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UNAUTHORIZED CONSTRUCTION

We all know that when a builder is proposing a plan he has to ensure that the mandatory open space has to be left. Once the plan is passed by the Mumbai Municipal Corporation it is expected from one and all that they will not tamper with the plan. Many times the ground realities are entirely different from the plans presented to the Mumbai Municipal Corporation Authorities. Some examples are as under:

- Lekages from bathroom, wc etc.
- Unauthorised constructions. Reorientation of flat by shifting the position of kitchen, wc, rooms etc. (Coutesy Interior Designer) Changes as regards use of flat.
- Mechanical parking are provided. Unfortunately, the structure is constructed in such a way that it is difficult to park the vehicle in the upper portion.
- Flat has been purchased, but many changes, including changes in niche area, drying space area are done. The flats are not maintained, resulting in leakage. At such point of time let us analyze the powers that are vested in the Municipal Officers and what type of action can be initiated?

Section 351: This section deals with issuing **Show Cause Notice** by the officers of the Mumbai Municipal Corporation. It is to be emphasized that if the work is carried out contrary to section 347 (which deals with permission to commence the work. It refers to section 342). Section 342 pertains to the permission granted by the MMC to construct the premises as per the Building plan. **This is not a stop work notice. It is issued when work has already been completed and persons are utilizing the said premises.** It can be invoked for unauthorized construction as well as unauthorized use of premises. Eg. residential to commercial, residential to industrial or vice versa. Construction carried out without permission. The Municipal officer asks the occupant to produce before him relevant documents to substantiate his claim that the use of the premises as of date is reflected in the Municipal Plan. This is basically a section used by the Municipal officers to satisfy themselves, as regards the structure. It is a transit stage whereby the Municipal Authority makes up his mind to accept the submissions as regards to the present position of the structure or to initiate action. Normally 7 days notice is given by the Municipal officers, when he is issuing a Show cause under Section 351. Of course the officer has got a right

to extend the said period of show cause. If the officer finds that the structure is not as per the structure as reflected in the Municipal plan, then the officer has every right to take action. Normally 48 hours notice is given to the occupant to restore the premises to its original position. The parties receiving the notice are entitled for a hearing wherein the parties can produce the relevant documents and make an attempt to convince the officer to withdraw the said notice. If the officer is not satisfied he can give opportunity to restore the premises to its original position/use. In the event the premises are not restored to original position, then the officer has right to initiate action under Section 488 of the MMC Act. The officer after hearing the parties passes an order under Section 351. The said order would be a reasoned order and the same will give an option to the party either to demolish the unauthorized construction suo moto i.e. by the party himself or else the corporation can demolish the said premises and/or revert the premises to its permissible user. If in case the premises are being used for purpose other than permitted use this section can be invoked. It needs to be emphasized that if the corporation wants to demolish the premises they will issue notice under Section 488. The order of the officer who shall be an officer not below the rank of Asstt. Municipal Commissioner has to be in writing and must mention if the authorities accept the version of the occupant/owner in which case they will withdraw the notice or take action as per due process of law. Well, it is the right of the party to approach the court (normally city civil court and in rare cases high court by filing a writ petition) and apply for a stay.

OFFENCES AND PENALTY FOR VIOLATION OF SECTION 351 & 354.

The action can be invoked by the officer under section 475A. The officer is entitled to remove or pull down the unauthorized work and recover the expenses from the occupant. Per offence not less than Rs. 5,000/- penalty upto Rs. 25,000/- for each offence. Daily penalty of Rs. 500/- for continuing offence. Imprisonment for a term is also provided which shall not be less than one month but which can extend to one year. The Officer if the offence pertains to tampering of the structure of the building the officer can also prosecute under section 475A. Per offence not less than Rs. 10,000/- penalty upto Rs. 50,000/- for each offence. Daily penalty of Rs. 1,000/- for continuing offence. Imprisonment for a term is also provided which shall not be less than three months but which can extend to three years.. The penalty includes both fine and/or imprisonment.

Section 354 of the Mumbai Municipal Corporation Act deals with notice for removal of structure etc which are in ruinous conditions or are likely to fall. It is at the discretion of the officer to direct repairs and/or total removal of the hazardous portion which could extend for the entire building. The penalty for the same is same as that of violation of section 351 which is clarified herein above.

Section 354A is basically a **STOP WORK NOTICE**. It is issued by the MMC officer whenever work is being carried out without taking permission from municipal authorities and or when ongoing work is done unlawfully. In its ambit things like (a) Extension of balconies, (b) Extension of rooms, (c) Putting up weather shed, (d) construction of hutment, (d) carrying out repairs without permission, (e) construction of society office etc. I may add that for tenantable repairs like changing floors, painting, electrical work, repairing of doors, windows no permission is required of MMC. If dimensions are not changed for above types of work there is no problem. This section is invoked by the officers when the work is going on.

OFFENCES AND PENALTY FOR VIOLATION OF SECTION 354A

The officer is entitled to demolish the unauthorized work and recover expenses from the occupant/owner.

Section 381 is invoked against the person by whose act, default or sufferance a **nuisance** arises. Exists or continues or is likely to arise. Even if some persons do not keep the terrace clean and they keep odd articles then the officer has power to treat such instances as breeding ground for mosquitoes and issue notice u/s. 381. Leakage from flats including bathrooms, water closet, drains external walls can be a ground for the officers to invoke action u/s. 381.

OFFENCES AND PENALTY FOR VIOLATION OF SECTION 381

Per offence not less than Rs. 2,000/- penalty upto Rs. 10,000/- for each offence.

Section 488. The officer by invoking Section 488 informs the parties that he would come and enter the premises of the occupant for the purpose of inspection, survey or execution of necessary work. This section empowers the officer to demolish the unauthorized construction by

entering the said premises. I may add that until and unless a notice under Section 488 is issued the officer of the MMC cannot enter the premises of an individual.

M RTP

The Planning authority officials i.e. officers of the Mumbai Municipal Corporation, MMRDA, SRA can also take action under Maharashtra Regional Town Planning Act. (MRTP Act). The same officer if he is quite sure that the illegality does not require to be investigated further, has powers under MRTP Act. MRTP action is far serious. If MRTP is invoked First Information Report (FIR) is filed with the local police station. This can result in arrest of the person. Not only is the same concerned with demolition of the premises but can result in imprisonment of the occupant, if he violates the provisions. The commonly used sections by the Authorities under MRTP, are sections 52, 53, 55, 56.

Section 52 of MRTP. MRTP is invoked by the officers if he finds that there is gross violation which requires immediate action and the unauthorized activity is going on in full swing. The same can be invoked even if unauthorized act is being done or has already been done. Under this section it may be noted that FIR is filled and panchnama is made by local police. The arrest of the person carrying out unauthorized work can be made and on conviction can also result in imprisonment, which shall not be less than one month but which may extend to three years and with fine not less than Rs. 2,000/- and not more than Rs. 5,000/-. For continuing daily offence with fine of Rs. 200/- per day, or with both. The metropolitan magistrate thus, has powers not only to recover Demolition expenses but also has powers to prosecute the party who has done the unauthorized construction. A question may be raised that I have not done unauthorized construction My predecessor has done. The said argument will not hold true. Occupant who will have to rectify the said irregularity/illegality irrespective of who and when it has been carried out originally.. Section 52 authorizes the officer to initiate action suo moto immediately if it satisfies that there is gross violation. The officer has to file an FIR and police will have to do panchnama, file FIR and MRTP action under 52 can be taken. As regards MRTP violations the only option available to the parties is to approach the high court. The arrest of the person carrying out unauthorized work can be made and on conviction can also result in imprisonment, which shall not be less than one month but which may extend to three years and with fine not less than Rs. 5,000/-. There is no maximum limit of the fine. For continuing daily offence with fine of Rs. 200/- per day, The metropolitan magistrate thus, has powers not only to recover Demolition expenses but also has powers to prosecute the party who has done the unauthorized construction.

Under Section 53 (1) of MRTP. One months time is given by the officer to rectify the alleged wrongful thing done by the party and restore the said premises to its original position. Under Section 53 (1) notice is given to party to restore the premises to its original position within a period of one month. The intention behind the same is to give opportunity to the party to restore the premises to its original position. For issuing notice under Section 53 (1) the officer does not have to file a panchnama. However, if after the stipulated period of one month the party has not restored the premises to its original position, then in such circumstances the officer has every right to make FIR and carry out panchnama along with police. The occupant/owner can be arrested and released on bail if he is able to convince the competent authority. Thereafter the police authorities have right to ask for sanction from the Municipal Authorities for prosecution of the occupant/owner. The sanctioning authority for arresting the person is the Assistant Municipal Commissioner as well as Senior Officers. A Show Cause notice issued under Section 53 (1) can be withdrawn by the officer if he is satisfied that the irregularity that was mentioned in the Show Cause notice is rectified by the party. It is advisable for the occupant to insist for a written order for withdrawal of 53 (1) otherwise the said section can be invoked by the said officials, it may even be invoked after years. The withdrawal power of MRTP does not vest with the person who has done the prosecution/complainant. The person receiving the notice can go to the municipal commissioner and request him to withdraw the notice. The Municipal Commissioner if satisfied can withdraw the MRTP notice in which case no action will be taken by Metropolitan Magistrate. The power vests with the competent authority i.e. Municipal Commissioner.

Section 55 MRTP This pertains to removal of unauthorized temporary development. Eg. Mandap for ganapati, navratri festival, weather shed, covering of terrace etc without municipal permission. If the construction is of a Mobile tower weather sheds or of temporary nature. In such circumstances action under Section 55 of the MRTP Act can be initiated. The procedure for

invoking the action is same as under Section 53 (1).

Section 56 MRTP The Municipal Assistant Commissioner has been given power of removal of unauthorized development or use. This is generally used when widening of roads etc. are to be undertaken. Even if the premises are with the permission of the planning authority than also if the authority feels that the use of the premises is required to be discontinued than in that case action u/s. 56 can be invoked after issuing notice with time of one month.

Various sections of the Mumbai Municipal Corporation authorizes the quantum of amount that has to be paid as well as the penal provisions. Action under Section 351, the penalty for 351 will be initiated by the judge of the Metropolitan Magistrate after receiving prosecution notice under Section 475 (A) of Mumbai Municipal Corporation Act.

Challenging MRTP action has to be done in high court but the procedures with regards to levy of fine as well as penalties may be decided by the Metropolitan Magistrate.

For MMC related matters the court is Shindewadi.

For western suburbs it is at Goregaon Malwani.

They are attended to by different Metropolitan Magistrates depending on the category

For licence there is a separate court

Section 351 is invoked if the officer has apprehension that construction is in violation of Section 342 & 347. Section 342 pertains to the permission granted by the MMC to construct the premises as per the Building plan. The law ensures that the officer does not misuse the power, when he is issuing notice under Section 351. For the said purpose the officer has to substantiate his submission, with a rough sketch, as well as details of the unauthorized work. A question that may arise in the mind of an individual is, how will the officer come to know if there is unauthorized construction or not if he has not entered the premises? For the same, the officer has every right to issue notice under Section 488, and then go and inspect the premises. I submit with utmost respect that an officer cannot directly come and enter the premises without issuing notice under Section 488. It is common knowledge that practically the officers of the MMC without issuing notice under 488, straight way come, inspect the premises and issue notice under Section 351. There is no need to issue a notice under Section 488 twice. A question that arises in the mind of an individual is, as soon as the notice is issued under Section 488 for entering the premises, should the party go to the court of Law and obtain a stay from the court? The same is not advisable because court would ensure that the officers of the MMC are able to do their

duty. They cannot do their duty unless they are permitted to enter the premises. Normally against 488 notices a stay would not be granted by the court.

Now if a notice is issued under Section 351 of the MMC Act, then can the party approach the court and take a stay? Well, it is the right of the party to approach the court and apply for a stay, but one has to ensure when a notice is issued under 351, 7 days time is normally given by the officer to substantiate the submission of the party with documentary evidence. If the party is able to convince the authorities that the structure is genuine and there are no illegalities, then if the officer is satisfied he will withdraw the 351 notice. In the event the officer feels that inspite of the notice being issued the party has not taken any steps to rectify the defects to restore the premises as per Building plan, approved by planning authority namely Section 342 then the officer has got right to initiate action against the occupant and/or the owners. When a notice is issued under Section 351 the party has a right to make representation. This representation can be made verbally as well as in writing. It is advisable for the parties to make the representation in writing, because at a later date when the matter is contested in court the first question that will be asked by the judges could be, if you have presented your case to the officer, have you been given a personal hearing? If all the relevant information has been made by the party before the officer and if the occupant is able to convince the court that he has not done any irregularities and the officer has acted in a high-ended manner then, in such circumstances the chances of the party of getting a stay increases. As and when the documents are presented by the parties at the time of hearing the officer has every right to accept the said documents or submit it to the Building Proposal Department and/or the Planning Authority and find out that the said documents are authentic in nature. If the officer comes to a conclusion that the said documents are fictitious documents or in variation to the approval granted then apart from action under MMC Act, MRTP even criminal action can be initiated. It may be emphasized that once the Full Occupation Certificate is granted by the Building Proposal Department then the role of the Building Proposal Department practically ceases. In case of Part Occupation Certificate the responsibility lies with the respective zonal building proposal department. It needs to be emphasized that the officer issuing the notice under Section 351 would be a Senior officer of the rank executive Engineer or

above. The said officer has every right to initiate action if he finds there are deviations as regards the use of premises and the same is not as per the sanctioned plan. Now let us analyze what action can be initiated by the officer after issuing the notice under Section 351 and after giving a detailed hearing to the party? The options available to the officer are as under:

The officer after hearing the parties passes an order under Section 351. The said order would be a reasoned order and the same will give an option to the party either to demolish the unauthorized construction suo moto i.e. by the party himself or else the corporation can demolish the said premises and/or revert the premises to its permissible user. If in case the premises are being used for purpose other than permitted use this section can be invoked . It needs to be emphasized that if the corporation wants to demolish the premises they will issue notice under Section 488. The said notice stipulates the date and time when the officer would come with his squad and demolish the unauthorized construction. When a notice is issued under Section 488, obviously the Municipal Authorities are going to spend money on demolition. The corporation has every right to recover the said expenses from the occupant of the premises. If the party does not pay the charges for demolition, then the Executive Engineer or the Senior Assistant Commissioner has every right to include the said charges in the assessment tax bill. The MCGM officials will also take prosecution action on the person who execute unauthorized work under Section 475 (A) OF Mumbai Municipal Corporation Act for which punishment as prescribed can be invoked upon.

12891 unauthorised construction BMC BOMBAY MUNICIPAL CORPORATION

Proof/Panchnama / Photograph.