respect of a structure set out in the notice. The plaintiff sought injunction against the defendants for taking any action in furtherance of the said notice.

3. The pleadings reveal that the case set out by the plaintiff to the effect that he is the owner of the said structure on the suit plot and he has documents in the form of water connection and electricity connection in his name qua the said structure. The case of the plaintiff is to the effect that another building by name Jeevan Pushpa, which is standing on the said plot is a dilapidated structure and a notice was issued by the Corporation in respect of the said building, which is also in possession of the plaintiff, but the suit structure is independent of Jeevan Pushpa. The submission is to the effect that the suit structure is independent to Jeevan Pushal building and, therefore, the relief as prayed for in the suit was sought.

4. In the said suit, a notice of motion was taken out seeking appointment of the Court Commissioner under Order 26 Rule 9 of the CPC to inspect the suit structure. The notice of motion was based on a premise that the suit structure is an independent structure apart from the Jeevan Pushpa and, under the fear that the suit structure may be demolished along with the other building, a clarification was sought as to whether the notice dated 08/12/2020 issued under Section 351 of the MMC Act includes or excludes the suit structure. The user of the building

is stated to be only for the purpose of supply of drinking water, free of cost, as a *pyau* and not being used for commercial purpose. The appointment of the Court Commissioner is sought to be justified on the ground that true facts have not come on record and as per Regulation No.9(2) of the Development Control Regulations and as per the provisions of the MMC Act, no permission is required for supply of drinking water facility and, therefore, the notice of motion prayed that the Court Commissioner shall visit the premises and submit a detailed report. It is this notice of motion which is rejected under the impugned order by recording that the plaintiff is intending to appoint the Court Commissioner to bring on record the actual use of water facility/*pyau* and by way of appointment of Court Commissioner what is sought to be done is to collect evidence about the use of the disputed structure. It being a settled provision of law that the Court Commissioner cannot be appointed for collection of evidence, the City Civil Court has rejected the application by order dated 05/10/2021.

5. It is settled provision of law that if the plaintiff stakes a claim based on the pleadings and averments made therein, the burden to prove the averments to be discharged by him. If the use of the structure is, as prayed to be a *pyau* or a drinking water facility and whether the water was being supplied free of cost or on payment of money, by bringing the evidence on record either documentary or oral, it is permissible for the petitioner to prove

the said assertion. I find no legal infirmity in the impugned order, which is upheld. The writ petition is dismissed.

[SMT. BHARATI DANGRE, J.]