

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

PUBLIC INTEREST LITIGATION NO. 94 OF 2015

Sharad Nago Chinawale,
Age Major, Occu.: Pensioner,
R/o Om Sai Apartments,
Above Talati Office, Pimpal,
Jalgaon, District Jalgaon

.. Petitioner

VS.

1] Ulhas Devram Sable
Age 54 years, Occu.: Business

2] Rajendra Devram Sable
Age 57 years, Occu.: Service

3] Ashok Devram Sable
Age 63 years, Occu.: Nil

All R/o Jalgaon, Plot No. 5,
“Suvarna Sandhya”,
State Bank Colony, Ring Road,
Jalgaon

4] The Municipal Corporation of
City of Jalgaon, Jalgaon
District Jalgaon

5] The Assistant Director,
Town Planning Department,
Jalgaon City Municipal Corporation,
Jalgaon, District Jalgaon

6] The State of Maharashtra,
Through its Secretary,
Urban Development Department,
Mantralaya, Mumbai

.. Respondents

Mr. K.C. Sant, Advocate for the petitioner
Mr. P.S. Patil, A.G.P for the respondent no.6 - State
Mr. S.S. Patil, Advocate for respondents 4 and 5
Mr. V.B. Patil, Advocate for respondent no.1

**CORAM : S.C. DHARMADHIKARI &
MANGESH S. PATIL, JJ.**
DATE : 28-06-2017

ORAL JUDGMENT :

1. Rule. Respondents waive service. By consent, heard forthwith.
2. By this Petition under Article 226 of the Constitution of India, the petitioner has sought a writ of mandamus or any other writ, order or direction directing the respondent – Municipal Corporation of city of Jalgaon (respondent no.4) and respondent no.5, to take action in accordance with law in respect of the construction made by the first respondent on a plot more particularly described in prayer clause (A) of the Petition. By prayer clause (B), a direction is sought that if this construction is completely illegal and unauthorized, then proper action be taken.
3. After hearing both sides at great length on earlier

occasion, we had passed the following order :-

“1. We have heard this matter in the morning session and even post recess. We have raised the following queries to the learned Advocates appearing on behalf of respondent no. 1 and to respondents no.4 and 5.

2. Queries to the respondent no.1 :-

i) If this respondent is relying upon the communication from the Corporation, copy of which is at page 159 of the paperbook, then, whether he has ever satisfied the authorities that in terms of the commencement certificate relied upon by him and copy of which is annexed to the Petition at page 26, compliance of the terms and conditions thereof and particularly condition no.6 has been made ?

ii) Whether his Architect has ever furnished a certificate and in terms of condition no.6 of the commencement certificate dated 16/01/1981 ?

iii) Once this commencement certificate is valid upto 12 months from the date of issue, then, when construction of the first floor is made ?

3. We have found that though the matter was kept back and to enable the Advocate for respondent no.1 to take instructions, there is no material forthcoming

about the queries raised by us.

4. However, an argument is raised by Counsel appearing for respondent no.1 that in the light of this commencement certificate, construction of ground + first floor is permitted. If the construction is permitted, then merely on the strength of some compliance made by present petitioner, who has a private dispute with this respondent, the Municipal Corporation could not have issued the subject notice. Notice dated 13/05/2009, copy is at page 35, was replied to and thereafter there has been an order of the civil Court.

5. As far as the communication at page 39 of the paperbook, it is argued that respondent no.1 replied to this notice at page 40 dated 31/10/2014 and has also pointed out that the construction is capable of being regularized. The application for regularization therefore has been made. The argument is that the notice at page 40 of the paperbook is traceable to Section 52 and 53 of the Maharashtra Regional and Town Planning Act, 1966 and by Sub-Section 3 of Section 53, permission for retention of the structure / first floor can be validly sought and that is capable of being granted because of prevailing policies so also there is enough F.S.I. available to regularize the construction. Hence Regulation no.16.2 of the Development Control Rules has been invoked by the respondent no. 1.

6. As far as the Municipal Corporation is concerned, we have directed the Counsel appearing for the said Corporation to produce the copies of the letters dated 25/07/2014 addressed by the Jalgaon City Municipal Corporation and the letter dated 17/09/2014 of the respondent no.1 addressed to the Corporation.

7. We have also asked whether relaxation is granted in a specific case and whether the power conferred by Regulation no. 16.2 can be invoked by the respondent no.1 in the light of the contents of the notice dated 31/10/2014.

8. The next query was whether as claimed by respondent no. 1, there is F.S.I. available and which can be utilized to have the construction regularized.

9. To both the queries, the learned Advocate for the Corporation presently has no answer but he assures the Court that he would produce the relevant documents and also get ready to answer the query of the Court about the availability of the F.S.I.

10. At the request of the Municipal Corporation's Advocate, we defer passing of the orders and post this matter for passing orders on 28th June, 2017 on the Supplementary Board."

4. In pursuance of this order and direction, the Municipal Corporation's Advocate has produced before us the two documents / communications of 25/07/2014 and 17/09/2014.

5. By the communication dated 25/07/2014, the Municipal Corporation had sought clarification from the first respondent with regard to the construction of first floor. He was to give a clarification and also forward the documents enlisted in this communication.

6. He addressed a detailed letter on 17/09/2014 which demonstrates that he is not disputing the receipt of the earlier notice, communications, but is providing a justification for the construction carried out.

7. It is only after these communications were referred together with the allegations in the Petition, that we have called upon the Corporation to produce the certified true copies of related documents as well. Accordingly, inspection report dated

28/10/2014 is produced which indicates by a sketch, the work which is unauthorised and the work which is without occupancy.

8. It is common ground that apart from this, there is another unauthorised construction carried out in the rear margin space and there are some other issues raised.

9. We clarify that if in terms of the applicable rules and regulations, this part of the deviations and brought to the notice of the respondent no.1, can be tolerated or regularised, then, on imposition of appropriate penalties and if that is permissible otherwise in law, the Corporation is free to consider the request in that behalf.

10. We are concerned only with first floor's construction.

11. We do not think that the Advocate for the respondent no.1 could provide any satisfactory explanation for the acts and which have been committed at site.

12. Pertinently, on 25/07/2014, the explanation was called for and with the supporting documents. On 17/09/2014, that explanation was provided. However, the Municipal Corporation was not satisfied with this explanation and has addressed notice dated 18/09/2014, calling upon the respondent no.1 to show cause as to why the construction on the first floor should not be declared as unauthorised and illegal.

13. From the record, it further appears that notice dated 31/10/2014 was addressed to the first respondent. In the report / description of the works, this notice elaborates as to how the entire first floor is being raised without any occupancy certificate. Secondly, on the first floor, there is a construction carried out on the northern side of some rooms. There is an unauthorised extension and this extended work with its measurements has been referred. As far as point no.3 is concerned, there is additional work of balcony. That is also pointed out with its direction and dimensions.

14. We are concerned essentially with this notice.

15. This matter was extensively argued today in the morning session and was kept back only to enable the Advocate appearing for the first respondent, to seek instructions from the first respondent, as to whether these respondents 1 to 3 on their own will remove this unauthorised and illegal works.

16. We expressly rejected the argument of these respondents' counsel to the effect that this work is capable of being regularised. According to us, what is unauthorised and illegal cannot be regularised in law. Regulation 16.2 of the Development Control Rules is not meant to serve that purpose else every unauthorised and illegal work can be regularised. It is only what is irregular that can be regularised and this is succinctly clarified by the Hon'ble Supreme Court in the case of **Mahendra Baburao Mahadik and others V. Subhash Krishna Kanitkar and others (2005) 4 S.C.C. 99**, which is directly on the point. In this case, the Hon'ble Supreme Court has elaborately discussed the ambit and scope of Section 44, 52 and 53 of the Maharashtra Regional and Town Planning Act (for short "M.R.T.P" Act). In this case, the

Hon'ble Supreme Court, in paragraphs 36, 37, 38, 41, 42, 43 and 47, held as under :-

“36. Once such a notice under Section 52 is served, the persons aggrieved within the period specified therein, which in the instant case is one month, must apply for permission for retention on the land of the building or works under Section 44 of the MRTP Act. Only when a permission is granted the notice would stand withdrawn. The question of grant of any permission would arise only if an application is made therefor. As the appellants herein had not filed such application, the Municipal Council was obliged not only to prosecute the owner but also to carry out the demolition in terms of the aforementioned notice dated 6.6.1998.

37. The Municipal Council is a 'local authority' as well as planning authority within the meaning of the provisions of Sections 2(15) and 2(19) of the MRTP Act.

38. The Municipal Council being a creature of statute was bound to carry out its functions within the four corners thereof. Being a statutory authority, it was required to follow the rules scrupulously. Concededly, the Municipal Council is not possessed of any statutory power to regularize unauthorized constructions. Its power is confined to compounding the offences in certain cases. Moreover, even development charges could not be recovered from the

appellant in respect of unauthorized constructions in terms of Section 124E(2) of the MRTTP Act.

41. It may be true that certain demands were made upon the appellants herein to deposit the development charges by the Municipal Council but the same were made without prejudice to their rights, as would appear from the notice dated 3.11.1998. Demand of the development charges without prejudice to the rights of the Municipal Council did not, thus, create any legal right in favour of the appellants. (See Chairman and MD, NTPC Ltd. Vs. Reshmi Constructions, Builders & Contractors, (2004) 2 SCC 663).

42. Payment of development charges by itself, therefore, did not lead to exoneration from the consequence of commission of an offence or regularization of unauthorized constructions.

43. The jurisdiction of a local authority is confined only to deal with application for grant of permission for construction as contained in Section 44 of the MRTTP Act whether at the initial stage or when a notice is served under sub-section (2) of Section 53 of the MRTTP Act. The power to grant such permission could be exercised only within the purview of the Building Bye-laws. Therefore, being beyond the scope of Section 44 of the MRTTP Act, the Municipal Council did not have any jurisdiction to direct regularization of such unauthorized constructions by reason of the said resolution or otherwise. The power of the

Municipal Council, it is trite, being confined to the provisions of the said Acts, no action could be taken by them contrary thereto or inconsistent therewith.

47. In *Mulchand Agarwalla* ((1995) 2 SCR 995), whereupon strong reliance has been placed by Mr. Naphde, this Court upon taking into consideration the provisions of the Calcutta Municipal Act and in view of the terminologies contained in Section 449 thereof noticed that the Magistrate had a discretionary jurisdiction to pass an order of demolition and held:

"The conduct of the respondent in adopting a hide-and-seek attitude in completing the constructions in deliberate defiance of the law calls for severe action. It would be most unfortunate, and the interests of the public will greatly suffer, if the notion were to be encouraged that a person might with impunity break the building rules and put up a construction and get away with it on payment of fine. All this would be good justification for making an order for demolition."

17. To our mind, therefore, all that the respondents 1 to 3 were called upon even by us, is to comply with this notice of 31/10/2014. Then, we clarified that if the compliance is made by respondents 1 to 3 on their own, we would not direct the Municipal

Corporation for immediate removal of this construction. For this limited purpose, the matter was kept back and in post recess, so that the Advocate can speak to the respondents 1 to 3 and file their undertaking, if so advised.

18. An undertaking is thereafter tendered by Ulhas S/o Deoram Sabale. He is present in Court. He says that he is filing this undertaking on behalf of himself as also on behalf of the respondents 2 and 3, as he holds a General Power of Attorney executed by them. This undertaking reads as under:-

“01. That, the answering Respondent No.1 to 3 hereby submitting an undertaking that the Respondent No.1 to 3 will remove the constructed structure stated in clause No.2 and 3 of the notice dated 31/10/2014 issued by Deputy Commissioner Jalgaon City Municipal Corporation Jalgaon in respect of Plot No.5, (C.T.S. No.8347) Gut No.278 and particularly at Exhibit-F Page No.40 as under:-

No.2: 1st floor, Northern side room 13.10 m x 1.14 m as stated as illegal excess construction.

No.3 1st floor, illegal excess balcony.

i) East – South side corner 11.55 x 0.90

- ii) West – South corner 6.80 x 0.90
- iii) East – North corner 4.20 x 0.90
- iv) South – North corner 3.70 x 0.90

02. That, the Respondent No.1 is cardio patient and suggest for cardio transplant. The Respondent No.2 age of 58 years and Respondent No.3 is age of 71 years.

03. Therefore, in this fact, the Respondent No.1 to 3 herein will remove the above referred structure mentioned as per notice dated 31/10/2014 within period of 3 months on their own cost.

Hence, this Undertaking.”

19. Undertaking is taken on record and marked “X” for identification.

20. Since the first respondent has undertaken as above to this Court, so also their being medical ailments from which these respondents are suffering, that we accede to the request of respondents 1 to 3 and grant them time. They shall comply with their undertaking as expeditiously as possible and in any case by 30/09/2017. No extension will be granted. If by this date, the undertaking is not complied with, then, in addition to initiating

proceedings for breach of the same, by invoking mandate of the Contempt of Courts Act, 1971, this Court would not hesitate to direct the Municipal Corporation to launch a criminal prosecution against these respondents. We would also grant liberty to the petitioner then to move a competent criminal Court. He can institute civil as well as criminal proceedings. If no compliance is reported by the respondent nos. 1 to 3 of the above undertaking, the Corporation can demolish the unauthorized construction and recover the costs in relation thereto from these respondents.

21. Needless, therefore to clarify that the above works are not capable of regularization or retention at site. In the form in which they are existing, it is not possible to grant any occupancy certificate either. It is only that after compliance with the undertaking that the respondents 1 to 3 can apply for issuance of occupancy certificate and for remaining of the structure or portion thereof. In no case, the occupancy till 30/09/2017 is regularised by us. Further, we clarify that action in accordance with law can continue, if initiated, or if not initiated, can be initiated, so as to bring all the acts of the respondents 1 to 3 to book. If compliance

is made with this undertaking and the unauthorised and illegal works are removed, then, the Corporation may consider the request for grant of occupancy certificate for the remainder of the structure on such terms and conditions as are permissible in law. If occupancy is granted, that does not mean exoneration from civil or criminal prosecution so also penal proceedings. All of this can go on in accordance with law.

22. The amount of Rs. 50,000/- (Rs. Fifty Thousand) deposited by the petitioner shall stand transferred to the District Collector, Aurangabad, so that the District Collector can utilize the amount to assist and aid such of those, including the families of the farmers and agriculturists, who unfortunately committed suicide.

23. Public Interest Litigation is disposed of.

24. Rule made absolute accordingly.

[MANGESH S. PATIL]
JUDGE

[S.C. DHARMADHIKARI]
JUDGE

arp/