

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 8723 OF 2024
IN
FIRST APPEAL NO. 745 OF 2024

Mrs. Meena Bhupat Giri ...Applicant.

IN THE MATTER BETWEEN

Mrs. Meena Bhupat Giri ...Appellant.

Versus

The Municipal Corporation of Greater Mumbai
and Others. ...Respondents.

WITH
INTERIM APPLICATION NO. 8718 OF 2024
IN
FIRST APPEAL NO. 744 OF 2024

Amrutlal Pasubhai Gala ...Applicant.

IN THE MATTER BETWEEN

Chunilal Narsi Savla (since deceased) ...Appellants.
Through legal heirs

Versus

The Municipal Corporation of Greater Mumbai
and Others. ...Respondents.

Mr. Pradeep J. Thorat and Ms. Sakshi Agarwal i/b. Mr. Bipin J. Joshi, for the Appellant
Ms. Pallavi Khale for Respondent No. 1 – MCGM
Mr. Akshay Patil, Mr. Jarin Doshi and Ms. Devika Mahadekar i/b. Malvi Ranchoddas and Company, for Respondent Nos. 3 to 5

Coram : Sharmila U. Deshmukh, J.

Date : February 20, 2025.

P. C. :

1. The Interim Application has been preferred seeking an order of injunction restraining the Corporation from acting upon the impugned notice issued under Section 351 of the Mumbai Municipal Corporation Act, 1888 (for short ***"MMC' Act"***) and implementing the speaking order dated 9th March 2010 in respect of the suit premises Shop No.2 which was the subject matter of proceedings before the trial Court in L. C. Suit No. 638 of 2010.

2. By the impugned Judgment dated 30th March 2024, the trial Court has dismissed the suit with costs. As against this, the present First Appeal has been preferred and has been admitted by this Court. Today, the matter is taken up for interim relief of stay of the impugned notice, failing which notice under 351 of the MMC Act would be put into action and the alleged unauthorized construction will stand demolished. Though the hearing is ostensibly between the noticee who is Appellant in the present case and the Corporation, the opposition to the stay is by the Learned Counsel for the landlord. The learned Counsel for the Corporation has failed to advance any arguments to support its own order. This is a common phenomenon noticed by this Court in a number of cases, where all actions right from

the issuance of notice under Section 351 of MMC Act to the final decision are being defended by the landlord, whereas the Corporation stands by as passive spectator. The present case is no different from those cases.

3. In the present case, the notice under Section 351 of the MMC Act was issued by the Corporation for alleged unauthorized construction of shops with brick masonry walls, AC sheet roof and rolling structure and unauthorized construction of mezzanine floor as shown in red colour in sketch. The notice came to be answered by the Appellant by reply dated 24th April 2009 and by Speaking Order dated 9th March 2010, the Corporation directed the Appellant to remove the unauthorized work, i.e., ground floor structure admeasuring about 13.37 Sq. meters and full mezzanine floor as shown in the accompanied sketch within 15 days from receipt of Order.

4. The impugned Order records that as per the remarks received from the assessment department dated 4th November 2009, area of structure is 13.80 sq. meter assessed to municipal taxes prior to 1961-62 and that no documents have been produced showing mezzanine floor prior to 1st April 1962 which is *datum* line for protecting commercial structure.

5. Mr. Thorat, learned Counsel appearing for the Appellant has taken this Court through the findings of the trial Court and would

submit that it was pointed out to the trial Court through the CTS plan that the tolerated structures are shown in Black ink which has been accepted by the trial Court. He would further submit that the impugned Judgment records the submissions of the Advocate for the MCGM that as per the assessment remarks, the ground floor structure admeasuring 13.80 Sq. meter and loft structure admeasuring 10.80 Sq. meter is assessed prior to 1961-62. He would submit that once it is the specific case of Corporation that part of the structure was subject to assessment prior to 1961-62, the notice which was issued under Section 351 of the MMC Act could not have been issued in respect of the unauthorized construction of the entire structure. He would further submit that a repair plan was relied upon by the Plaintiff below Exh. 42 which repairs were permitted by an Order of 1st March 1978 by the MCGM which has been discarded by the trial Court on the grounds that the said plan is in respect of a structure situated on CTS No. 3743, Plot No. 16 whereas the notice structure is situated on CTS No. 3746. He points out to the conveyance of the Respondent No. 2 and would submit that the conveyance is in respect of the property bearing original plot No. 9B and final plot No. 16 which is reflected in the repair permission. He would further point out the repair plan to show that repair permission was granted. He would further point out that the permission of 22nd May 1986 below Exh. 40 is in respect of the

structure situated on Plot No. 9B, final Plot No. 16 as held by the trial Court without noticing that the conveyance of the Respondent No. 2 itself refers in the schedule to the property as Plot No. 9B, final plot No.60.

6. *Per contra* learned Counsel appearing for Respondent No. 2 would submit that the assessment records produced by the Corporation before the trial Court would show that what was assessed prior to 1961-62 was the AC sheet roof and the shop admeasuring 13.80 Sq. meters and a loft area admeasuring 10.80 Sq. meters. He submits that the Speaking Order of the Corporation refers to the same and thereafter, has directed the demolition of unauthorized structure depicted by way of a sketch which is annexed to the Speaking Order. He submits that in view thereof, notice under Section 351 of the MMC Act was rightly issued. He would further point out the Deed of Assignment executed on 23rd May 1986 pursuant to which the rights are claimed by the Appellant and that the same refers to a shop admeasuring 400 Sq. feet and mezzanine floor of 400 Sq. feet. He submits that apart from the assessment remarks, there is nothing which is produced on record by the Appellant to show the existence of the suit structure prior to 1961-62. He would further submit that the power to grant injunction has to be exercised cautiously as held by a learned Single Judge of this Court (Coram : G. S. Kulkarni, J.) in the case of **Mohammed Iqbal Abdul**

vs. The Municipal Corporation of Greater Mumbai and another passed in ***Appeal from Order No. 85 of 2023 with Interim Application No. 1235 of 2023.***

7. I have considered the submissions and perused the records carefully.

8. The First Appeal has already been admitted by this Court and today, the issue is whether the notice structure is required to be protected pending the hearing and final disposal of the Appeal.

9. As to what is the notice structure can be found out from the notice issued under Section 351 of the MMC Act which describes the structure as an unauthorized construction of shop with brick masonry wall, AC sheet and rolling shutter and unauthorised construction of mezzanine floor. The notice was issued under Section 351 of the MMC Act on 23rd April 2009 which was responded to by the Appellant by producing the records which were available with them. After obtaining remarks from the assessment department, the Corporation in its Speaking Order dated 9th March 2010 has specifically recorded that as per the assessment department's remarks, the area of structure admeasuring 13.80 Sq. meter is assessed to municipal taxes prior to 1961-62. The remarks of the Corporation's own assessment department would therefore, demonstrate that part of the structure in respect of which notice was issued under Section 351 of the MMC Act

was an authorized structure. The moment the Corporation realizes that the portion of the structure is assessed prior to 1961-62, the same would be a tolerated structure and liable to be protected prior to the *datum* line. In such cases, it is incumbent upon the Corporation to issue fresh notice in respect of the unauthorized portion of the structure, which has not been done in the present case. The speaking order directs removal of unauthorised work i.e. ground floor structure admeasuring about 13.37 square meters and full mezzanine as per the accompanying sketch. Although a sketch has been annexed along with the Speaking Order depicting the unauthorized portion, there is no basis for the said sketch as it is not with reference to any plans or permissions which were granted earlier by the Corporation based on which it can be said with conclusiveness that this particular portion was the unauthorized portion. The speaking order directs the demolition of the so called unauthorised construction without giving any opportunity to the Plaintiff to submit its explanation to the assessment remarks. Once the Corporation finds from the assessment remarks that the portion of the structure is authorized then *prima facie* the foundation for the notice under Section 351 of the MMC Act is demolished which describes the whole construction as an unauthorized construction.

10. It is not the case of the Corporation that the structure which was

earlier authorized has been demolished and in its place a new structure has been erected. The Speaking Order specifically records that part of the structure admeasuring 13.80 Sq. meter is authorized. Further, it is the Corporation's own case before the trial Court that the ground floor structure admeasuring 13.80 Sq. meter and the loft area admeasuring 10.80 Sq. meter has been assessed prior to 1961-62. The assessment records were produced by the Corporation before the trial Court which establishes that portion of the structure is authorized. That being so, the notice could not have been issued under Section 351 of the MMC Act for demolition of the entire structure. *Prima facie* case for grant of ad-interim relief is made out by the Applicant.

11. As far as the balance of convenience is concerned, part of the notice structure has been shown existing prior to 1961-62. The Applicants are in possession of the said premises and at least from 1986 which is the Deed of Assignment which shows that the Applicants have been assigned the said structure admeasuring 400 Sq. feet ground floor and 400 Sq. feet mezzanine floor. As the Appeal will have to be heard finally in order to determine the merits of the matter, at this stage, the balance of convenience is in favour of the Plaintiff and in event the order is not stayed, the notice structure will be demolished and the Appeal will be rendered infructuous.

12. In view of the above, the Interim Application is allowed in terms

of prayer clause (a).

[Sharmila U. Deshmukh, J.]