

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

**APPEAL FROM ORDER NO. 28 OF 2024
WITH
INTERIM APPLICATION NO. 327 OF 2024
IN
APPEAL FROM ORDER NO. 28 OF 2024**

Kitabullah Khan
Age 83 years, Occ.Business
Residing at Room No.4, Madni Estate,
Goregaon Link Road, Mulund (West),
Mumbai-400078.

... Appellant/Applicant

v/s.

The Mumbai Municipal Corporation
of Greater Mumbai
a Statutory body established under the
provisions of Mumbai Municipal Corporation
Act, 1888, having their
Head office at Mahapalika Building,
Mahapalika Marg, Fort, Mumbai-400001
Through the Asst. Engineer (B & F)
“T” Ward, Mumbai.

... Respondent

Mr. S.C. Naidu a/w. Ms. Megha Shigavan and Ms. Kajal Chourasia,
Ms. Divya Yajurvedi a/w. Mr. Pradeep Kumar for the Appellant.
Mr. Anil Singh, Sr. Advocate with Ms. Seena Rawade for the
Respondent-MCGM.

CORAM: SHYAM C. CHANDAK, J.

**RESERVED ON: 23rd OCTOBER, 2024.
PRONOUNCED ON: 22nd NOVEMBER, 2024.**

JUDGMENT

. Aggrieved and dissatisfied with the impugned Order dated 13th December 2023, passed by the learned Ad-hoc Judge, Bombay City Civil Court, at Greater Mumbai in Notice of Motion No.2000 of 2018 in L.C. Suit No. 1995 of 2018, the original Plaintiff has preferred this Appeal, to quash and set aside the said impugned Order.

2) Heard learned Counsel Mr.Naidu for the Appellant and learned Senior Counsel Mr. Anil Singh for the Respondent.

3) **Rule.** Rule made returnable forthwith. Heard finally with the consent of the parties. (Hereinafter, the parties are being referred to by their original status in the trial Court i.e. Appellant as ‘Plaintiff’ and Respondent as ‘Defendant’.)

4) The case of the Plaintiff is that, he is owner of the suit structure namely ‘Supreme Stone’ and running a marble stone business there. The suit structure is ad-measuring 700 sq.ft. with AC Sheet roof having iron angle frame up-to the height of 8 ft. on the right side of the structure, B.M.Wall at left side, collapsible/channel shutter to the front and 3 feet B.M.wall at the rear side. That on 13th December, 2005 the Defendant had granted a permission to repair the suit structure. The suit structure is adjacent to a shop namely ‘Care and Cure Clinic’ and it is situated at LBS Road, Mulund (West),

Survey No. 67 (P) and CTS No. 723 of Nahur Village, Taluka Kurla, B.S.D., Mumbai. The Plaintiff alongwith others had purchased the land in the year 1995 where the suit structure is situated along with a structure admeasuring 1400 sq.yds., equivalent to 1220.72 sq. meters, by a registered Deed of Conveyance. The Plaintiff averred that, since then he is in possession and use of the suit structure. The Plaintiff is having an electricity connection at the suit structure. However, in the month of January 2018, the Plaintiff received a notice bearing No.T/DO2T/108/351-MMC ACT/T25No1/31-01-2018, issued by the Defendant under Section 351 of the Mumbai Municipal Corporation Act, 1888 (For short 'MMC Act'). The notice alleged that the Plaintiff has unauthorisedly constructed the suit structure. Immediately, the Plaintiff gave his reply dated 8th February 2018, to the said notice. However, the Defendant passed the speaking/demolition Order dated 27th April, 2018 and served it upon the Plaintiff on 17th May, 2018. Hence, Plaintiff filed the said suit and challenged the said notice as well as the demolition Order dated 27th April 2018. The said Notice of Motion No.2000/2018 was filed along with the suit, seeking for temporary injunction under Order 39 Rule 1 of the Code of Civil Procedure, thereby restraining the Defendant from demolishing the suit/notice structure.

5) The Plaintiff averred that the notice structure is an authorised structure. Said fact is reflecting from the Shop and Establishment Certificate and the Trade licence, issued by the Defendant. The area of the suit structure is stated in the Trade licence. However, the Defendant did not considered these documents. It is averred that the suit structure is totally different than the structure described in the impugned notice. That the Plaintiff never carried out an unauthorised construction and/or addition to the existing suit structure. Therefore, the impugned notice and the Speaking Order is illegal. According to the Plaintiff, there is a *prima facie* case and balance of convenience in his favour. Hence, if an injunction is refused an irreparable loss would occur to the Plaintiff. Therefore, it was prayed to restrain the defendant by way of temporary injunction from acting upon the said notice and the speaking Order, during the pendency of the suit.

6) The Defendant resisted the Notice of Motion by filing the reply. The Defendant at the outset contended that the suit is not maintainable, for the Plaintiff failed to give a prior statutory notice to the Defendant under Section 527 of the MMC Act. The Plaintiff has not given necessary description of the suit property to identify it, hence, the suit is liable to be dismissed under Order-VII Rule 3 of the

Code of Civil Procedure. The subject notice under Section 351 and the subsequent Speaking Order is an executive or administration act or an Order, therefore, the same is not open to challenge in the Court of law in view of the provisions of Section 515 (A) of the Act. Therefore, the trial Court has no jurisdiction to try and entertain the suit. It is contended that the Plaintiff has not come to the Court with clean hands. Not a single document is placed on record to prove the legality of the suit structure. As such the suit structure is unauthorised and the Plaintiff is not entitled for the relief of injunction. It is contended that after serving the Speaking Order upon the Plaintiff on 17th May, 2018 the Plaintiff has taken out the Notice of Motion on 28th May, 2018. On that date, the trial Court recorded that the notice structure was partly demolished and directed to maintain a status quo as per the photographs. However, it is contended that, meanwhile, the suit structure was demolished on 26th May, 2018. It is contended that the Plaintiff has not proved the legality of the suit structure and therefore, the Defendant has demolished the suit structure by following due process of law. The plaint does not disclose any cause of action. In the backdrop, the defendant prayed for dismissal of the Notice of Motion.

7) After considering the rival submissions in the light of pleadings by the parties and the documents relied upon in support of

their pleadings, the learned Judge of the trial Court held that, none of the documents produced by the Plaintiff proved the legality/authenticity of the suit structure. That, the Defendant-B.M.C. has filed an additional affidavit of Mr. Barwade, Junior Engineer of T-ward, wherein it is stated that the Defendant has removed the structure on 26th May, 2018. The photographs submitted by the Defendant taken on 26th May 2018, show that the suit structure has been completely demolished by the Defendant. The Plaintiff has not filed a counter affidavit and denied the contentions made in the said additional affidavit. However, the Plaintiff reconstructed the structure, without permission or order from the Court. That, the Plaintiff has suppressed the said fact from this Court.

7.1) The trial Court held that, the Index-II relied by the Plaintiff shows that the Plaintiff had purchased the suit property as stated above. However, there is no reference of the area and description of structure in the said Index-II. That, the Index-II cannot be said to be a document proving legality of a structure.

7.2) The trial Court held that the Plaintiff has not produced a single document to show that the suit structure has been constructed with permission of the Defendant or it is in existence since prior to the datum line or protected under the Slum Act. The fact of issuance

of the Shop and Establishment Certificate does not make the suit structure authorised. The Plaintiff has not produced photographs with date to show that the Defendant has demolished the notice structure partly. Hence, the Plaintiff is not entitled for equitable relief of injunction. As a result the Notice of Motion has been rejected answering the three aspects i.e. *prima facie* case, balance of convenience and irreparable loss against the Plaintiff, in negative. Hence, this Appeal.

8) Mr. Naidu, the learned Counsel for Plaintiff submitted that the suit structure is owned by the Plaintiff and it has been in existence as averred in the plaint. Said fact is evident from various documents relied by the Plaintiff in support of the suit. The Judgment and Decree in the earlier Long Cause Suit No.759/2011, filed by the Plaintiff clearly indicates that the suit/notice structure has been in existence since the time of the aforesaid 'Deed of Conveyance'. The said Judgment and Decree in the earlier suit has become final.

8.1) Mr. Naidu, submitted that the entire action issuing the subject notice under Section 351 of the Act and passing of the speaking order is at the instance of a private complaint dated 30th January 2018, filed by M/s.Nirmal Life Style. Said complaint was immediately followed by an inspection of the suit structure on 31st

January 2018. On the same day of inspection the notice under Section 351 of the Act, came to be issued. The Plaintiff promptly responded the notice by his reply dated 8th February 2018. However, the speaking Order came to be passed on 27th April 2018, and served upon the Plaintiff on 17th May 2018. Immediately, the Plaintiff filed the said suit on Monday i.e. 28th May 2018, giving necessary advance private notice of the suit to the Defendant, due to Summer Vacations. However, the Defendant came at the suit structure site on 26th May 2018, for demolition. Therefore, the Appellant could only resist the demolition confronting a circular of March 2006 to the demolition team and the police present with that team. Thereafter, an interim Order was passed by the trial Court on 28th May 2018. Meanwhile, M/s. Nirmal Lifestyle filed a Chamber Summons to add it as party to the Suit. It was allowed by the trial Court by Order dated 27th April, 2018. That Order was set aside by this Court in W.P.No. 8690/2018 with W.P.No. 8702/2018 filed by the Plaintiff *vide* Order dated 17th July, 2023. However, in the said Writ Petitions, there was no slightest whisper by the Defendant that the suit structure was completely demolished. It appears from the aforesaid Order passed by this Court that the suit structure is in existence.

8.2) Mr. Naidu submitted that the photo uploaded along with

the inspection report on the official website of the Defendant and the photo dated 9th October 2023 produced on record, are identical. There is nothing in the said photos based on which it can be opined that, the suit structure was demolished or partly demolished on 26th May, 2018. Another photo relied by the Defendant does not show that it relates to the suit property. Mr. Singh, the learned Counsel for the Defendant conceded the aforesaid photos. Yet, the trial Court held that the said photos evinced that the suit structure was demolished on 26th May, 2028. There is no contention that the debris of the demolished suit structure were removed by the Defendant and latter on the Plaintiff was charged for the same. There is no notice under Section 354 of the Act. Therefore, there is no substance in the claim of the Defendant that the suit structure is unauthorised one and it has been demolished but again constructed in a short time. However, the trial Court completely misread the documents and photos on record. Ultimately, it led the trial Court to reject the Notice of Motion, which is illegal. Hence, said Order is liable to be quashed and set aside and Notice of Motion be allowed as prayed for.

9) Per contra, Mr. Singh, learned Senior Counsel for the Defendant emphatically submitted that there is no mention of the previous suit and its outcome in the reply to the notice under Section

351 of Act and in the plaint. The suit has been filed on 28th May 2018. Admittedly, the demolition team had acted against the suit structure on 26th May, 2018. There is no specific averment in the plaint that the suit structure was not demolished or it was only partly demolished. However, the *Roznama* dated 28th May, 2018 has clearly noted that according to the statement of the Plaintiff, by that date the suit structure was partly demolished. But in fact, there was complete demolition of the suit structure by following the due process of law. Said fact of demolition was clearly stated in the affidavit-in-reply and the additional affidavit filed by the Defendant. Said fact can be also seen from the photo enclosed with the additional affidavit. However, the fact of demolition of suit structure is suppressed by the Plaintiff. Thereafter, the Plaintiff raised the new structure at the suit site without obtaining prior permission of the Court or the Defendant. There is no rejoinder to the affidavits of the Defendant contending that the suit structure was not demolished and nor it is reconstructed. All the documents produced by the parties were duly considered by the trial Court before passing the impugned Order. As such, there is nothing wrong or illegal in the impugned order which rejected the Notice of Motion. There is no ground in the Appeal that the suit structure is not demolished or only partly demolished. Thus,

there is no substance in the Appeal and the Appeal be dismissed.

10) In view of the rival submissions, I have carefully considered the material on record. The first controversy is that, the suit structure is unauthorised. In this regard the 'Deed of Conveyance' dated 16th September, 1995, the Index-II and other documents relied upon by the Plaintiff clearly indicate that the Plaintiff along with others had purchased the structure stated therein.

11) Secondly, the Plaintiff has specifically averred that the suit structure is a part of the entire structure purchased under the said 'Deed of Conveyance'. The trade licence (Exhibit-E) issued in the name of the Plaintiff by the Defendant under Section 394 of the Act clearly mention that the dimensions of the related structure is 112.15 sq. meters, which is equivalent to 1207.172 sq. ft. The Plaintiff claims that, out of the said 1207.172 sq. ft. area, the suit structure is admeasuring 700 sq. ft. This area and the area of the suit structure stated in the impugned notice under Section 351, is matching.

12) According to the Plaintiff, he has been running a granite stone shop at the suit structure. The documents produced by the Plaintiff, such as Electricity bill, the Shop and Establishment Act licence and the Trade licence issued under Section 394 of the Act clearly indicate that, since beginning, there has been a certain

structure at the suit site and there, the Plaintiff has been running his said business. The Defendant has not disputed the dimensions of the structure stated in the Trade licence. Similarly, the defendant has not denied that it had granted a permission to repair the suit structure. Said fact is evident from the Judgment in the earlier suit. However, the defendant has not explained as to why it issued the said licences and permission to the repair if the suit structure was unauthorised.

13) The Judgment and Decree passed in said L.C. Suit No.759/2011 clearly recorded that, in February 2009, the Defendant had issued a notice under Section 351 of the Act in respect of the same suit structure and the adjacent structure admeasuring about 500 square feet, claiming it to be an unauthorised construction. However, the trial Court held that, the structure in the notice of February, 2009 is not proved to be an unauthorised one. This Judgment and Decree is not appealed against, and it has attained finality. As such, the Plaintiff has made out a *prima facie* case that the suit structure has been in existence since he purchased the same under the said 'Deed of Conveyance'. The Defendant has not pointed out any material on record to demonstrate that the Plaintiff has added some portion to the suit structure or substantially altered it without prior permission of the Defendant. Hence, I find it difficult to be in unison with the

subject notice issued by the Defendant under Section 351 of the Act.

14) The second controversy is that, according to the Defendant pursuant to the speaking Order the demolition team of the Defendant demolished the suit structure on 26th May, 2018. However, the Plaintiff claims that, the said team could demolish only a minuscule part of the suit structure as immediately, the Plaintiff showed to that team the circular of March, 2006 and caused them to stop the demolition.

14.1) In this context it is significant to note that, after inspection of the suit structure on 31st January 2018, the Defendant uploaded the inspection report along with the photo of the suit structure, on the official website of the Defendant. Said photo along with the inspection report is produced in this Appeal by the Plaintiff. One photo dated 9th October, 2023 of the suit structure is produced on record. On comparison of both the photos, it is evident that the structure seen in both the photos is the same. Even the structure adjacent to the left of the suit structure seen in the said photos, appears same. However, the subsequent photo dated 9th October, 2023 hardly show any sign of complete demolition of the said structure. Needless to state that once an old structure is demolished, then it is difficult to reconstruct it as it was, in a short time. If indeed

the suit structure was demolished on 26th May, 2018, then certainly some part of the said adjacent structure would have suffered some damage. But it is not the case that the said adjacent structure received some damage during the demolition action.

14.2) No doubt one photo produced in this Appeal by the Defendant shows that some scrap material is lying at some site with a damaged tin structure. This photo bears the particulars i.e., name of the suit structure 'Supreme Stone', Demolition Date 26th May, 2018 and the impugned notice No. However, from the said particulars it is difficult to understand that said photo is of the suit structure site, it is of the suit structure and indeed it was taken on 26th May, 2018. On the contrary, *prima facie* it appears that the said photo has been edited subsequently to put the said particulars on it. This inference is possible because same photo enclosed with the inspection report does not bear such particulars. This alleged photo of the demolition of the suit structure does not cover the structures adjacent to the suit structure. The Defendant has not produced any photo of the actual demolition of the suit structure. There is no document showing that after the demolition the debris were disposed of by the Defendant at the cost of the Plaintiff. As such, it is difficult to hold that said photo is of the demolished suit structure. Therefore, only on the strength of

the affidavits in reply, it is difficult to hold the contention of the Defendant that on 26th May, 2018 the suit structure was completely demolished.

15) In support of his submission that the suit structure suffered only a minuscule damage in the demolition action, the learned Advocate Mr. Naidu heavily relied on the Circular of March, 2006 and submitted that, the Plaintiff immediately showed that Circular to the demolition team, hence, the said team stopped the demolition. There are various instructions in this Circular. The relevant instruction Nos. 9, 10 and 12 therein reads as under.

“9. It is observed in many case where the complaints of unauthorised construction either under progress or completed are received from elected representatives, the general public or through the concerned Zonal D.M.Cs, Addl. M.Cs, M.C. etc., prompt action is not taken by the Ward Office. In all such cases, action should be initiated immediately and a reply should go to the concerned officer or the complainant as the case may be within 15 days from the receipt of complaint indicating the action taken. Where action is being taken a further reply should be sent after completion of the action. In case where there is any court injunction the necessary details of the court case and with the period for which court stay is granted, if any etc., be communicated to such complainant.

10. To recover the cost incurred for detection, serving of notice, demolition, transporting materials, demurrage etc., it is

necessary to issue a notice of demand to the party concerned immediately after demolition in case the demolition cost is not sufficiently recovered from the building materials so seized.

12. Whenever any Notice is received from the party or his advocate about moving the Hon'ble Court for obtaining interim, ad-interim orders on the same day or the next day, ordinarily the action of demolition should be postponed by 48 hours excluding holidays to give an opportunity and fair chance to the party to get their grievance redressed before the Hon'ble Court. The party may be informed that if no restraining order is served on the concerned officer within 48 hours from the receipt of such notice, the concerned department shall proceed with its demolition action without any further notice."

15.1) In this context, Mr. Naidu submitted that the Plaintiff has filed the suit on 28th May, 2018 after giving an advance notice to the Defendant on 25th May, 2018, as there were summer vacations to the trial Court. However, the demolition team came to the suit structure site on a holiday i.e., Saturday 26th May, 2018 for the demolition action. The Defendant did not communicate to the complainant the Judgment and Decree in the earlier suit. As held by the Apex Court in the decision between ***State of Kerala and Ors. Vs. Kurian Abraham Pvt. Ltd. and Ors.***¹ cited by Mr.Naidu, the said Circular being issued by the Corporation, the Defendant should abide by that Circular.

1. (2008) 3 SCC 582.

15.2) It is pertinent to note that, when the trial Court granted an ad-interim relief i.e. ‘status quo’ on 28th May 2018, the Defendant did not challenge the same. The said Order only noted that, the suit structure was partly demolished but the exact demolition was not measured. As such, besides the affidavit it was for the defendant to bring on record some more material to show that the statement made by the Plaintiff as to partly demolition, was incorrect. That apart, the Order of this Court passed in the W.P. Nos.8690/2018 and 8702/2018 clearly indicates that, during hearing of the said Petitions the Complainant only argued that the suit structure is illegal and unauthorized. However, nowhere this Order mentions that, the Defendant had contended before this Court that the suit structure was completely demolished. If indeed the suit structure was completely demolished by the Defendant, there was no need for the Complainant to seek from the trial Court for his impleadment as party to the suit because with the demolition of the suit structure the purpose behind his Complaint was served.

16) Mr. Singh, learned Senior Counsel for the Defendant has relied on a decision of the Hon’ble Supreme Court in ***Dalip Singh Vs. State of Uttar Pradesh and Others***² wherein it is held that, “... *The materialism has overshadowed the old ethos and the quest for*”
 2. (2012) 2 SCC 114.

personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.” Further Mr. Singh cited a decision of the Apex Court between ***Bhaskar Laxman Jadhav and Others Vs. Karamveer Kakasaheb Wagh Education Society and Others***³, wherein in paragraph 44 it is held that, “*It is not for a litigant to decide what fact is material for adjudicating a case and what is not material. It is the obligation of a litigant to disclose all the facts of a case and leave the decision-making to the court.*” Lastly, Mr. Singh gave a reference of a decision of the Hon’ble Supreme Court in between ***Modern Insulators Ltd. Vs. Oriental Insurance Co. Ltd.***⁴, wherein it is held that, “*..... It is a settled position of law that in an appeal the parties cannot urge new facts.*”

16.1) However, considering the facts of the case in hand, the aforesaid decision cannot be applied here. Because, firstly, the Plaintiff is not guilty of suppression of fact/s. Secondly, the Plaintiff has not raised any ground which is not part of the pleading or grounds in the Appeal memo.

17) The upshot of the above discussion is that the Plaintiff has made out a *prima facie* case that the suit structure is in existence

3. (2013) 11 SCC 531.

4. (2000) 2 SCC 734.

since before. The Defendant could not demonstrate that, the suit structure is illegal or unauthorized. Considering the documents of the shop of the Plaintiff and the Judgment in the earlier suit, balance of convenience is in favour of the Plaintiff. As such, if an injunction is not granted, only Plaintiff will have to suffer an irreparable loss as his business would be stopped, which is a source of his bread and butter. However, the trial Court did not consider the facts of the case and the documents relied by the parties in a manner required in law, which ultimately resulted in erroneous rejection of the Notice of Motion. As a result, the impugned Order needs to be interfered with.

18) Thus, the impugned Order is liable to be quashed and set aside. The Appeal from Order succeeds, accordingly. Hence, following Order is passed.

- ORDER -

- (i) The Appeal from Order is allowed.
- (ii) The impugned Order dated 13th December 2023, passed by the learned Ad-hoc Judge, Bombay City Civil Court, at Greater Mumbai, in Notice of Motion No.2000 of 2018 in L.C. Suit No. 1995 of 2018 is quashed and set aside.
- (iii) The Notice of Motion No.2000 of 2018 in L.C. Suit

No. 1995 of 2018 is allowed and pending the said suit, there shall be an injunction in terms of prayer clause (a) in the said Notice of Motion.

(iv) The trial Court to decide the said suit on its own merit, without getting influenced by the aforesaid Observations in this Order.

(v) Appeal from Order is disposed of in aforesaid terms. Rule is made absolute.

(vi) Parties to bear their own costs.

19. As a result, Interim Application No.327 of 2024 does not survive and it stands disposed of, accordingly.

(SHYAM C. CHANDAK, J.)