

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

**APPEAL FROM ORDER STAMP NO.20432 OF 2016
ALONGWITH
CIVIL APPLICATION STAMP NO.20434 OF 2016**

Berry's Hotel Private Limited

.. Appellant/Applicant

Versus

Mumbai Municipal Corporation

through the Municipal Commissioner,

Head Office, Mahapalika Marg,

Mumbai-400 001 and another

.. Respondents

Mr. M. M. Vashi, Senior Advocate a/w Ms. Aparna Deokar, Mr. Makarand Kale, Mr. Panthi Desai i/by M. P. Vashi Associates for the Appellant/Applicant.

Mr. P. J. Thorat a/w Mr. S. K. Sonawane, Mrs. Madhuri More for the Respondents BMC.

CORAM : R.M. SAVANT, J.

DATE : 27th JULY 2016

PC.

1 In the above Appeal from Order an order came to be passed in the first session, thereby the further demolition by the officers of the Municipal Corporation of Greater Mumbai (For short "MCGM") in respect of the construction in the front open space was stayed by this Court and the MCGM was directed to maintain status-quo as at the said hour. At the request of the Learned Counsel appearing for the MCGM the above Appeal

from Order was kept at 3.00 p.m. for further hearing.

2 When the above Appeal from Order was taken up in the second session, the Learned Counsel for the MCGM Mr. P. J. Thorat stated that the demolition of the portion which is not covered by the sanctioned plan of the year 1958 has been completed by the officers of the MCGM.

3 The Learned Senior Counsel Mr. M. M. Vashi appearing on behalf of the Appellant/original Plaintiff takes exception to the demolition as according to him the MCGM has carried out demolition of even those parts of the structure in the open space which are retainable in terms of the order dated 29.02.2016 passed in Notice of Motion No.4397 of 2015 as also the sanctioned plan of the year 1958. It is in view of the aforesaid intervening development that the above Appeal from Order would have to be considered.

4 The above Appeal from Order concerns a challenge to the order dated 16.06.2016 passed by the Learned Judge of the City Civil Court, Greater Mumbai, by which order, the Notice of Motion filed by the Appellant/Plaintiff came to be dismissed. The said Notice of Motion was filed in the pending suit as the Plaintiff was served with a notice under Section 351 of the MMC Act dated 20.06.2016. By the said notice, the

Plaintiff was directed to restore the front compulsory open space as per the approved plan within two days. The said Notice of Motion has been dismissed principally on the ground that the Plaintiff has not removed the covering of the front side compulsory open space between building line and BM wall with AC sheet roof, three sides compulsory open space as covered with AC sheets has not been removed, cabin erected for the purpose to store gas cylinders and that the awning has not been removed. The Trial Court has observed that on account of the above the Plaintiff has not complied with the directions issued by the said Court i.e. City Civil Court vide order dated 29.02.2016 passed in Notice of Motion No.4397 of 2015 and has filed a false undertaking in the Court.

5 In the said context, it would be apposite to refer to the said order dated 29.02.2016. In the said order dated 29.02.2016, it has been observed by the Trial Court that the Plaintiff has removed both sides covering, has removed front side wooden glass portion from ground floor level of the restaurant, has removed side portion of east side and that the Plaintiff has removed AC sheet roofing and has made the awning retractable which is not fixed in nature. Having regard to the aforesaid facts, the Trial Court in the said order has observed that the Plaintiff has complied with the notice during the pendency of the suit and therefore the remaining portion which is there on the spot is not unauthorized and

therefore it can be protected. The said order dated 29.02.2016 is concluded by the operative part which reads thus :-

“1. N/m No.4397/2015 is partly allowed with no order as to costs.

2. Defendants are restrained from demolishing remaining portion of the structure till final disposal of the suit.

3. Plaintiff is further directed to keep the structure in the suit premises according to sanctioned plan and permission granted by BMC.

4. The remaining portion which is not according to the plan should be removed within two weeks and file undertaking that plaintiff will not raise any structure in violation of sanctioned plan of 1971 and permission of BMC till final disposal of the suit.”

6 Hence, the Defendants were restrained from demolishing the remaining portion of the structure till final disposal of the suit and the Plaintiff was directed that the remaining portion which is according to the plan should be removed within two weeks and file an undertaking that the Plaintiff will not raise any structure in violation of the sanctioned plan of the year 1958 and permission of the BMC till disposal of the suit. The Trial Court has corrected the year mentioned in clause 4 from 1971 to 1958 by a subsequent order.

7 As indicated above, the cause for filing the instant Notice of

Motion was the notice dated 20.06.2016 wherein the gravamen of the allegation was that the Plaintiff has not complied with the order dated 29.02.2016 in the matter of removing the portion which is not according to the sanctioned plan of the year 1958. In so far as the impugned order is concerned, the Learned Senior Counsel appearing on behalf of the Plaintiff was at pains to demonstrate that the demolition has been carried out of the portions of the structure in the open space, though the same were retainable in terms of the sanctioned plan as well as the order dated 29.02.2016 passed in the said Notice of Motion No.4397 of 2015. The Learned Senior Counsel appearing on behalf of the Plaintiff drew this Court's attention to the sanctioned plan of the year 1958 to demonstrate that in the said sanctioned plan there is a wall on the sides as also in the front, of the size and dimensions mentioned in the said sanctioned plan.

8 Per contra, it is the submission of Mr. P. J. Thorat Learned Counsel appearing on behalf of the MCGM that it is only that part of the structure which is not covered by the sanctioned plan which has been demolished in the action taken in the morning today.

9 In my view, without further dilating on the aspect of the demolition being carried out but having regard to the order dated 29.02.2016 which envisages the structure to be in terms of the sanctioned

plan of the year 1958, it would be just and proper to issue directions in that regard. This Court with the assistance of the Learned Counsel appearing for the parties has gone through the sanctioned plan dated 23.06.1958 and noted what is permissible under the said plan. In so far as the impugned order is concerned, in my view, the Learned Judge has recorded findings de-hors the sanctioned plan and even de-hors the order dated 29.02.2016 wherein the parts of the structure which are retainable have been mentioned and which has been adverted to in the earlier part of this order. Since the findings have been recorded by the Trial Court which are not in keeping with the order dated 29.02.2016 as also not in keeping with what is permissible under the sanctioned plan, it would be just and proper to set aside the impugned order and issue the following directions :-

I) The Plaintiff would be entitled to construct a parapet wall in front as per the sanctioned plan dated 23.06.1958 which would be 2 ft. 6 inches in height with removable plant boxes at its own expense.

II) The Plaintiff would also as per the sanctioned plan be entitled to put up removable fencing having height of 5 ft. 6 inches on both the right and left side of the suit premises.

III) Since the awning is permitted under the sanctioned plan, the Plaintiff would be entitled to keep the collapsible awning on the top of the open space.

IV) Since the Plaintiff is intending to get a gas connection from the Mahanagar Gas Ltd. and since an order has already been passed by a Learned Single Judge of this Court in respect of an adjoining restaurant. The present gas chamber cabin would be allowed to be retained for a period of three months from date so as to enable the Plaintiff to get gas connection from the Mahanagar Gas Ltd. This time is necessitated to be granted in view of the fact that no digging is permissible in the monsoon. The Learned Senior Counsel appearing for the Plaintiff on instructions of Mr. Vinodkumar Pandey authorized signatory undertakes to this Court that after 30.09.2016 the said gas chamber cabin would be removed as well as the gas cylinders. The Plaintiffs to take all safety precautions in respect of the aid gas chamber cabin.

V) The Mahanagar Gas Ltd. is directed to expeditiously dispose of the application made by the Plaintiff for the said

gas connection.

VI) The Plaintiff would remove the sale counters and cupboards from the compulsory open space for which also the Learned Senior Counsel gives an undertaking on behalf of the Plaintiff upon instructions of Mr. Vinodkumar Pandey the authorized signatory of the Plaintiff.

VII) In the light of the instant order, the Learned Senior Counsel on instructions of Mr. Vinodkumar Pandey authorized signatory of the Plaintiff makes a statement that the Appellant/Plaintiff would withdraw the suit itself being LC Suit No.2697 of 2015 as the grievance of the Plaintiffs no more survives. Statement accepted. The Plaintiff may approach the Trial Court with a copy of this order and withdraw the suit in the light of this order.

VIII) A copy of the sanctioned plan is taken on record and marked as "X" for identification.

IX) A copy of the order to be furnished to the Mahanagar Gas Ltd.

10 The Appeal from Order is allowed to the aforesaid extent and is disposed of.

11 In view of the disposal of the Appeal from Order, the Civil Application does not survive and to accordingly stand disposed of as such.

[R.M. SAVANT, J]