

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 314 OF 2018
IN
NOTICE OF MOTION NO. 204 OF 2018
IN
L.C. SUIT NO. 858 OF 2012
WITH
CIVIL APPLICATION NO. 412 OF 2018

Sher-e-Punjab Co-op. Housing Society Ltd. ... Appellant
Versus
Rajkumar C. Basantani & Ors. ... Respondents

WITH
INTERIM APPLICATION NO. 632 OF 2022

Bharat Lekhraj Harwani ... Applicant

In the matter between

Sher-e-Punjab Co-op. Housing Society Ltd. ... Appellant
Versus
Rajkumar C. Basantani & Ors. ... Respondents

Mr. E.K. Sasidharan for the appellant.
Mr. R.V. Pai, Senior Advocate a/w. Mr. S.J. Khera, Mr. Sangramsingh
Yadav, Mr. Akshay R. Pai and Mr. Atharva Sane for respondent no. 2.
Mr. R.Y. Sirsikar for respondent no. 3/MCGM.

CORAM: G. S. KULKARNI, J.
DATED: 12 January 2023

P.C.

1. Heard learned counsel for the appellant and learned counsel for respondent no. 2.
2. This appeal is filed assailing an order dated 16 April, 2018 passed by the City Civil Court at Mumbai in Notice of Motion No. 204 of 2018 in L.C. Suit

No. 858 of 2012 filed by the appellant/plaintiff. By the impugned order, the Notice of Motion as filed by the appellant interalia praying for a relief that Court Receiver, High Court, Mumbai be appointed as Receiver of the suit property, namely, plot of land admeasuring 9431.04 sq. mtrs. bearing CTS No. 368/5 corresponding to Survey No. 29 (Part), Village Mogra, Taluke Andheri, Mumbai situated at Sher-e-Punjab Colony, Mahakali Caves Road, Andheri (E), Mumbai – 400 093 with a direction to take possession thereof with all powers under Order 40 of the Code of Civil Procedure, 1908; and for a further prayer that a mandatory order and injunction be issued directing respondent no. 2 to demolish all structures standing on the suit property, has been rejected. There was an alternate prayer to the above relief, namely, that a mandatory order and injunction be granted against respondent no. 3/Municipal Corporation to demolish all structures standing on the suit premises, i.e., on the suit plot of land.

3. The learned trial Judge, considering the above prayers as made in the Notice of Motion filed by the plaintiff and after hearing the parties, framed two issues. Firstly, whether the appellant/plaintiff is entitled to a relief of appointment of Court Receiver in respect of the suit property and secondly, whether the plaintiff was entitled for mandatory order and injunction directing defendant no. 2/respondent no. 2 to demolish all structures standing on the suit property. Both the issues were answered in negative. The learned trial

Judge in rejecting such prayers observed that the suit in question itself was filed praying for a declaration that defendant nos. 1 and 2/respondent nos. 1 and 2 have no right, title and interest in the suit land and for a further declaration that the permission for construction of compound wall granted by the Municipal Corporation on 16 March, 2012 was illegal. The learned trial Judge observed that substantive issue involved in the suit was only in respect of permission granted by defendant no. 3/Municipal Corporation to defendant no. 2 to construct compound wall.

4. Learned trial Judge in the impugned order has referred to some of the factual antecedents, namely, that the plaintiff had approached this Court in Appeal from Order No. 460 of 2012 which came to be disposed of in terms of an order dated 8 May, 2012 passed by a co-ordinate Bench of this Court. As there is some relevance to the said order passed by this Court, the same is required to be noted, which reads thus:

“1. Heard Mr. R.A. Thorat, learned counsel for the appellant, Mr. Shiv Malhotra, learned counsel for respondent no. 1, Mr. R.V. Pai, learned counsel for respondent no. 2 and Ms. M.R. Bhoir, learned counsel for respondent no.3-BMC.

2. The original plaintiff has preferred this appeal challenging the judgment and order dated 23rd April, 2012 passed by the learned Judge, Bombay City Civil Court, Borivali Division, Dindoshi (Goregaon), Mumbai in draft Notice of Motion. By that order, the learned trial Judge declined to grant ad-interim relief.

3. During the course of hearing, Mr. R.V. Pai has made following statements:

(i) Respondent no. 2 is carrying out repair works of the wall at his costs and risk in accordance with estimate dated 24th March, 2012 given by AK Hi Tech Engineers. The said repair work is carried out in respect of the property covered by the document styled as Lease dated 5th November, 1999 and Sub-lease dated 6th September, 2000.

(ii) He states that the respondent no. 2 will abide by the outcome of the proceedings in Long Cause Suit No. 858 of 2012 as also subject to any action that the respondent no.3-Corporation proposes to take in respect of the said repair work.

(iii) He further states that the respondent no. 2 will not carry out further construction without obtaining requisite permission from respondent no. 3-Corporation.

4. Statements made by Mr. R.V. Pai are accepted.

5. In view of the statements, Mr. Thorat does not press this appeal. The Appeal from Order is accordingly disposed of as not pressed.

6. In view of disposal of Appeal from order, nothing survives in Civil Application no. 619 of 2012 and the same is also disposed of.

7. Parties to act upon the authenticated copy of this order.”

5. Thus, defendant no. 2/respondent no. 2 against whom entire grievance was being made, had made a statement before this Court that respondent no. 2 was carrying out repair works of the wall at his risk and costs and the said repair work, being undertaken, was carried out in respect of the suit property covered by the document styled as lease deed dated 5 November, 1999 and subsequent sub-lease dated 6 September, 2000 as created by the appellant/plaintiff-Society in favour of defendant no. 1. It was further stated by defendant no. 2/respondent no. 2 that they will abide by the outcome of the suit as also subject to any action that the Municipal Corporation proposes to take in

respect of the repair work. It was also stated that defendant no. 2/respondent no. 2 will not carry out further construction without obtaining requisite permission from defendant no. 3/respondent no. 3-Municipal Corporation. Such statements were accepted by this Court and accordingly, Appeal from Order came to be disposed of. However, despite the above order passed by this Court on 8 May, 2012, the grievance of the appellant is that certain unauthorized constructions were being resorted by respondent no. 2 and that no action has been taken by the Municipal Corporation despite request made in that regard. It is on such premise, the present Notice of Motion was moved by the appellants for reliefs as noted above.

6. Learned counsel for the appellant has drawn the Court's attention to the affidavit in support of Notice of Motion. I have perused the affidavit. The affidavit in support does not give any specific details as to what is the demarcation of the illegal construction and in respect of which action would be required to be taken considering that such construction is in breach of the statement as made before this Court and recorded in the order dated 8 May, 2012 as noted above.

7. In the above circumstances, the learned trial Judge noted the nature of the rights between the parties, namely, that the appellant/plaintiff itself had created rights in the land in favour of defendant no. 1/respondent no. 1 for a period of 99 years vide lease deed dated 5 November, 1999 which was a valid

and subsisting lease deed, and subsequent sub lease dated 6 September, 2000 as entered in favour of defendant no. 2. It is observed that it was an admitted position that appellant/plaintiff was not in possession of the leased property, subject matter of the lease and it was held by respondent nos. 1 and 2/defendant nos. 1 and 2 . It is also admitted by learned counsel for the parties at the bar that the lease has not been terminated, however, there is a suit which is filed in this Court initially which is now transferred to City Civil Court, for a relief that the lease be declared to be illegal. Further, no substantive orders are passed on such suit. The learned trial Judge in the impugned order has observed that considering the order dated 8 May, 2012 passed by this Court in Appeal from Order No. 406 of 2012 (supra), defendant no. 2 was required to carry out further construction with permission of defendant no. 3-Municipal Corporation, and if any construction was to be carried out without obtaining permission, in that event, it was for the Municipal Corporation, being the competent statutory authority, to take action of demolition of unauthorized construction. It is observed by the learned trial Judge that in these circumstances, it was not a case for appointment of a Court Receiver. Learned trial Judge also categorically observed that the appellant/plaintiff had failed to give any description of unauthorized construction and for which he would pray for relief of mandatory orders of demolition of such construction. Learned Judge thereafter observed that the nature of relief as prayed for in the Notice of

Motion, was in fact, beyond the scope and ambit of the suit and hence rejected the Notice of Motion.

8. Learned counsel for the appellant has limited grievance in assailing the impugned order. His submission is that the construction undertaken by respondent no. 1 is unauthorized, however, as noted above, learned counsel for the appellant is not in a position to demonstrate from the affidavit in support of the Notice of Motion as filed by the plaintiff before the trial Court that any specification of such construction on oath has been set out by the appellant. In the absence of such details being furnished, the observations as made by the learned trial Judge in paragraph 14 that the plaintiff did not give description of unauthorized construction cannot be stated to be in any manner perverse or illegal.

9. This apart, it appears that there are substantive rights which are created in favour of defendant nos. 1 and 2/respondent nos. 1 and 2 under the lease in question, hence there is sufficient protection which is granted to the appellant by virtue of the statement which was made on behalf of defendant no. 2/respondent no.2 as recorded by this Court in the order as noted above. Thus, the grievance as made by the petitioner in that regard is certainly subject matter of the final adjudication in the suit

10. Learned counsel for the appellant has also drawn the Court's attention to several orders passed by the coordinate benches of this Court on this Appeal, which includes the order dated 9 September, 2019 whereby this Court had appointed Court Commissioner to identify the portions of suit land forming part of CTS No. 368/5 and a direction to identify an area of 8031.7 sq. mtrs. a report was placed on record. Thereafter, in a subsequent order dated 15 January, 2020, a coordinate bench of this Court after considering the report of the Surveyor has observed that there is no clear identifiable demarcation in the said two portions of the land, i.e., CTS No. 368/5 and therefore, the Surveyor was directed to submit a plan with clear demarcation. Subsequently, there is another order dated 25 October, 2021 passed by this Court wherein on the conspectus as noted above, it was observed that respondent no. 2 shall not carry out any activity on the suit land, i.e., the entire property demarcated in Annexures-II in black and red lines as submitted by M/s. Shetgiri and Associates. The said position has continued to operate.

11. I have gone through the said orders. In my opinion, the intent of these orders was solely for the purpose of adjudication of this appeal, so that appropriate reliefs on the appeal can be passed. Certainly, the intention of the Court in passing such orders was not to decide as to what would be required to be decided by the trial Court in the adjudication of the suit. It also cannot be accepted that the report of the Commissioner as placed on record or any map

would amount to any evidence in the suit, as such material was invited by the Court under the orders of the Court, only for the purpose of adjudication of this appeal so as to explore the viability of any workable arrangement. It was necessary to refer to these orders so that there is clarity in this regard in the context of the final adjudication of the suit, as also that the parties are left to lead their respective evidence before the trial Court for the suit to be decided on its own merits.

12. In view of the above discussion, in my opinion, no infirmity whatsoever or illegality can be attributed to the impugned order passed by the learned trial Judge. The appeal lacks merits. It is accordingly rejected. No costs.

13. Interim orders as passed by this Court on 25 October, 2021 also stands vacated.

14. Needless to observe that the order dated 8 May, 2012 has continued to operate and the same shall continue to operate as recorded by this Court during the pendency of the suit.

15. In view of disposal of Appeal from Order, Civil Application as also Interim Application do not survive and the same are also accordingly disposed of.

(G. S. KULKARNI, J)