HUSENBASHA RAHAMAN NADAF

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 887 OF 2024
WITH
INTERIM APPLICATION NO. 15549 OF 2024

1. Mr. Maqsood Ahmed Jamaluddin Khan)
Adult, Indian Inhabitant, aged about 49)
years, Situated in Room No. 1, the)
compound known as National Ice Factory)
Arab Lane, Mumbai 400 008)

2. Mr. Noormohammed S/o. Mehndi Hasan)
Adult, Indian Inhabitant, aged about 46)
years Situated in Room No. 2, the)
compound known as, National Ice Factory,)
Arab Lane, Mumbai 400 008)

3. Mr. Abdul Mannan S/o. Usmangani)
Dastagir)
Adult, Indian Inhabitant, aged about 39)
years Situated in Room No.3, the compound)
known as National Ice Factory, Arab Lane,)
Mumbai 400 008.)

4. Mr. Abdul Jabbar Abdul Razak)
Adult, Indian Inhabitant, aged about 55)
yeas Situated in Room No.4, 1 the)
compound known as National Ice Factory,)
Arab Lane, Mumbai 400 008.)

5. Mr. Dinanath P. Singh)
Adult, Indian Inhabitant, aged about)
73 years Situated in Room No.15,)
the compound known as National Ice)
Factory, Arab Lane, Mumbai 400 008.)

6. Mr. Jawed Ali S/o. Idris Sharif Sheikh)
Adult, Indian Inhabitant, aged about 28)
years, Situated in Room No.6, the)
compound known as National Ice Factory,)
Arab Lane, Mumbai 400 008.)

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7. Mr. Faiyaz Ahmed Jawad Husain Qureshi)
Adult, Indian Inhabitant, aged about 51 yrs.)
Situated in Room No.7, the compound)
known as National Ice Factory, Arab Lane,)
Mumbai 400 008.)

8. Mr. Naeem Khan Tahir Khan)
Adult, Indian Inhabitant, aged about 54)
years Situated in Room No.8, 1 the)
compound known as National Ice Factory,)
Arab Lane, Mumbai 400 008.)

9. Mr. Wasim Tahir Khan)
Adult, Indian Inhabitant, aged about 58)
years Situated in Room No.9, the compound)
known as National Ice Factory, Arab Lane,)
Mumbai 400 008.)

10. Athar Abdul S/o. Kadir Tahit Khan)
Adult, Indian Inhabitant, aged about 35)
years Situated in Room No.10, the)
compound known As National Ice Factory,)
Arab Lane, Mumbai 400 008) ..Appellants
/Org. Plaintiffs

Versus

1. Municipal Corporation of Greater)
Mumbai Office at Mahapalika Marg,)
Mahapalika Bhavan, Mumbai 01 through)
Assistance Commissioner, D Ward having)
office at Nana Chowk, Mumbai)

2. Casa Bella Realty LLP)
A Limited Liability Partnership Firm, duly)
Registered under the Limited Liability)
Partnership Act, 2008, having its registered)
Office at Second Floor, Nathani Heights)
Commercial Arcade, Dr. D.B. Marg, Mumbai)
Central, Mumbai-400 008) ...Respondents
/Org. Defendants

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Appearance on 16.12.2024:
Mr. Ashok M. Saraogi a/w. Mr. Anand Mishra, for Appellants.

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Mr. Dharmesh Vyas a/w. Ms. Seena Rawde, for Respondent No.1 (MCGM).
Mr. Pradeep Thorat a/w. Ms. Aneesa Cheema a/w. Mr. Raju M. Jain, for Respondent No.2.
Mr. Manoj Kadu, Junior Engineer, 'D' Ward, present.

Appearance on 13.01.2025:
Mr. Anand Mishra a/w. Mr. Amit G. Dubey i/b. Mr. Ashok M. Saraogi, for Appellants.
Mr. Dharmesh Vyas, for Respondent No.1 (MCGM).
Mr. Pradeep J. Thorat i/b. Mr. Raju M. Jain, for Respondent No.2.

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CORAM : M.M. SATHAYE, J.

DATE : 13th JANUARY, 2025
(IN CHAMBER)

JUDGMENT

1. Learned counsel for the parties were heard on 11.12.2024 and 16.12.2024 and it is placed today for passing order.

2. The Appellants are Plaintiffs and Respondent are Defendants. The appeal is filed challenging the Order dated 22.11.2024 passed by the City Civil Court, Greater Mumbai in Notice of Motion No. 4920 of 2024 in L.C. Suit No. 6405 of 2024. By the said impugned Order *ad-interim* relief is refused. The said motion was taken out for restraining the Respondents from acting upon on the notices dated 08.10.2024 and speaking Orders dated 04.11.2024 issued by Respondent No.1 / Municipal Corporation in respect of suit structures.

3. The suit is filed challenging the notices issued u/s. 351 of the Mumbai Municipal Corporation Act (for short 'the said Act'), dated 08.10.2024 and the speaking Orders dated 04.11.2024 passed by the

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Designated Officer of Respondent No.1 / Municipal Corporation.

SUBMISSIONS

4. Learned counsel for the Appellants Mr. Saraogi, submitted that the Appellants / Plaintiffs are lawful occupants of their respective suit structures which are in existence since prior 1945. It is submitted that the suit structures have been assessed by the Respondent / Municipal Corporation since prior to 1961 and as such they are tolerated structures being prior to datum line. It is submitted that the suit structures are falling under slum land which is redeveloped under Slum Rehabilitation Scheme. Two assessment bills, bearing Nos.DX2402120010000 & DX2402040080000 and their respective Capital Value Statements are relied upon to contend that the suit structures are assessed in 1961 and as such the suit structures are in existence since prior to datum line and therefore, they are tolerated structures. It is contended that one of the assessment bills, mentions "house with sheds" in the description of the suit structures and Capital Value statements show "pucca building excluding chawls" & "kuccha building including chawls" which indicates that the suit structures are authorized. Learned counsel for the Appellants has relied upon documents issued in the name of the some of the Appellants, which according to him, *prima facie* shows eligibility during slum rehabilitation. He further submitted that in Chamber Summons No. 2477 of 2024 filed by the Respondent No. 2 Owner for impleadment in the said suit, Owner himself has stated that there are tin sheds in the suit properties, which supports the Appellants' case.

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5. Learned counsel for the Appellants has relied upon various circulars issued by the Respondent / Municipal Corporation from time to time. He has also relied upon following judgments in support of his submission in respect of the manner in which challenge to notices u/s. 351 of the said Act is to be considered.

1. Re: Directions in the matter of demolition of structures [Writ Petition (Civil) No.295 of 2022 order dated 13.11.2024 (para 90)]

2. Vadilal Maganlal Trevadia V. Bombay Municipal Corporation and Ors. [2021(1) Mh.L.J. 157]

3. Pali Hill Tourist Hotel Pvt. Ltd. V. The Municipal Corporation of Gr. Mumbai & Anr. [Appeal from Order No.715 of 2024 order dated 06.06.2017]

4. Masood Ahmed Siddiqui V. Mumbai Municipal Corporation & Ors. [Appeal from Order No.75 of 2013 order dated 23.01.2013]

5. Mr. Arvind Pradhanbhai Dama V The Municipal Corporation of Greater Mumbai [Appeal from Order No.361 of 2013 order dated 30.08.2013]

6. Mohamed Yusuf Abul Sattar V. Municipal Corporation for Greater Bombay [Appeal from Order No.712 of 1996 order dated 19.06.1996]

7. Vakil Mohamed Khan V. Municipal Corporation for Gr. Bombay [Appeal from Order No.069 of 1991 order dated 08.08.1991]

8. Selim Babu Khan & Ors. V. The Bombay Municipal Corporation [Writ Petition (L) No. 1330 of 2008 order dated 30.09.2008]

9. Ramesh Hargovinddas Divecha V. The Mumbai Municipal Corporation of Greater Bombay & Ors [Writ Petition No.715 of 1999 order dated 12.07.1999]

10. Jadav Chandra Das V. Guwahati Municipal Corporation [High Court of Assam - 1996-GAULR-1-72, 1996-GAULJ-1-43 Civil Rule:1371:1994, Order dated 25.08.1995]

6. On the other hand, learned counsel Mr. Vyas for Respondent No.1 / Municipal Corporation submitted that if the two assessment bills and capital value statements are minutely considered it can be

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seen that they are in respect of the structures of ice factory consisting of ground floor which is assessed for industrial use and about two sheds of ground floor only, showing the user as shop/commercial. It is submitted that the description of type of construction (factor value) is shown only for determining the rate at which tax has to be assessed and it does not signify the actual structure at site. It is submitted therefore the mentioned word like 'chawl' in the column of type of construction does not mean that there is authorized chawl which is assessed. It is submitted that the documents relied upon by the Appellants to contend that they are entitled in the process of slum rehabilitation, are nothing but acknowledgments of forms submitted for the purpose of grant of identity card in the survey carried out in the year 2000 and those documents are not photo passes and do not by itself grant any protection to the suit structures.

7. It is further submitted that suit notices issued are in respect of unauthorized structures which are made of brick masonry walls and ladi coba slabs and cannot be said to be temporary teen sheds by any stretch of imagination. It is further submitted that when the assessment bills only indicate ground floor structure, there is no question of first floor being authorized, which are in existence without any sanction. Relying on schedule-B and Rule 6 of Rules For Fixation Of Capital Value of Lands And Buildings, 2015, ('the 2015 Rules' for short) it is contended that the mention about *semi permanent / kuchha building including chawl or pucca building excluding chawl or RCC building* are nothing but nomenclature indicating basis on which weightages by multiplication is to be

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arrived at. The photographs of the structures are placed on record. He relied upon following judgments.

1. Ramakant Ambalal Choksi V. Harish Ambalal Choksi & Ors. [Civil Appeal No. 13001 of 20024 - Special Leave Petition (Civil) No. 252 of 2023 Order dated 22.11.2024]
2. High Court on its own motion, In the matter of Jilani Buiding at Bhiwandi V. Bhiwandi Nizampur Municipal Corporation & Ors. [Sou Motu Public Interest Litigation No. 1 of 2020 Order dated 26.02.2022]
3. Solitaire Builders & Developers V. Municipal Corporation of Greater Mumbai and Ors. [Contempt Petition No.90 of 2024 Order dated 21.11.2024]

8. Learned counsel Mr. Thorat for Respondent No.2 / owner contended that the structures are not tolerated and the Appellants do not have any photo passes and structures are not protected even under the applicable slum laws. He submitted that the judgment of **Vadilal Maganlal Trevadia (supra)** relied upon by the Appellants is already distinguished by this Court in paragraph 16 of the judgment of **Sandesh Sonu Gawalkar (supra).** He submitted that in the judgment of **Masood Ahmed Siddiqui (supra)** relied by the Appellants, is also in different set of facts and therefore clearly distinguishable.

9. He submitted that for claiming protection to the structure, it is necessary that a party must be found eligible and photo pass is issued, as contemplated u/s. 3X & 3Y of the Maharashtra Slum Areas (Improvement, Clearance And Redevelopment) Act, 1971 (for short 'the Slum Act"). He submitted that in the present case, the documents relied on in that behalf are nothing but applications for

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inclusion of name in survey and there is nothing on record to show that Appellants' eligibility is verified or photo passes are issued to them for claiming protection. He asserted that the suit property on which the structures are situated is not declared as slum. He submitted that mere averments in the chamber summons filed by Respondent No.2 about temporary teen sheds, does not mean that they are constructed prior to datum line. He pointed out that the concerned averment also asserts that tin sheds are without sanction.

10. He further submitted that the letter of SRA dated 28.08.2024 obtained under RTI, relied upon by the Appellants, merely indicates that an application was submitted and as the name of proposed society of slum dwellers was not given, the requested list was not provided. That this document does not establish in any manner, that the said structures (ground+1) are situated in slum. That it also does not show that any slum scheme is submitted where Annexure-II is prepared to justify any protection. Also, it is submitted that the cadastral survey sheet prepared by City Survey in 1972, does not show existence of the suit structures. He relied on following judgments in support of his case.

1. Shri Savji Bhavan Bera & Anr. V. The Municipal Corporation of Greater Mumbai and Anr. 2001 [SCC OnLine Bom 288]
2. Sandesh Sonu Gawalkar V. Municipal Corporation Gr. Mumbai [Appeal from Order No. 686 of 2022, Order dated 04.09.2023]

REASONS AND CONCLUSIONS

11. I have considered rival submissions and perused the record. The documents of two assessment bills and their corresponding

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capital value statements clearly indicate existence of ground floor structures of ice factory and sheds but they do not indicate any ground + one structure. The said documents also indicate that the structures reflected in the assessment are either industrial or commercial in nature and are not residential premises as asserted by the Appellants in the plaint.

12. The description given in the suit notices are specific, along with measurements of the suit structures with necessary details of city survey number and address etc. and therefore they cannot be said to be vague. The photographs placed on record by the Respondent / Municipal Corporation clearly indicate that the suit structures are necessarily ground + one structure and in one of the structures, even 'a half floor above first floor' is visible. In that view of the matter, the assessment bills and capital value statements relied upon by the Appellants do not establish the existence of the present structures (ground+1), prior to datum line.

13. So far as the alleged identity documents relied upon by the Appellants are concerned, they are basically forms submitted for grant of identity card in the survey carried out in the year 2000 and those documents do not indicate grant of any protection to the structures occupied by the Appellants. Besides, only 3 such documents are produced out of total 10 Appellants. Admittedly, the Appellants have not produced any photo-passes as contemplated u/s.3X and 3Y of the Slum Act.

14. Perusal of notices u/s. 351 the said Act, challenged in the suit

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as well as the speaking orders passed by the Designated Officer, shows that opportunity was given to the Appellants to submit the documents in support of their case about suit structure being authorized, however, the documents submitted by them have been found to be not supporting their case.

15. The judgment relied upon by the learned counsel for the Appellants in the case of **Vadilal Maganlal Trevadia (supra)** in support of his contention that burden of proving the assertion about unauthorized structure would lie on the authority alleging that structure is unauthorized, the same has been already considered by this Court in paragraph 16 of the case **Sandesh Sonu Gawalkar (supra)** which reads as under:

> "16. Mr. Saraogi has also placed reliance on judgment of this Court in **Vadilal Maganlal Trevadia** (supra) in support of his contention that the burden of proving the assertion about unauthorized nature of the structure would lie on authority alleging that the structure is unauthorized. However the facts in *Vadilal Maganlal Trevadia* were entirely different. In that case, the structure was illegally demolished and the Court had directed restoration of *status-quo ante*. In pursuance of the directions issue by the Court, the Petitioner therein had reconstructed structure. The Municipal Corporation alleged that the reconstructed structure was bigger in size than the demolished structure. It is in the light of these facts of the case, burden was shifted on Municipal Corporation to prove that the size of reconstructed structure was more than the demolished structure. Therefore, the judgment in *Vadilal Maganlal Trevadia* cannot be cited in support of a proposition that in every case Municipal Corporation must prove that the structure is unauthorized. On the contrary, provisions of Section 354A of the Act would require the person indulging unauthorized work to produce development permission issued for execution of such work. Therefore, the judgment in *Vadilal Maganlal Trevadia* would have no application to the present case."
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> [Emphasis supplied]

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The facts of the present case are also completely different as compared to the case in **Vadilal Maganlal Trevadia (supra)**. Therefore, the said judgment cannot be cited in support of the proposition that in every case, the Respondent / Municipal Corporation must prove that the structure is unathorized.

16. So far as judgment of **Masood Ahmed Siddiqui (supra)** relied upon by the Appellants is concerned, it cannot be applied to the facts of this case, being completely different. In that case, there were documents showing the existence of the structures of year 1979 and in those facts, the observations are made about taking cognizance of complaints of disgruntled landlord. In the present case, when there are no documents in support of existence of suit structures (ground+1), the said judgment will not advance the case of the Appellants and no fault can be found with cognizance taken by the Municipal Authorities.

17. In para 78 of **Suo Motu Public Interest Litigation No.1 of 2020 (supra),** the Division Bench of this Court has noted that the Civil Court needs to be extremely cautious and must have a well considered approach in dealing with suits like this and the actions against illegal structures taken by the Municipal Officers of the Municipal Corporation, must not be delayed by any undeserving judicial intervention.

18. So far as other judgments relied by the Appellants are concerned, they do not advance the case of the Appellants, because the subject matter of the suit being action against unauthorized

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constructions, the appeal will have to be considered on the case to case basis, since the set of facts are different in each case. What must be seen is whether the Appellants were given sufficient opportunity to submit documents in support of their case that the suit structures are authorized. Record indicates that after notices issued on 08.10.2024, time was given and the documents are considered and speaking orders are passed on 04.11.2024. Therefore there is no breach of principle of natural justice also.

19. In **Wander Ltd. And Another vs. Antox India P. Ltd. - 1990 (Supp) SCC 737,** the Hon'ble Supreme Court has laid down the law in respect of substitution of discretion by the Appellate Court in place of discretion already exercised by the Trial Court. In paragraph no. 14 of the said judgment, the Hon'ble Supreme Court has held that the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. This position has been followed thereafter consistently by this Court, which is reiterated recently by the Hon'ble Supreme Court in **Ramakant Ambalal Choksi Vs. Harish Ambalal Choksi [2024 SCC OnLine SC 3538]**

20. In the light of what is narrated above, when the impugned order is perused, it seen that *ad-interim* relief is refused by a reasoned order after considering the material on record and after

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having found that there is no *prima facie* material to support the case of the Appellants. The reasons mentioned and conclusion drawn in the impugned order are neither perverse nor arbitrary nor capricious. In that view of the matter, this is not a fit case to substitute discretion already exercised by the Trial Court.

21. There is no merit in the appeal. The same is accordingly dismissed. All pending interim application/s are also dismissed.

22. Needless to mention that the suit shall proceed on its own merits, in accordance with law. Rival contentions of the parties are kept open.

23. All concerned to act on duly authenticated or digitally signed copy of this order.

(M.M. SATHAYE, J.)

24. At this stage, learned counsel for the Appellants prays for continuation of ad-interim order passed by this Court on 16.12.2024. Learned counsel for Respondents (Municipal Corporation and Owner) opposed the request. Considering the fact that the protection granted by the Trial Court on 22.11.2024 was continued till passing of the order, the same is continued for a period of two weeks from today.

(M.M. SATHAYE, J.)

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