

Anand

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO.884 OF 2015

Bilkish Hamid Indrapurwala .Petitioner

v/s.

The Municipal Corporation of .Respondents
Greater Mumbai & ors.

Mr.Anil Anturkar, Senior Counsel a/w. Mr.Vachan Bodke & Ms Madhu
Hiraskar i/b. M/s.Chitnis Vaithy & Co., for the Petitioner

Mr. Aspi Chinoy, Senior Counsel a/w. Mr.Clive D'souza, for the
Respondent No.4

Mr.A.Y.Sakhare, Senior Counsel a/w. Ms K.H.Mastakar, for the
Respondent Nos.1 & 2

Mr.Amit Shastri, AGP, for the Respondent No.3

CORAM : A.A.SAYED, J.

DATE : 07.07.2015

P.C.

. By this Petition filed under Article 226 of the Constitution, the
Petitioner impugns the order dated 28.05.2014 of the Executive
Engineer (Building Proposal), W.S.H. Ward of Respondent
Corporation.

2. The impugned order dated 28.05.2014 reads as follows :

“MUNICIPAL CORPORATION OF GREATER
MUMBAI
NO.CHE/WS/1268/H/Misc./342

28 MAY 2014
Office of the Dy.Ch.Engineer,
(Building Proposal) W.S.-I
1st Floor, R.K. Patkar Marg,
Bandra (West),
Mumbai – 400 050.

To,
Shri Bilkish Indrapurwala
1st Floor, Lily Villa,
169, St. Andrews Road,
Bandra (West),
Mumbai 400 050.

Sub: Regularization of fixing of full height
glass by removing external wall in
part Gr.floor of existing bldg. on plot
bearing CTS No.C/586 of Village
Bandra, Bandra (W), Mumbai.

Ref: 1) CHE/WS/1268/H/Misc./342.
2) FP letter issued dtd.17.05.2014.

Gentleman,

Reference is please requested to the
above, wherein further particular was issued to
you for compliance of certain requisitions within
7 days. It was also informed vide the F.P. that if
you fail to do so the proposal will be recorded by
this department.

Since there is no compliance from your
end, by direction the said proposal is recorded
herewith which may please note.

Yours truly,

Executive Engineer,
[B.P.] W.S.H.Ward”

3. The case of the Petitioner is that he is the tenant of commercial unit on the ground floor of 169, Lily Villa, CTS No.C/586, Village Bandra, St. Andruess Road, Opposite Candies, Bandra(W), Mumbai – 400 050, ad-measuring 1500 Sq. feet (carpet area). One Mary Kutty Emanuel is the landlord of the Petitioner and the assignee of the building standing thereon. According to the Petitioner, the premises is commercial in use since its first date of assessment i. e. 31.03.1961. One Horace Peter Pereira, who is predecessor in title of Mary Kutty Emanuel had leased part of the ground floor premises to the Petitioner in 1988. The Petitioner is in use and occupation of the premises since 1989 and is using the same for non-residential purpose and has been issued a license under the Bombay Shops & Establishment Act. The premises are assessed by the Respondent – Corporation as commercial shop.

4. The premises was being renovated by the Petitioner for the purpose of business and the Petitioner removed the French Glass Window on one side of the premises for commercial display. Upon a complaint, the Respondent - Corporation issued a notice dated 08.03.2014 under Section 354-A of the Municipal Corporation Act, 1888. The Petitioner replied to the said notice. By an order dated 22.03.2014, the Respondent – Corporation concluded that the fixing of

the glass by removing wall was unauthorized construction. The Petitioner, therefore, filed Writ Petition, being Writ Petition (L) No.788 of 2014 impugning the order dated 22.03.2014. In the said Writ Petition, one Salsette Catholic Co-op. Housing Society Limited (hereinafter referred to as 'the Society'), took out a Chamber Summons for impleadment. By an order dated 08.04.2014 the Writ Petition and Chamber Summons were disposed of by passing the following order :

“By this petition the Petitioner challenges the order dated 22 March 2014 passed by the Designated Officer pursuant to the notice dated 8 March 2014 issued under Section 354-A of the Bombay Municipal Corporation Act, 1888.

2 At the outset the learned Senior advocate appearing for the Corporation points out that though notice refers an intention to change the user to commercial purpose, the notice is essentially for unauthorized fixing of glass by removing external wall. As far as the fixing of glass by removing external wall, there is no permission taken by the Petitioner for the same. In view of lack of permission and the change being unauthorized, the learned counsel for the Petitioner seeks leave to withdraw the petition as she has received instructions that the Petitioner is desirous of making an application for regularization.

3 Accordingly, the petition is disposed of as withdrawn. The Petitioner will make an application to the Municipal Corporation within three weeks from today for regularisation which will be considered purely on it's own merits. After the application is so made the Corporation will

take a decision within two weeks thereafter. Since the petition is being disposed of with a liberty to the Petitioner to make an application for regularization and that the learned counsel for the Petitioner has made a statement that no extension of time will be sought for making an application on any ground, the Corporation will not take coercive steps till the application is disposed of. If the application is not made within a period of two weeks, then the Corporation will be at liberty to proceed as per the notice.

The petition is accordingly disposed of in above terms.

4 In view of the disposal of the petition, the Chamber Summons stands disposed of.”

(emphasis supplied)

5. Pursuant to the aforesaid order, the Petitioner applied for the regularization through her Architect along with the letter dated 19.04.2014 and submitted the requisite documents. The Respondent – Corporation accepted the scrutiny fees of Rs.6,600/-. On 17.05.2014, the Respondent – Corporation called upon the Petitioner's Architect to submit certain documents within seven days i. e. by 23.05.2014. According to the Petitioner, her Architect submitted the said documents along with his letter dated 22.05.2014. The Architect also clarified that the requisitions were uncalled for since there was no FSI involved nor was the proposal for major structural changes and by way of abundant caution he also submitted a Structural Stability Certificate dated

26.05.2014. According to the Petitioner, she was shocked and surprised to receive the impugned order dated 28.05.2014 passed by the Respondent – Corporation, whereby the Respondent – Corporation rejected the Petitioner's proposal on the ground that certain requisitions were not complied within the stipulated time. It appears that along with the proposal for regularization, the following documents were submitted by the Architect:

- (i) Notice u/s. 342 of BMC Act
- (ii) P.R.Card
- (iii) C.T.S.Plan
- (iv) D.P.remarks
- (v) Ownership documents
- (vi) NOC from A.A. & C.
- (vii) Site photograph
- (viii) One set of plans

6. According to the Petitioner the Respondent – Corporation had acknowledged receipt of the documents and called upon the Petitioner to pay a sum of Rs.6,600/- which was paid by the Petitioner. On 17.05.2014, the Respondent – Corporation informed the Petitioner as follows:

- “(1) The original, latest, P.R.Cards in wards and CTS Plan/s are not submitted.
- (2) Architect area certificate is not submitted.

- (11) Assessment clearance certificate from A.A. & C. (H/W/Ward) is not submitted.
- (12) No action pending from Asstt. Commissioner H/W/Ward is not submitted.
- (13) Notice u/s 44/69 of MR & TP Act is not filled properly and signed by the Architect, Developer.
- (23) Society's consent along with a copy of General Body Resolution for the proposal not submitted.
- (24) Structural stability/adequacy certificate from structural Engineer is not submitted.
- (27) The plans submitted for proposal are not as per the provisions of DCR-1991 are not submitted.
- (31) 3 set of plan.
- (32) Consent of the owner."

In the said letter, it has been further stated that 'if the above compliances are not submitted in 7 days from the date hereof then the proposal will be deemed to be considered as recorded which please be noted.'

7. On 22.05.2014, the Architect of the Petitioner wrote a letter to the Executive Engineer, (Building Proposal) H/Ward, the extract whereof is reproduced hereunder :

“With reference to above cited FP remarks we have to state as under :

Sr. No.		
1	Original P.R.Card	Already submitted, however, no in words being misc. prop. No FSI involved.
2	Architect area ceft.	N.A.misc proposal.
3	A.A.&C ceft	Last paid bill already submitted.
4	No action ceft.	N.A., action initiated by A.E. (B&F) office & finally as per court order, the proposal is submitted for regularization.
5	Notice u/s. 44/69 of MR & TP Act	N.A. as misc. proposal.
6	Notice u/s.342 MCGM Act	Already submitted.
7	Consent from society	No society, land lord has issued NOC and same is already submitted.
8	Structure stability	Minor work. No structural changes are done & no FSI involved.
9	Plans as per DCR 1991	Already submitted.
10	3 set of plans	Enclosed herewith.
11	Consent of the owner	Already submitted.

In view of the above, you are requested to approve the plan at the earliest and oblige.”

8. On 26.05.2014, the Architect also submitted structural stability certificate of the building from licensed structural Engineer. On

28.05.2014, the impugned order came to be passed on the ground that since there was no compliance by the Petitioner, the proposal is recorded.

9. I have heard learned Senior Counsel for the parties. It is not in dispute that the proposal for regularization of the Petitioner through her Architect has been rejected only on the ground of non-compliance of furnishing certain documents. Learned Senior Counsel for the Petitioner submitted that there has been non-application of the mind while passing the impugned order by the Respondent – Corporation inasmuch the documents which were sought for had already been submitted by her Architect. He submitted that the Petitioner does not want to join issue with the Respondent - Corporation and that the Petitioner is ready and willing to furnish the documents again, if so required and the Respondent – Corporation be directed to decide the proposal of the Petitioner for regularization on merits.

10. Learned Senior Counsel for the Society (newly added Respondent No.4, pursuant to order passed today in Chamber Summons No.80 of 2014) submitted that the Salsette Catholic Co-operative Housing Society Ltd. is a tenant Co-Partnership Co-operative Housing Society and it is a Society of plot holders and owns several plots of land in Bandra (West), Mumbai which were

leased out for 998 years to several plot holders and the plot holders are the members of the said Society. Under an Indenture of Lease dated 31 March 1931 between the Society and one Pascoaline Francis Netto, the Society has leased out Plot No.169, ad-measuring 838.07 square meters to the said Pascoaline Francis Netto and a structure comprising of ground plus six floors was constructed by the said Pascoaline Francis Netto on the said leasehold plot. The said plot was thereafter transferred in favour of one Horace C. Pereira with the consent of the Society. By Deed of Assignment dated 11 February 1988 and registered in the year 1994, Horace C. Pereira illegally and behind the back of the Society assigned the said leasehold plot to one Mary Kutty Emmanuel, who is a front and constituted attorney of one Hamid A Indrapurwala who is the husband of the Petitioner. Learned Senior Counsel submitted that clause 17 of the Indenture of Lease dated 31 March 1931, specifically provides that before transferring the plots on lease, prior written permission of the Society is required to be taken from the Society, however no such permission was obtained by the lessee Horace C. Pereira. The Society therefore filed a suit being Suit No.1393 of 2011 against said Mary Kutty Emanuel in this Court inter alia for the declaration that the purported Deed of Assignment dated 11 February 1988, between Horace Peter Pereira and Mary Kutty Emmanuel and the purported Deed of Confirmation dated

12 October 1994 were illegal, null and void and not binding on the Society and the Society has also prayed for setting aside and cancellation of the said documents. The Society had also taken out a Notice of Motion No.2097 of 2011 and on 30 April 2012 this Court had made the Notice of Motion absolute in terms of prayer clause (a) thereby granting an injunction restraining Mary Kutty Emmanuel from selling, alienating or parting with the possession or creating third party right in respect of the leasehold plot. The said Mary Kutty Emanuel preferred an Appeal against the said order which was dismissed. Learned Senior Counsel further pointed out that the Applicant has also filed T.E. & R Suit No.12 of 2009 in the Court of Small Causes at Mumbai (Bandra Branch) against the unknown heirs and legal representatives of the Late Horace C. Pereira as also Hamid A. Indrapurwala for recovery of possession of the leasehold plot. As the Petitioner and her husband who is Constituted Attorney of Mary Kutty Emanuel was carrying out unauthorized additions and alterations in the suit premises, on an Application made in the said suit in the Court of Small Causes, a Court Commissioner, came to be appointed who submitted his Report on 21 March 2014.

11. Learned Senior Counsel further submitted that the Society by its letter dated 6 March 2014 addressed to the Assistant Municipal

Commissioner, H/West Ward complained that the Petitioner's husband Hamid A. Indrapurwala had demolished the walls of the flat of ground-floor premises and converted it into a commercial venture without the approval of the Society. A further letter was also addressed on similar lines on 12 March 2014 requesting the Assistant Municipal Commissioner to let them know of the action taken to stop the work including demolition of the ground-floor work carried out in the said premises. Pursuant thereto, officers of the Respondent - Corporation visited the ground-floor premises and found unauthorized work being carried out in the said ground-floor premises in the said building 'Lilly Villa' and a show cause notice was issued to the Petitioner under section 354A of the Mumbai Municipal Corporation Act, 1888.

12. Learned Counsel submitted that unless the No Objection is taken from the Society, the offending work carried out by the Petitioner and/or her husband Hamid A. Indrapurwala on the ground-floor premises of Lilly Villa on the Plot which is owned by the Society cannot be regularized under section 342 of the Mumbai Municipal Corporation Act, 1888. Learned Senior Counsel submitted that no useful purpose would be served in remanding the matter back to the Executive Engineer (Building and Proposal) W.S.H. Ward as in absence of No Objection Certificate from the Society, the regularization proposal

cannot be considered by the Respondent Corporation. Learned Senior Counsel further brought to my notice that the Society has filed a separate Petition being Writ Petition No.1694 of 2014 (which is also listed on Board today) wherein they have prayed for mandatory directions against Respondent-Corporation to take steps to demolish and/or for removal of unauthorized work viz. fixing of full height glass by removing the external wall in part of the ground-floor and construction of an enclose garage in said premises Lilly Villa and for directions to the Respondent-Corporation to stop the commercial activity being carried out in the said premises.

13. Learned Senior Counsel for the Society reiterated that the regularization Application was rightly rejected inasmuch as the Petitioner did not produce No Objection Certificate (NOC) of the Society. He has tendered a copy of Indenture of Lease dated 31.03.1931 and invited my attention to Clause (8) and (17) of the said Indenture under which the lessee Pascoaline Francis Netto had agreed with the Society as under:

“(8) not to erect or build or permit to be erected or built on the demised plot any structures except with the permission in writing of the Society and except in accordance with the plans, elevation, sections and specifications previously approved by the Society;”

“(17) not to assign underlet or part with the possession of the demised plot and the buildings thereon standing without the consent in writing of the Society for that purpose previously had and obtained”

Learned Senior Counsel has also relied upon the judgment of the Division Bench of this Court in ***Sun Pharmaceutical Industries Ltd. vs. The Municipal Corporation Of Greater Bombay & ors.*** in ***W.P.No.544 of 2012*** dated ***02.05.2012*** to contend that even in an Application for regularization, the covenants of the Lease Deed of the plot cannot be ignored. Learned Senior Counsel also relied on the judgment in ***New India Co-operative Housing Society Limited vs. Municipal Corporation Of Greater Mumbai And Another, (2008)9 Supreme Court Cases 694*** in support of his contention that when there is alteration in approved plan for effecting structural changes, NOC of the lessor Society was necessary and in absence of which the Corporation cannot sanction the modified plan.

14. Learned Senior Counsel for the Petitioner in Rejoinder submitted that till date there is no declaration by a competent Court that the Deed of Assignment entered into between the Horace C. Pereira and Mary

Kutty Emanuel was illegal. It is the Mary Kutty Emanuel who is the landlord of the Petitioner and a consent of the Petitioner's landlord Mary Kutty Emanuel has already been submitted to the Respondent Corporation. He submitted that if any further documents are required to be submitted to the Corporation, the Petitioner is ready and willing to submit the same. He submitted that there is no requirement of No Objection Certificate (NOC) from the Society since there is no privity of contract between the Petitioner and the Society and the Society has no concern with the alleged unauthorized work in the building in the leasehold plot. He submitted that there is no FSI implications in respect of the work carried out by the Petitioner and there was no alteration of plans. Learned Senior for the Petitioner suggested that the issue whether the NOC of the Society was required or not can be ruled upon by the Executive Engineer himself after hearing both the parties. He submitted that the judgment relied upon on behalf of the Society are on different facts would not apply to the present case.

15. Mr. Sakhare, learned Senior Counsel appearing on behalf of the Respondent Corporation supported the impugned order and submitted that the Petitioner has failed to submit the documents required for considering the Petitioner's proposal for regularization and hence, the impugned order is not required to be interfered.

16. I have considered the rival contentions of the learned Senior Counsel for the parties.

17. The dispute between the parties essentially appears to be as regards the submission of NOC of the landlord. The letter dated 17.05.2014 of the Respondent – Corporation calls upon the Petitioner to furnish 'consent of owner' and other documents. There is no mention of 'The Salsette Catholic Co-op. Housing Society Limited' in the said letter dated 17.05.2014. According to the Petitioner, she has already submitted the NOC of her landlord Mary Kutty Emmanuel whereas according to the Society, their NOC is required for consideration of the proposal of the Petitioner for regularization of the alleged offending work. Though elaborate submissions have been made by the learned Senior Counsel for the parties, I am not inclined to rule on this aspect at this stage. It is noticed that while passing the order dated 8 April 2014 in Writ Petition (L) No.788 of 2014 no argument was canvassed on behalf of the Society or the Respondent Corporation that no purpose would be served in directing the Respondent Corporation to consider the Regularization Proposal of the Petitioner in absence of a NOC from the Society. As a matter of fact, the order in the Writ Petition specifically records that the Regularization Application would be considered 'on merits'. Prima

facie, I find that most of the documents had been submitted by the Petitioner to the Respondent-Corporation except the NOC from the Society which according to the Petitioner was not necessary as she had submitted the NOC of her landlord Mary Kutty Emmanuel. The Respondent – Corporation did not even call upon the Petitioner to submit NOC from the Society and the Petitioner was only called upon to submit 'consent of the owner'. Prima facie, there appears to be some substance in the contention of the learned Senior Counsel for the Petitioner, that the Petitioner cannot be expected to submit two NOCs, particularly when there were no FSI implications or alteration of plans.

18. It cannot be disputed that by the impugned order the Application for regularization has been rejected on technical grounds and more particularly non-submission of the documents. As indicated earlier, the order dated 8 April 2014 of this Court clearly records that the regularization Application will be considered 'purely on it's own merits'. In my view, the Petitioner is required to be given an opportunity to put his case before the Respondent – Corporation that for the purpose of consideration of her Regularization proposal, the NOC from the Society is not necessary and the Petitioner is required to submit only the NOC from the landlord Mary Kutty Emanuel which has already

been submitted by the Petitioner. In the circumstances, in my view, and as suggested by learned Senior Counsel for the Petitioner, this aspect whether the NOC of the Society is required in the facts and circumstances of the case can also be considered by the Executive Engineer (Building Proposal) of the Respondent Corporation while considering the proposal for regularization after granting an opportunity of hearing to the Petitioner as well as the Society.

19. Taking an overall view of the matter, in my opinion, the following order would meet the ends of justice:

- i) The impugned order dated 28 May 2014 is set aside.
- ii) The Respondent Corporation shall, if necessary, issue a fresh letter to the Petitioner to furnish documents which according to it has not been furnished by the Petitioner. The compliance of the same shall be made by the Petitioner immediately thereafter.
- iii) The Executive Engineer (Building Proposal) while deciding the regularization Application shall rule on the aspect whether the NOC from the Society is necessary after hearing the Petitioner and the Society and by passing a speaking order. Liberty is granted to the Society to write to the Executive Engineer objecting to the regularization proposal and to submit relevant documents. A copy of the same would be marked to the

Petitioner. The Petitioner would be at liberty to respond to the objections.

- iv) The regularization Application already filed shall be considered and decided by the Executive Engineer (Building Proposal) afresh, after hearing the Petitioner and the Society without being influenced by the impugned order or the observations in this order.
 - v) The order of status-quo granted on 2 June 2014 by this Court in the Petition shall continue to operate until the decision of the Executive Engineer (Building Proposal). In the event, the regularization Application is rejected, no coercive steps be taken against the offending structure for a period of three weeks from the date of the communication of the decision to the Petitioner.
20. The Petition is disposed of in the aforesaid terms.

(A.A.SAYED, J.)