

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO. 87 OF 2017
AND
CIVIL APPLICATION NO. 123 OF 2017
(FOR STAY)

M/s. Zahra Developments .. Appellant
vs.
The Municipal Corporation of
Gr. Mumbai and ors. .. Respondents

Mr. K.P. Tiwari i/b K.P. Tiwari & Co. for the Appellant.
Mrs. M.M. More for the Respondent No.1– MCGM.
Mr. R.V. Govilkar i/b Govilkar & Associates for Respondent Nos.2 &3.

CORAM : M. S. SONAK, J.
DATE : 22 MARCH 2017.

P.C. :-

- 1] Heard learned counsel for the parties.
- 2] The challenge in this appeal is to the order dated 13 February 2017, by which, the learned Trial Judge has declined the ad-interim relief to the appellant/plaintiff.
- 3] Mr. Tiwari, learned counsel for the appellant, submits that there is no illegal construction carried out by the appellant. In any case, the appellant has applied for regularisation and the proposal for regularisation is pending. Relying upon the various decisions, which are referred to in paragraph 9 of the impugned order, Mr.Tiwari submits that as far as the proposal for regularisation is concerned, the MCGM ought to be restrained from proceeding with its action under Section 354-A of the Mumbai Municipal Corporation Act, 1888 (MMC Act)

4] Mr. Tiwari submits that the letter dated 25 January 2017, which is relied upon by the MCGM has been issued by an authority, who has no jurisdiction in the matter. Mr. Tiwari submits that the proper authority for regularisation is the Executive Engineer (Building Proposal), Bandra. He submits that the proposal is pending before the proper authority, i.e., Executive Authority (Building Proposal), Bandra.

5] Mr. Tiwari, in order to elaborate his submission that the construction is not unauthorised, cites as example of a driver on the road. He submits that when such driver is apprehended by the police officials and he produces a licence, which has already expired, it cannot be said that such person has acted illegally. Mr. Tiwari submits that this is only an irregularity, since there was no intention to breach the law. Mr. Tiwari submits that it is the intention that makes all the difference in such matters.

6] Upon consideration of the aforesaid submissions and perusal of the material on record, I see no reason to interfere with the impugned order.

7] In this case, a detailed speaking order has been made by the MCGM ordering the demolitions. This was preceded by a notice, informing the appellant, in details, about the illegal and unauthorised constructions undertaken by it. The illegal and unauthorised constructions in this case, are the additions and alterations in the form of partition walls with brick and mason and plywood on 4th, 6th and 7th and part terrace floor. In the notice, it was

alleged that all these additions and alterations, which are of a permanent nature, were beyond the approved or sanctioned plans. There was hardly any cause shown by the appellant. In particular, the appellant was unable to demonstrate that these additions and alterations were in accord with the sanction plans. Incidentally, this speaking order also records that the application for regularisation stands rejected.

8] There is no merit in the contention that the rejection of regularisation has been communicated by the authority having no jurisdiction in the matter. Ultimately, in this case, we are dealing with the MCGM and it is the MCGM, which has made it clear that the application for regularisation stands rejected. Further, the circumstance that the appellant applied for regularisation implies that even the appellant, was aware that the constructions undertaken by it were illegal and unauthorised. This is not a case where regularisation was applied for without prejudice or by way of abandon caution. For this purpose, the appellant was required to, at least *prima facie*, demonstrate that the constructions were in accord with the approved plans. Even this has not been done by the appellant. In fact, in the suit, the approved plans were never produced. If in the approved plans, there were provisions made for partition wall with brick and mason walls, then obviously, that is the first document, which the appellant would produce and demonstrate that there is nothing illegal about the said constructions. The fact that the approved plans have not been produced is sufficient to draw an adverse inference against the appellant. Besides, the appellant, who seeks discretionary reliefs, is required to come before the Court

with all documents. In this case, if, the appellant is serious in his contention that there was nothing illegal about the said constructions, then, it was incumbent upon the appellant to file an approved plan along with the plaint.

9] The decisions upon which the appellant places reliance are clearly inapplicable, because, in this case, the appellant's application for regularisation appears to have already been rejected. Even otherwise, no party can brazenly undertake an illegal construction and thereafter as a matter of right, insist that no action can be taken until the plea for regularisation is decided.

10] 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.

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 environment and, at the same time, the infrastructure consisting

1 (2004) 8 SCC 733

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] 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

2 (2013) 5 SCC 336

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.

13] 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 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.”

14] 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.

3 (2010) 2 SCC 27

4 1990 (Supp) SCC 727

15] There is no illegality or unreasonableness in the view taken by the learned Trial Judge. Accordingly, the appeal is dismissed. There shall, however, be no order as to costs.

16] Upon disposal of the main appeal, the civil application for stay does not survive and the same is also disposed of.

17] At this stage, Mr. Tiwari, learned counsel for the appellant, applies for a restraint upon the MCGM for a period of two weeks. Ms M.M. More, learned counsel for the MCGM, objects the same. However, the MCGM is restrained from implementing its order for a period of two weeks from today.

(M. S. SONAK, J.)