

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 5396 OF 2018

Sulochana Dattatraya Bavlekar	]	
Age 65 years, Occ. Agriculturist &	]	
Business, Sulochana Raj Bhavan,	]	
Mahabaleshwar, Taluka	]	
Mahabaleshwar, District Satara.	]	<u>... Petitioner.</u>

Versus

- | | | | |
|-----------|---|---|--------------------------------|
| 1. | The Chief Officer |] | |
| | Mahabaleshwar Giristhan Nagar |] | |
| | Parishad, Mahabaleshwar, |] | |
| | Taluka Mahabaleshwar, |] | |
| | District Satara. |] | |
| 2. | Retired Lt. Colonel Jayant Barla |] | |
| | Adult, Occ. Pensioner, |] | |
| | R/at. 4 Sai Niwas, Enclave Undri, |] | |
| | Pune - 411 028. |] | |
| 3. | Aniyas Francis |] | |
| | Age 68 years, Occ. Pensioner, |] | |
| | R/at. B/B/114, REL. Vihar, |] | |
| | Near Water Tank, Akurdi, |] | |
| | Pune - 411 033. |] | <u>... Respondents.</u> |

- Mr.A.V. Anturkar, Senior Advocate a/w. Mr.Sugandh B. Deshmukh for the Petitioner.
- Mr.Vijay Patil i/b. Mr.Siddharth R. Karpe & Mr.Arun Khot for Respondent No.1.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 4th MAY, 2018.

ORAL JUDGMENT :

1] Heard learned Senior Counsel for the Petitioner and learned Counsel for Respondent No.1.

2] By this Writ Petition, filed under Article 227 of the Constitution of India, the Petitioner is challenging the order dated 24th October 2017 passed by the District Judge-5, Satara, thereby dismissing Civil Misc. Appeal No.80 of 2017 which was preferred by the present Petitioner challenging the order below Exhibit-5 dated 13th April 2017 passed by the Civil Judge, Junior Division, Mahabaleshwar, in Regular Civil Suit No.81 of 2016.

3] The application at Exhibit-5 was filed by the present Petitioner for the relief of temporary injunction restraining the Respondent-Municipal Corporation from taking any action in pursuance of the notice dated 6th April 2016 issued under Section 52 and 53 of the Maharashtra Regional and Town Planning Act, 1966 (MRTP Act).

4] The contention of the Petitioner before the trial Court and this Court is that she is in possession of the suit land since 1994 on the basis of the development and lease agreement executed in the year 1994 by the Indian Church Trustees, Calcutta under the management

of the Bombay Diocesan Trust Association Private Limited. The said lease was for a period of 99 years and in consideration thereof amount of Rs.10,000/- per year was agreed to be paid by the Petitioner to the trust. Subsequently, an agreement dated 9th March 2010 was also executed by the trustees in her favour in which the execution of the earlier agreement is also admitted. She has spent the amount of Rs.30,00,000/- for maintenance and development of the said property as wax museum after giving an application/notice to the Respondent-Municipal Corporation on 5th February 2016 seeking permission for putting up temporary structure in the nature of tin-shed. Thereafter, waiting 60 days therefrom for the reply to the said notice from Municipal Council, which she did not received, under the provision of 'deemed permission', she has erected the temporary tin-shed admeasuring 140 feet x 30 feet on the said plot of land. By the impugned notice dated 6th April 2016, issued at the instance of Respondent Nos.2 and 3, who have no concern with the suit property but claimed to be trustees of the Bombay Diocesan Trust Association, Respondent No.1 – Municipal Council is calling upon her to remove the said structure on the count that it is illegal, unauthorized and put up without permission. Therefore, according to her, the said notice is illegal, null and void and therefore, Respondent No.1 be restrained from taking any action in pursuance of the said notice.

5] Respondent No.1 has resisted this application for interim injunction on various grounds, including that, the Civil Court has no jurisdiction to grant such relief in view of the provisions of Section 149 of the MRTP Act. Secondly, it is submitted that, the Petitioner is not the owner of the suit property, her lease-deed is seriously in question and disputed; the Petitioner is also not entitled to get the benefit of 'deemed permission', as she has neither the locus to file such application for permission to erect the structure nor her application was accompanied with the requisite documents except for the form and the map; hence, her application was required to be dismissed. It was also contended that the suit property is listed as Heritage Property, requiring permission for any construction thereon from Heritage Committee. No such permission is obtained. Mahabaleshwar is Eco-sensitive zone and local authority is bound to observe the rules strictly. Hence, on this count also, the application for interim injunction has to be dismissed.

6] Respondent Nos.2 and 3 had also resisted this application contending *inter-alia* that the suit property is exclusively owned and possessed by the trust and the Petitioner is merely a trespasser. The trust has not granted any right or permission to carryout any sort of construction over the suit property. It is submitted that the Charity

Commissioner has rejected the permission under Section 36 of the Bombay Public Trust Act, 1950, for the development agreement of the suit property, which was executed in favour of the Petitioner. Hence, the development agreement executed in favour of the Petitioner automatically stood cancelled and was not acted upon. The Petitioner has, however, acquired forceful and illegal possession over the suit property. It is denied that any lease agreement dated 9th March 2010 is executed or signed by the trustees and the agreement produced on record is a sham and bogus document. Thus, according to Respondent Nos.2 and 3 also, the application for temporary injunction has to be dismissed.

7] Both the trial Court and the Appellate Court have, after considering at length the submissions advanced by learned counsel for both the parties and after perusal of the material on record, held that the Petitioner has not proved her locus. She is not the owner of the suit plot; her lease-deed is also seriously in dispute; and she is also not entitled for benefit of the deemed permission. Appellate Court further held that the suit itself is not maintainable, as the Petitioner has not challenged the jurisdiction of the Municipal Council to issue such notice but merely asked for declaration that it is illegal, which is not sufficient to confer jurisdiction on the Civil Court.

8] Against this finding of the fact arrived at by the trial Court and confirmed by the Appellate Court, this Writ Petition is preferred.

9] At the outset it has to be stated that when there is concurrent finding of fact arrived at by the trial Court and confirmed by the Appellate Court, then in the Writ jurisdiction, the scope is very limited. Unless some perversity is pointed out in the impugned order, this Court cannot interfere in the discretionary order passed by the trial Court and confirmed by the Appellate Court. The law is very well settled in the case of *Wander Limited & Anr. Vs. Antox India P. Ltd., 1990 (supp.) SCC 727*, that this Court should restrain itself from interfering in the discretion exercised by the Trial Court, merely because this Court may arrive at a different view. For ready reference, paragraph No.14 of the said judgment can be reproduced as follows:-

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of discretion of the Court of first instance and substitute its own discretion, except where the discretion has been shown to have been exercised arbitrarily, capriciously or perversely, or, where the Court had ignored the settled principles of law regulating grant or refusal of inter-locutory

injunction. An appeal against the exercise of discretion is said to be an appeal on principle and therefore, the Appellate Court will not re-assess the material and seek to reach a conclusion different from the one reached by the Court below; if the one reached by the Court below is the one reached by that Court was reasonably possible on the material before it. The Appellate Court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage, it would have come to the contrary conclusion. If the discretion has been exercised by the trial Court reasonably and in a judicial manner, the fact that the Appellate Court would have taken a different view, may not justify interference with the trial Court's exercise of discretion.”

10] The only illegality or the perversity which is tried to be pointed out by learned Senior Counsel for the Petitioner is that, as per the Building Bye Laws and Development Control Rules (D.C.R.) framed under the Maharashtra Town Planning Act, “any one” can make an application to carryout development work or even the repair work. Reliance is placed on D.C.R. 4.1, wherein the word is used, “every person”, who intends to carryout development work or erect or re-

erect or make material alteration or demolish any building shall give notice, as required in writing to the Authority, of such intention in the Form given in Appendix A and the notice shall be accompanied by plans and statement in triplicate drawn or prepared in accordance with Bye-Law No.5. It is submitted that, this provision does not restrict its scope only to the 'owner' of the property.

11] Reliance is placed on Bye-Law No.5 of the D.C.R. which reads as follows:-

5. Information Accompanying Notice :

5.1 Every person giving notice referred in Bye-Law 4, shall submit there with following:-

a) Ownership Title : Two copies of the following shall be considered adequate for verifying the proof of ownership.

(i) A copy of the latest 7/12 extracts from Revenue Department or the Property Register Card : OR

(ii) A copy of the original sale / lease deed of the site on which the construction or reconstruction is proposed; and

(iii) Other documents acceptable to the Authority. In case of lease hold plots, the lessee will be responsible to prove that he is entitled to construct on the lease hold plot.

b) Receipt for Fees :- A challan or receipt for having paid the specified building permit fees to the Authority.

Site Plan :- A site plan in triplicate drawn to scale of not less than 1:500 shall show :-

(i) the direction of north point relative to the plan of the building;

(ii) The municipal number of the plot or premises, if any, and the name and number of the block and street or road in which the site is situated, and if the site is in any approved layout, the serial number of the site, and the reference number of such approval;

(iii) the boundaries giving the dimensions of the site and of any contiguous land belonging to the owner thereof;

(iv) the position of the site in relation to neighbouring street(s);

(v) all existing building standing on, over or under the site;

(vi) the position of the building and of all other buildings (if any) which the applicant intends to erect upon his contiguous land referred to in (iii) in relation to:

1) the boundaries of the site and in case where the site has been partitioned, the boundaries of the portion owned by the applicant and also of the portion owned by others; and

2) if there is no street within a distance 12 m. of the site, the nearest existing street;

(vii) the means of access from the street to the building, and to all other building (if any) which the applicant intends to erect upon his contiguous land referred to in (iii).

(viii) space to be left about the building to secure a free circulation of air, admission of light and access for scavenging purposes,

(ix) the width of the street (if any) in front and of the street (if any) at the side or rear of the buildings;

(x) any existing physical features, such as wells, drains, trees etc.

(xi) the ground area of the whole property and the built up area;

(xii) the position of overhead electric supply line and water supply lines if any, and

(xiii) such other particulars as may be prescribed by the Authority.

d)
e)
f)
g) "

12] It is submitted that, even this Bye-Law No.5 also permits the 'lessee' to carryout the development work or the necessary construction. Therefore, the locus of the Plaintiff, assuming that, she is a lessee and not the owner, should not have been considered by the trial Court or the Appellate Court.

13] However, in my considered opinion, both the trial Court and the Appellate Court have, after considering the lease agreement on record, found that the development/lease agreement required the permission of the Charity Commissioner. The very contents of the agreement reflect that it being a trust property, the permission of the Charity Commissioner was mandatory and hence, the agreement was subject to condition of obtaining such permission. It is not disputed that such permission was flatly refused by the Charity Commissioner. Hence, the status of the Petitioner even as a lessee is seriously in

question. It is pertinent to note that the Petitioner has not disclosed this material fact. Conversely, she has signed on the application for permission as owner of the suit property, thereby clearly misleading the authorities. Under these circumstances when after considering this agreement and the status of the Petitioner, the trial Court and the Appellate Court have arrived at certain *prima-facie* finding of the fact on this aspect, it will not be proper to disturb the said finding, especially when it is based on the evidence on record.

14] Moreover, in order to get the benefit of deemed permission, apart from the ownership or the status of the lessee, the Petitioner was required to comply with some mandatory conditions. She has to apply for the permission in the prescribed format. Bye-Law No.4.1 clearly provides that such application is required to be given in the Form given in Appendix A and it shall be accompanied by the plans and statement in triplicate drawn or prepared in accordance with the Bye-Law No.5. The said Bye-Law, as reproduced above, also provides that such notice has to be accompanied by the documents mentioned therein, like, 7/12 extracts or the property register card, the copy of the sale/lease-deed and other documents, which may be acceptable to the authority. Such application or notice is also required to be accompanied with the challan showing the payment of requisite fees

and also the site plan in triplicate. Unless all these documents are accompanied with the notice given, as per Bye-Law No.4.1 of D.C.R., the law is well settled that, the Petitioner cannot be entitled to avail the benefit of deemed permission. The application given by the Petitioner to the Respondent No.1 seeking permission is not at all accompanied with all these documents. No challan is produced to show that fees are paid along with application. In such situation, there is no question of Respondent-Municipal Corporation giving any reply to the said notice or the Petitioner claiming benefit of deemed permission on the basis of the said notice. Moreover, as observed by the trial Court, this application seeking permission was given on 5th February 2016, whereas impugned notice is issued by the Municipal Council on 6th April 2016. It does not appear that the Petitioner could have erected this structure within two days. It clearly indicates that the Petitioner has not even waited for sixty mandatory days, so that she can claim the benefit of deemed permission.

15] In such situation, the Respondent-Corporation is justified in taking action against the construction, which is apparently illegal and unauthorized. Hence, the submission that, at this interim stage, the construction needs to be protected, otherwise the Petitioner will suffer irreparable loss also, cannot be accepted. If the Petitioner has

indulged into carrying out the construction without obtaining due permission and without waiting for the period of 60 days to avail benefit of deemed permission, the Petitioner has done so at her own risks. She has to bear the consequences of such illegal act.

16] Even as regards the balance of convenience and irreparable loss, it is the general public at large, which is bound to suffer the same. The construction of the Petitioner is on heritage property, undertaken without permission of High Power Committee Mahabaleshwar, is in Eco-sensitive zone, a hill station and a tourist attraction. Such illegal and unauthorised construction, if allowed to exist, it is bound to be an eye-sore and affecting the natural beauty and heritage of the city. Respondent No.1-the Municipal Council, being the planning authority, is duty bound to protect its beauty and environment by ensuring that no illegal and unauthorised structures are allowed to exist. Therefore, no fault can be found in the trial Court rejecting the interim injunction sought against the Respondent from taking any action in pursuance of the notice dated 6th April 2016.

17] The next submission of learned Senior Counsel for the Petitioner is that the Appellate Court has committed an error in holding that the jurisdiction of the Civil Court to entertain such suit under Section 149 of MRTP Act is ousted. It is urged that, when the

Appellate Court itself has held in paragraph No.57 that, legality or validity of such notice can be questioned in Civil Court and not otherwise, then it follows that in the present case, as the Petitioner is questioning legality and validity of the notice issued under Section 52 and 54 of the MRTP Act, the Civil Court has jurisdiction.

18] However, in this respect, the perusal of the averments made in the suit in paragraph No. 12 go to show that, the only averment made by the Petitioner is that this notice is illegal and not binding on her. However, the Petitioner is not at all raising the contention that the Respondent-Municipal Corporation has no authority or jurisdiction to issue the impugned notice and therefore, it is a nullity. This Court has, already in the case of *Vandana Creations Private Limited V/s. Municipal Corporation of Greater Mumbai, 2016 DGLS (Bom.) 1777*, relying upon the judgment of this Court in the case of *Prathamesh Tower Co-operative Housing Society Ltd. V/s. Ganesh Co-operative Housing Society Ltd. & Ors., 2013(3) AIR Bom. R 796*, and *Laxman Barkya Wadkar V/s. Mumbai Municipal Corporation of India, First Appeal No.1635 of 2010*, held that, where the notice is issued under MRTP Act, jurisdiction of the Civil Court is expressly and clearly excluded in view of Section 149 of the Act. Only eventuality in which such notice can be challenged in the Civil Court is by *prima-*

facie showing that the said notice is a nullity or issued without jurisdiction. The Petitioner has not done so. She not challenged it on the count that the Municipal Council has no jurisdiction to issue it. On this count also, the impugned order passed by the trial Court and confirmed by the Appellate Court can not be disturbed. The Writ Petition therefore being without merit, stands dismissed.

19] At this stage, learned Senior Counsel for the Petitioner requests for order of status-quo for a period of four weeks in order to enable the Petitioner, either to remove the tin-shed on her own or to approach the Hon'ble Supreme Court.

20] Learned counsel for the Respondent strongly resists the said request.

21] In my considered opinion also, when the trial Court and the Appellate Court both, have rejected the application for temporary injunction on merit and this Court has also confirmed the said finding, then, no reason is made out to extend the order of status-quo. Hence, the said prayer is also rejected.

[DR.SHALINI PHANSALKAR-JOSHI, J.]