Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 150 of 2023
WITH
INTERIM APPLICATION NO. 2003 OF 2023

Mrs. Indra Bihari Sukheja ...Appellant
**Versus**
Municipal Corporation of Greater Mumbai ...Respondent

Mr. Anand Mishra, i/b Mr. Ashok Saraogi, for the Appellant.
Ms. Smita tondwalkar, for the respondent/MCGM.

CORAM: N. J. JAMADAR, J.
DATED : 14th JUNE, 2023

ORAL ORDER:-

**1.** Heard the learned Counsel for the parties.

**2.** This appeal is directed against an order passed by the learned Judge, City Civil Court, in Notice of Motion No.902 of 2019 in LC Suit No.595 of 2019, whereby the Notice of Motion taken out by the appellant – plaintiff, to restrain the respondent – defendant/Corporation from taking action on the basis of a notice issued under Section 351 of the Mumbai Municipal Corporation Act, 1888 ("the Act, 1988") dated 23rd January, 2019 and speaking order dated 19th February, 2019 and demolishing the Shop No.112 Sweety Cloth Store, situated at Gandhi Bazar, Chembur Colony, Mumbai ("the suit premises") came to be dismissed.

**3.** For the sake of convenience and clarity, the parties are hereinafter referred to in the capacity in which they are arrayed before the City Civil Court.

**4.** The plaintiff claimed to have acquired the suit premises under a registered Agreement dated 20th July, 1990. Representation was made to the plaintiff that the suit premises had been in existence since prior to 1950. In the year 2011, the defendant – Corporation had issued a notice under Section 351 of the Act, 1888 to remove the first floor, which was allegedly unauthorisedly erected over the suit premises. The plaintiff had assailed the said notice by filing LC Suit No.2910 of 2019. An application for regularization of the said structure was also filed. Eventually, the plaintiff removed the said unauthorised structure.

**5.** The plaintiff asserts, at the behest of the person who lays a rival claim over the suit premises, notice under Section 351 of the Act, 1888, came to be issued on 23rd January, 2019 in respect of the suit premises though the respondent – Corporation had not referred to the suit structure in the previous notice issued in the year 2011. The plaintiff filed reply along with documents to show that the suit premises has been in existence since prior to the datum line. However, the designated officer passed an order on 19th February, 2019 directing the removal of the suit structure without considering the reply and the documents filed by the plaintiff.

**6.** Thus, the plaintiff was constrained to institute suit seeking declaration in respect of the impugned notice and the consequential reliefs. In the said suit, Notice of Motion No.902 of 2019 was taken out to restrain the Corporation from acting upon the said notice and the speaking order till the disposal of the suit. The Notice of Motion was resisted by the defendant by filing an affidavit-in-reply.

**7.** By the impugned order, the learned Judge was persuaded to dismiss the Notice of Motion holding *inter alia* that the plaintiff failed to demonstrate that the suit premises has been in existence since prior to the datum line and the fact that the suit premises was not shown as unauthorised in the notice under Section 351 of the Act, 1888 issued in the year 2011, does not operate as an impediment in initiating action against the suit premises in the absence of material to show that the suit structure is either authorised or tolerated.

**8.** Being aggrieved, the plaintiff is in appeal.

**9.** I have heard Mr. Mishra, the learned Counsel for the appellant and Ms. Tondwalkar, the learned Counsel for the respondent, at some length.

**10.** The learned Counsel for the appellant submitted that the learned Judge, City Civil Court, did not properly appreciate the case of the plaintiff. Despite voluminous material to show that the suit premises has been in existence since prior to 1965, and recording a finding that the suit premises was assessed to tax in the year 1965, the learned Judge non-suited the plaintiff for the reason that there was no material to show that the suit premises has been in existence since prior to the datum line. The learned Counsel for the appellant would further urge that the fact that the suit premises was not shown as part of unauthorised structure in the notice issued in the year 2011 was also unjustifiably discarded.

**11.** In opposition to this, the learned Counsel for the respondent – Corporation supported the impugned order. It was submitted that, at best, the existence of the suit structure can be traced to the year 1965. Laying emphasis on the endorsement in the property tax receipt that the suit premises was first assessed on 1st April, 1965, the learned Counsel for the respondent submitted that the learned Judge committed no error in dismissing the Notice of Motion.

**12.** In the notice dated 6th January, 2011 indisputably the suit premises was not shown as a part of the unauthorised structure. The said fact by itself may not be decisive. However, the said fact, if considered in conjunction with the concomitant circumstances, may bear upon the determination of the *prima facie* case, at this stage.

**13.** Indisputably, there are assessment documents, which show that the suit premises was first assessed to tax on 1st April, 1965. The designated officer discarded the tax receipt on the premise that the suit structure, being a commercial structure, its existence prior to 1st April, 1962 ought to have been shown as that is the datum line for the commercial structure. It would be contextually relevant to note that in the registered agreement, under which the plaintiff claimed to have purchased the suit premises, there is a recital to indicate that the suit premises has been in existence since prior to 1965.

**14.** In the face of the aforesaid material, which establishes with an element of certainty that the suit premises has been in existence since 1st April, 1965, the plaintiff could not have been non-suited at an interim stage without providing an opportunity to substantiate the claim at the trial that the suit premises has been in existence since prior to the datum line.

**15.** The learned Judge, City Civil Court, took a very technical view of the matter in returning the finding that since the tax receipt indicates that the suit premises was first assessed to tax on 1st April, 1965, it cannot be said that it had been in existence since prior thereto. The first date of assessment to tax need not be the date from which only the existence of the structure can be inferred. It is not inconceivable that the premises might have been existence even prior to the date of first assessment. In the circumstances of the case, the learned Judge committed an error in recording a finding that no *prima facie* case was made out.

**16.** Since the discretion has not been exercised justifiably in the face of the documents which demonstrate that the suit premises has been in existence at least since 1st April, 1965, the same is required to be corrected in exercise of the appellate jurisdiction. Lest, the plaintiff would suffer an irreparable loss.

**17.** Thus, the following order:

**: O R D E R :**

**(i)** The appeal stands allowed.

**(ii)** The impugned order stands quashed and set aside.

**(iii)** Notice of Motion is made absolute in terms of prayer Clause (a).

**(iv)** In view of the disposal of the appeal, interim application does not survive and stands disposed.

**(v)** In the circumstances of the case, there shall be no order as to costs.

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