



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION  
APPEAL FROM ORDER NO.31 OF 2023  
WITH  
INTERIM APPLICATION NO.293 OF 2023**

Sohrab Turab Khan

... Petitioner

versus

Municipal Corporation of Greater  
Mumbai and Anr.

... Respondents

Mr. Prashant K. Aher, for Appellant.

Mrs. Smita Tondwalkar, for MCGM.

Mr. Kishor Hiralal Jagdale, J.E.(B&F) E Ward, present.

**CORAM: N.J.JAMADAR, J.**

**DATE : 19 JULY 2023**

**P.C.**

1. Heard the learned Counsel for the parties.
2. This appeal is directed against an order dated 14 October 2022 passed by the learned Judge, City Civil Court, Greater Mumbai in Notice of Motion No.309 of 2019 in L.C.Suit No.187 of 2019 whereby the Notice of Motion taken out by the Appellant-Plaintiff to restrain Respondent No.1 – Municipal Corporation from acting upon the Notice dated 13 October 2018 and the Speaking Order dated 21 December 2018 came to be dismissed.
3. Background facts can be stated, in brief, as under :
  - 3.1 The Plaintiff is a tenant of a premises being Room No.41, Second floor, Aishabai Chambers, Sofia Zubair Road, Byculla (W), Mumbai – 400 008. Aishabai

daughter of Haji Mohammed Kassam Charitable Trust is the landlord of the said premises. A premises annexed to Room No.41 (the suit premises) has been in possession and occupation of the Plaintiff since the inception of the tenancy. Neither the landlord nor any other authority has ever questioned the possessory title of the Plaintiff over the suit premises. In fact, in the plan submitted to repair the building, the existence of the suit premises has been duly shown.

3.2 The aforesaid being the position, according to the Plaintiff, at the instance of disgruntled elements, Respondent No.1 issued a notice purportedly under Section 351 of the Mumbai Municipal Corporation Act, 1888, inter alia, alleging that the Plaintiff had carried out unauthorized construction / development in the nature of erection of a kitchen admeasuring 1.65 mtr x 1.80 mtr. X 2.45 mtr (height) by means of wooden partition and ladi coba slab in the common passage besides Room No.41 and also opened a window admeasuring 1.60 mtr x 0.45 mtrs in the sloping roof of Room No.41 (notice structure).

3.3 On 22 October 2018, an appropriate reply to the said notice was issued. However, without considering the contentions in the said reply and providing an effective opportunity of hearing, the Respondent No.2 – Designated Officer, passed a Speaking Order on 21 December 2018 directing the removal of the notice structure and threatening demolition in the event of default.

3.4 The Appellant, thus, instituted the instant Suit asserting, inter alia, that

the impugned notice was issued by the Defendants *mala fides, de hors* the provisions of the Act, 1888, and in colourable exercise of the powers conferred on the Defendants. It was also asserted that the impugned action was in violation of the mandatory requirements of providing an effective opportunity of hearing to the person against whom an action was proposed to be taken in the matter of demolition of alleged unauthorized construction/development. The Plaintiff, thus, sought a declaration that the impugned notice was illegal, bad in law, and cannot be enforced and acted upon and the consequential relief of injunction.

3.5 In the said suit, the Plaintiff took out a Notice of Motion to temporarily restrain the Respondents-Defendants from acting upon the impugned notice.

3.6 By the impugned order, after considering the reply to the Notice of Motion, documents tendered for perusal and the submissions canvassed on behalf of the parties, the learned Judge dismissed the Notice of Motion opining that the Plaintiff failed to make out a prima facie case that the notice structure has been either authorized or tolerated. Being aggrieved, the Plaintiff is in appeal.

4. I have heard Mr. Prashant Aher, learned Counsel for the Appellant and Mrs. Tondwalkar, learned Counsel for the Respondents at some length. The learned Counsel took the Court through the pleadings and material on record.

5. Mr. Aher, learned Counsel for the Appellant, strenuously submitted that the learned Judge, City Civil Court, completely misdirected himself in placing the

entire burden of demonstrating that the notice structure is an authorized structure. Banking upon the pronouncement of this Court in the case of **Vadilal Maganlal Trevadia V/s. Bombay Municipal Corporation and Ors.**,<sup>1</sup> Mr. Aher would submit that the burden to show that the construction is unauthorized is on the person who alleges the same.

6. In the case at hand, according to Mr. Aher, the Municipal Corporation has not placed on record the approved plans to show that the notice structure was unauthorized. Taking the Court through the plan of the building prepared by Mumbai Building Repairs and Reconstruction Board, Mr. Aher urged, with tenacity, that the notice structure is shown in the said plan and, thus, its existence could not have been disputed. It was further submitted that the learned Judge, City Civil Court also lost sight of the fact that the Plaintiff being a tenant of Room No.41 was not expected to be in custody of the approved plans of the building, and, therefore, the Plaintiff could not have been non-suited on the ground of non-production of the approved plans.

7. Mrs. Tondwalkar, learned Counsel for the Corporation, in contrast, would urge that the nature of the unauthorized construction / development in itself militates against the claim of the Plaintiff. Indisputably, the Plaintiff has erected a kitchen in the common passage. In no circumstance, according to Mrs. Tondwalkar, such development can be with the prior approval of the planning authority. Repelling

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1 2021 (1) Mh.L.J. 157

the contention of Mr. Aher that it was for the Municipal Corporation to place on record the approved plans, Mrs. Tondwalkar submitted that it is for the person seeking protection from the action initiated by the planning authority under the provisions of Section 351 of the Act, 1888 to show that the structure is either authorized or tolerated. Reliance was placed on the observations of the Division Bench in the case of **Tushar Guru Salien V/s. State of Maharashtra and Ors.**<sup>2</sup>

8. To begin with, it is imperative to note that there is not much controversy over the fact that the alleged unauthorized development, in the nature of a kitchen, is made in the common passage. This nature of the alleged unauthorized development is required to be appreciated in the backdrop of the stated claim of the Plaintiff to be a tenant of Room No.41 of Aishabai Chambers. All the documents sought to be relied upon by the Appellant refer to the said Room No.41. At best, the Plaintiff can claim that the notice structure, especially the kitchen, is an adjunct of Room No.41. From this standpoint, the legality and validity of the impugned action deserve to be decided.

9. Mr. Aher placed heavy reliance on the plan prepared by the Mumbai Building Repairs and Reconstruction Board wherein in the common passage in between Room No.41 (incorrectly shown as Room No.43) and Room No.51 the existence of a structure is shown. I am afraid, the aforesaid plan is of any assistance to the Plaintiff. I find substance in the submission of Mrs.Tondwalkar that the said plan

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2 PIL 67 of 2017 dt. 28 August 2019

was prepared only for the purpose of repairs of the building and cannot be equated with a plan which either approves or permits construction / development, as the planning authority would do. A specific disclaimer that to effect is predominantly embossed on the said plan, “for repair purpose only”.

10. Reliance placed on the tenants list wherein the Plaintiff is shown to be a tenant of Room No.41 is, on parity of reasoning, of no assistance as the said area statement was prepared for and in connection with the repairs of Aishabai Chambers. No mileage can be drawn from either the said plan or the tenants list. It would suffice to note that there is no controversy over the fact that the Plaintiff has been in occupation of Room No.41, which essentially revolves around the structure allegedly erected by the Plaintiff in the common passage.

11. This leads me to the thrust of the submission of Mr. Aher that the learned Judge, City Civil Court, committed an error in placing the burden to establish the authorization on the Plaintiff. Reliance on the observations of this Court in the case of **Vadilal Maganlal Trevadia (supra)**, does not merit acceptance unreservedly. The observations of this Court in paragraph 49 of **Vadilal Maganlal Trevadia (supra)**, from which support and sustenance was sought to be drawn to the submission canvassed on behalf of the Appellant, read as under :

“49. It is trite that if a person or an authority alleges that a structure is an unauthorized one, the authorization or the permission must first be placed on record. Thereafter, it has to be shown as to how the structure has

deviated from the authorization or the permission. Obviously, the initial burden would be on the person or the authority who alleges that the structure is unauthorized. In such circumstances, the most crucial document would be the original or initial authorization/permission.”

12. In my view, the aforesaid observations cannot be construed to lay down an absolute proposition of law that in all situations, whenever an action under Section 351 is initiated, the Corporation is enjoined to first place on record a copy of the permission/authorization as was sought to be canvassed on behalf of the Appellant. Under the provisions of the Act, no development can be carried out without an express permission of the planning authority. In a case of this nature, where the alleged unauthorized development is shown to be in the common passage, which is ex-facie impermissible, the proposition that it was for the Corporation to show that in the initial approved plan the structure was not shown, would be in the negation of the settled principle of law that where the construction / development is alleged to be unauthorized, it is for the person who owns or occupy the said structure to show that it is either authorized or tolerated. The fallacy of this submission becomes manifest in a case of unauthorized development on a piece of land over which there is no pre-existing building.

13. At this juncture, a reference to the observations of the Division Bench in the case of **Tushar Guru Salien (supra)**, would be apposite. They read as under :

“5.Considering a propriety, a suit to enforce or protect an interest in the

property which is governed by a Municipal Statute, the interest protected has to be with respect to a plea that prima-facie, the structure which is being targated is an authorized structure. Meaning thereby, the plaint must take an averment of the sanction obtained from the corporation and must make an averment that the structure targated is prima facie governed by the sanction. Merely pointing out deficiencies in the notice or the authority of the person issuing the notice is neither here nor there. Thus, the sine qua non of such kinds of suits is a positive assertion made with reference to the sanctioned building plans.”

13. I am, thus, impelled to hold that the learned Judge, City Civil Court committed no error in declining to grant interim relief as the Plaintiff failed to make out a prima facie case.

14. The upshot of aforesaid consideration is that the Appeal fails.

15. Hence, the following order :

#### ORDER

- (i) The Appeal stands dismissed.
- (ii) In view of the dismissal of the Appeal, Interim Application also stands dismissed.
- (iii) No costs.

**( N.J.JAMADAR, J. )**