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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.405 OF 2016

Sandhya Gadkari Sharma & Anr. ... Petitioners
Vs.
Municipal Corporation of Greater Mumbai & Ors. ... Respondents

WITH
WRIT PETITION NO.1518 OF 2015

Ashok Tower Co-operative Housing
Society Limited and Anr. ... Petitioners
Vs.
Brihanmumbai Municipal Corporation and Ors. ... Respondents

Mr. A.V. Anturkar, Senior Counsel a/w Mr. Amol Gatane and Ms. Debashree Mandpe and Mr. Suraj Iyer i/by Ganesh and Company for Petitioners in WP/405/2016.

Mr. Venkatesh Dhond a/w Mr. Rohan Kadam, Mr. Munaf Virjee & Mr. Nishith Sharma i/by ABH Law LLP for petitioner in WP/1518/2015 and for Respondent Nos.6 and 7 in WP/405/2016.

Mr. Narayan Sahu i/by Mr. Akhilesh Sharma for Intervenor.

Ms. Sneha Phene a/w Ms. Smridhi Sahni and Fozan Lakdawala i/by Little & Co. for Respondent Nos.23 and 24 in WP/405/2016.

Mr. V.A. Thorat, Senior Counsel a/w Mrs. Shalaka Waghmare i/by Aagan Doshi for Respondent Nos.25 and 26 in WP/405/2016.

Mr. A.Y. Sakhare, Senior Counsel a/w Ms. K.H. Mastakar for Respondent – BMC in both matters.

Mr. Nivit Srivastava and Mr. Nakul Jain i/by Maniar Srivastava Associates, Respondent Nos.8 to 17 in WP/405/2016.

Mr. Nivit Srivastava i/by Maniar Srivastava & Associates for Respondent Nos.6 to 17 in WP/1518/2015.

Mr. Milind Sathe, Senior Counsel a/w Mr. Samit Shukla & Mr. Aman Kacheria i/by DSK Legal for Respondent No.5 in WP/1518/2015.

Mr. Pravin Samdani, Senior Counsel a/w Mr. Mayur Khandeparkar and Mr. Aman Kacheria, Mr. Samit Shukla i/by DSK Legal for Respondent No.5 in WP/405/2016.

**CORAM : A.S. OKA &
P.N. DESHMUKH, JJ.**

DATE : 2nd FEBRUARY, 2018

PC.

1 In both the Petitions, there are allegations made of large scale illegal alterations and additions to towers A, B, C and D which are subject matter of these two Petitions. Considering the nature of the allegations and the prima facie material on record, the issues raised in both the Petitions will have to be gone into. Even the prayers for interim relief calls for serious consideration.

2 Hence, we issue Rule. Advocates on record representing the parties today waive service. Rule on interim relief is made returnable on 14th March, 2018.

3 In Writ Petition No.405 of 2015, the learned Senior Counsel appearing for the petitioners submitted that ad-interim relief in terms of prayer clauses (v) and (vi) be considered. His submission is

based on the last amended Sanctioned Plan of 27th October, 2010 and no objection certificate granted by the Fire Brigade Department of the Mumbai Municipal Corporation. His contention is that there are large scale illegalities committed by covering open spaces and that the said acts constitute a very serious threat to the Fire safety of four towers where large number of people are staying. He invited our attention to the no objection certificate issued by the Fire Brigade Department and the sketch tendered across the bar which is prepared on the basis of the sanctioned plan of 27th October, 2010. He invited our attention to the order dated 19th January, 2017 passed by a Division Bench of this Court. He pointed out the report of the Chief Fire Brigade Officer of the Mumbai Fire Brigade submitted in terms of the directions of this Court. The report has been produced on record alongwith the affidavit dated 18th February 2017 of the Chief Fire Officer of the Municipal Corporation. By inviting our attention to the recommendations, he would urge that apart from removing all illegalities, the open spaces as required by the NOC issued by the Fire Brigade department and the last sanctioned plan will have to be restored. He submitted that the petitioners have objection to clause 2 of the recommendations by contending that the work will have to be carried out as per the Development Control Regulations of 1991. He also invited our attention to the notice dated 31st January, 2017 under Sub-Section (1) of Section

53 of the Maharashtra Regional and Town Planning Act, 1966. He submitted that the said notice will have to be implemented. He invited our attention to the communication dated 18th October, 2016 addressed by the Mumbai Municipal Corporation to one Shri Rakesh Kumar Sharma, the occupant of Flat No.2006 in 'B' wing. He pointed out that though the Municipal Corporation decided to demolish the extended two slabs on 48th floor level of 'D' wing, no steps have been taken. He submitted that the said letter records that certain illegal work on 48th and 49th floor of 'D' wing was demolished. He submitted that report of the Chief Fire Officer will show that now the illegal work has been again restored. He submitted that a direction be issued to the Municipal Corporation to take action. Lastly, he submitted that while implementing the recommendations of the Chief Fire Brigade Officer, the respondents cannot create a path-way having width of merely 6 meters and the path-ways and open space as shown in the last sanctioned plan and NOC of the Fire Department will have to be restored.

4 The learned Senior Counsel appearing for the Co-operative Housing Society (petitioner in Writ Petition No.1518 of 2015) submitted that the society has no objection in principle for implementing the recommendations of the Chief Fire Officer of the

Mumbai Municipal Corporation. He, however, submits that path-way having width of 6 meters on all sides of the building will be sufficient to meet the requirements of the Fire Brigade. He submitted that even the society is interested in ensuring Fire safety.

5 The learned counsel appearing for the developer tendered across the bar certain photographs and submitted that steps have been already taken towards implementation of the recommendations of the Chief Fire Officer. He submitted that a path-way having width of only 6 meters will be sufficient for Fire Engine to pass. He submitted that as regards the notice under Sub-Section (1) of Section 53 of the MRTP Act, a proposal for regularisation was submitted which is not in conformity with the Regulations. The learned counsel appearing for the Respondent Nos.18 and 19 supported the submissions of the learned counsel representing the developer and stated that the said respondents have taken their flat as it is from the developer.

6 The learned Senior Counsel appearing for the Respondent Nos.25 and 26 submitted that the said respondents are directly affected by the notice under Sub-Section (1) of Section 53 of the MRTP Act and therefore, their right to apply for regularisation cannot be taken away. He submitted that in the recommendations of the Chief Fire Officer, he has not suggested that open spaces as shown either in the last

sanctioned plan or in NOC of the Fire Brigade should be restored. The learned Senior Counsel relied upon two decisions of the Apex Court. The first is in the case of *Muni Suvrat Swami Jain S.M.P Sangh Vs. Arun Nathuram Gaikwad & Ors.*¹. He also relied upon the decision of this Court in the case of *Bilkishbai Moizbhai Vasi and Ors. Vs. Municipal Corporation for Greater Bombay & Ors.* in WP No.1286 of 1980. He also relied upon a decision of the Apex Court in the case of *Sayed Muzaffar Ali & Ors. Vs. Municipal Corporation of Delhi*². The submission is that it is ultimately the discretion of the Planning Authority to decide whether action should be taken against illegal constructions and in the present case, the Municipal Commissioner will have to decide whether or not to take action of demolition or removal of illegal construction. His submission is that mere departure from the sanctioned plan or putting up a construction without sanction does not *ipso facto* and necessarily and inevitably justify demolition of the structure. He submitted that there are cases and cases of such unauthorized construction and in certain cases, even compounding is permissible. He submitted that the Writ Court cannot issue a writ of mandamus directing that particular structure should be demolished as it is the discretion of the Planning Authority to decide whether it should be demolished or not.

1. AIR 2007 SC 38

2. 1995 Suppl.(4) SCC 426

7 We have given careful consideration to the submissions. In Writ Petition filed by the society as well as in the other Petition filed by individual members, there are very serious allegations in respect of carrying out illegal additions and alterations contrary to the sanctioned plans and the Development Control Regulations. Writ Petition No.1518 of 2015 has been extensively amended for bringing on record the alleged illegalities. Before we consider the prayer for interim relief in both the Petitions, we direct the appropriate designated officer to visit the four towers subject matter of this Petition and to ascertain apart from the illegalities which are the already noticed by the Municipal Corporation whether there are other illegalities associated with the towers. The designated officer after making a site visit will have to submit a detailed report along with an affidavit setting out the illegalities, if any, and action if any, he proposes to take on the basis of the said illegalities.

8 In terms of the directions issued by the Division Bench of this Court on 19th January, 2017, the Chief Fire Officer of the Mumbai Fire Brigade has submitted a report. We must note here that none of the parties to the Petitions dispute that measures will have to be taken in terms of the report of the Chief Fire Brigade Officer for the purposes of ensuring the Fire safety of the buildings. The only dispute is as to what steps should be taken. Though the petitioners in Writ Petition No.405 of

2016 may have stated that they have some objections to clause 2 of the recommendations, but the fact remains that they have not challenged the same in accordance with law. As of today, none of the parties have challenged the recommendations of the Chief Fire Officer who is undoubtedly an expert in the field and his recommendations are to ensure that there is no threat of fire to the four towers in which large number of people are residing. Therefore, there is no option but to direct the society, the developer/builder and all flat purchasers who are before the Court to take immediate steps for implementing the recommendations. At this stage, we are not entering into the larger question in the manner in which the recommendations should be implemented. We must state here that all the recommendations must be implemented to the satisfaction of the Chief Fire Officer. Within the time granted by this Court, recommendations will have to be implemented. Thereafter, the Chief Fire Brigade Officer will have to visit the site and verify whether his recommendations have been implemented in its true letter and spirit and in accordance with law. Only after such a report is submitted that the Court will go into the question whether the recommendations have been properly implemented.

9 Now, we turn to the arguments regarding discretion vested in the Municipal Authorities in the matter of dealing with illegal

constructions. As the submissions have been made by relying upon three decisions to which we have made a reference, it is necessary for us to deal with the said submission as it will have some bearing on the approach of the Chief Fire Officer when he considers whether compliance has been made with the recommendations.

10 There are several decisions of the Apex Court dealing with this aspect. One such decision is in the case of *Dipak Kumar Mukherjee Vs. Kolkata Municipal Corporation and Ors.*³ in which the Apex Court had an occasion to consider its earlier decisions. One such decision which is of significance as far as these Petitions are concerned is in the case of *Friends Colony Development Committee Vs. State of Orissa and Ors.*⁴ In paragraph 2 of the decision in the case of *Dipak Kumar Mukherjee Vs. Kolkata Municipal Corporation and Ors(supra)*, the Apex Court held thus: सत्यमेव जयते

“ 2. In the last four decades, the menace of illegal and unauthorised constructions of buildings and other structures in different parts of the country has acquired monstrous proportion. This Court has repeatedly emphasised the importance of planned development of the cities and either approved the orders passed by the High Court or itself gave directions for demolition of illegal constructions as in *K. Ramadas Shenoy v. Town Municipal Council, Udipi* [(1974) 2 SCC 506], *Virender Gaur v. State of Haryana* [(1995) 2 SCC 577], *Pleasant Stay Hotel v. Palani Hills Conservation Council* [(1995) 6 SCC 127], *Cantonment Board, Jabalpur v. S.N. Awasthi* [1995 Supp (4) SCC 595], *Pratibha Coop. Housing Society Ltd. v. State of Maharashtra* [(1991) 3 SCC 341], *G.N. Khajuria v. DDA* [(1995)5SCC762], *Manju Bhatia v. NDMC* [(1997) 6 SCC 370], *M.I. Builders (P) Ltd. v. Radhey Shyam*

3 (2013) 5 SCC 336

4 (2004) 8 SCC 733

Sahu [(1999) 6 SCC 464], Friends Colony Development Committee v. State of Orissa [(2004) 8 SCC 733], Shanti Sports Club v. Union of India [(2009) 15 SCC 705 : (2009) 5 SCC (Civ) 707] and Priyanka Estates International (P) Ltd. v. State of Assam [(2010) 2 SCC 27 : (2010) 1 SCC (Civ) 283].”

(emphasis added)

In paragraph 5, the Apex Court considered its earlier decision in the case of *Friends Colony(supra)* which reads thus:

“5. In Friends Colony Development Committee v. State of Orissa [(2004) 8 SCC 733] this Court noted that a large number of illegal and unauthorised constructions were being raised in the city of Cuttack and made the following significant observations: (SCC pp. 742-44, paras 20 & 22-24)

“20. ... Builders violate with impunity the sanctioned building plans and indulge in 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 suffers unbearable burden and is 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 designs 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 unauthorised 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. ...

22. In all developed and developing countries there is emphasis on planned development of cities which is sought to be achieved by zoning, planning and regulating building construction activity. Such planning, though highly complex, is a matter based on scientific research, study and experience leading to rationalisation of laws by way of legislative enactments and rules and regulations framed

thereunder. Zoning and planning do result in hardship to individual property owners as their freedom to use their property in the way they like, is subjected to regulation and control. The private owners are to some extent prevented from making the most profitable use of their property. But for this reason alone the controlling regulations cannot be termed as arbitrary or unreasonable. The private interest stands subordinated to the public good. It can be stated in a way that power to plan development of city and to regulate the building activity therein flows from the police power of the State. The exercise of such governmental power is justified on account of it being reasonably necessary for the public health, safety, morals or general welfare and ecological considerations; though an unnecessary or unreasonable intermeddling with the private ownership of the property may not be justified.

23. The municipal laws regulating the building construction activity may provide for regulations as to floor area, the number of floors, the extent of height rise and the nature of use to which a built-up property may be subjected in any particular area. The individuals as property owners have to pay some price for securing peace, good order, dignity, protection and comfort and safety of the community. Not only filth, stench and unhealthy places have to be eliminated, but the layout helps in achieving family values, youth values, seclusion and clean air to make the locality a better place to live. Building regulations also help in reduction or elimination of fire hazards, the avoidance of traffic dangers and the lessening of prevention of traffic congestion in the streets and roads. Zoning and building regulations are also legitimised from the point of view of the control of community development, the prevention of overcrowding of land, the furnishing of recreational facilities like parks and playgrounds and the availability of adequate water, sewerage and other governmental or utility services.

24. Structural and lot area regulations authorise the municipal authorities to regulate and restrict the height, number of storeys and other structures; the percentage of a plot that may be occupied; the size of yards, courts and open spaces; the density of population; and the location and use of buildings and structures. All these have in our view and do achieve the larger purpose of the public health, safety or general welfare. So are front setback provisions, average alignments and structural alterations. Any violation of zoning and regulation laws takes the toll in terms of public welfare and convenience being sacrificed apart from the risk, inconvenience and hardship which is posed to the occupants of the building.”

Ultimately, in paragraphs 8 and 9, the Apex Court held thus:

“8. What needs to be emphasised is that illegal and unauthorised constructions of buildings and other structures not only violate the

municipal laws and the concept of planned development of the particular area but also affect various fundamental and constitutional rights of other persons. **The common man feels cheated when he finds that those making illegal and unauthorised constructions are supported by the people entrusted with the duty of preparing and executing master plan/development plan/zonal plan. The reports of demolition of hutments and jhuggi jhopris belonging to the poor and disadvantaged section of the society frequently appear in the print media but one seldom gets to read about demolition of illegally/unauthorisedly constructed multi-storeyed structures raised by economically affluent people.** The failure of the State apparatus to take prompt action to demolish such illegal constructions has convinced the citizens that planning laws are enforced only against poor and all compromises are made by the State machinery when it is required to deal with those who have money power or unholy nexus with the power corridors.

9. We have prefaced disposal of this appeal by taking cognizance of the precedents in which this Court held that there should be no judicial tolerance of illegal and unauthorised constructions by those who treat the law to be their subservient, but are happy to note that the functionaries and officers of Kolkata Municipal Corporation (for short “the Corporation”) have been extremely vigilant and taken steps for enforcing the provisions of the Calcutta Municipal Corporation Act, 1980 (for short “the 1980 Act”) and the Rules framed thereunder for demolition of illegal construction raised by Respondent 7. **This has given a ray of hope to the residents of Kolkata that there will be zero tolerance against illegal and unauthorised constructions and those indulging in such activities will not be spared.”**

(emphasis added)

Ultimately, in paragraph 29, the Apex Court held thus:

- “29. It must be remembered that while preparing master plans/zonal plans, the Planning Authority takes into consideration the prospectus of future development and accordingly provides for basic amenities like water and electricity lines, drainage, sewerage, etc. Unauthorised construction of buildings not only destroys the concept of planned development which is beneficial to the public but also places unbearable burden on the basic amenities and facilities provided by the public authorities. At times, construction of such buildings becomes hazardous for the public and creates traffic congestion. **Therefore, it is imperative for the public authorities concerned not only to demolish such construction but also impose adequate penalty on the wrongdoer”**

(emphasis added)

The observations made by the Apex Court in paragraph 8 above will squarely apply to the facts of this case, if the Municipal Corporation tolerates the illegalities in the towers.

In the case of *Priyanka Estates International (P) Ltd. v. State of Assam*⁵, the Apex Court held thus:

“55. It is a matter of common knowledge that illegal and unauthorised constructions beyond the sanctioned plans are on rise, may be due to paucity of land in big cities. Such activities are required to be dealt with by firm hands otherwise builders/colonisers would continue to build or construct beyond the sanctioned and approved plans and would still go scot-free. Ultimately, it is the flat owners who fall prey to such activities as the ultimate desire of a common man is to have a shelter of his own. Such unlawful constructions are definitely against the public interest and hazardous to the safety of occupiers and residents of multistoreyed buildings. To some extent both parties can be said to be equally responsible for this. Still the greater loss would be of those flat owners whose flats are to be demolished as compared to the builder.

56. Even though on earlier occasions also, under similar circumstances, there have been judgments of this Court which should have been a pointer to all the builders that raising unauthorised construction never pays and is against the interest of society at large, but, no heed has been given to it by the builders. Rules, regulations and bye-laws are made by Corporations or by Development Authorities, taking in view the larger public interest of the society and it is a bounden duty of the citizens to obey and follow such rules which are made for their benefit. If unauthorised constructions are allowed to stand or given a seal of approval by court then it is bound to affect the public at large. An individual has a right, including a fundamental right, within a reasonable limit, it inroads the public rights leading to public inconvenience, therefore, it is to be curtailed to that extent.

(emphasis added)

Therefore, even assuming that the Municipal Authorities have discretion, when they exercise discretion, they will have to exercise

5 (2010) 2 SCC 27

the discretion in the light of the provisions of law and in the light of what the Apex Court has held in the above cases. When the law provides for maintaining a compulsory open space having a particular width, it is not mere mathematics. It has a direct connection with the issue of safety of the occupants of the building. After all, the development plan and Development Control Regulations have been made by experts in the field. Therefore, it is not possible for us at this stage to accept the argument that rules regarding compulsory open spaces and open areas which are mandatorily required to be maintained are mere formalities which can be ignored and brushed aside by the municipal authorities in the name of the discretion conferred upon them. The Municipal Authorities cannot ignore that all these requirements have a direct nexus with the safety of the human beings who have occupied the buildings. Therefore, we cannot accept over simplified argument that path which should be available around the building should have minimum possible width through which a Fire engine can pass.

11 Suffice it to say that even assuming the Municipal Corporation has a discretion, while dealing with the violation of rules regarding Fire safety, the discretion is not unfettered. The discretion will have to be exercised considering the importance of the Development

Control Regulations, the concept of Town Planning and the law consistently laid down by the Apex Court.

12 As far as the notice dated 31st January, 2017 is concerned, the learned Senior Counsel appearing for the Mumbai Municipal Corporation states that as per the oral directions issued by the earlier Division Bench, the same was not implemented. The learned counsel appearing for the developer states that an application for regularisation was made which was not in proper format. If any other respondents want to apply for regularisation, they had an opportunity available as the notice appears to have been served not only to the owner/developer but also to the society. As the learned senior counsel appearing for Respondent Nos.25 and 26 has made a grievance that they were not served with the copies of the said notice and they were not aware about it till 9th January, 2018, we make it clear that it will be open for all concerned parties to apply for regularisation of the offending structures set out in the said notice within a period of one month from today. We make it very clear that none of the parties present today have canvassed that the work subject matter of the said notice is authorised.

13 As regards the communication dated 18th October, 2016, if the Municipal Corporation has complied due process of law for demolition of extended two slabs of 48th floor level of the concerned

building/wing, the Municipal Corporation shall take the said action to the logical conclusion. If illegal structure of 48th/49th floor mentioned therein has been re-erected, the Municipal Corporation will have to immediately take action.

14 We make it clear that this order should not be construed to mean that we have permitted any party to apply for regularisation of the structures which were demolished and re-erected without permission.

15 Hence, we pass the following ad-interim order :-

ORDER

- (i) We direct the designated officer of the concerned ward or any other officer nominated by him to visit the towers subject matter of these Petitions with a view to ascertain whether there are any illegal and unauthorised additions, alterations and constructions carried out contrary to the development permission granted by the Municipal Corporation. A detailed report including photographs of the site shall be submitted to this Court along with an affidavit on or before 9th March, 2018. If any illegalities are found, the affidavit to state what action the Municipal Corporation proposes

to take in respect of the illegalities. The Municipal Corporation is free to immediately initiate action as regards the illegalities strictly after following due process of law;

- (ii) We direct the petitioners, the developer and all private respondents to ensure that all the recommendations in the report of the Chief Fire Brigade Officer which is produced on record along with affidavit dated 18th February, 2017 of Shri Prabhat Surajlal Rahangdale shall be implemented in its true letter and spirit by 10th March, 2018. We direct the Chief Fire Officer to visit the site thereafter with a view to ascertain whether the recommendations in the report have been implemented in its true letter and spirit. He shall submit a report to this Court on or before 14th March, 2018 when the Petitions will be heard for interim relief;
- (iii) It will be open for the parties concerned to apply for regularisation of the work/structure subject matter of notice dated 31st January, 2017 issued under Sub-Section (1) of Section 53 of the MRTP Act, 1966 within one month from today. If application for regularisation is made within a period of one month from today,

obviously the Municipal Corporation cannot take any further action on the basis of the notice without disposing of the applications for regularisation. We make it clear that if such applications are made within a period of one month from today, the Municipal Corporation shall dispose of the same within a period of 60 days from the date of filing of the applications;

- (iv) As regards the extended slabs of 48th floor of 'D' wing, if there is no legal impediment, the Municipal Corporation shall proceed to take action of demolition in accordance with law. In view of what is stated in the letter dated 18th October, 2016 addressed by the Assistant Engineer (B & F) F/South Ward addressed to Shri R.K. Sharma, if the illegal work on 48th and 49th floor of 'D' Wing which was demolished earlier has been re-erected, the Municipal Corporation shall take immediate steps for demolition of the re-erected structure/work in accordance with law;
- (v) Before the date fixed for hearing as to interim relief, while filing affidavit of compliance, the Municipal Corporation shall also place on record the details of the applications for regularisation made, if any, on the basis

of notice dated 31st January, 2017 and outcome if any, of the said applications;

- (vi) We also clarify that if applications for regularisation are not made within a period of one month in respect of said notice dated 31st January, 2017 the Municipal Corporation shall proceed to take action in terms of the said notice in accordance with law;
- (vii) We make it clear that we have made no adjudication on the question in what manner the recommendations of the Chief Fire Brigade Officer should be implemented. After considering the report of the Chief Fire Officer, this aspect will be gone into by the Court;
- (viii) The regularisation applications permitted to be filed within a period of one month shall be in on-line mode through a licensed Architect. We make it clear that the Municipal Corporation shall not decline to accept the applications on the ground that a copy of this order is not uploaded as this order is dictated in presence of the advocate for the Municipal Corporation.

(PN. DESHMUKH, J)

(A.S. OKA, J)