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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**FIRST APPEAL NO. 686 OF 2013
WITH
CIVIL APPLICATION NO. 2855 OF 2018
IN
FIRST APPEAL NO. 686 OF 2018**

The Municipal Corporation of Greater Mumbai,
a body corporate constituted under
Bombay Municipal Corporation Act,
having their head office at
Mahapalika Marg,
Mahapalika Bhuvan,
Mumbai – 400 001.

... Appellant/
Applicant

Versus

Nawab Ali Suleman,
(deleted since expired)

1. Jaffar Ali Nawa Ali Chaudhary
aged 60 years,
2. Jahid Ali Nawa Ali Chaudhary
aged 53 years,
3. Ashraf Ali Nawa Ali Chaudhary
aged 50 years,
all adults, residing at
Maharashtra Siddiqiya Compound,
Service Road, Vile Parle (East),
Mumbai – 400 057.

... Respondents

**WITH
CIVIL APPLICATION NO. 4366 OF 2016
IN
FIRST APPEAL NO. 686 OF 2013**

Nawab Ali Suleman,
(deleted since expired)

1. Jaffar Ali Nawa Ali Chaudhary
aged 60 years,

2. Jahid Ali Nawa Ali Chaudhary
aged 53 years,
3. Ashraf Ali Nawa Ali Chaudhary
aged 50 years,
all adults, residing at
Maharashtra Siddiqiya Compound,
Service Road, Vile Parle (East),
Mumbai – 400 057.

... Applicants

IN THE MATTER BETWEEN :-

The Municipal Corporation of Greater Mumbai,
a body corporate constituted under
Bombay Municipal Corporation Act,
having their head office at
Mahapalika Marg,
Mahapalika Bhuvan,
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Maharashtra Siddiqiya Compound,
Service Road, Vile Parle (East),
Mumbai – 400 057.

... Respondents

.....

Mr. A.Y. Sakhare, Senior Counsel with Mrs. Sheetal Mane Tadke and
Zishan Quazi for the Appellants – M.C.G.M.

Mr. Rakesh Kumar along with Ms. Kajal Thallapalli, Mr. Aslam Shaikh and
Mr. B.M. Shaikh i/by Judicare Law Associates for the Respondents.

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CORAM : R.D. DHANUKA, J.

RESERVED ON : 11th DECEMBER, 2019

PRONOUNCED ON : 14th JANUARY, 2020

JUDGMENT :

. By this First Appeal filed under Section 96 of Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC' for short), the appellant (original defendant) has impugned the oral judgment dated 29th September, 2011 decreeing the L.C. Suit No. 2608 of 2007 filed by the predecessor of the respondents (original plaintiff) and declaring the impugned notice dated 17th January, 2004 issued by the appellant under Section 89 of the Maharashtra Regional and Town Planning Act, 1966 (hereinafter referred to as 'M.R.T.P. Act' for short) notice dated 22nd June, 2007 issued under Section 90 of the M.R.T.P. Act and the order dated 25th June, 2007 passed by the Assistant Commissioner, K/East Ward in respect of the suit premises admeasuring 80ft. x 25 ft. made of patra sheet and A.C. sheet roof censused under No.KE XX III 4/6C illegal and bad in law. The Trial Court has also restrained the appellant perpetually from taking any action of removal of suit premises, in pursuance of notices and order. Some of the relevant facts for the purpose of deciding this First Appeal are as under :-

2. It was the case of the respondents that they are in use, occupation and possession of the structure admeasuring 80 ft. and 25 sq. ft. made of patra

sheet and A.C. sheet roof situated at C.S.T. No. 1938, Subhash Nagar, Vile Parle (East), Mumbai i.e. the said suit structure. The said suit structure was alleged to have been censused under No.KE XX III 4/6C during the census carried out in the year 1976 by Tahsildar (Enc.). It was also the case of the respondents that the said suit structure was also assessed to Municipal Taxes under no. KE-26-4B by the appellant. The respondents have been allegedly paying assessment taxes to the appellant in respect of the said suit structure. It was the case of the respondents that the suit structure was old one and the same is in existence since prior to 1976.

3. On 1st August, 1994, the Town Planning Scheme had been sanctioned under Section 88 of the M.R.T.P. Act by a notification dated 2nd June, 1994. The said scheme came into force w.e.f. 1st August, 1994. On 17th January, 2004, the appellant issued a notice under Section 89 of the M.R.T.P. Act to the respondents. On 28th February, 2001, the appellant issued a notice under Section 314 read with Section 394 of the Mumbai Municipal Corporation Act (hereinafter referred to as 'MMC Act' for short) alleging that the suit structure was constructed in the alignment of 60 ft. T.D. Road and directing the respondents to remove the suit structure within 48 hours from the date of receipt of the said notice.

4. The respondents vide their advocate's letter dated 1st March, 2001 replied to the said notice and denied the allegations made therein. The

respondents called upon the appellant to withdraw the said notice. The predecessor of the respondents filed a suit bearing L.C. Suit No. 1226 of 2001 challenging the said notice issued under Section 314 of the MMC Act before the City Civil Court. The said suit was decreed on 27th March, 2003. On 22nd January, 2004, the respondents replied to the said notice by their advocate's letter dated 22nd January, 2004, denying each and every allegations made therein and calling upon the appellants to withdraw the said notice.

5. It is the case of the respondents that the Assistant Commissioner, K/East Ward after more than 3 years passed an order dated 25th June, 2007 and issued a notice dated 22nd June, 2007 under Section 90 of the M.R.T.P. Act alleging that the documents submitted by the respondents did not prove the authorization of the suit premises and directed to remove the said suit structure under the M.R.T.P. Act. It is the case of the respondents that the Assistant Commissioner of the appellant after having considered the reply and documents submitted by the respondents passed an order on 25th June, 2006 observing that the Census Certificate was cancelled and therefore the same was treated as invalid and bogus. It was also held by the learned Assistant Commissioner that the documents produced by the respondents did not prove the authenticity of the suit structure.

6. On 12th July, 2007, the predecessor of the respondents filed a suit

bearing L.C. Suit No. 2608 of 2007 against the appellant *inter-alia* praying for a declaration that the notice dated 22nd June, 2007 issued by the appellant under Section 90 of the M.R.T.P. Act and order dated 25th June, 2007 passed by the Assistant Commissioner, K/East Ward in respect of the suit premises is illegal and bad in law, in executable in law and that the appellants are not entitled to remove the suit premises without providing alternate accommodation to the respondents in lieu of the suit premises. The respondents also prayed for an injunction against the appellant from in any manner executing and / or enforcing notice dated 17th January, 2004 issued under Section 89 of the M.R.T.P. Act and notice dated 22nd June, 2007 issued under Section 90 of the M.R.T.P. Act and order dated 25th June, 2007 passed by the Assistant Commissioner, K/East Ward in respect of the suit structure. The said suit was resisted by the appellant by filing a written statement dated 13th February, 2008.

7. On 17th August, 2011, the respondents examined the respondent no.2 as the sole witness who filed his affidavit of evidence dated 17th August, 2011. The said witness was cross-examined by the appellant. The appellant examined Mr. Mahesh Manokar Levede, one of the officer of the appellant as sole witness who was cross-examined by the learned counsel for the respondents. The Trial Court passed a judgment and decree dated 29th September, 2011 thereby decreeing the said suit. Being aggrieved by the said judgment and decree dated 29th September, 2011, the appellant (original

defendant) filed this First Appeal.

8. Mr. Sakhare, learned senior counsel for the appellant invited my attention to various paragraphs of the plaint, written statement and the documents annexed to the paper book. It is submitted by the learned senior counsel that respondents had impugned the notices the order passed by the appellant for implementing the Town Planning Scheme which was duly sanctioned under Section 88(c) of the M.R.T.P. Act as far back as on 1st August, 1994. Learned senior counsel placed reliance on an unreported judgment of this Court delivered on 7th October, 2013 by a Division Bench of this Court in case of ***Sadiq Ali Suleman (since deceased) through legal heirs v/s. The Municipal Corporation of Greater Mumbai*** in Writ Petition No. 2521 of 2012 and would submit that the said proceedings were arising out of the same Town Planning Scheme and the same plot. He strongly placed reliance on paragraphs 1 to 4, 6 to 8 and 11 to 14 thereof and would submit that in the said judgment dated 7th October, 2013 delivered by this Court, there was a reference of the same scheme and also to the L.C. Suit No. 2608 of 2007 filed by the respondents before the City Civil Court.

9. It is submitted that the Division Bench of this Court after considering various provisions of the M.R.T.P. Act relating to Town Planning Scheme sanctioned under various provisions of the M.R.T.P. Act has held that the Civil Suit impugning the notices under Sections 89 and 90 of the M.R.T.P.

Act was not at all maintainable. He submits that the judgment of the Division Bench of this Court squarely applies to the facts of this case. Learned senior counsel placed reliance on an unreported judgment dated 4th September, 2013 passed by the Division Bench of this Court in case of ***Munilal Bohari Harijan v/s. Municipal Corporation for Greater Mumbai and Others*** in Writ Petition No. 2712 of 2012 with Writ Petition No. 2713 of 2012 and would submit that since the Town Planning Scheme is finalized under Section 88 of the M.R.T.P. Act, the properties covered by such Town Planning Scheme vest in the appellant.

10. Learned senior counsel for the appellant placed reliance on an unreported judgment of this Court delivered on 5th May, 2011 in case of ***Laxman Barkya Wadkar v/s. Mumbai Municipal Corporation of India*** and in other companion matters and more particularly paragraph nos. 5 and 15 thereof. He submits that the notices issued under Sections 89 and 90 of the M.R.T.P. Act cannot be challenged by filing a Civil Suit. He submits that the only exception to the bar is that the action of the authority shall not appear to be nullity or without jurisdiction. He submits that no such case was made out by the respondents before the Trial Court.

11. Learned senior counsel for the appellant placed reliance on the judgment of this Court in case of ***Bales Sardara Paracha v/s. Municipal Corporation of Greater Bombay and Another, 2005 (4) Bom.C.R. 577*** and

in particular paragraph nos. 15, 16, 19 to 23 and would submit that under Section 149 of the M.R.T.P. Act, jurisdiction of a Civil Court is excluded in so far as the challenge to the orders passed or directions issued by the State Government or orders passed or notices issued by any Regional Board or Planning Authority or Development Authority under the M.R.T.P. Act are concerned.

12. Learned senior counsel for the appellant placed reliance on the judgment of this Court in case of ***Babar Sher Khan and Ors. v/s. Municipal Corporation of Brihanmumbai and Anr., 2008 (2) Bom.C.R. 335*** and in particular paragraph no. 19 and would submit that there is express bar for Civil Courts jurisdiction in view of Section 149 of the M.R.T.P. Act for considering the validity of a notice issued under Sections 89 and 90 of the M.R.T.P. Act. Learned senior counsel for the appellant placed reliance on the judgment of this Court in the case of ***Mohan N. Bhawe (Dr.) v/s. Municipal Corporation of Greater Bombay, 2005(3) Bom.C.R. 300*** and in particular paragraph nos. 3 and 6 in support of the aforesaid submission in respect of the jurisdiction of the City Civil Court to deal with the validity of the notice issued under Sections 89 and 90 of the M.R.T.P. Act and the order passed thereon.

13. It is submitted by the learned senior counsel that a Town Planning Scheme is sanctioned under the M.R.T.P. Act which is a self contained code.

Under the said sanctioned scheme, an arbitrator is appointed who issues notices to all the parties concerned. All the rights of parties to challenge the notices are taken away. The said arbitrator appointed under the provisions of the M.R.T.P. Act has to finalize the compensation and also about the apportionment of claim for compensation. He submits that subject to the right of an appeal available under the provisions of M.R.T.P. Act, the said notices under Sections 89 and 90 of the M.R.T.P. Act and the orders passed thereon cannot be impugned by way of a Civil Suit. The Town Planning Scheme sanctioned by the State Government is final in all respect.

14. Learned senior counsel for the appellant invited my attention to the averments made by the respondents in paragraph nos. 4, 5, 10, 12 to 14 in the plaint filed by the predecessor of the respondents and would submit that in the said plant filed by the respondents neither the Town Planning Scheme could be challenged nor the same has been challenged. Learned senior counsel invited my attention to the issues formulated by the learned Trial Judge and also the submission advanced by both the parties which were recorded by the Trial Court in the impugned judgment and decree.

15. It is submitted by the learned senior counsel that the appellant has already declared the census certificate relied upon by the respondents as bogus and has rightly cancelled the said certificate. He invited my attention to the findings rendered in the paragraph 23 of the impugned judgment and

decree of the learned Trial judge and would submit that except the conclusion that the provisions of Section 149 of the M.R.T.P. Act cannot be invoked and that the suit filed by the respondents challenging the impugned notices and order is maintainable in law, no reasons are recorded by the Trial Court while arriving at such erroneous findings. Various submissions made by the appellant and the evidence led by the appellant are not at all considered by the Trial Court in the impugned judgment and decree. None of the respondents or their predecessor had objected to the Town Planning Scheme at any point of time. There was no challenge made to the scheme or to the notices.

16. Learned senior counsel invited my attention to the prayers in paragraph 51 of the plaint and would submit that the prayer for alternate accommodation also cannot be decided in the said suit. There was no legal and convincing evidence made by the respondents before the Trial Court.

17. Mr. Rakesh Kumar, learned counsel for the respondents (legal heirs of the original plaintiffs) invited my attention to various averments made in the plaint by his clients and would submit that notice under Section 89 of the M.R.T.P. Act was issued by the appellant because the suit structure was affecting 60 ft. TP road. It is now the case of the appellant that the plot has to be handedover to some other person after issuing notice under Section 90 of the M.R.T.P. Act. He submits that such action on the part of the appellant

is malafide. He submits that under Sections 89 and 90 of the M.R.T.P. Act, no eviction can be permitted on the ground that the suit structure was unauthorized.

18. Learned counsel invited my attention to the issue no.1 formulated by the learned Trial Judge i.e. on “page 29 para 8(1)” and would submit that the said issue framed by the learned Trial Judge is answered in affirmative. He submits that the First Appeal filed by the appellant came to be admitted. No stay of the impugned judgment and decree passed by the Trial Court came to be granted by this Court till date.

19. Learned counsel for the respondents placed reliance on the judgment of Division Bench of this Court dated 13th September, 2017 in the Writ Petition No. 1753 of 2015 and other companion matters in case of ***Akram Noor Mohammad v/s. The State of Maharashtra and 4 Ors.*** and would submit that by the said judgment this Court had remanded the matter back to the authority so as to give an opportunity of being heard to the occupants and to pass an appropriate order on the issue whether the petitioners therein were entitled to benefit of the provisions under Regulations 33(15) or not and shall be given an opportunity of being heard to the petitioners therein before any order is passed keeping all contentions available to both the parties open.

20. Learned counsel for the respondents placed reliance on Regulations 33(7) and 33(15) of the Development Control Regulations, 1991 and would submit that the said provisions is equivalent to the Regulation 33(12) of the Development Regulations, 1991. He also placed reliance on the Regulation 33(10) of the Development Control Regulations, 1991. He submits that under Section 89 of the M.R.T.P. Act, there is no power of the appellant to handover vacant possession to any of the person having interest in the plot. The respondents were entitled to alternate accommodation from the appellant. He submits that in so far as the prayer clause A of the plaint is concerned, though the respondents had made out the case for grant of the entire reliefs under the said prayer, the Trial Court has not granted the said entire relief in favour of the respondents.

21. It is submitted that under Section 89 of the M.R.T.P. Act, only a procedure is prescribed in case the property covered by the said sanctioned scheme for eviction. In so far as the suit structure is concerned, he submits that the appellant did not offer any alternate accommodation to the respondents in lieu of the said suit structure possessed by the respondents. Learned counsel for the respondents placed reliance on Regulation 33(15) of the Development Control Regulations, 1991 and would submit that the said provisions has to be read with the Town Planning Scheme sanctioned by the State Government under the provisions of the M.R.T.P. Act. He submits that till such time, the respondents are given alternate premises in lieu of the suit

structures on the plot in question included in the Town Planning Scheme, the appellants could not have issued any notices for eviction under Sections 89 and 90 of the M.R.T.P. Act. He submits that since the notices issued under Sections 89 and 90 of the M.R.T.P. Act were not issued in accordance with law, there would be no bar against filing a suit impugning those notices and the order passed thereon under Section 149 of the M.R.T.P. Act.

22. Learned counsel distinguished the judgment of this Court in case of ***Sadiq Ali Suleman (since deceased) through legal heirs*** (supra) on the ground that the tenants and occupants cannot apply for any compensation or alternate plot before arbitrator appointed under the provisions of the M.R.T.P. Act. Learned counsel for the respondents distinguished the judgment of this Court in case of ***Laxman Barkya Wadkar*** (supra) and would submit that even in the said judgment, it is held by this Court that if the notice issued by an authority under Sections 89 and 90 of the M.R.T.P. Act are nullity and without jurisdiction, such notices can be impugned by filing a Civil Suit and in such a situation bar under Section 149 of the M.R.T.P. Act would not apply.

23. Learned counsel for the respondents submits that his clients have filed a Civil Application bearing No. 4366 of 2016 under Order XLI Rule 27 of the CPC and have prayed for liberty to rely upon additional documents, which would be necessary for the purpose of deciding the First Appeal and

thus be permitted to produce documents at this stage.

24. Mr. Sakhare, learned senior counsel for the appellant in rejoinder submits that the respondents cannot be allowed to raise any new arguments across the bar which were not advanced before the Trial Court or were not raised in the pleadings filed by the respondents before the Trial Court. He submits that no reliance was placed on Regulations 33(15) of the Development Control Regulations, 1991 before the Trial Court. The original owners of the suit land on which the suit structure is constructed was not impleaded as a party defendant before the Trial Court. He invited my attention to various provisions under Chapter VI which deals with the provisions for framing of Town Planning Scheme, sanction thereof and enforcement of such scheme including appointment of arbitrator and Tribunal for adjudication of the claims.

25. It is submitted by the learned senior counsel that in view of the sanction granted by the State Government in respect of the Town Planning Scheme in respect of various plots including a plot of land on which the suit structure is constructed, all such plots required by the appellant vest in the appellant free from all encumbrances. All rights in original plots which have been reconstituted shall determine and the reconstituted plots shall become subject to the rights settled by the arbitrator.

26. It is submitted that neither the original owners nor the respondents challenged any part of the sanctioned scheme under Section 88 or even did not make any claim before the learned arbitrator appointed under the provisions of the M.R.T.P. Act in respect of the suit structure. He submits that since the Town Planning Scheme has been already sanctioned as far back as 1st August, 1994, such sanctioned scheme has to be implemented by exercising powers under Sections 89 and 90 of the M.R.T.P. Act. He submits that in so far as the Development Control Regulations which are inserted in the Development Control Regulations, 1991 after sanction of the Town Planning Scheme and more particularly Regulations 33(15) which was added by Government Notification dated 29th September, 1988 would not apply with retrospective effect and would not apply to the facts of this case in any manner whatsoever.

27. Learned senior counsel for the appellant strongly placed reliance on the judgment of Supreme Court in case of the ***Municipal Corporation for Greater Mumbai v/s. The Advance Builders (India) Private Limited, 1971 (3) SCC 381*** and would submit that the Town Planning Scheme having been sanctioned is final and has to be implemented. Learned senior counsel for the appellant invited my attention to the paragraph 21 of the impugned judgment and decree and would submit that the Trial Court has already held that the point of entitlement of alternate accommodation could not be decided in the facts of the case in hand. There is no legal and convincing

evidence to that effect. It is competent authority who decides the claim for alternate accommodation. He submits that this part of the decision of the Trial Court has not been impugned by the respondents by filing any cross-objection or separate appeal.

28. Learned senior counsel invited my attention to the findings of the Trial Court in paragraph 23 of the impugned judgment and decree and would submit that the Trial Court has not rendered any reasons as to why the notices issued under Sections 89 and 90 of the M.R.T.P. Act for enforcement of the Town Planning Scheme were bad and illegal or as to why bar under Section 149 for filing the Civil Suit for impugning the notices issued under Sections 89 and 90 of the M.R.T.P. Act would not be apply to the facts of this case. No case is made out by the respondents as to how the exception carved out by this Court in case of **Laxman Barkya Wadkar** (supra) would apply to the facts of this case for filing of Civil Suit for impugning the notices under Sections 89 and 90 of the M.R.T.P. Act. He submits that the judgment of Division Bench of this Court in case of **Sadiq Ali Suleman (since deceased) through legal heirs** (supra), in case of **Munilal Bohari Harijan** (supra) and various other judgments referred to and relied upon by the appellants would clearly apply to the facts of this case and are binding on this Court.

29. It is submitted by the learned senior counsel that the census certificate

issued in the name of Nawab Ali Suleman was found bogus and therefore was already cancelled. In support of this submission, he also placed reliance on the oral evidence led by the witness examined by the appellant. It is lastly submitted that no case is made out for grant of any relief in the Civil Application filed by the respondents under Order XLI Rule 27 of CPC.

REASONS AND CONCLUSION

30. It is an undisputed position that the town planning scheme is sanctioned under section 88(c) of the M.R.T.P. Act on 1st August, 1994 by a notification dated 2nd June, 2019 in respect of the plot on which the suit structure was constructed in the alignment of 60 ft. T.D. road. Neither the original owner of the said structure nor the respondents raised any objection in respect of the said town planning scheme under any of the provisions of the M.R.T.P. Act nor filed any claim before the arbitrator appointed under the provisions of the said Act.

31. The question that arises for consideration of this Court is whether in view of the bar under section 149 of the M.R.T.P. Act, the respondents could have filed the suit *inter-alia* praying for declaration that the notice issued by the appellant under section 89 and the notice dated 22nd June, 2007 issued under section 90 of the M.R.T.P. Act and the order passed thereon could be challenged by way of suit before the City Civil Court or not.

32. A perusal of the prayers in the said suit filed by the predecessor of the respondents i.e. Nawab Ali Suleman clearly indicates that he had applied for a declaration that the said two notices issued by the appellant under sections 89 and 90 of the M.R.T.P. Act shall be declared as illegal, bad in law, unexecutable in law and that the appellant was not entitled to execute those notices against the original plaintiff and was not entitled to remove him from the suit premises without providing accommodation in lieu of the suit premises.

33. The appellant (original defendant) had raised specific plea of the jurisdiction of the Civil Court to entertain the suit in the written statement in view of section 149 of the M.R.T.P. Act. The Trial Court in the impugned judgment and decree framed the issue no.1-A i.a. “Whether in view of the provision of section 149 of the M.R.T.P. Act, suit is not maintainable ?”. Though the learned Trial Court recorded the submissions made by the appellant in detail in the impugned judgment, in paragraph 23 of the impugned judgment and decree, only recorded the conclusion that in view of the challenge given to the notices and order and in the facts and circumstances, it was abundantly clear that the provisions of section 149 of the Act could not be invoked and it has to be held that the suit was rightly filed by the plaintiff challenging the impugned notices and the order and was maintainable in law.

34. Though the appellant had advanced this argument in great detail, learned Trial Judge did not record any reasons as to why in the facts and circumstances of this case, the provisions of section 149 of the Act could not be invoked by the appellant. No reasons are recorded as to how the learned Trial Court came to the conclusion that the impugned notices and the order were illegal and bad in law.

35. A Division Bench of this Court in case of ***Sadiqu Ali Suleman (since deceased) through Legal Heirs vs. The Municipal Corporation of Greater Mumbai*** has dismissed the Writ Petition No.2521 of 2012 arising out of the same town planning scheme and the same plot bearing CTS No.1938, Subhash Nagar, Vile Parle (East), Mumbai – 57. A perusal of the said judgment indicates that there is reference to L.C. Suit No.2608 of 2007 filed by the predecessor of the respondent – Nawab Ali Suleman i.e. L.C. Suit No.2608 of 2007 in respect of the structure on the same plot. It was brought to the notice of the Division Bench of this Court that the said L.C.Suit No.2608 of 2007 was filed by the predecessor of the respondents had been decreed by the learned Trial Court. This Court after construing the provisions of sections 59 to 64 and 71 to 88 of the M.R.T.P. Act which provides for procedure for sanction of the draft town planning schemes has held that if the sanction of the town planning scheme is granted, the planning authority has been conferred with powers vide Chapter V(C) of the M.R.T.P. Act to enforce the scheme and can summarily evict those

continuing to occupy any land which they are not entitled to occupy under the final scheme.

36. Section 90 confers further powers to pull down the buildings or other works of such persons. The scheme can be varied as is clear from sections 91 and 92. Under those provisions, the town planning authorities' powers are prescribed to determine and disburse the compensation. The Division Bench of this Court held that it is not as if the parties like the petitioner therein had no remedy or forum and can be raised before this Court for the first time the issue of their entitlement. The petitioner in that case before the Division Bench for the first time claimed to be in possession and occupation of two structures on the same plot. This Court held that the resort to ordinary civil suit may not be permissible but yet there are several remedies which can be invoked by the aggrieved parties. In my view, the judgment of this Court rendered on 7th October, 2013 arising out of the same town planning scheme in respect of the same plot would clearly apply to the facts of this case. The civil suit filed by the predecessor of the respondents itself was not maintainable in view of the clear bar under section 149 of the M.R.T.P. Act. The judgment of the Division Bench of this Court is applicable to the facts of this case and is binding on this Court.

37. This Court in case of ***Laxman Barkya Wadkar (since deceased through legal heir & representative) & Ors. v. Mumbai Municipal***

Corporation of India has held that in view of bar under section 149 of the M.R.T.P. Act, an action on issuing a notice under section 53(1) or section 55 (1) of the M.R.T.P. Act as nullity is not maintainable unless a case is made out that the action of issuing notice under those provisions was nullity.

38. A perusal of the evidence produced on record clearly indicates that it is not proved that those two impugned notices were nullity on any ground whatsoever. Under section 89 of the M.R.T.P. Act, the planning authority is empowered to evict any person continuing to occupy any land which he is not entitled to occupy under the Town Planning Scheme in accordance with the prescribed procedure. Under section 90 of the M.R.T.P. Act, on and after the day on which a Town Planning scheme comes into force, the planning authority is empowered to issue prescribed notice in accordance with the provisions of scheme and to remove, pull down or alter any building or other work in the area included in the scheme which is such as to contravene the scheme or in the erection or carrying out of which any provision of the scheme has not been complied with, execute any work which it is the duty of any person to execute under the scheme in any case where it appears to the planning authority that delay in the execution of the work would prejudice the efficient operation of the scheme.

39. It is thus clear that exercise of powers by the planning authority to enforce the town planning scheme already sanctioned under section 88

cannot be impugned by way of a suit in view of clear bar under section 149 of the M.R.T.P. Act unless the plaintiff proves before the learned Trial Court that such notice was nullity. The town planning scheme already sanctioned by the State Government has already attained finality. The validity of the same scheme in respect of the same plot has been already upheld by the Division Bench of this Court in the said Writ Petition No.2521 of 2012.

40. Learned counsel for the respondents could not even demonstrate before this Court as to how the said two notices issued by the appellant for implementation of the scheme and the order were nullity in any manner whatsoever. The judgment of this Court in case of ***Laxman Barkya Wadkar*** (supra) applies to the facts of this case and is binding on this Court.

41. This Court in case of ***Bales Sardara Paracha*** (supra) has held that the language of section 149 is unambiguous and clear. The bar is clear and admits of no confusion. This Court in the said judgment adverted to the judgment of the Supreme Court in case of ***Firm of Illuri Subbayya Chetty & Sons v/s. State of Andhra Pradesh, AIR 1964 SC 322*** and after construing the provisions of the M.R.T.P. Act and adverting to the judgment of the Supreme Court held that section 149 clearly excludes the jurisdiction of the Civil Court so far as challenge to the orders passed or directions issued by the State Government or the orders passed or the notices issued to any person by the town planning authority or the development authority

under the M.R.T.P. Act are concerned. This Court accordingly did not interfere with the dismissal of the suit filed by one of the party before the Civil Court in view of bar under section 149 of the M.R.T.P. Act. Though this Court in the said judgment had considered the notices issued under section 55(1), the principles laid down by this Court in the said judgment would clearly apply to the facts of this case.

42. This Court in case of ***Babar Sherkhan*** (supra) after considering section 149 of the M.R.T.P. Act and after adverting to various judgments of this Court held that there is express bar for the Civil Court jurisdiction to impugn notice or order under M.R.T.P. Act and accordingly dismissed the appeal arising out of the dismissal of suit filed by the learned Trial Court. The said judgment also applies to the facts of this case.

43 This Court in case of ***Mohan Bhave*** (supra) has taken a similar view and has held that in view of bar under section 149 of the M.R.T.P. Act, notice under section 55(1) of the M.R.T.P. Act cannot be challenged by way of civil suit. The principles laid down in the said judgment would apply to the facts of this case.

44. The Supreme Court in case of ***Municipal Corporation for Greater Bombay & Anr. vs. The Advance Builders (India) Pvt. Ltd. & Ors.*** (supra) has held that section 55 of the Bombay Town Planning Act, 1954 is a self-

contained Code. The Supreme Court considered the provisions relating to the final scheme under the said Bombay Town Planning Act, 1954 which are in pari-materia with the provisions relating to the town planning scheme under the M.R.T.P. Act. It is held by the Supreme Court in the said judgment that it is primary duty of the local authority to remove all such buildings and works in the whole of area which contravene the town planning scheme. The development and planning is primarily for the benefit of the public, the Corporation is under a statutory obligation to perform its duty in accordance with the provisions of the Act. The Court has power to issue a writ of mandamus ordering that to be done which the statute require to be done. The principles of law laid down in the said judgment applies to the facts of this case.

45. The appellant in this case has also issued notices under sections 89 and 90 respectively of the M.R.T.P. Act for implementing the town planning scheme which was sanctioned and final in all respects in view of section 88(c) of the M.R.T.P. Act. Even if the respondents had any claim, right title or interest of any nature in the said suit structure, the respondents or their predecessor ought to have applied for appropriate relief before the learned arbitrator appointed by the State Government under section 72 of the M.R.T.P. Act. The appeal is provided under section 74 against some of the decisions of the learned arbitrator. It is not in dispute that neither the predecessor of the respondents nor the respondents claimed any rights in the

suit structure by filing any claim before the learned arbitrator prescribed under Chapter V of the M.R.T.P. Act asserting their alleged rights. Only when the appellant being the planning authority issued notices under sections 89 and 90 for eviction against the predecessor of the respondents, he filed the suit impugning the validity of those notices and the order before the Civil Court which did not have jurisdiction to entertain such suit in view of the clear bar under section 149. In my view, the M.R.T.P. Act being a self-contained Code, the remedies of the aggrieved party have to be as per the provisions of the said Act specifically provided and not outside the said Act.

46. A perusal of the finding rendered by the Trial Court and more particularly paragraph 21 indicates that the Trial Court has clearly held that the point of entitlement of alternate accommodation cannot be decided in the set of facts on the case in hand. There was no legal and binding evidence to that effect. It was the competent authority to decide the case of alternate accommodation. This finding rendered in the judgment and decree of the Trial Court has not been impugned by the respondents. Learned counsel for the respondents invited my attention to the prayers in the plaint and would submit that it was one of the specific prayer that the appellants are not entitled to remove the suit premises without providing an alternate accommodation to the plaintiff in lieu of the suit premises. The fact remains that the respondents have not challenged any part of the findings or the conclusion drawn by the Trial Court in respect of the claim for alternate

accommodation or otherwise.

47. Insofar as the submission of the learned counsel for the respondents that the case of the appellant now that plot has to be handed-over to some other person after issuing notices under Sections 89 and 90 of the M.R.T.P. Act and thus shows malafide is concerned, there is no merit in this submission of the learned counsel for the respondents. Neither any such allegations of malafide were made in the pleadings filed before the Civil Court nor was such issue raised during the course of argument. Be that as it may, the appellant being the planning authority has to comply with the provisions of the sanctioned town planning scheme, which cannot be challenged across the bar by the respondents at this stage.

48. Insofar as the reliance placed by the learned counsel for the respondents on the order of the Division Bench of this Court in case of **Akram Noor Mohammad** in Writ Petition No.1753 of 2015 thereby remanding the matter to the authority to give an opportunity of being heard to the petitioner therein and thereafter pass appropriate order is concerned, in my view, reliance placed on the said order passed by this Court by the Division is totally misplaced. The predecessor of the respondents in this case had challenged the said notices and order passed thereon on the ground that the said order was passed ex-parte and without hearing the predecessor of the respondents. In this case the respondents have succeeded before the Trial

Court. The said order passed by the Division Bench of this Court impugning the order passed by the authority holding that the structures of the petitioners therein were unauthorized does not apply to the facts of this case even remotely and would not assist the case of the respondents.

49. Insofar as reliance placed on Regulation 33(10) read with Regulation 33(15) of the D.C. Regulation 1991 by the learned counsel for the respondents and the submission that the said provisions have to be read with the town planning scheme sanctioned by the State Government is concerned, in my view reliance placed on these provisions by the learned counsel for the respondents is totally misplaced. No such reliance was placed before the Trial Court by the respondents. Be that as it may, Regulation 33(15) of D.C. Regulation which deals with 'redevelopment of contravening structures included in the final plot of a Town Planning Scheme' was inserted by a notification dated 29th April, 1998 i.e. much after filing of the suit by the predecessor of the respondents and the date of sanction of scheme. The parties thus would be governed by the provisions relating to the sanctioned Town Planning Scheme prevailing on 1st August, 1994 when the said scheme came into force. The provisions of Regulation 33(15) would not apply with retrospective effect.

50. In my view, there is no merit in the submission made by the learned counsel for the respondents that the tenants and occupants cannot apply for

any compensation or alternate plot before the learned arbitrator appointed under the provisions of the M.R.T.P. Act. The Division Bench of this Court in the judgment dated 7th October, 2013 in case of ***Sadiqu Ali Suleman (since deceased) through Legal Heirs*** (supra) arising out of the same town planning authority and in the same plot has held that the provisions under Section 72 onwards of the M.R.T.P. Act are complete mechanism which enables the arbitrator to render certain decisions in terms of section 73 and thereafter by the appellate authority. This Court has negatived similar contention in the said judgment in the Writ Petition filed by one of the occupant on the same plot.

51. On plain reading of section 72 read with section 74 which provides for an appeal clearly indicates that party who is aggrieved of such decision is entitled to apply to the learned arbitrator to make a reference to the Tribunal of Appeal for decision of appeal. In my view, the right, if any, of the respondents or their predecessor was to apply before the learned arbitrator under section 72 for appropriate relief and if aggrieved by the said order before the Appellate Authority. The predecessor of the respondents could not have filed the suit impugning the notices which were issued for implementation of the town planning scheme which scheme had attained finality under Section 88. Under Section 89, on and after a day on which the scheme is sanctioned and comes into force any person continuing to occupy any land which he is not entitled to occupy under the final scheme may be

evicted summarily by the planning authority in accordance with prescribed procedure. All the rights of any original plot holder which have been reconstituted were determined and reconstituted plot became subject to the rights settled by the learned arbitrator.

52. In my view, the said plot of land on which the suit structure is standing also vests in the town planning authority. All the rights in the original plots of the property, the owners or the occupants stood determined and become subject to the rights settled by the learned arbitrator. In my view, the rights claimed, if any, by the respondents thus could not have been determined by the Trial Court. In my view, the findings rendered by the Trial Court in favour of the original plaintiff overlooking the evidence led by the appellant thus deserves to be set aside.

53. Insofar as Civil Application No.4366 of 2016 filed by the respondents herein under Order XLI Rule 27 of the Code of Civil Procedure, 1908 is concerned, in my view, Mr.Sakhare, learned senior counsel for the appellant is right in his submission that no case is made out by the respondents for production of additional documents annexed to the said application. The respondents have not satisfied the conditions of Order XLI Rule 27 of the Code of Civil Procedure,1908.

54. I therefore, pass the following order :-

- a) The judgment and decree dated 29th September, 2011 passed by the learned Judge, City Civil & Sessions Court, (Borivali Division), Dindoshi is set aside. L.C. Suit No.2608 of 2007 filed by the respondents is dismissed. The respondents are directed to vacate the suit structures within four weeks from today and shall hand over vacant and peaceful possession to the appellant.
- b) First Appeal No.686 of 2013 is allowed on aforesaid terms.
- c) Civil Application No.2855 of 2018 for fixing early date of hearing does not survive and is accordingly disposed of.
- d) Civil Application No.4366 of 2016 is dismissed. There shall be no order as to costs.
- e) All parties to act on the authenticated copy of this order.

(R.D. DHANUKA, J.)