

Sayali Upasani

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

**APPEAL FROM ORDER NO. 369 OF 2023  
WITH  
INTERIM APPLICATION NO. 4534 OF 2023  
IN  
APPEAL FROM ORDER NO. 369 OF 2023**

|                                                |                                      |
|------------------------------------------------|--------------------------------------|
| Preston Francis Rodrigues and Others           | ...Appellants/<br>Org. Plaintiffs    |
| <b>Vs.</b>                                     |                                      |
| The Municipal Corporation of Greater<br>Mumbai | ...Respondent<br>/Org.<br>Defendants |

Mr. Pradeep Thorat i/b Mr. Shailesh Pal, for Appellant.  
Ms. Smita Tondwalkar, for MCGM.

**CORAM:- N. J. JAMADAR, J.**

**RESERVED ON:- 5<sup>th</sup> JUNE, 2023**

**PRONOUNCED ON:- 13<sup>th</sup> JULY, 2023**

**JUDGMENT:-**

1) This Appeal is directed against an order dated 29<sup>th</sup> April, 2023, passed by the learned Judge, City Civil Court, Borivali Division in Notice of Motion No. 271 of 2023 in L.C. Suit No. 204 of 2023, whereby the learned Judge declined to grant interim relief restraining the respondent-Corporation from

acting upon the notice dated 9<sup>th</sup> July, 2022 issued under Section 354-A of the Mumbai Municipal Corporation Act, 1888 (“the Act, 1888”) and the speaking order dated 15<sup>th</sup> July, 2022.

**2)** Background facts can be stated in brief as under:-

**(a)** The appellants-plaintiffs claim to be the owners of House premises No.156 consisting of ground plus three floors situated at Vile Parle (West) Mumbai (the suit premises). The suit premises has been in existence since prior to 1962. As the suit premises required urgent tenantable repairs, the plaintiffs had applied for, and pursuant to, the permission granted on 6<sup>th</sup> February, 2021, carried out the repairs.

**(b)** The plaintiffs assert on the basis of a false complaint of a disgruntled person the defendant issued a notice purportedly under Section 354-A of the Act, 1888, on 9<sup>th</sup> July, 2022, falsely alleging that the plaintiffs had commenced unauthorised vertical extension above first floor terrace with RCC beam, columns and slab adm. 6.7 m X 9 m. at the suit premises. An appropriate reply was filed on 13<sup>th</sup> July, 2022, pointing out that the plaintiffs had carried out tenantable repairs after obtaining requisite permission. Yet the designated officer by a speaking order dated 15<sup>th</sup> July, 2022, passed an order directing the

plaintiffs to remove the alleged unauthorised structure. It was incorrectly recorded that the plaintiff had not given reply to the notice. Nor produced any authentic documents to prove the authorisation for the notice structure. The plaintiffs assailed the legality and validity of the impugned notice and the speaking order.

(c) The learned Judge, City Civil Court, had initially directed the parties to maintain status quo. However, it was subsequently vacated. The plaintiffs came in Appeal from the said order, being Appeal From Order No. 272 of 2023. By an order dated 12<sup>th</sup> April, 2023, this Court directed the City Civil Court to hear and decide the Notice of Motion for ad-interim relief and continued the status quo till the City Civil Court passed an order on the application for ad-interim relief.

(d) By the impugned order dated 29<sup>th</sup> April, 2023, the learned Judge was persuaded to reject the prayer for ad-interim relief holding, *inter alia*, that despite notice under Section 354-A of the Act, 1888, the plaintiffs continued to carry out the construction. Eventually in pursuance of the speaking order dated 15<sup>th</sup> July, 2022, the defendant-Corporation had demolished the unauthorisedly erected structure on 16<sup>th</sup>

November, 2022, 30<sup>th</sup> November, 2022, 5<sup>th</sup> January, 2023 and 6<sup>th</sup> January, 2023. Yet, while instituting the suit, the plaintiffs had suppressed the said fact and, subsequently, took out the Chamber Summons to carry out the amendment that part of the allegedly unauthorisedly erected structure came to be demolished. Since the plaintiffs had not approached the Court with clean hands, they were not entitled to equitable relief.

3) Being aggrieved the plaintiffs are in Appeal.

4) I have heard Mr. Thorat, the learned Counsel for the appellant, and Mrs. Smita Tondwalkar, the learned Counsel for the respondent-Municipal Corporation at some length.

5) Mr. Thorat would urge that the learned Judge, City Civil Court, ought not to have given much weight to the fact that a portion of the structure came to be demolished by the respondent in flagrant violation of the policy of the Municipal Corporation in the matter of following due process of law before initiating action for demolition. Respondent-Corporation was duty bound to follow the policy directions contained in the circular dated 11<sup>th</sup> August, 2000, which came to be issued pursuant to the orders passed by this Court. Respondent –

Corporation thus could not have been allowed to take benefit of its own wrong.

6) Secondly, Mr. Thorat would submit that once the structure was complete, an action under Section 354-A of the Act, 1888 was legally impermissible. In that eventuality, the only course available to the respondent – Corporation was to initiate action under Section 351 of the Act, 1888. It was submitted that the designated officer proceeded as if the action was under Section 351 of the Act, 1888 and recorded that the construction carried out by the plaintiffs was totally unauthorised. That was not the remit of the enquiry by the designated officer, submitted Mr. Thorat.

7) Ms. Tondwalkar, on the other hand, stoutly supported the impugned order. Taking the Court through the documents on record which indicate that, post speaking order, the then on-going construction was demolished by the respondent, Ms. Tondwalkar would urge that a party who has not approached the Court with clean hands, does not deserve any equitable relief.

8) The provisions contained in Section 351 and 354-A of the Act, 1888, operate in different spheres. Section 351 empowers

the Commissioner to remove, alter or pull down the building or work which has been carried out contrary to the provisions of the Act, 1888, if the person responsible for the same fails to show a sufficient cause or remove the structure despite notice. Section 354-A, on the other hand, empowers the Commissioner to issue stop work notice, in respect of any erection of building or work which has been unlawfully commenced or is being unlawfully carried out. Plainly Section 354-A operates at a stage where the unauthorised construction or work is underway and can be classified as an ongoing work. This distinction between Section 354-A and 351 of the Act, 1888 was elucidated by the Supreme Court in the case of **Muni Suvrat-Swami Jain S.M.P. Sangh Vs. Arun Nathuram Gaikwad and Others**<sup>1</sup>. It was, inter alia, observed that the provisions of Section 354-A deal with the stop work notice whereas the provisions of Section 351 deal with the show cause notice for demolition of unauthorised structure. The provisions of Section 354-A have nothing to do with the question of demolition.

9) Mr. Thorat placed reliance on a decision in the case of **Goverdhan Ramnaresh Singh Vs. The Municipal Corporation of Greater Mumbai in Appeal From Order No. 257 of 1999, dated**

---

**1** (2006) 8 SCC 590

15<sup>th</sup> April, 1999, wherein it was observed that if a person has raised any unauthorised construction before notice under Section 354-A (1) was issued, the remedy to the Corporation is under Section 351 of the Act, 1888 and not under Section 354-A.

10) There can be no duality of opinion on this point. However, the aforesaid position in law, in the facts of the case, does not assist the cause of the submission on behalf of the appellants. The learned Judge, City Civil Court, has recorded a prima facie view that before the institution of the suit itself, the respondent-Corporation had taken action pursuant to the speaking order dated 15<sup>th</sup> July, 2022. The learned Judge found that the action of demolition of the then on going unauthorised structure, on 16<sup>th</sup> November, 2022, 30<sup>th</sup> November, 2022, 5<sup>th</sup> January, 2023 and 16<sup>th</sup> January, 2023 was evidenced by documents including the photographs. The learned Judge categorically observed that despite the demolition process having been carried out, the plaintiffs suppressed the said fact and approached the Court for the interim relief. The subsequent amendment carried out by the plaintiffs in the

plaint, adverting to the said demolition, was arrayed against the plaintiffs as the conduct lacking in *bona fide*.

11) The aforesaid approach of the learned Judge, City Civil Court, can not be said to be unjustifiable. The plaintiffs can not be permitted to urge at an ad-interim stage that the action of demolition was in violation of the policy directives as the plaintiffs did not approach the Court with a case that notice structure or part thereof was demolished. On the contrary, the plaintiffs, *ex facie*, did not disclose the said fact and sought relief on the premise that notice structure stood intact. The issue of non-compliance with the policy framed by the Corporation to follow due process, before taking action of demolition, cannot be considered in the abstract. It would be open for the plaintiffs to seek appropriate reliefs, if they choose to, by carrying out necessary amendment in the plaint.

12) Had the plaintiff approached the Court with a case that the action of demolition was carried out a day prior to the institution of the suit, issue of restoring the *status quo ante* the date of the suit could have been considered. On the contrary, there was material to indicate that the action was taken as back as in the month of November, 2022.

13) In this view of the matter, since the very structure, which the plaintiffs sought to protect, had been demolished, the learned Judge, City Civil Court, was justified in arriving at the conclusion that no *prima facie* case was made out. Nor the balance of convenience tilted in favour of the plaintiffs. In the circumstances of the case, the point of irreparable loss was also rightly answered against the plaintiffs.

14) Resultantly, the Appeal fails. Hence, the following order.

**ORDER**

- i) The Appeal stand dismissed.
- ii) In view of dismissal of the Appeal, the Interim Application also stands disposed.
- iii) No costs.

**[N. J. JAMADAR, J.]**