

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 1463 OF 2024.

Gold Plaza Developer Pvt. Ltd.]
A Company incorporated under the Indian]
Companies Act, 1956 having its office at 303,]
Swapna, Tarabaug, Lovelane, Mazgaon,]
Bombay – 400 010.] **...Appellant.**

Versus

The Municipal Corporation of Greater Bombay]
A Body Corporate incorporated under Bombay]
Municipal Corporation Act, 1888]
Having its office at Mahapalika Bhavan,]
Mahapalika Marg, Opp. C. S. T. Fort, Bombay –]
400 001.] **...Respondent.**

Ms. Pushpa Ganediwala, Ms. Anshu Agrawal i/b Ms. Indira Labde for the Appellant.

Ms. Vidya Vyavhare for Respondent-Corporation.

Coram : Sharmila U. Deshmukh, J.

Date : January 7, 2025.

Oral Judgment :

1. The present Appeal challenges the judgment and decree dated 22nd December, 2022 passed by the City Civil Court in L.C. Suit No. 116 of 2012 dismissing the suit filed by the Appellant challenging the Notice under Section 354A of the Mumbai Municipal Corporation Act, 1888 [for short, ***“the MMC Act”***] dated 25th January, 2011 and orders dated 28th March, 2011 and 7th January, 2012.

2. The facts of the case as pleaded in the plaint is that the plaintiff is owner of the property situated at 1st Shekhandi lane, 61-65, Vithalwadi, Bombay – 400 002 acquired under the Registered Deed of Conveyance. There was in existence, a structure comprising of ground plus six upper floors, which was totally in dilapidated condition and the plaintiff undertook tenantable repairs after getting sanctioned the repair plan from Maharashtra Housing and Area Development Authority. The notice under Section 354A of the MMC Act dated 25th January, 2011 was issued by the Corporation which came to be challenged by filing L.C. Suit No. 228 of 2011 wherein order dated 31st January, 2011 was passed to consider the plaintiff's reply. After considering the reply, the Corporation passed an order dated 28th March, 2011 which was challenged in L.C. Suit No. 773 of 2011. The application for ad-interim relief taken out in the said suit was rejected as against which Appeal from Order was filed before this Court and by order dated 5th April, 2011, the plaintiff was directed to approach defendant for permission to carry out construction, reconstruction, repairs, etc. to suit premises and the suit and appeal came to be disposed of. Pursuant thereto, the plaintiff applied for permission for reconstruction, repairs, regularization, etc. which came to be dismissed on the ground that it is not in proper format. By communication vide order dated 7th January, 2012, the Corporation communicated that it

will proceed with Notice under Section 354A and the orders passed thereto.

3. By the instant suit, the plaintiffs sought the substantial relief of declaration of the notice under Section 354A and the consequent orders as illegal, bad in law and liable to be revoked and by prayer clause (b) sought an order and direction to Defendant to furnish the format of Application for permission to reconstruct and for permanent injunction.

4. The suit came to be resisted by the Corporation raising various grounds challenging the maintainability in the absence of notice under Section 527 of the MMC Act. It was contended that the site was inspected on 25th January, 2011 where it was observed that unauthorized construction of structure with M.S. Girders and B. M. walls above the ground floor level was found in progress and no permission was produced for the said work. The officer of the Corporation took photographs and issued notice. After receipt of the notice, the plaintiffs submitted their reply and after considering the reply, the order has been passed for demolition. It was further contended that on 18th January, 2012, partial demolition up to top three floors was carried out and the rest of the structure was to be demolished on 19th January, 2012. However, in view of the *status quo* order passed by the Court, the same could not be proceeded with.

5. The parties went to trial. The plaintiff examined two witnesses, and produced the deed of conveyance, notice under Section 354A, replies filed by plaintiff, the orders passed in the previous litigation and the sanctioned repair plain of 7th February, 1961. The defendant examined its Junior Engineer and produced sixteen documents which included inspection report, complaint, notice under Section 354A, copy of the orders passed, unauthorized structure, detection sheets, partial demolition report, photocopy of photographs, assessment extract.

6. The Trial Court framed and answered the following issues:

Sr. No.	Issues
1.	Does the plaintiff prove that impugned notice dt.25/01/2011 issued u/s.354A and order dt.07/01/2012 are illegal, bad in law and null and void?
2.	Whether suit is bad in law for non-issuance of notice u/s.527 of MMC Act?
3.	Whether this Court has jurisdiction in view of Section 515A of MMC Act?
4.	What order and decree?

7. The Trial Court answered the Issue Nos. 2 and 3 in favor of Plaintiff, and answered the Issue No.1 in negative leading to dismissal of the suit.

SUBMISSIONS:

8. Ms. Ganediwala, learned counsel appearing for Plaintiff would submit that the Trial Court has failed to notice the sanctioned repair

plan which was placed on record after the evidence was led, which is of the year 1961. She submits that for challenging Section 354A notice, it was required to be shown that the structure was a tolerated structure as it is the consistent case of plaintiff in the plaint that the structure i.e. ground plus six floor is in existence prior to the datum line, i.e. prior to the year 1962. She submits that in support of said case, the evidence in the form of repair plan was duly produced, however, the same has not been properly considered by the Trial Court. She has taken this Court in detail to the findings *qua* the plan produced and would submit that erroneous finding has been arrived by the Trial Court stating that the certified copy of the Plan has not been produced. Pointing out the Plan along with the Application as well as repair permission granted by the Brihanmumbai Municipal Corporation, she would contend that the fact that the repair permission was granted in the year 1961 establishes the case of the structure being a tolerated structure. Pointing out Section 354A of MMC Act, she would submit that notice has been issued in respect of unauthorized construction of M.S. Girders and B.M. Walls above the ground floor level and when the sanctioned plan was on record, which shows the existence of structure of ground plus six floors prior to datum line, the notice issued under Section 354A is bad in law. She would further submit that it is the consistent case of the plaintiff that due to the dilapidated condition of the structure,

tenantable repair works were being carried out and there is no construction work which required permission of the Corporation.

9. *Per contra* Ms. Vyavhare, learned counsel appearing for Corporation would submit that in the Interim proceedings, an Application was filed by the plaintiff seeking regularization of the structure which itself indicates that the structure was an unauthorized structure. She submits that partial demolition was carried out on 17th January, 2012 which has not been challenged and therefore, it is proved that the construction above the ground floor was unauthorized construction. She would further point out the assessment remarks which were produced on record before the Trial Court to contend that the assessment remarks show that the property above ground floor has not been assessed and therefore, the existence of the structure prior to the datum line has not been proved. She would further submit that in the plaint, it has been admitted that repairs are been carried out which means there is some sort of work which has been carried out for which no permission has been produced on record and in light of the same, the notice under Section 354A has been rightly issued. She submits that the orders subsequent to the issuance of Section 354A notice has been passed after assessing the replies which have been filed and therefore, the notice is required to be upheld. She would further submit that the reliance has been placed on the repair plan of

MHADA is misplaced as it only shows that there was some repair which has been carried out. She would further point out prayer clause (b) of the Complaint, which seeks relief of direction to the Corporation to furnish the format of the Application for permission of regularization and submits that even if the sanctioned plan was produced later on, no Application was made for amending the Complaint for deleting the said prayer, which leads to the fact that there was unauthorized construction carried out.

10. In rejoinder, Ms. Ganediwala would point out that as far as the assessment remarks are concerned, the same refers to the Property No.61 to 63 whereas the subject-property is 61-65 and therefore, the assessment remark is not pertaining to the present property.

11. The following points arise for determination:

(i) Whether the impugned notice dated 25th January, 2011 issued under Section 354A of the MMC Act and orders dated 28th March, 2011, 7th January, 2012 are illegal, bad in law and are liable to be quashed and set aside;

(ii) Whether the plaintiff has established that the structure of ground plus six floor is a tolerated structure as it is in existence prior to the datum line of the year 1962 and is therefore, protected.

As to Point Nos.(i) and (ii):

12. Both the points are interlinked and therefore are taken up for

consideration together. The plaintiff has challenged notice under Section 354A issued in respect of an unauthorized construction structure by M.S. Girders and B.M. Walls above ground floor level. For the purpose of protecting the said structure, it is required for the plaintiff to establish that either the structure is a tolerated structure in as much as its existence prior to the datum line of 1962 or that the same has been constructed after obtaining permission from the Corporation. In the plaint, the case of the plaintiff is that he has purchased the said structure consisting of ground plus six floors by Deed of Conveyance of 25th September, 2008 and as the same was in dilapidated condition, certain tenantable repairs were carried out. The case of the Corporation is that the structure is of ground floor and unauthorized construction above ground floor was being carried out by erection of M.S. Girders and B.M. Walls above ground floor level which led to issuance of the Notice under Section 354A of the MMC Act.

13. Perusal of the judgment of the Trial Court would indicate that before the Trial Court, the repair plan of the existing building was produced which was marked as Exhibit-49 along with an Application dated 20th November, 1960 by the Architect to the Corporation seeking permission for the proposed repairs and enclosing the copies of the proposed repair plan. The acknowledgment of the Corporation is seen from the stamp on the said Application which is dated 20th November,

1960, i.e. the same date when the Application was submitted. The plaintiff had also produced permission for repairs to the existing building which was granted on 7th February, 1961 and the copy of the plan duly signed was enclosed as token of approval. Perusal of the said Plan would indicate the stamp of Corporation that the same has been approved subject to the conditions mentioned therein.

14. The said plan though produced on record was not considered by the Trial Court by observing that certified copy of sanctioned repair plan is not produced and notarized plan has been produced. When this observation is considered in light of the sanctioned plan produced on record along with Application for permission and the permission granted by the Corporation, it is clear that the Trial Court has arrived at an erroneous factual finding, as the plan produced is the original plan containing the Corporation's approval stamp. Further, the Trial Court has held that the permission has been granted on 7th February, 1961 and the plan is preceding the permission to doubt the authenticity of the plan. The said finding cannot be upheld for the simple reason that the proposed repair plan is required to be filed along with the Application and upon consideration thereof, the Corporation grants the permission and therefore, the sanctioned plan will necessarily precede the date of permission granted. Another reason why the Trial Court has doubted the genuineness of the said Plan is that the plan

does not bear particulars of file number and date of approval. There is stamp of approval by the Corporation's Department and when the sanctioned plan along with the Application for permission as well as the permission are read together, the same establishes the existence of structure i.e. ground plus six floors prior to the datum line of 1962.

15. Coming to the notice issued under Section 354A, although the same refers to the unauthorised construction of structure with M.S. Girders and B.M. walls, the notice does not state that there was any demolition of the previous structure and re-erection without any permission from the Corporation. Although, the written statement of the defendant refers to photographs, nothing has been demonstrated from the photographs to show that at the time when the site was inspected by the concerned Engineer, only the ground floor was in existence and there were no upper floors. This vital piece of evidence is missing. The sanctioned plan produced on record which shows the existence of ground plus six floors coupled with the absence of any material on record to demonstrate that at the time when the notice under Section 354A of the MMC Act was issued, the upper floors were demolished and new construction was being carried out leads to the inevitable conclusion that the structure is a tolerated structure being in existence prior to datum line of the year 1962.

16. As far as the contention as regards the assessment remarks not

showing the assessment of the said structure of ground plus six floor is concerned, Ms. Ganediwala has rightly pointed out that assessment remarks which are produced on record are in respect of Property Nos. 61-63, whereas the subject premise is Property bearing Nos. 61-65.

17. Ms. Vyavhare would also refer to the admission in cross-examination as well as the permission for regularization to support the contention of the Corporation that the structure was an unauthorized construction. The answer can be found in the judgment itself where the Trial Court has noted that the sanctioned plan was placed on record at the fag end of trial on the basis, the same was obtained subsequently from the erstwhile owners. The said observation is sufficient answer to the objection raised by Ms. Vyavhare. As it is the specific case of the plaintiff that he was not in possession of the sanctioned repair plan of the year 1961, at the time, when the permission for regularization was sought and it is only subsequently at the fag end of trial that he was able to lay his hand on the said repair plan, it is clear that the Application for regularization even if made would not come in the way of the conclusion that the structure of ground plus six floor was a structure in existence prior to the datum line. If it is the contention of the Corporation that the structure was demolished and re-erected, the same does not find the place in Section 354A notice or in the pleadings. Ms. Vyavhare would also rely upon the

decision in the case of ***Oliul Haque Shaikh vs. State of Maharashtra***¹, in Notice of Motion filed in Public Interest Litigation to contend that the plaint must make an averment in respect of the sanction obtained from the Corporation and merely pointing out the deficiency to the notice or the authority of the person issuing the notice was not sufficient. The said observations are noted in completely different factual scenario. In the present case, the case of the plaintiff is that the structure is a tolerated structure, which is established from the production of the sanctioned repair plan of the year 1961 read along with Application seeking permission to repair and permission of 7th February, 1961 granted by the Corporation itself.

18. In light of the above, the issues are answered in favor of the plaintiff. Accordingly, the following order is passed :

: O R D E R :

- [i] First Appeal stands allowed.
- [ii] The judgment and decree dated 22nd December, 2022 passed in L.C. Suit No. 116 of 2012 is reversed.
- [iii] L.C. Suit No. 116 of 2012 is decreed in terms of prayer clause 'a'.
- [iv] Decree to be drawn up accordingly.

[Sharmila U. Deshmukh, J.]

1 2019 SCC OnLine Bom 13381.