

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

**APPEAL FROM ORDER NO. 652 OF 2023
WITH
INTERIM APPLICATION NO. 14365 OF 2023**

Mr. Chintamani Vithal Tilekar ...Appellant

Vs.

Municipal Corporation of Greater Mumbai ...Respondents
and Others

Mr. Jagdish N. Jayale, for Appellant.

Ms. Smita Tondwalkar, for Respondent.

Mr. Aditya V. Jog, Junior Engineer (B&F) – Present.

CORAM:- N. J. JAMADAR, J.

DATED:- 18th AUGUST, 2023

ORAL ORDER:-

1) Heard Mr. Jayale, the learned Counsel for the appellant and Ms. Tondwalkar, the learned Counsel for the respondent-Corporation.

2) This Appeal is directed against an order dated 4th August, 2023, passed by the learned Judge, City Civil Court, Borivali Division, Mumbai, whereby the learned Judge declined to grant

ad-interim relief, restraining the respondents-defendants from acting upon a notice under Section 354A of Mumbai Municipal Corporation Act, 1888 ("the Act, 1888") dated 4th May, 2023 and the speaking order dated 11th May, 2023.

3) The appellant-plaintiff claimed to be in lawful occupation and possession of a ground plus three storey structure known as Tilekar House situated at House No. 138 C.T.S. No. D/718 of Danda Gaothan, Village Gaothan, Taluka Andheri, Vitthal Pada, Khar Danda, Khar West, Mumbai (the suit premises).

4) Notice was issued by the Designated Officer under Section 354A of the Act, 1888, alleging unauthorised 'on going construction' over the existing ground plus one storey structure without permission of the Competent Authority, at the suit premises. Since the plaintiff does not submit any document within the stipulated period by an order dated 11th May, 2023, the Designated Officer ordered removal of the notice structure within 24 hours from the receipt of the said order failing which the Corporation would remove the said structure at the risk of the plaintiff as to costs and consequences.

5) In the meanwhile, the plaintiff instituted L.C. Suit No. 1624 of 2023, assailing the legality and validity of the notice

dated 4th May, 2023 and the action sought to be taken on the basis of the said notice.

6) By an order dated 5th July, 2023, the learned Judge, City Civil Court declined to grant ad-interim relief noting, *inter alia*, that the Designated Officer had already passed a speaking order as no reply was filed by plaintiffs to the notice within the stipulated period and it appeared that the notice impugned in the said suit was acted upon and the structure demolished.

7) The plaintiff thereafter withdrew L.C. Suit No. 1624 of 2023 with liberty to institute a fresh suit on the same cause of action.

8) Availing the liberty granted by the City Civil Court, by an order dated 31st July, 2023, the plaintiff instituted instant suit, seeking, *inter alia*, a declaration that the impugned notice under Section 354A of the Act, 1888, is illegal, void and not enforceable, the impugned action of the defendants of partly demolishing the monsoon shed on the 3rd floor and the side walls of the 2nd and 3rd floor of the suit premises was illegal and that the plaintiff be permitted to restore, reconstruct and re-erect the demolished monsoon shed on the 3rd floor and the side walls of the 2nd and 3rd floors of the suit premises, and

permanent injunction restraining the defendants from further enforcing, implementing and executing the impugned notice and the speaking order.

9) The plaintiff took out the Notice of Motion seeking to restrain the defendants from further enforcement of the notice and speaking order, during the pendency of the suit, and the permission to cover the demolished portion of the suit premises by Tin A.C.C. Sheets.

10) By the impugned order, the learned Judge, City Civil Court declined to grant the ad-interim relief holding, *inter alia*, that material on record *prima facie* indicated that the defendants had carried out the demolition work at the suit premises on 2nd and 3rd August, 2023 and there was nothing to show that the said demolition was carried out illegally or without following due process of law. As regards the prayer to permit the plaintiff to cover the demolished portion by temporary construction and/or monsoon shade on the 3rd floor, the learned Judge was of the view that it was for the Municipal Corporation to consider such a request as the plaintiff had already filed an application with the Municipal Corporation for the said purpose.

11) Being aggrieved the plaintiff is in Appeal.

12) Mr. Jayale, the learned Counsel for the appellant submitted that the learned Judge City Civil Court misconstrued two vital documents namely notice dated 9th June, 1977 and repairs permission dated 12th May, 1982, which indicated the existence of ground plus three storey structure at the suit premises. The learned Judge proceeded on an incorrect premise that the notice dated 9th June, 1977 and the repair permission dated 12th May, 1982 were in respect of unauthorised development. What was lost sight of by the learned Judge, according to Mr. Jayale, was the nature of the structure, which then existed, namely, ground plus three structure. Mr. Jayale would further submit that the learned Judge also committed an error in placing implicit reliance on the statement made across the bar that the structure has been demolished pursuant to the notice and the speaking order. In a case of this nature, where there is a *prima facie* material to show that the ground plus three storey structure existed since the year 1975, in the least, the learned Judge ought to have granted interim protection till the defendant filed its reply, in

support of the contention that there was unauthorised 'on going construction' urged Mr. Jayale.

13) In opposition to this, Ms. Tondwalkar the learned Counsel for the respondent-Corporation laid emphasis on the fact that the impugned action cannot be faulted for not following due process of law. Indisputably, no reply was given made to the notice under Section 354A of the Act, 1888, within the stipulated period. The Designated Officer was thus justified in passing the speaking order directing removal of the unauthorised structure. Ms. Tondwalkar would further urge that there is no material on record to lend support to the claim of the plaintiff that the suit premises consisted of ground plus three storey structure since prior to the datum line. Nor the plaintiff has placed on record any material to show that the development was carried out with the approval of the Competent Authority. What impairs the plaintiff's case is the suppression of material facts. The plaintiff deliberately suppressed the fact that the impugned notice had already been acted upon, urged Mr. Tondwalkar. Inviting the attention of the Court to the observations in the impugned order, Ms. Tondwalkar would

urge that a party who does not approach the Court with clean hands is not entitled to any equitable relief.

14) At an ad-interim stage, the Court is required to take a prima facie view of the matter. Whether the learned Judge, City Civil Court was justified in declining to grant ad-interim relief is the limited question which crops up for consideration in this Appeal. The prime reason which weighed with the learned Judge, City Civil Court in declining to grant the ad-interim relief was the fact that the impugned notice was acted upon and the alleged unauthorised structure came to be demolished by the defendant-Corporation.

15) An endeavor was made by Mr. Jayale to draw home the point that the entire construction has not been demolished and monsoon shed and some part of the alleged unauthorised structure have been demolished. This submission is required to be appreciated in the light of an express prayer in the suit that it be declared that the impugned action of the defendants of partly demolishing the moonsoon shed on the third floor and the side walls of the 2nd and 3rd floor of the suit premises was illegal. In the backdrop of this prayer, it would be rather difficult to brush aside the claim of the respondent-

Corporation, which was sought to be supported by referring to the demolition report and the photographs that the portions of the unauthorised structure have already been demolished.

16) The main plank of the submission of Mr. Jayale that in the notices dated 9th June, 1977 and 12th May, 1982, the suit premises was described as ground plus three storey structure, prima facie does not advance the cause of the plaintiff. It is pertinent to note that in the reply to the notice under Section 354 A of the Act, 1888, which was belatedly given on 26th June, 2023, there is no reference at all to those documents. Failure on the part of the plaintiff to rely upon those documents at first possible opportunity can only be at the own peril of the plaintiff.

17) Ms. Tondwalkar was justified in placing reliance on the assessment list in which the property at house No. 138 was described as a shed.

18) Mr. Jayale attempted to wriggle out of the situation by canvassing a submission that subsequently a three storey structure came to be erected at the suit premises. This submission is of little assistance to the plaintiff. On the own showing of the plaintiff, the situation which would thus obtain

is that, as of the datum line, the structure at the suit premises was shed only. The plaintiff can not claim that the suit structure is a tolerated structure. If it is the case of the plaintiff that three storey structure came to be subsequently erected, then it is incumbent upon the plaintiff to show that the structure is authorised. No such permission is banked upon. Prima facie, the notice structure was neither tolerated nor authorised.

19) In any event since the impugned notice and speaking order have already been acted upon and the portions of the allegedly unauthorised structure have already been demolished, at this stage, no case to grant an ad-interim relief is made out. The learned Judge, City Civil Court thus committed no error in declining to exercise the discretion to grant ad-interim relief. In exercise of limited appellate jurisdiction this Court does not find any justifiable reason to interfere with such discretionary order at an ad-interim stage.

20) It is however clarified that the impugned notice under Section 354A of the Act, 1888 is restricted to unauthorised erection of structure over the existing ground plus one floor. Refusal of the trial court to grant ad-interim relief would not

justify any action on the part of the respondent-Corporation qua ground plus one storey structure at suit premises, on the basis of the said notice. Nor the plaintiff would be precluded from either seeking appropriate amendment in the plaint to seek further reliefs or approaching the planning authority for regularisation and/or permission to carry out development. In the event such application is made, the same be decided by the Court and/or the Competent Authority in accordance with law.

21) With the above clarification, the Appeal stands disposed.

22) In view of the dismissal of the Appeal, the Interim Application also stands disposed.

[N. J. JAMADAR, J.]