

CASE NO.:
Special Leave Petition (civil) 26241-42 of 2005

PETITIONER:
KASAM ALI MOMIN

RESPONDENT:
MUNICIPAL CORPORATION OF GREATER BOMBAY & ORS

DATE OF JUDGMENT: 04/01/2008

BENCH:
G.P. MATHUR & D.K. JAIN

JUDGMENT:
JUDGMENT

O R D E R

D.K. JAIN, J.:

1. These petitions under Article 136 of the Constitution, are directed against the judgment, dated 14th September, 2005, rendered by the High Court of Judicature, at Bombay in First Appeal No.580 of 2005 and order dated 28th October, 2005, passed in the review petition, whereby the appeal as well as the review application preferred by the petitioner against the judgment of the Bombay City Civil Court, dismissing his suit have been dismissed.

2. In order to appreciate the controversy involved, a few relevant facts may be stated.

3. The petitioner is the original plaintiff. He filed a suit for declaration and permanent injunction against the Bombay Municipal Corporation (hereinafter referred to as the \021Corporation\022), restraining them from carrying out demolition of the property bearing Shed No.80, Bombay Talkies Compound, Malad (West) Bombay. The case of the petitioner is that since 1969 he is the tenant in respect of an open piece of land admeasuring 1118 sq. feet, owned by a Trust, namely, Ram Kumar Jalan Public Charitable Trust, respondent No.2 herein. This land was given to him with a right to put up construction thereon as per the rent receipt dated 13th May, 1969. He carried out further construction on the plot prior to 1981 and constructed ground plus two upper floors. According to the petitioner, a fire broke out in the suit premises and the adjoining premises on 25th August, 1999, affecting the second floor along with the loft therein. On being informed, an officer of the Corporation inspected the site, prepared the inspection report and observed that no major damage was caused to the structure.

4. On 1st September, 1999, a notice under Section 354-A of the Bombay Municipal Corporation Act (for short \021the Act\022) was issued to the petitioner, alleging unauthorised reconstruction of the structure by him, to which he responded vide his reply dated 5th September, 1999. On 6th October, 1999, the Corporation issued yet another notice under Section 351 of the Act, requiring the petitioner to show cause as to why the notice structure be not pulled down or unauthorised change be not restored to its sanctioned user. He was called upon to produce documentary evidence to show that the building or work or change of user was not unauthorised. The petitioner

furnished explanation to the said notice vide letter dated 11th October, 1999, refuting the allegation of unauthorised construction. In the same letter the petitioner issued a notice to the Corporation, purporting to be a notice under Section 527 of the Act, threatening a legal action against the said show cause notice.

5. The explanation so furnished by the petitioner came to be rejected by the Corporation vide their letter dated 3rd December, 1999, inter alia, on the ground that the petitioner had failed to produce documentary evidence to show that the structure was in existence prior to datum line of 1st April, 1962. Aggrieved, the petitioner filed the suit challenging the said notice and order passed by the Corporation, seeking a declaration to the effect that the order and notice were illegal. Relief of injunction, restraining the Corporation from demolishing the structure which was referred to as Shed bearing No.180, was prayed for.

6. Initially, the suit was filed only against the Corporation. However, subsequently the said owner of the property, namely, the Trust was also impleaded. The Corporation did not file its written statement. However, the suit was contested by the Trust, by filing written statement. The stand of the Trust was that the petitioner was never given an open piece land on lease but a built up Shed (No.180), on the ground floor only, was given to him on rent. However, the petitioner carried out unauthorised construction under the guise of repairs to the portions of the Shed which was partially damaged in the fire, which broke out in the year 1999. It was also the stand of the Trust that the Shed was initially admeasuring 450 sq. feet only but the petitioner constructed ground plus two upper floors illegally without permission, consent and approval of the Trust and without getting the plan sanctioned from the Corporation.

7. On the basis of the pleadings, the Trial Court framed six issues. The petitioner and the Trust led evidence and the Corporation was permitted to cross examine the witnesses. On consideration of the evidence, so adduced, the trial court came to the conclusion that the petitioner had failed to prove that the first floor was in existence in the year 1969, when he had taken possession of the suit premises or that construction above the first floor was in existence before the datum line. Accordingly, the suit was dismissed.

8. Being aggrieved, the petitioner filed First Appeal to the High Court. The main point urged before the High Court was that the datum line for construction in the Bombay Talkies Compound being 1981 and since the structure of the petitioner was put up prior thereto, it was not liable to be demolished. The stand of the petitioner did not find favour with the High Court. Consequently, the appeal was dismissed. Against the said judgment, the petitioner unsuccessfully preferred Review Application. Both these orders are questioned in the present Special Leave Petitions.

9. We have heard learned counsel for the parties. It was vehemently contended by Mr. U.U. Lalit, learned senior counsel on behalf of the petitioner that the trial court as well as the High Court have failed to return a clear finding on the question of datum line, though it was specifically pleaded. Learned counsel submitted that in view of this fallacy in the order of the High Court, the matter deserves to be remitted back to the High Court for fresh consideration on this vital question.

10. We are unable to persuade ourselves to agree with learned counsel for the petitioner.

11. Indubitably, in the plaint as well as in his affidavit it was the specific case of the petitioner that the datum line for

industrial units at the Bombay Talkies Compound was 3rd March, 1981 as according to the petitioner this fact had been recognised by virtue of various orders issued by the officers of the Corporation as well as by the Government and the order passed by the High Court in the writ petition filed by the association of the unit holders. In support of his stand the petitioner produced several documents; examined himself and deposed on the lines of the averments in the plaint. The Corporation led no evidence, necessitating the petitioner to summon some official records. His application seeking leave to lead secondary evidence was also allowed. The Corporation was called upon to produce certain documents. As noted above, though the Corporation had not filed its written statement yet they were allowed to cross examine the petitioner. By giving certain suggestions, the Corporation set up a specific case that the datum line was never changed from 1st April, 1964, as applicable to all industrial sheds existing all over the city of Bombay, to 3rd March, 1981 as pleaded by the petitioner. Therefore, the onus was on the petitioner to prove that the Corporation had extended the datum line to 3rd March, 1981. It is manifest that no specific issue was framed, as claimed by the petitioner, with regard to the datum line. Nevertheless, while collectively dealing with the issues No.2, 3 and 4, relating to the question whether the notice structure was unauthorised and/or tolerated, the trial court examined threadbare the entire documentary and ocular evidence, referred to various orders passed by the High Court, brought on record by the petitioner and returned the findings that : (i) in none of the orders passed by the High Court, there was direction regarding regularisation and there was no mention of any datum line or policy statement on behalf of the Corporation much less 3rd March, 1981; (ii) the communication between the Corporation and the State Government was only draft guidelines sent for approval, inter alia, suggesting that because of litigation started by the occupants of the sheds, 3rd March, 1981 may be treated as a cut off date but there was no material on record to show that the proposal, sent as far back as in 1988, was accepted by the Government, (iii) admissions in the plaint as well as in the statement of the petitioner showed that he did not have any documentary evidence to show that the suit structure was in existence prior to 1st April, 1962 (iv) the petitioner had failed to prove the existence of the first floor and, in any case, the existence of the first floor when gala No.80 was taken into possession by him and (v) the petitioner had failed to prove that the first floor was in existence on or before the datum line.

12. In the light of the aforementioned findings returned by the trial court and affirmed by the High Court, which are primarily findings of fact, we do not find any reason to entertain the plea sought to be raised by learned counsel for the petitioner that the matter may be remanded back for determination of the datum line. It needs little reiteration that in exercise of its extraordinary power under Article 136 of the Constitution, ordinarily this Court does not interfere on questions of fact, except in exceptional cases when the finding is such that it shocks the conscience of this Court. In our opinion, the present case does not fall in the latter category.

13. In the conspectus of the circumstances aforesaid, the petition is devoid of any merit. We decline to grant leave. Dismissed.