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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 245 OF 2023

Dhanista Builders and Developers
through Proprietor
Devdas Bhujang Rao,
Aged : 76 years, Occu. Business
Having office address at Dhanista
Builders Damji & Shamji Developers
704, above D-Mart, Kanjur Marg, West,
Mumbai – 400 078

...Appellant

Versus

- 1 The Municipal Corporation
Brihanmumbai Municipal Corporation
Annex Building, Mahapalika Marg No.1,
Opposite CST Railway Station, Fort,
Mumbai – 400 001
- 2 The Assistant Commissioner, N Ward,
Ghatkopar (East), Mumbai 400 075
- 3 The Executive Engineer
(Building Proposal), ES, Mumbai
Municipal Corporation, N Ward,
Ghatkopar (East), Mumbai - 400077
- 4 The Health Officer
Health Department, N Ward,
Ghatkopar (East), Mumbai – 400 077

...Respondents

Mr. Uday Warunjikar, a/w Kiran Kulkarni and Neha Bachim,
i/b Kulkarni & Asso., for the Appellant.
Mr. Narendra Walawalkar, Senior Advocate, a/w Ms. Smita
Tondwalkar, for the MCGM.
Mr. Rajendra Bhoi, a/w Dr. Gunjan Mandwale, Architect, (N)
Ward, present.
Asst. Engg. S. B. Shinde and SE R. S. Bonde, DP (BMC),
present.

CORAM: N. J. JAMADAR, J.

RESERVED ON: 28th JUNE, 2023

PRONOUNCED ON: 3rd OCTOBER, 2023

JUDGMENT:-

1. This appeal is directed against an order dated 13th March, 2023, passed by the learned Judge, City Civil Court, Greater Bombay, in Notice of Motion No.726 of 20223 in LC Suit (L) No.1901 of 2023, whereby the learned Judge was persuaded to dismiss the Notice of Motion taken out by the plaintiff to restrain respondent Nos.1 to 4 – defendant Nos.1 to 4 from constructing a building for Dispensary on a plot of land bearing CTS No.139 (Pt), 140, 140/1 to 15 situated at Parsi Wadi, Near Jai Maharashtra Ganesh Maidan, Ghatkopar (West), Mumbai, (“the suit property”) till the final disposal of the suit.

2. For the sake of convenience and clarity, the parties are hereinafter referred to in the capacity in which they are arrayed before the City Civil Court.

3. The background facts leading to this appeal can be summarized as under:

(a) The plaintiff is the proprietary firm of Devdas Bhujang Rao. He deals in the business of construction and real estate development. Mr. Dhirajlal Mehta and Anil Kumar Mehta were the holders of the suit property. The plaintiff acquired the

suit property under a registered conveyance dated 1st February, 2011 on 'as is where is basis'. The suit property admeasures 1199 sq. mtrs. or 12,906 sq. ft. comprising fully tenanted structures standing thereon. Under the deed of conveyance the plaintiff was entitled to the compensation for the structures standing thereon in the event of any development in future.

(b) The plaintiff claimed to have been in possession of the suit property since year 2011. The suit property was affected by reservation for public ground and Gym. Since the suit property is totally encroached by tenanted structures, Brihanmumbai Municipal Corporation ("BMC") constructed WC structures for the occupants and also a Dispensary on the land reserved for Gym for the benefit of those occupants. However no part of the land, the plaintiff asserts, was ever reserved for Dispensary and it was built for the convenience of the occupants.

(c) The plaintiff claimed to have submitted a proposal to Slum Rehabilitation Authority (SRA) for the development of the suit property under Slum Rehabilitation Scheme – Regulation 33(10) of Amended DCR 1991. The plaintiff decided to incorporate Municipal Dispensary in the proposed development. The Executive Health Officer – defendant No.4 vide

communication dated 1st September, 2015 conveyed to the Executive Engineer (SRA), no objection for development of Dispensary subject to the Dispensary admeasuring at least 350 sq. mtrs. being reconstructed in the developed structure.

(d) While the redevelopment proposal awaited a decision of SRA, the plaintiff avers, BMC, of whom defendant No.1 is the Commissioner, defendant No.2; the Assistant Commissioner, and Defendant No.3; the Executive Engineer, started work of demolition of the then existing Dispensary over a portion of the suit property. It transpired that BMC had decided to construct a three storey structure utilising the entire FSI jeopardising the SRA Scheme. BMC did not either inform or seek the consent of the plaintiff about the proposed development. Without seeking consent or acquiring the suit property, of which proprietary title vests in the plaintiff, BMC went ahead with the work of demolition and construction of a three storey structure without any sanction and authority. Hence, the plaintiff addressed a letter on 2nd June, 2021 to defendant No.2. Later on, a legal notice was addressed on 29th August, 2022 calling upon BMC not to proceed with the proposed development. As the defendants paid no heed and continued to carry on the

development, the plaintiff was constrained to institute the suit for perpetual injunction.

(e) In the said suit, the plaintiff took out a Notice of Motion seeking to restrain the defendants from constructing any building for Dispensary till the disposal of the suit.

(f) The respondent No.1 - Defendant No.1 resisted the suit by filing an affidavit-in-reply and written statement. Tenability of the suit was contested for want of notice as envisaged by Section 527 of the Mumbai Municipal Corporation Act, 1888 ("the MMC Act"). It was denied that the plaintiff had right, title and interest in the suit property. BMC contended that the reconstruction of Dispensary was being carried out on the very same plot of land where the Dispensary stood. An area admeasuring 610.33 sq. mtrs. was shown to have been reserved in the DP-2034. However, as per actual site condition the land in possession of BMC for the then existing health post and Dispensary was 240.98 sq. mtrs. and the remaining area was encroached by the slum dwellers. Dispensary was running on the said plot since the year 1998. As the building was in dilapidated condition, it was decided to reconstruct the same by demolishing the then existing dilapidated Dispensary structure with the approval of Building Proposal Department.

(g) It was further contended on behalf of the defendants that since the then existing Dispensary has been demolished and it catered to the health requirements of local populace, it was necessary to immediately reconstruct the Dispensary lest the public at large would suffer irreparable loss. In contrast, the plaintiff would not suffer any irreparable loss if injunction was refused as the plaintiff had never been in the occupation of the suit property.

(h) By the impugned order dated 13th March, 2023, the learned Judge, City Civil Court, was persuaded to dismiss the Notice of Motion holding *inter alia* that the plaintiff failed to establish *prima facie* title over the suit property and the plaintiff having instituted the suit for injunction simplicitor without claiming possession of the suit property, the plaintiff was not entitled to the relief of temporary injunction. The learned Judge placed reliance on the decision of the Supreme Court in the case of ***Anathula Sudhakar vs. P. Buchi Reddy and ors.***¹ to rule against the maintainability of the suit.

(i) Being aggrieved the plaintiff is in appeal.

4. I have heard Mr. Warunjikar, the learned Counsel for the appellant and Mr. Walawalkar, the learned Senior Advocate for

1 (2008) 4 Supreme Court Cases 594.

the BMC/respondent at some length. The learned Counsel took the Court through the pleadings and the material on record.

5. Mr. Warunjikar, the learned Counsel for the appellant, strenuously submitted that in the impugned order the learned Judge has recorded contradictory findings,. At one stage, (paragraph 13) while repelling the contention on behalf of the defendant that the plaintiff has no right, title and interest in the suit property, the learned Judge has recorded that he found no substance in the contention that the plaintiff has no title over the suit property as the plaintiff acquired the same under the registered conveyance. Whereas in the concluding paragraph (paragraph 16), the learned Judge recorded a diametrically opposite finding that the plaintiff has not *prima facie* established his title over the suit property. This self-contradictory approach vitiated the impugned order, urged Mr. Warunjikar.

6. Mr. Warunjikar would further urge that the learned Judge misdirected himself in non-suiting the plaintiff on the count of maintainability of the suit for not seeking possession of the suit property by relying upon the decision in the case of ***Anathula*** (supra). In fact, the said decision has been further clarified by the Supreme Court in the case of ***T. V. Ramkrishna Reddy vs.***

*M. Mallappa and another.*² Moreover, in the case at hand, the plaintiff was not required to seek possession as the principal grievance of the plaintiff was construction over the property owned by him, without his consent or by following due procedure. Amplifying the submission, Mr. Warunjikar would urge that if BMC desired to develop the property in question for the purpose of providing a Health Service Centre, irrespective of the question as to whether the property is reserved in the development plan, BMC is enjoined to follow the procedure to acquire the land. It cannot straightway start construction over the private land trampling upon the rights of the owner. This aspect was not at all considered by the learned Judge and, therefore, the impugned order requires interference, submitted Mr. Warunjikar.

7. In opposition to this, Mr. Walawalkar, the learned Senior Advocate, would submit that the very institution of the suit was barred by the provisions in Section 527 of the MMC Act. One, the suit was not instituted within a period of six months from the date of accrual of the cause of action and, thus, squarely barred by limitation. Two, the pre-suit mandatory notice was not addressed to the Municipal Corporation and the notice to the Municipal Commissioner or any other officer of the

22021 SCC Online SC 674.

Municipal Corporation, does not constitute a notice to the Municipal Corporation. Nor the suit has been instituted against the Municipal Corporation.

8. Inviting the attention of the Court to the letters dated 2nd June, 2021 and 11th June, 2022 and legal notice dated 29th August, 2022 addressed on behalf of the plaintiff to the officers of the Municipal Corporation as distinct from the Municipal Corporation itself, Mr. Walawalkar would urge that on both the counts, namely, not giving notice to the Corporation and not filing the suit within six months of the accrual of the cause of action, the bar under Section 527 of the MMC Act firmly operates. To bolster up this submission Mr. Walawalkar placed reliance on a Division Bench judgment of this Court in the case of *Nathubhai Dhulaji A firm and others vs. The Municipal Corporation, Bombay and ors.*³ and another Division Bench judgment in the case of *Satish Shah vs. Municipal Corporation, Greater Bombay*⁴.

9. Joining the issue with Mr. Warunjikar, it was submitted by Mr. Walawalkar that the Municipal Corporation having been in undisturbed possession of the subject property since the year 1998, has perfected title over the suit property by way of adverse

³AIR 1959 Bombay 332.

⁴AIR 2005 Bombay 442.

possession. If the plaintiff intended to regain possession it was necessary for the plaintiff to institute a suit on title and seek possession. Therefore, the learned Judge, City Civil Court, committed no error in dismissing the Notice of Motion.

10. In any event, according to Mr. Walawalkar, since this Court is sitting in appeal over a discretionary order passed by the Trial Court under Order 39, the scope of which is extremely limited, it would be impermissible to delve into facts and overturn decision of the trial Court for the reason that a different view is possible. To draw support to this submission, Mr. Walawalkar placed reliance on a judgment of the Supreme Court in the case of *Wander Limited vs. Antox India Private Limited*⁵

11. Mr. Warunjikar countered the submissions of Mr. Walawalkar on the ground that none of the aforesaid submissions were canvassed before the learned Judge, City Civil Court. In fact, the written statement is conspicuously silent about the claim of adverse possession. The respondents – defendants, therefore, cannot be heard to urge the grounds which were never pleaded and raised before the City Civil Court.

⁵1990 Supp1 SCC 727.

12. I have carefully considered the submissions canvassed across the bar. Undoubtedly, the scope of appeal against an order granting or refusing to grant injunction is limited. The appellate court is required to evaluate whether the trial Court has kept the principles which govern the grant of injunction in view and exercised the discretion in a justifiable manner. Even if the appellate court considers that a different view of the matter could have been taken, that does not furnish a justifiable ground to interfere with the exercise of discretion. Surely, the appellate court can and is duty bound to interfere where the trial Court has taken a view which no reasonable person could have taken and thus the decision can be said to be perverse.

13. In the case of *Wander Ltd.* (supra) the Supreme Court enunciated that in an appeal against order passed in exercise of discretion, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of the interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. The appellate court will not reassess the material and

seek to reach a conclusion different from the one reached by the court below if the one reached by the court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner, the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion.

14. On the aforesaid touchstone, reverting to facts of the case, I deem it appropriate to first consider the reasons which weighed with the learned Judge, City Civil Court, to decline to exercise the discretion in favour of the plaintiff. The learned Judge noted that the plaintiff had acquired the suit property under a registered conveyance. And that there was no substance in the contention on behalf of the defendants that the plaintiff had no right, title and interest in the suit property. Yet, at a later stage, the learned Judge recorded that the plaintiff failed to establish *prima facie* title.

15. I find substance in the submission of Mr. Warunjikar that the learned Judge, City Civil Court, has recorded apparently

irreconcilable findings on the aspect of *prima faice* title over the suit property. Secondly, the learned Judge, City Civil Court, seems to have misconstrued the nature of the plaintiff's claim and proceeded to non-suit the plaintiff for not seeking the relief of possession.

16. It is true in the case of ***Anathula Sudhakar*** (supra) the Supreme Court had expounded the situations in which a person can sue for injunction simpliciter without seeking declaration of title and/or possession and had, *inter alia*, enunciated that where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with the plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter. However, the aforesaid proposition hardly governs the facts of the case at hand. Reasons are not far to seek.

17. First, the parties are not at issue over the fact that the suit property had been in possession of BMC. In fact, BMC had constructed a Dispensary over the suit property. Second, the plaintiff did not dispute the factum of possession or object to the act of running Dispensary at the suit property but took umbrage at the demolition of the then existing structure and

proposed erection of a three storey structure by allegedly consuming the FSI of the adjoining land jeopardising the proposed SRA scheme. Three, the plaintiff was not required to seek possession of the suit property as the plaintiff had approached the Court with a case that he intended to develop the suit property and provide for a Dispensary in the proposed development. Four, it was not one of the run of the mill cases of seeking injunction to restrain the adversary from causing interference with possession.

18. In a situation of this nature, where the essential challenge was to demolition of existing structure and reconstruction of a larger structure by allegedly consuming more FSI, there was no scope for application of the principle in the case of ***Anathula Sudhakar*** (supra). The learned Judge, City Civil Court, thus clearly misdirected himself in holding that the suit for injunction without seeking consequential relief was not maintainable.

19. Before adverting to deal with the entitlement to temporary injunction, I deem it appropriate to note the nature of the jural relationship which emerges. In the deed of conveyance dated 1st February, 2011 it is recorded in clear and explicit terms that the entire suit property was fully tenanted. BMC had constructed

WC structures for the tenants. BMC had also constructed a Dispensary for the benefit of tenants on the land reserved for Gym. There is material to show that the said Dispensary was in existence since the year 1998. Two factors assume significance. One, the building housing the Dispensary was constructed by BMC. Two, the plaintiff acquired the suit property on 'as is where is basis' being fully cognizant of the encumbered nature of the suit property, including the existence of the Dispensary thereon.

20. Though Mr. Walawalkar made an endeavour to urge that the longstanding possession of the BMC over the suit property justifies a claim for acquisition of title by prescription, yet, there is no support to such claim in the pleadings. *Prima facie*, the endeavour on the part of the defendants to contest the title of the plaintiff over the suit property firstly by denying the title and at the same breath by putting-forth the claim of acquisition of title by adverse possession, does not merit countenance as the inconsistent stands work out retribution of the alternate defence. *Prima facie*, the plaintiff succeeds in establishing title over the suit property.

21. On the aspect of the exact jural relationship between the parties, however, there is not much clarity, at this stage. The

plaint does not disclose the circumstances in which BMC came to be inducted in the suit property by the predecessor in title of the plaintiff. Nor there is any instrument under which BMC was permitted to construct the Dispensary at the suit property. However, the fact remains that BMC had constructed the Dispensary and it existed since 1998.

22. Dual ownership is not uncommon. Ownership in the superstructure may vest in one party while the ownership of the land beneath vests in another. If it is not a case of dual ownership, the fact that BMC was permitted to construct a building and had been in possession and occupation of the subject property since long, justifies an inference of a perpetual lease. Letting out land for building purpose without a fixed period leads to a presumption that the demise was intended to create a permanent tenancy. Undoubtedly, the presumption can be dispelled by showing circumstances and material to the contrary.

23. A Division Bench of this Court in the case of *Bavasaheb Walad Mansursaheb Korti vs. West Patent Press Co., Ltd.*⁶ held that the nature of the tenancy created by any document must nevertheless be determined by construing the document as a

6 AIR 1954 Bom 257.

whole. If the tenancy is for a building purpose, *prima facie*, it may be arguable that it is intended for the life-time of the lessee or may in certain cases be even a permanent lease. *Prima facie* such a lease is not intended to be, tenancy at will. But whether it is a tenancy for life or a permanent tenancy must ultimately depend upon the terms of the contract itself. The aforesaid decision was approved by the Supreme Court in the case of *Sivyogeshara Cotton Press, Devangere and ors. vs. M. Panchaksharappa and another*⁷.

24. Mr. Warunjikar would urge that even if the Municipal Corporation had constructed the building housing the Dispensary yet, when the said building was demolished and sought to be reconstructed, it was necessary to obtain the consent of the landlord or acquire the land. I find it difficult to accede to this submission unreservedly.

25. If BMC was allowed to construct the building, at the subject property, in exercise of its rights as a lessee or otherwise, the fact that subsequently the building was required to be demolished as it became dilapidated, does not necessarily impinge upon the right of the BMC to reconstruct the building. As noted above, the material on record does not equip the Court

7 AIR 1962 Supreme Court 413.

to arrive at the exact jural relationship between the predecessor in title of the plaintiff and BMC. In this view of the matter, the purpose for which the subject property was put to use assumes salience. This factor must weigh in determining at an interim stage the entitlement of BMC to reconstruct the building.

26. Mr. Warunjikar would urge that the Minutes of Meeting in which the decision to construct a multi-storey structure was taken indicates that at the instance of local Municipal Councillor, the BMC agreed to erect the structure in utter disregard to the fact that the plaintiff was the owner of the suit property. I have perused the said Minutes of Meeting (page 242). It, *inter alia*, records that the development of the suit property in the Slum Rehabilitation Scheme was a time consuming affair and, therefore, it was considered appropriate to construct the three storey building having 350 sq. ft. area on each floor, with a provision for another building on the reserved plot. Indeed, the said Minutes of the Meeting also record the presence of the local Municipal Councillor.

27. In the circumstances of the case and uncontroverted position that BMC had constructed WC structures and Dispensary to provide facilities to the occupants of the area, in my view, it would be hazardous to attribute *mala fide*. On the

contrary, the Minutes of Meeting record the necessity of making the provision for health services.

28. The only issue which merits consideration is the extent of the development. If the BMC proposes to construct a building of dimensions equivalent to the then existing Dispensary building, *prima facie*, it would not impair the rights of the plaintiff. The said exercise of reconstruction of the building with equivalent dimensions would be in conformity with the authority under which the BMC had erected the said structure. Development in excess of the dimensions of the old structure would bring in the element of proprietary title of BMC to the land beneath. The submission of Mr. Walawalkar that BMC has perfected title to the land is a matter for pleading, proof and adjudication. As noted above, the exact nature of the jural relationship between the plaintiff and BMC as regards the occupation of the subject land and the erection of structure thereon is in the corridor of uncertainty and requires adjudication post recording of evidence. In such circumstances, if the BMC consumes the entire FSI admissible qua the land on which the original building stood or the FSI in relation to the adjacent land, as alleged by the plaintiff, it would surely affect the development potential of the rest of the suit property.

29. It would, therefore, be appropriate to restrain the Municipal Corporation from constructing a building in excess of the dimensions of the original building housing the Dispensary. BMC would, thus, be entitled to reconstruct the building equivalent to the area and dimensions which the original building had, on the suit property. This course would protect the rights of the plaintiff. It would also cater to the requirement of the public at large for whose benefit the Dispensary is to be constructed. Simultaneously, it would ensure that the equities between the plaintiff and the BMC are balanced. This order would not, however, preclude BMC from resorting to the measures which it is empowered to take under the MMC Act, 1888 to acquire or carry out further development at the suit property in accordance with law.

30. On the aspect of the bar under 527 of the MMC Act to the institution of the suit, there can be no quarrel with the proposition of law in the case of *Nathubhai Dhulaji* (supra). However, in the peculiar facts of the case the question as to whether the bar contained in sub-section (1) of Section 527 would operate with equal force especially when the genesis of the dispute is in the nature of the jurial relationship between the plaintiff as the holder of the property and the Municipal

Corporation as an occupant thereof, may warrant adjudication at the trial. I am, therefore, not inclined to accede to this challenge at this stage. It would be in the fitness of the things that the questions of validity of the notice and bar of limitation are determined at the final decision of the suit. I am, therefore, impelled to partly allow the appeal.

31. Hence, the following order.

: O R D E R :

- (i)** Appeal stands partly allowed.
- (ii)** The impugned order stands quashed and set aside.
- (iii)** The respondents – defendants are restrained from constructing a building at the suit property beyond the area and dimensions of the building which housed the Dispensary, before its demolition
- (iv)** It is clarified that the respondents – defendants are at liberty to construct a building having dimensions equivalent to the original building which stood at the suit property.
- (v)** Needless to clarify that the Municipal Corporation shall not claim any equities for the said development.
- (vi)** Interim order dated 7th June, 2023 stands vacated.

- (vii) In the circumstances of the case there shall be no order as to costs.
- (viii) In view of the disposal of the appeal, interim application stands disposed.

[N. J. JAMADAR, J.]

At this stage, Mr. Warunjikar, the learned Counsel for the appellant, seeks continuation of the interim order for a further period of four weeks.

Mr. Walawalkar, the learned Senior Advocate for the respondent – Corporation, resists the prayer as the stay for the construction of the Dispensary ultimately affects public.

In the backdrop of the view this Court is persuaded to take, it may be expedient to continue interim protection for a period of three weeks from today.

Ordered accordingly.

[N. J. JAMADAR, J.]