

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

APPEAL FROM ORDER (ST.) NO. 32552 OF 2016

WITH

CIVIL APPLICATION (ST.) NO. 32553 OF 2016

IN

APPEAL FROM ORDER (ST.) NO. 32552 OF 2016

Irfan Yunus Namakwala

...Appellant

Versus

**The Municipal Corporation of Greater
Mumbai**

...Respondent

Mr. Mahesh Jethmalani, Senior Counsel, a/w Ms. Gunjan Mangala,
i/b Mr. K.J. Jha, for the Appellant.

Mr. Suresh Pakhale, a/w Mrs. Madhuri More, for the Respondent-
BMC.

CORAM : G.S. KULKARNI, J.

DATE : 19th December 2016

ORDER :

1. Heard Mr. Jethmalani, learned Senior Counsel for the Appellant and Mr. Pakhale, learned Counsel for the Respondent-Corporation.

2. This Appeal is directed against an order dated 27th October 2016 passed by the learned Judge, City Civil Court at

Sharayu.

Bombay in Notice of Motion No. 1397 of 2015 in L.C. Suit No. 867 of 2015, whereby the Appellant-Plaintiffs' Notice of Motion for injunctory reliefs pending the final disposal of the Suit has been rejected. The dispute in the Suit is in regard to the action initiated on behalf of the Respondent-Corporation under Section 351 of M.M.C. Act dated 5th October 2014 and consequent to the order dated 13th March 2015. The case of the Municipal Corporation is that the construction as complained in section 351 notice as undertaken in respect of the suit building is totally unauthorised and it is a new construction undertaken under the garb of repair permission granted by the MHADA. The concerned parties who would be affected by the action of the Municipal Corporation to demolish the suit building were heard including the Appellant who claims to be the owner of the building. The Assistant Engineer Building & Factory, D Ward, being the Designated Officer, has passed an order dated 13th March 2015 whereby according to Mr. Pakhale, learned Counsel for the Respondent-Corporation, all contentions as urged on behalf of the several parties are taken into consideration and findings and remark thereon are explicitly given. Mr. Pakhale submits that under the guise of repairs, the original structure which as per the plan of the Municipal Corporation is ground plus five has been now converted

to ground plus seven. From the following contents of the order referred in paragraph 3, passed by the Assistant Engineer, there appears to be much substance and what is being urged on behalf of the Corporation, which reads thus:-

Sr. No.	Representation During Hearing	Findings/Remarks
1	Executive Engineer, M.B.R. & R. Board Div-II's letter dtd. 21-06-2014, it is categorically admitted by Executive Engineer, M.B.R. & R. Board Div-II (MHADA). Work order was issued to MHADA Contractor on 03-01-2014. Checklist was submitted by Architect Shri. Kalpesh Shah to the office of E.E. (B.P.) City-I dtd. 04-01-2014. Further it is admitted by E.E., D-2, M.B.R. & R. Board that the plan of Repair Board is for Ground + 5 upper floor, however the site was jointly inspected with staff of M.C.G.M. on 18-06-2014 when violations beyond the repair plan such as shifting of staircase, installation of lift, spiral staircase from ground floor to 1st floor and unauthorized construction of 6th & 7th floor were observed. The said unauthorized work was carried out beyond the repair plan after 07-04-2014, the same shall be demolished	The contents of the letters are noted and same are not acceptable as MHADA has circumvented the process of obtaining IOD/CC for repair work to be carried out by tenant with NOC from Executive Engineer, M.B.R. & R. Board Div-II (MHADA) and under guise of repair work to be undertaken by Executive Engineer, M.B. R. & R. Board Div-II (MHADA) through its work order, tenants /occupants were allowed to construct entirely new building consisting Ground + 7 upper floors. The work is carried out by tenant under the NOC from Executive Engineer, M.B.R. & R. Board Div-II (MHADA) without obtaining Approval/IOD/CC from M.C.G.M.'s Building Proposal Department as per the policy guidelines u/no. CHE/142/DPBPC dtd. 15-05-1996 for the repairs/reconstruction of cess building. It is to mention here that by issuing Work Order,

	by M.C.G.M. and M.B.R. & R. Board office is not responsible for the said unauthorized work.	Executive Engineer, M.B.R. & R. Board Div-II (MHADA) has actively facilitated the reconstruction work through MHADA Registered Contractor and Architect. Thereby circumventing the due process required to be followed as per the policy guidelines under no. CHE/1-2/DPBPC dtd.15-05-1996 to obtain permission of Building Proposal Department of M.C.G.M.
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3. The case of the Municipal Corporation as can be seen from the above findings of the Assistant Engineer is that the concerned officer of the MHADA had participated and the reconstruction which was undertaken under his supervision and instructions, which is stated to be unauthorised, in view of the reconstruction exceeding permissible limits as the approved building as it stood was only ground plus five floors. The Municipal Corporation has recorded that there is no justification for the Executive Engineer of the MHADA to permit such a construction and therefore, the construction of ground plus seven is rendered illegal. If this be the case then one may wonder how the construction is at all legal and authorised and the Municipal Corporation may be completely justified in issuing a demolition notice to pull down the

unauthorized construction as permissible under the Mumbai Municipal Corporation Act, 1988. The law regarding illegal and unauthorized construction is by now well settled.

4. However, the fact remains that despite observations of this Court in order dated 8th April 2015 passed in Appeal from Order (St.) No. 9896 of 2015, which had arisen out of the rejection of the ad-interim reliefs MHADA was not before the trial Court, as the Appellant-Plaintiff for some reason did not implead MHADA as a necessary party to the Suit. From the submissions as made by Mr. Jethmalani, learned Senior Counsel for the Appellant, it appears that the principal contentions of the Appellant-Plaintiff are on the basis of certain permissions which are granted by MHADA and the construction is undertaken under the supervision and permission of MHADA. If this be the case, then it was all the more imperative for the Appellant-Plaintiff to implead MHADA as a necessary party to the Suit. However, this was not done. In fact, the Appellant-Plaintiff was required to be non-suited only on this ground and even this Appeal would fail, in view of such serious discrepancy.

5. Mr. Jethmalani concedes that not impleading MHADA was a mistake on the part of the Appellant. Mr. Jethmalani submits

that an opportunity be granted to the Appellant implead MHADA as a party Defendant to the Suit in question. It is submitted that the interest of justice would require that MHADA is heard before the Trial Court before a drastic action of demolition is undertaken. It is submitted that no prejudice would be caused to the Municipal Corporation.

6. Considering the facts of the case, in my opinion, MHADA was required to be heard in adjudication of the injunction application as there are definitely issue concerning the role of MHADA. Admittedly, in passing the impugned order, the learned Trial Judge must be considered to be at a handicap to go into all these issues in the absence of MHADA being a party to the Suit. Notably in the earlier L.C. Suit No. 1751 of 2014 filed by the Appellant-Plaintiff, MHADA was impleaded as a party.

7. In the circumstances, in the interest of justice, it would be appropriate to give one more opportunity to the Appellant-Plaintiff, to approach the Trial Court to be heard on the Notice of Motion though the conduct of the Plaintiffs is far from satisfactory as seen from the manner in which the present L.C. Suit has been filed, without impleading MHADA. Only on this count the impugned order

deserves to be entertained without examining any of the reasoning on the merits of the matter and the reasons which are recovered by the learned Trial Judge. Thus, in the interest of justice, in this situation the impugned order is set aside, so that the contentions on behalf of the appropriate statutory authorities namely Municipal Corporation and MHADA can be gone into by the learned Trial Judge in deciding the Notice of Motion, afresh and for an effective and complete adjudication of the Notice of Motion. All contentions of the parties are expressly kept open.

8. The Appellant is accordingly, permitted to amend the Complaint to implead the Maharashtra Housing & Area Development Authority and its Competent Officer to be implead as Defendant in the L.C. Suit No. 867 of 2015 as also make necessary consequential averments in the Complaint. The amendment to the Complaint is permitted to be carried out within one week from today and to be served on all the parties within that period. The added Defendant MHADA as also the Municipal Corporation shall file their respective replies on the amended pleadings within two weeks after they are served with the amended copy of the Complaint, if so advised. The learned Trial Judge shall endeavour to dispose of the Notice of Motion as early as possible

and preferably within a period of three months from today.

9. In the meantime, till the Notice of Motion No.1397 of 2015 is decided, the Municipal Corporation shall not take any coercive action in pursuance of the order dated 13th March 2015 under Section 351 of the M.M.C. Act. The Appellant-Plaintiff also undertakes that till the disposal of the Notice of Motion, the Appellant would not undertake any repairs, reconstruction, alteration, modification, etc. in respect of the suit building. Statement is accepted.

10. Needless to observe that if the Appellant fails to amend the Complaint as directed, the benefit of this order shall cease to operate and the Respondent shall be at liberty to pray for appropriate reliefs including dismissal of the Notice of Motion.

11. Appeal from Order is disposed of in above terms.
No costs.

12. Civil Application (St.) No. 32553 of 2016 would also not survive and is accordingly, disposed of.

[G.S. KULKARNI, J.]