Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3351 OF 2018

WITH

CIVIL APPLICATION NO. 2030 OF 2019

Savitribai Phule Shikshan Prasarak Mandal, Kamalapur,
through its President, Prof. MN Navale
At Post Kamlapur, Tal. Sngola,
District Solapur 413 307 ... **Petitioner**

~ versus ~

1. **Solapur Municipal Corporations**, through its Commissioner, Punyashlok Appasaheb Varad Path, Railway Lines, Solapur 413 001

2. **City Engineer**,
Solapur Municipal Corporation
Punyashlok Appasaheb Varad Path,
Railway Lines, Solapur 413 001 ... **Respondents**

Appearances

FOR THE PETITIONER	**Mr Sukand R Kulkarni.**
FOR RESPONDENT NO. 1	**Mr Deendayal G Dhanure.**

CORAM : S. C. Dharmadhikari &
G. S. Patel, JJ.

DATED : 29th August 2019

ORAL JUDGMENT:

1. By this Writ Petition under Article 226 of the Constitution of India, the Petitioner is challenging a notice dated 9th March 2018. The circumstances which this notice has been issued would have to be set out to appreciate the challenge.

2. The notice informs the Petitioner that there is a certain property and situate within the municipal limits of the Solapur Municipal Corporation. The Solapur Municipal Corporation was constrained to address this notice for the Petitioner has made extensive unauthorised and illegal construction. The Municipal Corporation has informed the Petitioner that this construction is not only unauthorised but illegal from the inception. The reason why these two words are frequently used in this notice are that no permission, much less any permission as contemplated by Section 44 of the Maharashtra Regional and Town Planning Act 1966 ("**MRTP Act**"), was ever taken. In fact, from the inception the Municipal Corporation has been directing the Petitioner to bring down this construction. A notice under Section 53 of the MRTP Act was issued way back on 17th February 2017. The response to that was also considered. The response to that was that an application within the meaning of sub-Section 3 of Section 53 with a request to permit retention of the works carried out at site.

3. Since such application has to be dealt with strictly in accordance with the parameters laid down by the very statue for grant of development permission that request was refused.

4. The Writ Petition presumes that the construction is capable of being regularised. The Petitioner presumes that because there is a non-payment of development charges of Rs. 8 crores with interest, amounting in all to about Rs. 9.50 crores approximately, that the Municipal Corporation intends to bring down or demolish this construction. If the payment is made then there is no possibility of such demolition, and that everything illegal and without permission will be condoned, accepted or 'regularised'. Then all notices to bring down this building or demolish this unauthorised and illegal construction would not survive.

5. Thus the Petitioner raises a challenge on the basis that the demand of Rs. 8 crores is not commensurate with the wrong committed at site. In other words, this should be in consonance with the alleged illegality committed in the construction activity. The contention is that there is no such nexus or connection and therefore the demand is exorbitant and illegal.

6. We do not understand this Writ Petition to be a Petition raising any challenge to the notices in relation to the construction carried out at site. The Writ Petition proceeds on the footing that there was a layout plan approved by letter dated 18th August 2009. That was for a partial development and later on a layout plan for the whole land was also approved by the 1st Respondent, the Municipal

Corporation. The building permission was granted under Section 253 of the then Bombay Provincial Municipal Corporation Act vide letter dated 7th January 2010. As the building permission was granted subject to Petitioner obtaining non-agricultural permission, that permission was sought for by making an application to the competent authority. That application was received but there was no response to the same. Subsequently a layout plan for staff quarters and a school building was approved on 1st July 2011. The Petitioner thereafter submitted proposals for building permission on 7th July 2011 which were received by the 1st Respondent on the same date after payment of appropriate scrutiny fees. However the 1st Respondent did not consider this layout plan and hence the Petitioner proceeded on the footing that beyond the period specified in the provision there is no authorisation in the law to consider that application and the permission sought vide that application is deemed to have been granted. On this understanding of such a deemed permission the construction activity was completed, and we are sorry to say, with impunity.

7. The construction activity was noticed and a letter was issued on 26th April 2012. That letter was followed by another letter of 7th May 2012. The Petitioner responded to this letter on 8th May 2012 but surprisingly the copies of these letters are not annexed. On 2nd June 2012 the 1st Respondent issued a letter pointing out certain construction of the Petitioner as unauthorised and directed the Petitioner to file a Reply. Then the Corporation invoked Section 478 of the Act by issuing notice dated 7th June 2012. The Petitioner submitted a reply to this notice on 10th October 2012 but this reply is allegedly not considered by the Corporation.

8. Thereafter the Petitioner was called upon to remove the alleged unauthorised and illegal construction. The Petitioner throughout termed this as an 'irregularity' in carrying out the construction and not an illegality. We will deal with this aspect a little later.

9. What we have noticed from the Petitioners' assertion itself is that even the sub-divisional officer to whom the application was made for conversion of the user from agricultural to non-agricultural had not permitted that but decided to impose penalty. The Petitioner then complains that after 6th August 2012 which was the last communication after more than a year on 16th August 2013 the Petitioner received a letter from the Municipal Corporation that construction put up by the Petitioner is unauthorised and that they will carry out an inspection and submit a report. The Petitioner responded to this communication.

10. The Petitioner purported to submit corrected plans through an architect.

11. However, the Petitioner claims to have paid a substantial amount towards development charges and other dues but even so the complaint is that the Municipal Corporation did not give up its stand of terming this construction as unauthorised and illegal. The Petitioner complains that no chance or opportunity was given to explain as to how the construction is otherwise permissible.

12. A Petition was brought before this Court being Writ Petition No. 11476 of 2013. There an order of status quo was passed and the Petition was disposed of on 4th December 2013 so as to enable the Petitioner to obtain appropriate reliefs by approaching a competent Civil Court. The Petitioner immediately approach the Civil Court by filing a Regular Civil Suit No. 1221 of 2013 along with an application for interim reliefs.

13. On 30th January 2014 the learned Trial Judge rejected this application and as now stated by the Petitioner virtually dismissed its Suit. A Writ Petition was brought challenging that order in Writ Petition No. 3663 of 2014 but that was dismissed by this Court on 21st January 2015.

14. The Petitioner then complains that though this Court gave an opportunity to the Petitioner to make an application for regularisation and that application was pending, the Corporation agreed to approve the revised building permissions and layout plans subject to the Petitioner institution paying an amount of Rs. 8,08,14,170/- towards development charges. The Petitioner presumes this is an approval to the construction activity which from inception was unauthorised and illegal and alleges that it showed its willingness to pay Rs. 1 crore immediately. The Corporation without furnishing details of calculation issued a notice under Section 53 of the MRTP Act on 25th October 2017 but on 28th December 2017 it allegedly approved the revised building permission and layout plans on certain conditions.

15. The Petitioner was served with another notice purporting to invoke Section 53 of MRTP Act demanding Rs.9,42,09,508/- towards development charges inclusive of interest and penalty.

16. The Petitioner institution communicated that it is expecting receipt of a substantial amount from the Government of Maharashtra towards reimbursement of scholarships and as soon as that amount is received it will make the payment. However now the Municipal Corporation is threatening to demolish the construction is the complaint.

17. The Petitioner therefore thinks that the matter is fairly simple. The presumption on which this Writ Petition is filed is that if Rs.9.50 crores had been paid then the construction is taken to be regular and authorised. It is only because there is a difficulty in arranging that sum and not being able to make a lump-sum payment of that amount within the time stipulated that the Corporation visits it with the impugned notice.

18. This Writ Petition was placed before this Court on 15th March 2018 and with the above perception a Division Bench of this Court was persuaded to pass the following order:

> "Not on board. Taken up on board.
>
> 2. Heard the learned senior counsel for the petitioner. He invited our attention to the documents annexed to the petition including letter dated 27th April 2017 addressed by the petitioner

to second respondent-Municipal Corporation. He states that the petitioner is accepting liability to pay a sum of Rs. 8,08,14,170/- and the petitioner wants suitable installments considering the fact that the petitioner is an educational institution.

3. Thus, the petitioner is disputing only the remaining part out of sum of Rs.9,42,99,508/-.

4. Place the petition high upon board on 16th April 2018.

5. There will be ad-interim relief in terms of prayer clause (c) subject to condition that the petitioner deposits a sum of Rs.2 crore with the first respondent on or before 4th April 2018 and subject to deposit of Rs.1 crore with the first respondent on or before 13th April 2018. If the amounts are not deposited within the stipulated period, ad-interim relief shall stand vacated without further reference to the Court."

19. After that order was passed on 16th April 2018 the Petitioner could deposit only Rs. 1 crore. This Court then said that the Petitioner should deposit a further amount of Rs. 2 crores with the Corporation by Friday, 28th April 2018 and extended the ad-interim protection on that condition. On 23rd April 2018 this Court was informed that an amount of Rs. 2 crores was not deposited in terms of the order passed by this Court prior to 23rd April 2018. Therefore, the ad-interim order was vacated and this Court clarified that the Municipal Corporation can take such action as is permissible in accordance with law. The Writ Petition also was not to be heard till the requisite deposit is made.

20. On 5th July 2018 however, this Court came to be informed that out of the admitted liability of Rs. 8,08,14,170/- the Petitioner has paid only a sum of Rs.3 crores. Unless the Petitioner deposits the entire balance admitted amount the prayer for rescheduling the date already fixed would not be considered and the matter was left at that.

21. The Writ Petition then came up on 25th October 2018 and an attempt was made to seek interim order in terms of the prayers in Civil Application No. 2341 of 2018 which this Court declined. Then on 22nd July 2019, this Writ Petition was placed before a Bench presided over by one of us (S.C. Dharmadhikari, J.) and on hearing the counsel for the Petitioner and Mr Dhanure appearing for 1st Respondent, the following order came to be passed:

> "1. Heard both sides. On the petitioner's depositing a sum of Rs.40 lakhs in this court, without prejudice to the rights and contentions in this petition and which amount shall be brought within a period of one week from today, we pass the following order:-
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> > "(i) The subsequent action of the Municipal Corporation of the City of Solapur shall remain in abeyance. This action is taken by a communication dated 11th July, 2019, in the sense that the request of the petitioner is to remove the seal on the administrative block of their premises as also the seizure of 17 buses, which buses belong to the petitioner's school. This subsequent action

> now will not enable the respondents to retain the buses or to continue with the seal, but this relief will be granted to the petitioner effective from the date the amount is deposited in this court."
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> 2. We place this matter for admission on 5th August, 2019. In the meanwhile, the petitioner is at liberty to move a civil application so as to amend the writ petition. Granting the liberty to move the civil application and placing the petition after two weeks, we have passed the above ad-interim order. This order will also be without prejudice to the rights and contentions of the Municipal Corporation of the City of Solapur.
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> 3. The reply affidavit tendered by Mr. Dhanure is taken on record."

22. Now this order must be understood in the back drop of the essential grievance projected on that date. The grievance projected was that instead of pursuing its notice of 9th March 2018, the Municipal Corporation charted a course unknown to law. It seized and attached seventeen school buses belonging to the Petitioner and also sealed the administrative block of the premises in which the Petitioner houses its school/educational institution. That is found prima facie to be not within the scheme of the enactment invoked and particularly its provision. Therefore with a conditional protection to that extent relief was granted.

23. When this matter was placed earlier and particularly on 5th August 2019 we insisted on an Affidavit in Reply being filed by the

Municipal Corporation. That Affidavit in Reply is now filed and the Affidavit of the Municipal Corporation clarifies the position. The Affidavit brings to our notice all the developments till date. The Affidavit of 20th July 2019 page 47 onwards though on our file was not noticed on the previous date of hearing because of the other issue projected namely seizure of buses and sealing of the administrative block. However now we carefully perused it with its annexures. Pertinently the Petitioner had not only filed a Civil Suit but tried to obtain an interim injunction therein so as to restrain the Municipal Corporation from pursuing and going ahead with its notices. The Trial Court dismissed the injunction application on 30th January 2014, and on 10th March 2014 even the Appellate Court refused to interfere with that order of the Trial Court. A writ petition against that appellate order failed on 25th January 2015. Thus the Trial Court order dated 30th January 2014, the District Court's order dated 10th March 2014 and this Court's order of 25th January 2015 to our mind conclude the issue. The issue was whether the Municipal Corporation could have proceeded to issue notices threatening demolition of the construction. The Trial Court has indeed observed that the Petitioner sought to make light of the whole matter. It projected as if it has only failed to obtain one non-agricultural user permission and if that had been brought possibly the construction is capable of being tolerated or regularised. The Trial Court observed that this was not the only condition and there were other conditions which were extremely vital and crucial. No bifurcation or segregation of conditions was permissible in the given facts and circumstances. Any conditional permission therefore demanded complete compliance of all terms and not only some of them. On such a conclusion, the Trial Court in a detailed order

dismissed the application for interim injunction. The notices are thus legal and valid. The challenge to the Trial Court's order has failed. Once that challenge has failed, and even this Court did not entertain the Petitioners in the first round (and later in a review), then, the Municipal Corporation could not have communicated to the Petitioner that it was willing to consider the regularisation of the construction of structures and buildings. All that the Municipal Corporation did was to calculate an amount payable towards development charges, interest and penalty and sought to recover this levy by the further communications. To our mind, the Municipal Corporation in issuing such notices of demand never gave an impression to the Petitioner that it will tolerate the construction activity carried out or has decided to regularise it. Once the Municipal Corporation issued the notices of demolition and held them in abeyance only because legal proceedings were pending, the Petitioner could not have presumed that these notices have been withdrawn or the Corporation gave up its intention to demolish the construction.

24. Even the Petitioner did not understand the matter in this manner as is evident from its own communication, a copy of which is at page 37 of the paper book. Thus throughout the matter must be viewed by segregating the issue of payment of development charges of which the Petitioner was in arrears and the construction activity which was expressly illegal and unauthorised.

25. It is the latter issue which is disturbing for us.

26. The Petitioner's Counsel has instructions to state that any amount over and above the sum brought in this Court would be paid or if time is granted will be paid even now but this Court should not allow the Municipal Corporation to demolish the construction. We do not think that Municipal Corporation can be allowed to withdraw or resile from its decisions merely because wrongdoers come forward and are ready and willing to pay fines and penalties or charges as demanded by the public body. If on payment of money every illegality can be cured, then, that understanding of such parties must be removed forthwith. The law does not permit this course. The law only allows retention of works carried out without a development permission provided development permission can otherwise be granted to such works. If no development permission can ever be granted then, merely because the construction and development has already been carried out there is no question of such a post facto permission or approval. The touchstone on which an application under Section 53 (3) is to be considered is only one, and that is if initially the Applicant had come and sought a development permission can that be granted, and if it could not have been granted, then, in this process or by this route, the same could not have been obtained. The Petitioner desires to obtain this by making payment and which also it has failed to do despite instalments.

27. We do not see why we should entertain such a litigant and in our jurisdiction under Article 226 of the Constitution of India. This jurisdiction is not only extraordinary but equitable and discretionary as well. It will not be permitted to be invoked so as to subvert the law or to make a mockery of the rule of law. If we allow the Petitioner to

retain the construction activity carried out at site or the Municipal Corporation to tolerate it we would be not only acting contrary to law but making a mockery of the rule of law. If that has to prevail then this construction and which is of such enormity as can only be crystallised from a table produced for our perusal by the Municipal Corporation, ought to go. The table shows that the total area is 47.125 Acres. The Petitioner has carried out the following construction:

Bldg. No.	Building Name	No of Floor	Height of Build. (in meter)	Built up area (in Sq.feet)
1.	C Type staff quarter	G+3	13.10	8685.93
2.	C Type staff quarter	G+3	13.10	8685.93
3.	C Type staff quarter	G+3	13.10	8685.93
4.	C Type staff quarter	G+3	13.10	8685.93
5.		G+4	14.85	14314.27
6.		G+3	13.10	17373.42
7.		G+3	12.90	15279.58
8.		Ground Floor	4.55	13579.09
9.		G+3	14.75	14912.96
10.		G+4	15.35	28164.84
11.		G+3	15.35	28164.84
12.		Ground Floor	4.05	2448.68
13.		Ground Floor	4.05	2525.64
			Total	**1,71,497.725**

28. This is the magnitude of the unauthorised and illegal construction and spread over an area of 47.12 Acres. There are 13 buildings of which eight are of ground plus three, two are of ground

plus four and three single storied. The total built up area is 171497.725 sq ft.

29. Once we have noticed the intent and purpose of instituting this Writ Petition is only to stall the inevitable then all the more we are disinclined to entertain this Writ Petition and to grant any reliefs in terms of the prayers thereof. The Writ Petition is dismissed.

30. Despite numerous judgments of the Hon'ble Supreme Court of India and this Court the tendency to carry out construction beyond permissible limits has not been curbed. In *K Ramadas Shenoy v Chief Officers, Town Municipal Council, Udipi & Ors* ,[1] the Supreme Court said:

> 29. **The Court enforces the performance of statutory duty by public bodies as obligation to rate payers who have a legal right to demand compliance by a local authority with its duty to observe statutory rights alone.** The scheme here is for the benefit of the public. There is special interest in the performance of the duty. All the residents in the area have their personal interest in the performance of the duty. The special and substantial interest of the residents in the area is injured by the illegal construction.
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> 30. **The High Court was not correct in holding that though the impeached resolution sanctioning plan for conversion of building into a cinema was in violation of the Town Planning Scheme yet it could not be disturbed because Respondent 3 is likely to have spent money. An excess of statutory power cannot be validated by**

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1 *K Ramadas Shenoy v Chief Officers, Town Municipal Council, Udipi & Ors*, (1974) 2 SCC 506:

> **acquiescence in or by the operation of an estoppel. The Court declines to interfere for the assistance of persons who seek its aid to relieve them against express statutory provision.** Lord *Selborne in Maddison v. Alderson* [(1883) 8 AC 467] said that **courts of equity would not permit the statute to be made an instrument of fraud.** The impeached resolution of the Municipality has no legal foundation. The High Court was wrong in not quashing the resolution on the surmise that money might have been spent. **Illegality is incurable**.
>
> (*Emphasis added*)

31. Strict action has been taken by courts repeatedly since *K Ramadas Shenoy*, whenever such illegality is encountered. See, for instance: *Pleasant Stay Hotel & Anr v Palani Hills Conservation Council & Ors*;[2] *Friends Colony Development Committee v State of Orissa & Ors*;[3] and *Kerala State Coastal Zone Management Authority v State of Kerala, Maradu Municipality & Ors.*[4]

32. Mere dismissal of such Writ Petitions will not have any deterrent effect. The wrongdoers know that at best their request, their applications, and their petitions would be dismissed. But beyond that there are no consequences to be visited on them. We want to remove and dispel this impression which is gaining ground with the wrongdoers. We think that not only the Municipal Corporation should be allowed to recover all arrears of the development charges with interest and penalty by a process known

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2 (1995) 6 SCC 127.

3 (2004) 8 SC 733.

4 (2019) 7 SCC 248.

to law and inclusive of attachment and sale of immovable properties, but, additionally, we think that filing repeated litigations not only in this Court on three or four occasions but Civil Suit, appeals to District court to delay the demolitions should result in imposition of heavy costs on the Petitioner. The Petitioner has taken advantage of the sympathy shown by this Court and which the Petitioner misunderstood totally. The Petitioner projected before this Court throughout that about 3000 odd students could be affected as they are taking education in the school/educational institutions. It is their future which is at stake. This was again a desperate attempt to stall the inevitable. In these circumstances we do not think that either the interest of 3500 students, the 400 and odd employees should deter us from imposing costs. In taking a stringent view, we are fortified by the observations of the Supreme Court in *Friends Colony (supra)*, paragraph 25. In this case, it is even more alarming that the Petitioner runs an educational institute which is completely illegal, and that it does so in the name of one of the foremost educationists in the history of this state. We do not believe that this rampant illegality in setting up the built structure can impart proper or correct values to students, nor do we for a single minute believe that the name that is invoked by the school would herself have condoned any such illegality.

33. We therefore impose costs of Rs. 1 lakh to be paid by the Petitioner to the Respondents in addition to the costs of demolition of the construction carried out which also should be borne by the Petitioner. Each of these amounts if not paid within the time stipulated by us shall be recovered as arrears of land revenue.

34. The costs that we have imposed should be paid within a period of four weeks from today. Should the Municipal Corporation raise a final demand for payment of development charges or arrears and interest and penalty thereon then within four weeks of non-compliance with that demand even that amount can be recovered by a process known to law and particularly for recovery of arrears of land revenue. Similar would be the fate of the demand calling upon the Petitioner to pay the demolition charges. The Petitioner must bear all these charges. Unless and until the Petitioner is burdened with them we do not think that the tendency to carry out construction activities beyond the permissible limits and with impunity can ever be curbed and curtailed. Needless therefore to clarify that we have made a difference between regularising something which is merely irregular and not permitting regularisation of something which is unauthorised and illegal from inception. If the latter is the act in which the Petitioner has indulged in then no application for regularisation or retention of the works shall be entertained by the Municipal Corporation. The Writ Petition and the Civil Application are dismissed.

35. The amount which is deposited by the Petitioner in this Court shall be paid over to the Municipal Corporation with accrued interest.

36. At this stage the Petitioner's Advocate seeks a stay of this order. This request is opposed by Mr Dhanure.

37. Having heard Counsel on this point we do not think the request as prayed can be granted particularly in view of our observations, findings and conclusions recorded hereinabove. The request is therefore refused.

(S. C. DHARMADHIKARI, J)

(G. S. PATEL, J)