

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 11293 OF 2014

Sadashiv D. Late

(since deceased by his L.Rs.

1a) Smt. Kusum S. Laate (wife) and ors) .. Petitioners

vs.

The State of Maharashtra and ors. .. Respondents

Mr. S.G. Deshmukh i/b Mr. D.P. Kolekar for the Petitioners.

Ms M.S. Bane, B-Panel Counsel for Respondent Nos.1,3 and 4.

Mr. V.R. Patil for Respondent No.2.

Mr. Dilip Bodake for Respondent No.5.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 08 February 2016.

Date of Pronouncing the Judgment : 12 February 2016.

JUDGMENT :-

1] The challenge in this petition is to the orders dated 16 June 2008, 10 December 2008 and 14 August 2014 made by the Collector, Commissioner and Minister (Revenue), directing the Grampanchayat Umbraj (Respondent No.2) to take action against the unauthorised construction carried out by the Petitioners, essentially on the grounds that none of the said Authorities have any jurisdiction to make the impugned orders.

2] Mr. S.G. Deshmukh, learned counsel for the Petitioners, has submitted that the Collector, Commissioner and Minister (Revenue)

are not at all Authorities authorised to make any orders under the provisions of Maharashtra Village Panchayats Act, 1959 (said Act) and therefore, the impugned orders made by them are *ultra vires*. In the alternative, Mr. Deshmukh submitted that there is ample material on record to establish that the construction in-question, has been made upon the Petitioners' private property. In these circumstances, Mr. Deshmukh submits that there was no question of exercise of any powers under Section 53 of the said Act. Finally, Mr. Deshmukh submitted that the Panchayat had filed an affidavit to the effect that the construction in-question have been regularized after levy of penalty upon the Petitioners and that there are several other unauthorised constructions like ones carried out by the Petitioners, and therefore, it will be difficult to take any action against the Petitioners' structure. Mr. Deshmukh has submitted that the affidavit filed by the Panchayat on 7 August 2014, before the Minister (Revenue), has not at all been considered by the Minister (Revenue). For all these reasons, Mr. Deshmukh submitted that the impugned orders are required to be quashed and set aside.

3] If the records are perused, it is clear that the Collector, by his order dated 16 June 2008, had directed the Panchayat to take action

under Section 52 (5) of the said Act against the unauthorised construction put-up by the Petitioners. Section 52 (5) of the said Act provides that without prejudice to the penalty prescribed under sub-section (4) of the Section 52, Panchayat may direct that the erection or re-erection of any building without such permission or in any manner contrary to the provisions contained in sub-section (1) of Section 52 or contrary to any conditions imposed by the Panchayat, be stopped; or by written notice required such erection or re-erection be altered or demolished as it may deem necessary. Further, if such requirement for alteration or demolition is not complied with within the time fixed in the notice, the Panchayat may cause the alteration or demolition to be carried out by its officers and servants and all expenses incurred by the Panchayat therefor, shall be recoverable in the same manner as an amount claimed on account of any tax recoverable under Chapter IX.

4] In this case, the Collector has not exercised any powers under Section 52(5) of the said Act. The Collector, upon noticing that the Petitioners has carried out an unauthorised construction, contravening the provisions contained in Section 52(1) of the said Act, as also several other legal provisions, has merely directed the

Panchayat to exercise its powers under Section 52(5) of the said Act. In these circumstances, it can hardly be said that the impugned order dated 16 June 2008 is in excess of jurisdiction, as contended by Mr. Deshmukh.

5] The order dated 16 June 2008, made by the Collector was confirmed by the Commissioner by order dated 10 December 2008. However, despite such confirmation, the statutory authority, including in particular, the Panchayat failed to implement the orders dated 16 June 2008 and 10 December 2008 for considerable period of time. In these circumstances, the Respondent No.5 and one Kakaso Mahamuni instituted Public Interest Litigation bearing PIL No. 230 of 2009, urging implementation. By this time, the Minister (Revenue) had also made the impugned order dated 14 August 2014, by which, a portion of the Commissioner's order dated 10 December 2008, in relation to exercise of powers under Section 53 of the said Act was set aside, however, a direction was issued in clause (3) of the said order dated 14 August 2014 to implement the order dated 16 June 2008 made by the Collector. This PIL No. 230 of 2009 was disposed of by the Division Bench of this Court, by making the following order, on 12 November 2014:

ORDER :

(a) We direct the first Respondent Village Panchayat, Umbraj, to implement the order dated 16th June 2008 (as modified on 23rd October 2008) in terms of the directions contained in Clause (3) of the order dated 14th August 2014 passed by the State Government in Revision Application preferred by the fifth Respondent;

(b) Implementation of the aforesaid directions shall be made within a period of four months from today;

(c) We make it clear that this order will not preclude the fifth Respondent from filing appropriate proceedings for challenging the order dated 14th August 2014. To enable the fifth Respondent to take out appropriate proceedings for challenging the said order, we direct that the direction issued in terms of Clause (a) above shall not be implemented for a period of six weeks from today;

(d) In the event of non compliance by the first Respondent of its statutory obligations, it will be always open for the Petitioner to file appropriate proceedings in accordance with law;

(e) The Petition is disposed of on above terms.

(A.S.GADKARI, J)

(A.S. OKA, J)

6] The Petitioners, in the light of liberty granted in clause '(c)' as aforesaid, has instituted the present petition to challenge the orders dated 16 June 2008, 10 December 2008 and 14 August 2014, on the ground that the same have been made in excess of jurisdiction.

7] The Minister (Revenue) in making the impugned order dated 14 August 2014, has already set aside the Commissioner's order dated 10 December 2008, to the extent, it had directed action under

Section 53 of the said Act. In these circumstances, there is no necessity to consider the contention of Mr. Deshmukh that no action under Section 53 of the said Act can be taken against the unauthorised construction carried out by the Petitioners, since, such unauthorised construction is not upon public street or open site. There is however, no case made out to interfere with the direction that the Panchayat takes an action under Section 52(5) of the said Act. Such a direction is *intra vires* and considering the facts, which emerge from the record, it is only appropriate that the Panchayat takes action under Section 52(5) of the said Act, in the matter of unauthorised construction put-up by the Petitioners.

8] Mr. Deshmukh, despite afford of opportunity to make his submission, stated that he has no submission to make in the context of legality or otherwise of the construction undertaken by the Petitioners except that such construction was within the property of the Petitioners and that the same had been regularised by the Panchayat. In fact, the learned counsel, was right in his approach, because, the material on record establishes that the Petitioners, on the basis of some permission to construct ground floor structure, have proceeded to erect a three storeyed building. There is no record

that the Petitioners had obtained permission to use the agricultural property for non-agricultural purposes. The reports from several authorities, including Deputy Engineer Road Development Corporation, Kolhapur, Executive Engineer, Public Work Department, Satara, Block Development Officer, Panchayat Samiti Karad, Tahasildar Karad, Assistant Director, Town Planning Satara, Executive Engineer, Maharashtra State Electricity Distribution Company, Taluka Inspector, Land Record Karad or Town Measurement Officer Karad have all commented upon the illegality of the Petitioners' construction. On 18 July 2006, even the Panchayat had issued stopped work notice to the Petitioners as the construction was in contravention of the rules. However, the Petitioners proceeded with a construction nevertheless.

9] The property of the Petitioners, is abutting the national Highway No.4. Some portion of the Petitioners' property is acquired for purposes of the highway. The Petitioners had put-up the construction, without complying with necessary provisions with regard to necessary set back. This is yet another illegality insofar as construction is constructed.

10] The impugned order dated 16 June 2008 lists out the several illegalities concerning the construction put-up by the Petitioners. There is really, no serious challenge to the enumeration of such illegalities. The only challenge raised by the Petitioners are that the Collector lacks authority to even direct the Panchayat to take action under Section 52(5) of the said Act in the matter of illegal and unauthorised construction. As noted earlier, in this case, the Collector has not himself exercised any jurisdiction under Section 52(5) of the said Act. The Collector has merely directed the Panchayat to exercise its powers, considering the circumstance that the construction put-up by the Petitioners are wholly unauthorised.

11] The Commissioner, in his order dated 10 December 2008, has noted that the Petitioners were required to undertake construction by leaving a distance of 20 meters from the center of the highway or 4.5 meters from the border of the highway, whichever was higher. However, the Petitioners have observed this requirement only in breach by hardly leaving any set back. The Commissioner has also observed that the construction in-question has breached the rule relating to Ribbon development. The Commissioner has also observed that construction is in breach of the conditions set out by

the Panchayat. The construction is in breach of the conditions prescribed by the Maharashtra Electricity Supply Company. Although the order of the Commissioner, insofar as it directs the action under Section 53 of the said Act may have been set aside, the order has been sustained insofar as it directs action under Section 52(5) of the said Act. Besides, the Minister (Revenue), has not disturbed the findings of fact recorded by the Commissioner. Rather, the Minister (Revenue) has also confirmed these findings and therefore, directed the Panchayat to take action under Section 52(5) of the said Act.

12] Therefore, considering the aforesaid facts and circumstances, including in particular, the concurrent findings of fact recorded by the three Authorities, which findings find support from the material on record that the Petitioners had indeed carried out construction, which is wholly unauthorised, there is no case made out to entertain the present petition. The impugned orders have not been made in excess of jurisdiction. The Authorities have only directed the Panchayat to take action under Section 52(5) of the said Act in the matter of illegal and unauthorised construction put by the Petitioners. In fact, it is the duty of the Panchayat Panchayat to take action in a matter of this nature, even in the absence of any direction

from the Collector, Commissioner or the Revenue (Minister). This Court, whilst disposing of PIL No. 230 of 2009 has also directed the Panchayat to implement the order dated 16 June 2008 (as modified on 23 October 2008) in terms of direction contained in clause '3' of the order dated 14 August 2014 made by the Minister (Revenue). This was of course, subject to the Petitioners, obtaining appropriate orders for setting aside the orders made by the Collector and the Revenue (Minister). There is no merit in the challenge made by the Petitioners to the orders made by the Collector and the Minister (Revenue). Consequently, the directions issued by the Division Bench of this Court in PIL No. 230 of 2009 is required to be implemented by the Panchayat.

13] There is no merit in the contention of Mr. Deshmukh that the affidavit filed by the Panchayat, in the matter of regularization has not been taken into consideration. The affidavit, very vaguely states that the permission had been granted to the Petitioners to put-up the construction, subject to certain conditions and that the Petitioners have put-up the construction in breach of such conditions. From this, it is clear that even the Panchayat admits that the structure was illegal and unauthorised, though, the Panchayat, has attempted to

down play the seriousness of the illegalities. Thereafter, the Panchayat, in the said affidavit, dated 7 August 2014 states that some fine has been imposed in the matter of regularization of the structure. The Minister (Revenue), was absolutely right, in not accepting such plea of regularization and directing the Panchayat to take action under Section 52 (5) of the said Act. Considering the gross nature of illegalities, coupled with obvious reluctance on the part of the Panchayat to discharge its statutory duty, the Collector, Commissioner and the Minister (Revenue), have acted within the bounds of their jurisdiction, in directing the Panchayat to take action under Section 52(5) of the said Act in the matter of illegal and unauthorised construction put-up by the Petitioners. Besides, the Panchayat, was also a party to PIL No. 230 of 2009, which was disposed of on 12 November 2014. By this date, the Panchayat had, half heartedly attempted to regularise the unauthorised construction. Despite this, the Division Bench of this Court , in its order dated 12 November 2014 directed the Panchayat to implement the Collector's order dated 16 June 2008 (as modified on 23 October 2008) in terms of clause (3) of the order dated 14 August 2014 made by the Minister (Revenue) in the revision application preferred by the Petitioners herein. This direction of the Division Bench has

attained finality for want of challenge before the Hon'ble Apex Court. As such, it is too late for the Petitioners, to claim that the unauthorised structure put up by them stands regularised or that, this aspect has not been considered whilst making the impugned orders.

14] The Hon'ble Apex Court in case of *Dipak Kumar Mukherjee Vs. Kolkata Municipal Corporation and ors.*¹, has emphasized that illegal and unauthorised constructions of buildings and other structures not only violates municipal laws and the concept of planned development of the particular area, but also affect various fundamental and constitutional rights of others 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 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-storied structure raised by economically affluent

¹ (2013) 5 SCC 336

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. The Hon'ble Apex Court, by reference to several earlier decisions, has stated that there should be no judicial tolerance of illegal and unauthorised constructions by those who treat the law to their subservient. The Hon'ble Apex Court in this case, has commended the Kolkata Municipal Corporation for its action against the unauthorised constructions, by observing that this has a given ray of hope to the residents of Kolkata that there will be a zero tolerance against illegal and unauthorised constructions and those indulging in such activities will not be spared.

15] In the present case, however, the Panchayat, which is enjoined to take action against the illegal construction is virtually dragging its feet in the matter, notwithstanding the *intra vires* orders made by the Collector, Commissioner and the Minister (Revenue) not to mention the directions issued by this Court in the PIL No. 230 of 2009 on 12 November 2014. It is to be noted that the Division Bench of this

Court, had directed the Panchayat not to take action for a period of six weeks from 12 November 2014 so as to enable the Petitioners to obtain interim orders in matter of the impugned orders. There is no record that during the period of six weeks, the Petitioners had obtained any interim relief in the matter. Nevertheless, the Panchayat, has not bothered to implement the directions with regard to action against the illegal and unauthorised construction of the Petitioners.

16] In case of *Friends Colony Development Committee Vs. State of Orissa*², the Hon'ble Apex Court held that though the municipal laws permit deviations from sanctioned constructions being regularised by compounding but that is by way of exception. Unfortunately, the exception, with the lapse of time and frequent exercise of the discretionary power conferred by such exception, has become rule. Only such deviations deserve to be condoned as are *bona fide* or are attributable to some misunderstanding or are such deviations as where the benefit gained by demolition would be far less than the disadvantage suffered. Other than these, deliberate deviations do not deserve to be condoned and compounded.

2 (2004) 8 SCC 733

Compounding of deviations ought to be kept at a bare minimum.

17] In case of *Royal Paradise Hotel (P) Ltd. Vs. State of Haryana*³, the Hon'ble Apex Court noted that the construction had been made in the teeth of notices issued for stopping the unauthorised construction and held that no authority administering municipal laws can regularise the constructions made in violation of the Act. It is time that the message goes aboard that those who defy the law would not be permitted to reap the benefit of their defiance of law and it is the duty of the High Courts to ensure that such defiers of law are not rewarded. The High Court was therefore fully justified in refusing to interfere in the matter. The High Court was rightly conscious of its duty to ensure that violators of law do not get away with it. No authority administering municipal laws and other laws like the Act involved, can encourage such violations. Even otherwise, compounding is not to be done when the violations are deliberate, designed, reckless or motivated. Marginal or insignificant accidental violation unconsciously made after trying to comply with all the requirements of the law can alone qualify for regularization which is not the rule, but a rare exception.

3 (2006) 7 SCC 597

18] In case of *Esha Ekta Apartments Cooperative Housing Society Limited and ors. Vs. Municipal Corporation of Mumbai and ors.*⁴, the Hon'ble Supreme Court, has in fact, began its judgment with the following :

“In the last five decades, the provisions contained in various municipal laws for planned development of the areas to which such laws are applicable have been violated with impunity in all the cities, big or small, and those entrusted with the task of ensuring implementation of the master plan, etc. have miserably failed to perform their duties. It is highly regrettable that this is so despite the fact that this Court has, keeping in view the imperatives of preserving the ecology and environment of the area and protecting the rights of the citizens, repeatedly cautioned the authorities concerned against arbitrary regularisation of illegal constructions by way of compounding and otherwise.”

19] This is a classic case where the Petitioners have put a wholly illegal and unauthorised construction in defiance of rules and regulations, in defiance the conditions, subject to which the Petitioners were issued permission to only put up a ground floor structure and not three storeyed structure, which they have ultimately put up. The structure is in defiance of rules relating to setbacks from national highways, in defiance with the rules relating to conversion of the agricultural property. The structure has been put up without obtaining permissions, NOCs, from statutory Authorities

4 (2013) 5 SCC 357

like the Public Work Department, Maharashtra State Electricity Distribution Company etc.. Despite all this the Panchayat, is reluctant to take any action against such illegal and unauthorised construction.

20] In the aforesaid facts and circumstances, as also the law on the subject, this petition is required to be dismissed and is hereby dismissed with costs, quantified at Rs.25,000/-. The costs shall be paid to the State of Maharashtra within a period of four weeks from today. Though, the petition is being disposed of, considering the chequered history, the Panchayat is directed to file a compliance report before the Collector within a period of six weeks from today.

21] All concerned to act on the basis of authenticated copy of this order.

(M.S. SONAK, J.)