

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

**APPEAL FROM ORDER NO.145 OF 2023
WITH
INTERIM APPLICATION NO.1853 OF 2023**

Sharfuddin Imamuddin Mansoor (deceased)
through legal heirs and representatives
Noorjahan Sarfuddin Mansuri and Ors. ... Appellants
versus
Mumbai Municipal Corporation and Anr. ... Respondents

Mr. Akshay Pawar for Appellants.
Mrs. Smita Tondwalkar, for Respondent No.1.

CORAM: N.J.JAMADAR, J.

DATE : 21 JUNE 2023

P.C. :

1. The challenge in this appeal is to an order dated 13 February 2023 passed by the learned Judge, City Civil Court, in Notice of Motion No.1439 of 2016 in L.C.Suit No.682 of 2016 whereby the Notice of Motion taken out by the Appellants-Plaintiffs to restrain the Municipal Corporation from acting upon a notice dated 7 December 2015 issued under Section 351 of the Mumbai Municipal Corporation Act, 1888 and from demolishing the shop premises bearing Shop No.3 admeasuring 7 x 7 x 10 situated behind Janaki Niwas Building, Off Sonapur Lane Bazar, LBS Road, Kurla (W), Mumbai (the suit structure) came to be dismissed.

2. The background facts can be stated as under :

2.1 Mr Peer Mohd. Ahmed Peer was the original holder of the suit structure. Under a Leave and Licence Agreement dated 10 December 1970, the predecessor in title of the Plaintiffs was put in possession of the suit structure and he has since been in the continuous possession and occupation of the suit structure. Landlord has passed receipts. The Plaintiffs have been running an establishment 'New Janata Mattresses' in the suit structure. Registration Certificate under the Maharashtra Shops and Establishments Act, 1948 has been issued. The landlord had also obtained repairs permission from the Municipal Corporation.

2.2 A dispute, according to the Plaintiffs, arose between their landlord and one Mr. Gupta. At the instance of said Mr. Gupta, Defendant No.1 Corporation has issued a notice purportedly under Section 351 of the Act, 1888 alleging that the suit structure is unauthorized, though it has been assessed to tax since prior to the datum line.

2.3 In the notice, it was incorrectly claimed that the Plaintiffs erected an unauthorized structure on an open plot of land. The Plaintiffs claimed to have given a reply to the said notice on 14 February 2015 pointing the correct facts and furnishing documents to show that the suit structure has been in existence since long. The Designated Officer, according to the Plaintiffs, passed a Speaking Order on 12 March 2016 without properly advertent to the reply and the documents in support thereof.

2.4 Being aggrieved, the Plaintiffs predecessor in title instituted a suit seeking a declaration against the legality and validity of the impugned notice, and

consequential injunctive reliefs. In the said Suit, the Plaintiffs took out the instant Notice of Motion.

2.5 By the impugned order, the learned Judge, City Civil Court, was persuaded to hold that the Plaintiffs could not establish that the suit structure has been in existence since prior to the datum line or it is otherwise protected by law. The documents pressed into service on behalf of the Plaintiffs, in the view of the learned Judge, City Civil Court, were not sturdy enough to draw inference about the existence of the suit structure since long. Resultantly, the Notice of Motion came to be dismissed.

2.6 Hence, this Appeal.

3. I have heard Mr. Pawar, learned Counsel for the Appellants and Mrs. Tondwalkar, learned Counsel for Respondent No.1 at some length. With the assistance of the learned Counsel for the parties, I have also perused the pleadings and material on record.

4. Mr. Pawar would urge that the learned Judge, City Civil Court, committed a manifest error in discarding the documents which indicate with sufficient clarity that the suit structure has been in existence even since prior to the datum line. In any event, the Plaintiffs had succeeded in demonstrating that they were put in possession of the suit structure under the Leave and Licence Agreement dated 10 December 1970. The learned Judge discarded the leave and licence agreement on the

premise that its term was of 11 months only. According to Mr. Pawar, the learned Judge did not properly appreciate the fact that in the schedule of the impugned notice, the unauthorized structure was described as the shop erected on an open plot of land. This claim of Respondent No.1 was shown to be demonstrably incorrect as the existence of the suit structure since long had been substantiated by documents of unimpeachable character. In substance, the learned Judge appreciated the material on record from a wrong perspective and that led to incorrect decision, urged Mr Pawar.

5. In contrast to this, Mrs. Tondwalkar, the learned Counsel for the Respondent No.1 endeavoured to support the impugned order. It was submitted that the learned Judge has arrived at a justifiable conclusion and the same is not open to correction in exercise of limited appellate jurisdiction. Mrs. Tondwalkar made an earnest endeavour to draw home the point that there is no material on record to show that the suit structure has been in existence since prior to the datum line. The documents which are of subsequent origin, according to Mrs Tondwalkar, are of no assistance.

6. I have given careful consideration to the aforesaid submissions. To begin with the description of the unauthorized work as provided in the Schedule to the notice under Section 351 of the Act, gives an impression that Shop No.3 was constructed on an open plot of land in recent past. The notice implies that there was an open plot of land and unauthorized development was carried out thereon. I find substance in the submission of Mr Pawar that the existence of the shop finds

mentioned in a couple of documents, which could not have been easily brushed aside.

7. In the assessment list, the property No.L-3485 (2)/320A, Bazar Road, was described as house with shops. The said house property was first assessed on 31 March 1962. In the Leave and Licence Agreement purportedly executed on 10 December 1970, the suit structure has been described as a permanent shop (No.3) outside New Lucky Restaurant. The repairs permission granted on 6 October 1988 by the Municipal Corporation in respect of New Lucky Restaurant, also records that the said structure was assessed to the municipal tax since prior to 31 March 1962.

8. The learned Judge, City Civil Court, was of the view that the aforesaid document do not, however, indicate that the suit structure has been in existence since prior to the datum line. The leave and licence agreement was sought to be discarded on the count that it was executed for 11 months only. The certificate issued under the Shops and Establishments Act, 1948, the rent receipts and the bills evidencing the electric supply to the suit structure, in the opinion of the learned Judge, City Civil Court, were of no assistance in clothing validity on the suit structure.

9. I find it difficult to agree with the aforesaid view which was recorded at an interim stage. The learned Judge was required to take a prima facie view of the matter. The material on record, as noted above, indicates with an element of certainty that the suit structure had been in existence since prior to 1970. It is true the certificate under the Shops and Establishments Act, 1948, the rent receipts or the

electricity bills would not by themselves be sufficient to substantiate the existence of the structure. However, the cumulative effect of the documents, at an interim stage, was required to be considered. Moreover, at this stage, the fact that in the assessment list, the property was shown as house with shops which was first assessed on 31 March 1962, could not have been jettisoned away without providing an opportunity to the Plaintiffs to substantiate their claim by adducing evidence at the trial. To put in other words, in the face of the documents adverted to above, the Plaintiffs could not have been non-suited at an interim stage.

10. Since the learned Judge was persuaded to evaluate and discard the documents severally instead of taking a cumulative view of the documents, to arrive at a conclusion as to whether a prima facie case was made out, the discretion exercised by the learned Judge deserves to be corrected. As the existence of the suit structure, at least since prior to 1970, has been prima facie established, balance of convenience tilts in favour of the Plaintiffs and they would suffer an irreparable loss in the event the injunction is refused.

11. For the foregoing reasons, the impugned order deserves to be interfered with. Hence, the following order :

ORDER

- (i) The Appeal stands allowed.
- (ii) The impugned order stands quashed and set aside.

(iii) The Notice of Motion No.1439 of 2016 is made absolute in terms of prayer clause (a).

(iv) The learned Judge is requested to make an endeavour to hear and decide Suit No.682 of 2016 as expeditiously as possible.

(v) The parties shall render necessary co-operation and shall not seek adjournments.

(vi) In view of the disposal of the Appeal, Interim Application does not survive and the same stands disposed.

(vii) No order as to costs.

(N.J.JAMADAR, J.)