

Sharayu.

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

WRIT PETITION NO. 2312 OF 2015

Vijay Kumar Gupta

...Petitioner

Versus

**The Zonal Grievance Redressal
Committee,
Office of the concerned Zonal DMC,
Zone-I,
Municipal Corporation of Greater
Mumbai,
E Ward Office Building,
10, Sheikh Haffizuddin Marg,
Byculla, Mumbai 400 008 And Ors.**

...Respondents

Ms. Reema Mishra, a/w Mr. Jitendra Jagtap, for the Petitioner.

Mr. Sagar Patil, a/w Ms. Yamuna Parekh, for the Respondent-BMC.

Mr. V.A. Thorat, Senior Counsel, a/w Mr. B.J. Joshi & Mr. Vilas Tiwari, i/b Mr. B.J. Joshi, for the Respondent Nos. 4 to 12.

**CORAM : ABHAY S. OKA AND
RIYAZ I. CHAGLA, JJ.**

DATE : 29 September 2017

ORAL JUDGMENT : (Per Abhay S. Oka, J)

1. As noted in the earlier order, as per the administrative order passed by the Hon'ble the Chief Justice, this Petition has been specially assigned to this Bench. Only in view of the directions contained in the order dated 11 August 2017 passed by the Apex Court in the Petition for Special Leave to Appeal (C) No. 17603-17604/2017, that we are giving out of turn priority to the hearing of this Petition. The order dated 11 August 2017 passed by the Apex Court expects this Court to decide this Petition by the end of this month.

2. The only substantive prayer made in this Petition under Article 226 of the Constitution of India, is prayer clause (a) which reads thus:-

“immediate action for demolition of the illegal 5th

and 6th Floor of the Building be undertaken by the Respondents by issuing appropriate writ in the nature of a writ of mandamus or direction or order.”

3. The case made out in the Petition in brief is that he is a resident of Gulmanor Building, Strand Road, Colaba, Mumbai – 400 005. The case made out in the Petition is that right from the year 1986, the Petitioner has been complaining about illegal extensions/illegal constructions on 5th and 6th floor of the said building. It is his case that the entire 5th and 6th floors of the building were illegally extended and constructed without seeking permission of the Mumbai Municipal Corporation. The Petitioner has referred to correspondence made by him with the Mumbai Municipal Corporation. The Petitioner has relied upon the order dated 1 October 1982 passed by the City Civil Court. The only substantive prayer is prayer clause (a) which have quoted above.

4. In this Petition, the Petitioner has relied upon the orders passed by the Mumbai Municipal Corporation (for short ***“the Said Corporation”***) in relation to demolition of illegal constructions associated with Flat Nos. 35, 39, 40 and 41 on the 5th floor of the said building. It is pointed out that as regards Flat No. 36, a notice under Section 351 of the Mumbai Municipal Corporation Act, 1888 (for short ***“the said Act”***) has been issued.

5. Reliance is also placed on the order made by the Deputy Commissioner (Zone I) on 7 August 2015 acting as Zonal Grievances Redressal Committee (GRC) constituted under Circular dated 4 June 2013. The relevant part of the directions issued by GRC reads thus:-

“Deputy Commissioner (Zone-1) issued orders that,

- 1. Before taking further action as regards notice under section 351 of the B.M.C. Act, in respect of Flat No. 35, 36, 39, 40, 41, the Designated*

Officer And Asstt.Engineer (Building & Factories)

A ward should make correspondence with the office-bearers of the housing Society for submitting the original plan of the building. Similarly, he should make correspondence with the Building Proposal Department also. If the original plan is received from the housing society, then he should get the same verified from Building Proposal Department. As the matter of set back terrace enclosure falls under the rules of FSI, he should prepare the original plan and should get verified through the Building Proposal Department as to whether there was a provision for set back terrace enclosure in the said building as per FSI rules in accordance of the rules prevailing at the time of building construction. Also, he should get verified the City Survey Plan submitted by the Complainant Shri. Gputa, from the Building Proposal Department.

2. *After verifying the original plan, if unauthorised construction is found then the action should be taken as per rules.*
3. *Copies of the documents for which approval has been obtained from the Municipal Corporation in respect of flat no. 36 by Shri. Waghela as well as of the affidavit presented by the Municipal Corporation in the Court, should be submitted to the A Ward office. Affidavit therein should be sent to the Legal Department for verification. Thereafter necessary action should be taken in accordance of the opinion of the Legal Department.*
4. *Flat below the flat no. 32 should be inspected and after comparing the same with the flat on the lower floor, decision should be taken in respect of additional changes in Flat No. 332.*
5. *Final orders are passed in respect of Flat no. 35,*

39, 40, 41. Further action in this regard should be taken immediately.

6. Complainant should be apprised of the action taken. Similarly, report should be submitted to this office.”

6. For the sake of completion of facts, we may note here that from the file tendered across the bar by the learned Counsel representing the Mumbai Municipal Corporation, we find that clause (i) of the directions issued under the order dated 7 August 2015 has been set aside by the Deputy Municipal Commissioner (Zone – I). This order dated 10 July 2017 is not the subject matter of challenge in this Petition.

7. The submission of the learned Counsel appearing for the Petitioner is that before 10 July 2017, clause (i) was already implemented. Her submission is that even in respect of Flat No. 36, the occupant/owner thereof is not in a position to produce any document to show legality thereof. Her submission is that no action is taken in respect of Flat No. 32 on the 5th Floor and

other premises on 5th and 6th Floors which are completely illegal. She has taken us through the Affidavits on record.

8. The learned Senior Counsel appearing for 4th to 12th Respondents, firstly contended that the Writ Petition under Article 226 of the Constitution of India seeking prayer clause (a) could not be entertained at the instance of the Petitioner. He submitted that as the building is so old, even the co-operative society is not in position to produce the sanctioned plan. On instructions, he stated that the owners/occupants of Flat Nos. 35, 39, 40 and 41 have instituted Civil Suits in the City Civil Court, Mumbai challenging the orders passed under Section 351 of the said Act as well as orders dated 7 August 2015 and 10 July 2017 passed by GRC. He states that till today, the concerned Respondents who have filed the Suits have not moved the learned Judge of City Civil Court for grant of any *ad-interim* or *interim* relief. He submitted that the Petitioner who is the resident of the same building for 30 years has belatedly filed the present Petition, which should not be entertained.

9. The learned Counsel appearing for the Mumbai Municipal Corporation stated that the scrutiny of documents submitted by the owner of the Flat No. 36 is in progress and therefore, no order has been passed on the notice under Section 351 of the said Act issued to him. He also submitted that as regards Flat No. 32, a notice dated 12 July 2017 under Section 351 of the said Act has been issued and further steps will be taken on the basis of the said notice. He stated that there is nothing on record to show that the Mumbai Municipal Corporation has examined legality and validity of the other premises on the 5th and 6th floors of the said building.

10. The learned Counsel appearing for the Petitioner submitted that a direction be issued to the Mumbai Municipal Corporation to initiate penal action against the earning officer in accordance with Section 475 B of the said Act as it is the obligation of Mumbai Municipal Corporation to do so.

11. We have given careful consideration to the submissions. As of today, in relation to the Flat Nos. 35, 39, 40 and 41 on the 5th floor of the said building, there are orders of removal of illegal construction passed under Section 351 of the said Act. As stated by the learned Senior Counsel appearing for the contesting Respondents, the said orders are the subject matter of challenge in the Civil Suits filed by the said Respondents. Even the orders of GRC dated 7 August 2015 and 10 July 2017 are the subject matter of challenge in the said Suits. A copy of one of the four Suits filed by Parveen J. Irani is tendered across the bar which shows that there is a challenge in the said Suit to the said orders. The learned Counsel appearing for the Petitioner submitted that the Suits have been belatedly filed which ought not to be entertained. However, it is for the concerned Court to go into the said aspect. Only order which can be passed in respect of Flat Nos. 35, 39, 40 and 41 today is that the order of demolition shall be implemented subject to the right of the concerned persons to move the City Civil Court for grant of *ad-interim* relief. If there is no *ad-interim* relief granted

within the stipulated time, the orders of demolition will have to be implemented.

12. As regards Flat No. 36, the owners/holder thereof has submitted the documents claiming that the Flat is authorised. The concerned officer of Mumbai Municipal Corporation will have to be pass an appropriate order on the notice issued under Section 351 of the said Act, after considering the said documents. As regards Flat No. 32, a notice under Section 351 of the said Act has been issued on 12 August 2017. Necessary order will have to be passed by the Mumbai Municipal Corporation on the said notice as well.

13. The said Corporation has not considered the issue whether there is any illegality associated with the other parts of 5th and 6th floor of the said building. Therefore, the Designated Officer will have to be inspect the said portion of the building and will have to decide whether there is any illegality associated with the construction. If he finds that there is any

illegality, he will have to initiate immediate action of demolition of illegal work/construction.

14. As far as the prayer for directing initiation of action under Section 475 B of the Mumbai Municipal Corporation Act is concerned, we permit the Petitioner to make a representation to the concerned Authority of the Mumbai Municipal Corporation, which is empowered to take action. If such representation is made, it will have to be decided within the time specified by this Court.

15. In view of above said discussion, we dispose of the Petition by passing the following order :-

- (i) The Orders passed in respect of Flat Nos. 35, 39, 40 and 41 under Section 351 of the said Act shall not be implemented by the Corporation for a period of six weeks from today to enable the concerned parties to move the City Civil Court

for grant of *ad-interim/interim* relief in the pending Suits. We make it clear that if on expiry of the period of six weeks from today, there is no prohibitory order passed by any Competent Court, the orders passed under Section 351 of the said Act in relation to Flat Nos. 35, 39, 40 and 41 shall be forthwith implemented by the Municipal Corporation;

- (ii) We direct the appropriate Officer of the Mumbai Municipal Corporation to pass an order on notices issued under Section 351 of the said Act, in relation to Flat Nos. 32 and 36 as expeditiously as possible and in any event, within a period of six weeks from today. Needless to add that the orders shall be passed in accordance with the law laid down in the case of *Sopan Maruti Thopte Vs. Pune Municipal Corporation*¹;

¹ AIR 1996 Bom 304

- (iii) We direct the Designated Officer of the concerned Ward to visit the building in question after giving sufficient advance notice to the Petitioner and the 4th Respondent Co-operative Society. He will ascertain whether any other portions of 5th and 6th Floors of the said building (save and except Flat Nos. 32, 35, 36, 39, 40 and 41) are illegal or there is any legality associated with the construction thereof;
- (iv) The visit shall be made by the Designated Officer within 15 days from the date on which this Judgment and Order is uploaded;
- (v) If the Designated Officer finds that there is any illegality associated with any other premises on 5th and 6th floor, he shall be immediately initiate necessary action for removal of illegal construction in accordance with law;
- (vi) We make it clear that no action as aforesaid

shall be taken without giving an opportunity of being heard all the persons affected by the proposed action of demolition/removal;

(vii) It will be open for the Petitioner to make a representation to the appropriate authority of the said Corporation seeking a direction to initiate action under Section 475 B of the said Act against the earning Officers. If such a representation is made, appropriate decision shall be taken by the appropriate Officer of the Mumbai Municipal Corporation on the said representation within one month from the date on which the said representation is filed. The decision shall be communicated to the Petitioner. We make it clear that there is no adjudication made on the merits on the said prayer;

(viii) The issue of legality and validity of the orders under Section 351 of the said Act in respect of

Flat Nos. 35, 39, 40 and 41 as well as the orders passed by the GRC on 7 August 2015 and 10 July 2017 is expressly kept open;

- (ix) All contentions of the parties on notices issued in respect of Flat Nos. 32 and 36 are kept open;
- (x) We make it clear that as far as the Suits filed in relation to four flats are concerned, the City Civil Court is free to decide the same on its own merits in accordance with law and no adjudication made by this Court on merits of the said Suits;
- (xi) Rule is made partly absolute on above terms;
- (xii) All concerned to act upon an authenticated copy of the Judgment and Order.

[RIYAZ I. CHAGLA J.]

[ABHAY S. OKA, J.]