

Sayali Upasani

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

**APPEAL FROM ORDER NO.444 OF 2021  
IN  
NOTICE OF MOTION NO.2403 OF 2014  
IN  
L.C. SUIT NO.2466 OF 2014**

|                                                                                         |                                       |
|-----------------------------------------------------------------------------------------|---------------------------------------|
| Omkar s/o Vishvnath Bhaye                                                               | ...Appellant/<br>Org.Plaintiff        |
| <b>Vs.</b>                                                                              |                                       |
| Municipal Corporation of Greater<br>Mumbai, Through Assistant Municipal<br>Commissioner | ...Respondents<br>/Org.<br>Defendants |

Mr. Ashok M. Saraogi, for Appellant.

Ms. Smita Tondwalkar, for Respondent-MCGM.

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

**RESERVED ON:- 15<sup>th</sup> M ARCH, 2023**

**PRONOUNCED ON:- 30<sup>th</sup> MARCH, 2023**

**JUDGMENT:-**

1) This Appeal is directed against an order dated 18<sup>th</sup> November, 2019, passed in Notice of Motion No.3403 of 2014 in L.C. Suit No. 2466 of 2014, passed by the learned

Judge, City Civil Court, Greater Bombay, thereby dismissing the Notice of Motion.

**2)** Background facts leading to this Appeal can be stated as under:-

**(a)** The appellant-plaintiff claims to be the owner of the premises situated at House No.82, Worli, Koliwada, Mumbai (“the suit premises”). It consisted of ground plus two upper floors and it had been in existence since last more than 100 years. A portion of the said building collapsed in the year 2001. The plaintiff was advised to carry out repairs to the rest of the structure, which was standing. Whilst the plaintiff carried out the said repairs, at the behest of Mr. H.R. Bhagat, who claimed to be an heir of one of the tenants in the suit property, the defendant-Corporation issued a notice dated 28<sup>th</sup> August, 2014, purportedly under Section 354 A of the Mumbai Municipal Corporation Act, 1888 (“the Act, 1888”).

**(b)** A reply was given to the said notice on 28<sup>th</sup> August 2014, itself.

(c) Apprehending demolition at the hands of defendant, the plaintiff approached the City Civil Court by filing a suit for declaration that the notice dated 28<sup>th</sup> August, 2014, was bad in law and the defendant had no right to take any action of demolition in respect of suit premises and also to permanently restrain the defendant and its servants and agents from acting upon the notice dated 28<sup>th</sup> August, 2014.

(d) In the said suit, the plaintiff took out a Notice of Motion seeking temporary injunction during the pendency of the suit.

(e) On 10<sup>th</sup> September, 2014, the learned Judge, City Civil Court was persuaded to grant ad-interim relief in favour of the plaintiff by restraining defendant from taking any action on the basis of the notice dated 28<sup>th</sup> August, 2014, as no speaking order was passed by the Designated Officer despite reply to the notice.

(f) Plaintiff asserts without considering the reply, the governing provisions of law, binding decisions of the courts and the circulars issued by the defendant, a speaking order came to be passed on 28<sup>th</sup> October, 2014, by the

Designated Officer. The plaintiff was called upon to remove the unauthorized work, failing which it would be demolished by the defendant. The said speaking order also came to be assailed by carrying out amendment in the Plaintiff and Notice of Motion.

3) The defendant-Corporation resisted the Notice of Motion by filing an affidavit-in-reply. It was, *inter alia*, contended that the plaintiff had instituted Suit No.2388 of 2009, for a declaration that the defendant has no right to cause any obstruction in the plaintiff carrying out repair/renovation/reconstruction in respect of the suit property and the said suit came to be dismissed by judgment and order dated 31<sup>st</sup>October, 2013. Subsequently, a complaint was received that the unauthorized construction was being erected at the suit property. Officers of the defendant visited the suit property and found that the unauthorized construction of B.M. Wall admeasuring 9' in height was in progress. Thus the notice under Section 354 A was served on the plaintiff. Post consideration of the reply, the Designated Officer has

passed the order on 28<sup>th</sup> October, 2014, repelling the objections to the notice. The plaintiff has thus no right to seek temporary injunction.

4) By the impugned order, the learned Judge, City Civil Court was persuaded to reject the Notice of Motion holding, inter alia, that the action of the defendant and the notice issued under Section 354A of the Act, 1888, were in conformity with law. Moreover, the Designated Officer had considered the reply submitted by the plaintiff and passed a reasoned order. The Court noted the photographs tendered for the perusal of the court purportedly snapped on 21<sup>st</sup> July, 2017 and 16<sup>th</sup> August, 2014 revealed that the entire structure had collapsed and foundation of brick masonry wall was being laid, respectively. It was thus concluded that the construction was being carried out sans any permission. Since the construction was not in the nature of tenantable repairs, the plaintiff was not entitled to injunction.

5) Being aggrieved, the plaintiff is in Appeal. By an order dated 22<sup>nd</sup> November, 2021, noting a statement made on

behalf of the appellant-plaintiff that the suit structure had not been demolished, ad-interim relief in terms of the prayer Clause “a” of Interim Application No.3445 of 2019 came to be granted; which continues till date.

6) I have heard Mr. Ashok Saraogi, the learned Counsel for the appellant and Ms. Smita Tondwalkar, the learned Counsel for the respondent-Corporation. I have also perused the material on record including the Plaint, impugned notice, speaking order and the impugned order passed by the learned Judge, City Civil Court.

7) At the outset, Mr. Saraogi submitted that ad-interim protection is in operation since 10<sup>th</sup> November, 2014. The said position, according to Mr. Saraogi, deserves to be continued till the final adjudication of the suit. Mr. Saraogi would further urge that even otherwise the action of defendant is demonstrably in breach of the statutory provisions and binding precedents.

8) Mr. Saraogi urged with a degree of vehemence that the notice under Section 354 A dated 28<sup>th</sup> August, 2014, is as vague as it could be. The only indication in the impugned

notice is that there was unauthorized construction of a brick masonry wall admeasuring 9' in height at the suit property without any further particulars. Plaintiff was simply asked to stop the erection of the said work. The notice, therefore, suffers from the vice of non application of mind, submitted Mr. Saraogi. The order passed by the Designated Authority is equally vague. It was, inter alia, stated therein that the notice under Section 354 A was issued in respect of erection of B.M. Wall and not repairs to the existing structure.

9) Mr. Saraogi further submitted that the confusion is further confounded by an affidavit-in-reply filed on behalf of the defendant-respondent in this Appeal. To the affidavit-in-reply, the defendant has annexed two photographs (Exhibit-4), which indicate that a ground plus two storey structure is erected at the suit property. Purportedly, those photographs have been snapped on 3<sup>rd</sup> March, 2022.

10) It was submitted that there is an essential distinction between the provisions contained in Section 354 A and

Section 351 of the Act, 1888, and the respondent-Corporation can not resort to action by construing those provisions interchangeably.

11) In opposition to this, Mr. Tondwalkar, would urge that the old structure had already collapsed as is evident from the photographs snapped on 21<sup>st</sup> July, 2014 and 16<sup>th</sup> August, 2014. The photographs snapped on 16<sup>th</sup> August, 2014, indicate that a B.M. Wall admeasuring 9' in height was being erected at the suit property. Ms. Tondwalkar would submit that the photographs annexed to the affidavit-in-reply (Exhibit-4) indicate the current state of the structure at the suit property.

12) I have carefully perused the affidavit-in-reply, filed in this Court. Though the photographs are referred to in paragraph No. 8 of the affidavit-in-reply, the deponent has refrained from making a categorical statement that the building has since been erected during the continuation of ad-interim protection.

13) If it is a case of erection of a ground plus two storey building taking advantage on an ad-interim order

restraining the defendant from taking action, in pursuance of the notice issued under Section 354A of the Act, 1888, in respect of a B.M. Wall admeasuring 9' in height only, it is a matter of grave concern. The entire complexion of the dispute gets completely altered. It is trite, a party who has carried out unauthorized construction taking undue advantage of ad-interim or status-quo order would not be entitled to claim any equitable relief. However, at this stage and in this proceedings, the Court is not equipped to deal with this issue as there is not much clarity on facts.

14) The situation is exacerbated by the fact that the plaintiff had approached the Court with a case that a major portion of the building had collapsed and the plaintiff had merely carried out repairs to the remaining structure. In paragraph 5 of the plaint, the plaintiff asserted that as of the date of the suit, the premises consisted of ground floor and even there was no roof over the ground floor structure.

15) In contrast, the photographs placed on record by the respondent-Corporation(Exhibit-4 to the affidavit-in-reply)

indicate that a ground plus two storey structure stands at the suit property.

16) Conversely, since the impugned notice was in respect of unauthorized erection of a brick masonry wall admeasuring 9' in height only, the respondent-Corporation would not be now in a position to take action on the strength of the said notice alone. If unauthorized construction has been carried out at the suit property, as is alleged on behalf of the Corporation, appropriate action under Section 351 of the Act, 1888, would be warranted. The provisions contained in Section 354 A of the Act, 1888, can not be legitimately resorted to, to support an action of demolition of unauthorizedly erected structure, at a distant point of time; which would be amenable to action of Section 351 of the Act, 1888.

17) The provisions of Sections 351 and 354 A of the Act, 1888, deal with different situations. In the case of **Muni Suvrat-Swami Jain S.M.P. Sangh Vs. Arun Nathuram Gaikwad and Others**<sup>1</sup>, explaining interplay between

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<sup>1</sup> (2006) 8 SCC 590

Sections 351 and 354 A of the Act, 1888, the Supreme Court enunciated that the provisions of Section 354 A have nothing to do with the question of demolition.

18) It seems that when the impugned order was passed, the learned Judge, City Civil Court was not apprised of the aforesaid developments. It would, therefore, be necessary to remit the Notice of Motion back to the learned Judge, City Civil Court with a direction to appoint a Court Commissioner, preferably an architect, to ascertain as to whether the building as shown in the photographs (Exhibit-4 to the affidavit-in-reply) is, in fact, erected at the suit site and, if yes, the approximate period during which the said building has been erected.

19) It would also be appropriate to grant liberty to respondent-Corporation to take appropriate action and/or file appropriate application before the City Civil Court and seek remedies, if it turns out that the building has been erected sans requisite permission of the Planning Authority and taking undue advantage of the ad-interim order.

20) Hence, the following order.

**:-ORDER:-**

- (i) The Appeal stands partly allowed.
- (ii) The impugned order stands quashed and set aside.
- (iii) Notice of Motion is restored to the file of learned Judge, City Civil Court.
- (iv) The learned Judge, City Civil Court shall appoint a Court Commissioner, preferably an architect, to ascertain as to whether a building (as shown in the photographs, Exhibit-4, to the affidavit-in-reply filed by the respondent in this Court) has been erected at the suit property, and, if yes, the approximate period during which the said building has been erected.
- (v) The plaintiff shall bear the expenses of commission.
- (vi) The learned Judge, City Civil Court shall decide the Notice of Motion afresh post report of the Court

Commissioner and after providing an opportunity of hearing to the parties.

(vii) The respondent-Corporation is at liberty to take appropriate action and/or file application and seek the remedies available in law, if it turns out that the building has been erected at the suit property sans permission and during the pendency of the Notice of Motion.

(viii) Till a fresh decision on the Notice of Motion, the ad-interim protection qua the impugned notice dated 28<sup>th</sup> August, 2014, and the speaking order dated 28<sup>th</sup> October, 2014, shall continue to operate.

No costs.

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