

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

WRIT PETITION NO.13482 OF 2022

Mubaraz Musafir Khan

.. Petitioner

v/s.

Kalyan Dombivli Municipal Corporation

& Ors.

.. Respondents

Mr. A. Y. Sakhare, Senior Advocate i/by Mr. Hemant Ghadigaonkar a/w.
Mr. Kasim Yusuf Sheikh, for the petitioner.

Mr. N. V. Walwalkar, Senior Advocate i/by Mr. A. S. Rao, for the
respondent Nos.1 and 2.

Mr. R. A. Thorat, Senior Advocate i/by Mr. Pratik Rahade, for respondent
No.4.

Mr. Kishor Patil i/by Ms. Rukmini Khairnar, for respondent No.3.

CORAM : R.D. DHANUKA &

KAMAL KHATA, JJ.

DATED : 17TH NOVEMBER, 2022.

ORAL JUDGMENT : (PER R. D. DHANUKA, J.)

1. By this petition filed under Article 226 of the Constitution of India, the petitioner have prayed for a writ of mandamus for

quashing and setting aside the order dated 21st October 2022 passed by the respondent No.2 thereby directing the petitioner to remove the offending structure.

2. The petitioner claims to be owner of the land underlying between petitioner and Sharadchandra Madhav Oak admeasuring 2000 sq. yards by an agreement dated 23rd February 1984. It is the case of the petitioner that upon demise of Sharadchandra Madhav Oak, his legal heir Sunita Arvind Vaidya entered into an agreement with respondent No.3 on 13th October 2014. The petitioner filed a Civil Suit bearing R.C.S. No.626/2015 before the learned Civil Judge, Junior Division, Kalyan. Petitioner and obtained interim order against respondent No.3 from dispossessing the petitioner from the said structure.

3. Insofar as the order which is the subject matter of this petition is concerned, it is common ground that the Municipal Corporation had passed an order dated 26th February 2016 in respect of the properties including the property claimed by the petitioner, by declaring the properties as unauthorized by initiating action under Section 260 and 267(1) of the Maharashtra Municipal Corporation Act. It is also common ground that neither respondent No.3 who claims to be owner of the entire property

nor anybody else impugned the said order except the petitioner.

4. By an order dated 4th October 2022, this Court in Writ Petition filed by petitioners bearing Writ Petition No.11629 of 2022, recorded the statement made by the Municipal Corporation that Corporation had no objection to issue fresh notice upon the petitioner under Section 260(1) of the Maharashtra Municipal Corporation Act and to pass a fresh order after granting personal hearing to the petitioner as well as respondent Nos.3 and 4. As per the said order, the Municipal Corporation issued a fresh notice to the petitioner and respondent Nos.3 and 4 under Section 260 and 267(1) of the Maharashtra Municipal Corporation Act on 10th October 2022 relating to four structures of the petitioner. The said notice was responded by the petitioner by giving reply on 14th October 2022.

5. The Municipal Corporation passed an order on the said notice on 21st October 2022 holding that the structures which was the subject matter of notice were unauthorized. Before passing the said order dated 21st October 2022, the Municipal Corporation corrected the said notice dated on 14th October 2022 by pointing out that the said notice was restricted to under Section 260(1) of

the Maharashtra Municipal Corporation Act.

6. Mr. Sakhare, learned senior counsel for the petitioner invited our attention to some of the documents annexed to the petition and submitted that the Civil Suit filed by his clients against respondent No.2 is still pending. Injunction order is passed by the Civil Court in favour of the petitioner. It is submitted that though by the order dated 26th February 2016, the Municipal Corporation had declared the larger properties area as unauthorized under Section 260 read with Section 267(1) of the Maharashtra Municipal Corporation Act, till date no action has been taken by the Municipal Corporation against other structures not claimed by the petitioner but claimed by respondent No.3. He submits that there is thus discrimination and arbitrariness on the part of the Municipal Corporation selecting petitioner only for an action under Section 260(1) of the Maharashtra Municipal Corporation Act and not the respondent No.3.

7. The next submission of the learned senior counsel for the petitioner is that, the notice was admittedly issued under Section 260(1) of the Maharashtra Municipal Corporation Act which empowers the commissioner only to designate an officer who

shall have jurisdiction over local area and as specified in the notification. He submitted that Section 260(1) does not empower the designated officer to take any action for removal of unauthorized construction. Such power, if any, vests in the designated officer under Section 260(1)(A) of Maharashtra Municipal Corporation Act which according to the learned senior counsel is not invoked by the designated officer in this case.

8. The next submission of the learned senior counsel is that Section 260(2) has not been complied with by the Municipal Corporation in this case. Learned senior counsel submitted that the petitioner had been paying Municipal taxes to the Municipal Corporation in respect of the offending structure and thus the designated officer could not have declared the said structure as offending structure.
9. Mr. Walwalkar, learned senior counsel for the Municipal Corporation on the other hand submitted that the mention of wrong section in the notice by the designated officer i.e. as section 260(1) of the Maharashtra Municipal Corporation Act would not invalidate the action of the Corporation. The fact remains that by the said impugned notice the designated officer had called upon the petitioner to show sufficient cause as to why the offending

structure shall not be removed, altered or pull down. He submitted that in the earlier Writ Petition, it was the grievance of the petitioner itself that no notice was issued to the petitioner under Section 260(1). This Court by order dated 4th October 2022 had directed the Municipal Corporation to issue notice under Section 260(1).

10. The next submission of the learned counsel for senior counsel is that, there is no question of any discrimination between the petitioner and the respondent No.3. He fairly submitted that by an order passed by the designated officer in the year 2016, entire property was described as unauthorized construction and was required to be demolished. He submitted that however, in view of the petition filed by the petitioner, part of the earlier order was modified by this Court with an opportunity to the petitioner to give reply to the notice with a direction to the Municipal Corporation to issue notice under Section 260 and to pass an order after granting personal hearing to the petitioner and respondent Nos.3 and 4.

11. It is submitted by learned senior counsel that since the order passed by the Municipal Corporation on 26th February, 2016 has

now attained finality order has to be read with the impugned order passed by the authority which is the matter of this petition. He submitted that the Municipal Corporation is ready and willing to comply with the said two orders within such time as may be directed by this Court.

12. Learned senior counsel placed reliance on the judgment of this Court in the case of Jagdish Amritlal karia & Anr. Vs. The Bombay Municipal Corporation & Anr.¹ and more particularly on paragraph No.7, in support of the submission that even in case of the unauthorized construction, the Municipal Corporation is empowered to collect payment and property taxes. He submitted that merely because property taxes are paid by the person on unauthorized construction, the unauthorized construction cannot be conferred with the status of authorized construction.

13. Mr. Thorat, learned senior counsel for respondent No.4 – complainant submitted that in the reply to the notice issued by the designated officer, the petitioner has taken a stand that the offending structure was a tolerated structure and thus, ought to have been protected by the designated officer. He submitted that

there is no such concept of tolerated structure under the provisions of the Maharashtra Municipal Corporation Act.

14. Mr. Patil, learned counsel for respondent No.3 admitted order passed by the designated officer on 26th February 2016, declaring the entire property as unauthorized is not impugned by respondent No.3 before any court of law. His client has not obtained any stay of the said order.

15. We have heard learned counsel for the parties at length and with their rival submission.

16. Insofar as first submission of Mr. Sakhare, learned senior counsel for the petitioner that the notice issued by the Municipal Corporation issued under Section 260(1) of the Maharashtra Municipal Corporation Act is not a valid notice is concerned, in our view there is no merit in this submission of learned senior counsel. A perusal of the said impugned notice clearly indicates that the Municipal Corporation had called upon the petitioner to show cause as to why offending structure shall not be removed, altered or pulled down. The learned senior counsel for the petitioner does not dispute that the petitioner had filed the said

Writ Petition bearing No.11629 of 2022. This Court had accepted the submissions made by the learned senior counsel in the said Writ Petition that the petitioner was not issued any notice by the Municipal Corporation before passing an order of demolition.

17. This Court accordingly directed the Municipal Corporation to issue notice under Section 260(1) of the Maharashtra Municipal Corporation Act to the petitioner. The petitioner has admittedly responded to the said notice and has rightly understood the said notice as notice under Section 260(1)(A) of the Maharashtra Municipal Corporation Act. Be that as it may, mention of wrong section in the notice would not confer any benefit upon the petitioner and would not permit the petitioner to contend that the notice was invalid. The text of the notice has to be considered by the Court to ascertain whether the same was within the conformity with the powers conferred upon the designated officer to initiate such action under Section 260(1A) of the Maharashtra Municipal Corporation Act or not.

18. In our view, upon considering the show cause notice issued by the designated officer, it is clear that said notice was issued under Section 260(1A) of the Maharashtra Municipal

Corporation Act. Merely because the notice mentions Section 260(1) of the Act is of no significance.

19. Insofar as submissions of Mr. Sakhare, learned senior counsel for the petitioner that there was discrimination on the part of the Municipal Corporation by selecting the structures only of the petitioner and by not taking any action against the structures of respondent No.3 is concerned, respondent No.3 does not dispute that the said order passed in the year 2016 has not been set aside by any competent Court of law. Mr. Walwalkar, learned senior counsel for the Municipal Corporation fairly agreed that the said order passed by the Municipal Corporation on 26th February, 2016 for the larger area operates as on the date and would be implemented and to be taken to its logical conclusion.

20. Insofar as reliance placed on Section 260(2) of the Act by Mr. Sakhare, learned counsel for the petitioner is concerned, in our view the said provision does not attract to the facts of this case. There is thus no merits in the submission made by learned counsel.

21. Insofar as the reliance placed on the property taxes paid by

the petitioner is concerned, in our view Mr. Walwalkar, learned senior counsel for the Municipal Corporation rightly placed reliance on the judgment delivered by a division bench of this Court in case of ***Jagdish Amritlal Karia*** (supra). This Court in the said judgment has clearly held that there is no provision in the Act which exempts unauthorized construction from payment of property taxes. The property taxes are generally for all buildings and lands and unless it is shown that any such building or land is exempted from payment, it cannot be held that there is no liability to pay property taxes. This Court also opined that the demolition of an unauthorized construction or imposition of penalty are safeguards provided therein. There is no unauthorized or illegal construction made in the city is exempted from payment of taxes , otherwise it may prove to be hazardous or dangerous to the public. This Court also rejected the submissions that the Municipal Corporation cannot impose the property tax on such illegal unauthorized construction. In our view, the principles laid down in the case of ***Jagdish Amritlal Karia*** (supra) are applicable to the facts of this case. We do not propose to take any contrary view in the matter. In our view, even if any property taxes are paid on such unauthorized construction by the petitioner, such

unauthorized construction cannot be conferred with the status of authorized construction.

22. Mr. Sakhare, learned senior counsel for the petitioner could not produce any documents in support of the claim of his clients that the offending structure was authorized or was constructed after obtaining prior sanction of the Municipal Corporation.

23. At this stage, Mr. Sakhare, learned senior counsel for the petitioner submitted that, an opportunity be granted to petitioner to be apply for regularization under Section 44 of the MRTP Act at this stage. This submission of the learned senior counsel is vehemently opposed by Mr. Walwalkar, learned senior counsel for the Municipal Corporation on the ground that application, if any, for regularization under Section 44 of the MRTP Act can be made only by the owner of the plot and nobody else. In our view, Mr. Walwalkar, learned senior counsel for the Municipal Corporation is right in his submission by placing reliance on the Rule 6 and 10 of the Maharashtra Development Plan Rules, 1970. The ownership claimed by the petitioner in the writ property is the subject matter of the Civil Suit filed by his clients which is pending before the learned Civil Judge Junior Division. Be that as

it may, the offending structure having been declared as totally unauthorized and illegal as far back as in 22016, no such request can be considered at this stage.

24. We do not find any infirmity in the impugned order passed by the designated officer. The Writ Petition is devoid of merits and is accordingly dismissed.

25. At this stage, Mr. Sakhare, learned senior counsel for the petitioner seeks six weeks stay to consider this order and take appropriate steps. Since the entire structure including the structure covered by the order passed by the Municipal Corporation on 2016 is unauthorized, application for stay of this order is rejected.

26. Writ petition is dismissed. The Municipal Corporation is directed to remove all the unauthorized structure which are the subject matter of the order dated 26 February 2016 including the offending structures which are declared as unauthorized by the impugned order dated 21st October 2022 within six weeks from today without fail.

27. Parties to act on the authenticated copy of this order.

28. Place the matter for reporting compliance on 5th January
2023.

(KAMAL KHATA, J.)

(R.D.DHANUKA, J.)