

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 7023 OF 2015

1. Anil S/o Bhimashankar Utage,
Age : 49 years, occ. Agriculture,
R/o Sadbhavana Nagar, Latur,
Dist. Latur.

2. Bajrang Madhavrao Sonwane,
Age 58 years, Occ. Agriculture,
R/o Sadbhavana Nagar, Latur,
Dist. Latur.

...PETITIONERS
(Ori. Plaintiffs)

versus

1. Sudhir S/o Chandrakant Fattepurkar,
Age 2 years, Occ. Medical Practitioner,
R/o Latur.

2. Latur Municipal Corporation,
Through its Commissioner,
Main Road, Latur.
Dist. Latur.

...RESPONDENTS
(Ori. Defendants)

.....

Mr. R.N. Dhorde, Senior Advocate instructed by
Smt. Anjali Dube - Bajpai, Advocate for Petitioners
Mr. V. D. Sapkal, Advocate h/f Mr. S. S. Manale,
Advocate for respondent No. 1
Mr. V. B. Jadhav, Advocate h/f Mr. Ashwin Hon,
Advocate for respondent No. 2

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CORAM : SUNIL P. DESHMUKH, J.

DATED : 20th AUGUST, 2015

ORAL JUDGMENT:

1. Rule. Rule made returnable forthwith. Heard the learned counsel for parties finally, with consent.

2. Petitioners are plaintiffs in Regular Civil Suit No. 10 of 2015, filed against respondents, pending on the file of civil judge, senior

division, Latur, *inter-alia*, praying following reliefs :

“ (1) The construction permission bearing No. LMP/PP/765/2013-14 dated 28-02-2014 granted by defendant No. 2 to defendant No. 1 in respect of M.C.H. No. R-8/1337/3 may kindly be declared as illegal and against the provisions of law.

(2) By decree of perpetual injunction defendant No.1 may kindly be restrained fro raising construction over the suit property without taking legal permission from defendant No.2 and leaving marginal space contemplated under law.

(3) By decree of mandatory injunction defendant No. 2 may kindly be directed to pull down the columns of ground floor and slab, other construction of under ground floor illegally raised by defendant No.1 over the suit property. ”

Respondent No.1 is defendant No.1 and respondent No. 2 is defendant No. 2 in said suit. Parties are hereinafter referred to by their original status in the suit.

3. It would be pertinent to refer succinctly to a few facts which may be relevant for decision in present writ petition.

4. Plaintiffs are owners of plots No. 4 and 7 from survey No. 30/A situated in area of Sadbhavananagar, AUSA road, Latur. Said area happens to be the area of erstwhile village Kanheri and with extension of Municipal Council/Corporation limits, it forms part of such extended municipal area. Defendant No. 1 is owner of adjoining plot from survey No. 24/a of said village. Defendant No. 2 is Municipal Corporation, which has control over the construction activities within its area of operation.

5. It is the contention of the plaintiffs that in the plots owned by them they have carried out constructions in 1993 and 2008 respectively and have been residing there since then, that defendant No. 1 is a renowned Neuro Surgeon in Latur and has been running hospital known as "*Ashwini Hospital*" in rented premises.

6. The plaintiffs contend that while construction activity commenced in the adjoining property owned by defendant No. 1, initially, they were not aware of its nature, however, subsequently they learnt that though the construction permission has been obtained by defendant No. 1 for the residential purpose, in fact, he is carrying out construction of hospital. According to the plaintiffs, the whole area is a residential area and as such in the same, hospital activity is not permissible on account of variety of reasons as have been referred to in the plaint. The plaintiffs allege that construction activity, especially, excavation of the soil from the suit plot, is dangerous in manner, as, it is without leaving any margin (space), causing threat to the compound wall of the plaintiffs. It appears to be further contention of plaintiffs that assuming that construction activity caused no damage to their compound wall, yet in the process, underground septic tank has been exposed and posing hazard to health.

7. In order to know details of construction activity by defendant No. 1, the plaintiffs had applied for information to defendant No. 2 - Corporation in August, 2014 and they received the same in the

month of September, 2014. According to them, information reveals factual position about application for construction permission having been made on 28-02-2014 and on the same day permission under the garb of residential construction, for hospital had been granted. It is further referred to in the plaint that on the very same day even regularization certificate under the provisions of the Maharashtra Gunthewari Developments (Regularisation, Upgradation and Control) Act, 2001 (hereinafter referred to as “ Gunthewari Act ”) also came to be issued. According to them, provisions of the relevant enactments, rules thereunder, regulations and development rules are misinterpreted in order to favour defendant No. 1. Construction permission had been obtained by defendant No. 1 by misrepresenting the facts and information. The plaintiffs contended that all these proceedings including grant of permission, regularization under Gunthewari Act are illegal, wrong and cannot be sustained. The plaintiffs advert to various aspects and contend that situation has to be arrested and retrieved by passing appropriate injunction orders. Building construction permission does not comply with relevant laws and, particularly, Standard Development Control and Promotion Regulations for Municipal Councils and Nagar Panchayats in Maharashtra. Along with plaint, application Exhibit-5 seeking temporary injunction had been filed.

8. On appearance, defendant No. 1 has filed written statement and denied allegations against him. It is specifically contended that

there is no collusion between defendant No. 1 and employees of defendant No. 2 and that grant of construction permission is in accordance with concerned rules. It is submitted out that there are quite a few hospitals run in the vicinity, particularly, one hospital was already existing right opposite to the residence of plaintiff across the road. It appears to be the contention that hospital activity is not deemed to be commercial activity and that hospital building in residential area is not prohibited. Defendant No. 1 further claims that huge loan amount was raised by him for construction of the building. Almost 75% construction work had been completed when suit was filed. There is no danger caused to the neighbouring building of the plaintiffs. Similarly, contentions of plaintiffs on temporary injunction had been opposed. Along with aforesaid contentions, legal submissions are also advanced by defendant No. 1 about jurisdiction of the court and maintainability of the suit.

9. In the interregnum, a letter came to be issued by defendant No. 2 to defendant No.1 informing him about cancellation of the construction permission.

10. The trial court under order dated 20-03-2015 granted application Exhibit-5 filed by the plaintiffs, restraining defendant No. 1 from raising further construction over the suit plot till the decision of suit. Though trial court had framed requisite points for

consideration of temporary injunction application viz; *prima facie* case, balance of convenience and irreparable loss to the parties, and has passed a long order injuncting defendant No. 1, reason for the order is the letter that had been issued by defendant No. 2 on 03-02-2015 cancelling the construction permission granted to defendant No. 1 which had played predominant role. Defendant No. 1 had contended that cancellation of permission is not tenable for contravention of requisite procedure to be followed in this respect. The trial court purportedly considered that defendant No. 1 had been carrying on construction over the suit property without leaving requisite margin space as there is disparity in sanction letter and sanctioned plan. Since defendant No. 2 cancelled the construction permission, it would not be proper letting the construction go on by defendant No. 1. It is under the circumstances, the court had passed the order injuncting defendant No. 1 from raising further construction.

11. It appears that defendant No. 1 had taken exception to letter dated 03-02-2015 issued by defendant No. 2 before division bench of this court in writ petition No. 2333 of 2015. The division bench under order dated 21-04-2015 had quashed and set aside the same leaving it open for the authorities of Municipal Corporation to issue appropriate show cause notice to the petitioner-therein (defendant No. 1 in suit) pointing out the deficiencies in construction activity and calling upon the petitioner to answer such

deficiencies/irregularities. (It appears that in furtherance of the same, certain proceedings have taken place culminating into order dated 03-08-2015 letting the construction activity by defendant No. 1 go on, subject to conditions referred to therein).

12. Against order dated 20-03-2015 on Exhibit-5, passed by the trial court, injunctioning defendant No. 1 from raising further construction, miscellaneous civil appeal No. 27 of 2015 had been preferred by defendant No. 1 on 29-04-2015 after receiving certified copies of requisite documents. It appears that on 02-05-2015 notice had been issued by the appellate court and the matter had appeared on its board of 08-05-2015. On 08-05-2015 the plaintiffs had put in their appearance and applied for adjournment. The matter was adjourned to 18-05-2015 for the purpose referred to in the process-sheet.

13. It appears that application had been moved on behalf of plaintiffs on 18-05-2015 seeking adjournment beyond vacation, as 20-05-2015 had been falling during the vacation and also pointing out various other aspects. However, it appears said request was not acceded to. On said date, various events appear to have occurred, which are depicted in the process-sheet that order came to be passed on Exhibit-1 that submissions be advanced in respect of main appeal itself and the matter was adjourned to 20-05-2015. It appears that learned judge while scheduling the matter for final hearing on appeal appears to have observed that he would be on

vacation from 25-05-2015. Accordingly the parties had advanced their submissions on 20-05-2015, and on 22-05-2015 decision was rendered by the appellate court allowing appeal. Aggrieved by said order, the petitioners are before this court.

14. Mr. Dhorde, learned senior advocate submits that the way in which the appeal has been conducted is highly reprehensible. There was no exigency which could impel the court to decide the appeal during vacation. According to him, it is curious as to why defendant No. 1 - appellant waited from 20-03-2015 to 29-04-2015 for filing appeal, without serving the petitioners and then suddenly saying that matter is urgent. It is submitted that the court could have easily granted time and even heard the matter on very first day upon re-opening after the vacation.

15. So far as merits of the matter are concerned, he submits that collusion between defendants No. 1 and 2 is evident. It is obvious from that when application for permission had been submitted on 28-02-2014, the same came to be granted on the very day along with certificate of regularization under the Gunthewari Act. He submits that this would, in fact, smell foul and the court ought to have considered the matter in the light of the same. He submits that while construction permission has been granted for residential use, the sketches of map which have been approved and sanctioned unequivocally depict that those are for hospital.

16. He submits that construction permission has been granted in residential zone, and as such commercial/hospital activity is not permissible/possible pursuant to relevant rules. For said purpose, he relies on Standard Development Control and Promotion Regulations for Municipal Councils and Nagar Panchayats in Maharashtra for A, B and C class Municipal Councils. The parties are not at dispute that these rules are applicable to Latur Municipal Corporation. Mr. Dhorde refers to Regulations No. 2.77.1 and 2.77.3.

17. With reference to aforesaid rules, learned senior counsel submits that when the institutional buildings are defined, construction activity as being carried out by defendant No. 1 clearly falls in the category of hospital referred to in rule No. 2.77.3 as Institutional Building. According to him, said building, is a building falling under regulation No. 6.2.6.1.

18. He, thereafter, refers to table No. 14 in aforesaid regulations showing various distances such as minimum road width, minimum open space, normal permissible FSI on net plot area etc. required to be kept in different type of buildings such as hospital, maternity home, health club, public/semi public buildings. According to him, building construction permission granted to defendant No. 1 is in contravention of the requirements under table number 14. He, therefore, submits that on merits as well, defendant No. 1 has no case and building construction permission obviously is in breach of said rules. He, therefore, submits that if such illegal construction is

allowed to go on, plaintiffs would be deemed to have accepted such illegal activity. He submits that under the circumstances there is urgent need to stop the construction.

19. Mr. Sapkal, learned counsel for respondents with reference to part III of said DCP Regulations points out regulations No. 22.1, 22.1.1 and 22.2.

20. Mr. Sapkal, contends that it is undisputed fact that the plot is situated in the area which is referable to regulation No. 22.1 and, therefore, submits that hospital activity in present area is not at all prohibited. He further submits that construction work of the building is on the verge of completion.

21. Learned counsel on either side have relied on certain judgments.

22. Mr. Dhorde, learned senior advocate places reliance on decision in the case of *Anirudh Kumar Vs. Municipal Corporation of Delhi* reported in 2015(4) ALL MR SC 458 which, according to him, rules that in residential area the commercial activity, particularly like hospital, is not only shunned but has been prohibited and directed to be removed. He has taken me through said judgment and in particular paragraphs number 11, 13, 47, 48 and 49. He submits that taking overall view of the situation, further deterioration in the same is not desirable. He, therefore, requests for setting aside the order passed by the appellate court.

23. Mr. Dhorde also refers to a decision in *Priyanka Estates International (P) Ltd. Vs. State of Assam* reported in (2010) 2 SCC 27 to buttress his submission that the courts generally do not approve of illegal construction activities. He submits, on the face of it, the activity of construction is against and in contravention of the relevant regulations and further that the appellate court had decided the matter hurriedly and as such the impugned order deserves to be set aside.

24. Mr. Sapkal, learned counsel for respondent no. 1 refers to decision in *Mandali Raanganna and ors. Vs. T. Ramchandra and Ors.* reported in *AIR 2000 SC 2291(1)* and contends that grant of injunction is an equitable relief and a person who had kept mum for a long time would not be entitled to order of injunction. Mr. Sapkal submits that even going by the averments of petitioners, the construction activities had begun in 2014 and the suit has been brought in 2015 by which time the construction was almost complete. He submits that the building development has further progressed after institution of suit and as such the construction activities are at advanced stage of completion. He relies on paragraphs 23 and 24 of aforesaid judgment which read as under :-

“ 23. *Rightly or wrongly construction have come up. They cannot be directed to be demolished, atleast at this stage. Respondent No. 7 is said to have spent three crores of rupees. If that be so, in our opinion, it would not be proper to stop further constructions.*

24. We, therefore, are of the opinion that the interest of justice would be subserved while allowing the respondents to carry out constructions of the buildings, the same is made subject to ultimate decision of the suit. The Trial Court is requested to hear out and dispose of the suit as early as possible. If any third party interest is created upon completion of the constructions, the deeds in question shall clearly stipulate that the matter is sub judice and all sales shall be subject to the ultimate decision of the suit. All parties must co-operate in the early hearing and disposal of the suit. Respondents must also furnish security before learned Trial Judge within four weeks from the date which, for the time being, is assessed at Rupees one Crore. ”

25. Mr. Sapkal learned counsel further relies on decision in *Shri Bansilal Narayandas Kankariya Vs. The Special Land Acquisition Officer* reported in 2000 (4) ALL MR 227, a division bench judgment of this court and points out paragraph no. 13 of the same which reads as under:-

*” 13. Learned counsel for the petitioners urged before us that the matter should be remanded to the State Government as the order dated 6th April, 1987 was passed without affording an opportunity of hearing to the petitioners. We have rejected the said contention and proceeded to decide the matter on merits. On this issue we may usefully referred to the judgment of the Supreme Court in the case of **M.C. Mehta Vs. Union of India and Ors.** (199 AIR SCW 2754) wherein it has been held :-*

' It is not always necessary for the Court to strike down an order merely because the order has been passed against the petitioner in breach of natural justice. The Court can under Article 32 or Article 226 refuse to exercise its discretion of striking down the order if such striking down will result in restoration of another order passed earlier in favour of the petitioner and against the opposite party in violation of principles of natural justice or is otherwise not in accordance with law. It is, therefore, clear that if on the admitted indisputable factual position, only one conclusion can be possible and permissible, the Court need not issue writ merely because there is violation of principles of natural justice. ' ”

26. According to learned counsel, having regard to the merits involved in the present case, it cannot be said that any prejudice is caused to the petitioners herein by order of the appellate court which, according to the petitioners, had been passed in gross haste. In this case, striking down of the impugned order, in all likelihood, would result in restoration of another order earlier passed in favour of the petitioners. He submits, in such a case, it would not be proper to get swayed away by the submissions of the petitioners on this count.

27. Learned counsel for defendant no. 2 submits that after hearing defendant no. 1, an order has been passed on 03-08-2015 letting construction activity by defendant no. 1 to go on, on certain conditions. He submits that he has nothing further to advance in the matter.

28. Perusal of order passed by the trial court on application Exhibit-5 seeking injunction against defendants, shows that order of cancelling construction permission by defendant No. 2 had been dominant consideration granting application. Subsequently, it appears that pursuant to order dated 31-04-2015 of division bench of this court in writ petition No. 233 of 2015, defendant No. 2 was directed to issue show cause notice to defendant No. 1 and in furtherance of the same, under order dated 03-08-2015 defendant

No. 1 had been allowed to carry on construction activity by defendant No.2 subject to conditions referred to in order dated 03-08-2015.

29. Looking at that the appellate court though has passed an order which ostensibly appears to be in vacation, the parties have addressed themselves on merits and after consideration of the same, the appellate court has arrived at that activity of construction and grant of permission *prima facie* appear in tune with the position under DCPR for A, B, C class municipalities. The court has also referred to various other similar constructions that have come up in the vicinity. The court has further directed defendant no. 1 to file an undertaking that in case result in the litigation goes against his interest, he would honour the decree of the court.

30. In view of aforesaid, with reference to the considerations which have weighed with the supreme court in the case of *Mandali Ranganna (supra)* cited by Mr. Sapkal, present case is not a case wherein construction activity which, according to defendants, is in advanced stage deserves to be stalled. I am, therefore, not inclined to cause interference in the impugned order.

31. Writ petition as such, is dismissed. Rule stands discharged.

32. Smt. Anjali Dube- Bajpai states that the plaintiffs intend to take up said proceedings further against order dated 07-08-2015

passed by defendant No.2 and it be left open for them. It is open for the plaintiffs to take up such proceedings as may be permissible under law and this order would not be an impediment coming in their way.

33. Having regard to the nature of the dispute, learned counsel for the parties concur that an early disposal of the suit itself would be expedient. Accordingly, trial court may dispose of the suit as expeditiously as possible preferably within a period of eight months from the date of receipt of writ of this order.

sd/-
(**SUNIL P. DESHMUKH, J.**)

MTK ***