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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2393 of 2006

WITH

NOTICE OF MOTION NO. 496 OF 2007

Sukhshanti Co-operative Housing
Society Ltd., through their Hon.
Secretary Mr. (Dr.) H.S. Bhatia
Indian Inhabitant, having their
registered office at 19, Peddar Road,
Mumbai – 400 026.

... Petitioner.

V/s.

1. Mr. Nishant M. Mahimtura
Indian Inhabitant residing at
Chandan, 62-B, Pedder Road,
Mumbai – 400 026.
2. Mr. Riyaz Ganji
Indian Inhabitant carrying on business
At Flat No. 2, Ground Floor,
Shanti No.3, at 19, Pedder Road,
Mumbai 400 026.
3. Municipal Corporation of Greater
Mumbai, (A Corporation Constitution)
under the B.M.C. Act, 1888 having
its office at Mahapalika Bhavan
Mahapalika Marg, Fort,
Mumbai – 400 001.
4. Municipal Corporation of Greater
Mumbai, (A Corporation Constitution)
under the B.M.C. Act, 1888 having
its branch office at “D” ward Municipal
office, at Jobanputra Compound,
Nana Chowk, Mumbai 400 007.

...Respondents.

Mr. Kunal M. Patel a/w Mr. Vijaykumar Mishra for the Petitioner.
Mr. Shashank Dubey for Respondent Nos.1 & 2.
Ms. Pooja Khandeparkar a/w Ms. S.V. Tondwalkar i/by Ms. Komal Punjabi
for the Respondent-BMC.
Mr. Dilip Aahire (Designated Officer 'D' Ward) – present.
Shri Dheeraj Kaunde, A.E. (B&F) 'D' Ward – present.

CORAM : A. S. GADKARI AND
KAMAL KHATA, JJ.
RESERVED ON : 6th January, 2025.
PRONOUNCED ON : 21st January, 2025.

JUDGMENT (Per Kamal Khata, J.):

1) By this Petition under Article 226 of the Constitution of India, the
Petitioner seeks the following prayers.

“(a) that this Hon’ble Court may be please to issue a writ of mandamus/direction and/order of a like nature be issued against the Respondent Nos.3 and 4, after considering the legality and validity or otherwise thereof, directing the Respondent No.3 and 4 to demolish the unauthorized structure/shop as more particularly set out in “Exh-E”.

(b) that this Hon’ble Court direct the Respondent No.1 and 2 to restore the said flats No.1A and 2 in their original state.

(c) that a writ of mandamus/direction and/order of a like nature be issued against the Respondent No.3 and 4 to demolish all encroachment over the property of the Petitioner in violation of the provision of law.”

Brief facts that led to the Petition are as under:

2) The Petitioner is a Society situated at Peddar Road, an elite location in Mumbai. They complained to Respondent Nos.3 and 4 (BMC) that it's member the Respondent Nos. 1 and 2 - owners of flat No. 2 (on the ground floor) have amalgamated the adjoining flat No.1A owned by a deceased member Dr. L Soneji. The illegalities they complained of were, that the Respondent Nos. 1 and 2 had (i) affixed a door usurping the common area leading to the two flats, (ii) installed a mild steel shutter to create an access of the flat to the main road and most importantly (iii) demolished the dividing walls of the flats endangering the structural stability of the building.

3) The Respondent Nos.1 & 2 retained their changes despite requests and written communications by the Society. Though called upon, the Respondent Nos.1 & 2 failed to produce the BMC permissions for the changes effected and their legal right to flat 1A. Following Society's complaints, the BMC merely issued 3 notices warning the Respondent Nos.1 & 2 but failed to restore the flats to its original position. Concerned about the structural stability of their building, having waited for a considerable period of 18 months, the Society was compelled to file this Petition.

Contentions:

4) Mr. Kunal Patel, learned counsel for the Petitioner – Society asserts

that, not only have the Respondent Nos.1 and 2 willfully deliberately and brazenly ignored the BMC. If that wasn't enough, the BMC failed to comply with the Court orders dated 22nd June, 2006 and 27th September, 2007. Its been almost nineteen years since. He drew our attention to the two orders which are reproduced for ready reference.

5) Paragraph No.5 of Court Order dated 22nd June 2006 passed in Appeal from Order No.315 of 2006 in Notice of Motion No.1443 of 2006 and Notice of Motion No.1406 of 2006 in S. C. Suit No.1511 of 2006 with Civil Application No. 401 of 2006 was as under:

*“5. In the meantime, the parties are directed to maintain status quo with regard to the suit property in terms of possession as of today as well as to the structure which is standing on the site. **This status quo order, however, will not preclude the corporation from proceeding with proposed action under section 351 of the Mumbai Municipal Corporation Act.**”*

(Emphasis supplied)

6) Order dated 27th September, 2007 in the Present Writ Petition directed as under:

1. Heard the learned counsel for the petitioner and the learned counsel for respondent numbers 3 and 4. respondent No 1 is personally present before the court. We have perused

the letter issued by the executive engineer building proposal, city-I dated 21st September 2007 wherein it is categorically mentioned that the earlier proposal of Mr nishant mahimtura submitted by architect shree Sachin Wairkar was rejected by the said executive engineer on 26th March 2007. It appears that there after there is no proposal pending before the set executive engineer building proposal, city-I.

2. Under these circumstances, rule. By way of interim relief we direct respondent numbers 3 and 4 to demolish all illegal encroachments and constructions which have been carried out in flat numbers 1A and 2. This shall be done within a period of 2 weeks from today.

7) Mr. Patel argued that, to make matters worse, the BMC failed to comply and prolonged the compliance even after the matter was taken up on 27th August 2024. It was only on 15th November, 2024 the compliance Affidavit filed reveals partial compliance of the Notice. The door enclosing the common area leading to the flat Nos.1A and 2 was removed by the BMC. In view of the above prays that the Petition be made absolute with costs.

8) *Per Contra*, the Respondent No.1 claims to be owner of flat No.2 on the ground floor of Building No.2. Flat 1A belonged to his aunt who

expired intestate on 11th January 2005. Respondent No.1 claims to be entitled to the flat as her heir. It is averred that the Society itself had granted permission for renovation of his flat. According to them, all the renovations carried out were legal. The Respondents claim that the two flats have been interconnected for more than 25 years based on plans submitted and consent terms filed on 28th April 1997 in the proceeding before the Small Causes Court. Reliance is also placed on the assessment bills of the BMC charging them as commercial premises for use of dispensary and tailoring shop. In addition Respondent No.1 relies on the Shop and Establishment License issued on 1st January 1997, granting permission to conduct the business of sale of garments from the two flats. It is thus submitted that the Petition be dismissed.

Reasons and Conclusion:

9) We heard learned advocates and perused the papers in the proceedings.

10) This is yet another case of BMC's failure to perform with statutory obligations namely execute its own Orders, restoring the subject Flats in their original state. Consequently, law abiding citizens are being compelled to come to Court. Appallingly, the BMC has failed to even comply with Court Orders.

11) A summary of what transpired is necessary to justify our conclusion.

11.1) Dr. L. Soneji the owner of Flat 1A of Shanti Building No.2 expired on 11th January 2005. The Doctor was running her clinic from the said Flat. Respondent No.1, claiming to be her legal heir, on the date of her death itself, demolishes the walls of his owned Flat No. 2 and adjoining Flat 1A and amalgamates them. In addition, he installs a door in the common passage leading to the two flats and also a shutter to access the main road from the Flats. All of this is done without the permission of the Society or the BMC and without remotely caring about the structural stability of the Building.

11.2) Since the common area of the society was usurped and partitioning walls of the two separate Flats were demolished the society in order to secure its building and the members living on the higher floors, lodged a complaint on 13th January with the Police Station and on 17th January, 2005 with the 'D' ward of the Municipal Corporation calling upon them to take action against two of its members for having blatantly flouted all laws and for putting the lives of other members at risk by demolishing the walls on the ground floor that divided the two flats. Not only do the Respondent Nos.1 & 2 not stop at doing this, despite a notice issued by Respondent No.4 under Section 354 of the BMC Act on 24th January 2005, and pulling down the illegal constructed shutter on 27th January 2005, they reconstruct the shutter and continue with the illegal addition and alteration.

11.3) The Petitioner society then sent notice on 3rd February 2005 to place on record the offenses committed by the Respondent Nos.1 and 2. Following up with the complaint, the Respondent No.4 issued another notice under Section 354 to the Respondent Nos.1 and 2. The Respondent No.4 also sought police help on the same day.

11.4) On 28th February 2005 the Respondent No.4 issues a stop work letter to Respondent No.1 with a warning.

11.5) The Respondent Nos.1 and 2 in utter defiance, continued with their illegal and unlawful activities of amalgamating flats 1A and 2 on the ground floor by encroaching upon the Petitioner's common area leading to that flat.

11.6) The Petitioners then, were compelled to file a Suit in the City Civil Court on 4th April 2006. On 7th April 2006, an interim Order restrains Respondent Nos.1 and 2 from carrying out such illegal construction.

11.7) On the next day on 8th April 2006, a Commissioner is appointed and called upon to visit the suit premises and submit a report. A week later on 17th June 2006, the Commissioner submits a report showing that the Respondents had in fact removed the walls of the two flats amalgamating the same as well as encroached upon the common area of the society leading to the two flats.

11.8) On 19th April 2006, the City Civil Court passed an order allowing the Petitioner's Motion and dismissing the Motion of Respondent

Nos.1 and 2 following the Order on 7th June 2006 the Respondent No.4 proceeds to issue a notice under Section 351 of the BMC Act to Respondent Nos.1 and 2.

11.9) A Civil Application is filed before this Court against the Order of 19th April 2006 passed by the City Civil Court. On hearing the parties, the single Bench of this Court passed an order dated 22nd June 2006 permitting the BMC to proceed with action required under Section 351 of the BMC Act, 1888.

11.10) The Respondent No.4 once again directs the Respondent No.1 to remove the unauthorized work and warns of further prosecution on 28th June 2006. On 11th of August the Petitioner issues a notice to the Respondent Nos. 3 and 4 to take action following the notice dated 28th June and the Order of 22nd June 2006 passed by this Court permitting the BMC to take action against the Respondent Nos.1 and 2 under Section 351 of the BMC Act.

11.11) Since no action has been taken subsequent to the 351 notice, the Society by this Petition on 7th September 2005 seeks directions from this Court against the Respondent Nos. 3 and 4.

11.12) Thus, despite the action initiated by the law-abiding Society and Orders of this Court, both the Respondent Nos.1 & 2 and the BMC have failed to comply.

12) The matter went into cold storage since the last order neither the

BMC nor the Petitioners have taken any further steps. The illegalities continued blatantly despite the Orders of the removal of those illegalities and restoration of the premises.

13) A bare perusal of the reply of Respondent No.1 dated 4th August 2007 would reveal that, the entire Affidavit is replete with wrong notions and falsehoods stated with an intent to mislead the Court. In fact, it admits that the Respondent No.1 took possession of flat No.1A on 12th January 2005 in paragraph 5B i.e. on the next day that Dr. L Soneji expired. It also admits that there were disputes between the legal heirs of the deceased Dr. L. Soneji and that a Suit was filed in the Bombay High Court bearing Suit No. 949 of 2005.

14) The Affidavit attempts to lead us to believe that it is the society who is obstructing the use of the common amenities and is harassing the Respondent No.1. Although it claims that the renovation work is carried on within the boundaries of law, the Respondent fails to produce any sanctions from the BMC permitting them to do so, it in fact admits that the Respondents continued the renovation work despite the Petitioners having gone to the Court seeking their stop of work, the Respondents blatantly call the Petitions and the notices of the BMC hindrances and nuisance. The Respondents claim that the two flats have been interconnected for more than 25 years based on a proceeding in the Small Causes Court where a plan was submitted, and consent terms was filed on 28th April 1997. A bare

perusal reveals it is not a sanctioned plan.

15) The Respondents seek to defend themselves based on the assessment done by the BMC and charging them as commercial premises for use of dispensary and tailoring shop. They also rely on the Shop and Establishment License issued on 1st January 1997 where they have sought permission to carry out the business of sale of garments from these two flats.

16) In our view, this would not suffice, a mere issuance of a shop and establishment license to carry out commercial activity does not amount to a permission granted to change the user from residential to commercial by a competent authority.

17) The Respondent also attempts to lead us to believe that the renovation work permission was granted by the society way back on 11th May 1996. However, a bare reading of the same would evince that the renovation sought to be done therein was with regard to flat No.2 alone and not with flat No.1A. In fact, it evinces an undertaking by the Respondent No.1 that no structural changes would be made whilst carrying out the work. It also reveals the terms and conditions of the Society for granting the 'no objection' relied upon. The terms of the Society categorically prevent structural changes and require as a pre-condition the Respondent Nos.1 & 2 to obtain necessary permissions from the BMC. Furthermore, an undertaking to indemnify the adjoining flats or shops is

implied for any damage caused to the adjoining flats or shops and its rectification at the Respondent No.1's cost. The undertaking also secures itself from additional taxes on account of the additional work levied by the BMC to be borne by the Respondent Nos.1 and 2.

18) By showing certain license fee receipts for rolling shutters paid, the Respondents attempt to lead us to believe that they had obtained permission from the BMC. There is no plan or permission as such attached by the Respondents. This is clearly an eyewash and misleading. The allegation that 'the Petitioners are hoping to extract monies from the Respondent' is also an attempt to form prejudice against the Society.

19) Evidently, the Respondent Nos.1 & 2 are responsible for endangering the lives of the Society members by removing the walls on the ground floor partitioning the flats. It is the Respondents who have flouted the law. They have not obtained any permissions from the BMC. They have taken advantage of being adjoining flat owners and illegally usurped Late Dr. Sonaji's ownership premises without following the due process of law.

20) A law-abiding citizen is expected to submit the proposed alteration plans and take structural stability reports before carrying out structural alterations of demolishing several walls in the premises to amalgamate them, even assuming he was a legal owner of both flats. He could have voluntarily restored the flats to the original position. This is clearly contempt on the face of it. We therefore issue *suo motu* contempt

against the Respondent Nos.1 & 2.

21) Evidently, the Affidavit filed on 6th January 2025 shows that the Respondent No.1 had no remorse for the illegalities and offenses committed by him. The attempt to defend his actions and inaction of the BMC, cannot justify the illegalities. In our view the Respondent Nos.1 & 2's actions are entirely violations of law.

22) There is nothing on record to show that the Respondent Nos. 1 & 2 were in joint possession with Dr. L Soneji. Admittedly, their purported Aunt was running a clinic from flat No.1A. Thus Respondent No.1's contention that he was in possession of flat No.1A is entirely misleading and unbelievable in the absence of cogent evidence.

23) The other argument that the Magistrate has acquitted the Respondent No.1 in the prosecution launched by the BMC thus legalizing his actions leaves us flabbergasted.

24) A perusal of the Magistrate's Judgement dated 2nd August 2013 particularly paragraphs 7 to 12 discloses that having launched the prosecution against the Respondent Nos.1 and 2, the material evidence required to prove the alteration/amalgamation of the flats namely the original sanctioned building plan of the building was not produced. This rendered the entire case, that lasted seven years, worthless and ineffective against the offenders permitting perpetuation of illegalities.

25) It is presumed that, the BMC officers were well aware that the

sanctioned plan was material evidence for prosecuting the Respondent Nos. 1 and 2. Despite this evidence being a part of the BMC record it was not produced before the Court. It appears that it was willfully not produced. No attempt was made to even call upon the Society to produce it. It is presumed that the BMC would issue notice to the offender based on the sanctioned plans, more so as it was not an unauthorised building. It is not BMC's case that they had issued notice to the Respondent Nos. 1 & 2 at the instance of the Society without verifying the correctness of allegations/complaints. Naturally, we draw an inference that, the BMC's officers desired to protect the offenders for the reasons best known to them. It is inconceivable that the BMC who has several departments such as the Assessment Department, the Building and Factory Department, the Sewerage Department and other departments and requires Architects to submit plans to each department for sanctions granted from each department would not have a single sanctioned plan from any department on its record.

26) Assuming, though unbelievable, that the BMC did not have it, we wonder, having issued the notices to the offender Respondents, what steps did the BMC officers take to update their record, especially when there was a complaint by the society against its member who had committed material illegality and had materially altered the building thereby leading to weakness of its structural stability.

27) It is settled law that the litigants must come to Court with clean hands. Any attempt to mislead the Court either by false statements and half-truths deserve to be expelled from the Courts to uphold the law and the dignity of the Courts.

28) This itself is a ground to take strict action against this litigant before this Court. He has sought to clearly show the Court in poor light and has abused the process in every manner and form and materially gained and enjoyed the benefits by amalgamating the two flats using them as shops by commercially exploiting it, entirely prejudicial to the Society members, whose lives have been endangered on account of the removal of the walls on the ground floor.

29) We are extremely pained and peeved with the BMC. The BMC has failed to implement the notices issued under section 351 of the BMC Act in its letter and spirit. Under Section 522 (1) of the BMC Act, the Police Commissioner by himself and through his subordinates are duty bound to render all assistance to the Municipal Commissioner, BMC to enforce the provisions of the BMC Act to maintain good order in the City. Pertinently, section 522 (2) emphasis about the duty of every police officer in the City to communicate without delay to the proper municipal officer, any information which he receives of a design to commit or of the commission of any offence against this Act or against any regulation by by-law made under the BMC Act. Furthermore, it emphasizes that every police officer is

duty bound to assist the Commissioner, the General Manager of the City or any municipal officer or servant under this Act. The provisions are to maintain law and order in the Mumbai City. The BMC ought to have taken Police help to comply with the Court Orders.

30) It appears to us that, there is a trend of selective enforcement of the law. Having seen a rise in this trend since past several months, we have appraised the current Municipal Commissioner as well as the Police Commissioner to stem this rot. After the Court passes Orders, it is then for the State Authorities to ensure its implementation to set things right. Non-implementation of directions passed by these Courts would embolden and encourage offenders and bring the State to anarchy and lawlessness.

31) In view of the aforesaid, we pass the following order:

1) Respondents Nos.1 and 2 are held guilty of contempt, having brazenly, willfully and successfully violated and continue to violate the Orders dated 22nd June, 2006 and 27th September, 2007 of the Court. The Registry to issue notice to Respondent Nos.1 and 2 to respond to the sentence term and fine under the Contempt of Courts Act.

2) The Respondent No.3 to calculate additional fine in accordance with Section 52 read with Section 43 of the MRTP Act read with Section 354 as per notice dated 28th February, 2005. It is clarified that the fine imposed must be on a daily

basis since the illegality has continued since 28th February 2005 till date.

3) The Municipal Commissioner of Respondent No.3 to investigate as to why Orders of this Court have not been implemented by the concerned Officers since 2007. The Municipal Commissioner also to investigate as to why despite the complaints that were lodged by the society as well as the notices issued by the BMC since 2005, no sanctioned plans of the building were produced either by the BMC or called upon to be produced by the society during the criminal complaints launched by the BMC against the Respondent Nos.1 and 2. It is evident from the judgment dated 2nd August, 2013.

4) We further direct the Municipal Commissioner to file a compliance Affidavit by 15th February, 2025 and he shall not delegate his powers to prepare and file the Affidavit to any subordinate Officer. The Affidavit must contain the steps taken to restore the building as per the sanctioned plan i.e. putting up the walls partitioning and or dividing the two flats as it stood at the time of sanction, to the satisfaction of the Society and its members.

5) Investigative steps taken by Commissioner of BMC to ascertain which officers were responsible for the

non-compliance of Notices as well as Court Orders and the failure to restore the partition walls of the building and why this Court was not approached if faced with hurdles to effect compliance of its Orders,

6) What actions are going to be taken against these officers who have abetted and encouraged an emboldened persons such as Respondent Nos. 1 and 2 to commit offenses and illegalities and to prevent its implementation for almost 20 years.

7) The Respondent Nos.1 and 2 to personally appear before this Court on 18th February 2025 as well as file an Affidavit by 3rd February, 2025 giving reasons why they should not be sentenced under the Contempt of Courts Act for flouting the Orders of the Court and continuing the offenses that have been committed by them by amalgamating the two flats without due permissions from the authorities as well as the society.

32) The Petition stands disposed off in terms of the aforesaid. In view of the disposal of the Petition, Notice of Motion No.496 of 2007 does not survive and the same is also stands disposed off.

33) List the matter on 18th February 2025 'for compliance'.

(KAMAL KHATA, J.)

(A.S. GADKARI, J.)