

**(2008) 02 BOM CK 0166**

**In the Bombay High Court**

**Case No :** Appeal from Order No. 147 of 2008 and Civil Application No. 186 of 2008

Mrs. Shameem Shah through her constituted attorney Mr.  
Abdul Rehman Khan

**APPELLANT**

**Vs**

Brihanmumbai Mahanagarpalika

**RESPONDENT**

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**Date of Decision :** 18-02-2008

**Acts Referred:**

Maharashtra Regional and Town Planning Act, 1966 — Section 136, 136(1), 149, 52(1), 55

**Citation :** (2008) 4 MhLj 699

**Hon'ble Judges :** J.H. Bhatia, J

**Bench :** Single Bench

**Advocate :** Aditya Chitale, for the Appellant; Geeta Joglekar, for the Respondent

**Final Decision :** Allowed

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**Judgement**

J.H. Bhatia, J.—Heard the learned Counsel for the Parties.

2. The appellant before this Court is the original plaintiff. According to the appellant, she had purchased the suit premises being suit shop No. 4 from one Vinod Vishram Tawade on 18.2.1997. The said Vinod Tawade had purchased the suit premises from one Bazirao Shripat Thorat, who was original allottee. On 21.9.2007, two person from the office of the defendant/ Municipal Corporation approached the suit premises and asked the brother and sister of the plaintiff to demolish the suit premises. According to the plaintiff, no notice was served by the defendant to the plaintiff and the defendant is intending to demolish the suit premises without following due process of law. With this contention, she filed suit seeking to restrain the defendant from taking any action without due process of law till decision of the suit. She also took out notice of motion for temporary injunction of the same nature. The defendant contested the notice of motion contending that the suit shop itself is illegal and unauthorised construction. There are number of illegal structures in the said vicinity of Tata Colony, Bharat Nagar,

Bandra (East). So, the defendant/BMC had issued notice u/s 55 of the Maharashtra Regional & Town Planning Act (In brief M.R.T.P. Act) and thus, due process of law has been followed. It was contended that after service of the said notice dated 20.06.2007, the occupants from the said vicinity challenged the said notice by filing L.C. Suit No. 2619 of 2007 and in that suit, notice of motion was dismissed and even the appeal was dismissed. It is contended that the plaintiff was aware of that notice and the said proceeding and, therefore, now she can not take a stand that the notice has not been served. After hearing the parties, the learned trial Court dismissed the Notice of Motion No. 252 of 2007. Hence, the plaintiff has preferred the present appeal.

3. As it is the case of the plaintiff/appellant that no notice was served on her and that the defendant is not taking action, which is as per the due process of law, I called upon the learned Counsel for the defendant/respondent to show the notice, which was issued and served on the plaintiff. The learned Counsel for the respondent made a statement that notice dated 20.6.2007 was issued to the Chairman and Secretary of Tata Colony Co-operative Housing Society. She has also shown that notice. As per that notice, the said Chairman and Secretary were informed that they had carried out development of temporary nature unauthorizedly without permission required under the M.R.T.P. Act and, therefore, they were called upon to remove unauthorised development within 15 days from the receipt of the notice. They were also informed that if they would fail to comply with requisition, they would be liable to prosecution and the unauthorised work would be demolished by the Municipal Corporation. The learned Counsel for the Corporation could not show me any notice, which has been issued to the plaintiff. It is contended that the name of the plaintiff was not on record of MHADA. However, the learned Counsel for the plaintiff has pointed out that the plaintiff is running business of sale of auto parts in the suit shop and for that purpose licence under Bombay Shops And Establishments Act, 1948 has been issued on 22nd February, 2000 and that licence has been renewed from time to time. Therefore, it can not be said that the Municipal Corporation was not aware about the name of the present plaintiff. Any way it is clear that notice was not issued to the plaintiff, though a notice was issued to the Chairman and Secretary of the Society and possibly notice might have been issued to some other persons, who had also made unauthorised construction of temporary nature.

4. Section 55(1) of the M.R.T.P. Act reads as follows:

Section 55 Removal of discontinuance of unauthorised temporary development summarily:

(1) Notwithstanding anything hereinbefore contained in this Chapter, where any person has carried out any development of a temporary nature unauthorizedly as indicated in Sub-section (1) of Section 52, the Planning Authority may by an order in writing direct that person to remove any structure or work erected, or discontinue the use of land made, unauthorizedly as aforesaid within fifteen days

of the receipt of the order; and if thereafter, the person does not comply with the order within the said period, the Planning Authority may request the District Magistrate or the Commissioner of Police, as the case may be, or authorize any of its officers or servants, to have such work summarily removed or such use summarily discontinued without any notice as directed in the order, and any development unauthorizedly made again, shall be similarly removed or discontinued summarily without making any order as aforesaid.

(2) The decision of the Planning Authority on the question of what is development of a temporary nature shall be final.

From the language of Section 55(1), it becomes clear that where any person has carried out any development of a temporary nature unauthorizedly, the Planning Authority may by an order in writing direct that person to remove any structure or work erected or discontinue the use of land made, unauthorizedly within 15 days of the receipt of the order. Therefore, receipt or service of the order is important. Section 136 of the M.R.T.P. Act provides as to how notice should be served. Section 136(1) reads as follows:

136. (1) All documents including notices and orders required by this Act or any rule or regulation made thereunder to be served upon any person shall save as otherwise provided in this Act or rule or regulation, be deemed to be duly served

(a) where the document is to be served on a Government department, railway, local authority, statutory authority, company, corporation, society or other body, if the document is addressed to the head of the Government department, General Manager of the Railway, Secretary or Principal Officer of the local statutory authority, company, corporation, society or any other body at its authority, principal, branch, local or registered office, as the case may be, and is either

(i) sent by registered post to such office; or

(ii) delivered at such office;

(b) where the person to be served is a partnership, and if the document is addressed to the partnership at its principal place of business, identifying it by the name or style under which its business is carried on, and is either

(i) sent by registered post to such office; or

(ii) delivered at the said place of business;

(c) in any other case, if the document is addressed to the person to be served and

(i) is given or tendered to him; or

(ii) if such person cannot be found, is affixed on some conspicuous part of his last known place of residence or business, or is given or tendered to some adult member of his family or is affixed on some conspicuous part of the land or

building to which it relates; or

(iii) if sent by registered post to that person.

From this, it is clear that firstly, the notice or order should be addressed to the person to be served. Secondly, that order or notice shall be tendered to him under Sub-clause c(i) or it may be sent to him by registered post under Sub-clause c(iii). In case, that person can not be found, under Clause c(ii), notice can be served by affixing on some conspicuous part of his last known place of residence or business, or by serving the same on some adult member of his family. Sub-clause c(ii) may be resorted to if the concerned person can not be found.

5. In the present case, it is clear that the Corporation had never issued notice or order u/s 55 of the M.R.T.P. Act addressed to the plaintiff. Admittedly, no such order or notice was served or tendered to her nor it was sent to her by registered post. According to the Corporation, notice addressed to the Chairman or Secretary was affixed on the building. Firstly, that can not be treated as notice to the plaintiff because it was not addressed to the plaintiff. Secondly, even if that notice is assumed to be correct, admittedly it was never tendered to the plaintiff nor it was sent by the registered post and, therefore, the Municipal Corporation could not take steps for substituted service provided under Sub-clause (ii) to Section 136(1)(c). In view of this, it must be held that notice was never issued to the plaintiff nor it was served to the plaintiff. In such circumstances any action taken by the Municipal Corporation to demolish the structure would be in violation of Section 55 and the notice would be bad in law.

6. The learned Counsel for the Corporation contends that the suit premises were shown in the map or sketch annexed with the notice issued to the Chairman and Secretary. For the reasons given above, merely because structure of the plaintiff was shown in that notice issued to the Chairman or Secretary of the Society but not to the plaintiff, it could not be valid notice and it is of no consequence. The learned Counsel also contends that on the basis of same notice, some other persons had filed L.C.Suit No. 2519 of 2007 and had taken out notice of motion in that suit. In that Notice of Motion relief was refused to them. Even Appeal From Order No. 630 of 2007 was dismissed. She has shown me order passed in that appeal. Paragraph 5 of that judgment clearly shows that the defendant No. 1 MMC had issued notice to several tenement holders including the Plaintiffs on 20-06-2007 and on receipt of the said notice, the plaintiffs had given reply on 23.06.2007. The learned Counsel for the Corporation states that in respect of the plaintiffs in that suit also, same notice was issued. It is not necessary for me to comment on this contention, particularly because in paragraph 5 of the judgment in the appeal, it is clearly mentioned that the plaintiffs were served with the notice and they were replied. If in that case, the plaintiffs were actually served with notice and they had replied, that notice could be valid. But in the present case Municipal Corporation could not point out that any such notice addressed to the plaintiff was ever issued or served on her. Therefore, merely because in that

suit no relief was granted, plaintiff in this case can not be deprived of that relief. The learned Counsel for the respondent contended that in view of Section 149 of the M.R.T.P. Act, no order or notice issued by Planning Authority can be challenged and hence, the suit itself is not tenable. This argument would be valid if notice or order would have been issued to and served on the plaintiff but in absence of such notice or order, ban u/s 149 can not be invoked.

7. For the aforesaid reasons, appeal is allowed. Impugned order is hereby set aside. Notice of motion is allowed in terms of prayer Clause (a)

8. It is hereby clarified that this order shall not prevent Municipal Corporation to take action by following due process of law.

9. As the appeal itself is disposed off, civil application does not survive and stands disposed off accordingly.