

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

APPEAL FROM ORDER NO.195 OF 2023

IN

NOTICE OF MOTION NO.975 OF 2010

IN

L.C. SUIT NO.820 OF 2010

WITH

INTERIM APPLICATION NO.2493 OF 2023

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Vitthal Maruti Parge

...Appellant/
Ori. Plaintiff

vs.

The Municipal Corporation of Greater Mumbai

...Respondent/
Ori. Defendant

Mr. Ashok Saraogi, for the Appellant.

Mrs. Smita Tondwalkar, for the Respondent-Corporation.

CORAM : N. J. JAMADAR, J.
RESERVED ON : APRIL 12, 2023
PRONOUNCED ON : JULY 03, 2023

JUDGMENT :

1. This appeal is directed against an order dated 9th March, 2023 passed by the learned Judge, City Civil Court, Mumbai in Notice of Motion No. 975 of 2010 in L.C. Suit No. 820 of 2010 whereby the said Notice of Motion came to be dismissed.

2. The plaintiff had taken out the said Notice of Motion to restrain the defendant-Municipal Corporation and its officers from acting upon a notice dated 19th January, 2010 purportedly issued

under section 351 of the Mumbai Municipal Corporation Act, 1888 (the Act, 1888) and a speaking order dated 15th March, 2010 passed by the designated officer directing the petitioner to remove the alleged unauthorizedly constructed first floor with BM walls and AC sheets at Raghunath Bundhe Chawl, Passpoli village, Sakivihar Road, Nitie, Powai, Mumbai 87 (the notice structure).

3. The plaintiffs had assailed the legality and validity of the notice dated 19th January, 2010 and the speaking order dated 15th March, 2010 in L.C. Suit No. 820 of 2010 on the ground that the ground + mezzanine floor structure admeasuring 14' x 9.5' sq. feet having height of 16' feet (the suit premises) was constructed by the husband of plaintiff No. 1 prior to 50 years. Plaintiff No. 1 had entered into an agreement to sale the suit premises in favour of Plaintiff No. 2. The plaintiff No. 1 had documents of unimpeachable character to establish that the suit premises had been in existence in the same state since long. It was assessed to tax as well. A copy of the assessment list was also annexed to the plaint.

4. Initially, the officers of the defendant-Corporation threatened to demolish the suit premises without following the due process of law. The plaintiff thus instituted L.C. Suit No. 1362 of 2009. The suit

came to be decreed restraining the defendant-Corporation from demolishing the suit premises without following the due process of law. Defendant addressed a notice dated 19th January, 2010 purportedly under section 351 of the Act, 1888 alleging that the plaintiff had unauthorizedly erected the notice structure. A reply was given on 22nd January, 2010. The plaintiffs assert, without considering the reply the designated officer passed an order dated 15th March, 2008 mechanically. The plaintiffs were thus constrained to again approach the City Civil Court seeking declaration that the impugned notice and speaking orders were illegal and bad in law and for consequential injunctive relief. In the said suit, the plaintiff took out Notice of Motion No. 975 of 2010.

5. Initially ad-interim protection came to be granted by the City Civil Court.

6. Respondent-defendant resisted the Notice of Motion by filing affidavit in reply and written statement. It was inter alia contended that a complaint was received from National Institute of Industrial Engineering that the occupier of the suit premises had carried unauthorized vertical extension on the existing structure and constructed additional floor with Brick Masonary Wall and A.C.

Sheet roof adm.10'.4" x 7.0", 10'.4" x 9'.2". Therefore, a notice under section 351 of the Act, 1888 was given on 19th January, 2010. The plaintiffs neither gave any satisfactory reply nor furnished any document to show that the notice structure was either authorized or tolerated. Thus a speaking order came to be passed on 15th March, 2010. The defendant has thus followed the due process of law and the challenge to the action was wholly unsustainable.

7. By the impugned order, the learned Judge, City Civil Court was persuaded to dismiss the Notice of Motion holding, inter alia that the plaintiff failed to establish a prima facie that either the notice structure was authorized or protected. A bald assertion that the suit premises had been in existence since 50 years prior to the institution of the suit was of no avail. Nor the documents placed on record like ration card and voter ID were of any assistance in advancing the cause of the plaintiff. It was further noted that nothing could be placed on record to show that the notice structure is protected under the provision of the Maharashtra Slum Areas (Improvement, Clearance And Redevelopment) Act, 1971 (the Act, 1971). Thus, the Notice of Motion came to be dismissed.

8. However, since the interim protection had been in operation

all these years, the learned Judge continued the interim protection for a period of two weeks from the date of the impugned order; which has since been continued by this Court.

9. Being aggrieved, the plaintiff No. 2 is in appeal.

10. I have heard Mr. Ashok Saraogi, the learned counsel for the appellant, and Mrs. Smita Tondwalkar, the learned counsel for the respondent-Corporation, at some length. With the assistance of the learned counsel for the parties, I have perused the pleadings and material on record.

11. At the outset, Mr. Saraogi, learned counsel for the appellant, would urge that the impugned order came to be passed at a stage where the suit itself ought to have been finality adjudicated. The ad-interim order had been in operation for more than 12 years. At this stage, the plaintiffs could not have been non-suited without providing an opportunity to substantiate their case by adducing evidence at the trial, submitted Mr. Saraogi.

12. It was further urged that the speaking order passed by the designated officer suffers from a clear non-application of mind. Though the reply to the notice under section 351 was filed under 6

days of the notice, the designated officer proceeded to pass the order directing the removal of the notice structure on the premise that the plaintiff failed to produce any document within the stipulated period. This approach vitiated the speaking order, urged Mr. Saraogi.

13. An endeavour was made by Mr. Saraogi to draw home the point that the respondent-Corporation has been following the policy to allow the erection of mezzanine floor. The notice structure falls within the frame work of the said policy. It was, thus, unwarranted to issue notice in respect of the notice structure. Mr. Saraogi would urge that the impugned action has been initiated at the instance of National Institute of Industrial Engineering, without any justification. Therefore, it is necessary to protect the suit premises till the dispute is finally adjudicated at the trial.

14. In opposition to this, Mrs. Tondwalkar would support the impugned order. It was urged that the designated officer had correctly noted that documents were not submitted to substantiate the claim of the plaintiff. A bald reply sans any document to show that the structure is either authorized or protected is of no significance. Even no assessment list was filed on behalf of the

plaintiff. Mrs. Tondwalkar would submit that when a notice under section 351 of the Act, 1888 is issued, it is incumbent upon the occupant to either show that the structure is authorized or tolerated. Mere pointing out infirmities in the notice or speaking order is not sufficient. To bolster up this submission, reliance was placed on an order passed by the Division Bench of this Court in the case of **Tushar Guru Salien vs. State of Maharashtra and Others**¹.

15. Mrs. Tondwalkar further submitted that the case that notice structure deserves protection under the policy of the respondent in respect of mezzanine floor is also unsustainable. The notice structure cannot be said to be in compliance with the said policy even if it is construed rather generously. Since the structure is neither authorized nor protected and, thus, clearly unauthorized, the plaintiffs do not deserve any protection, submitted Mrs. Tondwalkar.

16. The fact that impugned action has its genesis in the complaint of National Institute of Industrial Engineering (NITIE) becomes evident from the judgment dated 7th November, 2014 passed by the learned Judge, City Civil Court in LC Suit No. 1646 of 2010, instituted by NITIE against the plaintiffs herein and the Municipal

1 PIL No.67 of 2017 Dt. 28/08/2019.

Corporation. In the said suit, NITIE had sought direction to the Municipal Corporation to demolish the structure of first floor/mezzanine floor over the room which was in the occupation of defendant Nos. 1 and 2, the plaintiff in the suit. The learned Judge noted that the defendant Nos. 1 and 2 therein had instituted the instant suit No. 820 of 2010 and ad-interim orders were passed therein. The learned Judge thus directed the Municipal Corporation to demolish the illegal and unauthorized construction of first floor/mezzanine floor of the suit premises therein, after following due process of law.

17. Ms. Tondwalkar, the learned counsel for the respondent, banking upon the aforesaid judgment, would urge that no fault can be found with the impugned notice and the speaking order as the fact that the notice structure is required to be proceeded against, has been judicially recognized in LC Suit No. 1646 of 2010.

18. I have perused the aforesaid judgment. It does not appear that in LC Suit No. 1646 of 2010 the Court had gone into the aspect of the suit structure therein being either authorized or tolerated. Instead, the Court proceeded on the premise that since the LC Suit No.820 of 2010 instituted by the plaintiff herein/ defendant Nos. 1

and 2 therein (wherein ad-interim relief was granted) came to be dismissed in default on 19th July, 2012 and yet the defendant No. 3 Corporation had not taken any action in respect of the suit structure, it was necessary to direct the defendant No. 3 Corporation to demolish the first floor mezzanine floor of the suit premises by following due process of law.

19. In the case at hand, the learned Judge found that there was no material to substantiate the claim of the plaintiff that the notice structure was situated on the land duly notified as slum and thus protected under the provisions of the Maharashtra Slums Act, 1971. The plaintiff did not place on record either the notification issued under the Slums Act and/or photopass in respect of the suit premises. This finding of fact recorded by the learned Judge, City Civil Court appears rather impeccable.

20. The learned Judge was also of the view that though the plaintiff had placed on record the assessment list, there was no material to show that the said assessment list pertained to the notice structure. The learned Judge thus was not prepared to accede to the claim of the plaintiff that the notice structure has been in existence since prior to 50 years. It was thus observed that the notice structure is not protected under the prevailing policy of

the Municipal Corporation. Mr. Saraogi, learned counsel for the appellant, would submit that it had been a consistent stand of the plaintiff that the notice structure is not the first floor, as alleged, but a mezzanine floor which is duly protected under the policy of the Municipal Corporation. Attention of the Court was invited to the policy dated 8th August, 2005 for grant of permission for regularization of loft/mezzanine floor constructed prior to 15th August, 1997, in existing authorized buildings. Mr. Saraogi would urge that in terms of the said policy, the notice structure is entitled to protection. Attention of the Court was also drawn to the reply to the impugned notice dated 19th January, 2010, wherein it was mentioned that the notice structure has been in existence in the same condition comprising of ground + mezzanine floor.

21. In the plaint, the plaintiffs have asserted that the suit premises consisted of ground + mezzanine floor. The reply to the impugned notice also refers to the existence of the mezzanine floor. While passing speaking order, the designated officer simply noted that no document was produced within the stipulated period of impugned notice under section 351 of the Act. The claim of the plaintiffs that the notice structure was, in fact, a mezzanine floor was not delved into by the designated officer.

22. In the impugned order as well, the learned Judge, City Civil Court has not adequately delved into the question as to whether the notice structure deserves protection under the policy framed by the Municipal Corporation for granting authorization to the mezzanine floor which had been in existence prior to 15th August, 1997. This aspect assumes significance as even in the judgment in the LC Suit No. 1646 of 2010, the defendant No. 3 Municipal Corporation was directed to take action against first floor/ mezzanine floor of the suit premises therein.

23. This being the core question in controversy, the plaintiff could not have been non-suited without providing an opportunity to adduce the evidence to show that the notice structure being a mezzanine floor, as claimed by the plaintiffs, deserves protection under the policy of the Municipal Corporation.

24. In this context, the length of time for which the interim protection has been in operation assumes significance. The interim protection has been in operation since the year 2010. Municipal Corporation filed the written statement in the month of September, 2010. The sheer time lag of more than 12 years since the passing of ad-interim order warranted final adjudication of the suit.

25. Since, the learned Judge, City Civil Court has not delved into the aspect as to whether the notice structure is a mezzanine floor, as claimed by the plaintiffs, the exercise of discretion in declining to grant the interim relief, while ad-interim relief was in operation for almost 12 years, warrants interference. Since the suit has been instituted in the year 2010 and the defendant Corporation filed its written statement in the month of September, 2010 itself, it would be expedient in the interest of justice that the suit itself is finally heard and decided expeditiously.

26. The element of balance of convenience tilts in favour of the plaintiff. As the interim relief had been in operation for such a long period, the plaintiffs would also suffer irreparable loss if, at this stage, the injunction is refused and the notice structure is demolished without providing an opportunity to the plaintiffs to substantiate their case.

27. I am, therefore, persuaded to allow the appeal. Hence, the following order.

ORDER

- 1] The appeal stands allowed.
- 2] The impugned order stands quashed and set aside.
- 3] Notice of Motion is made absolute in terms of prayer clause (a).

4] Hearing of LC Suit No. 820 of 2010 stands expedited.

5] The learned Judge is requested to hear and decide the LC Suit No. 820 of 2010 as expeditiously as possible and preferably within a period of one year from the date of communication of this order.

6] In view of the disposal of the appeal, the interim application does not survive and accordingly stands disposed.

(N. J. JAMADAR, J.)