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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.2954 OF 2015 WITH
NOTICE OF MOTION 124 OF 2017

Mohammed Rashid Mohammed Yusuf ...Petitioner
vs.
1 The State of Maharashtra
2 Municipal Corporation of
Greater Mumbai ...Respondents

Mr.A.M.Saraogi for the Petitioner
Mr.K.R.Trivedi, AGP for the respondent No.1
Ms Pallavi Thakar for respondent No.2
Ms Evanta Gonsalves for the applicant

CORAM : A.S.OKA, &
 SMT.VIBHA KANKANWADI,JJ.
DATE : AUGUST 1, 2017

P.C.:

1 Rule. The learned counsel for respondent Nos.1 and 2 waives service. We have also heard the applicants in the Notice of Motion No.124 of 2017.

2 By this petition under Article 226 of the Constitution of India, the petitioner has taken an exception to the notice dated 18th June 2015 issued by the respondent No.2-Mumbai Municipal Corporation under section 55 of the Maharashtra Regional and Town Planning Act,1966 (for short 'MRTP Act'). By the said notice, the petitioner was called upon to demolish the illegal structure of temporary nature described in the schedule to the impugned notice. Schedule to the impugned notice reads thus:

SCHEDULE

"Unauthorised construction of C.I sheet partition and washing place and covering/capturing of passage area between premises No.2 and premises No.8 at above mentioned address as shown in the rough sketch as overleaf."

2 The petitioner replied to the notice by a reply dated 24th June 2015. In the reply, he claimed to be a tenant in respect of the premises No.7. His contention was that the premises No.8 is not in existence. It is contended that deliberately incorrect description was incorporated in the Schedule with a view to demolish the structure of the petitioner bearing the premises No.7.

3 On 19th August 2015 this Court passed an order of ad-interim relief of status quo.

4 One Mr.Abu Salem Ansari and five others have taken out the aforesaid Notice of Motion essentially for vacating the ad-interim relief. The applicants are claiming to be the trustees of the trust known as Lal Chimney Trust which is the owner of the larger property. In the affidavit in support, the fifth applicant has accepted that the petitioner is a tenant of the premises/shed No.7 on the ground floor of the said building. It is alleged in the affidavit that in between the premises/shed No.7 and premises/shed No.2, there is a common passage of the area mentioned in paragraph 7 of the affidavit. The

allegation is that the petitioner unauthorisedly constructed a washing place by encroaching upon the common passage thereby obstructed entry to the premises/shed No.2. It is contended that the impugned notice is in respect of the said structure between the premises/shed No.7 and premises/shed No.2. It is contended that after service of impugned notice, the structure mentioned in the schedule to the impugned notice has been demolished. Reliance is placed in the said Notice of Motion on the photographs annexed as well as the letter dated 11th August 2015 addressed to the said Trust by the Assistant Engineer and the Designated Officer of E Ward in which it is stated that illegal structure has been removed on the basis of the impugned notice. It is contended in the affidavit in support of the Notice of Motion that the petitioner has suppressed from this Court the fact that the demolition was already carried out. The contention raised by the learned counsel for the applicants is that thereafter, the petitioner has reconstructed the premises.

5 The petitioner has filed an affidavit by way of reply to the said Notice of Motion. Apart from denying that the petitioner has carried out illegal structure as alleged by the applicants, it is contended that what is demolished by the Municipal Corporation is a shed close to shed No.2 with which the petitioner has no connection. It is claimed that the premises No.7 is in possession of the petitioner which is still in existence.

6 The submission of the learned counsel for the petitioner is that as the premises No.8 is admittedly not in existence, an attempt is made by issuing a notice for demolishing the premises No.7 in possession of the petitioner. The contention of the learned counsel for the applicants is that the petitioner is trying to take undue advantage of the mistake in the schedule to the impugned notice. Her submission is that the petitioner knew that the illegal structure referred in the notice is in between the premises/shed No.2 and premises/shed No.7. She submitted that after removal of the offending structure on 4th August 2014, the petitioner has re-constructed the structure.

7 The Municipal Corporation has not filed any reply though the petition is pending from 13th August 2015.

8 We have considered the submissions. We have already quoted the description of the illegal structure in the schedule to the impugned notice. Even according to the case of the applicants in the Notice of Motion, the premises bearing premises/shed No.8 is not in existence. In fact, the contention of the applicants is that the petitioner has carried out illegal work subject matter of the notice is the common passage between the premises/shed No.2 and premises/shed No.7 which has been demolished and re-constructed. Thus, even the applicants in the Notice of Motion have accepted that the description

of the premises in the schedule to the impugned notice is incorrect.

9 The applicants are relying upon the letter dated 11th August 2015 addressed to the trust of the applicants by the Designated Officer which recorded that the work of demolition has been carried out on 4th August 2015.

10 Thus, there appears to be a dispute about the identity of the structure subject matter of the schedule in the impugned notice. The disputed question regarding identity of the structure cannot be resolved in the writ jurisdiction under Article 226 of the Constitution of India. We, therefore, propose to direct the Designated Officer to give hearing to the parties and to pass an appropriate order. As stand of the applicants in the Notice of Motion is that illegal structure was made between the premises/shed No.2 and premises/shed No.7, we propose to permit the petitioner to file documents on record in support of their case. If according to the petitioner, what is constructed in the passage between the premises/shed No.2 and premises/shed No.7 is an authorised structure, the petitioner is free to produce the documents. If the designated Officer finds that the structure between the premises No.2 and premises No.7 is unauthorised, it will be for him to pass an order of demolition.

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

(I) We direct the petitioner and the applicants in the Notice of Motion to appear before the Designated Officer of E Ward on 4th September 2017 at 11.00 a.m for fixing the schedule of hearing;

(II) The Designated Officer after fixing the date shall visit the property in question for identifying the location of the premises/shed No.2 and premises/shed No.7 as even according to the case of the petitioner and the applicants in the Notice of Motion, the premises/shed No.7 is in possession of the writ petitioner. At the time of site visit, he will ascertain whether there is any structure or enclosure in between the said two premises;

(III) The Designated Officer shall give an opportunity to the petitioner and the applicants in the Notice of Motion to file the documents on record;

(IV) After giving an opportunity of being heard to the writ petitioner and the applicants in the Notice of Motion, the Designated Officer will decide whether the structure/enclosure in the passage between the premises/shed No.2 and premises/shed No.7 is authorised. If he comes to the conclusion that the same is unauthorised, he shall proceed to pass an order of demolition of the said structure;

(V) In the event the order of demolition is passed by the Designated Officer, the same shall not be implemented for a period of four weeks from the date on which a copy of the order is served to the writ petitioner. The Designated Officer shall also serve a copy of the order to the applicants in the Notice

of Motion;

(VI) We make it clear that we have made no adjudication on merits and all issues are left open to be decided by the Designated Officer;

(VII) Rule is made partly absolute on above terms;

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

(VIBHA KANKANWADI,J.)

(A.S.OKA,J.)