

(2015) 10 BOM CK 0147

In the Bombay High Court

Case No : Appeal From Order No. 125 of 2015 in Notice of Motion No. 2677 of 2014 in S.C. Suit No. 2479 of 2014

Crescent Amity Realtors Pvt. Ltd.

APPELLANT

Vs

Chhaya Anant Gavankar and Others

RESPONDENT

Date of Decision : 26-10-2015

Acts Referred:

Mumbai Municipal Corporation Act, 1888 — Section 351

Citation : (2015) 10 BOM CK 0147

Hon'ble Judges : R.S. Dalvi, J.

Bench : Single Bench

Advocate : Anuj Narula i/b. Jhangiani Narula and Associates, for the Appellant;
Y.K. Tiwari i/b. K.P. Tiwari and Co., for the Respondent

Judgement

R.S. Dalvi, J.

Rule. Returnable forthwith.

1. The appellant filed a caveat in the Bombay City Civil Court in respect of the property concerned in the suit. It is allowed to be heard pursuant to the caveat. It claims to be a party defendant in the suit. It is shown as the "original defendant". However the legal process for bringing the appellant on record is stated not to have been initiated in the suit. That, of course, would be taken care of in the suit in the trial Court.

2. The appellant has challenged the order of the Bombay City Civil Court dated 3rd December, 2014 directing parties to maintain status-quo in respect of the suit premises till the next date of the notice of motion taken out in the trial Court. That is an ad-interim order. The appellant claims that the impugned order is wholly illegal and incorrect.

3. The impugned order is in respect of a structure bearing No.PX-31 admeasuring 17ft x 12 ft of BM walls and AC sheet roof with an otla adjacent thereto. The MMC has issued notice under Section 351 in respect of the suit structure as an

unauthorised construction. The respondent No. 1 who was the plaintiff in the suit has replied to the notice. The MMC has considered the reply and passed its order. That order was challenged in the suit.

4. The plaintiff who sues must make out a prima facie case when notice is issued for a structure under Section 351 of the MMC Act. The plaintiff must make out a prima facie case that the structure is authorised or tolerable to be entitled to any relief. It matters not that the relief is to be granted for short or a long duration. It also matters not that the relief is granted as an ad-interim or interim relief. The parameters of the prima facie case which is required to be made out are not different in an ad-interim or an interim application. Prima facie means "on the face of". The legal meaning of prima facie in Black's Law Dictionary 11th Edition at page 1228 is: "at first sight"; on first appearance, subject to further evidence or information.

5. Prima facie case is defined in the said dictionary as: party's production of enough evidence to allow the fact-trier to enter the fact at issue and rule in the party's favour.

6. Hence on the first date of hearing for any ad-interim application the plaintiff must show from the plaint itself and from the documents relied upon in the plaint as seen from the face of the documents a case made out by the plaintiff. This would not take into account any defence thereto.

7. To challenge a notice under Section 351 of the MMC Act the plaintiff must show by documentary evidence the fact that the suit structure is authorised or tolerable. Hence the plaintiff must produce sanctioned plans of the MMC to show the authorisation or documents of the plaintiff to show the structure being in existence prior to the datum line.

8. For any structure the initial datum line is of 1962/1964. If a structure is in a slum it would be 1995. If the structure is on Government land it would be of 1995.

9. The suit structure is not in a slum. The plaintiff has not shown the suit structure in any slum. The suit plot of land on CTS No. 214 shows only 2 structures constructed by a single person and tenanted to the plaintiff. One of them was a temple and the other was a residential room.

10. The temple structure has been considered in a previous litigation. The temple has been shifted to the Eastern side of the plot of land. The room has remained. The room is the suit structure.

11. The plaintiff has sought to show that there were a number of other structures surrounding the plaintiff's structure. Counsel on behalf of the plaintiff produced a City Survey Plan. The plan shows several structures. They were indeed on CTS No. 214. All the structures have been removed and the appellant is carrying on the development of the plot and the construction of a building thereon. The plaintiff's structure is only structure that has remained. It is in the midst of the

construction.

12. The structure is not constructed under any sanctioned plan. Hence it can only be at best a tolerable structure. If it is a tolerable structure it would have to be in existence prior to 1964. If it is shown to be tolerated it cannot be demolished even for the development of the plot and construction except upon offering the plaintiff any alternate accommodation as has been done with the other structures. If it is not a tolerable structure it would require to be demolished as per the notice of the MMC issued under section 351 upon which due legal process has been followed and which has been completed by considering the plaintiff's reply and passing the order of the MMC, which is challenged in the suit.

13. Hence what has to be seen is the tolerance of the plaintiff's structure. The plaintiff has produced various documents. The earliest of the document are of 1984. The plaintiff is stated to have tenanted the suit structure in 1984. Rent receipts from 1984 are produced. Thereafter a ration card has been obtained in 1985. The plaintiff has also tried to show one document of the plaintiff's son which is an Olakh-patra showing the applicant one Rajendra Anant Gawankar and showing the date of notice of 10th April, 1987 which does not relate to the suit structure at all. The plaintiff has relied upon an earlier suit filed against the landlord who constructed the structure in 1990 in which an order of injunction restraining the plaintiff's possession came to be passed in 1990. Electricity bills are produced from 1990. The domicile certificate has been issued in 1991. The election identity card is issued in 1994. The passport of the plaintiff is issued also in 1994. The gas connection of the plaintiff is taken in 1994. The telephone bill is produced from 2002. The latest passport is issued in 2010. The Aadhar card is issued much later as all Aadhar cards. The plaintiff has sought to show certain private correspondence which cannot be considered aside from the above public documents. All these documents do not show that the suit structure is tolerable.

14. The reply to the notice of the plaintiff shows various enclosures and those documents have been considered in the order of the MMC which has been challenged in the suit. The plaintiff has also relied upon a letter written to the Senior Inspector of Police in 2013.

15. The impugned order has considered all the aforesaid documents. None of these documents is shown to be of prior 1964. Hence none of the documents can prove the authenticity of the structure. The impugned order is seen to be correct. Hence the plaintiff's prima facie case is not made out. The plaintiff would not deserve any order of injunction.

16. The learned Judge has not considered any of these documents. The learned Judge has considered other extraneous matters.

17. The impugned order shows that the suit premises is protected under Government policy since it is in existence from 1995, so that the plaintiff is entitled to alternate accommodation. It is seen that the suit structure is not on government land. The plaintiff has not shown that the suit structure is on

government land. That is not even the case pleaded by the plaintiff in the plaint. It appears that around the suit plot of land there is a slum. Several structures are in a slum. Hence the plaintiff could have misguided the learned Judge on this issue. However a reading of the plaint and seeing the documents of the plaintiff belies either such a case or observation in para 2 of the impugned order relating to the government policy.

18. In para 3 of the impugned order the learned Judge has observed that personal hearing was given to the plaintiff upon the notice and due legal process was followed. Upon such an observation the order of status-quo is seen to be wholly incorrect.

19. In para 6 of the impugned order learned Judge has observed that the impugned order has been passed after verifying all the documents of the plaintiff. Personal hearing was also given to the plaintiff. Upon these observations also the order of status-quo is seen to be erroneously passed.

20. The learned Judge however appears to have been misguided by a suit filed in the City Civil Court in which the suit structure came to be protected along with the adjoining structure which was a temple until due legal process was followed. The parameters of such consideration are entirely erroneous. Whatever was observed in the earlier suit was between private parties. The private party was directed not to dispossess the plaintiff without following due legal process. That would not deter or restrain any public authority to perform its public duty to issue notice for removal or demolition of an otherwise unauthorised structure. That is what has happened in this case. The MMC has issued notice and hence due legal process is followed by the MMC, whether or not it is followed by the private parties.

21. The learned Judge has observed that the High Court set aside the said order. The learned Judge appears to have gone through the High Court order which does not relate to the suit structure at all, but to the temple structure. The learned Judge has observed that the High Court observed that the temple structure was constructed without the sanctioned plan and yet had given directions to follow due legal process only against the temple structure. If that was so, the order did not concern the suit structure at all. The learned Judge need not have been concerned with what any other Court considered for another structure. The learned Judge has correctly observed that the impugned order was set aside against the temple structure only.

22. All that the Court had to see was the "tolerability" of the suit structure which is not been seen and hence the order of status-quo is seen to be erroneous.

23. Counsel on behalf of the plaintiff drew the attention of the Court to an order passed by the learned single Judge of this Court dated 2nd March, 2006 in the case of Abdul Hasan Shaikh Mansuri Vs. Mun Corporation of Mumbai & Ors, in which the MMC had not issued any notice and hence was on entirely different facts. The Court observed that in such a case even if the structure is

unauthorised no authority can be permitted to take unilateral action except by following due process of law. That is a proposition of law with which none can have any quarrel. However that proposition of law does not apply to this case because due legal process is followed.

24. Counsel on behalf of the plaintiff has also relied upon two orders of the Hon'ble Supreme Court (1) in the case of Rame Gowda (D) by Lrs. Vs. M. Varadappa Naidu (D) by Lrs. and Another, in the case of Krishna Ram Mahale (Dead), by his Lrs. Vs. Mrs. Shobha Venkat Rao, which are between private parties and in which the parameters are wholly different.

25. Counsel on behalf of the plaintiffs drew the Court's attention to another order passed by this Court itself on 8th August, 2013 in an appeal between the appellants and respondent Nos. 1 & 2. That was the case in which the plaintiff herein sued for protection of this very structure along with the temple. The Court saw that the residential structure was tenanted to the plaintiff and the plaintiff had produced certain public documents as also the order of the Small Causes Court of 1990. Hence an order of injunction against disturbing the plaintiff's possession which came to be passed in respect of the suit structure was not set aside. The Court observed that the plaintiff made out a prima facie case of possession of the residential structure and hence the plaintiff's possession was protected until due legal process was followed. The plaintiff has tried to rely upon that order. The reliance thereupon is wholly misconceived. In that case the plaintiff's possession had to be seen as on the date of the suit. If the plaintiff showed such a possession the other private party would not be entitled to disturb it until due legal process was followed. That however does not mean that if the plaintiff's possession was in an unauthorised structure the municipality cannot follow due legal process to demolish it. That is what has happened in this suit. The private party (the appellant herein) has not sought to disturb the plaintiff's possession without following due legal process. The municipality has sought to demolish the suit structure as being an unauthorised construction upon following due legal process. The standard of prima facie case to be made out by the plaintiff in the above suit is, therefore, entirely different. Whereas in the previous suit the plaintiff had to show its possession, in this suit the plaintiff is required to show the authorisation or toleration of the suit structure. That has not been shown.

26. Even the contention of Mr. Tiwari that the notice of motion can be heard bags the issue. The function of the appeal Court is not to let an a legal ad-interim order remain because the interim application will be heard. This contention may well be extended to the suit. The function of the appeal Court is to see whether the impugned order is legal or not by seeing the prima facie case of the plaintiff.

27. No prima facie case is made out. No order or protection of the structure could be passed. The ad-interim order of status-quo is, therefore, erroneous and incorrect. It is set aside.

28. Since the status-quo order has remained in force since 3rd December, 2014 it shall continue till 23rd November, 2015.