

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 704 OF 2023

Malwani West View CHSL

... Petitioner

Versus

Mumbai Housing and Area Development Board
& Ors.

... Respondents

Mr. G.S. Godbole, Senior Advocate a/w. Mr. Yahya Ghoghari, Mr.
Mustafa Shabbir Shamim i/b. Shamim & Co. for the petitioner.
Mr. Abhay L. Patki, Addl. G.P. for the State.

CORAM: G. S. KULKARNI
& R.N. LADDHA, JJ.
DATED: 06 March, 2023

P.C.

1. This petition is filed by the petitioner, a Cooperative Housing Society,
making the following prayers:

“a) this Honourable Court may be pleased to issue an appropriate Writ, Order or Direction thereby striking down Section 5 of Maharashtra Regional and Town Planning (Amendment) Act, 2017 being Maharashtra Act No. 32 of 2017 which substituted sub-section (1) of Section 53 of the Maharashtra Regional and Town Planning Act, 1966 w.e.f. 15.4.2017;

b) this Honourable Court be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate Writ, Order or direction under Article 226 of the Constitution of India calling for the records related to substitution of sub-section (1) of 53 of Maharashtra Housing and Area Development Authority Act, 1976 by Mah. Act 32 of 2017 (Amendment Act) w.e.f. 15-4-2017, and after examining the legality, validity and propriety thereof, to declare said amended Section 53(1) as unconstitutional, illegal, ultra vires and bad in law and hence, the same be struck down;

c) This Honourable Court be pleased to issue the Writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate Writ, Order or direction calling for the records of Respondent nos. 1 and 2 and after going into the legality and propriety thereof, to quash and set aside the said impugned notice dated 4th January, 2023 (Exhibit ‘P’);

(d) this Honourable Court be pleased to issue a Writ of Mandamus or any other appropriate Writ, Order or direction directing to conduct a thorough enquiry into the actions of Respondent no. 2 and other officials and to take appropriate actions in accordance with law;

(e) this Honourable Court be pleased to issue a Writ of Mandamus or any other appropriate Writ, Order or direction directing the Respondents to rebuild the ota/platform and benches/portions and compensate the petitioners for the losses and damages suffered by the illegal and unlawful actions of the respondents;

(f) pending the hearing and final disposal of the present petition, this Hon'ble Court may be pleased to stay the operation of the impugned notice dated 4th January, 2023 (Exhibit 'P').

(g) Pending the hearing and final disposal of the present petition, this Honourable Court may be pleased to restrain the respondent Authority to in furtherance to the impugned notice dated 4th January, 2023 (Exhibit 'P').

(h) pending the hearing and final disposal of the present petition, this Honourable Court may be pleased to restore the status quo ante by permitting the petitioner to rebuild the ota/platform and benches and other premises;

(i) For ad-interim reliefs in terms of prayers above;"

2. It appears from the averments as made in the petition that a permanent platform with a shed was constructed in the open space/compound of the petitioner-Society. From the nature of such construction as seen from the photographs, it is quite clear that such construction is firmly embedded into the earth with a shed thereon which is in the open area, a part of which also appears to be parking area (surrounded by cars). To undertake such construction, no permission was taken from the Planning Authority/respondent in the present petition. It also appears that there are serious internal disputes between the members of the petitioner-Society. Certain members had made complaint to the respondent/Planning Authority of such

illegal construction of a permanent nature without obtaining prior permission. Consequent thereto, a notice came to be issued by respondent no. 1-Municipal Corporation (for short “**MCGM**”) to the petitioner on 4 January, 2023 under section 52¹ read with Section 53(1)² of the Maharashtra Regional and Town Planning Act, 1966 (for short “**MRTPA Act**”). It appears that notice was executed and the unauthorized structure was removed on 5 January, 2023.

3. Despite such factual position, the present petition came to be filed almost one month and six days of such action, i.e., on 11 February, 2023 and making interim prayers (supra), which could not be granted and/or which had already become infructuous, as would not be disputed by Mr. Godbole, learned senior counsel for the petitioner. In fact, we are quite surprised to note such interim prayers, as this would amount to the petitioner pursuing a non-issue.

4. Nonetheless Mr. Godbole would insist that the petitioner would intend to pursue the petition on the prayers as noted by us above. Mr. Godbole would not dispute that the construction which was objected by the impugned notice issued by MCGM was in any manner sanctioned and/or authorized by the MCGM or it was put up after a prior permission being obtained from the MCGM. His submission is that considering the nature of the construction, no permission was required to be obtained to put up such construction. His grievance is to the effect that the structure in question ought not to have been

1 Penalty for unauthorized development or for use otherwise than in conformity with Development Plan.

2 Power to require removal of unauthorized development.

removed/demolished. Mr. Godbole is, however, not in a position to support such contention that no permission was required to be taken from the Planning Authority to put up such construction, the nature of it being that it was a construction firmly embedded to the earth. Also there is nothing on record that at any point of time, permission was obtained by the petitioner to undertake such construction. The petitioner was under an impression that to undertake such construction although of a nature which is firmly embedded to the earth, no prior permission was required from the Planning Authority. It appears that such perception of the petitioner is certainly not correct.

5. Be that as it may, the grievance of the petitioner is primarily on the removal of the impugned structure, which according to the petitioner ought not have been removed as per the notice issued under Section 52 read with Section 53(1) of the MRTP Act within 24 hours as per the impugned notice. In support of such contention, Mr. Godbole has placed reliance on the decision of the Division Bench of this Court in *Rajiv Mohan Mishra vs. City and Industrial Development Corporation of Maharashtra Ltd.*³.

6. We are not inclined to accept Mr. Godbole's submission, inasmuch as the construction in question as undertaken by the petitioner was a rank illegal construction falling within the provisions of Clause (a) of sub-section (1) of Section 52, namely, construction carried out without a prior permission being

3 2019(1) Bom. C.R. 479

required to be obtained as per the provisions of the MRTP Act. For convenience, Section 52 may be extracted, which reads thus:-

“Section 52: Penalty for unauthorised development or for use otherwise than in conformity with Development Plan.

(1) Any person who, whether at his own instance or at the instance of any other person commences, undertakes or carries out development or institutes, or changes the use of any land—

(a) without permission required under this Act; or

(b) which is not in accordance with any permission granted or in contravention of any condition subject to which such permission has been granted;

(c) after the permission for development has been revoked; or

(d) in contravention of any permission which has been duly modified,

shall, on conviction, [be punished with imprisonment for a term [which shall not be less than one month but which may extend to three years and with fine which shall not be less than two thousand rupees but which may extend to five thousand rupees, and in the case of a continuing offence with a further daily fine which may extend to two hundred rupees] for every day during which the offence continues after conviction for the first commission of the offence.

(2) Any person who continues to use or allows the use of any land or building in contravention of the provisions of a Development plan without being allowed to do so under section 45 or 47, or where the continuance of such use has been allowed under that section continues such use after the period for which the use has been allowed or without complying with the terms and conditions under which the continuance of such use is allowed, shall, on conviction be punished [with fine which may extend to five thousand rupees;] and in case of a continuing offence, with a further fine which may extend to one hundred rupees for every day during which such offence continues after conviction for the first commission of the offence.”

(emphasis supplied)

7. In the context, as to what Section 52 of the MRTP Act would provide, it is also necessary to note the provisions of Section 53 of the MRTP Act, under which the impugned notice has been issued. Section 53 reads thus:

“53. POWER TO REQUIRE REMOVAL OF UNAUTHORISED DEVELOPMENT.

(1) (a) Where any development of land has been carried out as indicated in clause

(a) or (c) of sub-section (1) of section 52, the Planning Authority may, subject to the provisions of this section, serve on the owner, developer or occupier a prior notice of 24 hours requiring him to restore the land to conditions existing before the said development took place;

(b) if the owner, developer or occupier fails to restore the land accordingly, the Planning Authority shall immediately take steps to demolish such development and seal the machinery and materials used or being used therefor.

1A) Where any development of land has been carried out as indicated in clause (b) or (d) of sub-section (1) of section 52, the Planning Authority may, subject to the provisions of this section, serve one months' notice on the owner, developer or occupier requiring him to take necessary steps as specified in the notice.

(2) In particular, such notice may, for purposes of sub-section (1), require—

- (a) the demolition or alteration of any building or works;
- (b) the carrying out on land of any building or other operations; or
- (c) the discontinuance of any use of land.

(3) Any person aggrieved by such notice may, within the period specified in the notice and in the manner prescribed, apply for permission under section 44 for retention on the land of any building or works or for the continuance of any use of the land, to which the notice relates, and pending the final determination or withdrawal of the application, the mere notice itself shall not affect the retention of buildings or works or the continuance of such use.

(4) The foregoing provisions of this chapter shall, so far as may be applicable, apply to an application made under sub-section (2).

(5) If the permission applied for is granted, the notice shall stand withdrawn; but if the permission applied for is not granted, the notice shall stand; or if such permission is granted for the retention only of some buildings, or works, or for the continuance of use only a part of the land, the notice shall stand withdrawn as respects such buildings or works or such part of the land, but shall stand as respects other buildings or works or other part of the land, as the case may be; and thereupon, the owner shall be required to take steps specified in the notice under sub-section (1) as respects such other buildings, works or part of the land,

(6) If within the period specified in the notice or within the same period after the disposal of the application under sub-section (4), the notice or so much of it as stands is not complied with, the Planning Authority may

(a) prosecute the owner for not complying with the notice; and where the notice requires the discontinuance of any use of land any other person also who uses the land or causes or permits the land to be used in contravention of the notice; and

(b) where the notice requires the demolition or alteration of any building or works or carrying out of any building or other operations, itself cause the restoration of the land to its condition before the development took place and secure compliance with the conditions of the permission or with the permission as modified by taking such steps as the Planning Authority may consider necessary including demolition or alteration of any building or works or carrying out of any building or other operations; and recover the amount of any expenses

incurred by it in this behalf from the owner as arrears of land revenue.

(7) Any person prosecuted under clause (a) of sub-section (6) shall, on conviction, [be punished with imprisonment for a term [which shall not be less than one month but which may extend to three years and with fine which shall not be less than two thousand rupees but which may extend to five thousand rupees, and in the case of a continuing offence with a further daily fine which may extend to two hundred rupees] for every day during which such offence continues after conviction for the first commission of the offence.

8) The Planning Authority shall, by notification in the Official Gazette, designate an officer of the Planning Authority to be the Designated officer for the purposes of exercise of the powers of the Planning Authority under this section and sections 54, 55 and 56. The Designated Officer shall have jurisdiction over such local area as may be specified in the notification and different officers may be designated for different local areas.”

(emphasis supplied)

8. It is clearly seen from the cumulative reading of Section 52(1)(a) read with Section 53(1) of the MRTP Act that if the construction is of a nature falling in Clause (a) of sub-section (1) of Section 52, undertaken without permission required under the MRTP Act, then necessarily the consequence under Section 53(1)(a) would become applicable namely the power vested with the planning authority to *inter alia* serve on the owner a prior notice of 24 hours requiring him to restore the land to its original condition existing before the said development took place. Therefore, the action of the municipal corporation in issuing a 24 hours notice, the construction in question, being per se illegal, falling within the purview of clause (a) of sub-section (1) of Section 52, certainly cannot be faulted.

9. In any event, the construction as undertaken by the petitioner has already stood demolished. If the petitioner has any intention to put up such construction, it is always open to the petitioner to make an application to the

municipal corporation (MCGM) seeking permission to put up such construction. Thus, in the facts and circumstances of the present case, we are not inclined to examine any academic issue and/or delve on a larger legal issue as being asserted by the petitioner, as seen from prayer clause (a).

10. For these reasons, in the facts of the present case, we are also not inclined to accept the submissions as urged by Mr. Godbole by placing reliance on the decision of the Division Bench in *Rajiv Mohan Mishra* (supra), as we do not find any illegality in the MCGM exercising its powers as vested in it under Section 53(1)(a) of the MRTTP Act read with Section 52(1)(a). We also cannot be oblivious that the present proceedings are filed under Article 226 of the Constitution of India, it would be always open to the petitioner to place reliance on such decision in the event the petitioner is of the opinion that the structure of the petitioner was legal, and prove the same in appropriate proceedings wherein a prayer for restoration of such structure as demolished, can be asserted, to be examined on evidence being led by the parties.

11. In light of the above discussion, we find no merit in the present petition. It is accordingly dismissed. No costs.

(R.N. LADDHA, J.)

(G. S. KULKARNI, J.)