

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION

APPEAL FROM ORDER NO.305 OF 2023
WITH
INTERIM APPLICATION NO.3856 OF 2023
WITH
APPEAL FROM ORDER NO.306 OF 2023
WITH
INTERIM APPLICATION NO.3857 OF 2023

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Abdul Hamid Mapkhan Shah

...Appellant/
Ori. Plaintiff

vs.

The Municipal Corporation of Greater Mumbai

...Respondent/
Ori. Defendant

Mr. P.J. Thorat a/w. Mr. S.S. Yadav i/b. B.S. Shukla, for the Appellant.

Mr. Rajiv Chavan, Senior Advocate a/w. Ms. Smita Tondwalkar, for MCGM.

Mr. Harish Chavan, and Mr. Deepak Manjare, R/C Ward present.

CORAM : N. J. JAMADAR, J.
RESERVED ON : APRIL 20, 2023
PRONOUNCED ON : APRIL 26, 2023

JUDGMENT :

1. These appeals are directed against a common order dated 13th April, 2023 passed by the learned Judge, City Civil Court at Dindoshi (Borivali Division) in Notice of Motion No. 1229 of 2021 and 1231 of 2023 in L.C.Suit No. 539 of 2020 whereby the Notices of Motion taken out by the appellant/ plaintiff to restrain the defendant from demolishing 5 structures bearing No. RXX-25/1/1, RXX-26-1/1, RXX-27-1/1, RXX-28-1/1 and RXX-29-1/1 (the suit

structures) pursuant to notice dated 15th February, 2020 and the speaking order dated 30th June, 2021 and the notice dated 10th February, 2023 under section 351 of the Mumbai Municipal Corporation Act, 1888 (the Act, 1888) and the speaking order dated 23rd March, 2023, respectively, came to be dismissed.

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. The background facts leading to these appeals can be stated as under:-

a) The plaintiff claims to be in the occupation and possession of the suit structures. Those structures have been in existence since prior to 1961-62. They are censused structures. Census certificates in respect of RXX-25-1/1 and RXX-26-1/1 with the record year 1976 were issued on 20th February, 1980 in favour of Gaul Vincent Pimenta. Whereas census certificates in respect of structure No. RXX-27-1/1, RXX-28-1/1 and RXX-29-1/1 with record year 1976 were issued in favour of Govindram R. Kalra on 20th February, 1980 by the office of the Controller of Slums.

b) The plaintiff claims to have acquired first two structures from

Gaul Pimenta in the year 1994 under an Agreement for Sale dated 17th May, 1994. The remaining 3 structures were acquired by the plaintiff from Govindram Kalra under an Agreement for Sale dated 16th June, 1994. Thus the plaintiff claims to be entitled to and possessed of all the suit structures.

4. In the year 2014 a notice was issued to the plaintiff purportedly under section 351 of the Act, 1888 alleging unauthorized construction of 5 structures, swimming pool and WC block with BM wall covered with AC sheets roof. It was followed by a speaking order dated 7th May, 2014. The plaintiff instituted LC Suit No. 1166 of 2014 assailing the legality and validity of the said notice and speaking order. However, by an order dated 22nd May, 2014, ad-interim relief was declined by the City Civil Court in the said suit. Consequently, the structures described in the said notice were demolished by the defendant- Corporation on 27th August, 2014.

5. The plaintiff asserts the defendant, on the strength of a motivated complaint of Municipal Councilor falsely alleging that the plaintiff has re-erected the unauthorized structures, addressed a notice dated 15th February, 2020 and called upon the plaintiff to either submit approval for development issued by the competent

authority or remove the unauthorized work within three days thereof, lest the defendant would demolish those structures.

6. The plaintiff thus instituted the instant suit and sought an interim relief to restrain the defendant from acting upon the said notice and order. The City Civil Court by an order dated 13th March, 2020 directed the defendant to pass a reasoned order after considering the reply filed by the plaintiff. Yet, the designated officer passed a cryptic unreasoned order on 4th June, 2021. By an order dated 26th June, 2021 the City Civil Court refused ad-interim relief.

7. The plaintiff approached this Court in an Appeal From Order No. 180 of 2021. By an order dated 10th August, 2021 this Court was persuaded to allow the appeal by setting aside the order passed by the City Civil Court and directed the learned Judge, City Civil Court to decide the Notice of Motion No. 1229 of 2021 expeditiously.

8. While the suit and the said Notice of Motion were subjudice, the defendant issued a fresh notice under section 351 of the Act, 1888 on 10th February, 2023 alleging erection of 16 unauthorized structures. The plaintiff gave reply on 17th February, 2023. Again

by a laconic order dated 23rd March, 2023 the designated officer directed the plaintiff to remove the notice structure within 15 days lest they would be demolished. The plaintiff was thus constrained to amend the plaint and assail the legality and validity of the aforesaid notice dated 10th February, 2023 and the order dated 23rd March, 2023.

9. Interim reliefs were sought by taking out Notice of Motion No. 1231 of 2023. The defendant resisted the Notice of Motion by filing a reply contending, inter alia, that the plaintiff has carried out unauthorized development despite demolition of unauthorized structures in the year 2014. The suit structures are neither authorized nor tolerated. Hence, the defendant was within its rights in initiating action under section 351 of the Act, 1888.

10. The learned Judge, City Civil Court, after appraisal of the rival contentions and the material on record, was persuaded to dismiss the Notices of Motion holding, inter alia, that the plaintiff could not succeed in demonstrating that 16 notice structures were in existence prior to datum line. The census certificates relied upon by the plaintiff were of no assistance to the plaintiff as the plaintiff was running a hotel and resort at the subject premises which

consisted of several rooms including a swimming pool. The learned Judge found that the plaintiff was provided a fair opportunity of hearing and the designated officer was justified in passing the order dated 23rd March, 2023. Thus, no prima facie case was made out. Having regard to the nature of the development, the learned Judge was persuaded to hold that balance of convenience did not tilt in favour of the plaintiff nor the plaintiff would suffer irreparable loss.

11. Being aggrieved the plaintiff is in appeal.

12. I have heard Mr. P.J. Thorat, learned counsel for the appellant and Mr. Rajiv Chavan, learned senior advocate for the Corporation at some length. With the assistance of the learned counsel for the parties, I have perused the pleadings and the material on record.

13. Mr. Thorat, the learned counsel for the appellant, strenuously submitted that the notice dated 15th February, 2020 lacked elementary particulars. It neither indicated the unauthorized structure nor the statutory provisions in exercise of which the said notice was issued. Moreover, the fact that the said notice was issued at the behest of a local politician was self evident. Though this aspect was considered by this Court in Appeal From Order No. 180

of 2021, the trial Court committed an error in discarding the said aspect which bears upon the bonafide of the defendant's action.

14. Mr. Thorat would further urge that the fresh notice dated 10th February, 2023 and the speaking order dated 23rd March, 2023 also suffer from the same taint. Mr. Thorat advanced a severe criticism against the order passed by the designated officer dated 23rd March, 2023 on the count that there was no consideration at all and the documents were brushed aside by a singular sentence that the documents did not prove the authorization and existence of the notice structure before the datum line i.e. 1st April, 1962 fixed for tolerated commercial structures. The trial Court committed an error in upholding such un-reasoned order, urged Mr. Thorat.

15. Taking the Court through the census certificates and the documents which indicate that the competent authorities have granted requisite certificates and/or licenses for carrying out the business in the subject premises, Mr. Thorat would urge that, at this interim stage, the plaintiff has made out a strong prima facie case and he could not have been non-suited without providing an opportunity to substantiate his case at the trial.

16. Per contra, Mr. Rajiv Chavan, learned senior advocate for the defendant, submitted that the plaintiff by his conduct has disentitled himself from any equitable relief. Despite the unauthorized structures erected by the plaintiff having been demolished in the year 2014, the plaintiff has again erected as many as 16 unauthorized structures. Taking the Court through the notice structures, Mr. Chavan would urge that unauthorized development is simply unimaginable. Mr. Chavan further submitted that the plaintiff has approached the Court with a case to protect 5 censused structure. However, the notice structures do not relate to those 5 allegedly censused structures, even remotely. In any event, the fact that the structures are censused does not grant immunity from action for unauthorized development, submitted Mr. Chavan. To this end, a strong reliance was placed on a judgment of Division Bench of this Court in the case of High Court on its own motion (In the matter of Jilani Building at Bhiwandi vs. Bhiwandi Nizampur Municipal Corporation and Others¹.

17. To begin with few facts which are rather un-controverted. First it is incontrovertible that the plaintiff had instituted LC Suit No. 1166 of 2004 assailing the legality and validity of notice under section 351 of the Act, 1888 in respect of certain structures over

¹ PIL No.1/2020 Dt. 26/02/2022.

the subject premises and as the plaintiff failed to obtain any ad-interim relief, those structures were demolished by the defendant on 27th August, 2014. Second, the plaintiff claims to have acquired interest in the 5 censused structures, by virtue of the Agreements for Sale executed by the predecessors in title on 17th May, 1994 and 16th June, 1994, who were granted the census certificates on 20th February, 1980. Third, the plaintiff approached the Court with Notice of Motion Nos. 1229 of 2021 as well as 1231 of 2023 to protect those 5 censused structures only.

18. In the aforesaid view of the matter to appreciate the controversy in a correct perspective, it may be apposite to note the description of the 5 suit structures in respect of which census certificates were issued. The particulars are tabulated as under:-

Sr.	Name	Structure Number	Area
1	Gaul Vincent Pimenta	RXX-25-1/1	50 x 50 Sq.ft.
2	Gaul Vincent Pimenta	RXX-26-1/1	50 x 50 Sq.ft.
3	Govindram R. Kalra	RXX-27-1/1	102 x 17 Sq.ft.
4	Govindram R. Kalra	RXX-28-1/1	120 x 12 Sq.ft.
5	Govindram R. Kalra	RXX-29-1/1	50 x 50 Sq.ft.

19. It would be contextually relevant to note that the unauthorized structures in respect of which notice was issued in the year 2014 and which were eventually demolished. The

description of the unauthorized work in the said notice read as under:-

“Unauthorized construction of structure with B.M. walls and covered with (A) A.C. sheet roof admeasuring 1) 77’-3” x 16’-6” x 11’-0” height, 2) 32’-0” x 37’-0” x 10’-0” height, 3) 21’-0” x 26’-3” x 11’-0” height, 4) 41’-0” x 41’-0” x 11’-0” height 5) 41’-0” x 81’-0” x 5’-0” depth (swimming pool), B) unauthorized construction of W.C. block with B.M. wall and covered with A.C. sheet roof admeasuring 1) 16’x 42’ x 9’0” height 2) 10’-0” x 20’-0” x 9’-0” height at Survey No. 42, CTS No. 41 (pt.), Plot No. 1, village Gorai, Gorai Beach, Borivali (West), Mumbai-92.”

20. At this juncture, the structures in respect of which the impugned notice came to be issued under section 351 of the Act, 1888 on 10th February, 2023 deserves to be noticed. They are described as under:-

- 1} Unauthorised construction of shed with A.C. sheet and I Section admeasuring 8.0 m x 7.0 m x 2.0 m (ht.).
- 2} Unauthorised construction of reception shed with A.C. sheet, B.M. Wall and G.I. pipe admeasuring 8.0 m x 7.0 m x 2.0 m (ht.).
- 3} Unauthorised construction consisting of rooms with BM wall & AC sheet roof admeasuring 14.0 m x 4.0 m x 2.0 m (ht.).
- 4} Unauthorised construction of ladies toilet with ph. Roof sheet roof admeasuring 9.0 m x 4.5 m x 2.0 m (ht.).
- 5} Unauthorised construction consisting of 12 rooms with BM Wall & AC sheet roof admeasuring 46.0 m x 4.5 m x 2.0 m(ht.).
- 6} Unauthorised construction consist of 5 rooms of Ground + 1st floor structure with BM Wall, AC sheet and ladi coba ladi slab admeasuring 12.0 m x 2.0 m (ht.).
- 7} Unauthorised construction consisting of 6 rooms of ground + 1st floor structure with BM Wall, AC sheet and ladi coba ladi slab admeasuring 65.0 m x 12.0 m x 2.0 m (ht.).
- 8} Unauthorised construction consisting of 6 rooms of Ground + 1st floor structure with BM Wall, AC sheet and ladi coba ladi slab admeasuring 40.0 m x 12.0 m x 2.0 m (ht.).

- 9} Unauthorised construction of open shed near Swimming pool with A.C. sheet roof, I-section & M.S. pipe admeasuring 6.0 m x 3.0 m x 2.0 m (ht.).
- 10} Unauthorised construction of security cabin with BM wall & AC sheet roof admeasuring 3.0 m x 3.0 m x 2.0 m (ht.).
- 11} Unauthorised construction of shed with FRP material & concrete pole admeasuring 5.0 m x 4.0 m x 2.0 m (ht.).
- 12} Unauthorised construction of room with BM Wall and A.C. sheet roof admeasuring 10.0 m x 6.5 m x 2.0 m (ht.).
- 13} Unauthorised construction of kitchen with BM Wall and AC sheet roof admeasuring 9.0 m x 12 m x 2.0 m (ht.).
- 14} Unauthorised construction of Banquet with BM Wall and AC sheet roof admeasuring 33 m x 9.0 m x 2.0 m (ht.).
- 15} Unauthorised construction of open air platform with ladi coba admeasuring 30.4 m x 15.2 m x 0.6 m (ht.).
- 16} Unauthorised construction of 19 number of wooden shacks in which 7 shacks are ground + 1st floor and 12 shacks are ground floors admeasuring 6.0 m x 3.0 m x 4.0 m (ht.) and 6.0 m x 3.0 m x 3.0 m (ht.) respectively situated at Sun Beach Resort, Ponda Wadi, Gorai Beach, Gorai Village, Borivali (West), Mumbai 400 091.

21. In the backdrop of the aforesaid clarity on facts as to the nature of the censused structures, the structures which were unauthorizedly erected and demolished in the year 2014 and the nature of the allegedly unauthorized development carried out by the plaintiff post the demolition of the structures in the year 2014, the submissions on behalf of the parties deserve to be considered.

22. An endeavour was made on behalf of the plaintiff to draw home the point that the impugned notice dated 10th February, 2023 does not relate to the structures which were demolished in the year

2014 and, therefore, the allegations that the plaintiff has re-erected the structures which were demolished in the year 2014 is devoid of substance.

23. This submission loses sight of the fact that the plaintiff's case entirely rests on the census certificates which were issued in favour of the predecessors in title of the plaintiff. The structures in respect of which census certificates were issued, as noted above, do not bear any resemblance to the structures which were demolished in the year 2014 and the structures in respect of which notice has been issued on 10th February, 2023. In the absence of material to demonstrate that the plaintiff has continued to occupy the structures, in respect of which the census certificates have been granted in favour of the predecessor in title of the plaintiff, in the same condition in which they were acquired, the census certificates, even if taken at par, do not advance the cause of the plaintiff. Once the identity of the censused structures is lost, the plaintiff can resist the action under section 351 of the Act only if he succeeds in establishing that either the structures are authorized or tolerated.

24. The plaintiff does not claim to have obtained any permission for development. The edifice of the case of the structures being

tolerated rests on the census certificates. On the own showing of the plaintiff, the structures were censused in the year 1976. Prima facie no material could be placed on record to demonstrate that the suit structures were in existence prior to the datum line. Moreover, the census certificates, even if construed rather generously, do not relate to the unauthorized structures referred to in the notice dated 10th February, 2023.

25. Evidently, no photo pass has been issued in favour of either the predecessors in title of the plaintiff or the plaintiff. Even where a photo-pass has been issued under section 3Y of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 & Slum Rules (the Act, 1971) it does not grant absolute immunity from action for unauthorized development. 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.

26. The Division Bench In the matter of **Jilani Building at Bhiwandi** (supra), after an elaborate considerations of all the relevant provisions and the specific contentions 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.

70. As discussed above, there are provisions under the MMC Act as also under the MRTP Act and the MLRC which confer several powers on the authorities to take action against illegal constructions. We may, however, clarify that a protection which has been conferred by Section 3Z of the Slums Act, to the protected occupiers, cannot be confused or interpreted to mean that the protected occupier enjoys and is granted a complete immunity from putting up unauthorized construction or structure and/or can make illegal additions or alterations. The protection which is granted is to a basic slum structure as may be recognized in the photo-pass. If mere issuance of a photo-pass is interpreted to be a blanket and an unfettered permission to put up any illegal construction, additions or alterations, it would lead to an abuse of the provisions of Section 3Z read with Section 3X-(a)(b)(c). Such can never be the intention of the legislature that the municipal authorities cannot take any action against the unauthorized structures merely because a photo-pass is issued.

.... ..

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 MRTP 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 MRTP 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 MRTP 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 MRTP 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.

(emphasis supplied)

27. In view of the aforesaid pronouncement, the plaintiff's endeavour to salvage the position by banking upon the census certificates does not merit countenance.

28. What exacerbates the situation is the nature of the unauthorized development described in the notice dated 10th February, 2023. Unauthorised development of huge magnitude has been carried out for commercial exploitation. The erection of structures is in flagrant violation of the development control regulations and constitutes brazen illegality. The fact that the unauthorized structures were demolished in the year 2014 further accentuates the situation and bears upon the exercise of discretion.

29. The submission based on the alleged motivated action, in the facts of the case, does not deserve any countenance. Complaints about the unauthorized re-erection of demolished structures cannot be jettisoned away by attributing motives. In the case at hand, there is prima facie substance in the contention on behalf of the defendant that despite demolition of structures in the year 2014, the plaintiff again erected unauthorized structures.

30. In conclusion, the complete dis-connect between the prayers in the Notices of Motion, which were filed apparently to protect the censused structure, with an objective to derive benefit of the census certificates, and 16 unauthorized notice structures renders the case of the plaintiff wholly unsustainable. Thus, the learned Judge, City

Civil Court committed no error in declining to exercise the discretion in favour of the plaintiff. Resultantly, no case is made out to interfere in the exercise of discretion by the trial Court, in exercise of limited appellate jurisdiction.

Thus, the following order.

ORDER

1} The appeals stand dismissed.

2} In view of the dismissal of the appeals, the Interim Applications also stand dismissed.

(N. J. JAMADAR, J.)

31. At this stage Mr. Thorat, the learned counsel for the appellant prayed for continuation of interim protection.

32. For the reasons recorded in the judgment, the prayer for continuation of protection does not merit acceptance and hence oral application stands rejected.

(N. J. JAMADAR, J.)