

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

NOTICE OF MOTION {L} NO.495 OF 2019
IN
PUBLIC INTEREST LITIGATION NO.67 OF 2017

Oliul Haque Shaikh & Others

.... Applicants/
Interveners

In the matter between

Tushar Guru Salien

.... Petitioner

Vs.

State of Maharashtra & Others

.... Respondents

Ms Prachi Tatake i/by Mr. S.P. Chavan for the
Applicants/Interveners.

Mr. Shishir Joshi with Ms Bhakti Jugal for the
Petitioner.

Ms Geeta Shastri, Addl. GP, for the Respondent-
State.

Mr. N.V. Walawalkar, Senior Advocate, with Mr.
P.G. Lad, Mr. Dharmesh Vyas & Ms Vandana
Mahadik for the Respondent-BMC.

Mr. Sanket Sakalkar, Junior Engineer, C/Ward,
present in Court.

CORAM: S.C. DHARMADHIKARI &
G.S. PATEL, JJ.

DATE : SEPTEMBER 23, 2019

P.C:

1. On request, taken up on production board as
urgency was made out.

2. This application is moved in a Public Interest
Litigation (“**PIL**”).

3. The applicants are before this Court complaining that, without they being impleaded as respondents the directions issued in the PIL are sought to be enforced against them. The prayer clauses (a) and (b) of this notice of motion read as under:-

“(a) That, this Hon’ble Court be pleased to direct the Petitioner to implead the Applicants as party Respondents in P.I.L. No.67 of 2017;

(b) That, this Honourable Court be please to direct the concerned departments of the Respondent No.2 and 3 to substantiate/verify the sanctioned plan of the building being Ex.B to the present application;”

4. An exhaustive prayer clause (c) refers to the legal provisions and it is said that a building known as Sayeeda Manzil, bearing No.57/59 situate at Ismail Curtey Road, Ghoghari Mohalla, Mumbai-400 003 would be demolished and thereafter the tenancy rights in respect of the same would be totally lost. The applicants say very boldly that, this building comprising of ground floor, mezzanine one to eight floors and an attic floor is located on a plot of land at Bhuleshwar. They came to know yesterday, that means prior to this application being moved and this application is sought to be moved by them to protect an imminent demolition which they say will take place pursuant to the orders passed in the PIL.

5. Now, the affidavit in support of this notice of motion is affirmed before a Notary, Public, on 19-9-2019.

6. The applicants say that, they have been occupying the premises since long and if the whole building is brought down, they will be without any shelter. They have claimed that, there is a Suit filed by respondent Nos.4 and 5 in the City Civil Court at Mumbai. They have come to know that the interim relief applied for in that Suit was not granted. An Appeal From Order challenging that dismissal was also dismissed by this Court.

7. From the website of the Court they came to know that there is an order passed in this PIL and which is dated 28-8-2019.

8. It is claimed that there is a Commencement Certificate granted and therefore the construction is authorized and that construction dates back to the year 1956.

9. It is argued that if the demolition takes place, that will be without verification of the claim and a scrutiny of the documents by the Municipal Authorities. They will utilise the order passed by this Court to bring down the structure/construction. That will, therefore, benefit none other than the petitioner in the PIL. Thus, the projection is that this is

not a PIL at all.

10. The order passed by the First Court is referring to the complaint of the PIL petitioner. Then this order of 28-8-2019 refers to the previous order in the PIL dated 30-7-2019. In that previous order, the Municipal Corporation was directed to produce photocopies of two complaints registered as Long Cause Suit No.1062 of 2018 and Suit No.618 of 2018. These Suits were filed in the City Civil Court at Mumbai. There were ad-interim orders passed in one of the Suits. The ad-interim order restrained the Municipal Corporation from demolishing the structure. The PIL drew the attention of the Court that gross unauthorised constructions have been effected on land bearing Survey No.2576, which is at Pydhonie, Bhuleshwar Division, Mumbai. The survey numbers are assigned by the Revenue Authorities, whereas the Municipal Corporation carries out an assessment and assigns a separate number to the properties. The two Suits claimed that, the plaintiffs therein occupy buildings having Municipal Nos.47/57, 54/58 and 57/59 and there is a stop work notice issued under Section 354-A of The Mumbai Municipal Corporation Act, 1888 ("**MMC Act**") followed by a Show Cause Notice. The Notices refer to a building comprising ground floor, mezzanine floor and 9th floor overlooking that the building comprised ground floor, mezzanine eight floors and an attic above the eight floors. The

plaintiffs in the Suits say that they are occupying rooms on the eight floor as tenants. They produced certain documents and which would, according to them, evidence their possession. The Notice is questioned only on the ground that the same is issued not by a Competent Authority. Now the City Civil Court, on the strength of this, granted ad-interim protective order but this Court expressed its displeasure in the manner in which that protective order was passed. This Court brought to the notice of the learned Judges of the trial Court that, before any such protective orders are passed the Courts must ascertain for themselves that plaints in the Civil Suit contain a specific statement that the Notice is issued in relation to a structure which is authorised and legal. The Notice is issued in relation to a structure which has permissions and sanctions from the Municipal Corporation. Thus the sanction and permission must relate to the specific structure which is the subject-matter of the Suit. Merely pointing out deficiencies in the Notice or the authority of the person issuing the Notice will not advance the case of any of the plaintiffs, according to the First Court's observation in the PIL. This Court found that there is no such pleading and yet protective orders have been passed. We do not think that the displeasure expressed by the First Court can be ignored and brushed aside by us in the manner sought by the applicants in this notice of motion.

11. The applicants ought to be aware that PIL proceedings are in the nature of *in rem* and the wrongdoers are not required to be impleaded as respondents and an order in the PIL bind not only the parties to the same but also those who are not party to the PIL. Thus the legal position being well settled, we cannot allow the applicants to introduce themselves as parties in the PIL. There is an additional reason for not permitting them to be impleaded and that is, that two persons occupying portions of this very structure/building moved the Civil Suits and sought protective order(s) of injunction restraining the Municipal Corporation from demolishing the building or the structure, or the portions occupied by them. When two occupants can move the Civil Court, then nothing prevented the applicants before us from approaching the Competent Court. They do not do so but when they realise that those persons who have obtained protective orders will also not be able to resist the demolition on account of the observations in the PIL, that they have been prompted to move this application. For all we know, the wrongdoers who are now unsuccessful in perpetuating their occupation and possession of the premises might have put up themselves as applicants to seek a protective order.

12. We do not think that the structure itself can be protected once it is the subject-matter of the Notice under

Section 351 of the MMC Act and that Notice has been upheld, *prima facie*, for its legality and validity even by a learned single Judge of this Court and who dismissed the Appeal From Order (Stamp) No.25660 of 2019 on 18-9-2019.

13. The observations of this Court in the Appeal From Order are extremely relevant and we reproduce the same:-

"4 The matter has a background, which needs to be noted before the merits of the Plaintiffs' case and in particular, his challenge to the impugned order is considered. Originally, a notice was issued by the Municipal Corporation under Section 354A of the MMC Act. The notice was replied to by the Plaintiffs and pending consideration of their reply, the Plaintiffs even filed a suit before the City Civil Court at Bombay challenging that notice. At the hearing of the notice of motion filed by the Plaintiffs in that suit, the Corporation made a statement that they would be issuing a notice under Section 351. This notice was issued on 27 March 2018 and is the subject matter of the present suit. Simultaneously, with these developments, it appears that a public interest litigation was filed in this court by one Tushar Guru Salien in particular reference to the ad-interim orders in the two suits filed by the Plaintiffs herein. Ad-interim orders passed in those suits were produced before the court and its attention was drawn to the general pattern which such cases followed. First protection orders were obtained from the court vis-a-vis the initial construction, the matters were prosecuted over time, and further constructions were made under the protection of interim orders. This court, taking cognisance on the grievance of the PIL Petitioner, sounded a note of caution for the benefit of all Judges in the State of Maharashtra before whom such suits were instituted, clarifying amply the legal position. This court made it clear that whenever a suit to enforce or protect an interest in the property which is governed by a municipal statute was filed before the court, the interest protected has to be with respect to a plea that prima facie the structure which was sought to be targeted by the municipal administration was an authorised structure. The court made it clear that the plaint must make an averment in respect of the

sanction obtained from the Corporation, showing that the structure targeted was prima facie governed by the sanction; merely by pointing out deficiencies in the notice or the authority of the person issuing the notice was not sufficient. The court, in other words, made it clear that sine qua non of suits of this nature was a positive assertion made with reference to the sanctioned building plans. In particular reference to the suit building with which we are concerned in the present appeal, the court noted that the photographs filed in the public interest litigation showed that the suit was filed and relief sought (that was on 11 September 2017), what existed at site was a ground floor, which was being unauthorisedly constructed upon, whereas, regrettably, the court noted, as of the date it passed its order (i.e. 28 August 2019) as many as nine storeys had been constructed. The court also noted that the Plaintiffs had, in the present case, simply questioned the authority of the person issuing the notice under Section 351 (impugned in the present suit) by simply pleading that he had not shown that he was the competent authority. After this order was passed by the PIL Court, it appears that the Corporation proceeded to consider the Plaintiffs' reply originally filed to the notice under Section 351 and passed its order on 11 June 2019 rejecting the Plaintiffs' representation and reiterating its intent to pull down the structure originally communicated vide the notice under Section 351. It is, at that stage, that the Plaintiffs moved the City Civil Court in their suit challenging Section 351 notice for interim protection and it is that application which was rejected by the trial court and that is how the present appeal from order has been moved.

5 *It appears from the record of the case that both the competent authority of the Municipal Corporation and the trial court have considered in extenso all documents filed by the Plaintiffs in support of their case for protection of the suit building. There were in all 17 documents filed by the Plaintiffs. Most of the documents were recent documents, which did not, in any way, show that the suit building existed prior to the datum line. None of the documents showed that the building, as it exists at site, had any sanction from the Planning Authority. The only plan of the building filed before the authorities and produced before the court was a photocopy of a plan. The plan was a bare plan; it did not contain any permission or approval of the competent authority. There is no endorsement of any permission or approval from the Planning Authority. On the other hand, the corporation produced assessment bills of the notice structure. These were*

issued by the Assistant Assessor and Collector, C-ward. The bills showed that the notice structure was assessed as a C.I. Shed. This was as of 2016-2017. The notice structure was a ground floor structure and the type of the construction was semi permanent / kutchha building. As against this assessment bill, nothing could be produced by the Plaintiffs to show that the building existed as of the cut-off date or there was any sanction obtained by the Plaintiffs or their predecessors for construction at site. The trial court, in the premises, observed that admittedly, the Plaintiffs had not shown that the notice structure was constructed with prior permission of the Planning Authority. The court also noticed that the Plaintiffs had failed to show that the structure had existed since prior to the datum line, that is to say, 17 April 1964. The Plaintiffs had taken a stand before a court that the building was 100 years old. The court noticed that there was no document filed by the Plaintiffs to support such a case. The court, in the premises, noted that there was no prima facie case for granting any protection to the Plaintiffs.

6 Even at the hearing of the present appeal from order, learned Counsel for the Plaintiffs is unable to point out any other document in support of his case either that the structure existed prior to the datum line or was constructed with permission from the Planning Authority. He seeks to reply upon the provision of Sub-section (1A) of Section 351 and in particular, submits that the particular officer of the Municipal Corporation, who had issued a impugned notice in the present case, did not have the authority. Once again, as noticed by the PIL Court, the only basis of making this assertion is that no such authority was indicated and no document in support of such authority was filed by the designated officer. It is clear from the provisions of law, in particular the explanation introduced into Section 351 by 1998 Amendments, and also as clarified by the Division Bench of this Court in the PIL referred to above, that to show sufficient cause within the meaning of Section 351 the claimant before the court has to prove that the work mentioned in the notice was carried out under a permission issued by the Planning Authority. The explanation makes it clear that the sufficient cause only meant that the work mentioned in the notice under Section 351 was carried out in accordance with the provisions of Section 337 or 342 and Section 347 of the MMC Act."

14. We do not think that we can grant any relief in this

notice of motion. It is misconceived and is dismissed.

15. We would request the Registry not to register any application on the Original Side as well as Notice of Motion or Chamber Summons but as Interim Applications to maintain consistency.

(G.S. PATEL, J.)

(S.C. DHARMADHIKARI, J.)