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

WRIT PETITION NO. 2289 OF 2014

Godfrey Sarrao … Petitioner.

V/s.

Commissioner,
Brihanmumbai Mahanagarpalika & Ors. … Respondents

Mr. P. R. Arjunwadkar i/b Ms. Prabha Badadare for the Petitioner.
Ms. Vandana Mahadik for the the Respondent No.1
Mr. Ganesh Gupta for the Respondent No.2.

CORAM : A.S.OKA &
SMT. VIBHA KANKANWADI, JJ.
DATE : 22nd JUNE, 2017

ORAL ORDER: (PER SMT. VIBHA KANKANWADI, J)

. The Petitioner has invoked the Writ Jurisdiction of this Court under Article 226 of the Constitution of India for issuing appropriate writ to declare the notice dated 04th August 2014 under the Maharashtra Regional and Town Planning Act, 1966 (for short "MRTP Act") issued by the first Respondent Municipal Corporation directing the Petitioner to remove exhaust chimney etc. as wrong, illegal, malafide and abuse of jurisdiction.

2 The Petitioner has come with a case that his father had started a Restaurant somewhere in 1970 in Gala Nos. 1, 2 and 3 in the property developed by M/s. Gundecha Builders. After making a huge investment for converting the said three Galas, he has made provisions for the restaurant, kitchen, washing room etc. The first Respondent had provided a separate pipeline for supply of water and after

inspecting the kitchen, gave appropriate direction for arrangement of exhaust and at the relevant time, the entire exhaust from kitchen was carried upto window and thrown out through window. Considering the then situation, the Respondent/Corporation has approved the then exhaust system.

3 The case of the Petitioner is that he had joined the restaurant business with his father in the year 1984. His father, in order to avoid nuisance to the members of the second Respondent Society, with the oral permission of the then Secretary and under a bonafide belief that no permission is required from the first Respondent, erected an exhaust system in M.S. Steel and electric fans/motors and as per the said system, entire exhaust of restaurant, kitchen and washroom was centrally collected and pumped through ducts which were fixed on outer wall of building with M.S. bracket, running up to height of building and six feet there above. The officer of first Respondent had visited the premises and had noticed the said exhaust system but never objected to the same. The Petitioner's father expired on 13th March, 2008 and thereafter, the Petitioner has inherited the property and restaurant. The membership and share certificate of Gala Nos. 1, 2 ad 3 were transferred in the name of the Petitioner by the second Respondent Society. Various licences are now standing in the name of the Petitioner after the death of his father. Even the Chief Fire Officer had informed the Medical Officer of the Health, P/South Ward that the first Respondent has no objection for change of fuel i.e. from LPG gas cylinder to PNG as the Petitioner has been obtaining all the necessary permissions for any changes sought to be made in the restaurant. All the relevant documents were filed. It is a specific contention of the Petitioner that under the bonafide belief that the first Respondent has no objection for the proposal of the installation of chimney/exhaust fans, the Petitioner had installed the same. By a letter dated 30th July, 2005, he has asked

the permission for the chimney and exhaust fans to be installed in his premises. The first Respondent had received the said application, however, never communicated the rejection and therefore, the Petitioner believes it to be the deemed permission. In the year 2005, the Petitioner erected/renovated/updated the exhaust system as before, but with better quality material and better quality workmanship. However, there was some grievance regarding pollution due to the hotel activities and hence, the Officers of the first Respondent had sought a clarification by issuing a letter dated 23rd August 2005. Even at that juncture, there was no grievance made that the exhaust system is illegal and unauthorised. The Petitioner had communicated the compliance made to the suggestion given by the first Respondent by his letter dated 22nd October 2005. It is further averred in the petition that though he is the Chairman of the second Respondent Society, he is in minority and he developed some rival views with the other members of the society. When he applied for permission to erect a temporary monsoon shade on 09th May, 2014, it was denied by the second Respondent by its letter dated 30th May, 2014. He had approached the Registrar of Co-operative Societies and then got the permission. Since 1971 till 2013, he and his father have conducted the business in the said premises smoothly. However, after 2013, the society members started pressurizing him. The grievance has now been made in respect of the exhaust system. Thereafter, the Officers of the first Respondent visited the site on 18th July, 2013 and submitted a report on 17th September 2013. Again in the month of December 2013, some of the members of the second Respondent filed complaint against the said structure of the Petitioner. At the request of the Petitioner, the Structural Engineer Shri. Vipul Shah visited the site on 21st January 2014 and inspected the chimney and exhaust system. He observed that there is no danger to the building of the society. The report has been annexed. Again there was a round of complaints by the Society members to

the first Respondent Corporation and inspection Notice was issued by the first Respondent on 31st May, 2014 regarding alleged unauthorised encroachment in the open space and unauthorised erection of chimney and exhaust system. Yet another notice under Section 55 of the Maharashtra Regional and Town Planning Act, 1966 came to be issued on 04th August 2014. The said notice has been challenged by the Petitioner in this petition.

4 An affidavit-in-reply has been filed by the second Respondent society. All the other contentions have been denied and it has been specifically mentioned that the erection of Chimney and exhaust system is unauthorised. It is denied by them that permission for erecting/renovating/updating exhaust system is not necessary. It has also been denied that in the year 2005, the Petitioner has updated his system with better quality material and better quality workmanship. It has been stated that in June, 2013 some of the members of the second Respondent filed a complaint to the first Respondent regarding illegal construction, encroachment and installation of illegal implements likes Gas, Chimney, AC exhauster, gas cylinder in passages. After due visit of the concerned Officer of the Respondent, a report was submitted and the notice was issued. There was no compliance of the said notices. Thereby, the second Respondent society has contended that the Petitioner has made encroachment on the open spaces and erection of chimney and exhaust system is unauthorised. They have objections for the same.

5 We have heard the learned Counsel appearing for the Petitioner and the learned Counsel appearing for the first and second Respondents. He urges that the Chimney is in existence for several years and was never objected to. He urged that the chimney does not affect anyone and is necessary for running business of restaurant. The learned Counsel appearing for the Petitioner failed to

point out the documents authorising the erection of chimney and exhaust system.

6 Merely because the said structure is in existence for a considerable time and it was not objected by the first Respondent, it does not mean that it was legally constructed. The application dated 30th July, 2005 seeking permission for chimney and exhaust fan cannot be considered to be an application for permission to construct because it is not as per Rules. Concept of "deemed permission" cannot be invoked in this case as the application for permission was not as per Rules.

7 The photographs of the chimney and the exhaust system have been annexed. It is pertinent to note that the restaurant run by the Petitioner is on the ground floor and the duct of the chimney which is made up of steel has gone right upto terrace. The exhaust of the system is above the terrace. The building is multi-storied. When it is unauthorised structure, it cannot be protected. The report of the Structural Engineer that it is not causing any danger to the building is also not helpful to the Petitioner for the simple reason that since it is unauthorised, it cannot be protected.

8 We have also not found any force in the submissions that the Petitioner was under impression that no permission is required for erecting chimney and exhaust fan/system. No provision to that effect has been pointed out by the Petitioner.

9 Further photographs on record would show that the part of the chimney has also covered long distance from the basement and other instruments have also been installed in the same line. The alleged silence of the second Respondent prior to 2013 will not help the Petitioner. Obtaining of licences from

different Departments of the first Respondent for running the restaurant will also not legalise an unauthorised construction that has been made in respect of the chimney and exhaust system. Therefore, the Petitioner has failed to show that the impugned notice under Section 55 of the MRTP Act issued by the Respondent No.1 is illegal and deserves to be quashed.

10 No case is made out for the interference. Hence, we proceed to pass following order :-

O R D E R

a) Writ Petition is hereby dismissed. No order as to costs.

b) Ad-interim relief granted on 02nd August 2014 will continue to operate for a period of eight weeks from today.

(SMT. VIBHA KANKANWADI, J.) **(A.S.OKA, J.)**