

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 686 OF 2022

WITH

INTERIM APPLICATION NO.10271 OF 2022

Sandesh Sonu Gawalkar

Age : 42 years,

R/o. 62/DC, Gawalkar House,

Worli Koliwada, Mumbai 400 030

...Appellant.

Versus

Municipal Corporation, Gr. Mumbai

Mahapalika Bhavan, Mumbai

G/South Ward, N. M. Joshi Marg,

Lower Parel, Mumbai 400 001.

...Respondent.

Mr. Ashok M. Saraogi, for Appellant.

Mrs. Smita Tondwalkar, for Respondent-MCGM.

CORAM : SANDEEP V. MARNE, J.

RESERVED ON : 23 AUGUST 2023.

PRONOUNCED ON : 04 SEPTEMBER 2023.

JUDGMENT:

1. By this appeal, Appellant challenges order dated 24 June 2022 passed by the City Civil Court refusing to grant ad-interim relief of injunction against Notice dated 26 February 2022 for demolition of part of suit structure.

2. Briefly stated, facts of the case are that the Appellant-Plaintiff claims to be the owner of suit structure bearing house No.62/DC situated at Gawalkar House, Worli Koliwada, Mumbai 400 030. He claims that to be in possession of part of suit structure and the balance part has been let out to different tenants. Appellant-Plaintiff claims that he has carried out some tenantable repairs to the suit structure by replacing internal and external plaster.

3. The Designated Officer of G/South Ward of Municipal Corporation of Greater Mumbai issued Notice dated 26 February 2022 under provisions of Section 354A of the Mumbai Municipal Corporation Act 1988 (**Act**) to Appellant-Plaintiff alleging that he had unlawfully commenced and was unlawfully carrying on work described in the Schedule to the notice. Appellant-Plaintiff was accordingly called upon to stop execution of the work and produce permission granted by Competent Authority for execution of said work. In the Schedule to the notice, the unauthorized construction was described as under-

“Schedule (Description of work):

Unauthorized construction of (1) R.C.C. Staircase adm. approx. 4.5m X 2.1 m. by construction of 2 nos of R.C.C. Columns & Beams at 1st Floor. (2) Unauthorized construction of B. M. Wall adm. 6.0m X 3.0m height at 1st floor. (3) Unauthorized construction of 3 nos. of R.C.C Columns on 1st Floor. (4) Unauthorized construction of 3 nos of R.C.C. Column and R.C.C. Chajja Slab adm. approx 6.0m X 1.0m at 2nd Floor and (5) Unauthorized construction of parapet wall adm. 6.0m X 1.0m height at 2nd floor at Plot 62 DC, Gawalkar House, Golphadevi Temple Road, Worli Koliwada, Mumbai, Maharashtra 400030, India.

4. Appellant-Plaintiff filed reply to the Notice through his advocate on 28 February 2022 and denied that any work, as described in the notice, were being carried out at the suit structure. He contended that only tenantable repairs were being carried out for Holi Festival, which does not require any permission.

5. Appellant-Plaintiff instituted L. C. Suit No.486 of 2022 in City Civil Court at Bombay challenging the Notice dated 26 February 2022. During pendency of the Suit, Designated Officer of the Municipal Corporation thereafter passed Speaking Order dated 17 March 2022 holding that the Appellant-Plaintiff failed to produce any valid permission of Competent Authority (Executive Engineer Building Proposal) and directed him to remove/restore the notice work. It was further directed in the speaking order that failure to stop notice work would result in demolition thereof. Appellant-Plaintiff filed Chamber Summons No.439 of 2022 for amendment of the plaint for challenging

the speaking order dated 17 March 2022. Appellant-Plaintiff also filed Notice of Motion No.1269 of 2022 seeking temporary injunction restraining Respondent Municipal Corporation from acting on the Notice dated 26 February 2022 and Speaking Order dated 17 March 2022 and from demolishing any part of the suit structure. Appellant-Plaintiff claims that during pendency of the Notice of Motion, oral directions were given by the City Civil Court directing Municipal Corporation not to take any action in pursuance of impugned notice.

6. The Respondent Municipal Corporation opposed Notice of Motion by filing Affidavit-in-reply. After hearing both the sides on the issue of grant of ad-interim relief, the City Civil Court was pleased to reject the prayer for ad-interim injunction by order dated 24 June 2022. Appellant-Plaintiff has accordingly filed the present appeal challenging the order dated 24 June 2022. By order dated 05 December 2022, this Court directed parties to maintain *status-quo*, which order continues to operate till today.

7. Mr. Saraogi, the learned counsel appearing for Appellant would contend that the Municipal Corporation has erroneously issued notice under Section 354A of the Act when in fact no work was under progress at the time of issuance of the notice. That the scope of notice under Section 354A of the Act is restricted to ongoing construction. That in respect of a work, which is already executed, only notice which can be given is under provisions of Section 351 of the Act. He would invite my

attention to Section 342 of the Act in support of his contention that tenantable repairs do not require any permission. That work carried out by the Appellant-Plaintiff was merely tenantable repairs which does not require any permission. He would also invite my attention to the assessment bills in respect of the building showing the assessment thereof before 1 March 1961 and would submit that entire suit structure consisting of Ground + 2 Floors with common passage has been recorded in the assessment of the Municipal Corporation.

8. In support of his contention, Mr. Saraogi would place reliance on Circulars dated 11 August 2000 and March 2006 issued by the Municipal Corporation. He would rely upon following judgments in support of his contentions.

- 1) Vadilal Maganlal Trevadia Vs. Bombay Municipal Corporation & Ors., 2021(1) Mh.L.J.
- 2) Muni Surat Swami Jain S. M. P. Sangh Vs. Arun Nathuram Gaikwad, Civil, 2006-Scale-10-122 / 2006-BLR-4-3161.
- 3) Appeal from Order No.998 of 2002, decided on 2nd December 2002.
- 4) Salim Anwar Mohammed Amin Siddique Vs. Municipal Corporation of Gr. Bombay, Appeal from Order No.534 of 2003 decided on 27 August 2003.
- 5) Mr. Prakash s/o. Hanumant Nakhwa Vs. Municipal Corporation of Gr. Mumbai, Appeal from Order No.536 of 2007 decided on 30th July 2007.

9. *Per contra*, Mrs. Tondwalkar the learned counsel appearing for Municipal Corporation would oppose the petition and support the order passed by the City Civil Court. She would submit that the work at the suit structure was in progress when inspection was carried out and notice was issued. In this connection she would invite my attention to the affidavit-in-reply filed before the City Civil Court. She would further submit that the Circulars relied upon by the Appellant are superseded by Circular issued in the year 2011. In support of her contentions, she would place reliance on the order passed by Division Bench of this Court on 28 August 2019 in **Tushar Guru Salien Vs. State of Maharashtra & Ors.**, PIL No. 67 of 17 decided on 28th August, 2019. She would pray for dismissal of the appeal.

10. Rival contentions of the parties now fall for my consideration.

11. Notice dated 26 February 2022 issued under provisions of Section 354A of the Act is challenged on the ground that it could not have been issued in respect of a work which was not in progress. Section 354A enables the Municipal Commissioner to stop execution of a work which is commenced and is being unlawfully carried on. It is contended by Appellant that the moment execution of the work stopped/completed, notice under Section 354A cannot be issued. It would therefore be necessary to refer to the provisions of Section 354A which reads thus:

354A. Power of Commissioner to stop erection of building or work commenced or carried on unlawfully

(1) If the Commissioner is satisfied that the erection of any building or the execution of any such work as is described in section 342 has been unlawfully commenced or is being unlawfully carried on upon any premises, the Commissioner may, by written notice, require the person erecting such building or executing such work to stop such erection or work [forthwith].

(2) If the erection of the building or execution of the work is not stopped as required by the Commissioner, or permission approved by the competent authority in favour of the erection of the building or execution of the work is not produced within twenty-four hours from the service of notice referred to in sub-section (1), the Commissioner may, without further notice, remove or pull down the building or work and the expenses thereof shall be paid by the said person or owner of the building or work. The Commissioner may also direct that any person directing or carrying out such erection or work shall be removed by any police officer from the place where the building, is being erected or the work is being executed.

(3) In addition to the action that the Commissioner may take under sub-section (2), he may, without further notice, cause to be removed any materials, machinery, equipment, devices or articles used in the process of erection of the building or execution of such work.

(4) If the expenses incurred by the Commissioner under sub-section (2) and (3) are not paid within one month from the date of demand, such sum as remains unpaid shall be treated, as arrears of property tax and the procedure prescribed under this Act for recovery of arrears of property tax shall, *mutatis mutandis*, apply to the recovery of such unpaid sum.]”

12. Thus, under Section 354A of the Act, the Municipal Commissioner, upon being satisfied that any work has been unlawfully commenced or is being unlawfully carried out without obtaining development permission, the Municipal Commissioner is empowered to

require executor of such work to stop the same. If despite issuance of notice, execution of the work is not stopped or permission for execution of work is not produced within 24 hours of service of notice, the Municipal Commissioner is empowered to remove or pull down the work. The *sine qua non* for exercise of power under Section 354A is either commencement of work or carrying on the work. Thus, the notice under Section 354A can be issued only if the work is at the stage of being executed. The natural corollary of this would be that the work, execution of which is complete, would not attract notice under Section 354A. This position has been reiterated in the Circulars issued by the Municipal Corporation in the year 2000 and 2006 relied upon by Mr. Saraogi. Though Mrs. Tondwalkar has pointed out that those Circulars stand superseded by fresh circular in the year 2011, I need not delve further into the issue of instructions given in any Circular in absence of any dispute to the proposition that notice under Section 354A can be issued only in respect of an ongoing work. Therefore, reliance of Mr. Saraogi on various orders passed by this Court reiterating this position is unnecessary.

13. It is therefore necessary to examine the stage of the work at the time of issuance of Notice dated 26 February 2022. The relevant portion of the Notice reads thus-

“And whereas I am satisfied that you have unlawfully commenced/ are unlawfully carrying on erection of building / execution of work as described in the schedule appended below in contravention of section 337/342 and section 347 of the said Act

situated at Plot 62 DC, Gawalkar House, Golphadevi Temple Road, Worli Koliwada, Mumbai, Maharashtra 400030, India.”

14. Thus, a specific statement is made in the notice that the Appellant-Plaintiff has unlawfully commenced and was unlawfully carrying on the work. The notice is based on ‘First Inspection Report’ prepared in pursuance of the inspection conducted on 26 February 2022. In that report, the work status is shown as ‘on going’. Thus, first inspection report as well as notice do contain specific allegation that the work was being executed on 26 February 2022. Photographs of the suit structure placed on record would also indicate that the work was under progress on 26 February 2022. In that view of the matter, issuance of notice under Section 354A cannot be faulted with.

15. Mr. Saraogi has relied on judgment of the Apex Court in **Muni Surat Swami Jain** (supra). However the facts as well as issue involved in that case are entirely different. The main issue involved before the Apex Court was whether High Court can issue Writ of Mandamus for demolition of the structure before passing of any order for demolition. In that case, notice under Section 354A was issued. However after issuance of the notice, execution of the work was stopped. Despite execution of the work being stopped, the High Court issued directions for demolition of the structure. Thus, in case before the Apex Court the work was not under progress at the time High Court issued directions for demolition of the structure. It is in the light of these facts that the Apex Court held that

High Court could not have issued mandamus for demolition of the structure. The issue involved in the present case is entirely different. Notice under Section 354A of the Act alleging ongoing unauthorized construction has been issued. The photographs placed on record and the inspection report do indicate that the work was ongoing. Therefore, the judgment of the Apex Court in *Muni Surat Swami Jain* would have no application to the present case.

16. Mr. Saraogi has also placed reliance on judgment of this Court in **Vadilal Maganlal Trevadia** (Supra) in support of his contention that the burden of proving the assertion about unauthorized nature of structure would lie on authority alleging that the structure is unauthorized. However the facts in *Vadilal Maganlal Trevadia* were entirely different. In that case, the structure was illegally demolished and the Court had directed restoration of *status-quo ante*. In pursuance of the directions issue by the Court, the Petitioner therein had reconstructed structure. The Municipal Corporation alleged that the reconstructed structure was bigger in size than the demolished structure. It is in the light of these facts of the case, burden was shifted on Municipal Corporation to prove that the size of reconstructed structure was more than the demolished structure. Therefore, the judgment in *Vadilal Maganlal Trevadia* cannot be cited in support of a proposition that in every case Municipal Corporation must prove that the structure is unauthorized. On the contrary, provisions of Section 354A of the Act would require the person indulging unauthorized work to produce

development permission issued for execution of such work. Therefore, the judgment in *Vadilal Maganlal Trevadia* would have no application to the present case.

17. The next contention raised by Mr. Saraogi is that the nature of work executed by the Appellant-Plaintiff is tenantable repairs within the meaning of Section 342 of the Act. I am unable to agree. Notice alleges construction of RCC staircase and number of RCC columns and beams on first and second floor, parapet wall, etc. Photographs produced alongwith petition also would indicate that RCC work was being carried out at the suit structure by extending the same. By no stretch of imagination, can it be contended that work commenced by Appellant-Plaintiff pertain to tenantable repairs.

18. Reliance of Mr. Saraogi on the assessment bill would not cut any ice in what is alleged in the notice is construction of extension to the existing structure. The notice would indicate that the Appellant-Plaintiff is carrying out extension both to first and second floor in addition to construction of RCC staircase. Therefore mere reflection of structure consisting Ground, First and Second floor and common passage in the assessment sheet would not *ipso facto* lead to conclusion that even added extension, is also part of assessment made in the year 1961.

19. In my view, no case was made out by the Appellant-Plaintiff for grant of any ad-interim protection during pendency of Notice of Motion. The City Civil Court has not committed any error in passing the

order dated 24 June 2022. The appeal is devoid of merits and warrants dismissal. Needless to observe that the findings recorded are *prima facie* for examining whether Appellant-Plaintiff is entitled to ad interim injunction. The appeal is accordingly dismissed without any order as to costs.

20. After order is pronounced Mr. Saraogi, learned counsel appearing for Appellant would request for continuation of ad-interim order of *status quo* which was granted by this Court on 05 December 2022. Ms. Tondwalkar, the learned Counsel appearing for Respondent-MCGM would oppose the prayer.

21. Considering the fact that ad-interim order of *status quo* is in operation since 05 December 2022, the same is extended for a period of six weeks from today.

SANDEEP V. MARNE, J.

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