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

FIRST APPEAL NO. 401 OF 2003

Abhay M. Divekar

.. Appellant

Versus

Municipal Corp. of Gr. Bombay & Ors.

.. Respondents

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Adv. S. S. Gokhale for the Appellant.

Adv. Pallavi Khale i/b Adv. Komal Punjabi for the Respondent-BMC.

CORAM: FIRDOSH P. POONIWALLA, J.

RESERVED ON: OCTOBER 16, 2025

PRONOUNCED ON : JUNE 9, 2026

P. C.

1. This First Appeal challenges the Judgement and Decree dated 16th January, 2003 passed by the City Civil Court at Bombay in L.C. Suit No. 6952 of 1996.

FACTS

2. In this Judgement, the Appellant will be referred to as the Plaintiff and Respondent No.1 will be referred to as “the BMC”.

3. The Plaintiff is in use, occupation, enjoyment and possession of premises situated at first floor, Manu Mahal, 471-C, King’s Circle, Matunga, Mumbai- 19 (hereinafter referred to as “**the suit premises**”). The Plaintiff’s

father had been residing at the suit premises since the year 1940 till 1982. The Plaintiff was born in 1948 and is living in the suit premises till date. The Plaintiff is using the suit premises for his residential purpose and as a hospital.

4. During a usual round of inspection, the officers of the BMC visited the suit premises on 2nd November, 1996 and detected the unauthorised covering of a common passage by providing two collapsible gates and one wooden door. The officers of the BMC asked for the requisite permission to the Plaintiff and after making inquiry in the vicinity as well as in the Building and Factory Department learned that the Plaintiff had carried out unauthorised construction without the permission of the BMC. They accordingly prepared an Inspection Report and rough sketch and forwarded the same to their superior officers. The same were in turn put up before the Deputy Municipal Commissioner (Zone-II) for consideration and further action. The Deputy Municipal Commissioner (Zone-II) after going through Inspection Report and rough sketch, *prima facie* came to the conclusion that the Plaintiff's work was unauthorised and accordingly issued a Notice under Section 351 of the Mumbai Municipal Corporation Act, 1888 (hereinafter referred to as "**the MMC Act**") to the Plaintiff. The said Notice was duly served upon the Plaintiff.

5. By the said Notice dated 22nd November, 1996, the Plaintiff was informed that he had carried out unauthorised work i.e. unauthorised covering of common passage by providing two collapsible gates and wooden door without the permission of BMC and thereby was requested to show sufficient cause in writing as to why the said work should not be pulled down. The said Notice further requested the Plaintiff that if he was in possession of any proof to show that the said work is not unauthorised, he should produce the same. By the said Notice, the Plaintiff was further informed that, if he failed to show cause within the stipulated period, the said work would be removed or pulled down by the BMC at the risk and costs of the Plaintiff.

6. The Plaintiff replied to the said Notice dated 22nd November, 1996 by his letter dated 26th November, 1996. In the said reply, the Plaintiff contended that the suit premises had been used as a maternity hospital and hence, for safety, the Plaintiff had provided the gates and door, and further requested the BMC that the Plaintiff's reply should be treated as a Notice under Section 527 of the MMC Act.

7. Along with the said reply, the Plaintiff annexed copies of rent receipts, a copy of a plan and a deed of conveyance.

8. Thereafter, before the Deputy Municipal Commissioner could pass an order of demolition, the Plaintiff filed the present Suit on 17th December,

1996. The Bombay City Civil Court refused to grant any ad-interim injunction to the Plaintiff.

9. Thereafter, the officers of BMC forwarded the Inspection Report, the rough sketch, the documents produced by the Plaintiff, alongwith the Plaintiff's reply, to the superior officers of the BMC, and, in turn, the same was put up before the Deputy Municipal Commissioner (Zone-II) for consideration and further action. The Deputy Municipal Commissioner (Zone-II), after considering the reply and the documents produced by the Plaintiff, and after going through the office records, passed a reasoned and speaking order of demolition dated 20th December, 1996. The said Order was duly served upon the Plaintiff. The said Order informed the Plaintiff that the reply and documents produced by the Plaintiff were considered by the BMC. However, the documents produced by the Plaintiff did not prove the authorisation or existence of the Noticed structures prior to the datum line. By the said Order, the Plaintiff was directed to remove the said unauthorised work within 7 days from the receipt of the said Order, failing which the unauthorised work would be removed by the BMC at the risk and costs of the Plaintiff.

10. The Plaintiff again approached the City Civil Court, and by an Order dated 4th July , 2000, the City Civil Court referred the matter to the Deputy Municipal Commissioner for giving a personal hearing to the Plaintiff and to

pass an order and communicate the same to the Plaintiff, and till that date not to take action against the Plaintiff.

11. As per the directions given by the Bombay City Civil Court, the BMC fixed personal hearings on 18th March 2000, 29th April 2000, and finally the matter was heard on 22nd September, 2000. At the time of personal hearing, the Plaintiff was present before the Deputy Municipal Commissioner and the Assistant Engineer F/North Ward was also present on behalf of the BMC. The Deputy Municipal Commissioner gave a hearing to the Plaintiff, and, thereafter, passed an Order that the Plaintiff should either approach the Building Proposal Department of the BMC for regularising the unauthorised construction or remove the unauthorised construction within 15 days. Further, the said Order directed that, on receiving the Application, the Building Proposal Department should finalise and dispose of the Application within 15 days from the date of the Application. The said Order also provided that, if no Application was made, the Assistant Municipal Commissioner F/North ward should remove the unauthorised construction.

12. Thereafter, the Plaintiff made an Application for regularising the Noticed structures to the Assistant Engineer (Building and Proposal Department). However, after considering the documents and Application filed by the Plaintiff, the Plaintiff's Application for regularisation was not accepted as the Plaintiff had not complied with the requisitions of the BMC.

13. In the present Suit filed by the Plaintiff, the BMC filed a Written Statement only on 23rd October, 2002, after the evidence of the Plaintiff, and therefore, the Plaintiff was again allowed to lead evidence.

14. The following issues were framed in the Suit by the Bombay City Civil Court.

“Issues

- 1. Whether Plaintiff proves that he or through his father the flat has been used for residential and also for hospital purpose from 1940?*
- 2. Whether Plaintiff proves that the action of Corporation in issuing notice dt. 22.11.1996 u/s. 351 of B.M.C. Act, is illegal and bad.*
- 3. Whether Plaintiff is entitled for injunction as prayed for?*
- 4. Whether the suit is maintainable for want of statutory notice u/s. 527 of B.M.C. Act?*
- 5. What Order and Decree?”*

15. In the Suit, the Plaintiff led his own oral evidence. The BMC led the evidence of one Ravindra Bhagaji Ghule, the Sub-Engineer of the EEBPT Department of BMC, and of Rajesh Sitaram Patil the Junior Engineer working in the Storm Water Drains Department (SWD) of the BMC. The Plaintiff and the BMC also tendered documents in evidence.

16. By a Judgement dated 16th January, 2003, the Bombay City Civil Court passed the following Order :

“ORDER

(1) *Suit is partly decreed as under.*

(2) *The Corporation shall not remove the 2 collapsible gates put at first floor of the premises concerning Flat Nos. 4,5, 6 and 7. However, Corporation is at liberty to remove the wooden door or doors covering the passage. The Plaintiff shall not obstruct by perpetually closing these gates and shall not use passage for human habitation. No costs.*

Suit is dismissed against Defendant Nos. 2 and 3.”

POINTS FOR DETERMINATION

17. By the impugned Judgement and Order dated 16th January 2003, the Court has directed BMC not to remove the two collapsible gates at the Suit Premises but has given BMC the liberty to remove the wooden door covering the passage. BMC has not filed an Appeal against the said Judgement and Decree dated 16th January, 2003. Therefore, the Judgement and Order dated 16th January, 2003 has become final in so far as the two collapsible gates are concerned. In these circumstances, the following point arises for determination of this Court.

a) Whether the Trial Court was right in holding that the BMC is at liberty to remove the wooden doors covering the passage and by directing the Plaintiff not to obstruct by perpetually closing the gates and not to use the passage for human habitation?

SUBMISSIONS OF THE APPELLANT (PLAINTIFF)

18. Ms. S.S. Gokhale, the learned Advocate appearing on behalf of the Plaintiff, referred to the Agreement dated 28th March, 1962 entered into between the BMC and the landlord permitting change of user along with the map attached thereto. Ms. Gokhale also referred to a copy of the letter dated 17th October, 2001 issued by BMC and the licence plan attached thereto. Ms. Gokhale submitted that the said documents did not state that there were any common passages as contended by the BMC and as held by the Trial Court. Ms. Gokhale contended that there was no challenge to the said agreement or the plan and, therefore, it must be accepted that there were no common passages and the wooden door was not obstructing any common passage.

19. Further, Ms. Gokhale referred to the impugned Judgement and submitted that the impugned Judgement talks of other occupants when there are no other occupants in the Suit Premises.

20. Further, Ms. Gokhale submitted that the impugned Judgement does not deal with the basic documents which clearly showed that there was no common passages.

21. Further, Ms. Gokhale referred to a Circular No. HC/43 (1968-69) of the BMC and, in particular to paragraph 6, thereof which stated that unauthorised residential and non-residential structures constructed and

existing prior to 17th April 1964 and 1st April, 1962 need not be demolished. Ms. Gokhale submitted that, by virtue of the provisions of this Circular also, the wooden gate ought not to be demolished.

22. In support of her submissions, Ms. Gokhale relied upon the following Judgements :

- a) Judgement of this Court in *Maneklal N. Shah alias Kothari Vs. Municipal Corporation of Greater Bombay 2014 (2) Mh.L.J 341*,
- b) Judgement of this Court in *Bilkishbai Moizbhai Vasi & Anr. Vs. Municipal Corporation for Greater Bombay (Writ Petition No. 1286/1980)* and c) Judgement of this Court in *Bhujanga Abba Patil (since deceased) through his legal heirs Smt. Bay Anabai Bhujanga Patil & ors. Vs. Dnyanu Ramchandra Powar 2017(1) Maharashtra Law Journal 2013*.

23. In conclusion, Ms. Gokhale submitted that this Court be pleased to allow the present Appeal

SUBMISSION OF RESPONDENT NO.1 (BMC)

24. Ms. Pallavi Khale, the learned Advocate appearing on behalf of the BMC, submitted that the wooden door constructed by the Plaintiff encroached the common passage, thereby encroaching the rights of other

Respondents and visitors. Ms. Khale submitted that the said door was constructed without seeking any permission from the BMC and therefore ought to be demolished.

25. Ms. Khale submitted that the Plaintiff has admitted in his evidence that the wooden door was constructed only 15 to 20 years back and therefore the Circular referred to by the Plaintiff was not applicable.

26. Ms. Khale submitted that the fact, that the Plaintiff submitted a regularisation proposal, showed that the said wooden door was not an authorised structure. In this context, Ms. Khale referred to the evidence of the Plaintiff and that of the witness of the BMC. Ms. Khale further submitted that this regularisation proposal of the Plaintiff had also been rejected as the Plaintiff had failed to provide the requisite information and documents.

27. In support of her submissions, Ms. Khale relied upon the Judgement of the Hon'ble Supreme Court in *Seema Arshad Zaheer Vs. Municipal Corporation of Gr. Mumbai (in Special Leave Petition (Civil) No. 9479/2005)* and to the decision of this Court in *Tushar Guru Salien Vs. State of Maharashtra (PIL NO. 67/2017)*.

28. In conclusion, Ms. Khale submitted that, for all the aforesaid reasons, the present Appeal ought to be dismissed.

ANALYSIS AND FINDINGS

29. The question that falls for consideration of this Court is whether the Trial Court was right in holding that the BMC is at liberty to remove the wooden door covering the passage and by directing the Plaintiff not to obstruct by perpetually closing the gates and not to use the passage for human habitation.

30. As far as the wooden door is concerned, the Plaintiff has not produced any document to show that same was authorised by the BMC.

31. The Plaintiff has relied upon an Agreement dated 28th March, 1962 between the BMC and the landlord permitting change of user. It is the case of the Plaintiff that the same does not show any passage, and, therefore, the question, of the wooden door blocking any passage, does not arise. However it is important to note that the said Agreement also does not refer to any wooden door. Further, the License Plan annexed to the letter dated 17th October, 2001 relied upon by the Plaintiff also does not show any wooden door. In fact, the License Plan shows a common passage.

32. Further the fact, that the wooden door is not authorised, is demonstrated by the fact that the Plaintiff made an application for regularisation of the same. Further, the said application was rejected as the Plaintiff had not complied with the requirements of BMC. In this context, the BMC's witness, Ravindra Ghule, has deposed that the office of the BMC had

received the regularisation proposal from the architect of the Plaintiff. The said proposal was for regularisation of enclosure of the passage. The said proposal was considered by the higher authority and BMC had issued a requisition letter to the architect on 17th April, 2001 signed by the Assistant Engineer Building Proposal (City). Further, Mr. Ravindra Ghule deposed that due to non-compliance of the requisition, the proposal was recorded on 4th October, 2001 (i.e. rejected) and the same was communicated to the architect of the Plaintiff and also to Shah Nursing Home of the Plaintiff. Mr. Ravindra Ghule also deposed that the map which was submitted by the Plaintiff clearly indicated that, by the proposed closure of the passage, light and air to the stair case would be hampered.

33. Further, as far as the Circular relied upon by the Plaintiff is concerned, paragraph 6 of the said Circular reads as under :

“6. Unauthorized residential and non-residential structure constructed and existing prior to 17th April, 1964 and 1st April, 1962, resp. need not be demolished even if action, under sanction of the S.C.

obtained to carry out demolition unless action is required to be taken under the later part of para 2.”

34. The Circular shows that a residential structure existing prior to 17th April, 1964 and a non-residential structure existing prior to 1st April, 1962 is protected. However, in the present case, the Plaintiff has deposed in his Examination-in-Chief on 10th October, 2002 that the wooden door has been

in existence since more than 15 to 20 years. Therefore, as per the Plaintiff's own deposition, the wooden door could not have been constructed earlier than 1982. This clearly shows that the wooden door was constructed after the datum lines of 17th April, 1964 and 1st April, 1962 and therefore the said Circular does not apply to the case of the Plaintiff.

35. Further, as far as the submission of the Plaintiff that there is no common passage is concerned, as stated earlier, the witness of BMC, Ravindra Ghule, has stated that the map which was submitted by the Plaintiff for regularisation clearly indicated that by the proposed closure of the passage, the light and air to the staircase would be hampered. This shows the existence of a passage.

36. Further, the second witness of the BMC, Mr. Rajesh Patil, has deposed that, on 2nd November, 1996, when he had visited the suit premises, he had noticed that, on the first floor, at two places, the common passage was closed by putting two collapsible gates, and one wooden door. He had prepared an Inspection Report under his signature and it was put up before the Assistant Engineer for comments. In the cross-examination of Mr. Rajesh Patil, the said statement was not challenged. This clearly shows that there did exist a common passage and the wooden door blocked the same.

37. In the light of the aforesaid reasons, the impugned Judgement correctly permits the BMC to remove the wooden doors or doors covering the

passage and further directs the Plaintiff not to obstruct by perpetually closing these gates and not to use this passage for human habitation. In these circumstances, I am not inclined to interfere with the said Judgement dated 16th January, 2003 of the Trial Court.

38. In this context, it would be appropriate to refer to the Judgements relied upon by Ms. Khale on behalf of the BMC.

39. Ms. Khale referred to the Judgement of the Hon'ble Supreme Court in ***Seema Arshad Zaheer (supra)*** and, in particular, to paragraph 30 thereof wherein the Hon'ble Supreme Court has referred to certain observations in ***MI Builders Pvt. Ltd. Vs. Radhey Shyam [1999 (6) SCC 464]***. Paragraph 30 reads as under :

“30. It is true that in cases relating to orders for demolition of buildings, irreparable loss may occur if the structure is demolished even before trial, and an opportunity to establish by evidence that the structure was authorized and not illegal. In such cases, where prima facie case is made out, the balance of convenience tilts in favour of plaintiff and a temporary injunction will be issued to preserve status quo. But where the plaintiffs do not make out a prima facie case for grant of an injunction and the documents produced clearly show that the structures are unauthorized, the court may not grant a temporary injunction merely on the ground of sympathy or hardship. To grant a temporary injunction, where the structure is clearly unauthorized and the final order passed by the Commissioner (of the Corporation) after considering the entire material directing demolition, is not shown to suffer from any infirmity, would be to encourage and perpetuate an illegality. We may refer to the following observations of this

Court in M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu [1999 (6) SCC 464] made in a different context:

"This Court in numerous decisions has held that no consideration should be shown to the builder or any other person where construction is unauthorized. 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 requires to be exercised has to be in accordance with law and set legal principles."

40. In my view this Judgement clearly shows that the wooden door constructed by the Plaintiff, which is unauthorised, must be demolished.

41. Ms. Khale then referred to the decision of this Court in ***Tushar Guru Salien (supra)***. Paragraph 5 of the said Judgement is relevant and reads as under :

"5) Concerning a property, a suit to enforce or protect an interest in the property which is governed by a Municipal Statute, the interest protected has to be with respect to a plea that prima-facie, the structure which is being targeted is an authorized structure. Meaning thereby, the plaint must make an

avermment of the sanction obtained from the Corporation and must make an averment that the structure targeted is prima-facie governed by the sanction. Merely pointing out deficiencies in the notice or the authority of the person issuing the notice is neither here nor there. Thus, the sine qua non of such kinds of suits is a positive assertion made with reference to the sanctioned building plans.”

42. The said decision clearly lays down that in a Suit regarding construction, in respect of which notice has been issued by a statutory authority like the BMC, the Plaintiff must show that the structure in question is authorised. In the present case, the Plaintiff has not shown that the structure in question is authorised. On the contrary, as stated herein above, the Plaintiff had applied for regularisation of the structure, which was rejected.

43. I will now deal with the Judgements relied upon by Ms. Gokhale in support of the Plaintiff's case. The first Judgement relied upon by Ms. Gokhale is ***Maneklal N. Shah (supra)***. Ms. Gokhale referred to paragraph 3 of the Judgement which reads as under :

3. It is true that if structure is constructed without any written permission from the Municipal Corporation or without any sanctioned plan, it is termed as "unauthorized or illegal construction." However, premises in possession of tenants, if they are having existence since years, and tenant is able to show long standing existence of the suit premises since prior to predatum line, in accordance with policy decisions and circulars of Municipal Corporation, the decision making authority of Municipal Corporation is required to pass a reasoned order by considering the

documents produced by the noticee as to whether structure described in the notice is capable of being regularized or whether it is tolerable in accordance with prevalent circulars, and decisions of Municipal Corporation. Therefore, considering the evidence led in this case, that plaintiff / appellant had also received notice long back in the year 1975, and assuming that the structure is in open space and if it is on private land and capable of being regularized for the time being, decision making authority on behalf of the Municipal Corporation can surely consider as to whether the suit structure can be tolerated for the time being, until owner / landlord would follow due process of law for eviction of the tenant.

44. The said Judgement holds that if a tenant is able to show long standing existence of the premises since prior to the datum line, in accordance with its policy decisions and circulars, the Municipal Corporation is required to pass a reasoned order by considering the documents produced by the noticee as to whether the structure described in the Notice is capable of being regularised or whether it is tolerable in accordance with the prevalent circulars and decisions of the Municipal Corporation.

45. What is held in this Judgement does not come to the aid of the Plaintiff. The first reason is that, as accepted by the Plaintiff in his evidence, the wooden door has been constructed much after the datum line. Further despite the same, the BMC had considered the Plaintiff's application for regularisation and had rejected the same as the Plaintiff did not produce the requisite information and documents.

46. The second Judgement relied upon by Ms. Gokhale is the Judgement in ***Bilkishbai Moizbhai Vasi (supra)*** . The relevant portion of the said Judgement reads as under :

“ Section 351 obliges the Municipal Commissioner, if the construction of any building or the execution of any work is commenced contrary to the provisions of the Act, to give notice requiring the person constructing or doing the work to show cause why it should not be pulled down. The word used in this context is "shall". If sufficient cause is not shown, the Commissioner "may" remove, alter or pull down the building or work. It is left to the Commissioner's discretion whether or not to demolish the unauthorised construction if sufficient cause is not shown. The court cannot impede the exercise of that discretion by the issuance of a mandatory order.

The dispute is between the petitioners as landlords and those who have constructed the structures or are occupying them. It is a purely private dispute for which the petitioners must seek redress by way of a civil suit. They cannot be provided with the machinery of the 1st respondent to settle private scores.”

47. The said Judgement holds that it is left to the Commissioner's discretion whether or not to demolish the unauthorised construction, if sufficient cause is not shown. It is further held that the Court cannot impede the exercise of that discretion by the issuance of a mandatory order. In the present case, the Commissioner, after giving an opportunity to the Plaintiff to regularise the structure, has not regularised the structure as the Plaintiff failed to produce the requisite information and documents. Therefore this Judgement does not take the case of the Plaintiff any further. Further, in the said Judgement, the Court has held that the machinery of the BMC cannot be

provided to settle private disputes between tenants and landlords. In the present case, the BMC has taken action against the Plaintiff as the said wooden door is unauthorised. The Plaintiff had even made an application to the BMC for regularisation of the said wooden door, but the same was rejected as the Plaintiff had not provided the requisite information and documents. In these circumstances, this is a dispute between the BMC and the Plaintiff and not a private dispute. For this reason also, the said Judgement does not take the case of the Plaintiff any further.

48. The last Judgement relied upon by Ms. Gokhale is the Judgement in ***Bhujanga Abba Patil (supra)***. Ms. Gokhale relied upon the head note of the said Judgement which reads as under :

“Since the area of the plot agreed to be sold to the defendants by the erstwhile owner was clearly mentioned in the sale deed which was duly admitted and confirmed by the erstwhile owner of the said land himself and also admitted and confirmed by the witnesses examined by the defendants, reference to the boundaries of the plot mentioned in the sale deed as conclusive by the first Appellate Court is totally perverse and illegal. Since specific area of the land was sold by the erstwhile owner to the defendants which was specifically mentioned in the sale deed, the finding/observation of the first Appellate Court that the boundaries would prevail is ex facie perverse. The boundaries or the area mentioned in the sale deed entered into between the defendants and the erstwhile owner of the said property would not prevail over the area mentioned in the sale deed in view of the exact area of property sold having been clearly mentioned in the sale deed. Since the first Appellate Court had not dealt with and considered the oral and documentary evidence led by the parties in the right

perspective and has on the other hand decided ex facie contrary to the documents and oral evidence and has rendered various findings which are ex facie perverse, such perverse findings can be interfered with by exercising powers under section 100 of the Code of Civil Procedure, 1908. 2007(6) Mh.L.J. (S.C.) 336 and (1983) 2 MLJ 340 (Madras), Rel. (Paras 37 to 48).”

49. In my view, the said Judgement is totally irrelevant as far as the present case is concerned, and does not take the case of the Plaintiff any further.

50. For all the aforesaid reasons, the Point for Determination is answered in the affirmative i.e. against the Plaintiff.

51. For all the aforesaid reasons, the present Appeal is required to be dismissed.

ORDER

In light of the above discussion and for the aforesaid reasons, the following Order is passed :

A) The Appeal is dismissed.

B) In the facts and circumstances of the case, there will be no order as to costs.

[FIRDOSH P. POONIWALLA, J.]