

(2016) 10 BOM CK 0029

In the Bombay High Court

Case No : Appeal From Order (St) No.27240 of 2016 with Civil Application (St) No.27242 of 2016

M/s. Masjid Wa Madrasa

APPELLANT

Vs

Municipal Corporation

RESPONDENT

Date of Decision : 04-10-2016

Acts Referred:

Bombay Provincial Municipal Corporations Act, 1949 — Section 351
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : (2017) 1 ALLMR 862 : (2017) 1 CivilLJ 771 : (2016) 6 MhLJ 800

Hon'ble Judges : Dr. Shalini Phansalkar-Joshi, J.

Bench : Single Bench

Advocate : Mrs. Madhuri More, Advocate, for the Respondent; Mr. P. K. Dhakephalkar, Senior Advocate a/w Ms. Simeen Shaikh, a/w Ms. Rashmi Patil a/w Ms. Priyanka Gharge i/by M/s S.K. Shrivastav and Co, for the Appellant

Final Decision : Disposed Off

Judgement

Dr. Shalini Phansalkar-Joshi, J.(Oral) - Heard learned counsel for the parties.

2. Admit.

3. With the consent of learned counsel for both the parties, the appeal is heard finally at the stage of admission.

4. This appeal takes an exception to the order dated 21st September, 2016, passed by the City Civil Court Mumbai, in Draft Notice of Motion in L.C. Suit No.2166, thereby refusing ad-interim relief of injunction, restraining Municipal Corporation from taken any action in pursuance of Notice dated 19.7.2016, issued under Section 351 of the Mumbai Municipal Corporation Act, 1988 (for short called as, "MMC" Act"), and the order dated 02.09.2016, passed by the Assistant Commissioner of Municipal Corporation directing the appellant to remove unauthorized structure within 7 days.

5. It is the case of the appellant that suit structure is used for imparting

education and offering Namaz for Muslim community since 1972. It is in existence since prior to 1962 and therefore is a protected structure. In the suit bearing No.941 of 2007, in respect of the disputes amongst the landlords, Court Receiver was appointed and at present entire Kantharia Mahal, of which suit property is a part, is in possession of the Court Receiver.

6. In the backdrop of these facts, on 24.4.1990, Municipal Corporation issued notice under Section 351 of the Mumbai Municipal Corporation Act, calling upon the appellant to show cause as to why said structure should not be demolished. After the appellant filed reply to the said notice and on being satisfied with the said reply, the said notice and the action thereunder were dropped. Thereafter again on 2.12.2013, another notice under Section 354-A of the MMC Act, was issued calling upon the appellant to stop construction. However, no action was taken in pursuance of the said notice also which shows that said notice was also dropped.

7. It is urged that, again on 19.7.2016, fresh notice came to be issued under Section 351 of the MMC Act, calling upon the appellant to show cause as to why the suit structure should not be pulled down. The description of the structure was mentioned in the schedule and it is submitted that it is more or less, same description, which was mentioned in the earlier notice. The appellants have replied the said notice on 27.7.2016 and thereafter the said order came to be passed respondent corporation on 2.9.2016, calling upon appellant to demolish the said structure on the count that it is illegal and unauthorized.

8. The appellant, therefore, approached the trial court for relief of interim injunction restraining the respondent Municipal Corporation from taking any action in pursuance of the said order. It is submitted by learned counsel for appellant that trial court has, however, rejected interim relief by simpliciter observing that the documents produced on record do not show that the structure was in existence prior to 1972 or it is protected structure. The documents also do not indicate that the alleged structure is constructed with permission of the Municipal Corporation, hence, the trial Court rejected ad-interim relief directing respondent Municipal Corporation to file reply to the Notice of Motion till next date.

9. The submission of learned counsel for appellant is that the very issuance of two earlier Notices in the year 1999 and 2013, more than prima facie establish the existence of the said structure at least since year 1999, though according to appellant it is in existence prior to 1972. Therefore, according to him, at this stage at least, interim relief needs to be granted till respondent corporation files reply to the Notice of Motion and challenges the existence of the said structure. Learned counsel for appellant has also placed on record the policy of the Government and the resolution passed by the Government on 18th November, 2015 protecting religious structures which were in existence since prior to 29.9.2009. In view thereof, it is urged that on the basis of Government Resolution and the policy, which is found reflected in the order passed by the

Division Bench of this Court (Coram: A. S. Oka & C.V. Bhadang, JJ.), in Society for Fast Justice and ors. v. State of Maharashtra and anr, in Public Interest Litigation No.104 of 2010, dated 18th February, 2016, the impugned structure, being of religious nature is required to be protected till decision of the Notice of Motion.

10. Per contra, learned counsel for respondent corporation has invited attention of this Court to the description of the suit structure, as given in the earlier notices and also in the present notice and pointed out that earlier, the suit structure was merely the brick masonry walls, M.S. Pipe, A.C. sheet/GI sheet roof; whereas present structure is R.C.C. ground + first floor and therefore, definitely there is unauthorized structure carried out by the appellant and such construction being not proved in any way to be carried with permission from the Municipal Corporation or getting the plan sanctioned for the same, it is required to be demolished. It is urged that whatever documents, appellant had produced on record on receipt of impugned notice, were considered by the Designated Officer, Assistant Engineer of Municipal Corporation and thereafter, he has passed said order, as those documents were not showing prima facie that the suit structure in the present form was in existence prior to datum line 1st April, 1982. Hence according to learned counsel for respondent, trial Court has rightly exercised its discretion in holding that the appellant has failed to make out prima facie case for grant of interim relief and this Court should restrain itself from interfering in the discretion exercised by the trial Court, within the limited scope of appellate jurisdiction.

11. The impugned notice which is produced on the file of this Court at page No.57 reveals that by the said notice, appellant was directed to show cause as to how construction which he has carried is legal and authorised. Schedule of the notice describes the structure found at the site as follows :

"unauthorized of ground + first floor and R.C.C. structure with R.C.C. column beam and slab and GI sheet roof admeasuring 40 ft x 30 ft square feet and height of structure if 25 feet approximately"

12. As against it, in the earlier notice which was issued to the appellant 24.4.1999, description of the unauthorized structure carried is, as follows :-

"Construction of structure with brick missionary walls, M.S. pipe, A.C. sheet//G I sheet roof admeasuring 26".3"x 34".9" ht. 12 at ridge level without B.M.C. permission on open land."

13. Thus, even a cursory perusal of the description of the suit structure as given in the earlier Notice in year 1999 and the present notice given in the year 2016, is more than sufficient to show that the nature of suit structure is changed from A.C.C. sheet with brick masonry work to the ground + first floor R.C.C. structure, R.C.C. column beam and slab.

14. It was, therefore, for the appellant to state under which permission he has

changed the nature of this structure, whether he has obtained any permission from the Municipal Corporation to do so or got the plan sanctioned for changing the total nature of the structure. The appellant, as can be seen from the order passed by the Designated Officer, or from the impugned order passed by the trial Court, has not produced any document to show that suit structure standing at the site is constructed after getting requisite permission or getting the plan sanctioned from the Municipal Corporation.

15. It is pertinent to note that on 02.12. 2013 also the stop work notice was issued to the appellant informing him to stop the unauthorized work of construction of the structure R.C.C beams and columns which was in progress. Therefore, it is not that the appellant was not aware that he has changed the nature of the suit structure and that too, he has constructed unauthorized structure without getting requisite permission from the Municipal Corporation. The appellant was also given opportunity to show cause as to how structure was authorised. However, in the reply given to the impugned notice, he has failed to do so. Whatever documents which appellant has produced were duly considered by the Designated Officer and while passing order, it was held that those documents do not prove existence of the structure as it was standing on that day at the site since prior to either the year 1962 or 1972 or even to the year 1999.

16. Under such circumstances, when some illegal and unauthorized structure of ground + first floor R.C.C. is carried out, as described in the impugned notice and the appellant has prima facie failed to prove legality of the said structure, it cannot be said that the trial Court has committed any illegality in refusing the relief of ad-interim injunction so as to warrant interference therein at the hands of this Court. Hence appeal holds no merit and the same stands dismissed.

17. It is made clear at this stage that the observations made herein above are only for the purpose of deciding this appeal and trial Court shall not get influenced by those observations and decide the Notice of Motion independently, on its own merits.

18. Learned counsel for appellant then submits that if appellant makes an application for regularisation of the structure, the directions be given to Municipal Corporation to consider the same. Learned counsel for respondent corporation submits that the Municipal Corporation will consider such representation independently on its own merits.

19. As the appeal itself has been dismissed, Civil Application (ST) No.27242 of 2016 does not survive and the same is disposed of accordingly.