

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION  
WRIT PETITION NO.2239 OF 2014

Mr.Anand Mishra i/b Mr.A.M.Saraogi for the  
Petitioner  
Mr.Rajiv Mane, AGP for the respondent No.1  
Ms Vandana Mahadik for respondent No.2

P.C.:

3 The challenge in this petition under Article  
226 of the Constitution of India is to the notice  
dated 1st March 2014 issued by the first respondent-  
Corporation to the petitioner under section 349 of  
the Mumbai Municipal Corporation Act, 1888. For the  
sake of convenience, we are reproducing the relevant  
part of the notice which reads thus:

"Whereas the external walls and covering of the roof by Tarpaulin and bamboo shed etc admeasuring 32.7 X 23.3 in open spaces situated near Chheda Nagar Bus Stop, E.E.High Way Service Road, Sewanagar, Chembur, Mumbai-89, causes nuisance to adjacent premises, of which you are the owner/Occupier, have/has since the Mumbai Municipal Corporation Act, came into force been constructed of inflammable material, I hereby require you under Section 349 of the Mumbai Municipal Corporation Act, to remove such walls/partitions and covering and I further give you Notice that if within 07 (seven) days from the service..."

4 On 16th April 2015, this Court noted the statement of the learned counsel for the petitioner that the petitioner has not applied for regularization. Certain documents are produced on record by the Mumbai Municipal Corporation. The documents consist of inspection report dated 28th February 2014 as well as certain photographs taken on 1st March 2014.

5 The submission of the learned counsel for the petitioner is that what is constructed by the petitioner is a weather shed. The second contention is that notice is not addressed to the petitioner but to the petitioner's brother who is not concerned with the structure subject matter of this petition.

It is the contention raised in the petition that the weather shed does not contain roof or wall as contemplated by section 349 of the Mumbai Municipal Corporation Act, 1888. The learned counsel for the first respondent supported the impugned notice on the basis of the affidavit of Shri P.S. Wetam, Assistant Engineer in Building and Factory Department of the Municipal Corporation.

6 We have considered the submissions. We must note here that it is not the case made out in the petition that the structure is an authorized structure. Therefore, we consider this petition in the context of challenge to the action under section 349 which reads thus:

**"349. Roofs and external walls of buildings not to be of inflammable materials.**

(1) No external wall and no covering of a roof built or renewed since the Bombay Municipal Act, 1872 came into force shall, except with the written permission of the Commissioner, consist of wood, cloth, canvas, grass, leaves, mats or any other inflammable material.

(2) If any external wall or covering of a roof is or has been, since the said Act came into force, constructed of any such material, the Commissioner may, by written notice, require the owner or occupier of the building to which such wall or roof

appertains to remove such wall or covering.

(3) In relation to buildings in the suburbs [or, as the case may be, the extended suburbs] the provisions of this section shall apply as if for the reference in sub-sections (1) and (2) to the Bombay Municipal Act, 1872, reference had been made to the Bombay Municipal (Extension of Limits) Act, 1950 [or, as the case may be, the Bombay Municipal [Further Extension of Limits and Schedule BBA (Amendment) Act, 1956]:

Provided that nothing in sub-section (2) shall prevent the Commissioner from requiring the removal of any external wall or covering if it was built or renewed or retained in contravention of any law in force in the suburbs immediately before the coming into force of the Bombay Municipal (Extension of Limits) Act, 1950 [or, as the case may be, in force in the extended suburbs immediately before the coming into force of the Bombay Municipal [Further extension of Limits and Schedule BBA (Amendment) ] Act, 1956.]

7 Analysis of section 349 shows that there is a prohibition on making external wall or covering of roof by material such as wood, cloth, leaves, mats or any other inflammable material except with the written permission of the Commissioner. Sub-section 2 provides that if any external wall or roof or covering has been made of any such material after

the Mumbai Municipal Corporation Act, 1888 came into force, the Commissioner has a power requiring the owner or occupier to remove such wall or roof. The power under sub-section 2 can be exercised when wall or covering of roof consists of wood, cloth, canvass, grass leaves or any other inflammable material and when such wall or roof is made without written permission of the Municipal Commissioner. Thus, the condition precedent for taking action under sub-section 2 is that the Commissioner must be satisfied that the external wall or roof or covering of roof is made up of an inflammable material.

8 Whether the material used in external wall or covering is of inflammable material depends on several factors, such as the nature of user of the structure, size of the structure etc. In the present case, going by the documents tendered by the Municipal Corporation and the assertions made in the impugned notice, the Municipal Corporation seems to have proceeded only on the footing that as the Tarpauline sheets and bamboos have been used, inflammable material has been used. It cannot be said that in each case where a weather shed is made up by the use of Tarpauline sheets and bamboos, it is made up of inflammable material as it depends upon facts of the each case.

9 Therefore, in the facts of the case, if appropriate Officer gives an opportunity of being heard and thereafter decides the issue whether the present case is governed by sub-section 2 of section

349, it will meet the ends of justice. Notice itself records that under section 68 of the Mumbai Municipal Corporation Act, 1888 the Commissioner has empowered the Assistant Engineer (Building & Factory), M/W ward to exercise, perform and discharge all powers, duties and functions conferred and vested in the Commissioner by sections 349 and 489 of the said Act of 1888.

10 Accordingly, we dispose of this petition by passing the following order:

- (I) We direct the petitioner to appear before the Assistant Engineer (Building & Factory) M/W Ward of the Mumbai Municipal Corporation on 30<sup>th</sup> June 2017 at 11.00 a.m.;
- (II) It will be open for the petitioner to file a reply on the very day. No further time shall be granted;
- (III) After considering the reply, the Assistant Engineer shall pass a speaking order within a period of six weeks from 30<sup>th</sup> June 2017;
- (IV) The Assistant Engineer shall serve a copy of the order to the petitioner;
- (V) If the order be adverse to the petitioner, for a period of two weeks from the date of communication of the said order to the petitioner, the same shall not be acted upon;
- (VI) All contentions of the parties on merits are kept open;
- (VII) Rule is made partly absolute on above terms;

(VIII) We make it clear that this order will not preclude the Mumbai Municipal Corporation from proceeding against the subject structure under any other provision of law;

(IX) All concerned to act upon an authenticated copy of this order.

(VIBHA KANKANWADI,J.)

(A.S.OKA,J.)