

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION St.NO. 27871 OF 2015**

Shailesh Nandlal Gaglani

..Petitioner

Vs.

Mira Bhyandar Municipal Corporation & Anr

..Respondents

**Mr. P. S. Dani Senior Advocate, i/b Mr. R. D. Suryawanshi for the
Petitioner**

Ms Pooja Singh i/b Mr. N. R. Bubna for the Respondent No.1

CORAM : R. M. SAVANT, J.

DATE : 27th OCTOBER, 2015

P.C.

1 The Writ Jurisdiction of this Court is invoked against the order dated 5-10-2015, passed by the Learned District Judge -12, Thane, by which order, the Appeal filed by the Petitioner being Misc Civil Appeal No.104 of 2015, came to be dismissed and resultantly the order dated 5-6-2015 passed by the Learned Joint Civil Judge Junior Division, Thane, rejecting the application Exhibit 5 filed by the Petitioner for temporary injunction, came to be confirmed.

2 The Petitioner herein is the original plaintiff in the suit in question being Regular Civil Suit No.419 of 2015. The Respondents herein are the Defendants to the Suit, Respondent No.1 is the Municipal Corporation for the area known as Mira-Bhayandar. The dispute in the proceeding is as regards the

user of the premises admeasuring 248 sq.ft. on the ground floor of the building of the society of the flat purchasers. The said premises are being used for commercial purposes by the Plaintiff i.e. the Petitioner herein. At this stage, it is required to be noted that a notice under Section 260 the Maharashtra Municipal Corporation Act, 1949, (hereinafter referred to as the said Act) came to be issued on 29-4-2006 to the Plaintiff alleging unauthorised construction in so far as the said office premises of the society is concerned. The said notice was challenged by the Plaintiff by filing Regular Civil Suit No.306 of 2006 interalia on the grounds mentioned in the Suit. In the said Suit an application for temporary injunction came to be moved by the Plaintiff which application came to be allowed. It seems that thereafter a statement came to be made on behalf of the Defendant No.1 i.e. the Municipal Corporation that it would follow the due process of law. By recording the said statement, a decree was passed by the Trial Court in terms of the said statement. It appears that thereafter another notice under Section 260 of the said Act came to be issued on 2-12-2013 pursuant to which notice, a reply dated 21-12-2013, came to be filed by the Plaintiff in which reply reliance was placed on various documents including the sale deed which was executed by the builder in respect of the said premises admeasuring 248 sq.ft. The Plaintiff was heard pursuant to the said notice and an order came to be passed on 11-7-2014 under Section 260 (1) and (2) of the said Act. The Plaintiff challenged the said order by filing another Suit being Regular Civil Suit No.743 of 2014. Suffice it would be to

state that in the said Suit an application for temporary injunction was filed which was allowed and thereby the Defendant No.1 i.e. the Municipal Corporation was restrained from taking any action pursuant to the said order dated 11-7-2014. Whilst the aforesaid Suit i.e. Regular Civil Suit No.743 of 2014 was pending, the Defendant No.1 Corporation through its Town Planning Officer issued a notice dated 13-4-2015 under Schedule (D) Chapter XII Clause (10) of the said Act, alleging unauthorised use of the office premises for commercial purposes. Pursuant to the said notice, a hearing was granted to the Plaintiff pursuant to which hearing an order came to be passed on 20-5-2015 by the Town Planning Officer of the Municipal Corporation. In the said order, the Town Planning Officer has referred to the antecedent notices issued under Section 260 and the order passed pursuant thereto under Section 260 (1) and (2) of the said Act. By the said order, the Plaintiff has been called upon to stop the commercial use of the premises in question, and vacate the said premises within 15 days of the said order failing which the Ward Officer of the Corporation is directed to take steps to seal the premises in question.

3 Aggrieved by the said order dated 20-5-2015 passed by the Town Planning Officer the Plaintiff has filed the instant Suit being Regular Civil Suit No.419 of 2015 challenging the said notice dated 13-4-2015 and the order dated 20-5-2015 passed subsequent thereto. In the said Suit, the Plaintiff also filed an application for temporary injunction. The Plaintiff as on the earlier

occasions relied upon various documents amongst which is the document by which the developer has sold the suit premises to the Plaintiff. The Plaintiff also questioned the power and authority of the Town Planning Officer to issue notice and pass an order. The Plaintiff also questioned the notice on the ground that issuance of such notice is not contemplated under the Schedule (D) Chapter XII Clause (10) of the said Act. The Defendant No.1 filed its reply to the said application and interalia defended its action on the ground that the notice was required to be issued in view of the fact that there was an unauthorised use of the society office premises for commercial purposes. It was also stated that the Commissioner has delegated his powers under the said Schedule to the Town Planning Officer and therefore the action of issuance of notice and passing of the order by the Town Planning Officer could not be questioned.

4 The Trial Court considered the said application for temporary injunction Exhibit 5 filed by the Plaintiffs and rejected the same by its order dated 5-6-2015. The gist of the reasoning of the Trial court is that the sanctioned plan shows the said premises as the office of the society and that the said office premises being sold by the developer and now being used for commercial purposes, warranted the issuance of the notice under Schedule (D) of the said Act. The Trial Court observed that the Plaintiff has not been able to demonstrate that the premises which are being used for commercial purposes

and the office premises are two distinct premises. The Trial Court also did not countenance the contentions urged on behalf of the Plaintiff that the Town Planning Officer was not properly authorised in view of the delegation which the Commissioner has made by virtue of the endorsement made on the note put up by the Law Officer. The Trial Court accordingly as indicated above has rejected the application for temporary injunction.

5 The Plaintiff aggrieved by the order dated 5-6-2015 passed by the Trial Court carried the matter to the District Court by way of an Appeal being Misc Civil Appeal No.104 of 2015. The Lower Appellate Court i.e. the Learned District Judge-12, Thane on a re-appreciation of the material on record did not deem it appropriate to interfere with the order passed by the Trial Court rejecting the application for temporary injunction. The Lower Appellate Court thereby confirmed the findings of the Trial Court as regards the unauthorised use of the society office premises for commercial purposes. The Lower Appellate Court also observed that the grant of injunction in the earlier two Suits would have no impact in so far as the relief sought in the present Suit is concerned, as in the earlier Suits the notices were alleging unauthorised construction when it is not the case of the Municipal Corporation that the construction of the office premises is unauthorised. The Lower Appellate Court also did not countenance the contention urged on behalf of the Plaintiff as regards the authority of the Town Planning Officer to issue the notice. The

Lower Appellate Court observed that in view of the endorsement made by the Commissioner on the note of the Law Officer. The Town Planning Officer was authorised by the Commissioner to take steps under Schedule (D) Chapter XII Clause (10) to the said Act. The Lower Appellate Court has accordingly dismissed the Appeal by the impugned order dated 5-10-2015 and accordingly confirmed the order passed by the Trial Court directing the stoppage of the unauthorised use of the suit premises for commercial purposes, direction to vacate the premises and in default the direction to seal the premises. As indicated above, it is the said order dated 5-10-2015 which is taken exception to by way of the above Petition.

6 The Learned Senior Counsel Mr. P. S. Dani appearing on behalf of the Petitioner / Plaintiff would reiterate the contentions which were urged on behalf of the Plaintiff before the Courts below. The Learned Senior Counsel would re-urge the contention as regards the authorisation of the Town Planning Officer to issue the notice under Schedule (D) Chapter XII Clause (10) of the said Act. It was also the submission of the Learned Senior Counsel that in view of the fact that temporary injunction was granted in the two earlier Suits, the Courts below have erred in rejecting the application for temporary injunction in the instant Suit. It was also the submission of the Learned Senior Counsel that the action as directed by the order dated 20-5-2015 passed by the Town Planning Officer is not contemplated under Schedule

(D) Chapter XII Clause (10) of the said Act and at the highest a penalty of Rs.500/- can be imposed on the Plaintiff. It was the submission of the Learned Senior Counsel that handing over of the possession of the premises or sealing of the premises would go beyond the powers that are conferred on the Municipal Corporation under the said Act.

7 Per contra the Learned Counsel Ms Singh appearing on behalf of the Respondent No.1 Corporation sought to support the impugned order. It was the submission of the Learned Counsel that the power to seal the premises is implicit in the power which is conferred by Schedule (D) Chapter XII Clause (10) of the said Act. It was the submission of the Learned Counsel that in view of the unauthorised use of the society office premises for commercial purposes that action was required to be taken and the action of sealing is required to be taken if the commercial use is not stopped by the Plaintiff.

8 Having heard the Learned Counsel for the parties I have bestowed my anxious consideration to the rival contentions. As indicated above the passing of the order dated 20-5-2015 by the Town Planning Officer calling upon the Plaintiff to stop the unauthorised use of the premises in question for commercial purposes has triggered of the filing of the instant Suit i.e. Regular Civil Suit No.419 of 2015. The question that is therefore posed is whether the Plaintiff has made out a prima facie case as also whether the other two

ingredients which are essential to be satisfied for the grant of injunction have been so satisfied by the Plaintiff. In the said context it would be necessary to advert to the earlier two Suits filed by the Plaintiff. The said Suits are Regular Civil Suit No.306 of 2013 which was filed challenging the notice under Section 260 alleging unauthorised construction in respect of the suit premises i.e. the society office premises. The said Suit as indicated above came to be decreed on the statement made on behalf of the Municipal Corporation that the due process of law would be followed. The due process of law thereafter was sought to be adopted by the Municipal Corporation and consequently a fresh notice under Section 260 came to be issued and thereafter an order came to be passed under Section 260(1) and (2). This resulted in the second Suit filed by the Plaintiff being Regular Civil Suit No.743 of 2014. In the said Suit also the application for temporary injunction was allowed thereby the Defendant No.1 i.e. the Municipal Corporation was restrained from taking action pursuant to the order dated 11-7-2014 passed under Section 260(1) and (2). However, what cannot be lost sight of in respect of the said two proceedings is that the notices which were the subject matter of the said two Suits were one alleging unauthorised construction. It is required to be noted that it is not even the case of the Defendant No.1 Corporation that any unauthorised construction is carried out by the Plaintiff. The allegation is as regards unauthorised use of what is shown as the society office premises in the sanctioned plan. It is in the said circumstances that the fresh proceedings came to be initiated and a notice

under Schedule (D) Chapter XII Clause (10) to the said Act came to be issued for the unauthorised use of the office premises for commercial purposes without the permission of the Commissioner. Such a case is covered by clause (a) of Schedule (D) Chapter XII Clause 10.

9 In so far as the said aspect is concerned, the only defence taken by the Plaintiff is that the said premises have been sold by the developer to the Plaintiff. The said fact therefore raises a larger issue as to whether the developer in fact could have sold of the premises which were shown in the sanctioned plan as society office premises to the Plaintiff for being used for commercial purposes by scoring of the word “office” and replacing the same by the word “flat”. However, that is a larger issue which need not be gone into at this stage. Both the Courts below have as indicated above observed that it is not the case of the Plaintiff that the premises used by him for commercial purposes are different than the office premises which are shown in the sanctioned plan as such. In the said circumstances, the Courts below have rightly come to a conclusion that the use of the premises by the Plaintiff can be prima facie said to be against the sanctioned plan wherein the premises are shown as society office premises. The Courts below have therefore come to a conclusion that the Plaintiff has not made out a prima facie case.

10 In so far as the power of the Town Planning Officer to issue the

said notice dated 13-4-2015 is concerned, the Commissioner of the Municipal Corporation has authorised the Town Planning Officer to take steps under Schedule (D) Chapter XII Clause (10) by making an endorsement on the opinion given by the Law officer of the Municipal Corporation. Though the Learned Senior Counsel appearing on behalf of the Petitioner sought to question the manner in which the Town Planning Officer has been authorised by the Municipal Corporation by placing reliance on Section 67 of the said Act, in my view, the said contention has no merit having regard to the subsequent Section that is Section 69 of the said Act which contemplates the empowerment of the officers of the Municipal Corporation to exercise certain powers of the Commissioner or the Transport Manager, which empowerment can be made by an order in writing. In the instant case, as indicated above there is no dispute about the fact that the Commissioner has authorised or empowered the Town Planning Officer to take action for the unauthorised use of the society office premises by making endorsement on the opinion of the Town Planning Officer. In my view therefore, the Courts below were right in rejecting the application for temporary injunction filed by the Plaintiff and that the finding of the Courts below that the Plaintiff has not made out a prima facie case or the balance of convenience is not in favour of the Plaintiff, no irreparable loss would cause to the Plaintiff, cannot be faulted with.

11 However, the question that arises is whether the Plaintiff can be

directed to vacate the premises. As indicated above, the Plaintiff claims that he has purchased the premises from the developer vide an agreement which was executed on 19-10-2004 between the Plaintiff and the developer. The Plaintiff is also a member of the society in respect of the premises in question. The provisions on which reliance has been placed by the Municipal Corporation also does not contemplate the direction to be issued for vacating the premises or in default sealing of the premises. This is a case where there is an authorised use of the society office premises which were shown as such in the sanctioned plan. As indicated above, the Plaintiff claims that the said premises have been sold to him by the developer. The same as indicated above raises a larger issue. However, in my view the Town Planning Officer has erred in directing the Plaintiff to vacate the premises and in default directing the officer to seal the premises. At the highest the authority could have directed the Plaintiff to cease from carrying on the unauthorised use of the premises for commercial purposes, but could not have directed the Plaintiff to vacate the premises and in default to seal the premises. If the society requires the premises for its own use obviously it would have to follow the due process of law to get the premises vacated from the Plaintiff. However, in the guise of proceedings initiated under the said Act, the society cannot be entitled to the said relief. Hence in so far as the direction to the Plaintiff to vacate the premises or in default the premises to be sealed is concerned, the same stands set aside. However, it is clarified that the Plaintiff would have to stop the commercial use

of the premises forthwith. The housing society in question would be entitled to pursue the remedy if already adopted or which it wants to adopt to recover the possession of the premises from the Plaintiff. Hence though the orders passed by the Courts below refusing to grant temporary injunction to the Plaintiff are confirmed. Subject to the directions as above, the above Writ Petition is disposed of.

[R.M.SAVANT, J]