

Santosh

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

APPEAL FORM ORDER NO. 194 OF 2023

SANTOSH
SUBHASH
KULKARNI

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Meena Khimji Shah ...Appellant

Versus

Municipal Corporation of Greater Mumbai ...Respondent

WITH

INTERIM APPLICATION NO. 2491 OF 2023

Mr. Diwakar Dwivedi, for the Appellant.

Ms. Smita Tondwalkar, for the Respondent/MCGM.

Mr. Anand Ashok Patil, Sub-Engineer, 'D' Ward, present.

CORAM: N. J. JAMADAR, J.

DATED : 21st MARCH, 2023

ORDER:-

1. This appeal is directed against an order passed by the learned Judge, City Civil Court, Borivali Division, Dindoshi, Mumbai, in Notice of Motion No.770 of 2023 in LC Suit No.533 of 2023, whereby the application for temporary injunction restraining the Municipal Corporation of Greater Mumbai ("MCGM"), the respondent – defendant from demolishing the premises in pursuance of the notice dated 14th January, 2023, under Section 351 of the Mumbai Municipal Corporation Act, 1888 ("the Act, 1888") and the speaking order dated 10th February, 2023 came to be dismissed.

2. The appellant – plaintiff claimed to have purchased Room No.3, (earlier Room No.5), R.P. Chawl, Matar Pada, Amboli, Andheri (W), (“the subject premises”) from Mr. Khimji Shah under an Agreement for Sale dated 3rd November, 2021. Mr. Khimji Shah delivered possession of the subject premises and all the relevant documents in respect of the subject premises. Those documents include annual rent receipts issued in favour of Mr. Khimji Shah since prior to 1972, the electricity bills issued by Bombay Suburban Electric Supply Ltd. in favour of the then occupant of the subject premises, the Ration Card and assessment receipts and water consumption bills issued by the concerned authorities. Documents like the correspondence received at the subject premises and the birth certificate of the plaintiff's daughter were also banked upon in support of the plaintiff's claim. It was further affirmed that the subject premises was declared a slum under the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971.

3. The plaintiff approached the Court with a case that at the instance of the persons having vested interest, a notice under Section 351 of the Act, 1988 was issued on behalf of the respondent alleging unauthorized construction and development. An appropriate reply was filed to the said notice

by the plaintiff on 25th January, 2013. Eventually the designated officer passed a speaking order on 10th February, 2023 and directed removal of the alleged unauthorized structure i.e. (1) balcony passage admeasuring 3.50 mtr. X 1.95 mtr. X 2.5 mtr. height by using M. S. Angle, I-sections, B. M. Wall, Ladi Coba Slab for flooring and AC Sheet for roofing. (2) *Otla* admeasuring 2.36 mtr. X 0.66 mtr. X 0.25 mtr. height obstructing the access in front of the subject premises (notice structure).

4. The plaintiff asserted that the speaking order was passed without properly appreciating the plaintiff's case and the documents tendered in support thereof. The designated officer passed the speaking order without application of mind. Hence, the suit for declaration that the notice and the speaking order are illegal, bad in law and *mala fide* and to restrain the defendant from demolishing the notice structure.

5. In the said suit, the plaintiff took out a Notice of Motion seeking demolition to restrain the defendant from taking action on the basis of the said notice and the speaking order.

6. The defendant – respondent resisted the Notice of Motion by filing an affidavit-in-reply. Notice structure was allegedly erected sans any permission. It was contended that the

designated officer had considered the reply to the notice under Section 351 of the Act, 1988 and the documents filed in support thereof and passed a speaking order. Thus, no interference was warranted therein.

7. The learned Judge, City Civil Court, after appraisal of the rival contentions and the material on record, was persuaded to return a finding that the petitioner failed to make out a *prima facie* case. The material on record *prima facie* indicated that the petitioner constructed a balcony in the passage and an *otla* in the open space in front of the subject premises. The documents relied upon by the plaintiff did not pertain to the notice structure. Nor the plaintiff succeeded in *prima facie* establishing that the notice structure was either authorized or tolerated. Thus, in the absence of *prima facie* case, the balance of convenience was in favour of the respondent – defendant. Likewise, the learned Judge concluded, no irreparable loss would be caused to the plaintiff.

8. Being aggrieved, the plaintiff is in appeal.

9. I have heard Mr. Dwivedi, the learned Counsel for the appellant – plaintiff and Ms. Tondwalkar, the learned Counsel for the respondent – defendant. With the assistance of the learned Counsel for the parties, I have perused the averments in

the plaint, affidavit in support of Notice of Motion and affidavit-in-reply thereto and the documents tendered for the perusal of the learned Judge, City Civil Court.

10. The learned Counsel for the appellant - plaintiff endeavoured to draw home the point that the documents which indicate that the predecessor in title of the plaintiff, who incidentally happened to be the father of the plaintiff, had been an occupant of Room No.3 (subject premises) since prior to 1970. There were documents of unimpeachable character like the electricity bills, water bills, assessment bills, Ration Card and the public record like the birth certificate of the daughter of the plaintiff which *prima facie*, establish the possession of the plaintiff over the subject structure. In the facts and circumstances of the case, the learned Judge, City Civil Court, committed a grave error in refusing to protect the notice structure without providing an opportunity of adducing the evidence at the trial, urged the learned Counsel for the appellant. If the notice structure is demolished, the plaintiff would suffer an irreparable loss. In contrast, no prejudice would be caused to the respondent – defendant in case the notice structure is protected till the conclusion of the trial. Lest, the plaintiff would suffer an irretrievable prejudice.

11. In contrast, Ms. Tondwalkar would urge that the plaintiff has misconceived the nature and scope of the notice under Section 351 of the Act, 1888. What was sought to be removed is unauthorizedly erected balcony and *otla* obstructing access and not Room No.3, the subject premises. All the documents relied upon by the plaintiff pertain to the subject premises and not the notice structure. Therefore, according to Ms. Tondwalkar, the learned Judge, City Civil Court, correctly exercised the discretion not to grant the temporary injunction.

12. I have given anxious consideration to the rival submissions canvassed across the bar.

13. First and foremost, the schedule appended to the notice under Section 351 of the Act, 1888 dated 18th January, 2023, containing the description of the allegedly unauthorized construction/development deserves to be noted. It reads as under:

“Unauthorized construction of 1) Balcony in passage adm. 3.50 mtr. X 1.95 mtr. X 2.5 mtr. (ht. By using M. S. Angles, I-Sections, B. M. Wall, Ladi Coba Slab for flooring and A. C. Sheet for roofing. 2) Ovla adm. 2.36 mtr. X 0.66 mtr. X 0.25 mtr. (ht.) obstructing the access in front of existing structure situated at Room No.03, R. P. Chawl, Mhatarpada, Amboli, Andheri (W) Mumbai 400 058.”

14. In the aforesaid context, from the tenor of the plaint, it becomes abundantly clear that it proceeds on the premise that

the plaintiff and the predecessor in title of the plaintiff have been in occupation of Room No.3, the subject premises, since prior to 1970 and there are documents to evidence the factum of possession of the plaintiff and the predecessor in title over the subject premises. All the documents *prima facie* pertain to the said Room No.3. In fact, the Agreement for Sale dated 3rd January, 2021, under which the plaintiff claimed to have acquired proprietary title over the premises, indicates that an area admeasuring 200 sq. ft. i.e. Room No.5 Amboli, Matarpada, Andheri (W) was conveyed. In the Agreement for Sale there is no reference to the balcony and *otla*.

15. In the face of the aforesaid material, the designated officer was justified in observing that all the documents pertain to the subject premise and not the notice structure. The learned Judge, City Civil Court, has also considered all those documents and recorded a finding that *prima facie* those documents did not pertain to the allegedly unauthorized structure in front of the subject premises.

16. Mr. Dwivedi endeavoured to impress upon the Court that there is overwhelming material to show that the predecessor in title of the plaintiff had been in possession of the subject premises. I am afraid, even if the case of the plaintiff is taken at

par, it is of any assistance for the reason that the subject matter of the impugned notice is not the subject premises but the notice structure namely balcony in the passage and *otla* in front of the existing structure. Evidently, there is no document to show that the said development had been carried out with the permission of the competent authority. Endeavour of the plaintiff to salvage the position by asserting that there is no such unauthorized development but only minor repairs does not merit acceptance.

17. At this juncture, it would be necessary to keep in view the nature of the jurisdiction exercised by this Court in an appeal against an order declining to exercise the discretion to grant the temporary injunction. It is trite that the Appellate Court would be justified in interfering with the exercise of discretion where the trial court has acted arbitrarily or perversely in exercise of its discretion. Such perversity in the exercise of discretion may arise either in granting temporary injunction when there is no material or refusing to grant a temporary injunction by discarding the relevant material. The Court would also be justified in interfering with the order of the trial court where the latter has passed the order ignoring settled principles of law.

18. A useful reference, in this context, can be made to a judgment of the Supreme Court in the case of *Seema Arshad Zaheer and others vs. Municipal Corporation of Greater Mumbai and others*¹. In the said case the Supreme Court expounded the principles which govern the grant of temporary injunction in the context of allegations of erection of unauthorized structure, and also the nature of jurisdiction exercised by the Appellate Court. The observations in paragraphs 30 to 32 are instructive and, hence, extracted below:

“30. The discretion of the court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff : (i) existence of a *prima facie* case as pleaded, necessitating protection of plaintiff's rights by issue of a temporary injunction; (ii) when the need for protection of plaintiff's rights is compared with or weighed against the need for protection of defendant's rights or likely infringement of defendant's rights, the balance of convenience tilting in favour of plaintiff; and (iii) clear possibility of irreparable injury being caused to plaintiff if the temporary injunction is not granted. In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff's conduct is free from blame and he approaches the court with clean hands.

31. It is true that in cases relating to orders for demolition of buildings, irreparable loss may occur if the structure is demolished even before trial, and an opportunity to establish by evidence that the structure was authorized and not illegal. In such cases, where *prima facie* case is made out, the balance of convenience automatically tilts in favour of plaintiff and a temporary injunction will be issued to preserve *status quo*. But where the plaintiffs do not make out a *prima facie* case for grant of an injunction and the documents produced clearly show that the structures are unauthorized, the court may not grant a temporary injunction merely on the ground of sympathy or hardship. To grant a temporary injunction, where the structure is clearly unauthorized and the final order passed by the

1 (2006) 5 SCC 282.

Commissioner (of the Corporation) after considering the entire material directing demolition, is not shown to suffer from any infirmity, would be to encourage and perpetuate an illegality. We may refer to the following observations of this Court in *M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu* made in a different context : (SCC p. 529, para 73).

"This Court in numerous decisions has held that no consideration should be shown to the builder or any other person where construction is unauthorized. This dicta is now almost bordering the rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in moulding the relief. Such a discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorised construction, if it is illegal and cannot be compounded, has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing the robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is requires to be exercised has to be in accordance with law and set legal principles."

32. Where the lower court acts arbitrarily, capriciously or perversely in the exercise of its discretion, the appellate court will interfere. Exercise of discretion by granting a temporary injunction when there is "no material", or refusing to grant a temporary injunction by ignoring the relevant documents produced, are instances of action which are termed as arbitrary, capricious or perverse. When we refer to acting on 'no material' (similar to "no evidence"), we refer not only to cases where there are total dearth of material, but also to cases where there is no relevant material or where the material, taken as a whole, is not reasonably capable of supporting the exercise of discretion. In this case, there was "no material" to make out a prima facie case and therefore, the High Court in its appellate jurisdiction, was justified in interfering in the matter and vacating the temporary injunction granted by the trial court."

19. On the aforesaid touchstone, reverting to the facts of the case, in the absence of any material to show that the notice structure was either authorized or tolerated, the learned Judge,

City Civil Court, cannot be said to have committed any error in declining to exercise the discretion to grant the temporary injunction. Absence of such material leads to an inescapable inference that the notice structure is completely unauthorized. Such a structure does not deserve to be protected, for the only reason that its demolition, during the pendency of the suit, would cause hardship to the plaintiff.

20. The conspectus of the aforesaid consideration is that the learned Judge, City Civil Court, seems to have kept in view the principles which govern the grant of temporary injunction and declined to exercise the discretion in favour of the plaintiff. The conclusion arrived at by the learned Judge, City Civil Court, being justifiable, does not deserve to be interfered with in exercise of appellate jurisdiction.

21. Hence, the following order:

: O R D E R :

- (i) Appeal stands dismissed.
- (ii) No order as to costs.
- (iii) In view of dismissal of the appeal, Interim Application No.2491 of 2023 does not survive and stands disposed.

[N. J. JAMADAR, J.]