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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1084 OF 2015

Anant Kisan Keni & Anr. ...Petitioners
vs.
Thane Municipal Corporation
and another ...Respondents

Mr.Sanjay Thokade for the Petitioners
Mr.Mandar Limaye for the respondent No.1
Mr.S.M.Oak i/b Mr.Sagar A. Joshi for respondent
Nos.3 and 4.
Mr.Kishor Patil i/b Mr.Rajiv Matkar for respondent
No.6.

CORAM : A.S.OKA, &
RIYAZ.I.CHAGLA, JJ.
DATE : JUNE 11, 2018

P.C.:

1 Heard the learned counsel appearing for the petitioners who has tendered an application for amendment which is taken on record. The Registry to register the said application.

2 Prayer (a) which is the only substantive prayer made in this petition reads thus:

“(a) that this Hon'ble Court be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, order or direction, thereby calling upon the papers and proceedings from the

files of the Respondent No.1 with regard to the construction of the building on petitioned Land bearing Survey No.421 (A/1) Hissa No.6 admeasuring 6 Aar about 630 sq meters at village Kalwa, Taluka and District Thane and after perusing the legality and propriety of the act of the respondent no.1 with regard to the construction of building on the petitioned land, issue appropriate direction to the respondent No.1 to take action for demolishing the said illegal and unauthorised building constructed on the petitioned land bearing survey No.421 (A/1) Hissa No.6 admeasuring 6 Aar about 630 sq mtrs at village Kalwa, Taluka and District Thane."

(underline supplied)

3 In this petition, the grievance made by the petitioner is that the respondent No.2 carried out construction of a building consisting of ground plus four floors without obtaining permission from the Thane Municipal Corporation. It is alleged in the petition that the petitioners filed a representation with the Thane Municipal Corporation praying for the action of demolition of illegal construction on their land. The petitioners are relying upon the representations including the legal notice dated 7th September 2013 issued by the petitioners through their Advocate to the Commissioner of the first respondent. In the said notice, the petitioners contended that entire building constructed by the

second respondent is illegal and therefore, action of demolition should be taken. Even notice calls upon the Thane Municipal Corporation to set the criminal law in motion.

4 Thus, the entire petition proceeds on the footing that the construction of the second respondent is illegal and that the first respondent ought to have demolished the said building.

5 On 9th April 2018 it was noted that the first petitioner was allotted a premises in the subject building and that he had transferred the same to a third party by accepting the consideration of Rs.6,70,000/-. Paragraphs 1 to 4 of the order dated 9th April 2018 read thus:

"1 The learned counsel appearing for the petitioners, on instructions states that first petitioner has accepted the consideration of Rs.6,70,000/- under the agreement dated 26th September 2006. He states that the first petitioner will deposit a sum of Rs.6,70,000/- together with the simple interest thereon at 9 percent per annum from 26th September 2006 in this Court within a period of one month from today. We accept the said statement.

2 We, however, make it clear that the acceptance of this statement shall not be

construed to mean that this Court is inclined to entertain the petition on merits. The question whether the petition can be entertained on merits will be decided only after the deposit of the amount is made. By accepting the aforesaid statement, we keep the petition on 11th June 2018 for admission in the category of fresh matters.

3 In the meanwhile, we direct that the appropriate officer of the first respondent to examine the case and to file the Affidavit setting out whether there is any illegality associated with the building in question as alleged. Such affidavit shall be filed in any event on or before 5th June 2018.

4 We make it clear that no further time shall be granted. As and when amount as assured is deposited by the petitioners, the Registrar Judicial-I shall invest the said amount in fixed deposit in any nationalised bank."

6 Accordingly, the petitioner deposited a sum of Rs.13,61,475/- in this Court. Today, an affidavit is tendered by the Municipal Corporation of Shri Vijay Jadhav in which it is stated that a notice dated 6th June 2018 has been served to all the occupants of the building by invoking section 260 of the Maharashtra Municipal Corporation Act, 1949

and they have been called upon to show cause within 15 days. Copies of the notices have been annexed to the affidavit.

7 An application for amendment tendered by the learned counsel for the petitioners seeks permission to add a prayer directing the first respondent-Thane Municipal Corporation to consider regularization of the illegal construction of the said building. In fact, by incorporating the prayer, the petitioners are praying not only to issue a writ of mandamus directing the first respondent to consider the application for regularization but the petitioners are trying to seek directions against the second to fifth respondents to apply for regularization.

8 Thus, the stand taken in the Civil Application which is affirmed by the first petitioner is completely contrary to the stand taken in the writ petition and the prayer made in this writ petition. The petitioners have completely taken a u-turn. The very fact that the Civil Application is filed now seeking to incorporate a prayer for regularization of the illegal construction shows that filing of the present petition is nothing but an abuse of process of law.

9 Writ jurisdiction under Article 226 of the Constitution of India is always discretionary and equitable. Considering the conduct of the petitioners this is a fit case where not only that

the writ petition should be dismissed but the petitioners should be penalised by directing them to pay compensatory costs to the first respondent-Municipal Corporation.

10 Considering the nature of controversy, we quantify cost at Rs.50,000/-. As we are dismissing the writ petition, we propose to permit the petitioners to withdraw the amount which they have deposited as per the directions recorded in the order dated 9th April 2018.

11 The petitioners will be permitted to withdraw the balance amount after retaining a sum of Rs.50,000/- with the Court which will be payable to the first respondent.

12 Accordingly, we pass the following order:

(I) Writ petition is dismissed. Civil application tendered across the bar is also dismissed;

(II) It will be open for the petitioners to withdraw a sum of Rs.13,68,475/- deposited with this Court on 2nd May 2018. However, while permitting the petitioners to withdraw the said amount, the Registry will deduct a sum of Rs.50,000/- towards costs of this petition. If the amount deposited by the petitioners is invested in the Fixed Deposit, premature encashment of the fixed deposit shall be made

and interest, if any, accrued thereon shall be paid over to the petitioners;

(III) A sum of Rs.50,000/- which will be retained by the Registry shall be paid to the first respondent-Municipal Corporation by way of costs;

(IV) We make it clear that we have made no adjudication on the legality and validity of notice dated 6th June 2018 and all contentions are kept open;

(V) We also make it clear that notwithstanding disposal of this petition, the Thane Municipal Corporation shall take the aforesaid notices already issued by it to its logical conclusion in accordance with law laid down by this Court in the case *Sopan Maruti Thopate and another vs. Pune Municipal Corporation and another*¹.

(RIYAZ.I.CHAGLA,J.)

(A.S.OKA,J.)

1 1996 (1) Mh.L.J. 963