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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 481 OF 2023

WITH

INTERIM APPLICATION NO. 12948 OF 2023

The Municipal Corporation of

Greater Mumbai

...Appellant

V/S.

Nasimbanu W/o. Shafique Razak

Shaikh

...Respondent

Ms. Smita Tondwalkar, for the Appellant-B.M.C.

Mr. Jagdish N. Jayale a/w. Mr. Jayesh J. Jayale, for
the Respondent.

Mr. Swapnil Deorukhkar, H-West Ward present.

CORAM : SANDEEP V. MARNE, J.

Resd for Judgment On : 5 December 2023.

Pron. Judgment On : 11 December 2023.

JUDGMENT :

Admit. With the consent of the parties, taken up for final disposal forthwith.

2. This Appeal is filed by the Municipal Corporation for Greater Mumbai challenging Order dated 11 May 2023, passed by the City Civil Court allowing the draft Notice of Motion tendered by the Respondent-Plaintiff in Long Cause Suit No. 509 of 2023. The City Civil Court has passed an Order of Temporary Injunction restraining the Municipal Corporation from taking any further action in pursuance of the Notice dated 8 February 2023, issued under the provisions of Section 314 of the Mumbai Municipal Corporation Act, 1888 (**MMC Act**).

3. The Respondent-Plaintiff claims to be in use, occupation and possession of Room No.4 of Gafoor Chawl (Bhasin Chawl), situated at C.T.S. No.1611, TPS-VI, Navjeevan Society, Dattatray Road, Sanctacruz (West). According to Plaintiff, the structure admeasures 22 feet x 11 feet, consisting of ground plus one upper floor. Plaintiff states that the structure was originally occupied

by Mrs. Noornunissa Sikandar Shaikh and that the Plaintiff acquired the suit premises from the original occupier by executing Affidavit and General Power of Attorney dated 10 January 2001 and has since been in use and occupation of the suit premises. The Municipal Corporation issued notice under Section 314 of the MMC Act stating that the Storm Water Drainage Department has undertaken the work of improvement of construction of storm water drain and while its execution at the Dattatray Road, it was noticed that the structure of the Plaintiff was affecting the work of connectivity of storm water drain from Dattatray Road to Relief Road Nallah at downstream side. It was alleged that erection of structure on the Nallah constituted an offence under Section 312(1) of the MMC Act as well as Sections 286 and 269 of the Indian Penal Code, making the Plaintiff liable for criminal prosecution. Plaintiff was therefore called upon to remove the unauthorized structure within 48 hours. Plaintiff replied the notice on 13 February 2023 and relied upon various documents. She also simultaneously lodged Long Cause Suit No. 509 of 2023 before the City Civil court, challenging the Notice dated 8 February 2023. The City Civil Court passed order dated 17 February 2023 directing the Municipal Corporation to consider Plaintiff's reply and documents and to pass a speaking order. The

Municipal Corporation was restrained from taking any coercive steps for a period of 10 days in the event of any adverse order being passed. The Municipal Corporation thereafter passed Speaking Order dated 24 April 2023 rejecting the reply and documents relied upon by the Plaintiff and called upon her to remove the notice structure. Plaintiff tendered draft Notice of Motion seeking restraint Order against the Municipal Corporation from enforcing, executing and implementing Notice dated 8 February 2023 and Speaking Order dated 24 April 2023. After hearing both the sides, the City Civil Court has passed order dated 11 May 2023 allowing the draft Notice of Motion and directing the Appellant-Municipal Corporation from taking any further action in pursuance of the Notice and Speaking Order till decision of the Suit. The Municipal Corporation is aggrieved by Order dated 11 May 2023 passed by the City Civil Court and has filed the present Appeal.

4. Ms. Tondwalkar the learned counsel would appear on behalf of the Appellant-Municipal Corporation and submit that the City Civil Court has failed to appreciate that the notice structure is constructed on existing storm water drain and the same is liable to be removed under the provisions of Sections 312 and 314 of

the MMC Act. She would further submit that the Municipal Corporation has undertaken the work of augmentation of the existing storm water drain by constructing box type drain. That the entire work is completed and on account of the structure of the Plaintiff being situated right at the point where newly augmented drain is to be connected to the road side drain at Dattatray Road, the Municipal Corporation is unable to establish the connectivity. That heavy flooding is located in the area in each monsoon and that completion of the work of augmentation of existing storm water line is of utmost importance. That the Plaintiff's structure is coming in the alignment of storm water drain and is obstructing free flow of storm water drain.

5. Ms. Tondwalkar would further submit the Plaintiff has no right to continue to remain in the structure which stands on storm water drain and therefore the question of it being declared as a tolerated structure or slum structure does not arise. Alternatively, she would submit that the Municipal Corporation has nonetheless considered all the documents relied upon by the Plaintiff to verify whether she can be treated as a protected slum dweller prior to 1 January 2000 and that after going through all the documents relied upon by the

Plaintiff, it is clearly seen that the structure cannot be treated as tolerated structure. That plaintiff could not produce any document to demonstrate existence of structure prior to 1 January 2000. That the electricity bills relied upon by her clearly show that the electricity supply at the suit premises is after the year 2001. That the Municipal Corporation sent the slum survey receipt issued in the name of Noornunissa Sikandar Shaikh for verification to the Competent Authority of Slum Development Authority who confirmed that there are no records of the said survey receipt. She would therefore submit that no demonstrable case is made out by the Plaintiff to prove existence of the structure as on 1 January 2000 for being declared as eligible as Project Affected Person for allotment of alternate premises. Ms. Tondwalkar would submit that in any event Municipal Corporation cannot be restrained from completing the work of connecting the augmented storm water drain to the road side storm water drain at Dattatray Road till the Plaintiff establishes her entitlement for grant of alternate accommodation. She would pray for setting aside the order passed by the City Civil Court.

6. *Per Contra*, Mr. Jayale the learned counsel appearing for the Respondent-Plaintiff would oppose the

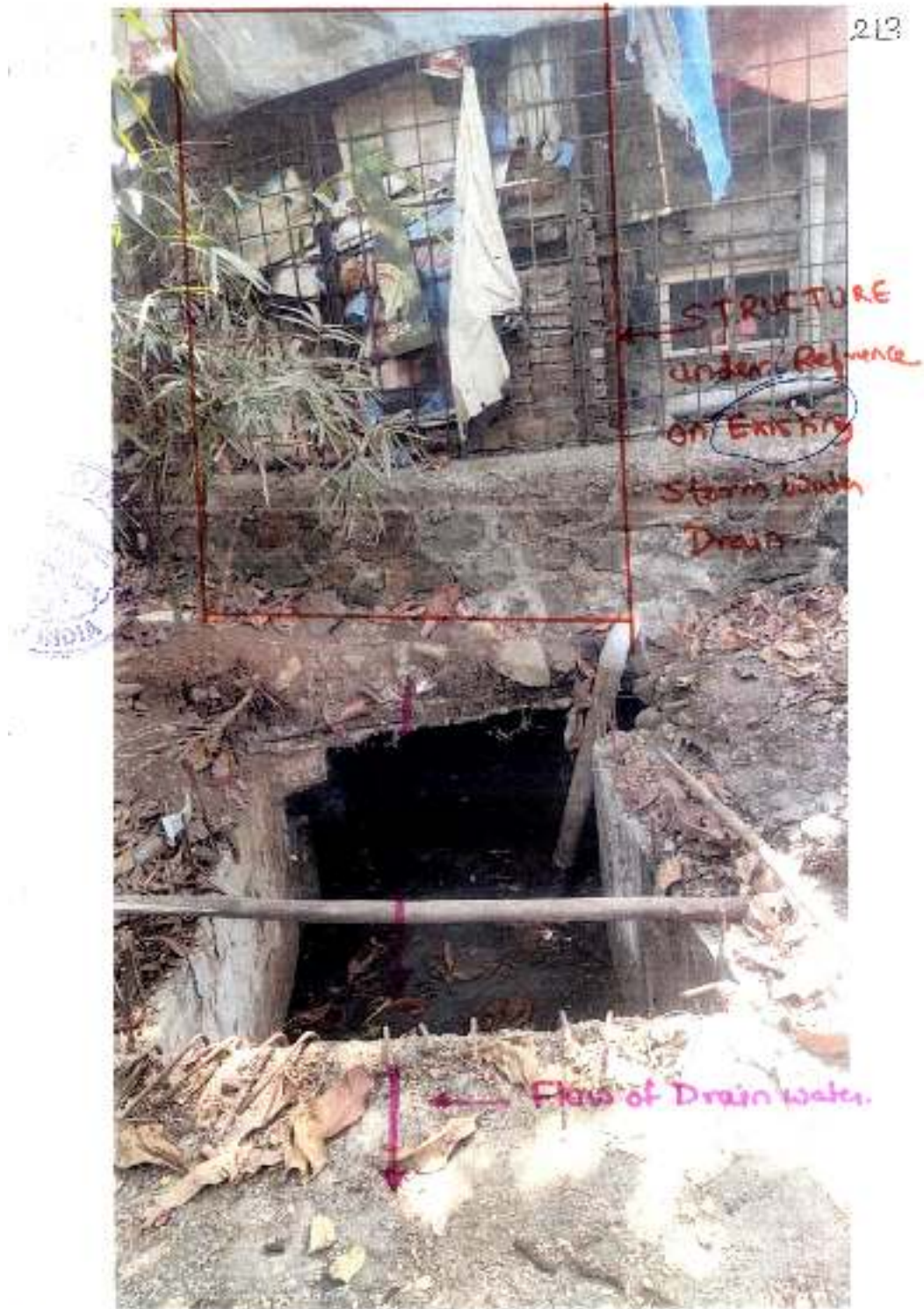
Appeal and support the Order passed by the City Civil Court. He would submit that the provisions of Section 314 of the MMC Act would have no application to the facts of the present case as the structure is not located on existing drain. That the Municipal Corporation is proposing to erect a new drain beneath the structure of the Plaintiff and the same cannot be done without following the procedure of prescribed under Section 222 of the MMC Act. That the Municipal Corporation has adopted a short cut method to avoid following of procedure under Section 222 by falsely claiming that there is an existing drain beneath the structure of the Plaintiff. That since no drain exists below the suit structure, Section 312 and consequently Section 314 would have no application. He would submit that the Notice itself uses the word 'construction' thereby indicating that the work undertaken by the Municipal Corporation is construction of a new drain to establish a new connectivity between the existing drain passing along Dattatray Road to major Nallah located against the Relief Road. That even in the Affidavit filed by the Municipal Corporation, it is contended that *"the work of construction of storm water drain is in progress at Dattatray Road"*.

7. Mr. Jayale would further submit that the suit structure is surveyed while conducting the slum survey and the slum survey receipt is issued in the name of Noornunissa Sikandar Shaikh (Plaintiff's predecessor in title) showing existence of the structure at the time of conduct of the survey. Additionally, he would rely upon the Ration Card, Voters' list and various other documents to indicate occupation of the premises by Noornuissa Sikandar Shaikh much prior to 1 January 2000. He would also place heavy reliance on Notice dated 16 April 1999 issued by the Tehsildar, Andheri alleging construction of structure on government land and calling upon the Occupier to demonstrate existence of structure prior to 1 January 1995. That the Municipal Corporation for Greater Mumbai has conveniently taken into consideration only selective documents and have conveniently ignored various other documents such as Ration Card, voters list demonstrating existence of the suit structure prior to 1 January 2001. That the suit structure cannot be demolished as the same is a tolerated structure. In the event the Municipal Corporation requires land for construction of drain beneath plaintiff's structure, the Municipal Corporation must resort to acquisition of the land. He would place reliance on Bottle Neck Policy to submit that the suit

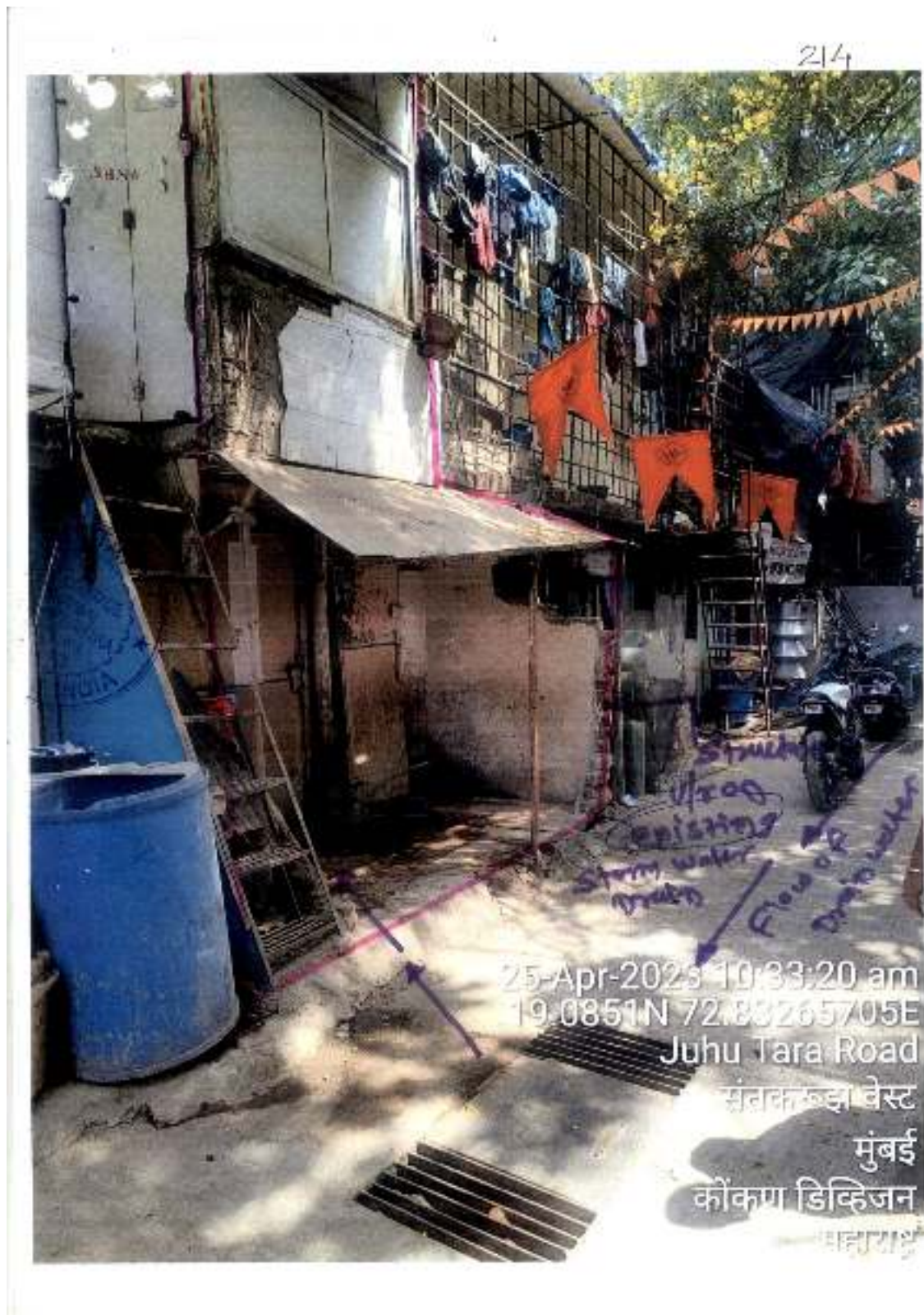
structure is covered in Category-B of the Policy introduced vide Circular dated 28 March 2017. That under that Circular, the plaintiff is entitled to be rehabilitated as a Project Affected Person. He would rely on the order of the Apex Court in **Utran Se Besthan Railway Jhopadpatti Vikas Mandal V/s. Government of India & Ors.**, SLP (C) Diary No. 19714/2021 decided on 16 December 2021 in support of the contention that it is incumbent upon the government authorities to provide alternate accommodation to Project Affected Persons even in absence of existence of any policy. He would pray for dismissal of the Appeal.

8. After having considered the submissions canvassed by the learned counsel appearing for the contesting parties, it seen that the City Civil Court has restrained the Appellant-Municipal Corporation from acting on the Notice dated 8 February 2023 and Speaking Order dated 24 April 2023. The net result of the order is that Municipal Corporation stands restrained from completing the work of augmentation of storm water drain by establishing connectivity with another drain at Dattatray Road. For better understanding of the exact location of the Plaintiff's structure, it would be necessary

to incorporate the photographs at the front and rear portions of Plaintiff's structure:

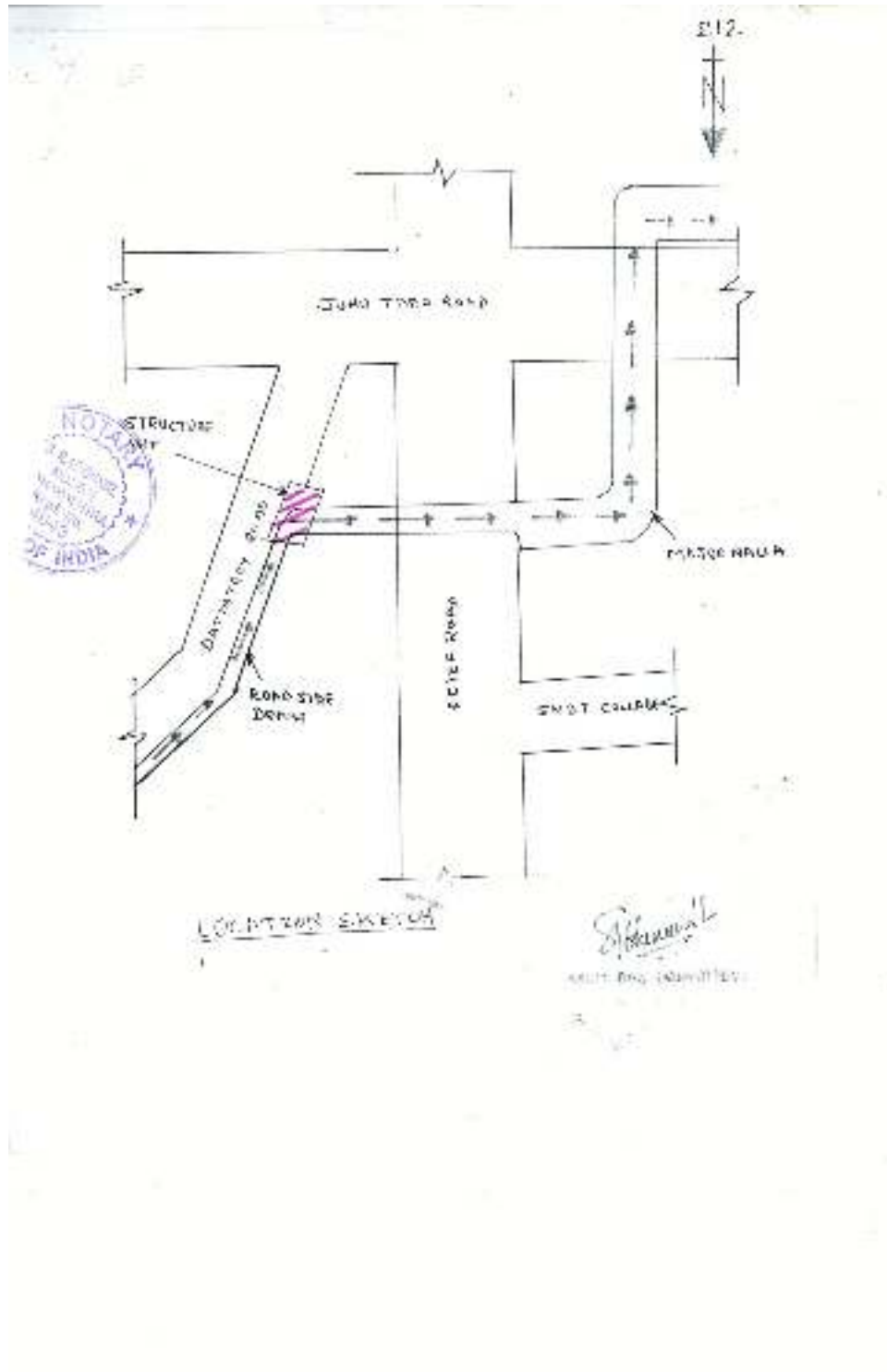


Rear



Front

9. The following sketch prepared and relied upon by the Municipal Corporation would demonstrate the position of drain vis-à-vis location of the Plaintiff's structure.



10. The impugned notice dated 8 February 2021, is issued under the provisions of section 314 of the M.M.C. Act, which reads thus :

314. The Commissioner may, without notice, cause to be removed—

(a) any wall, fence, rail, post, step, booth or other structure or fixture which shall be erected or set up in or upon any street, or upon or over any open channel drain, well or tank contrary to the provisions of sub-section (1) of section 312, after the same comes into force 1 [in the city or in the suburbs, after the date of the coming into force of the Bombay Municipal (Extension of Limits) Act, 1950 2[or in the extended suburbs after the date of the coming into force of the Bombay Municipal [Further Extension of Limits and Schedule BBA (Amendment)] Act, 1956;

(b) any stall, chair, bench, box, ladder, bale, board or shelf, or any other thing whatever placed, deposited, projected, attached, or suspended in, upon, from or to any place in contravention of sub-section (1) of section 313 ;

3[(c) any article whatsoever hawked or exposed for sale in any public place or in any public street in contravention of the provisions of section 313A and any vehicle, package, box, board, shelf or any other thing in or on which such article is placed or kept for the purpose of sale.]

4[(d) any person, unauthorisedly occupying or wrongfully in possession of any public land, from such land together with all the things and material unauthorisedly placed, projected or deposited on such land by such person :

Provided that, the Commissioner shall, while executing such removal, allow such person to take away his personal belongings and household articles, such as cooking vessels, bed and beddings of the family, etc.

11. The Municipal Commissioner is empowered under section 314 to remove any structure erected upon any street, channel, drain, well or tank contrary to the provisions of sub-section (1) of section 312. It would therefore be necessary to refer to the provisions of section 312, which reads thus :

312. Prohibition of structures or fixtures which cause obstruction in streets.

(1) No person shall, except with the permission of the Commissioner under section 310 or 317, erect or set up any wall, fence, rail, post, step, booth or other structure or fixture in or upon any street or upon or over any open channel, drain, well or tank in any street so as to form an obstruction to, or an encroachment upon, or a projection over, or to occupy, any portion of such street, channel, drain, well or tank.

(2) Nothing in this section shall be deemed to apply to any erection or thing to which clause (c) of section 322 applies.

12. Under Section 312, there is a prohibition on erection of any wall, fence, rail, post, step, booth or other structure or fixture in or upon any street or upon or over any open channel, drain, well or tank which causes obstruction to or encroaches upon any portion of street, channel, drain, well or tank. Thus, so far as the drain is concerned, there is a prohibition under Section 312 for erecting any structure thereon. If any person erects any

structure on a drain contrary to the provisions of Section 312(1), the Municipal Commissioner can cause the same to be removed without service of any notice. Thus, in respect of any unauthorized structure erected on a drain, the power of the Municipal Commissioner to cause its removal is unbridled.

13. There is debate between the parties as to whether there already existed drain beneath the suit structure or whether the Municipal Corporation has undertaken the work of laying or construction of a new drain. It is Plaintiff's case that the Municipal Corporation is laying a new drain beneath the suit structure and that it is necessary for the Municipal Corporation to follow the procedure prescribed under Sections 222 and 226 of the MMC Act. Sections 222 and 226 of the MMC Act reads thus:

222. Powers for making drains.

(1) The Commissioner may carry any municipal drain through, across or under any street, or any place laid out as or intended for a street, or under any cellar or vault which may be under any street, and, after giving reasonable notice in writing to the owner or occupier, into, through or under any land whatsoever within [Brihan Mumbai], or, for the purposes of out fall or distribution of sewage, without¹[Brihan Mumbai].

(2) The Commissioner may enter upon, and construct any new drain in the place of an existing drain in, any land wherein any municipal drain has been already lawfully

constructed or repair or alter any municipal drain so constructed.

(3) In the exercise of any power under this section, as little damage as can be shall be done, and compensation shall be paid by the Commissioner to any person who sustains damage by the exercise of such power.

226. Powers of Commissioner to dig, construct and maintain tunnels below any land and to undertake related works for carrying sewage or storm water.

(1) For the purpose of carrying sewage or storm water, the Commissioner may dig, construct and maintain a tunnel or tunnels below any land, whether such land is built upon or is vacant, and undertake related works and do such other acts as he deems necessary for digging, construction, maintaining such tunnel or tunnels and undertaking other related works.

(2) Before digging and construction of any tunnel, or any other related work is undertaken by the Commissioner under sub-section (1), he shall cause to be published in the local newspapers in English, Marathi, Hindi, Gujarati and Urdu a notice intimating his intention to dig, construct and maintain such tunnel and to undertake and maintain other related work. Such notice shall indicate the alignment and the depth and the length and circumference of the tunnel and the buildings under which such tunnel is proposed to be constructed and maintained and other related works which are proposed to be undertaken and maintained. Such notice shall also specify the date, which shall not be earlier than sixty days from the date of its publication in the local newspapers, on or after which the digging and construction of the tunnel is proposed to be started or such related work is proposed to be undertaken:

Provided that, simultaneously with the publication of such notice in the newspapers, the Commissioner shall, by a notice served in the manner provided in sections 484 and 485, call upon the owner of, or any other person, who, in the opinion of the Commissioner, may be interested in, the land below which such tunnel is to be dug and constructed or such related work is to be undertaken, to show cause, within thirty days from the date of its publication in the local newspapers, why such tunnel should not be constructed and such related work should not be undertaken. After considering the cause, if any, shown by the owner of or such other person interested in, such land, and after giving a reasonable opportunity to the persons

concerned of being heard, the Commissioner may pass such orders as he deems fit.

(3) Any person aggrieved by any order passed by the Commissioner under sub- section (2) may, within thirty days from the receipt of such order, refer the matter for the decision of the Chief Judge of the Small Cause Courts, whose decision shall be final and shall be called in question in any suit or other legal proceeding in any Court:

Provided that, the Chief Judge shall not entertain any such reference, which is not made to him, within the period specified in this sub-section and he shall summarily dismiss such reference.

(4) Whether a reference is made to the Chief Judge under sub-section (3) within the specified period and a notice thereof is served by the party concerned on the Commissioner, the Commissioner shall not commence the digging and construction of the tunnel or undertake any related work, unless the Chief Judge has summarily dismissed such reference or has decided the reference and allowed the digging and construction of such tunnel and undertaking of such related work.

14. It would therefore be necessary to first determine the factual dispute as to whether a drain already exists beneath the suit structure or whether the Municipal Corporation is constructing a new drain. The averments made in the plaint does not throw any light on this factual controversy. In fact in the plaint, there is no positive assertion on the part of the Plaintiff that the Municipal Corporation is laying down a new drain in the suit Structure. The City Civil Court has also not recorded any finding to that effect in the impugned order. The contention of construction of new drain is raised essentially by relying upon the language employed in the

Notice dated 8 February 2023. The relevant portion of the Notice reads thus:

Storm Water Department has undertaken the work of Improvement of construction of storm water drain and same is in progress at Dattatray Road. Assistant Engineer (S.W.D.) H/West has informed this office that u/r structure affecting the work of connectivity of Storm Water Drain from Dattatray Road to Relief Road Nalla at downstream side and has informed to remove this structure immediately. The u /r G+1 Structure is made up of Brick masonry, AC Sheet of size 4.60 m X 2.35 m (Approx.) on existing SWD which is contrary to the provision of section 312(1) of MMC Act, 1888 without obtaining permission of Competent Authority.

15. Thus, use of the word “construction” is sought to be relied upon by the Plaintiff to suggest as if construction of a new drain is undertaken. What is ignored by the Plaintiff is, however, that the Notice also uses the word “improvement”. Thus, what is sought to be done is apparently “improvement of the existing drain”. In the Affidavit in Reply filed before the City Civil Court, the Municipal Corporation averred as follows:

Further, plaintiff's structure is on existing Storm Water Drain, which is connect the upper side catchment area to the major nalla at downstream. plaintiff's structure is on such location that it is obstructing the drain connectivity hampering the flow of rain water and resulting in rain water flooding at upstream side, causing inconvenience to the public.

16. Thus, The Municipal Corporation pleaded a specific case before the City Civil Court that the Plaintiff's structure stands on "existing storm water drain". Ms. Tondwalkar, has also placed on record the catchment map of Nallah system prepared and sanctioned on 25 April 2018. The said map shows existence of Drain to connect Dattatray Road to the Nallah passing through the Relief Road.

17. The Municipal Corporation has also placed on record the photographs of the site taken prior to the work being undertaken, which clearly shows existence of drain beneath the suit structure. I am therefore of the *prima-facie* view that the Plaintiff's structure is located on the existing drain. Therefore, the provisions of Sections 312 and 314 of MMC Act are fully applicable in respect of the suit structure and the Notice issued by the Municipal Corporation cannot *prima-facie* be faulted.

18. The next issue is about the grant of benefit of rehabilitation to Plaintiff. There is no dispute to the proposition that if Plaintiff proves that the structure is tolerated one on any count, such as existence prior to datum line or protected slum structure prior to 1 January 2000, the Municipal Corporation would treat her

as Project Affected Person and alternate accommodation would be granted to her. Though, Mr. Jayale has placed reliance on the Bottle Neck Policy formulated vide Circular dated 25 March 2017, *prima facie*, the same is applicable only in respect of the structures affected by widening of road for preventing bottlenecks for free flow of traffic. Ms. Tondwalkar, after taking instructions from the officer of the Municipal Corporation who was present in the court during the course of hearing, fairly submits that even in respect of authorized/tolerated structure affected by the work of construction/improvement of drains, the Municipal Corporation has policy to treat the occupier as Project Affected Person for grant of benefit of rehabilitation. In light of this position, it is necessary for the Plaintiff to make out a case that the suit structure is tolerated one so that the Plaintiff can be treated as a Project Affected Person for grant of benefit of rehabilitation.

19. The issue is whether the Municipal Corporation should be restrained from completing the work of augmentation of existing storm water drain till the Plaintiff establishes her case for treatment as Project Affected Person. The answer to the question, to my mind appears to be in the negative. As of now, the Plaintiff has

not been able to produce any concrete evidence before the Municipal Corporation to demonstrate that the suit structure is a tolerated one. A slight debate has taken place between the rival parties about the date of existence of the structure. In my view, it is not necessary at this juncture to decide whether the structure is tolerated or not. The same can be decided at the time of trial of the suit. If Plaintiff succeeds in demonstrating that the suit structure is a tolerated one, she would be treated as Project Affected Person and would be granted the benefit of rehabilitation. If on the other hand, the Plaintiff fails to demonstrate that the suit structure can be treated as a tolerated structure, she would not be entitled to benefit on account of demolition of structure. In my view, therefore, the Municipal Corporation can be permitted to demolish the suit structure with a view to establish crucial connectivity between the newly augmented storm water line coming from the Relief Road to the existing drain passing alongside Dattatray Road. Cause of floods on Mumbai roads during monsoons is a well known phenomenon. It causes loss of life, property as well as inconvenience to the citizens. The Municipal Corporation in such circumstances cannot be prevented from completing the crucial work of augmentation of the existing storm water lines. Admittedly, Plaintiff is neither

the owner of the land nor has obtained any development permission for constructing the suit structure. Her case is that since the structure exists for a considerable period of time, the same needs to be protected. In my view upon balancing the rights of the citizens to have flood free roads and the right of an unauthorized occupant to seek rehabilitation, the latter must give way to the former. It is not that by demolition of the Plaintiff's structure, her rights will be altogether extinguished. In case she is successful in demonstrating before the City Civil Court that the structure is a tolerated one, she would be entitled to all the benefits of the policy formulated by the Municipal Corporation for treating her as Project Affected Person and granting permanent alternate accommodation.

20. This Court is aware of the difficulties that would be faced by the Plaintiff on account of demolition of the suit structure and non-availability of alternate premises till decision of the suit. However considering the nature of the work undertaken by the Municipal Corporation, the plaintiff cannot be permitted to occupy the suit structure till she establishes her rights in the suit. Therefore, hearing of the suit can be expedited so as to minimize the time gap between demolition of the

suit structure and deciding eligibility of the Plaintiff for grant of Alternate Accommodation. The Plaintiff can amend the suit to seek the relief for treatment as Project Affected Person and for grant of permanent alternate accommodation. It is clarified that then in the event of the Plaintiff establishing before the City Civil Code that the structure is/was a tolerated one, the Plaintiff shall be treated as a Project Affected Person for the purpose of allotment of Permanent Alternate Accommodation.

21. I am therefore of the view that the Order passed by the City Civil Code is indefensible and is liable to be set aside. The Appeal accordingly succeeds. The order dated 11 May 2023, passed by the City Civil Court is set aside. The Respondent-Plaintiff is granted time of four weeks to voluntarily vacate and/or pull down the suit structure. Upon expiry of period of four weeks, the Municipal Corporation shall be entitled to demolish the suit structure.

22. The City Civil Court is requested to expedite hearing of Long Cause Suit No. 509 of 2023 and to make an endeavour to decide the same as expeditiously as possible, preferably within a period of one year without seeking any extension. This City Civil Court shall not be

influenced by any of the observations made in the present judgment while deciding the suit finally. With the above observations, the Appeal is allowed. There shall be no order as to costs.

SANDEEP V.MARNE, J.