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

**APPEAL FROM ORDER NO.950 OF 2022
WITH
INTERIM APPLICATION NO.18923 OF 2022**

Pradeep Hariram Oberoi

...Appellant

vs.

The Municipal Corporation of Greater Mumbai
and Another

...Respondents

Mr. Vishal Kanade a/w. Ms. Jhanvi Joshi, Mr. Nilesh Pandey i/b.
Equa Juris, for the Appellant.

Mr. Abhinandan Vagyan i/b. Ms. Kanchan Chindarkar and Mr.
Prashant More, for Respondent No. 2.

Mrs. Smita Tondwalkar, for Municipal Corporation.

CORAM : N. J. JAMADAR, J.
RESERVED ON : APRIL 3, 2023
PRONOUNCED ON : JUNE 5, 2023

JUDGMENT :

1. This appeal is directed against an order dated dated 13th September, 2022 passed by the learned Judge City Civil Court, Mumbai in Notice of Motion No. 618 of 2021 in L.C. Suit No. 1245 of 2021 whereby the Notice of Motion taken out by the appellant plaintiff to restrain the respondent No. 1/defendant No. 1 Municipal Corporation from acting upon a notice dated 22nd October, 2020 under section 351 of the Municipal Corporation Act, 1888 (the Act, 1888) and the speaking order came to be dismissed.

2. The appeal arises in the backdrop of the following facts:-

a) The plaintiff has been in possession of a gala premises admeasuring 912 sq.fts. Situated at Survey No. 92, CTS No. 250, village Bhandup, Tal. Kurla known as Hariram Garage (the suit property), as a tenant thereof. M/s. Rolex Mdetals Industries, respondent No. 2 is the landlord. Late M/s. Hariram Oberoi, the father of the plaintiff was the original tenant of the suit property. It was demised to late Hariram since prior to 1955. The suit property comprised of permanent structure with AC sheet roof with area admeasuring about 2000 sq.ft.

b) The plaintiff asserts a portion of the suit property was affected in road widening scheme and resultantly the suit property now admeasur 912 sq.fts. In the wake of the dispute, over the demised premises, the landlord/ respondent No. 2 had initially instituted RAE Suit No. 799 of 2005 and subsequently withdrew the said suit. It is the case of the plaintiff that at the instance of the landlord, the respondent No.1 Corporation has initiated action qua the suit property unjustifiably.

c) The plaintiff asserts the suit property is a censused structure. It has been declared a slum under section 4(1) of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 (the Slum Act, 1971), vide gazette notification dated 2nd

March, 1978. A Census certificate has also been issued by the competent authority on 18th December, 1980. Survey receipt came to be issued on 20th July, 2000. The revenue authorities have also levied non-agricultural tax on the suit property for the alleged conversion of users of the suit property.

d} It is further averred that the plaintiff had started tenantable repairs. Thereupon, a notice under section 354A of the Act, 1888 came to be issued on 30th July, 2019. The plaintiff instituted LC Suit No. 2297 of 2019 assailing the legality and validity of the said notice. As interim relief was not granted, the plaintiff had preferred an Appeal From Order (St.) No. 26430 of 2019. By an order dated 27th September, 2019 this Court had allowed the appeal and restrained the respondent No. 1- Corporation from taking action pursuant to the said notice. It is the claim of the plaintiff that instead of, assailing the said order dated 27th September, 2019 before the Supreme Court, the respondent No.1- Corporation issued notice dated 22nd December, 2020 under section 351 of the Act, 1888. A detail reply was filed on 29th December, 2020 annexing thereto all the relevant documents. Without considering the said reply and the documents, the designated officer passed the speaking order in a perfunctory manner. Thus, the plaintiff was constrained to again approach the City Civil Court seeking

declaration that the impugned notice dated 22nd December, 2020 purportedly issued under section 351 of the Act, 1888 and the speaking orders dated 10th February, 2021 and 11nd February, 2021 are illegal and bad in law and also to restrain the respondent No. 1 Corporation from demolishing and/or pulling down the suit property and acting upon the impugned notice and the speaking order. In the said suit, the plaintiff took out a Notice of Motion seeking interim reliefs.

3. The respondents/defendants resisted the Notice of Motion. The substance of the resistance put forth by the respondent-Corporation was that subject structure was neither tolerated nor authorized. Permanent structure was erected sans permission of the planning authority. By the impugned order, the learned Judge, City Civil Court was persuaded to dismiss the Notice of Motion. The learned Judge was of the view that it could not be prima facie established that the suit property is situated in a slum area. In any event, there was no impediment under the Slum Act, 1971 to proceed against an unauthorized development. The learned Judge further recorded that in Appeal From Order (St.) No. 26430 of 2019 this Court had expressly reserved the liberty to the respondent-Corporation to proceed against the suit property in accordance with

law if it was found that the structure was unauthorized and liable to be demolished and, therefore, the respondent- Corporation was within its rights in initiating action for unauthorized development.

4. Being aggrieved, the plaintiff is in appeal.

5. I have heard Mr. Vishal Kanade, learned counsel for the appellant, Mr. Abhinandan Vagyan, learned counsel for respondent No. 2/ landlord and Mrs. Smita Tondwalkar, learned counsel for the Municipal Corporation. With the assistance of the learned counsel for the parties, I have perused the pleadings and the material on record including the impugned order.

6. To begin with, it is necessary to note the description of the structure furnished in the impugned notice dated 22nd December, 2020 purportedly issued under section 351 of the Act, 1888. The schedule to the notice reads as under:-

“Unauthorized Construction of 4 galas on open plot using sipporex blocks wall and A.C. Sheet roof with M.S. Rolling shutter Adm. Total 10.8 mtr. X 8.1 mtr. X 3.8 mtr at ridge & 3.1 mtr. Ht at eaves as shown in the Sketch at above mentioned address.”

7. It would be contextually relevant to note that the respondent No. 1 Corporation had initially professed to proceed qua the suit

property under section 354A of Act, 1888, with the allegations that the plaintiff/appellant had been carrying out unauthorized construction of shops on open land with Siporex blocks, A.C. Sheet roof and MS Shutter ad-measuring 12.1 m x 7.0 m x 3.0 m, without permission of competent authority.

8. In Appeal From Order (St.) No. 26430 of 2019 this Court recorded a categorical finding that the Court Commissioner's Report clearly demonstrated that the work had attained completion by the time the Commissioner visited the premises. Thus, the finding recorded by the trial Court that there was on going construction, was not sustainable. This Court, further observed that if it was the Corporation's case that the suit structure was unauthorized and liable to be demolished either on the ground that it did not exist as of the datum line or that it was constructed without seeking authorization from the planning authority, the Corporation was free to adopt such steps as may be permissible in law, but it could not have availed the provisions contained in section 354A of the Act, 1888. Armed with the said liberty, the respondent-Corporation has apparently initiated the impugned action.

9. Mr. Kanade, the learned counsel for the appellant would urge

that the impugned notice and the speaking order suffer from the vice of clear non-application of mind. The fact that the father of the plaintiff and, after his demise, the plaintiff has been in possession of the suit property since prior to 1955 is incontrovertible. It is also indisputable that the premises has been put to commercial use. In the circumstances, the issue of the impugned notice on the ground that the plaintiff has erected unauthorized structure on open plot of land is wholly unsustainable. Mr. Kanade, would urge that the learned Judge, City Civil Court did not at all advert to the voluminous material placed on record to show the long standing possession and enjoyment of the suit property by the plaintiff and his predecessor in title. The slum declaration, the census certificate and the notice issued by the revenue authorities for conversion of land use, were all unjustifiably discarded by the learned Judge. Thus the impugned order deserves to be interfered with, submitted Mr. Kanade.

10. Mrs. Tondwalkar, the learned counsel for respondent No.1-Corporation would submit that the appellant has not placed on record any material to show that the development at the suit property was carried out with necessary permission of the planning authority. The endeavour of the appellant to show the infirmities in

the impugned notice and the speaking order is of no significance. It incumbent upon the party who assails the notice under section 351 of the Act to show that either the structure is authorized or tolerated. The appellant has miserably failed to make out a prima facie case on this count. Therefore, pointing out infirmities in the notice and the speaking order would not advance the cause of the appellant.

11. To bolster up aforesaid submission Mrs. Tondwalkar placed reliance on the observations of the Division Bench in the case of **Tushar Guru Salien vs. State of Maharashtra and Others**¹. The Division Bench observed, inter alia, as under:-

5. Concerning a property, a suit to enforce or protect an interest in the property which is governed by a Municipal Statute, the interest protected has to be with respect to a plea that prim-facie, the structure which is being targeted is an authorized structure. Meaning thereby, the plaint must make an averment of the sanction obtained from the Corporation and must make an averment that the structure targeted is prima-facie governed by the sanction. Merely pointing out deficiencies in the notice or the authority of the person issuing the notice is neither here nor there. Thus, the sine qua non of such kinds of suits is a positive assertion made with reference to the sanctioned building plans.

12. Mr. Vagyani, the learned counsel for the respondent No. 2 supported the impugned order. It was submitted that the tenancy

¹ PIL No.67/2017 Dt. 28/08/2019.

and the possession over the suit property are not in dispute. An open land was the subject matter of demise. The appellant/plaintiff has started to erect permanent structure and, therefore, the landlord was constrained to approach the Court of Small Causes and seek relief. Attention of the Court was invited to an order dated 30th January, 2020 passed by the Court of Small Causes, Mumbai on an application for temporary injunction in T.E. Suit No. 61 of 2017 whereby the defendants therein were restrained from carrying out any construction of permanent nature at the suit premises i.e. open plot of land admeasuring about 225.50 sq.mtr. and covered under C.T.S. No. 250/5, situated in Rolex Metal Industries Compound at LBS Marg, Bhandup (w), Tal. Kurla, Mumbai. Mr. Vagyan also invited attention of the Court to the observations in the speaking order wherein the notice structure was shown as open and marked as per the drawing 36 of the 'S' ward. Mr. Vagyan would thus urge that it is the development sans permission which is a legitimate subject matter of the impugned notice and the proposed action of demolition.

13. I have given anxious consideration to the rival submissions.

14. Evidently, the impugned notice proceeds on the premise that

the notice structure was sought to be erected on the open piece of land. It is the case of respondent No. 2 landlord that an open piece of land was the subject matter of demise. Whether this contention prima facie appears nearer to the truth ?

15. First and foremost, the long standing possession of the plaintiff and his predecessor in title is rather indubitable. There are rent receipts for the period as back as May, 1955 and June, 1955. The possession of the plaintiff and the predecessor in title of the plaintiff is relatable to a period prior to the dautam line for a commercial structure.

16. The affidavit in reply on behalf of defendant No.2/ landlord throws light on the nature of the demised property and also the user thereof. In paragraph 4 of the affidavit in reply it was contended that the suit property was let out to Mr. Hariram Oberoi, the late father of the plaintiff, prior to 40 years for the purpose of carrying the business of garage and vehicle parking place. Prima facie it is difficult to readily agree with the contention on behalf of the defendants that the character of the demised property remained an open land for almost 70 years. The aforesaid contention of defendant No. 2 in the affidavit in reply lends

credence to the claim of the plaintiff that the suit property has been used as a garage and for commercial purpose.

17. I find substance in the submission of Mr. Kanade that the learned Judge, City Civil Court did not properly advert to the documents which were tendered in respect of the plaintiff's claim. For instance, in the impugned order while noting that the plaintiff has placed reliance on the Government gazette dated 2nd March, 1978, in which CTS No. 250, whereat the suit property is situated, was declared as the slum area, yet the said document was discarded by ascribing a reason that those documents were not sufficient to conclude that the notice structure was situated in the slum area. It is imperative to note that the plaintiff had also banked upon a census certificate purported to have been issued by the Controller of Slums dated 18th December, 1980 that the suit property was recorded as censused structure bearing No. TXC 14/5 admeasuring 50 x 40 = 2000 sq.fts.

18. Mr. Vagyani attempted to controvert the aforesaid certificate by relying upon a certificate dated 4th November, 2019 wherein it was mentioned that the properties situated at CTS Nos. 250, 251 and 252 of Mouje Bhandup, Tal. Kurla were not declared as the

slum under the Act, 1971.

19. I am afraid the aforesaid communication is of assistance at this stage. The learned Judge, City Civil Court was required to appraise the plaintiff's claim *prima facie*. The plaintiff had brought material on record to show that he and his predecessor in title have been in possession of the suit property since prior to 1955. The learned Judge noted that the CTS number over which the property was situated was declared as slum in the Government notification. In addition, a census certificate was issued by the Collector of Slums. Moreover, on 12th February, 1999 a notice was issued to the plaintiff for conversion of the user of the suit property from agriculture to commercial. In the face of these documents, the learned Judge could not have non-suited the plaintiff, at an interim stage. The long standing possession coupled with purpose of demise warranted an opportunity to the plaintiff to establish at the trial that the work being carried out on the suit premises was of tenantable repairs and did not necessitate permission from the planning authority.

20. Undoubtedly, the Court of Small Causes by an order dated 30th January, 2020 restrained the defendants therein, including the

plaintiff herein, from carrying out further construction of permanent nature. That, however, does not imply that the action of the respondent-Corporation is legal and valid. It is imperative to note that the respondent No. 1 Corporation proceeds on the premise that the plaintiff was erecting a structure on an open plot of land. This foundational premise, in my considered view, is belied by the documents and material on record.

21. In the totality of the circumstances, I am of the considered view that the learned Judge, City Civil Court did not adequately consider the material which bears upon the determination of the legality and validity of the notice. Failure to consider the relevant material resulted in an erroneous view on the existence of a prima facie case. The long standing possession and user of the demised premises for the commercial purpose tilts the balance of convenience in favour of the plaintiff. Absence of permission from the planning authority, in a situation of the present nature, where the nature of the development is contentious, cannot be determinative. In the event the structure which stands on the suit property is demolished, the plaintiff would suffer an irreparable loss.

22. The conspectus of the aforesaid consideration is that the exercise of discretion by the learned Judge, City Civil Court deserves to be corrected, in appeal. Hence, the appeal deserves to be allowed. It is, however, clarified that this order cannot be construed as an authority to carry out further development or violate the injunction granted by the Court of Small Causes in T.E. Suit No. 61 of 2017 by order dated 30th January, 2013.

Hence, the following order.

ORDER

- 1] The appeal stands allowed.
- 2] The impugned order passed by the learned Judge, City Civil Court in Notice of Motion No. 681 of 2021 stands quashed and set aside.
- 3] The Notice of Motion stands allowed.
- 4] The respondent/defendant No. 1 Corporation is restrained from acting upon the impugned notice dated 22nd December, 2020 under section 351 of the Act, 1888 and the speaking orders dated 10th February, 2021 and 11th February, 2021 till the disposal of the suit.
- 5] It is hereby clarified that this order cannot be construed as an authority to carry out further development in the suit property or violate the order passed by the Court of Small Causes in T.E. Suit

No. 61 of 2017, dated 30th January, 2020.

6] Hearing of the suit stands expedited.

7] No order as to costs.

8] In view of the disposal of the appeal, the interim application also stands disposed.

(N. J. JAMADAR, J.)