SUPREME COURT OF INDIA

Municipal Corporation of Greater Mumbai

Vs.

Sunbeam High Tech Developers Private Ltd.

C.A.No.7627 of 2019

(Deepak Gupta and Aniruddha Bose,JJ.,)

24.10.2019

JUDGMENT

Deepak Gupta,J.,

1. The issue involved in these appeals is whether if a municipal corporation demolishes a structure in exercise of powers vested in it but in violation of the procedure prescribed, the High Court direct the 'owner/occupier' of the building to reconstruct the demolished structure?

2. The municipal corporations in the State of Maharashtra like in any other part of the country are vested with the power to demolish structures which violate the laws and have been built without any building plans or in violation of the laws. The exercise of the power of demolition which affects the property of the citizens of this country must be exercised in an absolutely fair and transparent manner. Rules in this regard must be followed. At the same time, the Court has to balance the private interest with the larger public interest. Cities and towns must be well planned and illegal structures must be demolished. Rule of law comprises not only of the principles of natural justice but also provides that the procedure prescribed by law must be followed. Rule of law also envisages that illegal constructions which are constructed in violation of law must be demolished and there can be no sympathy towards those who violate law.

3. Before we refer to the statutory provisions, we may make reference to a judgment of the Bombay High Court which appears to be the locus classicus on this subject, as far as the Bombay High Court is concerned. In *Sopan Maruti Thopte and Another vs. Pune Municipal Corporation and Another*[1], the Bombay High Court referred to various provisions of law, and thereafter issued the following directions :-

> "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."

After issuing these directions the Court also issued a word of caution to courts not to grant interim injunctions protecting illegal constructions from demolition. We may refer to the following observations:-

> "24. In our view, passing interim orders indiscriminately and without apparent and due application of mind, which has the effect of allowing the plaintiff to continue to enjoy the fruits of his illegal actions including unauthorised construction tends to lower the Court's prestige and clearly undermines the Rule of Law.
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> 28. Considering the aforesaid decisions it should be borne in mind before issuance of an injunction that it is a discretionary and an equitable relief. It is not mandatory that for mere asking such relief should be given. It is not a charity at the cost of public. However, we make it clear that the procedure established by law has to be followed by the public authorities, whether it be the State or a local body, including the Municipal Corporations. At the same time, the procedural lapses, unintentional or intentional, which do not seriously affect the substantive rights of a person, ought not to result in ad interim orders which protect illegality having already been committed by the plaintiff and to give licence of continuing fruits of such illegality for years. Violators of law should not liberally be allowed to take protection of Court of law by obtaining ad interim injunctions which have the effect of continuing such violation."

Statutory Provisions

4. The relevant provisions to deal with the issue in hand are covered under Chapter 12 of The Mumbai Municipal Corporation Act [Bom. III of 1888] (hereinafter referred to as 'the MMC Act'). Section 337 of the MMC Act provides that before erecting any building, notice in this behalf has to be given to the Commissioner of the Municipal Corporation. The phrase 'to erect a building' not only means erecting a new building but also includes within its ambit re-erection of any building by demolishing the existing building entirely or erecting any building by removing the roof of the existing ground floor structures and adding one or more upper floors and to complete a dwelling house, originally meant to be used as one dwelling house into more than one dwelling houses. Building plans have to be furnished to the Commissioner, in terms of Section 338.

5. Even with regard to execution of works not amounting to erection of building notice under Section 342 of the MMC Act has to be given to the Commissioner. The relevant portion of the Section reads as follows:-

> "342. Notice to be given to the Commissioner of intention to make additions, etc., to or change of user of, a building. Every person who shall intend-
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> (a) to make any addition to a building, or change of existing user or
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> (b) to make any alteration or repairs to a building involving the removal, alteration

or re-erection of any part of the building except tenantable repairs:
Provided that no lowering of plinth, foundation or floor in a building shall be permitted.

Explanation.- "Tenantable repairs" in this section shall mean, only,-

(i) providing guniting to the structural members or walls;

(ii) plastering, painting, pointing;

(iii) changing floor tiles;

(iv) repairing W. C., bath or washing places;

(v) repairing or replacing drainage pipes, taps, manholes and other fittings;

(vi) repairing or replacing sanitary water plumbing, or electrical fittings; and

(vii) replacement of roof with the same material, but shall not include,-

(a) change in horizontal and vertical existing dimensions of the structure;

(b) replacement or removal of any structural members of load bearing walls;

(c) lowering of plinth, foundations or floors;

(d) addition or extension of mezzanine floor or loft; and

(e) flattening of roof or repairing roof with different material;

(c) [* * *]
(cc) to make any alteration in a building involving-

(i) the sub-division of any room in such building so as to convert the same into two or more separate rooms,

(ii) the conversion of any passage or space in such building into a room or rooms, or

(d) to remove or reconstruct any portion of a building abutting on a street which stands within the regular line of such street, shall give to the Commissioner, in a form obtained for this purpose under section 344, notice of his said intention, specifying the position of the building in which such work is to be executed, the nature and extent of the intended work, the particular part or parts, if any, of such work which is or are intended to be used for human habitation and the name of the

person whom he intends to employ to supervise its execution."

6. An analysis of this Section clearly indicates that if any addition is to be made to the building or existing use of the building is to be changed then notice is required to be given to the Commissioner before such addition or change is made. Even for making any alteration or repair to a building which involves the removal, or alteration of any part of the building, permission is required except for tenantable repairs which have been specifically defined in the explanation of this Section. The proviso lays down that no lowering of plinth, foundation or floors in the building shall be permitted. Tenantable repairs have been defined and we need not dwell on what are tenantable repairs for the purpose of deciding these cases. We would, however, like to emphasise that even in case of repairs not falling within the category of tenantable repairs, notice will have to be given to the Commissioner and permission is to be taken and then only work can be commenced in terms of Section 347.

7. We are mainly concerned with Section 351 which reads as follows :-

> "351. Proceedings to be taken in respect of buildings or work commenced contrary to section 347.
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> (1)The Commissioner shall, by notification in the Official Gazette, designate an officer of the Corporation to be the Designated Officer for the purposes of this section and of sections 352, 352A and 354A. The Designated Officer shall have jurisdiction over such local area as may be specified in the notification and different officers may be designated for different local areas. (1A) If the erection of any building or the execution of any such work as is described in section 342, is commenced contrary to the provisions of section 342 or 347, the Designated Officer, unless he deems it necessary to take proceedings in respect of such building or work under section 354, shall- (a) by written notice, require the person who is erecting such building or executing such work, or has erected such building or executed such work, or who is the owner for the time being of such building or work, within seven days from the date of service of such notice, by a statement in writing subscribed by him or by an agent duly authorized by him in that behalf and addressed to the Designated Officer, to show sufficient cause why such building or work shall not be removed, altered or pulled down; or (b) shall require the said person on such day and at such time and place as shall be specified in such notice to attend personally, or by an agent duly authorized by him in that behalf, and show sufficient cause why such building or work shall not be removed, altered or pulled down.
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> Explanation. - "To show sufficient cause" in this sub-section shall mean to prove that the work mentioned in the said notice is carried out in accordance with the provisions of section 337 or 342 and section 347 of the Act.
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> (2) If such person shall fail to show sufficient cause, to the satisfaction of the

> Designated Officer, why such building or work shall not be removed, altered or pulled down, the Designated Officer may remove, alter or pull down the building or work and the expenses thereof shall be paid by the said person. In case of removal or pulling down of the building or the work by the Designated Officer, the debris of such building or work together with other building material, if any, at the sight of the construction, belonging to such person, shall be seized and disposed of in the prescribed manner and after deducting from the receipts of such sale or disposal, the expenditure incurred for removal and sale of such debris and material, the surplus of the receipts shall be returned by the Designated Officer, to the person concerned.
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> (3) No court shall stay the proceeding of any public notice including notice for eviction, demolition or removal from any land or property belonging to the State Government or the Corporation or any other local authority or any land which is required for any public project or civil amenities, without first giving the Commissioner a reasonable opportunity of representing in the matter."

Sub-section (1A) was the original sub-section (1). It appears that if the erection of any building or the execution of any work is commenced contrary to the provisions of Section 342 or 347 then the designated officer shall issue written notice calling upon the builder, occupier, owner to submit his reply within 7 days from the service of notice to show cause as to why such a building should not be demolished. The designated officer can also require the person to appear before him personally on a time and date fixed by him. The Explanation is important. It lays down that 'sufficient cause' would mean that the work is being carried out in accordance with the provisions of Sections 337 or 342 and 347 of the MMC Act. This means that required permission before the construction has to be obtained and if the person, within 7 days, is not able to produce such permission, then the designated officer can take steps to remove the building. Sub-section (2) provides that if the noticee does not show cause or the designated officer is not satisfied with the reply filed, then the building can be removed or pulled out. Sub-section (3) debars the jurisdiction of civil courts to stay proceeding of any such public notice.

8. Dealing with the issues relating to building under construction and/or reconstruction and/or extension without valid permission the Bombay High Court in Sopan's case (supra) had directed that a short notice of 24 hours be issued after drawing a panchnama at the site and also by taking photographs of such structure and/or extension. It was also ordered that the photographs should indicate the date when the same were taken. Direction 4 provided that if after demolition the un-authorised structure is re-erected without valid permission within a period of 1 year then also notice of only 24 hours would be required. We are not directly concerned with directions 5 and 6. In Sopan's case (supra), no direction was given that if the offending structure is demolished illegally the same should be permitted to be reconstructed. The reconstruction jurisprudence seems to have developed at a later stage.

9. At this juncture it would be necessary to point out that when Sopan's case (supra) was decided there was no provision fixing a time line for filing a reply to the notice. Now, 7 days have been fixed to file the reply in terms of Section 351 sub-section (1A), and,

therefore, the first direction in Sopan's case (supra) is no longer operative. The Legislature has enacted a provision and this direction cannot be said to be valid any more.

10. The main dispute is with regard to the 2 nd direction in Sopan's case (supra) which provided that demolition of the building structure can be done only after giving 15 days' notice to the affected person.

11. Shri Atmaram N. Nadkarni, learned Additional Solicitor General, appearing for the appellants submits that by making an amendment to Section 351, providing a period of 7 days for notice to be given, the first direction in Sopan's case (supra) is no longer valid.

12. However, as pointed out by Mr. Bharat Zaveri, learned counsel appearing on behalf of the respondents that the second direction in Sopan's case (supra) requiring 15 days' notice to be given to the affected person before demolition of the structure, is still valid and, therefore, 2 notices are required to be given viz.,(i) a show cause notice of 7 days in terms of Section 351 (1A) and; (ii) notice of 15 days in terms of Sopan's case (supra). The learned counsel also submits that the judgment in Sopan's case (supra) holds the field till date, and we agree with the counsel that in terms of direction no.2 in Sopan's case (supra), 15 days' notice has to be given before demolishing the structure. We are not oblivious to the fact that Sub-section (2) of Section 351 does not lay down any timeline in this regard. It was in this context that when no timelines were laid down either for show cause notice or for demolition that the Bombay High Court in Sopan's case (supra), fixed two timelines of 15 days each for issuing show cause notice and, thereafter, to take action of demolition. The Legislature intervened and the first period has been curtailed from 15 days to 7 days but the second direction has not been interfered with by the Legislature. Therefore, that judgment continues to hold the field in this regard.

13. Admittedly, in both the cases the second notice does not comply with the direction given in Sopan's case (supra). Therefore, there is no manner of doubt that the requirement with regard to the second notice has not been complied with in either of the cases. As such, the action of demolition without following the procedure prescribed by law is illegal.

14. That brings us to the main issue before us. Is the writ court justified in issuing a direction that since the building has been demolished without following the procedure prescribed by law, the petitioners before the High Court (Respondents before us) be permitted to reconstruct the structure albeit using the same material, and of the same dimensions, as existed earlier? The second direction given is that before commencing of work of reconstruction, the petitioner shall serve a notice to the designated officer. It has further been observed by the High Court that the reconstruction of the structure on the basis of its order will confer no authenticity on the structure. The third important direction of the High Court provides that if the original structures were constructed without obtaining development permission, the structures reconstructed pursuant to the orders of the Court will also be construed to be constructed without proper development permission. Hence the Corporation can initiate action of demolition of the structures, after following the law laid down in Sopan's case (supra). We have been told that this is the regular

practice followed in the Bombay High Court, throughout the State of Maharashtra.

15. We are constrained to observe that we cannot approve of such directions. The High Court itself is aware that some of these structures may have been constructed without permission. If that be so, even if the demolition was carried out without giving the second notice, why should the party who has violated the law by raising the construction without obtaining permission be permitted to raise another illegal structure which only has to be razed to the ground, after following the procedure prescribed by law? Why should the Nation's wealth be misutilised and misused for raising an illegal construction which eventually has to be demolished?

16. We make it clear that we do not approve the action of the Municipal Corporation or its officials in demolishing the structures without following the procedure prescribed by law, but the relief which has to be given must be in accordance with law and not violative of the law. If a structure is an illegal structure, even though it has been demolished illegally, such a structure should not be permitted to come up again. If the Municipal Corporation violates the procedure while demolishing the building but the structure is totally illegal, some compensation can be awarded and, in all cases where such compensation is awarded the same should invariably be recovered from the officers who have acted in violation of law. However, we again reiterate that the illegal structure cannot be permitted to be re¬erected.

17. Assuming that the structure is not illegal then also the Court will first have to come to a finding that the structure was constructed legally. It must come to a clear-cut finding as to the dimensions of the structure, what area it was covering and which part of the plot it was covering. In those cases the High Court, once it comes to the conclusion that the structure which has been demolished was not an illegal structure, may be justified in permitting reconstruction of the structure, but while doing so the Court must clearly indicate the structure it has permitted to be constructed; what will be the length of the structure; what will be its width; what will be its height; which side will the doors and windows face; how many number of storeys are permitted etc. We feel that in most cases the writ court may be unable to answer all these questions. Therefore, it would be prudent to permit the structure to be built in accordance with the existing by-laws. Directions can be issued to the authorities to issue requisite permission for construction of a legal structure within a time bound period of about 60 days. This may vary from case to case depending upon the nature of the structure and the area where it is being built.

18. Blanket orders permitting re-erection will lead to un-planned and haphazard construction. This will cause problems to the general public. Even if the rights of private individuals have been violated in as much as sufficient notice for demolition was not given, in such cases structures erected in violation of the laws cannot be permitted to be re-erected. We must also remember that in all these cases, the High Court has not found that the structures were legal. It has passed the orders only on the ground that the demolition was carried out without due notice. As already indicated above, compensation for demolished structure or even the cost of the new structure to be raised, if any, can be imposed upon the municipal authorities which should be recovered from the erring

officials, but in no eventuality should an unplanned structure be permitted to be raised.
19. Times have changed. Technology has advanced. However, the legal fraternity continues to live in a state of status quo. Sopan's case (supra) was decided on 09.02.1996. More than two decades have elapsed. The Courts must not be hidebound by old decisions and the law must develop in accordance with changing times.

20. All concerned viz., the State, the Municipal authorities and the High Court need to take note and advantage of advancement in technology. We have been informed that disputes with regard to the dimensions and nature of the structure arise especially in those cases where rural or suburban areas are included at a later stage in the municipalities. Some of these structures have no sanctioned plans. The Development Control and Promotion Regulations for Greater Mumbai, 2034, provide that no permission shall be required to carry out tenantable repairs to the existing buildings which were constructed with the approval of the competent authority, or are in existence since 17.04.1964 in respect of residential structures, and 01.04.1962 in respect of non-residential structures, as required under Section 342 of the MMC Act. We have already noted what is meant by tenantable repairs. This is explained in Section 342 of the MMC Act. Only repairs envisaged in the explanation are permitted to be carried out without permission and all other repairs have to be carried out with permission. Since these old buildings do not have plans it is difficult to find out whether the construction carried out is actually tenantable repairs or the structures are being constructed/reconstructed for which permission is required.

21. There is no difficulty to find a solution to this problem if the State is inclined to do so. Till the State frames any laws in this regard, we direct that before any construction/reconstruction, or repair not being a tenantable repair is carried out, the owner/occupier/builder/contractor/architect, in fact all of them should be required to furnish a plan of the structure as it exists. This map can be taken on record and, thereafter, the construction can be permitted. In such an eventuality even if the demolition is illegal it will be easy to know what were the dimensions of the building. This information should not only be in paper form in the nature of a plan, but should also be in the form of 3D visual information, in the nature of photographs, videos etc.

22. All over the country we find that when people raise illegal constructions it is claimed that the said construction has been existing for long. The answer is to get Geomapping done. The relevant technology is Geographic Information System (GIS). If on Google Maps one can get a road view, we see no reason as to why this technology cannot be used by the municipal corporations. At the first stage we direct that all the cities in Maharashtra where the population is 50 lakhs or more the municipal authorities will get Geomapping done not only of the municipal areas but also of areas 10 Kms. from the outer boundary. This can be done by satellite, drones or vehicles. Once one has the whole city geomapped it would be easy to control illegal constructions. We further direct the State of Maharashtra to ensure that sufficient funds are made available to the municipal corporations concerned and this exercise should be completed within a period of one year from the date of this order.

23. We also would like to give further directions regarding the manner in which the evidence of illegal construction/reconstruction etc., is collected and notices are issued and served. We, therefore, issue the following directions:-

(1) It will be obligatory for all Municipal Corporations in the State of Maharashtra where the population is 50 lakhs or more to get geomapping and geo-photography of the areas under their jurisdiction done within a period of one year. Geomapping will also be done of an area of 10 Kms. from the boundary of such areas. The records should be maintained and updated by the Municipal Corporations within such time period as the Municipal Corporation deems fit, keeping in mind the specific circumstances of the area under its jurisdiction.

(2) Whenever any new area, which is not already geomapped, is brought under the jurisdiction of a particular municipality, it will be the duty of the concerned Municipal Corporation to ensure that geomapping of the area is conducted and the geomapping records of such area are created at the earliest.

(3) In cases where buildings are already existing and it is alleged by the Municipal Corporation that the building has been constructed in violation of applicable laws:-

3.1. The Commissioner/Competent Authority on coming to know that an illegal building has been constructed, shall issue a show cause notice giving 7 days in terms of Section 351 to the owner/occupier/builder/contractor etc. Along with this notice the Commissioner/Competent Authority shall also send photographs and visual images taken on the site clearly depicting the illegal structure. Photographs and images should digitally display the time and date of taking the photographs;

3.2. In case the notice is not replied to within the time prescribed, i.e., 7 days, then the building shall be immediately demolished by the Municipal Corporation;

3.3 In case the owner files a reply to the notice, the Commissioner/Competent Authority of the Municipal Corporation shall consider the reply and pass a reasoned order thereon. In case the reply is not found satisfactory then the order shall be communicated in the manner laid down hereinafter to the owner/ occupier/ builder/contractor etc. giving him further 15 days' notice before demolition of the property. During this period the owner/ occupier/ builder/contractor etc. can approach the appellate/revisional authority or the High Court.

(4) In those cases where according to the municipal corporation there is ongoing construction which is being carried on in violation of the applicable laws:-

4.1. The Commissioner/Competent Authority on coming to know that there is ongoing construction in violation of the applicable laws shall issue a show cause notice giving 24 hours in terms of Section 351 to the owner/occupier/builder/contractor/architect etc. Along with this notice the

Commissioner/Competent Authority shall also send photographs and visual images taken on the site clearly depicting the illegal structure. Photographs and images should digitally display the time and date of taking the photographs;

4.2. The Commissioner/Competent Authority can also issue an interim 'stop-construction' order along with the notice or any time after issuing the notice. Such order shall also include the relevant pictures of the alleged violation(s). Photographs and images should digitally display the time and date of taking the photographs;

4.3. In case the notice is not replied to within the time prescribed, i.e., 24 hours, then the building shall be immediately demolished by the Municipal Corporation;

4.4. In case the owner/occupier/builder/contractor/architect etc. files a reply to the notice, the Commissioner/Competent Authority of the Municipal Corporation shall consider the reply and pass a reasoned order thereon. In case the reply is not found satisfactory then the order shall be communicated in the manner laid down hereinafter to the owner/occupier/builder/contractor/architect etc. giving him further 7 days' notice before demolition of the property. Duringthis period the owner/ occupier/ builder/contractor/ architect etc. can approach the appellate/revisional authority or the High Court.

(5) In regard to service of notice we direct as follows :-

5.1. Wherever possible notice shall be served personally on the person who is raising or has raised the illegal structure including the owner/occupier/builder/contractor/architect etc.;

5.2. Notice, in addition to the traditional mode, can also be sent through electronic means, both by e-mail and by sending a message on the mobile phones. Even a message to a foreman or person in-charge of the construction at the site will be deemed to be sufficient notice;

5.3. In the notice, the municipal authorities shall also give an e-mail ID and phone number where the noticee can send his reply through e-mail or messaging services. This will hopefully do away with all disputes with regard to alleged non-service of notice.

6. Till the State frames any laws in this regard, we direct that before any construction/reconstruction, or repair not being a tenantable repair is carried out, the owner/occupier/builder/contractor/architect, in fact all of them should be required to furnish a plan of the structure as it exists. They will also provide an e-mail ID and mobile phone number on which notice(s), if any, can be sent. This map can be taken on record and, thereafter, the construction can be permitted. In such an eventuality even if the demolition is illegal it will be easy to know what were the dimensions of the building. This information should not only be in paper form in the nature of a plan, but should also be in

the form of 3D visual information, in the nature of photographs, videos etc.

24. As far as Civil Appeal No. 7627 of 2019 @ SLP(C) No.15909 of 2018 is concerned the structure has been rebuilt. That obviously cannot be un-done now. We, however, direct the municipal corporation to ensure that fresh notice is issued to the respondent and thereafter action is taken strictly in accordance with law. The whole process should be completed within a period of three months. In case an order adverse to the respondent is passed by the municipal corporation, then the respondent will be at liberty to approach the High Court and raise all grounds available to it.

25. As far as Civil Appeal No.7626 of 2019 @ SLP(C) No.16489 of 2018 is concerned, reconstruction has not been done and, therefore, we partly allow the appeal and set aside the order of the High Court to the extent it allows reconstruction. We remit the matter to the High Court which is requested to proceed in accordance with law laid down in this case.

26. Both the appeals are disposed of in the above terms. The Registrar General of the Bombay High Court shall cause copies of this judgment to be served upon the Chief Secretary, State of Maharashtra as well as Principal Secretary, Urban Development Department, Mumbai, Maharashtra, who will ensure that copy of this judgment is served upon all the municipal corporations in the entire State of Maharashtra. Pending application(s), if any, also stand(s) disposed of.

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