



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 933 OF 2013**

Prathamesh Tower Cooperative  
Housing Society Limited.  
Building - C, Opposite A.K. Vaidya  
Ground, New Link Road, ...Petitioner  
Borivali (West), Mumbai - 400 091. (Orig. Deft. No.4)

Versus

1. Gorai Road (Borivali) Shree Ganesh  
Cooperative Housing Society Ltd.,  
Building - B, New Link Road,  
Opp. Don Bosco School,  
New MHB Colony, Borivali (West),  
Mumbai - 400 091.
2. The Municipal Corporation for  
Greater Mumbai, having its Head  
Office at Mahapalika Bhavan,  
Opp. CST Railway Station,  
Mumbai - 400 001.
3. The Executive Engineer (BP),  
WS 'R' Ward, Corporation Building,  
C-Wing, Sanskruti Complex,  
90 feet D.P. Road,  
Near St. Lawrence School,  
Kandivali (East),  
Mumbai - 400 101.
4. The Assistant Municipal Commissioner,  
R-Central Ward, BMC Building,  
S.V. Road, Borivali (West), ...Respondents/  
Mumbai - 400 092. (Orig.Deft.nos.1,2&3).

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Mr. Shreepad Murthy a/w. Ms. Shobha Mehra i/b. P.M. Bhansali, for the Petitioner.

Mr. Surel Shah i/b. Mr. Ram Singh, for Respondent no.1.

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**CORAM : A.P.BHANGALE, J.**

**DATE : 4<sup>th</sup> APRIL, 2013.**

**JUDGEMENT :-**

1. Rule. Heard finally by consent pursuant to order passed by this Court on 1<sup>st</sup> April 2013. The Petitioner has challenged legality of the impugned order on preliminary issue framed under Section 9A of the Civil Procedure Code (Maharashtra Amendment). The issue framed was as to whether the suit is maintainable in view of Section 149 of the Maharashtra Regional Town Planning Act, 1966 (hereinafter referred as MRTP Act). Parties had chosen not to lead any oral evidence. The Court below decided the preliminary issue holding the suit as maintainable.

2. The facts briefly stated are:-

The plaintiff had filed Long Cause Civil suit no. 2642 of 2012 with a prayer for to declare the notice bearing no.AC/RC/BF-I/MRTP 53(i)/8437 of 2012 dated 29-10-2012 issued under Section 53(1) of MRTP Act as illegal, bad in law, extraneous, non-germane, issued upon irrelevant consideration and not enforceable in respect of suit compound wall as shown in photograph marked 'A' for identification in law. The plaintiff had added the word

'Nullity' in prayer clause by subsequent amendment to the plaint. The plaintiff decided to incorporate challenge to the order no. AC/RC/BF-1/MRTP 53(i)/8437 of 2012 dated 05-12-2012 (referred as 'fresh impugned notice' in the amended plaint). The challenge is mainly on the same ground as stated in the prayer clause as above. In addition the plaintiff contended that the later notice/order was issued without considering the facts in the matter, without any justification and at the instance of Prathamesh Tower Co-operative Housing Society or such other invisible forces, without following the principles of Natural justice and without following the due process of law.

3. Learned Advocate for the Petitioner argued with reference to the structure of the compound wall in question (appearing in photograph marked for identification as 'A') to argue that the access gates which were available for years to the defendant (Petitioner Prathamesh Tower CHS Ltd.) hitherto were sought to be blocked by the plaintiff (Respondent no.1) by adopting a novel method executing unauthorized construction/work of compound wall by obtaining permission from the Police. By letter dated 25-10-2012 it appears that Petitioner had highhandedly applied to the local police for to permit construction of the wall in question blocking the access to the members of the Petitioner's Co-operative Housing Society which was till then freely available as approach way to the main Road by the existing gates. The first respondent surreptitiously

invoked the police protection for sum of Rs 2319/-. The police protection was sought and the compound wall constructed/extended in such a manner to cover/block the access gates which were hitherto available as right of approach way to the Link road for Petitioner's members of the co-operative housing society. Photograph ('A' for identification) was taken while the construction was still in progress. No permission of the planning authority or Municipal Corporation of Greater Mumbai (MCGM) was sought as required according to law. According to learned advocate the Police could never have permitted illegal construction by providing police protection to illegal execution of the construction work for blocking the road access hitherto available to the Petitioners. Under these circumstances the Petitioner had brought this obvious illegality immediately to the notice of the MCGM/ planning authority. Thus statutory action was initiated against the plaintiff under the provisions of the MRTP Act. Learned Advocate for the Petitioner submitted that the remedy of a civil suit, which was not at all maintainable, was deliberately adopted by the respondent (plaintiff) as a ploy to procrastinate or to cause delay for the demolition of the illegal construction in suit by the competent town planning authority/ MCGM and to enjoy fruits of illegal offensive act for years together. He made reference to the ruling in **Gopinath Ganpatrao Pensalwar v/s. State of Maharashtra and Anr. Reported in 2006(6)**

**Bom.C.R.6**, wherein it was held that where Revenue Officer purports to do act or pass an order which is invalid, his action does not operate to raise bar under Section 11 of Act. He also placed reliance on the ruling in **Qari Mohammed Zakir Hussain & Others v/s. Municipal Corporation of Greater Mumbai & Others, reported in 2002(2) Bom.C.R.98** wherein it was observed that it is well settled that exclusion of the jurisdiction of the City Court is not to be readily inferred but such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if the jurisdiction is so excluded the Civil Courts have jurisdiction to examine into the issue where the provisions of the Act have not been complied with, or statutory Tribunal has not acted in conformity with the fundamental judicial procedure.

4. Learned Advocate for the respondent (plaintiff) submits that the writ Petition is not maintainable on the ground that the Petitioner could have adopted alternative remedy of filing Civil Revision. He made reference to ruling in **Dhullabhai Mana Praga & Ors. vs. Manikbhai Vithalrao Bhusarath (deceased) & Ors. reported in 2009(5) Mh.L.J.524**. It was a case in which the decree for possession under the Bombay Rent Act, 1947 was against the tenants. It was sought to be challenged by a Writ Petition instead of Civil Revision. Single Judge of this Court in the facts of that case observed that writ Petition cannot be normally entertained to assail the decree passed when remedy of Civil Revision was available. The ruling in,

my opinion would not absolutely bar the Petitioner herein for invoking extra-ordinary jurisdiction of this Court by remedy of Writ Petition in the fact and circumstances of the case, particularly when Petitioner is seeking protection of fundamental rights against highhanded illegal construction as alleged. Hence the contention of the respondent (Plaintiff) does not merit the consideration in the facts and circumstances stated in the case in hand.

5. Learned Advocate for the Petitioner submitted that there is tendency on the part of builders in Mumbai to construct unlawfully and file a civil suit and get continuing protection from the City Civil Court in the guise of interim orders of the Bombay City Civil court which may continue for prolonged periods of even years together due to huge pendency of civil suits in trial Courts. It is a fact that a civil suit in city civil court of Mumbai once interim order is passed may remain pending for years together without any final decision. He made reference to ruling in **Mohan N. Bhawe (Dr.) v/s. Municipal Corporation of Greater Bombay, reported in 2005(3)Bom.C.R.300**, wherein it was held that notice is issued under Section 55 under due exercise of powers and functions by the officer empowered. Hence, order passed by the Planning Authority is final under Section 55(2) and cannot be challenged in a suit or other legal proceedings since the order is passed by the planning authority. The Assistant Commissioner having been thus authorized to act, there is not dispute that he exercised his

jurisdiction and powers while issuing notice under Section 55 of the Act and his orders are final. Similar view is taken in the case of ***Bales Sardara Paracha v/s. Municipal Corporation of Greater Bombay and Another, reported in 2005(4)Bom.C.R.577***, wherein it was observed that language of Section 149 is unambiguous and clear. The bar is clear and admits of no confusion. If section 149 of Act is read in light of Apex Court Judgment in AIR 1964 S.C. 322, the jurisdiction of Civil Court is barred. It was also observed that where the bar in the Special Act is express and clear the jurisdiction of the Civil Court stands excluded. There can be therefore, no doubt that since in the present case Section 149 creates an express bar whether the alternative efficacious remedy is available or not need not be investigated into. The Supreme Court also observed that the Court could entertain a suit questioning the validity of an order passed under Section 343 of the Corporation Act, only if the Court is of prima facie opinion that the order is nullity in the eyes of law because of an jurisdictional error in exercise of the power by the Commissioner or that the order is outside the Corporation Act. It was further held that Section 149 of the MRTP Act clearly excluded the jurisdiction of Civil Courts so far as the challenge to the orders passed or directions issued by the State Government or orders passed or notices issued by any Regional Board, Planning Authority or Development Authority under the MRTP Act are concerned. Reliance is also placed upon

ruling in ***Babar Sher Khan and Ors v/s. Municipal Corporation of Brihanmumbai and Anr. Reported in 2008(2), Bom.CR.335***, wherein it was observed suit for challenging validity of notice is barred as per the provisions of Section 149 of the Act. Reliance was also placed on the rulings in which similar view is taken viz. ***Kalyan Dombivli Municipal Corporation v/s. Prakash Mutha, reported in 2008(3), Bombay Cases Reporter, 720***. He also placed reliance on the ruling in ***Ulhasnagar Municipal Corporation and Another v/s. Kailash Tikamdas Mulchandani, reported in 2008(5), ALL MR 204***, wherein it was held that Notice issued under MRTP Act cannot be challenged/questioned in any suit or other legal proceedings in Civil Court in view of Section 149 of MRTP Act, 2008. Reliance was also placed on the rulings in ***Laxman Barkya Wadkar v/s. Mumbai Municipal Corporation of India, in Bom.HC First Appeal no.1635 of 2010***, wherein it was observed that suit cannot be dismissed at the threshold on the ground of bar of Section 149 if there is a case made out in the plaint that the action of issuing notice under Section 53(1) or Section 55(1) is “nullity”. He further submitted that under these circumstances as well as according to the provisions of MRTP Act, the civil suit in the present case could not have been entertained by the Bombay City Civil court. Learned Advocate for the Petitioner argued that the plaintiff has not questioned the applicability of the provisions of MRTP Act

so as to treat the notice/order issued under the Act as 'nullity'. He criticized the the impugned order on the ground that the learned judge ignored the facts and wrongly decided to entertain the suit despite specific statutory bar to entertain a civil suit challenging notice/order issued under the MRTP Act , without recording even prima facie satisfaction that the notice/order issued by the planning authority are legally void . He invited my attention to Section 149 Of the MRTP Act1966 which reads thus:

*“Save as otherwise expressly provided in this Act, every order passed or direction issued by the State Government or order 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.”*

From the language of this Section, it is clear that every order passed or directions 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.

Learned Advocate for the respondent no.1 who chose to support the impugned order is at pains to justify the impugned Order. According to him the suit was rightly

entertained and held as maintainable by the Bombay City Civil Court.

6. Having heard submissions at the bar at length; in my opinion, even if for the sake of argument it is accepted that, civil suit is maintainable in town planning cases despite statutory bar, there also, unless the self-contained statutory remedy incorporated in the Act is fully exhausted such suit preventing planning authority from demolishing the illegal construction or unauthorized development would not lie in civil Court. it must be borne in mind that under the provisions of the MRTTP Act it is statutory responsibility of the local planning authority to execute the final development plan effectively without delay. The planning authority is adequately armed under the statutory provisions to take prompt and effective steps to remove unauthorised development if unauthorised development in the form of illegal construction contrary to the town planning scheme is noticed in the city. Therefore legislature in its wisdom, has made all the acts done by the Planning Authority to implement the town planning scheme final under the provisions of the M.R.T.P. Act and, therefore, all such notices and orders having the statutory finality are specifically made immune from being challenged or questioned in any civil suit in view of the provision under Section 149 of the M.R.T.P. Act. The MRTTP Act is self-contained to provide the remedies when notice is issued under the Act. Because permission can be obtained under

the Act for to carry out or retain the the alleged unauthorised development . Thus, the jurisdiction of the Civil Court is expressly and clearly excluded under Section 149 of the M.R.T.P. Act and a civil suit cannot be entertained, more so when motivated to perpetuate the criminal act or continuing offence of unauthorized construction. Section 52 of the Act contains penal provisions for to punish the offenders liable for unauthorized development or use which is contrary to provisions of the M.R.T.P Act by a punishment which is minimum one month and may extend up to three years and fine of Rs 2000/- to Rs 5000/- with additional daily fine up to Rs 200/- if offence continue beyond the conviction for first commission of offence.

7. Once therefore a notice under Section 52 of the MRTP Act is served, the persons aggrieved by such notice has statutory remedy within the period specified therein, which in the instant case is one month, must apply for permission for retention on the land of the building or works in question under Section 44 of the MRTP Act. Only when permission is granted, the notice/ order would stand withdrawn. The question of grant of any permission would arise only if an application is made therefor. As the first respondent herein had not filed any such application, the Municipal Corporation as planning authority was obliged not only to prosecute the owner but also to carry out the demolition of illegal construction in terms of the aforementioned notice

dated 29.10.2012 under Section 53 (1) of the MRTP Act. The terms of Section 44 of the MRTP Act are crystal clear that, a person intending to raise any construction is required to make an application in respect thereof to the Planning Authority for permission in such form and containing such particulars and accompanied by such documents, as may be prescribed. Filing of such application and obtaining such permission are imperative requirements of MRTP Act, 1966 (State law of town planning.) Such permission, if granted, remains in force for a period of one year unless extended by the Planning Authority. The Municipal Corporation of Greater Mumbai is a 'local authority' as well as planning authority within the meaning of the provisions of Sections 2(15) and 2(19) of the MRTP Act and has requisite authority to initiate action under the provisions of the MRTP Act. Hence order passed by the MCGM as planning authority under the MRTP Act. The notice/ or order issued under the provisions of the MRTP Act by or on behalf of the MCGM as planning authority cannot therefore be termed as 'nullity', legally void in the eye of law. Moreover it appears in the present case that the amendment of introducing the word 'nullity' was result of an afterthought ingenuity of lawyer's drafting aimed to continue the suit indefinitely in the Bombay City Civil Court. The civil court must exercise caution and care before allowing such amendment in the plaint which may be malafide, aimed at prolonging the litigation without legal justification or which may result in

change in the nature of the suit or of the cause of action originally pleaded on the date of the institution of the suit. Dishonest amendment which would take away the legal right accrued in favor of the defendant, motivated to confer jurisdiction on the civil court and to prolong fate of the suit intending to perpetuate the wrong which amounts to continuing offence, cannot be allowed . Because the plaintiff cannot be allowed to circumvent the provisions of town planning law to suit his mission to perpetuate the criminal act of illegal construction of blocking the gates, obstructing approach way of the Petitioner (Defendant cooperative housing society) to the main road by obtaining interim protection therefor in a protractible proceeding filed as long cause civil suit in Bombay City Civil Court.

8. Section 53 authorizes the local authority as planning authority to direct removal of unauthorized development. Sub-section (1) of Section 53 authorizes the local authority as planning authority under the MRTP Act to issue a statutory notice where a development of land has taken place in violation of the conditions indicated in Sub-section (1) of Section 52. The jurisdiction of a local authority as planning authority is confined only to deal with application for grant of permission for construction as contained in Section 44 of the MRTP Act, whether at the initial stage or when a notice is served under Sub-section (2) of Section 53 of the MRTP Act. The power to grant such permission could

be exercised only within the purview of the Building Bye-laws. Therefore, being beyond the scope of Section 44 of the MRTP Act, the Municipal Corporation as local municipal authority did not have any jurisdiction to direct regularization of such unauthorized or unlawful constructions by reason of the resolution or otherwise. The power of the Municipal Corporation, as planning authority under the MRTP Act, it is trite, being confined to the provisions of the MRTP Act, no action could be taken by the MCGM contrary thereto or inconsistent therewith.

9. In terms of Sub-section (7) of Section 53, a person prosecuted under Clause (1) of Sub-Section (6) of Section 53 will be inflicted with the punishment specified therein. In ***M.I. Builders Pvt. Ltd. vs. Radhey Shyam Sahu and Others [(1999) 6 SCC 464]***, the Apex Court observed:

*"73. The High Court has directed dismantling of the whole object and for restoration of the park to its original condition. This Court in numerous decisions has held that no consideration should be shown to the builder or any other person where construction is unauthorised. This dicta is now almost bordering the rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in moulding the relief. **Such a discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorised***

***construction, if it is illegal and cannot be compounded, has to be demolished.*** There is no way out. Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing the robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is required to be exercised has to be in accordance with law and set legal principles. As will be seen in moulding the relief in the present case and allowing one of the blocks meant for parking to stand we have been guided by the obligatory duties of the Mahalaplika to construct and maintain parking lots." (emphasis mine)

A discretionary power must be exercised having regard to the larger public interest. The Municipal Corporation being a creature of statute and invested with powers of planning authority under the MRTP Act was bound to carry out its statutory functions within the four-corners thereof. Being a statutory planning authority, it was required to follow the rules scrupulously. The Municipal Corporation on its own as local authority is not possessed of any statutory power to regularize such unauthorized constructions which are found contrary to and actionable under the provisions of the MRTP Act. Moreover, even development charges could not be recovered from the

respondent in respect of unauthorized constructions in terms of Section 124-E(2) of the MRTP Act.

10. The remedy when notice under section 53 (1) is issued by the planning authority, is self contained under the MRTP Act in Section 44 read with section 53 (3) of the MRTP Act. Planning authority's power is confined to compounding the offences in certain cases. Permission may be granted for retention of the development/construction work in question. Thus alternative efficacious statutory remedy was available for the plaintiff-respondent to apply for permission for the retention of the offending notice structure.

11. Section 52 provides for penalty for unauthorized development or for use otherwise than in conformity with the Development plan whereas Section 53 confers the powers to require removal of unauthorized development. Distinction between Sections 52 and 53 is obvious. The Legislature could not have intended that unauthorized development; illegal construction work should be visited merely with penal consequences. It was enacted for the sake of completeness of statutory action in public interest. Section 53 empowers the Planning Authority to require removal of unauthorized development. Thus, punishing the wrong doer is not enough. The unauthorised and illegal development also must be removed and for that purpose provisions are in place as enacted. In such case, therefore, the suit by the plaintiff who had bye-passed the statutory

remedy under the provision in Section 44 read with Section 53 (3) of the MRTP Act, and approached the Bombay City Civil Court with a Civil Suit, seeking protection for the illegal construction raised contrary to the provisions of the MRTP Act could not have been entertained in the facts and circumstances brought to my notice. More so when subsequent amendment in the plaint is deliberately made to introduce the word 'nullity' was nothing but ingenuity of lawyer's drafting to any how trying to invest or confer jurisdiction in the Bombay City Civil Court with a view to buy time for unlawful retention of the suit structure. The Civil Court must be on guard against such attempts before exercising its plenary jurisdiction available to do real justice between the parties. The action of the MCGM as planning authority to issue notice and to pass the necessary order to remove unauthorised development/work was within the scope of statutory power and authority under the MRTP Act and can not be labeled as unconstitutional or beyond jurisdiction of the MCGM as planning authority. The learned Judge of the Bombay City Civil Court therefore erred to entertain the civil suit despite statutory bar under Section 149 of the MRTP Act as aforesaid. The discretion of the civil court cannot be used for to protect or perpetuate the offending act of illegal construction/unauthorized work actionable under the provisions of MRTP Act. If such civil suit is readily entertained by the Civil court wherein the party has

bypassed the alternative and primarily available statutory remedy of filing the proceedings before the planning authority as is permissible under Section 44 read with Section 53(4) of the MRTP Act as stated above, it would defeat the salutary policy of the town planning law to implement the final development plan in expeditious planned and orderly manner in the city of Greater Mumbai. Therefore, the builder must understand that illegal construction cannot be protected by means of a long drawn out litigation like Ordinary Civil Suit, even if police power is used for to protect it while raising illegal construction. It shall never be beneficial without legal sanction by the competent authority.

12. It is well known fact that the civil suit once instituted in city of Mumbai remain pending for years or for indefinite long period considering the immense docket pendency. When remedy by way of Civil suit is statutorily barred the plaintiff is not precluded from resorting to alternative remedy which is self-contained and available under the provisions of the MRTP Act or to invoke writ jurisdiction, if so advised. In any event the plaintiff is not remediless and can exhaust remedies available under the MRTP Act and find remedy elsewhere if statute bar him to avail the remedy of instituting ordinary civil suit. Be that as it may, remedy available by way of Civil suit cannot be utilized to perpetuate the continuing wrong continuing offending act of retaining unauthorized and illegal construction made

punishable as continuing offence under the MRTP Act. I must therefore quash and set aside the impugned order. Hence, following order is passed :-

**ORDER**

The impugned order dated 17<sup>th</sup> January, 2013 passed by the Bombay City Civil Court in L.C Suit no. 2642 of 2012 holding the said civil suit as maintainable is quashed and set aside. The Long cause suit no. 2642 of 2012 stands dismissed with costs. However the respondent (original plaintiff) shall be at liberty to apply within one month from the date of this order for permission under Section 44 read with Section 53(3) of the MRTP Act. Till such application, if preferred within time as aforesaid, is heard and decided and till order is communicated to the parties by the planning authority, no coercive action be taken against the notice structure pursuant to the notice/order impugned in the said Suit. If such application is made it is to be decided by the planning authority concerned as early as possible and necessarily within a period of three months from the date of this order. The rule is made absolute accordingly.

**(A.P. BHANGALE, J.)**