

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER (STAMP) NO. 3324 OF 2017
WITH
CIVIL APPLICATION (STAMP) NO. 3325 OF 2017

Shri Pritesh Madhukant Sanghavi .. Appellant
vs.
Municipal Corporation of Greater Mumbai .. Respondents

Mr. M. V. Holamagi for Appellant.
Ms M. More for Respondents – MCGM.

CORAM : M. S. SONAK, J.
DATE : 01 MARCH 2017

P.C :

- 1] Heard heard learned counsel for the parties.
- 2] The challenge in this appeal is to the order dated 1 February 2017, by which, the learned trial Judge has dismissed the appellant's (plaintiff's) notice of motion seeking a restraint upon the Municipal Commissioner of Greater Mumbai (MCGM) from enforcing or implementing its notice dated 10 January 2017 issued under section 53(b)(6) of the Maharashtra Regional and Town Planning Act, 1966 (MRTP).
- 3] Mr. Holamagi, learned counsel for the appellant has made the following submissions in support of the appeal :-

(A) That in respect of other alleged unauthorised constructions in the suit building, the MCGM has issued notices under section 351 of the Mumbai Municipal

Corporation Act, 1888 (MMC Act), whereas, in the case of the appellant, notice has been issued under section 53(1) of the MRTP. This according to Mr. Holamagi constitutes discrimination and there is accordingly failure to follow the due process of law;

(B) The developer / owner has already applied for regularization of the alleged unauthorised constructions. The pending consideration of the application for regularization, it is impermissible for the MCGM to issue the impugned notice dated 10 January 2017 and therefore the enforcement of such notice was required to be enjoined;

(C) The Executive Engineer (B.P.)E.S.-I has already put up a noting that the so-called variations from the approved plan are of an approvable nature. This means that there is nothing unauthorised in the constructions and in any case, the deviations can always be regularized, since they are of an approvable nature. This aspect has been ignored whilst making the impugned order. There is a circular of the MCGM which prescribes that unauthorised constructions can be regularized by imposition of a fine. In this case, if any, fine is found to be payable, the appellant is ready and willing to pay the same. However, no useful purpose will be served in permitting demolition of structures.

(D) Finally, Mr. Holamagi submitted that the appellant is not the one who has done any unauthorised construction. If the builder / developer has condoned any unauthorised construction, the appellant cannot be made to suffer, since, the appellant has already made investments in the property.

Mr. Holamagi submits that this is not a case where some public project is held up on account of unauthorised constructions and the MCGM will gain nothing by implementing its order of demolition. On the contrary, irreparable loss and prejudice will occasion to the appellant, in case injunctive relief is declined.

4] Ms More, learned counsel for the MCGM submits that the notice dated 10 January 2017, which is impugned in the suit is only a consequential order. The same was issued because, the developer, despite notice dated 11 June 2014, has failed to restore the structure / premises as per the approved plans dated 20 July 2012 or obtained any regularization in respect of the unauthorised constructions. He submits that several unauthorised constructions have been carried out in the premises and the note of the E.E.(B.P.) is being misinterpreted. The note itself states that there are several constructions or irregularities which are incapable of being regularized. That apart, she submits that even factually the proposal for regularization has not been accepted and even criminal prosecution is initiated against the occupier / developer. She submits that due process of law has been adopted in this case and there is absolutely no case made out to grant any injunctive relief in favour of the appellant. She submits that it is in public interest that illegal and unauthorised constructions are not allowed to prevail and the appellant, cannot seek any injunction on the ground that such illegal and unauthorised constructions may have been carried out by the developer. She submits that it is always open to the appellant to sue the developer for damages in accordance with law. For all these reasons, she submits that there is no case made out to interfere with the impugned order in this appeal.

5] In this case, on 11 June 2014, MCGM issued notices under section 53(1) of the MRTP requiring the owner / developer from whom, the appellant claims rights, title or interest to restore the structure / permissions as per the approved plan dated 20 July 2012. An option was also given to the owner / developer of getting the unauthorised works regularized. Obviously, this means that regularization was contemplated to the extent the unauthorised constructions are approvable and not otherwise.

6] The notice dated 10 January 2017, which, the appellant has chosen to impugn in the suit, is really a consequential notice. A mere challenge to this notice, without, there being any substantive challenge to the notice dated 11 June 2014, really, means nothing. The notice dated 10 January 2017 was issued because, the owner / developer, or for that matter the appellant, neither restored the structure / premises to the status of the approved plan dated 20 July 2012, nor, any orders were obtained for the purposes of regularization. Reliance placed upon the noting of the Executive Engineer, is quite misplaced. In the first place, mere notings create no rights. That apart, the noting itself states that there are various illegalities which are not even an approvable. Thirdly, merely because, some irregularities may be approvable that does not mean that a party can insist as a matter of right to act in breach of the approved plans and thereafter seek for approvals. Matters, have to be decided in the facts and circumstances of each individual case. The provision for regularization is mainly, for the purposes of condoning inadvertent deviations from the approved plan in the course of construction. The purpose of regularization is not to afford a licence to any party to put up illegal constructions with impunity and thereafter insist upon regularization or insist upon

restraint on the Municipal Authorities until proposal for regularization is disposed of.

7] In this case, from the material placed on record, it does appear that the proposal for regularization has not been accepted. Otherwise, there was no question of launching the prosecution against the owner / developer as has been observed in the impugned order. Documents have also been placed by the MCGM to this effect. This is also the contention of learned counsel for the MCGM that it is impermissible for the appellant, to claim injunctive relief, merely on the basis of some vague statement that proposal for regularization is still pending or on the basis of some nothing, where it is stated that some of the unauthorised constructions are approvable. Significantly, in this case, there is no challenge to the notice dated 11 June 2014, which is, the notice impugned in the present case. Considered from this perspective, there is really no infirmity in the impugned order.

8] There are no submissions made before me that there are no illegal or unauthorised constructions carried out whether by the owner / developer or the appellant. There is no contention in the plaint that the structure as it stands, is in consonance with the approved plan dated 20 July 2012. The fact that the application for regularization was made, implies that there was an admission that there was something irregular and unauthorised. In such circumstances, the discretion was rightly exercised by the learned trial Judge and there is neither any unreasonableness or arbitrariness in exercise of such discretion.

9] The submission that the owner / developer is at fault may or may not be well taken. In any case, if the owner / developer is at

fault, then, it is for the appellant to seek damages from the owner / developer. On such ground, the MCGM cannot be restrained from taking action against the illegal and unauthorised construction.

10] The submission on basis of irreparable loss and prejudice is also quite misconceived in the facts and circumstances of the present case. Just as the undertaking of an illegal and unauthorized construction is against public interest, so also, the toleration of such illegal unauthorised construction is also against public interest. There are several instances when the complaint is made against the MCGM that they do not take action against illegal and unauthorised constructions despite writs issued by this court. In a case where MCGM, has taken action against illegal and unauthorised constructions, such action, cannot be stayed on the ground that the MCGM has nothing to gain by such demolitions or that irreparable loss and prejudice will occasion the party, who has carried out illegal and unauthorised constructions. If, the appellant is indeed serious in his contention that the illegal and unauthorised constructions have been carried out by the developer / builder, it is for the appellant to seek remedy against such developer / builder. For that reason, public authorities like the MCGM cannot be restrained when they seek to take action against illegal and unauthorized constructions.

11] In ***Friends Colony Development Committee vs. State of Orissa***¹, the Hon'ble Supreme Court made the following significant observations :

“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

1 (2004) 8 SCC 733

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.....

12] The circular relied upon by Mr. Holamagi, applies in a situation where case is made out for regularization and the discretion is exercised in accordance with law by the MCGM to permit such regularizations. On the basis of such circular, no party can insist upon undertaking illegal and unauthorised constructions and thereafter contend that such illegal and unauthorised constructions have to be regularized on the basis of payment of fine. The submission based upon discrimination is also misconceived. It is not the case of the appellant that the MCGM has no right or authority to issue notice under section 53 of the MRTP. The MCGM is very much authorized to issue such notice, since, it is the planning authority, as well. This is a case of illegal and unauthorised constructions contrary to or in excess of approved plans. Accordingly, provisions of section 53 of the MRTP were

rightly invoked and it cannot be said that there is any discrimination because in respect of some other unauthorised constructions in the building, action was initiated under section 351 of the MMC Act.

13] In ***Dipak Kumar Mukherjee vs. Kolkata Municipal Corporation & Ors.***², the Hon'ble Supreme Court has held 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 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. Therefore, there should be no judicial tolerance of illegal and unauthorised constructions by those who treat the law to be their subservient.

14] In ***Priyanka Estates International (P) Ltd. vs. State of Assam***³, the Hon'ble Supreme Court refused to order regularization of illegal construction by observing 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

2 (2013) 5 SCC 336

3 (2010) 2 SCC 27

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.”

15] In making the impugned order, the learned trial Judge has exercised discretion reasonably. There is no error of law or principle. The correct parameters in matters of grant or refusal of interim relief had been applied by the learned trial Judge. Therefore, taking into consideration the law laid down by the Hon'ble Supreme Court in the case of ***Wander Ltd. & Anr. vs. Antox India P. Ltd.***⁴, there is no case made out to interfere with the impugned order.

16] This appeal is therefore dismissed. Ad interim order, if any, is hereby vacated. There shall be no order as to costs.

17] In view of dismissal of appeal, civil application does not survive and is disposed of accordingly.

18] At the request of Mr. Holamagi, the ad interim order is extended by a period of four weeks from today. However, the appellant is also required to maintain *status quo* in respect of the suit premises.

(M. S. SONAK, J.)

Chandka

4 1990 (Supp) SCC 727