

(2023) 04 BOM CK 0045

In the Bombay High Court

Case No : Appeal From Order No.202 Of 2023, Interim Application No.2504 Of 2023 In Notice Of Motion No.4118 Of 2017

Devendra Ramchandra Palsamkar

APPELLANT

Vs

Municipal Corporation Of Greater Mumbai And Another

RESPONDENT

Date of Decision : 25-04-2023

Acts Referred:

Mumbai Municipal Corporation Act, 1888 — Section 351
Slum Areas (Improvement and Clearance) Act, 1956 — Section 4
Maharashtra Ownership Flats (Regulation Of The Promotion Of Construction, Sale, Management And Transfer) Act, 1963 — Section 11

Citation : (2023) 04 BOM CK 0045

Hon'ble Judges : N. J. Jamadar, J

Bench : Single Bench

Advocate : J.S. Yadav, B.P. Shukla, Smita Tondwalkar

Final Decision : Dismissed

Judgement

N. J. Jamadar, J

1. This appeal is directed against an order dated 10th February, 2023 passed by the learned Judge, City Civil Court, Dindoshi (Borivali Division) in Notice of Motion No. 4118 of 2017 in L.C. Suit No. 3231 of 2016 whereby the Notice of Motion taken out by the appellant/plaintiff for temporary injunction came to be rejected.

2. 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.

3. Shorn of superfluities, the facts are:

a] The plaintiff claimed to be in use, occupation and possession of a structure admeasuring 15 x 9 ft. made up by B.M. Wall and A.C. sheet roof and a shed in front of the said structure admeasuring 45' x 15' situated at Survey No. 163, Kandivali (w), Mumbai (the notice structure). The plaintiff asserts the notice

structure is duly censused in the year 1976. Ravi (Rev) Joseph Pareira was the original occupant of the notice structure. It was censused vide Census No. RXC-1-1/1A. A census certificate was issued on 29th November, 2016 in favour of the previous occupant. The factum of the notice structure being a censused property is also recorded in the census form dated 22nd October, 1976 maintained by the Additional Collector (ENC) which has been furnished to the plaintiff under the Right to Information Act. A repair permission dated 10th November, 1982 was issued to the previous occupant. Since the previous occupant was carrying on the business of auto spare parts and repair work under the name and style of "Janta Auto Garage", according to the plaintiff, Municipal Corporation has issued shops and establishment certificate. An electric connection was provided to, and electricity bills were also issued in respect of, the notice structure.

4. The plaintiff avers that the plaintiff acquired the suit premises under the agreement for sale dated 12th January, 2000 for a valuable consideration and there are documents which evidence the occupation of the notice structure by the plaintiff.

5. On the basis of a false complaint, according to the plaintiff, the designated officer issued notice dated 7th July, 2016 under section 351 of Mumbai Municipal Corporation Act, 1888 alleging that the plaintiff has unauthorizedly erected the notice structure. An appropriate reply with supporting documents was submitted on 14th July, 2016. The speaking orders came to be passed on 21st November, 2016 and 30th November, 2017 without adverting to the contentions and documents submitted by the plaintiff calling upon the plaintiff to remove the alleged unauthorized structure within 15 days thereof. The plaintiff was thus constrained to institute the suit seeking a declaration that the notice dated 7th July, 2016 and the speaking orders dated 21st November, 2016 and 30th November, 2017 are illegal, malafide, and to permanently restrain the defendant No. 1 and its agent from demolishing the notice structure pursuant to the said notice and orders.

6. An affidavit in reply was filed by defendant No. 1 resisting the prayer in the Notice of Motion. The impugned notice and the speaking orders were stated to be in order and issued and passed in conformity with the governing provisions of law. The documents relied upon by the plaintiff, according to the defendant No. 1, did not establish that the notice structure is either a censused premises or a slum or otherwise tolerated commercial structure which is in existence prior to 1st April, 1962, nor the plaintiff could establish that the notice structure is a slum and has been in existence prior to 1st January, 2000. The plaintiff, according to defendant No. 1, failed to produce any authentic document like city survey plan and assessment bills showing existence of the notice structure prior to the datum line. Consequently, the notice structure being wholly unauthorized was liable to be demolished.

7. After appraisal of the rival contentions and the documents tendered for his

perusal, the learned Judge, City Civil Court was persuaded to reject the Notice of Motion opining, inter alia, that the census certificate relied upon by the plaintiff had already been cancelled. There was no prima facie material to show that the notice structure existed prior to datum line. The fact that before the competent authority the plaintiff had claimed that the land over which the notice structure is situated is the land of defendant No. 2 – society, also weighed with the learned Judge in holding that the plaintiff had not approached the Court with clean hands. Holding thus, the parameters which govern the grant of temporary injunction were answered against the plaintiff.

8. Being aggrieved the plaintiff is in appeal.

9. I have heard Mr. Yadav, learned counsel for the appellant and Ms. Tondwalkar, learned counsel for the MCGM at some length. With the assistance of the learned counsel for the parties, I have perused the material on record.

10. Mr. Yadav, the learned counsel for the appellant, would urge that the learned Judge, City Civil Court committed a manifest error in non-suiting the plaintiff at an interim stage despite there being voluminous material to show that the notice structure has been in existence since prior to 1974. The fact that the notice structure is censused structure was unjustifiably discarded by the learned Judge on the ground that census certificate have been cancelled by an order of the State Government dated 15th July, 2000. Inviting the attention of the Court to the said order dated 15th July, 2000, Mr. Yadav strenuously submitted that the import of the said order was not to deprive the protection available to the censused structure completely. According to Mr. Yadav, the documents placed on record by the plaintiff, if properly construed, make out a strong prima facie case. Without providing an opportunity to establish its case at the trial, the notice structure can not be permitted to be demolished. From this stand point, according to Mr. Yadav, the balance of convenience tilts in favour of the plaintiff. Irreparable loss would undoubtedly be caused to the plaintiff if temporary injunction is not granted, urged Mr. Yadav.

11. On the contrary, the learned counsel for defendant No.1 stoutly submitted that none of the documents placed on record prima facie indicate that either the notice structure has been in existence prior to the datum line or it is a censused structure. Neither photopass nor a declaration under the Slum Act has been placed on record by the plaintiff. In the absence of any material to show that the notice structure is a tolerated structure, no other inference than that of structure being unauthorized is deducible. Moreover, the ambivalent stand of the plaintiff as to the ownership of the land over which the notice structure is situated renders the plaintiff's claim wholly unsustainable. Therefore, the learned Judge, City Civil Court was fully justified in declining to exercise the discretion in favour of the plaintiff.

12. I have given careful consideration to the submissions canvassed across the bar.

13. The thrust of the submission of Mr. Yadav was that the notice structure being a censused structure could not have been termed as unauthorized and thus subjected to an action under section 351 of the Code. A strong reliance was placed on a communication dated 29th September, 1980 addressed to the predecessor in title of the plaintiff by the then Controller of the Slums that the structure No. PXC 1 x 1/1 A, Surve No. 163, Pareira Compound, Kandivali Gaonthan Road, Kandivali (west) was censused on 14th August, 1976. Reliance was also placed on repairs permission granted by the Municipal Corporation and the Certificate under Shops and Establishment Act. The learned Judge was not persuaded to give weight to the census certificate as the census certificate stood revoked pursuant to the Government order dated 15th July, 2000.

14. Mr. Yadav endeavoured to impress upon the Court that the said order dated 15th July, 2000 has been misconstrued as it did not imply that the protection stood revoked. Fresh certificates were to be issued by the Competent Authority.

15. In the facts of the case, the question as to what is the import of the order dated 15th July, 2000 issued by the State Government does not necessarily arise for determination. It is imperative to note that the defendant No. 1 Corporation got the census certificate relied upon by the plaintiff verified from the Dy. Collector (Encroachment). The communication dated 10th February, 2017 addressed by the Dy. Collector (Encroachment) categorically records that the census certificate in question having been issued in the year 1976 stood cancelled, in view of Government Resolution dated 15th July, 2000, and fresh photo passes have been issued in accordance with the Government Resolution dated 11th July, 2001. Indisputably, the plaintiff has not placed on record any photo pass.

16. In any event, the fact that the structure is censused by itself does not provide absolute immunity to the holder of such structure. If unauthorized development is carried out by the holder of censused structure either in relation to the said structure or otherwise, the planning authority is not precluded from taking action against such unauthorized development.

17. A Division Bench of this Court, in the matter of High Court on its own motion (In the matter of Jilani Building at Bhiwandi vs. Bhiwandi Nizampur Municipal Corporation and Others PIL No.1/2020 Dt. 26/02/2022. after an elaborate consideration of all the relevant provisions and the specific contention of the parties that in view of the provisions contained in the Slums Act, 1971, the Municipal Corporation is not authorized to take action against unauthorized development, enunciated law as under.

74. We are, thus, of the clear opinion that the MCGM being a Planning Authority for the entire Greater Mumbai area (excluding those areas in which by law other planning authorities are appointed), the MCGM has jurisdiction to exercise all powers under the MMC Act as also the MRTTP Act and the Slums Act, to take action against illegal structures as permissible in law, not only in regard to all

such areas within its jurisdiction, but also the slum areas falling under the Slums Act, except when a demolition order has been made under the Slums Act. We find that even Section 4 of the Slums Act would cast no embargo on the MCGM to take appropriate action in regard to any buildings which are unauthorized and/or dilapidated. Per se, Section 4 does not prohibit the planning authority to exercise any of its authority in regard to the structures of the nature Section 4 would contemplate either before the area is declared as a "slum area" or after it is declared as a "slum area". It is nobody's case that prior to an area being declared as slum, the planning authority namely the MCGM would not have any authority under the MMC Act and the MRTTP Act to take action against unauthorized construction in such areas in regard to structures in these areas. From a holistic reading of the provisions of the Slums Act as discussed above, it is difficult to conceive that merely because an area is declared to be a slum under Section 4, the planning authority would lose its control and authority to regulate the structure by implementing the provisions of the MMC Act and the MRTTP Act in the event the structures are dilapidated and/or in any manner unauthorized.

75] The above discussion would lead us to conclude that Chapter I-B of the Slums Act imposes no embargo on the powers of the Municipal Corporation(s) to take action against unauthorised structures in the slum areas, including the slums declared under Section 4 of the Slums Act which may include slums on the State Government's land or land belonging to any other public authority, under the provisions of the MMC Act, Maharashtra Municipal Corporations Act and the MRTTP Act. Such statutory mandate cannot be curtailed by any executive fiat including the Government Circulars dated 7 September 2010 and 10 October 2013, which we have discussed above in paragraph 46. We accordingly answer questions (i)(a) and (i)(b) as posed by Mr.Jagtiani and as noted by us in paragraph 43, to hold that the MCGM and/or Municipal Corporations would wield all powers and authority to take actions against any structure beyond the photo-pass structure found to be unauthorized which is situated in such slums.

18. The Division Bench has thus declared in empathetic terms that the Municipal Corporation has every power and authority to take action against any structure beyond the photo pass structure which is found to be unauthorized, even if situated in the slums.

19. As noted above in the case at hand, the plaintiff does not bank upon any photo pass. Reliance on the census certificate simplicitor, in the circumstances of the case, does not seem to advance the cause of the plaintiff. Endeavour of the plaintiff to bank upon the other documents like the certificates issued under Shops and Establishment Act and electricity bills etc. to show that the notice structure is tolerated can not be countenanced. Moreover, the authenticity of the certificates purportedly issued under the Shops and Establishment Act to THE predecessor in title of the plaintiff namely, "M/s. Janta Auto Garriage" was also impaired as the concerned department informed the designated officer of the

defendant that no details could be found as regards the registration certificate purportedly issued in favour of Janta Auto Garage.

20. The learned Judge was justified in adverting to the ambivalence of the stand of the plaintiff as regards the ownership over the land beneath the subject structure. At one breath, the plaintiff claimed that the subject structure, being censused, was located on a Government land and, at another breath, the plaintiff claimed that the notice structure was situated on the land of defendant No. 2 society. In fact, the defendant No. 2 society has filed a written statement contending that the plaintiff has erected the unauthorized structure over the premises without permission. The defendant No. 2 also adverted to the fact that the plaintiff had resisted the grant of Deemed Conveyance certificate under section

11 of the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963 before the Dy. Registrar Cooperative Societies on the ground that his predecessor in title had sold the subject structure and land beneath the same to him and the defendant No. 2 society was not entitled to grant of Deemed Conveyance over the entire land and it was required to be subdivided. This stand of the plaintiff dismantles the substratum of his case that the subject structure, being a censused structure, is tolerated. Undisputably, the plaintiff does not claim to have obtained any permission for the development.

21. In the aforesaid view of the matter, this Court does not find any ground to interfere with the discretionary jurisdiction exercised by the learned Judge, City Civil Court. Resultantly, the appeal fails. Hence, the following order.

ORDER

1} The appeal stands dismissed.

2} In view of the dismissal of the appeal, the Interim Application also stands dismissed.