

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

**CIVIL APPLICATION NO.1426 OF 2012
IN
FIRST APPEAL NO.419 OF 2014**

Digitally
signed by
BALAJI
GOVINDRAO
PANCHAL
Date:
2024.04.23
10:16:14
+0530

Dinesh Rampyare Dube & Anr. ..Applicants
Versus
The Municipal Corporation of Gr. Bombay & Ors. ..Respondents

Mr. V. K. Gupta, for the Applicants.
Mr. Santosh Parad, for the Respondent/MCGM.
Ms. Henna P. Shah a/w Palak Ranka, for the Respondent No.4.

CORAM : KISHORE C. SANT, J.

DATE : 17th APRIL, 2024

PC.

1. Heard the parties.
2. This Application is filed by original plaintiffs who have challenged the order of dismissal of suit by filing an Appeal. The plaintiffs claimed to be tenants in the suit structure inducted by landlords/defendant Nos.2 and 3. Plaintiffs sought relief of declaration and injunction. The cause of action was stated to be a notice dated 09.08.2000 issued by the Corporation under Section 351 of the Mumbai Municipal Corporation Act and the order dated 02.09.2000.
3. It is the case of the plaintiffs that the predecessor-in-title

of the plaintiffs was inducted by the landlord/ defendant Nos.2 and 3 in cabin No.1 of 9 X 5 ft. on the backside of the building of defendant No.4 co-operative society, namely Lalmani Co-operative Housing Society Ltd. That on the basis of complaints made by the society to the Corporation, the Corporation issued notices and the same came to be challenged. In support of the case, plaintiffs relied upon notice issued by the Corporation dated 09.08.2000 to the original plaintiff and defendant No.2 as owner for removal of unauthorized structure i.e. suit stall. Plaintiffs also relied upon the assessment order by the Corporation. Thus, it is the case that Plaintiffs are in authorized possession of the suit stall. The land is owned by the owner and not by the society and the stall is situated on the backside of the society's building, however, in the compound of the society. It is further claimed that only because of the complaints of the society the notice is issued under Section 351 of the Mumbai Municipal Corporation Act.

4. Learned advocate for the Applicants in support of the Application argued all above facts and stated that during the pendency of the suit i.e. Suit No.5276 of 2000, the interim relief was there all throughout. Even after filing of this Appeal, possession is protected by way of ad-interim relief since 2012. He thus submits that equity requires to protect the possession of the plaintiffs. Learned advocate for Respondent No.4 relies upon the order passed by this Court in Appeal from Order No.8 of 2021 along with Interim Application No.69 of 2021 along with Interim Application Stamp

No.603 of 2021 in the case of ***Shantilal Chhogalalji Doshi Vs. Municipal Corporation of Greater Bombay & Anr.*** This Court in the said order has quoted paragraphs 30, 31, 32 & 33 from the judgment in the case of ***Seema Arshad Zaheer & Ors. Vs. MCGM & Ors.*** reported in ***(2006) 5 SCC 282.***

5. Learned advocate for the Respondent No.4 vehemently opposes the Application. She submits that the Court has categorically held that the plaintiffs have failed to show that the construction of the stall is legal and that the plaintiff was validly inducted as a tenant. She further points out that the Court has also recorded that there is no evidence to show that the person who inducted the plaintiff in the suit stall is having no right over the land. She submits that the entire land is of the society, which is formed in the year 1995. She further argued that there cannot be legal right of illegally inducted tenant in unauthorized structure.

6. Learned advocate for the Respondent No.1/Corporation also vehemently opposes the Application.

7. This Court has considered the submissions of learned advocates.

8. About the facts which are stated above, there is no dispute. This Court has only to see as to whether the Applicants have established *prima-facie* legal right to occupy the suit stall. For that, it is necessary to see as to whether there is any legal right

vested in the Applicants/plaintiffs. Though it is argued that there are various receipts issued by the landlord in favour of the plaintiff, it needs to be seen as to whether the alleged landlord has proved any right over the land. In the Trial Court the landlord didn't appear and thus there is no question to prove his legal right over the property. When the landlord is not proved to be legal owner, there is no question of recognizing any right of the plaintiff on the basis of receipts issued by the so called landlord. There is nothing to show that the stall in question is standing there prior to datum line i.e. 1961. Admittedly, the plaintiff is also inducted somewhere in 1990. Thus, there is no question of recognition of the suit structure. There is no question of creating valid tenancy by landlord who himself does not have any title to the property. So, the rent receipts issued by the landlord will not be helpful to the Applicants. The next question that would fall for consideration as, whether to allow the application merely because there was ad-interim relief running in favour of the Applicants since 2014. It is seen that while granting ad-interim relief, other side was not heard and no full hearing was given. It is only because Trial Court had extended interim relief, the same is continued. While granting first order, only defendant No.1/ Corporation was before the Court and though there was service, other Respondent i.e. society was not before the Court. The fact remains that there was no representation when the ad-interim relief was passed.

9. At this stage, it would be material to see paragraphs 30

to 33 from the judgment in the case of ***Seema Arshad Zaheer (cited supra)***, which is reproduced below :-

“30. The discretion of the court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff : (i) existence of a prima facie case as pleaded, necessitating protection of the plaintiff's rights by issue of a temporary injunction; (ii) when the need for protection of plaintiff's rights is compared with or weighed against the need for protection of defendant's rights or likely infringement of defendant's rights, the balance of convenience tilting in favour of plaintiff; and (iii) clear possibility of irreparable injury being caused to plaintiff if the temporary injunction is not granted. In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff's conduct is free from blame and he approaches the court with clean hands.

31. It is true that in cases relating to orders for demolition of buildings, irreparable loss may occur if the structure is demolished even before trial, and an opportunity to establish by evidence that the structure was authorised and not illegal. In such cases, where prima facie case is made out, the balance of convenience automatically tilts in favour of plaintiff and a temporary injunction will be issued to preserve status quo. But where the plaintiffs do not make out a prima facie case for grant of an injunction and the documents produced clearly show that the structures are unauthorised, the court may not grant a temporary injunction merely on the ground of sympathy or hardship. To grant a temporary injunction, where the structure is clearly unauthorised and the final order passed by the Commissioner (of the Corporation) after considering the entire material directing demolition, is not shown to suffer from any infirmity, would be to encourage and perpetuate an illegality. We may refer to the following observations of this Court in *M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu* [1999 (6) SCC 464] made in a different context : (SCC p.529, para 73).

"This Court in numerous decisions has held that no

consideration should be shown to the builder or any other person where construction is unauthorised. This dicta is now almost bordering the rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in moulding the relief. Such a discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorised construction, if it is illegal and cannot be compounded, has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing the robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is requires to be exercised has to be in accordance with law and set legal principles."+

32. Where the lower court acts arbitrarily, capriciously or perversely in the exercise of its discretion, the appellate court will interfere. Exercise of discretion by granting a temporary injunction when there is 'no material', or refusing to grant a temporary injunction by ignoring the relevant documents produced, are instances of action which are termed as arbitrary, capricious or perverse. When we refer to acting on 'no material' (similar to 'no evidence'), we refer not only to cases where there are total dearth of material, but also to cases where there is no relevant material or where the material, taken as a whole, is not reasonably capable of supporting the exercise of discretion. In this case, there was 'no material' to make out a prima facie case and therefore, the High Court in its appellate jurisdiction, was justified in interfering in the matter and vacating the temporary injunction granted by the trial court.

33. We find no reason to interfere with the order of the High Court in the seven appeals. We accordingly dismiss these SLPs. as having no merit. The petitioners are granted 15 days time to make alternative arrangements. Parties to bear their respective costs."

10. Today, all the parties argued application on merits. This

Court has also considered the reply of the Corporation. Thus, considering all these above aspects and in view of the observations of the Hon'ble Apex Court in paragraph 30 in the case of ***Seema Arshad Zaheere (cited supra)***, this Court is not convinced with the arguments of the plaintiffs.

11. The Application therefore deserves to be dismissed and same is dismissed.

12. At this stage, learned advocate for the Applicants prays for eight weeks time.

13. Learned advocate for the Respondent No.4 opposes the said prayer. However, considering that ad-interim is running since 2014, it would be desirable to stay effect of this order for eight weeks.

[KISHORE C. SANT, J.]

Corrected pursuant to speaking to minutes of order dt. 22.04.2024.