
(2015) 01 BOM CK 0071

In the Bombay High Court

Case No : Civil Revision Application No. 448 of 2013

Sarina Esmeralda Lopez

APPELLANT

Vs

Vijay Goverdhandas Kalantri

RESPONDENT

Date of Decision : 16-01-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Maharashtra Regional and Town Planning Act, 1966 — Section 149, 44, 45, 5, 52
Mumbai Municipal Corporation Act, 1888 — Section 149, 351, 354, 515-A

Citation : (2015) 3 ABR 344 : (2015) 3 ALLMR 306 : (2016) 1 BomCR 481 :
(2015) 2 MhLj 603

Hon'ble Judges : R.M. Savant, J.

Bench : Single Bench

Advocate : D.D. Madon, Senior Advocate and Cyrus Ardes Shir instructed by Naik Naik and Co., Advocates for the Respondent

Judgement

R.M. Savant, J.—The revisionary jurisdiction of this Court under Section 115 of the Code of Civil Procedure is invoked against the order dated 22/3/2013 passed by the learned Judge of the City Civil Court, (Borivali Division), Dindoshi thereby adjudicating upon the preliminary issue which is to the following effect:-

Whether the suit is not maintainable, the jurisdiction of the Court being ousted by virtue of Section 149 of the Maharashtra Regional Town Planning Act, 1966?

2. The factual matrix involved in the above Civil Revision Application can be stated thus:-

At the outset it would be necessary to describe the parties to the Civil Revision Application. The Applicant herein is the original Defendant No. 2 to the suit; Respondent No. 1 herein is the original Plaintiff and the Respondent No. 2 is the original Defendant No. 1 to the suit. The Maharashtra Regional and Town Planning Act would be referred to hereinafter as the "MRTP Act".

The case of the Plaintiff is that by an Agreement of Sale dated 5/6/1982 between

the Plaintiff and one Oriental Developers, the Plaintiff purchased a residential premises being Flat No. 2 on the ground of the building now known as Wahedna Apartment, situated at 75, Hill Road, CPS No. B-12, Bandra (West) Mumbai-400 050 on ownership basis. The said Flat No. 2 consists of 3 bedrooms, hall and kitchen. The said premises of the Plaintiff are abutting the open space of the Building. It is the case of the Plaintiff that he had also acquired a right in respect of the said open space. It is the case of the Plaintiff that the said open space is forming part of the said Flat No. 2 and that the Plaintiff has a direct access to the said open space and has exclusive possession of it. The said open space is admeasuring 21 ft. x 9 ft. x 8.6 ft. It is the case of the Plaintiff that the said open space is enclosed by a brick masonry wall and the Plaintiff has a direct access to the said open space. It is further the case of the Plaintiff that the right of the Plaintiff has never been challenged by the society. It is the case of the Plaintiff that he has neither constructed the brick masonry wall nor has provided direct access to himself to the said enclosed passage nor has carried out any development. It is the case of the Plaintiff that a notice under Section 53(1) of the MRTP Act was suddenly issued by the Assistant Commissioner, "H" Ward of the Defendant No. 1-Municipal Corporation of Greater Mumbai (herein after referred to for short "the MMC"), to the Plaintiff alleging that the Plaintiff has carried out unauthorized construction and therefore the Plaintiff was called upon to restore the status of the suit property to its original position, a copy of the sanctioned plan was enclosed with the said notice. A Reference to the said notice would be made in greater detail in the latter part of this judgment.

3. The said notice was replied to by the Plaintiff vide his letter dated 24/4/2012. He contended that he had not carried out any development as alleged. It was contended that the wall was constructed by the Developer, and that the Plaintiff was a bonafide purchaser of the Flat No. 2 along with the enclosed open space. It is the case of the Plaintiff that the said reply was not considered and two days prior to filing of the suit, some persons posing to be officers of the MMC attached to the "H" ward of the MMC visited the suit premises and gave a threat to the Plaintiff that the said premises would be demolished. It is the case of the Plaintiff that as there is an apprehension which is generated on account of the said threat of demolition, the suit in question was filed.

4. In the suit in question the principal relief sought is for a declaration that the notice issued by the MMC under Section 53(1) of the MRTP Act dated 2/4/2012 is illegal and bad in law and the same is liable to be quashed and set aside. In the said suit a Notice of Motion for injunction was filed by the Plaintiff wherein ad-interim relief was granted by the Trial Court and the said Notice of Motion was adjourned for reply to be filed to the same. The Applicant herein filed a Chamber Summons for her impleadment in the said suit which was allowed by the Trial Court and the Applicant was accordingly joined as party Defendant No. 2 to the said suit. The MMC filed its written statement-cum-reply to the said Notice of Motion whereas the Applicant who is the Defendant No. 2 filed her reply opposing the said Notice of Motion. The said Notice of Motion is pending and by virtue of

the ad-interim order, an injunction is operating against the MMC.

5. In view of the objection which was raised to the jurisdiction of the City Civil Court to try the suit in question, by the Defendants that a preliminary issue was framed which has already been adverted to herein above. The Trial Court adjudicated upon the said preliminary issue and ruled that it has the jurisdiction to try and entertain the suit. The gist of the reasoning of the Trial Court, as can be seen from the impugned order, is that the Plaintiff has challenged the impugned notice as being bad in law and a case of nullity is pleaded. The Trial Court observed that the contention raised and the submission made in that regard may not be applicable to the entire alleged unauthorized work of construction shown in the impugned notice. The Trial Court has further observed that in so far as change of position of doors of the kitchen and master bedroom, toilet from its original position is concerned, it would amount to internal work of improvement, alterations, affecting only the interior of the building. The Trial Court has referred to the judgment of a learned Single Judge of this Court (A.S. Oka, J) wherein the learned Single Judge has held that if there is an allegation made in the plaint that action of issuing notice u/s. 53(1) or 55 of the MRTTP Act is a nullity or without jurisdiction, the express exclusion of the jurisdiction of the Civil Court will not come in the way of the Civil Court entertaining the said suit. The Trial Court having regard to the said judgment seemed to be of the view that since the notice is challenged on the ground that it is bad in law and a case of nullity is pleaded, the suit is maintainable. The Trial Court also referred to the judgment in Shiv Kumar Chadha and Others Vs. Municipal Corporation of Delhi and Others, case wherein the Delhi High Court has held that the Court has to be satisfied that the action appears to be a nullity. The Trial Court has thereafter concluded that since there is a case of nullity pleaded, and the construction work which prima facie amounts to internal work and since the MMC has not replied to the letter dated 24/4/2012, the suit as filed is maintainable. As indicated above the Trial Court has by the impugned order ruled that it has the jurisdiction to try and entertain the suit.

6. Heard the Applicant in person Mrs. Sarina Lopez, the learned Senior Counsel Shri D.D. Madon appearing for the Respondent No. 1 and the learned Senior Counsel Shri Joquim Reis appearing for the Respondent No. 2.

7. The Applicant in person Mrs. Sarina Lopez reiterated her case urged before the Trial Court viz. that in view of the bar under Section 149 of the MRTTP Act, the suit in question challenging the notice under Section 53(1) was not maintainable. It is the contention of the Applicant in person that though the Trial Court has observed that a case of nullity has been pleaded, in fact there is no mention of the word "nullity" in the plaint. The Applicant in person referred to various judgments in support of her contention that the suit is not maintainable in view of the bar of Section 149. A reference to the said judgments would be made at the appropriate stage in the instant order.

8. Per contra, the learned Senior Counsel Shri D.D. Madon appearing on behalf of

the Respondent No. 1-Plaintiff would support the impugned order. The learned Senior Counsel would contend that the legality or otherwise of the structure is not material for the purposes of the issue as to whether the suit is maintainable. It is the submission of the learned Senior Counsel that the Trial Court is only required to consider on the basis of the case pleaded as to whether the suit is maintainable. The learned Senior Counsel sought to draw this Court's attention to the averments made in the plaint and would contend that it is the case of the Plaintiff that action of issuing notice being bad in law and ultra vires, the suit as filed is maintainable. The learned Senior Counsel sought to place reliance on the unreported judgment dated 10/4/2014 of a learned Single Judge of this Court (N.M. Jamdar, J) in Writ Petition No. 2243 of 2013 and companion matters in the case of Mr. Yogesh Megaji Gada v/s. The Municipal corporation of Greater Mumbai and anr. in support of his contention that the suit filed by the Plaintiff was maintainable. The learned Senior Counsel also sought to question the notice on the ground that the allegations made in the notice are not clear if one considers the asterisk which have been placed against the items which finds a place in the said notice. The learned Senior Counsel would therefore contend that no case for exercise of the revisionary jurisdiction of this Court is made out.

9. The learned Senior Counsel Shri Joquim Reis appearing on behalf of the Respondent No. 2-MMC would also question the maintainability of the suit on the touchstone of Section 149 of the MRTP Act. The learned Senior Counsel would also seek to draw the Court's attention to the various judgments of the learned Single Judges of this Court upholding the bar of Section 149 of the MRTP Act, some of which have also been cited by the Applicant in person. The learned Senior Counsel would contend that though the notice has been challenged on the ground of being bad in law and ultra vires, the Plaintiff has not demonstrated as to how the said notice is bad in law and ultra vires. The learned Senior Counsel by drawing this Court's attention to the averments in the plaint and the statutory provisions would contend that no case of the notice being bad in law or ultra vires or nullity is made out. The learned Senior Counsel would contend that without applying for regularization under Section 53(3), the Plaintiff has rushed to the Civil Court and obtained interim injunction, thereby preventing the MMC from taking action against the unauthorized construction. The learned Senior Counsel by drawing the attention of the Court to the averments made in the plaint would contend that the said averments ex-facie demonstrate that construction was carried out by the Plaintiff unauthorizedly. The learned Senior Counsel would lastly contend that the Trial Court has erred in holding at the stage of adjudication of the preliminary issue that the development carried out amounts to internal work.

10. Having heard the Applicant in person, the learned Senior Counsel for the Respondent No. 1 and the learned Senior Counsel for the Respondent No. 2, I have considered the rival contentions. In the context of the challenge which is raised and which revolves around the bar as contained in Section 149 of the MRTP Act it would be necessary to briefly refer to the objects and reasons behind

the MRTTP Act. The MRTTP Act has been enacted to make provision for planning the development and use of land in Regions established for that purpose and for the constitution of Regional Planning Boards therefor; to make better provisions for the preparation of Development plans with a view to ensuring that town planning schemes are made in a proper manner and their execution is made effective, to provide for the creation of new towns by means of Development Authorities; to make provisions for the compulsory acquisition of land required for the public purposes in respect of the plans. The underlying object of the MRTTP Act is therefore to have a proper and planned development in the areas to which it applies. It is therefore the statutory obligation of a planning authority to see that the development is carried out in terms of the development plan. The planning authority is therefore vested with the requisite power under the MRTTP Act to take action against the unauthorized construction. It is with a view to give finality to the orders passed by the planning authority that the bar under Section 149 of the MRTTP Act is provided. There can be no dispute about the fact that the MMC is both the local authority and the planning authority in so far as the provisions of the MRTTP Act are concerned.

11. Having regard to the object of the MRTTP Act, it would now be apposite to refer to Section 53 of the MRTTP Act which is one of the provisions in contention. The said provision is reproduced herein under for the sake of ready reference:-

53. Power to require removal of unauthorised development:-(1) Where any development of land has been carried out as indicated in sub-section (1) of section 52, the Planning Authority may, subject to the provisions of this section, 5[****] serve on the owner a notice requiring him, within such period, being not less than one month, as may be specified, therein after the service of the notice, to take such steps as may be specified in the notice,

(a) in cases specified in clause (a) or (c) of sub-section (1) of section 52, to restore the land to its condition existing before the said development took place.

(b) in cases prescribed in clauses (b) or (d) of subsection (1) of section 52, to secure compliance with the conditions or with the permission as modified:

Provided that, where the notice requires the discontinuance of any use of land, the Planning Authority shall serve a notice on the occupier also.

(2) In particular, such notice may, for purposes of subsection (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 of 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 carrying out of any building or other operations, itself cause the restoration of the land to its conditions 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 subsection (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.

A reading of Section 53(1) therefore discloses that an order of demolition can be passed in the cases specified in clause (a) or clause (c) of sub-section (1) of section 52 to restore the land to its condition existing before the said development took place. In cases covered by clauses (b) or (d) of sub-section (1) of section 52, an order can be passed to secure compliance with the conditions or with the permission as modified. Sub-section (2) of Section 53

vests the power in the planning authority for carrying out the purposes of subsection (1) to order demolition or alteration of any building or works; the carrying out on land of any building or other operations or the discontinuance of any use of land. A reading of Section 53(3) discloses that 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,. Hence Section 53(3) is in the nature of a remedy which is provided to an addressee of a notice under Section 53(1) of the MRTP Act to apply for regularization.

12. It would also be apposite to refer to Section 149 of the MRTP Act which contains the bar. The said provisions is reproduced herein under for the sake of ready reference:-

149. Finality of orders:-Save as otherwise expressly provided in this Act, every order passed or direction issued by the State Government or order passed or notice issued by any Regional Board, Planning Authority or Development Authority under this Act shall be final and shall not be questioned in any suit or other legal proceedings. The said provision posits that every order passed or direction issued by the State Government or order passed or notice issued by any Regional Board, Planning authority or Development Authority would be final and would not be questioned in any suit or other legal proceedings. Hence the said Section can be said to be what is popularly known as "the Finality Clause", or "the Clause of Exclusion".

13. After referring to the relevant statutory provisions, it would now be apposite to refer to the notice dated 2/4/2014 issued under Section 53(1) of the MRTP Act by the MMC. The relevant excerpt of the said notice is reproduced herein for the sake of ready reference:-

AND WHEREAS it has been reported to me that, you have commenced, undertaken or carried out development or instituted or changed the use of the land described in the Schedule appended below:-

- (i) Without the permission required under the Act
- (ii) Which is not in accordance with the permission granted.
- (iii) After the permission for development was duly revoked
- (iv) In contravention of the permission which was duly modified

You are therefore hereby called upon:-

- (i) To demolish the structure or the building atm
- (ii) To restore the premises under reference to its original position as per the approved plan under No. CE/6972/BSII/AH

Within one month from the date of receipt of this notice.

Please note that on failure to comply with the aforesaid requisition, You will be liable for prosecution under the said Act and the aforesaid requisitions will be carried out at your risk and cost.

SCHEDULE

(Description of the unauthorized development together with the particulars of land)

The position of door of kitchen and master bedroom toilet is changed from its original position, as well as a living and bedroom windows removed and fixed sliding glass panels on there to access open passage. The outside open passage enclosed near living and bedroom by constructing brick masonry walls adm. 21"x9"x8".6". The Offset portion outside living room is merged in living room are shown in red colour on plan under No. CE/6972/BSII/AH. Attached herewith.

A reading of the said notice therefore discloses that the Plaintiff was called upon to restore the premises under reference to its original position as per the approved plan under No. CE/6972/BSII/AH, which portion appears in bold in the original notice. The alleged unauthorized construction which has been carried out has been mentioned in the Schedule of the said notice. The reading of the said Schedule shows that apart from the change in position of the doors of kitchen and master bedroom, toilet from its original position, it is also alleged that the outside open passage is enclosed near the living and bedroom by constructing brick masonry wall adm. 21"x9"x8"6". It is further alleged that the Offset portion outside the living room is merged in living room as shown in red colour on plan attached to the notice. The Plaintiff in fact has accepted in the plaint that the approved plan was attached to the notice which was served upon him. The Plaintiff can be said to have understood the notice and has therefore replied to the said notice, and the reply is only to the effect that the open space abutting his flat was sold to him by the Developer and the wall was also constructed by the Developer. It is required to be noted that the Plaintiff gave his reply but no application was made under Section 53(3) of the MRTP Act.

14. Now the defining aspect that is the bar posited by Section 149 of the MRTP Act would have to be considered. There is a bar to the filing of the proceedings on account of the finality given to the order passed under the MRTP Act. The said bar of Section 149 had come up for consideration before the learned Single Judges of this Court the judgment of one of the learned Single Judges has been referred to by the Trial Court in the impugned order. The said judgment has been rendered by a learned Single Judge of this Court (A.S. Oka, J.) in First Appeal No. 1635 of 2010 in the case of Laxman Barkya Wadkar v/s. Mumbai Municipal Corporation. The learned Single Judge after considering the judgments of this Court as well as the Apex Court concluded that the bar of Section 149 is not absolute and would not apply, if the notice/order is challenged on the ground of nullity. Paragraph 16 of the said judgment is material and is reproduced herein for the sake of ready reference:-

There is no necessity to reconsider the view taken by this Court earlier in as much in the case of Bales Sardara Parach (*supra*) this Court accepted the contention that if action under section 55 of the said Act is alleged to be nullity, the jurisdiction of the Civil Court is not ousted. In any event, what binds this Court is the law laid down by the Apex Court in the aforesaid decisions. Similar view is taken by another learned Single Judge of this court in a group of Petitions being Writ Petition No. 2243 of 2013 and companion matters by the judgment dated 10/4/2014. The learned Single Judge (N.M. Jamdar, J) was concerned with the challenges to the notices issued under Section 351 and Section 354 of the Mumbai Municipal Corporation Act, 1888. The challenge to the said notices by way of Writ Petitions was justified on the ground that there is a bar under Section 515-A of the MMC Act to the filing of the suits. The bar under Section 515-A is akin to the bar under Section 149 of the MRTTP Act.

15. The learned Judge (N M Jamdar, J) after adverting to the concept of "nullity" and "jurisdictional error" by referring to the judgments of the Apex Court, this Court as well as the English Courts held that the suit is maintainable if there is a jurisdictional error by the authority. Paragraph 22 of the said Judgment is material and is reproduced herein under:-

22 The learned Senior Advocate appearing for the Corporation has in fact not taken an extreme position that the civil suit in all the circumstances is barred. He submitted that no Petitioner can directly approach this court on a presumption that suit is not maintainable and must show that there has been jurisdictional error in order to succeed in the suit. Mr. Dwarkadas, submitted that the legislative policy is to curtail the litigation by not permitting the challenge to the order of demolition/stoppage on merits, that is, on assessment of evidence in a regular trial. According to him by introducing exclusion clause the scope of the litigation will now to be restricted only to the jurisdictional error in the order of the authority. This submission is correct. Even if the jurisdiction of the civil court has been excluded by section 515-A, it is still open if the Petitioners show that there a jurisdictional error on the part of the authority. The scope to challenge the order has been narrowed down to this effect. There is no scope of unlimited challenge to the orders under the relevant sections. 16. The aforesaid two judgments in Laxman Barkya Wadkar's case and Yogesh Megaji Gada's case therefore sound a slightly different tune than the judgments of the learned Single of this Court concerning Section 149. The said judgments are the Judgments reported in Dr. Mohan N. Bhawe Vs. The Municipal Corporation of Greater Bombay, ; 2008(3) MahLJ 686 in the case of Kalyan Dombivli Municipal Corporation v/s. Prakash Mutha, unreported judgment in C.R.A. 132 of 2004 in the case of Ulhasnagar Municipal Corporation v/s. Kailsash Tikamdas and unreported judgment in Writ Petition No. 933 of 2013 in the case of Prathamesh Towers v/s. Gorai Road (Borivali) Shree Ganesh Cooperative Housing Society Ltd. and ors; Bales Sardara Paracha Vs. The Municipal Corporation of Greater Bombay and Tikam Chetvani, . The learned Single Judges of this Court in the said judgments have held that in view of the finality given to the order passed by

the authority under the MRTTP Act, the bar under Section 149 of the MRTTP Act operates and hence the suit questioning the notice or order would not lie. The aforesaid judgments have been relied upon by the party in person as well as the learned Senior Counsel appearing on behalf of the Respondent No. 2-MMC.

In the context of the proposition which has now been laid down by the said two judgments sounding a slightly different tune viz. that if there is a jurisdictional error committed by the authority, then a suit would lie which can be said to be an exception to the general proposition that the bar under Section 149 of the MRTTP Act would operate, that the facts of the instant case would have to be considered. In the said context Paragraphs 5, 7, 9, 13, 14, 15 and 18 of the plaint are material. The same are reproduced herein under for the sake of ready reference.

5. While acquiring Flat No. 2, the developer had raised the existing masonry wall for the purpose of security. Thus, the Plaintiff was having direct access and exclusive possession of open passage admeasuring about 21 ft. x 9 ft. x 8.6 ft. On the said open space, the Plaintiff is having an excess to bedroom and the living room. For the purpose of the present suit, the said open passage, which is enclosed by brick masonry wall and having a direct access exclusively for the Plaintiff is hereinafter referred to as the suit premises for the sake of convenience.

7. Suddenly, on 2nd April 2012 the Plaintiff was served with a Notice issued under Section 53(1) of the MRTTP Act by the Asst. Commissioner, "H" Ward of the Defendant, alleging therein that the Plaintiff has carried out unauthorized development under the provisions of 52(1) of the MRTTP Act and called upon the Plaintiff to restore the same as per the original sanctioned plan. The Defendant had also enclosed copy of the sanctioned plan along with the said Notice dated 2nd April 2012. Herewith enclosed and marked Exhibit B (colly) is a copy of the Notice dated 2nd April 2012.

9. The Defendant has neither considered the said reply nor has applied their mind to the fact of the case. Suddenly, two days back, some persons posing to be as officers attached to the H Ward of the Defendant visited the suit premises and gave a threat to the Plaintiff that the said premises shall be demolished by the Defendant at any moment without giving any rule or passing any order upon and without considering reply given by the Plaintiff.

13. The provision of Section 52 of the MRTTP Act is not at all applicable as no permission under Section 44 or 45 of the MRTTP Act is required for carrying out construction activities, which do not affect the frame work of the building. Admittedly, the nature of unauthorized development is shifting of doors and removal of the windows and fixing the same with sliding glass. The said work done fall within the purview of additions, alterations and/or development, which requires permission under Section 44 or 45 of the MRTTP Act.

14. Notice has been issued without application of mind. The mala fide act of the

Defendant is clearly established on the fact that the Defendant took steps to check the sanctioned plan, but failed and included to consider the decision of the permission reflected in the BCC or the situation has raised on the date of granting Occupation Certificate. The Occupation Certificates are not granted or the Building Completion Certificate is not granted when there is unauthorized work. Grant of BCC and Occupation Certificate indicate that the Defendant has condoned and/or tolerated the said alleged unauthorized development.

15. The act of the Defendant is against the principle of natural justice as by the Notice the Defendant has straightway issued an order for demolition and arrange to prosecute without giving any opportunity to submit an explanation. Thus, the Defendant arrived at conclusion regarding the unauthorized development without giving any opportunity to the Plaintiff.

18. From the facts stated hereinabove and the contention raised, it is clear that the act of the Defendant is illegal, bad in law, malafide, against the principle of natural justice and ultra virus. The Plaintiff is therefore entitled for a declaration that the Notice issued by the Defendant under Section 53(1) of the MRTP Act dated 2nd April 2012 bearing No. HW/BF/JE-2/MRTP-53(1)3058 of 2012 is illegal and bad in law and as such the Defendants are not entitled to give upon the same.

The gist of the averments contained in Paragraphs 5, 7 and 9 which are introductory averments have already been referred to in the earlier part of this Judgment. A reading of Paragraph 13 discloses that the factum of development carried out by him has been accepted by the Plaintiff but he seeks to justify the same that the same would amounts to additions alterations or development which requires permission under Section 44. A reading of the averments in Paragraph 14 discloses that the Plaintiff knows about the sanctioned plan but relies upon the occupation certificate to justify the development. In Paragraph 15 the Plaintiff has alleged violation of principles of natural justice on the ground that straight way the order of demolition has been issued. In Paragraph 18, the Plaintiff has averred that the act of the Defendant No. 1 MMC is illegal, bad in law, malafide, against the principles of natural justice and ultra vires, and thereby seeks to justify the declaration that is sought. The cause of action can be said to be mentioned in Paragraph 20 of the plaint and the Plaintiff has averred that since there is a threat of demolition, that there is urgency in the matter.

17. In so far as the allegation that principles of natural justice are violated, the said ground is based on the fact that straight way the notice of demolition has been issued, the scheme as contained in Section 53 of the MRTP Act has been referred to herein above. The said scheme does not contemplate any hearing to be granted prior to issuance of a notice under Section 53(1) of the MRTP Act as the addressee of the notice is given time to carry out corrections or make amends. As indicated above, Section 53(3) provides for a representation or an application to be made for regularization under Section 44 and pending such consideration further action pursuant to the notice is stayed. Admittedly no

representation is made by the Plaintiff and the construction/development is sought to be justified on the ground that it is sold to him by the Developer who has also put up the wall. Hence when the statute does not provide for hearing to be granted prior to the issuance of the notice under Section 53(1), the question of violation of principles of natural justice would not arise, and in fact the Plaintiff without availing of the opportunity under Section 53(3) has rushed to the Civil Court and obtained injunction on the ground that there is a threat of demolition. It is also required to be noted that the authority of the officer issuing the notice or the authority of the MMC to issue notice has not been questioned by the Plaintiff. In so far as whether the notice could have been given by the MMC in respect of the construction/development which has been carried out at any earlier point of time, that is even accepting for a moment the case of the Plaintiff that the Developer has put up the brick masonry wall and enclosed the open space, in view of the amendment to Section 53, limitation of three years which was prescribed for taking action has been removed and therefore the MMC was within its right to issue notice in respect of the alleged unauthorized construction/development assuming that it was put up by the Developer.

18. Hence if the case of the Plaintiff is tested, there is no issue of jurisdiction which arises for consideration. The Plaintiff has also not been able to prima facie prove as to how the notice is bad and illegal. Mere use of the words illegal, bad in law without any substantiation would not aid the Plaintiff to invoke the jurisdiction of the Civil Court as the jurisdiction of the Civil Court can now be invoked only if the action is a nullity on account of there being an error of jurisdiction. The Trial Court has erred in observing that since the word nullity is used, the suit is maintainable. Though the Plaintiff was not specifically attributed nullity to the said order and since illegality cannot take place of nullity assuming for a moment one takes place of the other, the said ground is also not substantiated. The Trial Court has further compounded the fact by holding that the development of changing the position of the doors amounts to internal work. How such a conclusion could be arrived at by the Trial Court at the preliminary stage, therefore begs an answer. In my view, the Trial Court has therefore a committed jurisdictional error in entertaining the suit in question.

19. Since the only exception to entertain a suit is on the basis of the order being a nullity as suffering from a jurisdictional error, the said ground must be so overwhelming so as to superimpose itself on the bar. The ground of nullity must be such that it is ex-facie borne out from the facts and cannot be arrived at by a convoluted process. It is also required to be noted that the suit is filed on the basis of the alleged threat of demolition, as indicated herein above the Plaintiff has not filed any application under Section 53(3) of the MRTTP Act after the notice is received. The cause of action appears to be merely a ruse to file the suit. If such types of suits are entertained, the bar contained in Section 149 of the MRTTP Act would turn otiose.

20. At this stage it would also be relevant to refer to the judgment of the Apex

Court reported in *Dhruv Green Field Ltd. Vs. Hukam Singh and Others*, . The judgment of the Apex Court was concerned with a similar case of the bar of jurisdiction of the Civil Court. The Apex Court has held that where there is no express bar, but statutory provisions imply exclusion of jurisdiction. The Apex Court held that exclusion still cannot be inferred unless the statute also provides an adequate and efficacious alternative remedy. The Apex Court has further observed that the jurisdiction would be retained despite express or implied bar, if the order or action complained of is a nullity. The Apex Court has clarified that if the allegation is that the order is illegal, but not a nullity, the jurisdiction of civil court would remain barred. In the instant case as indicated above the Plaintiff has not demonstrated as to how the action of the MMC in issuing the notice is a nullity. In my view, therefore the learned Judge of the City Civil Court has fallen into an error by entertaining the suit in question, the same therefore warrants exercise of the revisionary jurisdiction of this Court. The impugned order dated 22/03/2013 is therefore required to be quashed and set aside and is accordingly quashed and set aside. Resultantly, it would have to be held that the Bombay City Civil Court does not have the jurisdiction to entertain the suit. The suit in question is accordingly required to be dismissed in view of the bar of Section 149 of the MRTP Act and is accordingly dismissed. The above Civil Revision Application is accordingly allowed to the aforesaid extent. The parties to bear the own costs.

21. At this stage, the learned counsel appearing on behalf of the Respondent No. 1-Plaintiff Shri Cyrus Ardeshir, in view of the dismissal of the suit, prays for stay of the instant order. The said prayer is opposed to on behalf of the Applicant in person. In the facts and circumstances of the present case, the instant order is stayed for a period of four weeks from date.