

Sharayu Khot.

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

WRIT PETITION (L) NO. 354 OF 2018

Kalique Vazirullah Khan

...Petitioner

Versus

Mumbai Municipal Corporation & Ors.

...Respondents

Mr. Pradeep J. Thorat, for the Petitioner.

Ms. Shital Mane, for the Respondent-BMC.

Mr. Naseem Ahmed Siddiqui, Respondent No. 3 is present.

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

DATE : 24 April 2018

ORDER :

1. Heard the learned Counsel appearing for the Petitioner and the learned Counsel appearing for the 1st and 2nd Respondents.

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April 24, 2018

2. Paragraphs 1 and 2 of the order dated 27 February 2018 read thus:-

“1. Heard the learned Senior Counsel for the Petitioner and learned counsel appearing for the Mumbai Municipal Corporation (1st and 2nd Respondents). The learned counsel appearing for the Respondent Nos. 1 and 2 on instructions of Mr. Satish Malekar, Assistant Engineer who is personally present in Court states that the communication dated 2nd June 2016 (Exhibit 'N' to the Petition) as well as order dated 6th April 2016 (Exhibit 'L' to the Petition) will be withdrawn and after hearing the parties, he will pass a fresh order on the notice dated 28th December 2015 (Exhibit – 'K') to the Petition.

2. We accept the said statements. However, the 3rd Respondent is not represented.”

3. By the same order, the parties were put to the notice that the Petition will be disposed of finally at the stage of admission. The 3rd Respondent appeared in person on 16 April 2018 and tendered a Reply. Today, the 3rd Respondent is present in person. He states that except what is stated in his Reply, he does not want to say anything.

4. By this Writ Petition under Article 226 of the Constitution of India, the first prayer is made for issuing a writ of mandamus against the 1st and 2nd Respondents to take action of removal the unauthorized structure having an area of 210 sq.ft. carried out by the 3rd Respondent. The second prayer is to pass an appropriate order on the basis of the notice issued under Section 351 of the Mumbai Municipal Corporation Act, 1888 (for short “the said Act”). There is a Reply filed by Shri. Satish Malekar on behalf of the 1st and 2nd Respondents. In the Reply, it is contended that the notice was issued on 28 December 2015 under Section 351 of the said Act and final order has been passed on the said notice on 6 April 2016 by the

Assistant Engineer (Building and Factory) who is the Designated Officer. Final order holds that the structure of the 3rd Respondent was in existence prior to 1 April 1962 and therefore, the structure is a tolerated structure.

5. On the earlier date, the learned Counsel appearing for the Petitioner had made certain submissions. After considering the submissions, the aforesaid statement was made on 27 February 2018 by the learned Counsel appearing for the 1st and 2nd Respondents on instructions of the concerned Municipal Officer.

6. As the Municipal Corporation is itself ready to withdraw the order dated 6 April 2016, we do not see any legal impediment in permitting the Municipal Corporation to do so.

7. We have perused the Reply filed by the 3rd Respondent, in which he has reiterated that the structure was in existence before the cut off date. He has stated that the

Petitioner is a builder and developer and he wants to deliberately drag him in litigation.

8. We, therefore, proposes to direct the Municipal Corporation to pass a fresh order after withdrawing the communication dated 2 June 2016 and the order dated 6 April 2016 passed on the notice dated 28 December 2015. While passing an order on the basis of the notice under Section 351 of the said Act, the Municipal Corporation will be bound by the law laid down in the case of ***Sopan Maruti Thopte & Anr. Vs. Pune Municipal Corporation***¹. Hence, we pass the following order.

(i) We accept the statements of the 1st and 2nd Respondents recorded in paragraph 1 of the order dated 27 February 2018;

(ii) We direct the Municipal Corporation to pass a fresh order on the notice dated 28 December

¹ 1996(1) Mh.L.J. 963

2015 after giving an opportunity of being heard to the 3rd Respondent. The order shall be passed as expeditiously as possible;

- (iii) A copy of the order passed shall be served to the Petitioner as well as to the 3rd Respondent. If the order be adverse to the 3rd Respondent, the same shall not be acted for a period of two weeks from the date on which this order is actually communicated to the 3rd Respondent;
- (iv) All contentions of the 3rd Respondent are kept open;
- (v) The Writ Petition is disposed of in the above terms.

9. At this stage, the learned Counsel appearing for the Petitioner submits that the Petitioner may be heard before passing the order. According to us, the Petitioner has no *locus* to

be heard on the notice issued under Section 351 of the said Act.

Hence, the said prayer is rejected.

[RIYAZ I. CHAGLA J.]

[ABHAY S. OKA, J.]