

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

WRIT PETITION {L} NO.957 OF 2019

Shreedharan R. Thaliya Parampil,
An Adult Indian Inhabitant,
having his address at Hotel Santosh
(Tadka-I), situated at CTS No.312,
Opp. Maroli Church, R.C. Marg,
Chembur, Mumbai.

.... Petitioner

- Versus -

1. State of Maharashtra
through the Hon'ble Minister
Urban Development Department,
Mantralaya, Mumbai.
2. Municipal Corporation of Greater
Mumbai, represented through its
Commissioner, CST, Mumbai-1.
3. The Asstt. Municipal Commissioner,
“M” West Ward Municipal
Corporation, “M” West Ward
Municipal Building, Sharadbhau
Acharya Road, Chembur.
4. The Asst. Engineer, M (West) Ward
Building, S.N. Acharya Marg,
Chembur, Mumbai.
5. Sanjay Nilkanthrao Tapre,
Sub-Engineer (BP), M.C.G.M.,
Municipal Building, CST,
Mumbai-400 001.

.... Respondents

Ms Sanjukta Dey with Mr. Shivraj Patne for the
Petitioner.

Ms Geeta R. Shastri, Addl. Government Pleader, for
Respondent-No.1-State.

Ms Rupali Adhate for the Respondent-MCGM.

CORAM: S.C. DHARMADHIKARI &
B.P. COLABAWALLA, JJ.

DATE : APRIL 09, 2019

ORAL ORDER (Per Shri S.C. DHARMADHIKARI, J.):

1. By this petition under Article 226 of the Constitution of India, the petitioner has challenged an order passed by the State Government under Section 47 of The Maharashtra Regional and Town Planning Act, 1966 (“**MRTP Act**” for short).

2. That is a power of Appeal and an Appeal is preferred to the State Government against an order passed by the Municipal Corporation of Greater Mumbai/Planning Authority. The Planning Authority came to the conclusion that a structure/building which has been standing at the site is an unauthorised and illegal construction. On 7-8-2018, the Municipal Corporation of Greater Mumbai decided that it should

be brought down.

3. It is that order and also a refusal, on an application made by the petitioner seeking permission to retain the said structure at the site, which is impugned in this petition.

4. The petitioner before us has impleaded the State of Maharashtra, the Municipal Corporation of Greater Mumbai and its officials. He says that he has been residing in Mumbai and is running a hotel/restaurant business in the name and style “Hotel Santosh (Tadka-1)”. He says that the said hotel is being conducted for the past 17 years. He has all the permissions, approvals and licenses. He says that the taxes have also been paid regularly by him. This is a restaurant-cum-bar. The premises admeasures 231 sq. mtrs. and this structure/building is situate on a plot of land bearing CTS No.312 of Village Wadavali, Taluka Chembur, Mumbai. This plot of land was owned by one Public Charitable Trust. There are other buildings and structures apart from this restaurant-cum-bar. It is stated that the plot/portion of the land where the structure/building of

the restaurant-cum-bar is situate/standing was leased by the Trust to one M/s. Maheshwari Enterprises. The rent of these premises is paid to this entity by the petitioner and it is stated that the petitioner was inducted in the said premises by one Ishwar Devadiga. The said gentleman was running a restaurant business prior to 1978. The petitioner places reliance upon a survey carried out under The Maharashtra Slum Areas (Improvement, Clearance And Redevelopment) Act, 1971 in which the structure was identified at serial No.661. It is stated that the petitioner approached the said Devadiga and expressed his intention to join the restaurant business. In the year 2001, Devadiga and the petitioner entered into a Partnership Deed and it was duly registered. The petitioner has placed reliance on this Deed to submit that the petitioner continued to carry on business and it is his case that the licenses and approvals were issued in his name after Mr. Devadiga passed away in the year 2006, leaving behind his wife and children. They have consented to the business being run and conducted entirely by the petitioner.

5. The petitioner says that there was a local person who started harassing the petitioner by making complaints and lodging protests. He was an extortionist. The petitioner was tired of his influence and his activities of making false and frivolous complaints. He says that on the false complaints and without verifying or scrutinising the papers or records, a Show Cause Notice dated 18-12-2013 was issued, invoking Section 351 of The Mumbai Municipal Corporation Act, 1888 (“**the MMC Act**” for short). The conclusion is that, the petitioner has made an illegal construction using brick masonry walls partly by M.S. Grill and A.C. Sheet roofing admeasuring about 2143.65 sq.ft. Width and 14 ft. high. The petitioner submitted a detailed reply to this Notice on 25-12-2013, and not satisfied with the claim of the petitioner, an order of demolition was passed on 22-7-2015. The petitioner has made a grievance that even before this Show Cause Notice, he had an occasion to access the Municipal records which included a rough sketch showing that the petitioner's restaurant-cum-bar was not an authorised or a legal structure.

6. The petitioner filed a Suit in the City Civil Court at Mumbai and later on that Suit came to be dismissed on the ground that the City Civil Court has no jurisdiction to entertain and try the Suit. The petitioner filed a First Appeal in this Court and the First Appeal also came to be dismissed on 21-11-2017. The petitioner unsuccessfully challenged this verdict in the Hon'ble Supreme Court but even the Special Leave Petition came to be dismissed.

7. During the pendency of the Special Leave Petition, the petitioner filed Writ Petition (Lodging) No.267 of 2018 challenging the Notice dated 18-12-2013 and the consequential order of 22-7-2015. During the pendency of this writ petition, the impugned Notice dated 10-2-2018 invoking Section 488 of the MMC Act has been served on the petitioner. The petitioner filed Writ Petition (Lodging) No.520 of 2018 challenging this Notice, and by a common order dated 21-2-2018 the petitioner's petitions were disposed of by allowing the petitioner to apply for regularisation of the offending structure. That was upon an

undertaking filed by the petitioner.

8. The petitioner then applied, by invoking the jurisdiction and power of the Municipal Corporation/Planning Authority, for permission for retention of the subject structure. However, the application was dismissed on 26-6-2018. Aggrieved thereby, the petitioner filed Writ Petition (Lodging) No.2250 of 2018 on 3-7-2018. This Court, however, was of the opinion that the petitioner can file a fresh application and that was filed. However, that was rejected on 7-8-2018. This Court disposed of Writ Petition (Lodging) No.2250 of 2018 challenging this rejection by granting liberty to the petitioner to file an Appeal under Section 47 of the MRTTP Act. The State Government was thus approached and the impugned order has been passed on the petitioner's Appeal.

9. Ms Dey, appearing on behalf of the petitioner, would submit that the order passed by the State Government suffers from non-compliance with the principles of natural justice. The petitioner has pointed out that a letter was addressed to the

Appellate Authority mentioning that despite its written instructions, the documents submitted along with a report of the Appellate Authority were not allowed to be accessed by the petitioner.

10. The petitioner proceeds on the premise that the whole matter is decided against him mainly because he failed to prove the existence of the structure with the dimension and size indicated in the report prior to the cut-off date. The cut-off date in respect of commercial structure was determined as 1-4-1962. If the structure with this dimension and size was non-existent, then, it is evident that the petitioner has either extended an old structure illegally and unauthorisedly or has built an altogether a new building.

11. The other contention of the learned counsel is that, if the petitioner is running a restaurant-cum-bar after obtaining all the requisite permissions and licenses, then, the authority should have noted the fact that it is some disgruntled or mischievous person, possibly a rival, who wants to displace the

petitioner. The Municipal Corporation and other authorities ought not to have obliged him.

12. The counsel submits that the Corporation as also the State Government have grossly erred in arriving at the conclusion that the petitioner had failed to produce documentary evidence to show that the structure is old and exempted one and that it was assessed prior to the cut-off date. In fact documentary evidence was provided but the authorities have failed to refer to it.

13. In that regard, our attention has been invited by the counsel to a license, copy of which is annexed at page 78 of the paper-book. It is stated that this license refers to the name of the firm as M/s. Hotel Santosh and the licensee's name as Ishwarchand Devadiga. Prior to that, there is a document which is also a license issued in the name of the same gentleman as the said Devadiga had applied for issuance of a license to deal with Indian made foreign liquor. Thus, the petitioner is not a usurper who has suddenly come on the scene but it was a regular

business and conducted from the said premises. Our attention is also invited to the document at page 138 of the paper-book which, according to the counsel, points out the total area of the restaurant. This is the area certified even by the Collector and other statutory authorities. The counsel has also invited our attention to a Note-sheet (Exhibit-R, page 232) which says and for the first time, that the structure is a slum structure. The counsel submits that this is a fact introduced much after the proceedings and a permanent structure or construction like the one made by the petitioner can, by no stretch of imagination, be termed as a slum. Thus, the counsel submits that the authorities are not sure whether the structure was a slum or an existing old one and there is an ample proof of its existence even prior to the cut-off date. She relies upon the internal notes and emerging from the files maintained by the Corporation itself. In relation to this license, the Corporation had noted that the trade premises are situated on a private land. It is censused and numbered for commercial use as per the remarks of the Deputy Collector (Encroachment), Kurla-II. This Deputy Collector says that he has

no objection in granting the license as the hotel is already in existence. Since the trade premises are situated on a private land, the pitch holder's card was not issued. The structure is assessed to Municipal tax prior to 1-4-1961. It is in these circumstances that the counsel would submit that there are clear remarks in the Municipal records denoting that this is an old structure, existing prior to the cut-off date and none have ever objected to its existence or the business carried out therefrom. It is argued by the counsel that in the synopsis of the arguments, while proving the existence of the subject-structure prior to 1961, filed by the petitioner/appellant before the State Government, it was specifically urged in para 2 that the Municipal Corporation itself states that the structure is assessed and the Municipal taxes are being collected since prior to 1961. Even the assessment bill was produced. It is in these circumstances, she would submit that the finding rendered is perverse. She would submit that even if there is a concurrent finding but if the same is vitiated by perversity or error of law apparent on the face of the record, then, this Court in its writ

jurisdiction can interfere with the same. She would submit that voluminous documentary evidence has been discarded and the impugned order, therefore, deserves to be quashed and set aside.

14. On the other hand, the Advocate appearing for the Municipal Corporation supported the impugned order. She would submit that the concurrent findings of fact are not vitiated by any error of law apparent on the face of the record or perversity. This is not a Court of further appeal. It would not be open for it to re-appreciate and reappraise the same factual materials to arrive at a different conclusion. In the circumstances, this writ petition be dismissed.

15. From a reading of the petition and all its annexures, it is apparent that the matter has a chequered history. Firstly, the Municipal Corporation of Greater Mumbai invoked Section 351 of the MMC Act. That section enables the Municipal Corporation and particularly the Municipal Commissioner to arrive at a satisfaction contemplated by it and to deal with

buildings or works commenced contrary to Section 347. This section, therefore, enables the authority to arrive at a satisfaction that the erection of any building or the execution of any such work, is commenced contrary to the provisions of Section 342 or Section 347 of the MMC Act and a Notice is required to be issued to the person who is erecting such building or executing such work, or has erected such building or executed such work, to answer or show-cause to the Notice contemplated by Clause (a) of sub-section (1A) of Section 351, and how the matter has to be dealt with if the cause is shown or not shown, is then set out and by an amendment introduced by Maharashtra Act 11 of 2002, sub-section (3) says that no Court shall stay the proceedings of any Public Notice including Notice for eviction, demolition or removal from any land or property belonging to the State Government or the Corporation or any other local authority or any land which is required for any public project or civil amenities, without first giving the Commissioner a reasonable opportunity of representing in the matter. Thus, if sufficient cause is shown to the satisfaction of the Commissioner,

he may drop the proceedings but if the cause is not sufficient and the Commissioner is not satisfied, accordingly the building or work can be removed, altered or pulled down.

16. The subject-Notice, though invoking Section 351 of the MMC Act, has then been construed as a Notice even under Sections 52 & 53(1) Clause (a) of the MRTP Act. Everybody is routinely construing the legal provisions under the MMC Act and the MRTP Act to mean that, as of right somebody who is in receipt of such a Notice or thereafter an order based thereon, adverse to the interest of the party on whom the Notice has been served, can apply for regularisation of what has been termed as an unauthorised or illegal work. In other words, if the building has been erected or the work has been executed contrary to the provisions of Section 342 or Section 347 of the MMC Act, still an application for regularisation can be made and dealt with.

17. The Hon'ble Supreme Court had on several occasions clarified that a person can seek an opportunity to satisfy the authorities that such work has been executed or such building

has been erected with their approval and in any event the development permission under Section 44 of the MRTP Act can be granted in relation to that development. That opportunity is available to him and he can seek retention of the work or the development at site and that is by invoking sub-section (3) of Section 53 of the MRTP Act. The present proceedings have been understood thus and that is why the petitioner was allowed to apply for regularisation/retention of the work/building at the site.

18. The order of the authority, in the first instance, was passed because it was not satisfied with the cause shown. The petitioner does not dispute that when the Appeal was preferred, the petitioner had to point out to the Appellate Authority that the structure or building was in existence prior to the cut-off date. It was the petitioner who approached the authority with such a case. It was the petitioner who showed cause to the Notice by urging that his structure or building is not erected unauthorisedly and illegally but it was existing at the site prior to the cut-off date and was assessed continuously. Moreover, the

petitioner had to establish and prove, once such a stand was taken, that the structure or building with its present size and dimension was in existence prior to the cut-off date.

19. Thus, it is not enough to say that this structure was in existence prior to 1-4-1962 but that it was in existence with the same dimension and size, as is now mentioned by the petitioner in answer to the Show Cause Notice and in the retention application. The structure may have been in existence prior to 1-4-1962 but with the dimension and size as claimed by the petitioner, is the moot question. We have in that regard found that the petitioner at best relied upon some documents from the official records to say that such a structure, as is now claimed to be a running restaurant-cum-bar was indeed in existence prior to 1-4-1962. However, the impugned order proceeds on the footing that it was not of the same size and dimension.

20. The Appellate Authority has found that the petitioner relied upon some documents in possession of the

Municipal Corporation and an explanation therefore was sought from the Municipal officials. In that regard, the file was produced and equally the explanation was provided that the structure, as was claimed to be in existence, was not of the size and dimension asserted by the petitioner. The reasons assigned by the Appellate Authority in the impugned order are that, it is the petitioner who asserted that the structure was in existence prior to 1-4-1962 and that it was first assessed to Municipal taxes on 1-4-1980. At that time, however, the area of the structure was mentioned as 32.25 sq. metres and 2.95 sq. metres (Paan Stall). The petitioner, on the other hand, has not accepted this position. The petitioner says that the structure as was in existence prior to 1-4-1962 had an area exactly as asserted by the petitioner. The petitioner repeatedly says this and claims that the area was 2143.65 sq.ft. width and 14 ft. high. The petitioner cannot and could not have succeeded in establishing this fact for there was nothing in the Municipal records to denote such a building or construction or structure was existing at the site. On the other hand, the Notice was issued by invoking

Section 351 on the clear satisfaction of the Municipal authorities that such a structure, as is now claimed to be Hotel Santosh (Tadka-1), has been erected without any approval or permission and it is unauthorized. The area of the construction as mentioned in the Show Cause Notice, therefore, was as claimed by the petitioner. It is that structure and its existence which had to be established and proved. The petitioner has miserably failed to establish and prove the same. We are, therefore, of the clear opinion that the Municipal Corporation was justified in issuing a Notice dated 10-2-2018, under Section 488 of the MMC Act calling upon the petitioner to demolish this structure, as the petitioner had failed to establish that it was constructed with authority and by complying with the law. The petitioner was, therefore, called upon and rightly to remove/demolish /pull down this structure. The order passed in that behalf on 1-8-2015 is in accordance with law and is, therefore, not vitiated by any error of law apparent on the face of the record or perversity. The order says that the petitioner had submitted certain documents along with a photocopy of the assessment bill under

MW-2096(9B), which was verified by the Assessment Assessor and Collector. The first date of the assessment is 1-4-1980. However, the petitioner had not submitted any documentary evidence showing the authenticity of the Notice-structure. No approval from the Competent Authority and particularly the Executive Engineer (Building Proposal) Eastern Suburban of the MCGM or documents showing existence of the Notice-structure, which is termed as a structure constructed using brick masonry walls partly by M.S. Grill and A.C. Sheet roofing admeasuring about 2143.65 sq.ft. Width and 14 ft. height., prior to 1-4-1962 and in commercial use were produced. Thus, the structure was in unauthorised category.

21. This is a clear finding of fact and we have found that all the materials relied upon and the pleas reiterated before the Appellate Authority and equally before us do not establish and prove this primary fact.

22. Consequently, we do not find any merit in the writ petition. It is dismissed.

23. At this stage, a request is made to direct the Municipal Corporation to stay its hands and not to demolish the subject-structure for a period of two (2) months to enable the petitioner to approach the higher Court.

24. We have found from the facts and circumstances narrated in the petition itself that the petitioner was served with the Notice under Section 351 of the MMC Act on 18-12-2013 and on 1-8-2015 an order was passed on this Notice. Thus, from the issuance of this Notice and for a period of one-and-half-year the petitioner approached several authorities and Courts and tried to stall the obvious. After that order was passed, the authorities and equally some Courts were misled into believing that the petitioner can apply for regularisation/retention of the structure. We do not see anything like regularisation being permitted in law. What can be regularised is an irregularity and not an illegality. Once this is a clear case of illegality and that is sought to be perpetuated by the request made before us, it is time we warn litigants like the petitioner that after availing of

multiple opportunities in a desperate attempt to avoid the imminent demolition or pulling down of the structure, they cannot request this Court, in its discretionary jurisdiction and after having dismissed their petition, to allow them to continue with the commercial activity in an illegal and unauthorised construction.

25. The request is, therefore, refused.

26. After the request as above has been refused, Ms Dey, appearing for the petitioner, would submit that the petitioner will accept all the adverse orders including the one passed today. However, the petitioner would like to continue with the business and that restaurant business is his only source of livelihood. He would not approach any higher Court and would accept the adverse verdict but he should be allowed to retain the authorised part of the structure, for his apprehension is that if tomorrow the structure or building is pulled down, even the good will perish with the bad. In other words, even the authorised or legal part of the construction will perish and will

be pulled down. In that event the petitioner will have to start from the beginning and that would involve enormous expenditure.

27. After having made this request, in the presence of the petitioner and fully realising the consequences of such a statement, we direct that in the event the petitioner pulls down the unauthorised or illegal construction of the area and size mentioned in the Show Cause Notice by only retaining that part which was covered by the assessment receipt or proceedings of 1-4-1980 and which shows that there was a structure in existence prior to 1-4-1962, then, the Municipal authorities may allow the petitioner to retain that part and carry on his hotel business therefrom.

28. After having noticed that it is not possible to segregate the legal and authorised part of the construction from the unauthorised and illegal and the result would be that the entire structure will have to be pulled down, the petitioner says that within a period of four (4) weeks from today, he will pull

down or demolish the existing structure but after he submits proof of such demolition or pulling down and the Municipal officials are satisfied after a site inspection that it has indeed been pulled down and demolished, he may be allowed to seek permission to construct a building or a structure admeasuring 32.25 sq. metres and use it as a tea stall-cum-eatery/restaurant, and 2.95 sq. metres (Paan Stall). Beyond this size and area, nothing else would be constructed and the petitioner undertakes not to carry out any construction beyond this permissible limit nor extend the structure that may be erected/retained by him beyond this limit.

29. In the light of the statement by the petitioner, which is accepted as an undertaking to this Court, we direct that in the event the petitioner pulls down or demolishes the construction at his cost, charges and expenses within four (4) weeks from today and submits the proof of such demolition and the Municipal Corporation is satisfied that it has indeed been pulled down and demolished, he may be permitted to construct a building or erect a structure of the above size and dimension

and in the event the petitioner is desirous of carrying on a business or trade of eatery-cum-restaurant, the Municipal authorities may permit him to do so. However, this will be subject to the petitioner complying with all the other requirements stipulated not only in the MMC Act and the MRTTP Act but such other Laws as are in force. In the event he fails to do so, the structure/building existing at the site can be pulled down or demolished by the Municipal Corporation at the cost, charges and expenses of the petitioner.

(B.P. COLABAWALLA, J.)

(S.C. DHARMADHIKARI, J.)