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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 10045 OF 2018

Smt. Venubai Dattatraya Patil

.. Petitioner

Vs.

The Municipal Corporation for the City
of Bhiwandi Nizampur, Through the
Municipal Commissioner.

.. Respondents

Mr. G. S. Godbole I/by Mr. Parag M. Tilak for petitioner.
Mr. N. R. Bubna for respondent-Corporation.

CORAM: NARESH H. PATIL, ACTING CJ &
G. S. KULKARNI, J.

SEPTEMBER 05, 2018.

P.C.

1. The petitioner prays for following substantive reliefs :-

(a) This Hon'ble Court be pleased to issue a Writ of Mandamus or a Writ in the nature of a Writ of Mandamus to direct the Respondent not to implement and/or execute and/or enforce the Notice dated 25.04.2016 bearing No. BNMC/City Dev Dept./Pr.S.No.3/10 issued under Section 260(1) and (2) of the Maharashtra Municipal Corporations Act, 1949 (being Exh. D to this Petition).

(b) This Hon'ble Court be pleased to issue a Writ of Mandamus or a Writ in the nature of a Writ of Mandamus to direct the Respondent not to take any coercive steps against building having ground plus 5 floors and building having ground plus 3 floors, both constructed on land bearing Survey No.45/2 corresponding with CTS No. 5679 in Village Kaneri, Taluka Bhivandi, Thane till the petitioner's Application for Regularization (being Exh. R) is decided the the Corporation.

2. The petitioner claims to be co-owner of land bearing Survey No.45/2 corresponding with CTS No. 5679 in Village Kaneri, Taluka Bhivandi, District – Thane. The petitioner has carried out construction on the said land having ground plus five floors and ground plus three floors without obtaining any permission whatsoever from the Municipal Corporation which is the planning authority. The said construction is thus brazenly unauthorized and illegal.

3. The respondent – Corporation i.e. the Municipal Corporation for the City of Bhiwandi Nizampur accordingly issued impugned notice dated 25/4/2016 to the petitioner under Section 260(1) and (2) & Section 478(1) of the Maharashtra Municipal Corporations Act, 1949 and Sections 52 to 55 of the Maharashtra Regional Town Planning Act, 1966. The Corporation declared the said construction as illegal one and directed to

remove the said structures within one month, failing which the officers of the Corporation would demolish the said structures.

4. Writ Petitions also came to be filed in this court bearing Writ Petition Nos.6899 of 2017 and 6900 of 2017 by one Arvind P. Jaiswar for direction to demolish the subject illegal structures. The Division Bench of this court (Coram : A. S. Oka & P. N. Deshmukh, JJ.) passed order on 4/1/2018. Paras 3 to 5 of the said order read as under :-

“3. The learned counsel for the first and second Respondents, on instructions, states that in view of ad-interim relief granted by the Civil Court at Bhiwandi, the said Respondents could not proceed with demolition of the illegal buildings. In both cases, we find that construction of multi storeyed building has been carried out. In fact, the photographs annexed to additional affidavit filed in Writ Petition No. 6899/2017 show that construction is in progress. To ensure that third party interests are not created in respect of the premises in the illegally constructed buildings, for the benefit of the innocent third party purchasers, it will be appropriate if Court Receiver is appointed in respect of the buildings, which are subject matter of these two petitions.

4. Accordingly, we direct the learned Civil Judge (J.D.) at Bhiwandi to appoint any officer of his Court or any member of the Bar as the Court Receiver. The Court Receiver, so appointed, shall take possession of the buildings which are subject matter of these two writ petitions, without disturbing the possession of the persons found in possession. The Court Receiver shall affix boards at the prominent places, informing the public that the buildings are in possession of the Court Receiver, and that no one shall deal with the premises in the buildings.

5. We direct the Petitioners in these two petitions to deposit a sum of Rs.20,000/- in the Court of the learned Civil Judge (J.D.) at Bhiwandi for meeting

the expenses of the Court Receiver. The learned Civil Judge (J.D.) Bhiwandi is free to permit the Court Receiver to withdraw the said amount. The order appointing the Court Receiver shall be passed by the learned Civil Judge only on the deposit of the aforesaid amount by the petitioner. The Registrar (Judicial-I) shall communicate this order to the learned Civil Judge by email or FAX.”

(emphasis added)

5. On 24/4/2018, the Division Bench (Coram: Abhay S. Oka and Riyaz I. Chagla, JJ.) passed further order in the said writ petitions directing the Receiver to make frequent site visits to ensure that there is no further construction made and unoccupied premises are not allowed to be occupied.

6. In Writ Petition No. 5474 of 2018 which was filed by the petitioner – Arvind Feruram Jaiswar, the Division Bench (Coram : Abhay S. Oka and Riyaz I. Chagla, JJ.) passed following order on 1/8/2018 :-

“1. Not on board. Taken on board.

2. The learned Counsel appearing for the 1st and 2nd Respondents states that due process of law has been completed by passing an order of demolition, a copy of which is annexed at Exhibit F to this Petition. He states that if there is no prohibitory order any Competent Court which prevents them from taking an action of demolition, a programme of demolition will be immediately fixed. We accept the said statement.

3. Place the Petition on 23rd August 2018 for “Direction”.

4. Compliance Affidavit shall be filed on or 21st August 2018.”

(emphasis added)

7. On 23/8/2018 said Writ Petition No. 5474 of 2018 was heard by the present Division Bench wherein we passed following order :

“1. Perused the earlier order passed by this Court. Learned counsel for the petitioner submits that the application for regularization has been made. Learned counsel for the Corporation submits that police protection would be sought by written communication shortly and necessary action would be taken in accordance with law.

2. Registry to forward copy of this order to the Commissioner, Bhiwandi Nizampur City Municipal Corporation.

3. S.O. to 6th September, 2018.”

(emphasis added)

8. The learned counsel appearing for the petitioner submits that under Section 52A and 53(3) read with Section 44 of the M.R.T.P. Act, 1966 the petitioner is having statutory right to apply for regularization for the subject structures. The learned counsel submits that petitioner did not apply for permission before raising construction i.e. ground plus five and ground plus three floors. It is submitted that the application for regularization made under Section 52A has been rejected by the Corporation, copy of which is annexed to the petition at page 101, whereas the application filed under Section 53(3) read with Section 44 is pending. The learned counsel submit that the petitioner was not made party to the earlier petitions and therefore, she was not aware of the orders passed by

this court. The petitioner did not receive any notice from the respondent – Corporation, which notice is under challenge in the present petition.

9. We have heard the learned counsel for the Corporation. The learned counsel submits that entire structures are illegally constructed. The Corporation is not inclined to accept the regularization and accordingly the application has been rejected.

10. We have seen growing tendency in getting involved in raising illegal constructions of multi-storeyed building. Third party interests are created in unauthorized buildings. The Planning Authority / State Government needs to take serious view of the matter and devise mechanism to curb such practices.

11. The Corporation shall also take use of latest technology like Satellite mapping system for tracing illegal construction activities.

12. In similar fact situation while dealing with the construction of an unauthorized building under the Kalyan Dombivali Municipal Corporation in Writ Petition No. 10697 of 2017, where, even the flats came

to be sold, this court did not accept the plea of the petitioner therein to protect the totally unauthorized structure following the mandate in the decisions of the Supreme Court in the case of **M.I. Builders Pvt. Ltd. V/s. Radhey Shyam Sahu & ors.**¹ and **Friends Colony Development Committee vs. State of Orissa & ors.**² This court made following observations in its order dated 23/8/2018 in paras 9 to 11 which read thus:-

9. The prima-facie consideration of the matter based on the available record shows that respondent no.3 surprisingly could gather courage to carry out such a huge construction of 7 storey building without getting any permission from the Corporation. More surprisingly, inspite of having a network of Inspectors, officers and Ward Officer, the Corporation authorities failed to notice that illegal construction of such a magnitude was coming up and was completed. More so even third party rights were allegedly created by way of execution of lease deed, sale deed, agreements etc.

10. It is not known as to in what manner the Municipal Commissioner and the concerned officers dealt with the complaints filed by the petitioner. It is even not known as to what cognizance police authorities took on receipt of complaint from the petitioner. After exhausting all possible remedies, the petitioner, a lady doctor by profession attached to Thane ESI hospital has rushed to this Court for redressal of her grievance. In this state of affairs the issue is required

1 (1999) 6 Supreme Court Cases 464

2 (2004) 8 Supreme Court Cases 733

to be addressed and looked into by this Court.

11. During the course of hearing the learned Counsel appearing for petitioner has referred to the views expressed by the Apex Court in the case of ***M.I. Builders Pvt. Ltd. V/s. Radhey Shyam Sahu & ors.*** and ***Friends Colony Development Committee v/s. State of Orissa & ors.*** dealing with illegal construction. Paragraphs 73 and 81 of the judgment of M.I. Builders read as under:

73. The High Court has directed dismantling of the whole project and for restoration of the park to its original condition. This Court in numerous decisions has held that no consideration should be shown to the builder or any other person where construction is unauthorised. This dicta is now almost bordering the rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in moulding the relief. Such a discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorised construction, it is illegal and cannot be compounded, has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing the robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is required to be exercised has to be in accordance with law and set legal principles. As will be seen in moulding the relief in the present case and allowing one of the blocks meant for parking to stand we have been guided by the obligatory duties of the Mahapalika to construct and maintain parking lots.

81. A number of cases come to this Court pointing to unauthorised

constructions taking place at many places in the country by builders in connivance with the corporation/municipal officials. In a series of cases, this Court has directed demolition of unauthorised constructions. This does not appear to have any salutary effect in cases of unauthorised construction coming to this Court. While directing demolition of unauthorised construction, the court should also direct an enquiry as to how the unauthorised construction came about and to bring the offenders to book. It is not enough to direct demolition of unauthorised construction, where there is clear defiance of law. In the present case, but for the observation of the High Court, we would certainly have directed an enquiry to be made as to how the project was conceived and how the agreement dated 4-11-1993 came to be executed.”

Paragraph 20 of the judgment in the case of Friends Colony Development Committee (cited supra) needs to be reproduced as under:-

“20. The pleadings, documents and other material brought on record disclose a very sorry and sordid state of affairs prevailing in the matter of illegal and unauthorized constructions in the city of Cuttack. Builders violate with impunity the sanctioned building plans and indulge deviations much to the prejudice of the planned development of the city and at the peril of the occupants of the premises constructed or of the inhabitants of the city at large. Serious threat is posed to ecology and environment and, at the same time, the infrastructure consisting of water supply, sewerage and traffic movement facilities suffer unbearable burden and are often thrown out of gear. Unwary purchasers in search of roof over their heads and purchasing flats/apartments from builders, find themselves having fallen prey and become victims to the design of unscrupulous builders. The builder conveniently walks away having pocketed the money

leaving behind the unfortunate occupants to face the music in the event of unauthorized constructions being detected or exposed and threatened with demolition. Though the local authorities have the staff consisting of engineers and inspectors whose duty is to keep a watch on building activities and to promptly stop the illegal constructions or deviations coming up, they often fail in discharging their duty. Either they don't act or do not act promptly or do connive at such activities apparently for illegitimate considerations. If such activities are to stop, some stringent actions are required to be taken by ruthlessly demolishing the illegal constructions and non-compoundable deviations. The unwary purchasers who shall be the sufferers must be adequately compensated by the builder. The arms of the law must stretch to catch hold of such unscrupulous builders. At the same time, in order to secure vigilant performance of duties, responsibility should be fixed on the officials whose duty it was to prevent unauthorized constructions, but who failed in doing so either by negligence or by connivance.

13. In case the concerned officers are found responsible in negligence of their duties, the Commissioner of the Municipal Corporation for the City of Bhivandi Nizampur shall initiate appropriate action against such officers.

14. In exercise of our writ jurisdiction, we are not persuaded, in the facts of the case as stated above, to grant relief of equity. There is no merit in the pleas raised by the learned counsel for the petitioner.

15. Writ Petition is dismissed.

16. The Registry to forward copy of this order to the Chief Secretary, Government of Maharashtra, Mantralaya Mumbai and to the Commissioner, Municipal Corporation for the City of Bhiwandi Nizampur.

G. S. KULKARNI, J.

ACTING CHIEF JUSTICE

Pravin
Dasharath
Pandit

Digitally signed by
Pravin Dasharath
Pandit

Date: 2018.09.11
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