

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

WRIT PETITION (L) NO. 3827 OF 2018

Mohammed Imran Mohammed }
Akhtar Qureshi } Petitioner
versus
The Assistant Commissioner - }
'C' Ward and Anr. } Respondents

Mr.Rakesh Kumar with Ms.Kajal Thallapalli,
Mr.B.M.Shaikh and Mr.Aslam Shaikh I/b.
M/s.Judicare Law Associates for the petitioner.

Ms.P.H.Kantharia with Ms.Rupali Adhate for
respondent nos. 1 and 2.

Mr.Mohansinh Rajput with Ms.Suma Kudapali
I/b. Ms.Kshitija Wadatkarn for respondent no.3.

Mr.Sanket Sakhalkar-Junior Engineer (B & F) 'C'
Ward present.

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

DATE :- APRIL 11, 2019

P.C. :-

1. The affidavit filed by the petitioner is taken on record.
2. On this petition, on the earlier occasion, we had passed the following order:-

"1. When this matter was heard on the earlier occasion and today and we invited the attention of Mr.Kumar appearing for the petitioner, to the memo of the petition, its annexures, the affidavits in reply and rejoinder, on instructions from the petitioner-Mohammed Imran Mohammed Akhtar Qureshi, Mr.Kumar says that the

portion where the restaurant was extended and the tables and chairs or sofas were arranged and food was served, will now be removed. He will therefore remove everything that is not a loft area.

2. Though Mr.Kumar says that between the ground floor and what is now depicted in the photographs produced by both the sides, as a terrace, that is not, as argued by the Mumbai Municipal Corporation, the first floor. The first floor is something between the terrace and the ground floor and that was always existing.

3. Presently, we do not accept the statements made on this point by either side.

4. We grant three weeks time to the petitioner to show his *bona fides* by removing what in his perception, was an illegal and unauthorised construction or activity. If the loft is an existing construction and before the cut-off date, then, after complying with the statement, the petitioner shall produce the details in relation to this loft. We want to consider and strictly from the point of view of the larger public interest and safety of those visiting the petitioner's shops/establishments, as to how much area is covered by the loft, meaning thereby, its length and width and before the cut-off date. Depending upon that, we will consider the request of the petitioner to allow him to retain that portion.

5. Additionally, Mr.Kumar, on taking instructions, says that in terms of the photographs shown by the petitioner himself and at page 232 of the paper-book, the angles or the erections on the perceived terrace area will be removed. In other words, the photographs at page 232 show that there are some angles embedded in the floor and existing at site, what is known as a terrace area. This will also be removed within three weeks.

6. In order to test the *bona fides* of the petitioner and without prejudice to the rights and contentions of both sides, we place this matter on 11th April, 2019 on "Supplementary Board".

7. Needless to clarify that we have not accepted the version of either side, that there is no unauthorised and illegal construction or that there is a portion between the ground floor and what is now shown as terrace is not the exact and correct measurement. It is not even the height nor it is the area in square feet, which can be accepted as existing before the cut-off date."

3. Mr.Kumar tenders an affidavit of compliance and says that the petitioner has fully abided by the order of this court. The Municipal Corporation says otherwise. It says that the petitioner has not removed the illegal portion and continues to carry on the activities therefrom, whereas, Mr.Kumar says that the loft cannot be said to be illegal and unauthorised construction for it exists for at least three decades if not more and assessed to municipal taxation.

4. We do not think that this court can pursue this case any further for in our limited jurisdiction, we cannot be called upon to hold a trial. The matter would require the petitioner and the respondents to bring in oral and documentary evidence and prove their cases. In any event, presently, the burden rests on the petitioner to establish and prove that the notice is lacking in *bona fides* and also without jurisdiction for it is seeking to demolish an authorised and legal construction. That the petitioner can do by bringing a suit in the competent civil court.

5. Mr.Kumar prays that in order to bring such a suit and apply for interim reliefs, the petitioner be granted time and till the time specified by this court, the Municipal Corporation should not pursue its notice and its speaking order, and take coercive steps.

6. Ms.Kantharia opposes this request and submits that if the petitioner was aware of the remedies at the first instance, then, this writ petition should not have been filed at all. That apart, she submits that by granting longer time, the Municipal Corporation will be prevented from carrying its notice and order to their logical conclusion. In the event the commercial activities continue, that will endanger the life of people visiting the restaurant.

7. On hearing both sides on this limited point, we are of the view that the writ petition is not a remedy of the petitioner, but, the petitioner would have to approach a competent civil court. The petitioner can challenge all actions as also the speaking order dated 10th October, 2018. The petitioner can seek such ad-interim and interim reliefs as are permissible in law by placing the requisite material before the trial court.

8. We grant the petitioner time of four weeks to approach the trial court and to apply for ad-interim/interim reliefs. In the event the petitioner approaches the civil court and files the application, the trial court is not obliged to continue the arrangement carved out by us, but must decide the matter on its own merits and in accordance with law. It is only to enable the petitioner to approach the civil court that we are not allowing the

Municipal Corporation to implement and enforce the speaking order.

9. This writ petition is, therefore, disposed of by directing that the impugned speaking order and the notice preceding it shall not be implemented and enforced for a period of four weeks from today.

10. We clarify that we have not expressed any opinion on the rival contentions. The earlier order passed by this court as also the present order need not be continued by the trial court in the event it finds that the requisite materials are not produced by the petitioner.

11. The writ petition is disposed of. There would be no order as to costs.

(B.P.COLABAWALLA, J.)

(S.C.DHARMADHIKARI, J.)