

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 3663 OF 2022

**The Rajhans Co-operative Housing
Society Ltd.**

..... Petitioner

VERSUS

**The Municipal Corporation of Greater
Mumbai & Ors.**

..... Respondents

Mr. A.V.Anturkar, Senior Advocate, a/w. Mr.Aseem Naphade,
Ms.Chaitra Rao for the Petitioner.

Ms.Madhuri More, i/b. Mr.Sunil Sonawane for the Respondent nos. 1
to 3 – MCGM.

Dr.Birendra Saraf, Senior Advocate, a/w. Dr.Abhinav Chandrachud,
Mr.Vaibhav Charalwar, Mr.Arun Panicker for the Respondent no.4.

**CORAM: R. D. DHANUKA AND
KAMAL KHATA, JJ.
DATE : 7TH OCTOBER, 2022**

P.C:-

By this petition filed under Article 226 of the Constitution of India, the petitioner has prayed for a writ of certiorari for quashing and setting aside the impugned orders dated 17th January, 2019 and 12th November, 2020 passed by the respondent nos. 2 and 3 to not pursue the notice issued under section 351 of the Mumbai Municipal Corporation Act, 1888 against the respondent no.4.

2. The petitioner also prays for a writ of mandamus against the Municipal Corporation to remove and pull down the notice structure being “unauthorized horizontal extension to the Garage No. 10 admeasuring 6.30 mt. x 10 mt. and having height of 3.00 mt.”
3. Some of the relevant facts for the purpose of deciding this petition are as under :-
4. It is the case of the petitioner that M/s. New Rajasthan Builders completed the construction of the building of the petitioner society comprising 23 flats and 10 garages in terms of the plan sanctioned by the respondent no.1 Corporation. Sometime in the year 1966, the said builders put up a plan for sanction by respondent no.1 for construction of additional garages on rear side of the building and the same was approved by the respondent no.1.
5. It is the case of the petitioner that in a letter addressed by the respondent no.1 on 22nd May, 1972, the respondent no.1 Corporation stated that no marriage hall was approved by the respondent no.1. On 13th November, 1966, the respondent no.4 purported to have purchased from the builders a hall, with two rooms, one bathroom and one water

closet on the ground floor of the society. On 13th May, 1967, the petitioner society was registered. On 22nd January, 1968, the said builder executed a deed of conveyance in favour of the petitioner.

6. In the month of May 1968, the petitioner submitted a proposal for the construction of additional garages. In the month of November 1968, the builders submitted a plan for extension of Garage No.10. According to the petitioner the said proposal was rejected by the respondent no.1 on 3rd March, 1969. The respondent no.1 filed Case No.11136 ME of 1997 against the trustee of the respondent no.4 before the learned Metropolitan Magistrate, Bhoiwada. It is the case of the petitioner that on 10th February, 2006, the learned Metropolitan Magistrate convicted the trustee for the alleged offences.

7. Sometime in the year 2017, the petitioner filed a writ petition bearing no. 1801 of 2017 for a writ of mandamus for directing the respondent no.1 Corporation to initiate action against the illegalities committed by certain members of the society including the respondent no.4. According to the petitioner, while going through the papers, the petitioner noticed a copy of the Intimation of Disapproval issued in the

year 1968. In the year 2018, the petitioner made an application under the provisions of Right to Information Act for the copies and plans and documents.

8. On 17th May, 2018, the respondent no.1 informed the petitioner that the file was available under “citizen search” on the official website of the respondent no.1 and the documents can be fetched by visiting the said site. The petitioner accordingly downloaded the documents from the website of the respondent no.1 including the sanctioned plan as well as the plan proposing to alter/modify/adding of the construction already sanctioned on 9th June, 2018. The petitioner withdrew the Writ Petition No. 1801 of 2017 on 16th July, 2018 and filed a representation before the respondent no.2 on 16th September, 2018. On 9th October, 2018, the petitioner also provided the sanctioned plans to the respondent no.2.

9. On 31st October, 2018, the respondent no.2 called upon the respondent no.4 to show cause as to why the alleged unauthorized structure carried out by the respondent no.4 shall not be pulled down. On 3rd November, 2018 and 13th November, 2018, the respondent no.4 filed a reply to the said show cause notice. On 27th December, 2018, the

petitioner filed a rejoinder before the respondent no.2 and contended that the respondent no.4 had failed to produce any material to show that the construction of the hall and structure was ever sanctioned by the respondent no.1.

10. On 17th January, 2019, the respondent no.2 passed an order to not pursue the said notice under section 351 of the Mumbai Municipal Corporation Act, 1888 against the respondent no.4. On 13th June, 2019, the petitioner filed a complaint dated 10th June, 2019 against the order dated 17th January, 2019 before the Zonal Grievance Redressal Committee. The Zonal Grievance Redressal Committee granted a hearing to the respondent no.4 on 26th July, 2019. As directed by the Deputy Municipal Commissioner, the respondent no.3 granted a personal hearing to the parties on 17th January, 2020. The petitioner filed Writ Petition No. 1100 of 2020 since no order was passed by respondent no.3 for a considerable period of time. On 29th October, 2020, this Court directed the respondent nos. 1 to 3 to dispose of the representation made by the petitioner within four weeks.

11. On 13th November, 2020, the petitioner was served with a copy of the order dated 12th November, 2020 passed by the respondent no.2, refusing to take any action on the said notice issued under section 351 of

the Mumbai Municipal Corporation Act. The petitioner thus filed this petition for various reliefs.

12. At the threshold Dr. Birendra Saraf, learned senior counsel for the respondent no.4 raised a preliminary objection about the maintainability of this writ petition on the ground that the petitioner society had already filed various other proceedings against the respondent no.1 relating to the same subject matter before various courts and was unsuccessful. He submitted that there are various disputed questions of facts which cannot be gone into by this Court in this petition filed under Article 226 of the Constitution of India.

13. Mr. Anturkar, learned senior counsel for the petitioner on the other hand dealt with the preliminary issues raised by Dr. Saraf, learned senior counsel for the respondent no.4 and also made various submissions on merits.

14. It is submitted by the learned senior counsel that the issue raised by the petitioner in various other proceedings either before the City Civil Court or before the Co-operative Court against the respondent no.4 did

not involve any issue relating to unauthorized construction being carried out by the respondent no.4 and thus this writ petition arising out of the enactment on part of the Municipal Corporation to demolish the unauthorized construction after issuing a notice under section 351 of the Mumbai Municipal Corporation Act is maintainable. In support of this submission, the learned senior counsel invited our attention to the various averments, prayers and the orders passed by the Co-operative Court, Co-operative Appellate Court, City Civil Court and this Court in the other proceedings filed by the petitioner against the respondent no.4. He submitted that the petitioner could not have filed a suit impugning the inaction on the part of the Municipal Corporation against the respondent no.4 before the Civil Court or before the Co-operative Court. The petitioner has thus rightly filed this petition under Article 226 of the Constitution of India insofar as such inaction on the part of the respondent no.1 against the respondent no.4 under section 351 of the Mumbai Municipal Corporation Act is concerned.

15. The learned senior counsel for the petitioner invited our attention to first impugned order dated 17th January, 2019 refusing to take any action against the respondent no.4 in respect of the alleged unauthorized

construction being carried out by the respondent no.4 and submitted that not a single document showing that the disputed structure had been constructed before the cut off date i.e. 1st April, 1962 was produced. All the documents produced by the respondent no.4 in the reply to notice under section 351 are that of after 1st April, 1962.

16. It is submitted by the learned senior counsel that the documents referred to on page 162 cannot be relied upon. Merely because it is not an unauthorized construction reflected on the earlier map would not mean that the said construction is a legal or authorized construction or approved construction. He submitted that the building plan is submitted for seeking approval of the Municipal Corporation. The Municipal Corporation is concerned only with that building for which the permission is sought under the Development Control Regulation and is not concerned with the other structures which are existing and which are reflected on the map.

17. It is submitted by the learned senior counsel for the petitioner that admittedly respondent no.4 did not produce any sanctioned plan before the Municipal Corporation in compliance with section 351 of the

Mumbai Municipal Corporation Act to show that the said offending structure was authorized and was constructed prior to the datum line i.e. 1st April, 1962.

18. Learned senior counsel invited our attention to the issues framed by the City Civil Court in this suit filed by the petitioner against the respondent no.4 and the Municipal Corporation and submitted that the subject matter of the said suit was 'change of user' and did not amount to any alleged unauthorized construction being carried out by the respondent no.4. The learned senior counsel placed reliance on the explanation inserted in section 351 by Mah. 10 of 1998 of the Mumbai Municipal Corporation Act providing that "to show sufficient cause" in sub-section (1) of section 351 shall mean to prove that the work mentioned in the said notice is carried out in accordance with the provisions of sections 337 or 342 and 347 of the Act. He submitted that the respondent no.4 thus ought to have produced sufficient proof so as to show that the said offending structure was an authorized structure which the respondent no.4 has failed to prove.

19. The learned senior counsel failed to prove the complaint dated

16th September, 2018 filed by the respondents and submitted that it was a specific case of the petitioner in the said complaint for the sanctioned plan. There was no proof of construction of any hall on the ground floor of the same layout or otherwise. He submitted that prior to the year 2018, the sanctioned plan of the building in question was not available. Only in the year 2018, the map of the plan was made available by the Municipal Corporation on its website. No sooner the petitioner downloaded the copy of the map from the website of the Corporation, the petitioner filed the said complaint dated 16th September, 2018 against the respondent no.4 to the respondent no.2.

20. The learned senior counsel invited our attention to the second impugned order dated 12th November, 2020 and submitted that the said order is a non-speaking order and thus deserves to be quashed and set aside on this ground itself.

21. Ms. More, learned counsel for the respondent nos. 1 to 3 Corporation supported the order passed by the respondent no.2 and submitted that the said order passed by the Municipal Corporation is in accordance with law and no interference is warranted in the said order.

22. Dr. Saraf, learned senior counsel for the respondent no.4 on the other hand invited our attention to the order dated 16th July, 2018 passed by this Court in Writ Petition No. 1801 of 2017 filed by the petitioner against the Municipal Corporation and others including his client seeking liberty to withdraw the said writ petition and with liberty to make a representation to the respondent no.1 Corporation on the basis of the documents subsequently obtained.

23. The learned senior counsel for the respondent no.4 submitted that the said building was constructed in the year 1960. The respondent no.4 had purchased the said hall on 13th November, 1966. He submitted that the said agreement dated 13th November, 1966 between M/s. New Rajasthan Builders and the respondent no.4 was in respect of the hall and two rooms with one bathroom and one water closet on the ground floor as per the plan attached to the said agreement and was not in respect of any garage as sought to be canvassed by the petitioner.

24. The learned senior counsel for the respondent no.4 placed reliance on the Deed of Conveyance dated 22nd January, 1968 that was

entered into between the said builder and the petitioner society and submitted that even in the said Deed of Conveyance it was clearly provided that the said builder had constructed a hall. The petitioner society was thus aware that the tenement sold to the respondent no. 4 by the said builder was a hall and not a garage. He submitted that the petitioner never disputed the said agreement for sale that was entered into between the said builder and the respondent no.4 and also the Deed of Conveyance between the builder and the said society which was also in respect of the said hall.

25. It is submitted by the learned senior counsel that the petitioner now cannot be allowed to contend that the petitioner did not have a copy of the said sanctioned plan till 2018. He submitted that his client has not carried out any alteration in the premises after having purchased the said premises. The learned senior counsel also relied upon the city survey plan before this Court showing the existence of the hall. He relied upon the various documents to show that the petitioner society has been charging the maintenance charges to the respondent no.4 for an area of 1525 sq.ft. The petitioner society had also held a Special Annual General Meeting of the petitioner society in the said hall as far back as

on 22nd January, 1968. The petitioner society has collected maintenance charges from the respondent no.4 in respect of the hall and not a garage. He invited our attention to the averments made by the petitioner in paragraphs 4.8 and 4.12.

26. Mr. Anturkar, learned senior counsel for the petitioner in the rejoinder arguments submitted that only on 17th May, 2018, when the Municipal Corporation informed the petitioners that the copies of the sanctioned plan are now available on the website, the petitioner came to know about the hall. There is thus no delay of 50 years as sought to be canvassed by the learned senior counsel for the respondent no.4. The learned senior counsel for the petitioner submitted that immediately after downloading the sanctioned plan of the Municipal Corporation, the petitioner filed this petition. He submitted that in any event, since the construction carried out by the respondent no.4 is illegal, there being a delay in filing this writ petition, if any, would not be a fetter for filing of the said writ petition alleging the violation of provisions of law by the respondent no.4.

REASONS AND CONCLUSIONS :-

27. The petitioner society has already filed various litigations against the respondent no.4 before various Courts in respect of the said hall. In the suit filed before the City Civil Court, the evidence was recorded.

28. A perusal of the decree passed by the judgment delivered by the First Co-operative Court in Dispute No. CC/II/14 of 1986 filed by the petitioner against the respondent no.4 indicates that the petitioner society had examined a witness before the Co-operative Court. The Co-operative Court recorded the finding that the petitioner society did not dispute the agreement between the petitioner and the respondent no.4 that was executed on 13th November, 1966. The petitioner also did not pray for any declaration with regard to the said Deed of Conveyance or the agreement entered into between the said builder and the said respondent no.4. The Co-operative Appellate Court however allowed the appeal partly and remanded the matter back to consider additional documents.

29. The witness examined by the petitioner before the City Civil

Court in Long Cause Suit No. 3906 of 1997 filed by the petitioner admitted in his cross examination that in the conveyance executed in favour of the society, the suit premises have been shown as the hall and not a garage. In a resolution passed by the Petitioner society on 31st October, 1968 it was resolved that the suit premises was recognized as a hall and the petitioner society used to charge Rs.100/- per month as maintenance charges for the same. The petitioner had been raising the bills upon the respondent no.4 towards maintenance charges in respect of the hall and not the garage. The petitioner society was also using the said hall for some of the meetings. When the said witness had signed the said Deed of Conveyance on behalf of the petitioner society, the words 'Hall 10' were there at the time of such signing. He had signed the said Deed of Conveyance after reading the said document. He also admitted that it could not be pointed out from the letter Ex.10 that the suit premises was sanctioned as a garage.

30. The learned senior counsel for the petitioner could not dispute that right from the inception of the petitioner society, the society itself accepted, conveyed and admitted the suit property as a hall only.

31. A perusal of the agreement entered into between the said builder and the said respondent no.4 indicates that in clause (10) of the said agreement, it was provided that the flat holder shall not use the said flat for any purpose other than as a hall or any other permissible purpose.

32. A perusal of the said agreement entered into between the builder and the petitioner society also clearly indicates that the said conveyance also refers to Hall 10 against consideration of Rs.71,000/- paid by the respondent no.4 to the developer. The petitioner society neither challenged the said Deed of Conveyance nor disputed the contents thereof at any point of time.

33. We are not inclined to accept the submissions made by the learned senior counsel for the petitioner that though the petitioner was aware that there was an alleged change of the permissible use of the said tenement as garage by alleged use thereof as a hall in 1968 onwards, the petitioner was not aware that there were any alleged alteration or addition in the said garage.

34. Dr. Saraf, learned senior counsel for the respondent no.4 is right

in his submission that the petitioner was all throughout aware that the tenement sold to the respondent no.4 by the builder was a garage which was not only reflected in the agreement entered into between the said builder and the respondent no.4 but also in the Deed of Conveyance entered into between the said builder and the petitioner society. The size of the hall with room and WC was about 1500 sq.ft. area which could not have been the area of the garage.

35. The Municipal Corporation has considered these aspects in detail in the first order passed on the said notice issued under section 351 of the Mumbai Municipal Corporation Act dated 17th January, 2019. Mr. Anturkar, learned senior counsel for the petitioner could not dispute that the said so called sanctioned plan produced by the petitioner in the year 2018 was not on the website of the Municipal Corporation. In the order dated 17th January, 2019 the respondent no.2 has also recorded that the File No. EB/2050/A comprising of the approved plan is presently not traceable within their office inspite of diligent searching. The Designated Officer had accordingly rendered a finding that the notice structure is authorized. Insofar as the order dated 17th January, 2019 passed by the Executive Engineer/Designated Officer is concerned, it is

not disputed by the learned senior counsel for the petitioner that the said order dated 17th January, 2019 was not impugned by the petitioner immediately. In view of the representation made by the petitioner, the Executive Engineer/Designated Officer passed another order on 12th November, 2020 and held that there was no change in the order dated 17th January, 2019. We do not find any infirmity in the order dated 17th January, 2019 and 12th November, 2020 passed by the Municipal Corporation.

36. The petitioner has been filing several proceedings relating to the same structure against respondent no.4 on one or the other ground before various Courts. The writ property had already been purchased by the respondent no.4 as far back as in the year 1968. The said complaint came to be made by the petitioner alleging the construction to be unauthorized on the part of the respondent no.4 only in the year 2018 i.e. after more than 50 years. In our view, the said complaint filed by the petitioner was vexatious and was not tenable. The Municipal Corporation thus rightly dropped the action initiated under section 351 of the Mumbai Municipal Corporation Act in a complaint filed by the petitioner.

37. In our view, the writ petition is devoid of merits and is accordingly dismissed. No order as to costs.

[KAMAL KHATA, J.]

[R. D. DHANUKA, J.]