

(2013) 08 BOM CK 0158

In the Bombay High Court

Case No : Appeal From Order No. 1278 of 2012 with Civil Application No. 1737 of 2012 with Civil Application No. 1738 of 2012

Kiran Ramesh Kothari

APPELLANT

Vs

Jayantilal Meghji Pokar and Others

RESPONDENT

Date of Decision : 21-08-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 41 Rule 33
Maharashtra Regional and Town Planning Act, 1966 — Section 53(1)
Mumbai Municipal Corporation Act, 1888 — Section 488

Citation : (2013) 5 ABR 927 : (2014) 1 ALLMR 64 : (2013) 6 MhLj 245

Hon'ble Judges : Roshan Dalvi, J

Bench : Single Bench

Advocate : N.R. Bubna, for the Appellant; R.D. Suryanwanshi, for the Respondent No. 1 and S.K. Sonawane, for the MMC, for the Respondent

Final Decision : Disposed Off

Judgement

Roshan Dalvi, J.—Rule. Made returnable forthwith. The Appellant has challenged the order of the Judge City Civil Court, Bombay dated 18th July, 2012 granting ad-interim injunction prayed for by the Plaintiff. The Plaintiff (Respondent No. 1) sued for protection of the construction of a balcony outside his premises being Flat No. 603 in Sara Residency, Ghatkopar (E). The Appellant is the owner of flat No. 402 which is directly below flat No. 603 of the Respondent No. 1 (Plaintiff in the suit). The Plaintiff constructed a balcony outside the flat. The Appellant complained to the Mumbai Municipal Corporation (MMC) on 19th June, 2007. The complaint shows that the occupant of flat No. 603 recently put a hanging terrace with the help of heavy iron angle which looms upon his terrace. It is stated that the construction is built in such way it may be harmful in future. It would take away the right of privacy and be an obstacle for fresh air and light. It also stated that construction is unauthorised and requests MMC to remove the illegal construction.

2. The MMC issued its notice on 1st August, 2007 upon the Plaintiff in respect of construction of balcony adjacent to eastern side window of hall of the Plaintiff resting on M.S. I Sections and spartex tiles & MS pipe.

3. The Plaintiff replied to the notice stating that he had already applied for regularization of the work and requested the MMC not to proceed with any action.

It may be mentioned that the application for regularization would show that the structure which was to be regularised was admittedly irregular. It is, therefore, seen from the Plaintiff's own case that the structure is not authorised under any sanctioned plan. The building where Appellant resides is a new construction. The Appellant has not relied upon any sanctioned plans or contended that the suit balcony is a sanctioned structure. It is only to be seen whether the structure is regularizable and has been regularised by the MMC upon the application for regularization made by the Plaintiff since prior to issue of the notice dated 1st August, 2007.

4. In fact the Plaintiff made application for regularization on 6th August, 2007 and replied to the MMC's notice on 7th August, 2007. The application shows the request of the Plaintiff to regularize balcony of the living room at Flat No. 603 held by him on the 6th floor of Sara Residency. It specifies that it was adjacent to eastern side window of the hall made with ladi-coba resting on MS I Section with spartex tile flooring and MS pipe grill parapet. The description of the construction of the balcony stated by the Plaintiff is identical to description of the structure under the MMC's notice. The Plaintiff showed his readiness to pay his charges for the regularization.

5. On 14th September, 2007 the Asstt. Municipal Commissioner (AMC), N Ward passed his order directing Plaintiff to remove the balcony within 15 days as it was not constructed with prior permission of the MMC and hence was unauthorised.

6. The Appellant contends that thereafter an order came to be passed on 22nd January, 2008 rejecting the regularization application of the Plaintiff as it was not in conformity with the Development Control Rules (DCR) with regard to FSI calculation and the balconies provision. The Appellant contends that that order rejecting regularization has not been challenged. The Appellant contends that the balcony constructed by the Plaintiff utilised the FSI which is not available and hence could not be regularised.

7. On 12th February, 2008 the AMC issued a letter to the Plaintiff calling upon the Plaintiff to remove the unauthorised construction of the balcony mentioned in the notice dated 1st August, 2007 within 7 days of the receipt of the letter and as Plaintiff was ordered to remove the noticed structure and proposal for regularization was not approveable nature. This notice also shows that the Plaintiff's application for regularization could not be approved and hence was disapproved.

8. On 27th February, 2008 the MMC issued its notice u/s. 488 of the MMC Act to the Plaintiff informing the Plaintiff that the structure would be removed by the MMC on 29th February, 2008.

9. The Plaintiff sued in the Bombay City Civil Court and obtained an order of injunction against removal of the structure.

10. The Applicant took out Chamber Summons to be made a party Defendant in the suit under the provisions of Order 1 Rule 10 of the CPC. The Chamber Summons came to be rejected on 21st January, 2009.

11. Thereafter the Plaintiff's Notice of Motion came to be granted on 11th February, 2010. The MMC filed Appeal against order granting interim relief to the Plaintiff. The Appeal came to be disposed off on 8th November, 2011 directing trial court to decide the suit expeditiously as evidence of the Plaintiff was already recorded by them.

12. Since the Appellant was not made party to the suit she has applied to the MMC to be examined as witness for the Corporation by her letter 25th April, 2011. She sent a further letter to the MMC on 24th June, 2001 specifying that she was the complainant and sufferer of the unauthorised construction constructed just above her terrace. She contended that the construction was dangerous and may collapse any time. She relied upon the photographs of the construction.

13. She again wrote another letter dated 28th June, 2011 to the MMC setting out similar facts. She was not examined as witness.

14. The judgment came to be passed on 8th April, 2012 decreeing the Plaintiff's suit and declaring the notice of the MMC dated 1st August, 2007 illegal and malafide and bad in law.

The learned Judge relied upon the due legal process followed by the MMC upon the notice dated 1st August, 2007 considering reply of the Plaintiff dated 7th August, 2008 which culminate in the final order of the MMC dated 14th September, 2007 as also the application for regularization made by Plaintiff. The learned Judge has also relied upon the rejection of the regularization application dated 22nd January, 2008 and the final order dated 12th February, 2008. However, upon hearing the advocate for the Plaintiff and the MMC the learned Judge concluded that the regularization application was not until then rejected. He observed that without passing an order on the regularization application the impugned order was passed upon the notice issued by the MMC. The learned Judge has also considered that the regularization application was pending and the balcony could have been erected upon the circular of the MMC.

15. Under the circular relating to enclosure of the balcony constructed, certain balconies indeed may be regularised. However, such regularization would be subject to total FSI of the construction. Where the total FSI is reached over construction even of balconies cannot be regularised under the Development

Control Rules, 1991 (DCR). It is a moot point whether the balconies contemplated in the circular of the MMC relating to enclosures are completely new projections out the flat of the any person; the balconies are what are constructed utilizing FSI and then only enclosed by grill or windows. It is obvious that the learned Judge was misinformed of the facts of the case by the advocates of the Plaintiff and the MMC. Despite referring to the order dated 22nd January, 2008 Exh. 26 in the evidence, which order for rejection of the regularization application, the learned Judge held that the application was pending.

16. Had the Appellant been a party Defendant to the suit the truth would have been brought to the notice of the Court. The Appellant was indeed necessary party for assisting the Court in determination of the issue in the suit before the Court and in coming to the conclusion about the suit construction. Gross miscarriage of justice resulted to the Appellant. She was not allowed to be made a party Defendant by the Court. She was not even made a witness by the MMC. The Plaintiff proceeded in the absence of the complainant who knew all the facts of the case. It is clear from the order that the MMC did not point out to the Court that the letter of the MMC dated 22nd January, 2008 Exh. 26 in evidence constituted an order of rejection of the regularization application. The Plaintiff misguided the Court by utter falsity. The Plaintiff was issued the letter. The Plaintiff knew that the regularization application is not granted. Yet the Plaintiff by falsity misguided the Court and contended that the regularization application was still pending before the MMC. Upon that premise alone the Court on 9th April, 2012 declared the notice dated 1st August, 2007 and the order passed there on 14th September, 2007 following and completing due legal process as illegal, malafide and bad in law. This was indeed travesty of justice. However, the Court granted liberty to MMC to initiate fresh proceedings against the Plaintiff in respect of the noticed structure after passing an order on the Plaintiff's application for regularization pending before it.

17. The Appellant once again complained to the MMC by letter dated 11th May, 2012 received by the MMC on 14th May, 2012 informing the MMC how the final judgment came to be passed with liberty to the MMC to initiate fresh proceedings against the Plaintiff in respect of the noticed structure after passing an order on the application of the regularization.

18. Consequently the MMC issued another notice dated 11th June, 2012 u/s 53(1) of the MRTP Act to the Plaintiff to remove the balcony structure. The Plaintiff replied to the notice by his letter dated 2nd July, 2012 and sued the MMC again claiming that the officers of the MMC had come to the suit premises on 6th September, 2012 and threatened to demolish the suit premises without communicating the order of the MMC upon the notice dated 11th June, 2012.

19. The Plaintiff applied for ad-interim injunction for protection of suit balcony structure which came to be granted under the impugned order. The order came to be passed upon the premise that no decision was taken by the MMC upon the notice dated 11th June, 2012 and the MMC application was malafide. The ad-

interim injunction came to be granted despite the contention of the MMC that the Court had no jurisdiction in respect of the notice issued under MRTA Act and the Plaintiff's application for regularization itself shows that the structure was unauthorised. However relying upon the judgment in the earlier suit which included the direction to decide the regularization application, the Court again observed that the disputed notice was issued without a decision on the regularization application.

20. It may be mentioned that the such an observation could be made only upon the Plaintiff again misdirecting and misleading Court by falsity of the case.

21. In the complaint upon which application for ad-interim injunction came to be made, the Plaintiff inter-alia averred in paragraph 11 that the balcony structure was constructed by the builder M/s. Sara Builders and Developers as per sanctioned plan in the year 2004-2005 and that it was in the same condition since the acquisition of the flat by the Plaintiff. It may be mentioned that that fact is also false. Had it been correct, the Plaintiff would have produced the plans specifications of the building sanctioned as late as in 2004-2005 as one of the flat purchasers. The Plaintiff has not relied upon or shown the Court such plans. If the balcony was authorised under the sanctioned plan, there was no reason for the Plaintiff to apply for its regularization. The application for regularization runs diametrically counter to the averment of the Plaintiff in paragraph 11 of the plaint that the construction is authorised under the sanctioned plans.

22. The Appellant has relied upon photographs of construction of the balcony showing step-by-step its construction. Those were the photographs that the Appellant could have shown the Court, had the Appellant been a party Defendant or at least been cross examined as witness on behalf of the MMC in the first suit itself. Those photographs expose another lie of the Plaintiff.

23. The Appellant has been severely prejudiced and aggrieved by the ad-interim order of injunction. The ad-interim order of injunction is passed without knowing of the correct facts and upon the false averments in the plaint. The ad-interim order of injunction wrongly considers that the notice was issued without the decision of regularization application of the Plaintiff. That consideration is only because the Plaintiff stated wholly incorrect and false facts to the Court.

24. The Plaintiff is seen not to have come to Court with clean hands. The Plaintiff has demonstrated to have lied to the Court. The Appellant has been given leave to prosecute this Appeal. Mr. Bubna on behalf of the Appellant strenuously argued for setting aside the ad-interim order of injunction in this Appeal.

25. Mr. Suryavanshi, counsel on behalf of the Respondent No. 1 contended that the Appellant may apply to the Court for being made a party Defendant in the suit. The contention is as wholly frivolous as the Plaintiff's suit itself. The Plaintiff could have allowed the Appellant to be a party Defendant in the suit to bring the correct facts on record and to hear his initial suit on merits (had there been any merits in her case) which he opposed and which opposition the Court upheld so

that the Appellant was gravely and seriously prejudiced as can be seen from the facts hereinabove recited. The Appellant need not follow the same procedure again. In fact if the Appellant followed same procedure it would be contended that it must be similarly dismissed. Hence the Appellant has not only justifiably but rightly chosen to appeal against the impugned order instead of choosing to be a party Defendant in the suit before the trial Court. It is apparent that such contention is taken only to defeat and delay the Appellant's right by the technicalities of having the Appellant to make another application, an aspect eschewed by the Division Bench of this Court of Chief Justice Chagla and Justice Bhagwati as set out in the case of *The Province of Bombay Vs. Western India Automobile Association*, thus:

Technicalities should never be permitted to override substantial justice.

26. It is to be seen whether the appellate court can, on the merits of the case of the parties, upon the aforesaid facts, set aside the impugned ad-interim order of injunction dated 18th July, 2012 passed by the Judge, City Civil Court, Bombay.

27. Order 41 Rule 33 sets out the powers of the Court of Appeal thus:

33. Power of Court of Appeal.-The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, (and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees.

(underlining supplied for emphasis)

28. Upon false facts stated by the Plaintiff it cannot be stated that the trial Court ought to have passed an order refusing the ad-interim injunction. The Court has granted the ad-interim injunction only based upon the Plaintiff's claim and the facts that have transpired more specially that the notice was issued without taking action upon the regularization application. However, the Plaintiff knew very well that the order was passed by the falsity of his own case. Such a Plaintiff is not entitled to an order on equity once it is found either by the trial Court itself or by the Appellate Court, which has the same powers as the Court, to pass any order or any further order as the case may require. This is a fit case in which the salutary principle laid down by the Supreme Court in the case *S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others*, requires to be applied.

29. The Supreme Court laid down the guiding principles for litigants having recourse to Courts and to Courts who deal with litigants in paragraph 7 of the

Judgment thus:

The Courts of law are meant for imparting justice between the parties. One who comes to the Court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation.

30. The Plaintiffs have played a fraud upon the Court. The Plaintiffs have come to Court with a false case. The Appellant has shown the false case. The Plaintiffs cannot be allowed the grant of the equitable reliefs of injunction upon such falsity. In fact, upon law laid down in the case of C. Naidu (Supra) the Plaintiff's suit itself would deserve to be dismissed. Consequently the impugned order of the learned Judge granting ad-interim injunction against the Defendants in terms of prayer "a" of the Plaintiff's Notice of Motion granted on 18th July, 2012 and thereafter extended on 8th August, 2012 is discontinued. Consequently there shall be no ad-interim relief to the Plaintiff in the suit filed by the Plaintiff being Suit No. 1925 of 2012 filed in Bombay City Civil Court.

31. Rule is granted to the above extent. The Appeal from Order is disposed off accordingly.