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

WRIT PETITION NO.4948 OF 2018

Baldev Gupta ... Petitioner
V/s.
The Municipal Corporation of Greater
Bombay & Ors. ... Respondents

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Mr. Chandraprakash Kewlaprasad Tripathi a/w Ms.
Bhagyashri Gawan, for petitioner.

Mr. A. Y. Sakhare, Senior Advocate a/w. Mr. R. Y.
Sirsikar, for respondents (BMC).

CORAM : AMIT BORKAR, J.

DATED : OCTOBER 30, 2023

P.C.:

1. Challenge in this writ petition is to the order dated 23 October 2015 passed by the Executing Court in Execution Application No.22 of 2012 in L.C. Suit No.483 of 2008.

2. The petitioner initially filed L.C. Suit No.2110 of 2000 challenging notice under Section 354 (a) of the Mumbai Municipal Corporation Act, 1888 (for short 'MMC Act'). On 30 August 2004, the said suit was decreed. The structure which was part of decree was described in paragraph 4 of the decree which reads as under:

5. Defendants their servants, agents, officers and all persons claiming through them are hereby restrain permanently by an order of injunction of this Court from demolishing their suit premises namely structure

admeasuring 13 feet x 70 ft. 9/12/04 up of patra sheet wall and AC roof on land bearing survey no.81(part) situated near Lido Cinema, Jaiswalwadi, Sona Villa, Juhu Road, Santacruz (West) Mumbai – 49 pursuant to notice bearing no.KW/06/AEM/od dated 3.4.2000.

3. The Corporation thereafter issued fresh notice.
4. The petitioner, therefore, filed L.C. Suit No.483 of 2008 which was again decreed by the Trial Court *vide* judgment and decree dated 1 September 2009. Clause 3 of the decree reads as under:

3. The defendants are hereby perpetually restrained from demolishing and/ or pulling down the suit premises i.e. enclosed area admeasuring 13' X 70' made of Patra Sheet wall are A.C. sheet roof on land bearing Survey No.81 (Part) situated near Lido Cinema, Jaiswala Wadi, Juhu Road, Sanctacruz (West), Mumbai, in pursuance of the impugned notice bearing *no.K/W/283/OD/BF dated 13/03/2008*.

5. After decree, the respondent Corporation on 23 November 2011 issued notice under Section 354(a) MMC Act. The description of the structure in the notice is as under:

“Unauthorised construction on nalla land with M.S frame covered with A.C. sheet roof admeasuring 70 ‘0”x13 ‘0” (14 ‘0”4+)

6. The petitioner, therefore, filed Writ Petition No.2453 of 2011.

7. This Court by order dated 28 March 2011² permitted the petitioner to file Execution Application.
8. In furtherance of said order, the petitioner had filed Execution Application No.22 of 2012.
9. The Trial Court granted opportunity of hearing to the parties. Framed issues and dismissed the Execution Application with the finding that the decree holder has failed to prove that the structure which was subject matter of earlier suit is the same in relation to which notice under Section 354(a) of the MMC Act was issued by the Municipal Corporation.
10. The petitioner has, therefore, filed present writ petition.
11. During pendency of writ petition, the Municipal Corporation has filed affidavit-in-reply. In the affidavit-in-reply, the Municipal Corporation has contended that on 23 November 2011 received a complaint of Santacruz police station regarding on going unauthorized construction in SNTD nalla portion. The Municipal Corporation, therefore, on 24 November 2011 demolished the structure which was subject matter of notice under Section 354(a) of the MMC Act. According to Corporation, earlier patrasheet structure which was subject matter of decree has been replaced by M.S. sheet structure which is entirely new structure.
12. Learned Advocate for the petitioner submitted that the Executing Court exceeded its power by going beyond the scope of the decree. According to him, the decree has its stand need to be executed. According to him, again demolition by the Municipal Corporation is high handed and the Executing Court ought to have

allowed the Execution Petition.

13. Per contra, learned senior Advocate on behalf of Municipal Corporation submitted that the entirely new structure was being build by the petitioner by taking benefit of order of injunction in earlier suit. The structure stands on nalla. Since, it is entirely new structure being build during process of its construction, the Municipal Corporation by issuing notice under Section 354 (a) of the MMC Act as demolition the structure.

14. On perusal of record and after having heard Advocates for the parties, in my opinion, the first issue which requires adjudication is regarding power of Executing Court while deciding objection under Section 47 of CPC. It appears that there is dispute regarding description of the suit property.

15. It needs to be noted that the power of Executing Court in execution was a issue before the Apex Court in the case of **Pratibha Singh And Another Versus Shanti Devi Prasad And Another**, reported in (2003) 2 SCC 643. The issue involved before the Apex Court was in the context of ambiguity in description of the suit property in suit for specific performance. The Apex Court in the context of said facts, observed that the Executing Court can resort can be had to Section 152 or Section 47 of the Code of Civil Procedure, 1908 depending on the facts and circumstances of each case which of the two provisions would be more appropriate, just and convenient to invoke. The executing suit property may be ascertained by the Executing Court as a question relating to execution, discharge or satisfaction of decree within the meaning

of Section 47 of CPC.

16. According to the petitioner, the structure in question always consisted of patrasheet. However, according to the Municipal Corporation, the construction being carried out by the petitioner was a new construction consisting of M.S. sheet. In the facts of the present case, the issue arises for consideration is whether the fresh notice dated 23 November 2011 under Section 354(a) of the MMC Act was in relation to a new structure consisting of M.S. frame having same measurement or was in relation to patrasheet structure which was subject matter of the decree to get over the decree such notice was issued.

17. The petitioner did not produce any evidence before the Executing Court when the Executing Court held an inquiry under Section 47 of CPC.

18. The Executing Court has recorded finding that the height of the construction on the date of earlier suit was 14 ft.; however, based on material on record, it appears that the height of the construction is 20 ft. The material placed on record by Municipal Corporation indicated that the height of structure as per panchnama dated 22 November 2011 indicated use of iron frame and wooden pole and A.C. sheets for construction and the shed is of about 20ft. height. Curiously, it is not the case of decree holder that in addition to patra shed structure, he constructed M.S. sheet structure and therefore, the Municipal Corporation ought to have demolished M.S. sheet structure only and ought to have not demolished patrasheet structure which is protected by the decree.

19. It was, therefore, necessary for the petitioner to bring on record material to indicate that the subject matter of notice under Section 354 (a) of the MMC Act was exactly the same structure which was subject matter of earlier suit.

20. In the absence of such material and the Municipal Corporation having produced material in the form of panchnama of photographs to indicate that the structure which was subject matter of notice under Section 354(a) of the MMC Act consisted of M.S. sheet having height of 20 ft., no fault can be found that the finding recorded by the Executing Court that the Municipal Corporation has followed due process of law as per Section 354(a) of the MMC Act.

21. Moreover, this Court by order dated 30 October 2018 appointed, Sheristedar of this Court as the Court Commissioner. He along with architect from the panel of this Court and Videographer had visited the site. He submitted a report to this Court. The conclusions of the said report are as under:

Conclusion:

Based on my observations, Architect's report, layout plan/ drawing of nalla and Google images it is concluded that:

- The suit structure is situated on nalla.
- As per D.P. Plan the suit land portion does not seem to be in existence between the Lido Tower and the nalla.
- The nature of construction is permanent and seem to be larger than the structure seen in existence in Google image of 2009-10, whereas it was not observed till

2007.

– As observed, the width of the nalla is overall wide, however at the place of the suit structure it is reduced.

22. On perusal of the photographs, maps and material annexed by the said Court Commissioner along with technical report produced by the expert, I am satisfied that the structure in relation to which notice under Section 354 (a) of the MMC Act was issued was not subject matter of decree and the subject matter of notice under Section 354(a) of the MMC Act was a new construction; therefore, in my opinion, the Executing Court has not committed error of jurisdiction while dismissing the Execution Application. There is no merit in the writ petition.

23. The writ petition stands disposed of in above terms. No costs.

24. Ad-interim relief granted earlier to continue for the period of two weeks from today.

(AMIT BORKAR, J.)