

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

WRIT PETITION NO. 10697 of 2017
WITH
CIVIL APPLICATION NO. 631 OF 2018
IN
WRIT PETITION NO. 10697 of 2017

Dr. Surekha Kashinath Bhalerao ... Petitioner

V/s.

Kalyan Dombivali Municipal Corporation
& ors. ... Respondents

Mr. S.M.Gorwadkar, Sr. advocate a/w. Mr.N.A.Mogre for the
petitioner.

Ms. Nisha Mehra, AGP for respondent no.2.

Mr. Sandeep D. Shinde for respondent no.1.

Mr.D.S.Joshi for respondent no.3.

Mr. Devidas H. Jadhav, Jr. Engineer, Town Planning Dept. KDMC
present in Court.

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Panjwani

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**CORAM : NARESH H. PATIL, ACTING C.J.
& G.S. KULKARNI, J.**

23rd August, 2018.

P.C.

The petitioner claims to be owner of Plot No.19 situated at

Village Asde Golavali, Tal: Kalyan vide registered sale deed executed on 23rd February, 1968 between petitioner's father late Kashinath Raoji Bhalerao and Shinivar Ambo Patil and others. The revenue record shows new Survey No. of Plot as 61-8 G which is annexed at pages 22 to 24.

2. The Counsel appearing for petitioner submits that in the year 2016 the petitioner noticed that some construction activity has commenced on the said plot. The petitioner thereafter made complaint to Municipal Commissioner, KDMC, Kalyan, Dist. Thane on 17th December, 2016. Copy of the said complaint was forwarded to the Commissioner of Police and the concerned Senior Inspector of Manpada police station alongwith others. It is annexed at page-29 of the paper-book as **Exhibit B**. The petitioner found that no action was taken inspite of the complaint made. At the relevant time it is submitted that petitioner even met Ward Officer and registered a grievance regarding the alleged illegal construction carried out on the said plot. The petitioner was helpless to resist and stop the construction activity. An attempt was made thereafter by making a

representation addressed to the Commissioner, KDMC, Kalyan on 30th May, 2017 after noticing that the construction has progressed and there was no other alternative than to request for demolition of illegal construction. Copy of the said communication is placed on record annexed at page-55 as **Exhibit N**.

3. Another complaint was specifically addressed to the Senior Police Inspector Manpada Police Station, Dombivali East on 2nd June, 2017 and copy was also forwarded to Joint Commissioner of Police, Thane. In spite of making best possible efforts, none of the authorities took cognizance of the complaint of the petitioner and therefore, the petitioner decided to approach this Court. This petition is being heard since October 2017. The Kararnama is dated 19th October, 2016.

4. The Corporation has preferred not to file any reply thereto. The Builder-Developer has filed reply of Kanhaiyalal Rajit Prajapati, Partner and authorized signatory of respondent no.3 M/s. Prajapati Constructions. The Counsel appearing for respondent no.3 submits

that consequent to registered agreement (page 79) which is referred as a development agreement executed between Kapil Kanhaiyalal Prajapati and Nagesh Rajaram Samant, commenced construction over the plot which is now claimed by the petitioner as owner of the said plot. The Counsel submits that construction of the 7 floors building with multiple flats and two shops on the ground floor commenced without getting the commencement certificate. It is submitted that 3rd party interest has been created by the parties and there are in all 50 flats. 25 occupants are staying in the building and remaining 25 flats are lying vacant according to Counsel and one shop on the ground floor is lying vacant.

5. The Counsel further submits that in fact there seems to be a dispute in respect of the identification of the plot which is claimed by the petitioner and plot which is developed by the builder and this needs to be resolved. The plot on which petitioner constructed the building is referred in the revenue record as Survey No.68-5 A in village Golavali, Tal. Kalyan. Size of the plot on which building is

constructed is 1200 sq. meters. This Court on 15th March, 2018 passed the following order:-

“ Not on board. Taken up on board.

2. Heard the learned counsel for the petitioner and the learned counsel appearing for the third respondent. The third respondent has tendered a reply to the civil application in which it claims that there are 49 flats/premises in the building constructed by the third respondent which is admittedly constructed without obtaining development permission from the competent authority. In reply, it is claimed that on 23rd February, 2018, an application for regularization has been made. In paragraph-5 of the said reply, it is contended that 24 flat purchasers have been placed in possession. The learned counsel appearing for the petitioner disputes that the possession of 24 flats have been handed over.

3. Place the petition on 27th April 2018 under the caption of fresh admission alongwith civil application.

4. We hereby restrain the third respondent from creating any third party interests in respect any of the

premises or tenements in the building till further orders.

We also restrain the third respondent from parting with possession of any of the premises or tenements in the said building to any third party.

5. If the possession of 24 flats, which are claimed to be sold, or of any other flat is not handed over till today, the same shall not be handed over till further orders. We direct the third respondent to file an affidavit disclosing particulars of all 24 flat purchasers including details such as the consideration, date of the agreement/sale deed, date of delivery of possession etc. Such affidavit shall be filed within a period of two weeks from today.”

6. It is the grievance of the Counsel that inspite of the aforesaid order passed, respondent no.3 created 3rd party interest to create further complications in the matter.

7. The Counsel appearing for respondent no.3 submitted that they had filed an application for regularisation of construction. They have

received a communication from the Town Planner dated 1st March, 2018, a copy of the same is placed before us.

8. The original file has been produced by the Counsel appearing for the Corporation in which we find the similar order with added paragraph-13. The endorsement to the effect that application for seeking regularisation has been rejected, is not appearing in the communication which the Counsel appearing for respondent no.3 submits was forwarded by the office of the Town Planner and has been received. The Counsel appearing for petitioner submits that it is very likely that this document is forged one and has been manufactured to create further complications. The Counsel appearing for Corporation instructed by the officers submits that the document appearing on the Corporation's file is the original document signed by the Town Planner who is at present on leave due to personal health problems.

9. The prima-facie consideration of the matter based on the available record shows that respondent no.3 surprisingly could gather

courage to carry out such a huge construction of 7 storey building without getting any permission from the Corporation. More surprisingly, inspite of having a network of Inspectors, officers and Ward Officer, the Corporation authorities failed to notice that illegal construction of such a magnitude was coming up and was completed. More so even third party rights were allegedly created by way of execution of lease deed, sale deed, agreements etc.

10. It is not known as to in what manner the Municipal Commissioner and the concerned officers dealt with the complaints filed by the petitioner. It is even not known as to what cognizance police authorities took on receipt of complaint from the petitioner. After exhausting all possible remedies, the petitioner, a lady doctor by profession attached to Thane ESI hospital has rushed to this Court for redressal of her grievance. In this state of affairs the issue is required to be addressed and looked into by this Court.

11. During the course of hearing the learned Counsel appearing for

petitioner has referred to the views expressed by the Apex Court in the case of ***M.I. Builders Pvt. Ltd. V/s. Radhey Shyam Sahu & ors.***¹ and ***Friends Colony Development Committee v/s. State of Orissa & ors.***² dealing with illegal construction. Paragraphs 73 and 81 of the judgment of M.I. Builders read as under:

73. The High Court has directed dismantling of the whole project and for restoration of the park to its original condition. This Court in numerous decisions has held that no consideration should be shown to the builder or any other person where construction is unauthorised. This dicta is now almost bordering the rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in moulding the relief. Such a discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorised construction, if it is illegal and cannot be compounded, has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters.

1 (1999) 6 Supreme Court Cases 464

2 (2004) 8 Supreme Court Cases 733

Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing the robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is required to be exercised has to be in accordance with law and set legal principles. As will be seen in moulding the relief in the present case and allowing one of the blocks meant for parking to stand we have been guided by the obligatory duties of the Mahapalika to construct and maintain parking lots.

81.A number of cases come to this Court pointing to unauthorised constructions taking place at many places in the country by builders in connivance with the corporation/municipal officials. In a series of cases, this Court has directed demolition of unauthorised constructions. This does not appear to have any salutary effect in cases of unauthorised construction coming to this Court. While directing demolition of unathorised construction, the court should also direct an eqnruiy as to how the unauthorised construction came about and to bring the offenders to book.

It is not enough to direct demolition of unauthorised construction, where there is clear defiance of law. In the present case, but for the observation of the High Court, we would certainly have directed an enquiry to be made as to how the project was conceived and how the agreement dated 4-11-1993 came to be executed.”

Paragraph 20 of the judgment in the case of Friends Colony Development Committee (cited supra) needs to be reproduced as under:-

“20. The pleadings, documents and other material brought on record disclose a very sorry and sordid state of affairs prevailing in the matter of illegal and unauthorized constructions in the city of Cuttack. Builders violate with impunity the sanctioned building plans and indulge 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 of water supply, sewerage and traffic movement facilities suffer unbearable burden and are 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 design 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 unauthorized 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. At the same time, in order to secure vigilant performance of duties, responsibility should be fixed on the officials whose duty it was to prevent unauthorized constructions, but who failed in doing so either by negligence or by connivance.

12. The issue as to whether the respondent no.3 constructed a structure on the plot owned and possessed by the petitioner or on the plot which according to petitioner was under an agreement, possession of which was handed over to the respondent no.3 need not be gone into these proceedings. The question raised before this Court is as to whether the Corporation authorities and Police authorities would allow illegally constructed building to remain unaffected and none of the authorities would take any action against the construction carried out without permission flouting all the statutory provisions of law. The filing an application for regularisation of an illegally constructed building of such a magnitude is no answer to the fact that respondent no.3 could

with impunity without seeking commencement certificate go ahead to construct a huge building of seven storey. In these premises taking into consideration the above stated views of the Apex Court and the facts brought before this Court, we are required to deal with the issue.

13. The learned AGP on instructions submits that after 27th March, 2017, police did not receive any communication making a request to the police authorities for taking action against the said structure. The Counsel appearing for Corporation now submits that appropriate notice is to be issued to the occupants of the building and a separate communication is also sent to the police for seeking their help. The learned AGP submits that in case any such communication is received, the police authorities would extend all the necessary co-operation to the Corporation authorities in aid and assistance of maintaining rule of law and for carrying out the operation exercised to be undergone by the corporation authorities. The learned Counsel appearing for Corporation had made it clear that the Corporation has rejected the application for regularisation and they would now proceed

to take necessary steps to demolish the structure. The learned Counsel appearing for Corporation submits that the communication of rejection of application for regularisation has been served on Architect Durvesh Thasche.

14. For the reasons stated above, following order is passed:-

- a)** The Writ Petition stands allowed.
- b)** The Corporation shall issue notice of 15 days to the occupants of the building to vacate the premises.
- c)** If the occupants do not vacate, the Municipal Corporation shall take police help to remove the occupants.
- d)** On the building being vacated, the Corporation shall undertake demolition of the building.
- e)** After the demolition, cost of demolition and incidental expenses shall be recovered from respondent no.3, which if not paid shall be recovered as arrears of land revenue.
- f)** No Civil Court shall entertain any suit or proceedings filed by any person in connection with the subject matter of this order.

15. The Civil Application No.631/2018 does not survive and stands disposed of accordingly.
16. The Notice issued by Corporation to respondent no.3 dated 1st March, 2016 be kept in a sealed cover with Registrar Judicial.
17. The parties shall not create any third party interest of whatsoever nature in respect of remaining flats.
18. Stand over for **four weeks** for '**compliance**'.

G.S.KULKARNI, J

ACTING CHIEF JUSTICE

L.S. Panjwani, P.S.