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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

**WRIT PETITION (L) NO.942 OF 2018
WITH
NOTICE OF MOTION NO.199 OF 2018
IN
WRIT PETITION (L) NO.942 OF 2018**

Ashok Jaiswar And 2 Ors.

...Petitioners

vs

The Commissioner, Municipal Corporation
of Greater Mumbai And Anr.

...Respondents

.....

Mr. Sharique Nachan, i/b. Judicare Law Associates, for the Petitioners.

Mr. Ashwin V. Sakolkar, for Respondent Nos. 1 and 2 – MCGM.

Mr. Yadunath Chaudhari, a/w. Mr. Kevin Pereira, i/b. Susmit Phadtale,
for Respondent No.3.

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CORAM : S.C. GUPTE, J.

DATED : 19 APRIL, 2018

P.C. :

. Heard learned Counsel for the Petitioners and learned Counsel for the Municipal Corporation and the newly added society.

2. This petition challenges a speaking order passed by the Assistant Engineer, Municipal Corporation of Greater Mumbai under the provisions of Section 351 of the Mumbai Municipal Corporation Act. It is the case of the Municipal Corporation in its original show cause notice issued to about 26 structures existing in the plot belonging to

Respondent No.3 Society that these structures were erected without any permission from the competent authority and requiring the occupants of the structures to show cause why the structures should not be removed or pulled-down. In pursuance of the notice, representations were made on behalf of some of the occupants and they were heard by the Assistant Engineer. In his impugned order dated 13 March 2018, the Assistant Engineer observed that there was no satisfactory or conclusive proof or documentary evidence to prove existence of the notice structure prior to the datum line (such datum line for commercial structures being 17 April 1964) or the authorisation of the structures as per plans approved by Executive Engineer (building proposal) City, or any other competent authority. Accordingly, under the impugned orders, the occupants were directed to remove the structures, failing which the structures were proposed to be demolished by the Municipal Corporation.

3. Insofar as Structure Nos.1 to 5 out of these 26 structures are concerned, there are on record MHADA certificates in respect of existence and eligibility of these structures. Accordingly, whilst a decision in respect of Structure Nos. 1 to 5 is said to be pending, the occupants of Structure Nos. 6 to 16 and 22 to 26 were issued the final speaking order requiring removal of the structures.

4. The main grievance of the Petitioners is that their structures were indeed in existence prior to the datum line and that there was adequate material produced by the Petitioners herein before the Assistant Engineer in proof of such existence. At the very outset, learned Counsel for the Municipal Corporation raises a preliminary objection relying on

the case of **Abdul Karim Ahmed Mansoori vs. The Municipal Corporation of Greater Mumbai**¹. Learned Counsel submits that there is an alternative remedy in the form of a suit before a civil court available to the Petitioners in case they are aggrieved by an order passed by the Municipal Corporation under Section 351 of the Mumbai Municipal Corporation Act. Whereas originally there was a right of action by way of a civil suit in respect of actions of the Municipal Corporation under Section 351 or 354A of the Mumbai Municipal Corporation Act, by virtue of an amendment Section 515A was introduced in the Mumbai Municipal Corporation Act, which provided for bar of jurisdiction of civil courts in respect of orders passed or directions issued by the competent authority under Section 351 or 354A of the Mumbai Municipal Corporation Act. This Court, in the case of **Abdul Razzaq Sunesra vs. Municipal Corporation of Greater Mumbai**², whilst upholding the constitutionality of Section 515A held that on an examination of the scheme of the Act, sufficient safeguards appear to have been provided by the legislature to ensure that the determination by the authority was within the statutory parameters. The requirements of fairness of procedure and objective considerations for the outcome of the enquiry are implicit in the statute and the bar of jurisdiction of the civil court was valid and *intra vires* the statutory power of the State. No doubt, the case of **Abdul Karim Ahmed Mansoori** does open a window for challenging an order or a direction under Section 351 or 354A of the Act on the basis that the provisions of the Act have not been complied with whilst issuing such order or direction or the authority does not act in conformity with fundamental judicial procedure or good faith. But merely because on

1 2013(6) ABR 141

2 2013(6) ALL MR 297

these limited grounds a civil suit is maintainable to challenge an order or direction under Section 351, it cannot be said that there is in existence a statutory remedy of a suit in all cases where there is a challenge to an order or direction under Section 351. Such a construction will render the provision of Section 515A completely nugatory and that would mean that in any and every case the civil court would have jurisdiction to entertain a suit challenging an order or direction under Section 351 or 354A. In any event, even where there is in existence a statutory remedy, it does not imply any absolute bar on the jurisdiction of this Court to pass appropriate orders under Article 226 of the Constitution of India. The objection of the Municipal Corporation is accordingly repelled.

5. Coming now to the merits of the Petitioners' case, it is apparent from the record of the case that there is indeed no material produced before the authority to show that these offending structures were in fact in existence prior to the datum line. Learned Counsel for the Petitioners relies on an old communication from the estate department of the Government concerning "additional structures or shade adjoining" the erstwhile landlord's premises in the subject land. Relying on this communication, it is submitted that there is material, accordingly, to show that the structures existed prior to 23 September 1958. Besides a vague reference to additional structures or shade adjoining the premises, there is nothing to identify these offending structures, namely, Structure Nos. 12 to 16 or 22 to 26 as structures existing prior to the datum line or referred to in this communication. Learned Counsel for the Petitioners also relies on the receipts issued by Respondent No.3 Society for the structures to support his case of their existence prior to the datum line.

None of these receipts is for any structure or room from out of room nos. 12 to 16 or 22 to 26. The receipts are either for room nos. 2 or 4, or the open plot of land. Learned Counsel for the Petitioners also relies on his clients' representation before the Municipal Corporation where the Advocate making a representation of their behalf has referred to four structures admeasuirng approximately 4000 sq.ft.. Once again, the reference here is only to four structures. Relying, however, on the grounds mentioned in the representation, it is submitted that the representation was for the entire area admeasuring 4000 sq.ft., which was indeed comprised in only four rooms, which were said to be funauthorizedly treated as separate structures having 27 rooms/tenements. Even here, the statement that the so called composite structures, i.e. four in number, comprised of 4000 sq.ft. area or that this entire area of 4000 sq.ft. was in existence prior to the datum line, has no basis. Learned Counsel also suggests that if these other structures were not part of the structures named as room nos.1 to 4, there was no need for the society to issue multiple rent receipts in respect of these four rooms. That would be a rather speculative matter. That is no material to prove the existence of any particular structure or area as of the datum line.

6. In the premises, in the absence of any material to show that the structures in fact existed prior to the datum line, the impugned order passed by the Engineer cannot be faulted either as perverse or vitiated by any malafides, legal or otherwise. In the premises, there is no occasion to interfere with the order under Article 226 of the Constitution of India. Accordingly, there is no merit in the petition and the petition is

dismissed.

7. On the application of the Petitioners, the ad-interim protection granted to them against coercive steps in pursuance of the impugned orders and which protection is operating as of today, is extended by a further period of three weeks.

8. In view of the disposal of the writ petition, the notice of motion taken out therein does not survive and the same is also disposed of.

(S.C. GUPTE, J.)