

(2018) 03 BOM CK 0090
In the Bombay High Court
Case No : WRIT PETITION NO.2613 OF 2017

SUNBEAN HIGH TECH DEVELOPERS PRIVATE LIMITED	APPELLANT
Vs	
THE MUNICIPAL CORPORATION OF GREATER MUMBAI AND 2 ORS	RESPONDENT

Date of Decision : 26-03-2018

Acts Referred:

Constitution of India — Article 226
Maharashtra Regional Town Planning Act, 1966 — Section 51(1)
Mumbai Municipal Corporation Act, 1888 — Section 351
Bombay Provincial Municipal Corporation Act 1949 — Section 360

Citation : (2018) 03 BOM CK 0090

Hon'ble Judges : A.S. OKA, J, P. N. DESHMUKH, J

Bench : Division Bench

Advocate : M. M. Vashi, Aparna Deokar, Vandana Mahadik

Judgement

P.N. DESHMUKH, J.

1.This petition filed under Article 226 of the Constitution of India, challenges the action of demolition of petitioner's subject structures by the

Respondent/Corporation on 28/9/2017 without issuing any notice of demolition or otherwise to the Petitioners. In the circumstances, the specific prayer

clause (b) of the petition is for direction to the Respondents to allow the Petitioners to reconstruct the demolished structures and to repair and relocate

the two porta cabins in its original place. In the alternative, it is further prayed that the Respondents be ordered and directed to permit the petitioner to

reconstruct the subject structure demolished on 28/9/2017 or to allow the Petitioners to reconstruct the same subject to the Respondents reimbursing

the cost whatever shall be incurred by the Petitioner for reconstruction.

2.It is the case of the Petitioners that one Raghunath Mahadev Salvi was the

owner and in occupation of land ad-measuring 2000 sq. yard at Survey

No.39(part) CTS No.1 situated at Village Valnai from 1952 and had constructed 8 residential structures each ad-measuring 375 sq.ft. and was making

payment of nonagricultural assessment tax since 1972 as per the order of the Revenue authorities. It is further the case of the petitioner that in

addition to above residential structures there was one more structure ad-measuring 1200 sq. ft. which was also assessed by Respondents on which

property tax was regularly paid.

3.The entire property that is the above referred structures were sold by his legal heirs to one Mr. R. Mugum Pariar, who transferred and assigned all

his rights title and interest in respect of the subject structures in favour of one Sambhaji Dattu Chauvan from whom the Petitioner came into

possession of the subject structures and was in occupation of the same, which consists of 2800 sq. ft. used for running a restaurant on obtaining eating

house license and shop and establishment license both issued by the Respondent department. It is also the case of the Petitioner that he was also

having a Bar for which he was issued with F.L.III license by the competent authority as well as was issued with license from the Food and Drug

Department required for the purpose of carrying out business of Restaurant and Bar.

4.It further appears to be the case of the Petitioner that on 9/12/2016 one notice came to be issued in the name of directors of his firm purportedly

under section 351 of the MMC Act which is duly replied through his advocate and in the meantime he had obtained necessary documents from the

office of the District Inspector of land records and the City Survey to establish as to since when, the structures which is the subject matter in the

petition were in existence. It is the case of the petitioners that City Survey office had confirmed that the structures were found in existence during the

survey which was carried out on 1/4/1964.

5.In the background of above stated facts, the learned counsel appearing for the petitioner thus contended that the impugned notice which even

otherwise was issued in the wrong name is bad in law and as the act of demolition is carried out by the Respondents without following due process as

laid down by this Court in the case of Sopan Maruti Thopte & Anr. vs. Pune Municipal Corporation and Anr. 1, the petition be allowed. The Petitioner

by effecting amendment to the petition has also brought on record fact of cancellation of his licenses without giving any opportunity of hearing to the Petitioners.

6. Respondent Nos. 1 to 3 resisted the petition by filing affidavit in reply contending that the repair permission was issued by the Respondent No. 3 for

carrying out repair to the structure to the original owner Raghunath Salvi. No exact dimensions were mentioned in the said repair permission and that

since the Petitioner has not submitted a copy of the application for repair permission to the Respondents nor has annexed such document in the

petition, he has not approached with clean hands which fact itself shows that the construction is without obtaining any permission from the competent

authority. Another contention raised by the Respondent No. 3 is that though, the Respondents issued letter to Deputy Collector requesting to provide

documents establishing the authenticity of the subject structures, till date no reply is received from the concerned authority and has further stated that

the act of demolition thus carried out by the Respondent is legal which is stated to be carried out by issuing notice 28/9/2017. To establish the said

case, Respondent has filed affidavit of the concerned Mukadam, stating that on instructions of his superior he has visited the subject structure on

20/9/2017 at 2.30, 3.30 and again at 4.30 p.m., however as the premises were found closed he pasted the notice on the outer side of the premises and

obtained its photographs. Thus, it 1 AIR 1996 Bom 304 appears to be the case of respondents that on pasting notice as aforesaid subject structures

came to be legally demolished.

7. We have given careful consideration to the facts and submissions and from the documents it is established that the subject structures were in

existence since 1/4/1964 and were in possession of the Petitioners. Admittedly, demolition came to be effected on 28/9/2017 i.e. within 15 days from

the date of notice of demolition which was pasted to structure on 20/9/2017 which even otherwise is not issued to the petitioners.

8. In the case of Sopan Maruti (supra) the first Court has issued following directions in paragraph Nos. 19 to 21 which reads thus.

19. Hence, on the basis of the law as discussed above, it is directed that after 1st May, 1996 the Bombay Municipal Corporation or the Municipal

Corporations constituted under the B. P.M.C. Act would follow the following

procedure before taking action under Section 351 of the B.M.C. Act or under S.260 of the B.P.M.C. Act.

(i) In every case where a notice under Section 351 of the B.M.C. Act/ under Sec. 260 of B.P.M.C. Act is issued to a party 15 days' time shall be

given for submitting the reply. In case the party to whom notice is issued sends the reply with the documents, and shows cause, the Municipal

Commissioner or Deputy Municipal Commissioner shall consider the reply and if no sufficient cause is shown, give short reasons for not accepting the

contention of the affected party.

(ii) It would be open to the Commissioner to demolish the offending structure 15 days after the order of the Commissioner/Deputy Municipal

Commissioner is communicated to the affected person.

(iii) In case the staff of the Corporation detects the building which is in the process of being constructed and/or reconstructed and/ or extended without

valid permission from the Corporation, it would be open to the Commissioner to demolish the same by giving a short notice of 24 hours after drawing a

panchanama at the site and also by taking photographs of such structure and/or extension. The photographs should indicate the date when the same

were taken.

(iv) In case where the Municipal Corporation has followed due process of law and demolished the unauthorised structure and or extension, if the same

is reconstructed without valid permission within a period of one year, it would also be open to the Corporation to demolish the same by giving a short

notice of 24 hours.

(v) If the offending structure and/or extension which is assessed by the Corporation for two years, notice shall provide for 15 days' time to show

cause. If the Deputy Municipal Commissioner comes to the conclusion that he requires assistance of the party, he may give an oral hearing if he

deems fit and proper before passing the order. It is made clear that oral hearing is not at all compulsory but it is at the discretion of the authority.

(vi) In any other case the Corporation is directed to issue a show cause notice in case of any structure and/or extension other than those mentioned in

clauses (i) to (iv) above. The Corporation shall provide for 7 days' time to show cause in such a case.

20. In case the notice is issued under Sec. 478 of the B.P.M.C. Act, 1949 and if the person has not complied with the requisitions of the Commissioner, then it would be open to the Commissioner to demolish the unauthorised structure after expiry of 30 days of the period specified in the notice for removal of such construction.

21. The Municipal Corporations in the State of Maharashtra would follow the above directions so as to avoid unnecessary litigation:

9. Documents filed in support of the petition, being at Exhibit "A" establishes, the fact of NA order issued by the office of the Additional District

Deputy Collector dated 25/4/1972, on the basis of which the erstwhile owner of the property Raghunath Salvi was paying assessment taxes. Exhibit

B" and "C" establish eating house license and Shop and Establishment licenses issued to the Petitioners, while Exhibit "D" establish the petitioners

running Bar and Restaurant on possessing valid license from Collector, Sub-urban Bombay, being Competent Authority. Exhibit "I" issued by the

District Inspector of Land Records and City Survey Officer establishes authenticity of the structures, which are found in existence during the survey

carried out on 1/4/1964 which document is found duly authenticated by the Additional Collector by letter at Exhibit J, particularly upon the request

made by the Respondents. This documents thus establish that the subject structure was in existence as aforesaid. Even otherwise from the case of

respondents, there is nothing to establish that before action of demolition was carried out, due procedure as contemplated in law as aforesaid is

followed.

10. Hence, we find this to be a fit case where the Respondent has shown complete disregard to the law and has illegally demolished all the subject

structures of the petitioners without following due process of law. In the circumstances, we have no option but to permit the Petitioners to reconstruct

the subject structure more particularly as described in paragraph 4 to the petition, subject to right of the Respondent No.1 to initiate action of

demolition in accordance with law and clarify that reconstruction of the subject structures will not confer any authenticity of the subject structures.

We, however deny the Petitioners any relief to reconstruct two porta cabins to its original place in view of the fact that the erstwhile owner of said

subject structure having being served with notice under section 51(1) of the

MRTP Act 1966 had filed L.C. Suit No.2811/2012 before the City Civil Court and had sought interim protection in respect of said subject structure which is said to be still in force. In that view of the matter, the Petitioner is at liberty to take recourse available under law on this subject of the petition before the Competent Court.

11.Hence, we pass the following order:

(i)It will be open for the petitioners to reconstruct the structures as has been stated in paragraph 4 of the Petition at the same place where it was in

existence earlier and of the same dimensions. The construction material shall be of similar nature;

(ii)Before commencing the work of reconstruction, the petitioner shall serve a notice to the designated officer of the concerned ward of the

respondent department. Needless to state that even if the structures are reconstructed on the basis of this order no authenticity will be conferred on

the subject structures;

(iii)If the original subject structures were constructed without obtaining development permission, the reconstructed structures which are now permitted

to be reconstructed will have to be treated as constructed without obtaining the development permission. Therefore, after reconstruction it will be open

for the Respondent/Corporation to initiate action of demolition of the subject structures which however, shall not be taken without following the law

laid down in Sopan Maruti's case supra;

(iv)Rule is partly made absolute on the above terms with no orders as to costs.

After the judgment is pronounced, the learned counsel appearing for the Municipal Corporation seeks stay for a period of eight weeks. The learned

Senior Counsel appearing for the Petitioners on instructions states that the order of reconstruction will not be enforced by the Petitioners for a period

of eight weeks from today. We accept the said statement. Hence, it is not necessary for us to consider the prayer for stay.