

Vidya Amin

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

WRIT PETITION NO. 689 OF 2023

Gokul Arcade Premises Co-op. Society Ltd. ... Petitioner

Versus

Assistant Commissioner, K-East, Municipal ... Respondents
Corporation of Greater Mumbai & Ors.

Mr. Aseem Naphade a/w. Ms. Kavisha Shah, Mr. Hamza Lakhani and
Ms. Mehali Mehta i/b. India Law Alliance for the petitioner.

Mr. Pradeep Thorat with Mr. Rupesh Mandhare i/b. Sean Wassoodew
for respondent nos. 6 to 9.

Ms. Vandana Mahadik for respondent/MCGM.

Mr. Ashwajeet V. Adhav, Jr. Engineer (B &F), K/E Ward present.

**CORAM: G. S. KULKARNI
& R.N. LADDHA, JJ.**
DATED: 24 April, 2023

P.C.

1. Not on board. Upon mentioning, taken on board on a praecipe as moved on behalf of the petitioner

2. This petition is filed by the petitioner-Cooperative Society praying for the following reliefs:

“a) This Hon’ble Court be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or by other appropriate Writ, Order or Direction, directing the Respondent Nos. 1 to 5, its servants, subordinates & agents and successors in office to forthwith initiate action against the Respondent No. 6 to 9 u/s 351 of the MMC Act;

b) *This Hon'ble Court be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, Order or Direction, directing the Respondent Nos. 1 to 5, its servants, subordinates, agents and successors in office to forthwith initiate action against the Respondent No. 6 to 9 u/s 354A of the MMC Act for the continuous illegal construction being carried on at site;*

c) *This Hon'ble Court be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, Order or Direction, directing the Respondent Nos. 1 to 5, its servants, subordinates, agents and successors in office to forthwith remove the illegal permanent sheds constructed by the Respondent Nos. 6 to 9;*

d) *This Hon'ble Court be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, Order or Direction, directing the Respondent No. 6 to 9 to restrain from encroaching the common areas of the Petitioner society;*

e) *This Hon'ble Court be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, Order or Direction, directing the Respondent No. 10, its servants, subordinates, agents and successors in office to forthwith to inspect the premises and ensure compliance of fire safety norms;*

f) *This Hon'ble Court be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, Order or Direction, directing the Respondent Nos. 6 to 9, its servants, subordinates, agents and successors in office to forthwith to restore the said premises back to its original state in accordance with the sanctioned plans;*

g) *That pending the hearing and final disposal of the present petition, this Hon'ble Court may be pleased to restrain the Respondent nos. 6 to 9 from carrying out any construction work in their shops and maintain status quo."*

3. The grievance of the petitioner is *inter alia* in regard to the amalgamation by respondent nos. 6 to 9 of shop nos. 21 to 28 situated on the ground floor of the premises. This apart, the grievance is also in regard to encroachment by the respondents in the open space belonging to the

petitioner-society which is stated to be an encroachment on an area of about 2000 sq.ft. The case of the petitioner is that because of such encroachment, Fire NOC has not been issued to the premises.

4. Insofar the case of the petitioner in regard to amalgamation of shop nos. 21 to 28 by respondent nos. 6 to 9 is concerned, the co-ordinate Bench of this Court on 12 January, 2023 had passed an order directing the Municipal Corporation to depute a competent officer to visit the site to inspect the ground floor space and to submit its reply. It was observed that inspection shall be carried out in the presence of the authorised representatives of the petitioner and also in the presence of respondent nos. 6 to 9, after giving appropriate prior notice to them. We may note the said order, which reads thus:

“1. Heard learned Counsel for the parties.

2 Issue notice for final disposal at the admission stage to the Respondents, returnable on 9th February, 2023.

3 The learned AGP waives notice for Respondent Nos. 1 to 5 & 10. The learned Counsel waives notice for Respondent Nos.6 to 9. Copy of the Petition be served upon the learned Counsel for Respondent Nos. 1 to 5 & 10.

4 The grievance is about Respondent Nos. 6 to 9 illegally converting the ground floor space into some banquet hall.

5 The learned Counsel for the Petitioner submits that even though certain deviation has been noticed by the Corporation, no action has been taken by the Corporation for rectifying the deviation and removing the illegal construction so far made by Respondent Nos. 6 to 9.

6 The learned Counsel for Respondent Nos. 6 to 9 submits that whatever work was initiated, it was only in the nature of renovation and even that work has not been completed and no further civil activities are going on.

7 Stand over to 9th February, 2023.

8 In the meanwhile, we direct Respondent No. 1 to depute a competent officer to visit the site, inspect the ground floor space, in respect of which the Petition has been filed, and submit its report. Inspection shall be carried out in the presence of the authorized representative of the Petitioner and also Respondent Nos. 6 to 9 and/or any officer, after giving appropriate prior notice to them.

5. In pursuance of the above order passed by this Court, an inspection was undertaken and a report of the inspection was also prepared. Pursuant thereto, a notice was issued to respondent nos. 6 to 9 under the provisions of Section 351 of Mumbai Municipal Corporation Act (for short “**M.M.C. Act**”). In response to the said notice, respondent nos. 6 to 9 submitted all documents to justify that the amalgamation was not unauthorized. On such notice, the Designated Officer of the Municipal Corporation, K-East Ward, passed a speaking order dated 31 March, 2023 thereby after examining all the documents, the Designated Officer observed that respondent nos. 6 to 9 have failed to produce any authentic documents approved by the competent authority or any other document to prove its authorization. It was also observed that respondent nos. 6 to 9 have failed to show existence of the said structure prior to datum line, i.e., 1 April, 1962 for commercial structure. Accordingly, the Designated Officer directed respondent nos. 6 to 9 to remove the notice structure shown in the sketch as annexed to the notice under section 351 of the MMC Act within 15 days from the receipt of the said letter, failing which the subject premises shall be demolished by staff of the MCGM.

6. It is informed by Mr. Thorat, learned counsel for respondent nos. 6 to 9 that the speaking order dated 31 March, 2023 was assailed by respondent nos. 6 to 9 by approaching the City Civil Court at Mumbai, Borivali Division, Dindoshi in L.C. Suit No. 1019 of 2023. Also a Notice of Motion No. 1388 of 2023 was moved in the said Civil Suit. The learned Judge of the City Civil Court passed a detailed order dated 19 April, 2023 on such Notice of Motion in the following terms:

ORDER

“1. This Notice of Motion is taken out by the plaintiff for temporary and permanent injunction restraining the defendant from taking action in pursuance of impugned Notice dated 03/03/2023 and Speaking Order dated 05/04/2023 issued under Section 351 of MMC Act, in respect of notice work, till getting approval for the proposal and declaration declaring the notice and order to be null and void.

2. I have heard learned Counsel for the plaintiff and defendant and perused the entire Record and Proceedings, documents filed therewith and reply filed by the defendant/MCGM on N/M itself.

3. It is contended that plaintiff is owner of the Shop Nos. 21 to 28 consisted of Ground + Basement having an area admeasuring about 630 sq.ft. Carpet area (each), in the commercial building known as Gokul Arcade comprising Basement + Ground + 2 upper floors constructed on the plot of land bearing CTS No.173A of village Vile Parle situate at Vile Parle (East), Mumbai-400 057; as per approved Plan sanctioned u/ No. CE/5088/WS/AK on 24/02/1996 (hereinafter referred as Suit Premises).

4. It is claimed that plaintiff acquired ownership right under the MOFA Act. The suit premises are part of commercial building. The plaintiff has let out suit premises by an agreement for Leave and License on 30/8/2022. The Licensee of plaintiff has obtained Shop and Establishment Certificate. The plaintiff, in order to get permission for change of user from shop to banquet hall, has approached before defendant through architect and submitted proposal for permission as per rule. Fire Brigade Department has granted ‘NOC’. The plaintiff started tenantable repairs. The proposal is pending before the defendant/ Corporation for due decision.

5. It is alleged that suddenly on 03/03/2023 the defendant/Corporation had issued Notice alleging that plaintiff had carried out unauthorized construction at the suit building. The plaintiff replied to the said Notice alongwith furnishing documents but the defendant/ Corporation without considering reply and documents passed Speaking Order on 05/04/2023 directing to demolish the notice structure. It is submitted that the above mentioned work are beyond approved plan therefore, notice under Section 351 is bad and illegal. The defendant cannot act when the proposal is pending before the defendant/Corporation for obtaining permission. So, impugned Notice as well as Speaking Order being illegal same is liable to be quashed and set aside. Hence, the plaintiff instituted the suit.

6. The plaintiff has taken out Notice of Motion for relief mentioned in terms of the prayer Clauses (a) to (c) as stated above and relied upon Copy of approved plan sanctioned u/No. CE/5088/WS/AK on 24/02/1996, Copy of Leave and License Agreement, Copy of Shop and Establishment Certificate, Copy of Proposal dated 7/02/2023, Copy of Rule 39 of DCPR 2034, Copy of 'NOC' from Fire Brigade Department of Corporation, Copy of Policy, Copies of License obtained from Competent Authority, Copy of Notice dated 3/03/2023, reply dated 10/03/2023, copy of order dated 5/04/2023, copy of Circular dated 04/03/2002, etc.

7. The learned Counsel for the plaintiff submitted that the building is in existence as per approved plan, It is constructed by the Builder. It is assessed to the Tax Department. The suit structure is purchased by the plaintiff. He submitted that the defendant/Corporation wrongly issued the Notice Under Section 351 of MMC Act instead of 53 of MRTP Act. He further submitted that the plaintiff has right to file an Application for Regularization through its Architect but the Notice was issued illegally Under Section 351 of MMC Act prescribing the deadline of 7(seven) days. Therefore, the plaintiff has an apprehension to demolish the suit building in pursuance of impugned Notice and speaking order. He submitted that the even if, notice under Section 351 of MMC Act is issued, still the plaintiff is entitled to regularization of suit building. He pointed out that the plaintiff has already submitted regularization application before the defendant/Corporation on 7/02/2023 in the prescribed format. The same application is pending. He submitted that during the pending the application under Section 53(3) of MRTP Act, the defendant/Corporation has no any right to take action in pursuance of impugned notice and order.

8. The learned Counsel on the instruction of plaintiff submitted that if the Notice of Motion is decided directing defendant to consider the Application for Regularization and decide in accordance with law granting protection to the notice structure, in that event the Notice of Motion as well as the whole suit may be disposed of. The statement of learned Counsel for plaintiff is recorded and accepted.

9. *The Notice of Motion is resisted by the defendant/Corporation. The learned Counsel for the defendant submitted that prima facie there is unauthorized construction as mentioned in the Schedule of notice. There is no document with the plaintiff to show that the notice structure has been constructed as per the approved plan or permission granted by the defendant/Corporation. Therefore, the plaintiff is not entitled for any protection as prayed for. He fairly admits that the Application for Regularization of the plaintiff is pending and he is ready to decide in accordance with law. Ultimately, he prayed to dismiss the Notice of Motion.*

10. *It appears from impugned Notice that Notice is issued to the suit building for Unit Nos.21 to 28 for unauthorized development. The Agreement for Sale pertaining to suit building shows that the building has been constructed as per the approved plan No. CE/5088/WS/AK dated 24/02/1996 obtained from the Municipal Corporation of Greater Mumbai. The plaintiff has filed the proposal for permission for the unauthorized development. Record further shows that plaintiff approached before the concerned Department of the defendant for regularization of unauthorized structure in prescribed manner before Executive Engineer (Building and Proposal) Department through its licensed Architect or Surveyor on 07/02/2023.*

11. *It is argued by the Ld. Counsel for the plaintiff that Under Section 53 (3) r/w Section 44 of MRTP Act, even if the Notice is issued under Section 351 of MMC Act, considering the facts and circumstances of the case, the plaintiff is entitled to approach for the regularization of the Notice structure as provided Under Section 53(3) of MRTP Act, though the Notice structure is unauthorized and defendant is duty to bound to decide the proposal in accordance with law. In the case of Ms. Kangana Ranaut (supra) Hon'ble Bombay High Court held that even if the petitioner is failed to show sufficient cause to the notice, it was open to petitioner to approach MCGM for regularization of such work which is commenced contrary to Section 342 and 347 of MMC Act. Even if, the Notice is given Under Section 354-A of MMC Act. The ratio of said judgment is squarely applicable to the present case considering the facts and circumstances of the case.*

12. *In this case, the notice ought to have been given under the provision of MRTP Act since there is allegation that the unauthorized construction is carried out beyond approved plan. Therefore, I hold the plaintiff is entitled to approach for regularization of notice structure considering facts and circumstances of the case, in which plaintiff has already approached. The defendant is duty bound to decide the said proposal in accordance with law. Furthermore, as per section 53(3) of MRTP Act till the decision of the said proposal, the defendant cannot take action, on the basis of impugned Notice and order °*

13. *In view of above discussion, considering the statements made by both parties and material available on record, the following order would meet end of justice. Hence I pass the following order -*

ORDER

1. *The Notice of Motion No.1388 of 2023 is disposed of with following directions:*

i) The defendant/Corporation shall decide the proposal of regularization, filed on 7/02/2023 by plaintiff in respect of Notice structure in accordance with law, till then no coercive action shall be taken and thereafter, 2(two)weeks.

ii) Needless to say, that in case the regularization proposal is rejected, the defendant/Corporation shall be entitled to execute Notice dated 03/03/2023 and Speaking Order dated 05/04/2023 issued under Section 351 of MMC Act after prescribed period, in accordance with law.

2. *In wake of disposal of Notice of Motion, the suit of the plaintiff becomes infructuous. Hence, it is also disposed of as per the statement made by the plaintiff.*

3. *All the contentions of the parties shall be kept open.*

4. *The Notice of Motion No. 1388 of 2023 and L.C. Suit No. 1019 of 2023 stand disposed of accordingly.”*

7. Thus, the position is that the regularization application filed by respondent nos. 6 to 9 is pending consideration of the Municipal Corporation. The suit itself is also disposed of. The regularization application would now be decided by MCGM in accordance with law.

8. Insofar as the issue of amalgamation is concerned, in our opinion, the grievance of the petitioner as urged in the petition would stand substantially addressed and now it is subject matter of the regularization application and all rights and contentions of the parties in that regard are kept open. The

petitioner be also heard by the concerned officer of the Municipal Corporation in deciding the regularization application.

9. Insofar as the grievance of the petitioner regarding encroachment on the open space, which is stated to be of about 2000 sq.ft., by respondent nos. 6 to 9 and which has become a reason for non-issuance of Fire NOC by the Municipal Corporation, we direct the Designated Officer of the Municipal Corporation, to whom about four representations are addressed by the petitioner, to decide the same in accordance with law after hearing the petitioner and also respondent nos. 6 to 9. Let an appropriate order after hearing the parties be passed on such representation, within a period of three weeks from today. All contentions of the parties in that regard are kept open. It is clarified that the Designated Officer shall decide the petitioner's representation after the regularization application is decided by the Building Proposals Department.

10. The observations as made above shall not come in the way of any pending legal proceedings between the parties. As also the complaints/representation of the petitioner in regard to encroachment be decided by the Designated Officer after considering all the materials on its own merits.

11. We accordingly, dispose of the Writ Petition in the above terms. No costs.

(R.N. LADDHA, J.)

(G. S. KULKARNI, J.)

corrected as per speaking to minutes order dated 21.06.2023.