

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.1556 OF 2023**

AMOL AJITKUMAR PATNI
VERSUS
MUNICIPAL CORPORATION THROUGH COMMISSIONER
AND OTHERS

...

Mr. Rahul Joshi, Advocate for the Petitioner.
Mr. S. S. Dande, AGP for Respondents-State.
Mr. A. R. Vaidya, Advocate for Respondent No.1.

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**CORAM : SHARMILA U. DESHMUKH, J.
DATED : 27th FEBRUARY, 2023.**

PER COURT:-

1. By this petition the challenge is to the order dated 25.01.2023 passed by the District Judge in RCA No.111/2021 below Exhibit-26 rejecting the application for continuation of the status quo till the disposal of the temporary injunction application.

2. The petitioner is the plaintiff, who has instituted RCS No.96/2015 seeking the relief of perpetual injunction. It is the case of the petitioner that in the year 2015, the petitioner had leased plot nos.22 and 23 situated at Jadhavwadi, Aurangabad for a period of 99 years from one Kailas Ramchandra Aher and non-agricultural permission was obtained on 17.03.2005. It is the case of the petitioner that after taking property on lease and being put in possession, the petitioner had constructed a shop under the name and style of "Shagun Steel" and for that purpose had obtained the necessary electricity connection and telephone connection. On 27.09.2015 the respondent-Corporation issued a

public notice disclosing that 60 meters wide road is planned by the Aurangabad Municipal Corporation and unauthorized constructions on the portion of the road should be removed within 24 hours, failing which the Corporation will initiate action against the unauthorized constructions. On 28.09.2015 the authorities of the respondent-Corporation visited the petitioner's shop claiming it to be unauthorized construction. An objection was raised by the petitioner before the Corporation. As the petitioner apprehended action at the instance of the Corporation, the suit came to be filed.

3. In the written statement it was the case of the defendant-Corporation that the construction of the petitioner is on a DP road of 60 meters i.e. on the service road and there is a Government Resolution dated 10.06.2004 as also the resolution of the standing committee of the Corporation for removal of the encroachment, which comes under the DP road of 60 meters. On 12.02.2016 the Trial Court in the order below Exhibit-5 allowed the application and restrained the defendant-Corporation from obstructing with the possession of the plaintiff over the suit property. The Trial Court in the order dated 12.02.2016 observed that the defendant has raised an objection as regards the construction being made on the service road, however unless and until documentary evidence of existence of 60 meters road and encroachment on it is produced, the respondent will have to follow the necessary provisions of law in respect of unauthorized construction on private property. Subsequently, RCS No.96/2015 was dismissed by the Trial Court vide judgment and order dated 13.10.2021 as against which an appeal came to be filed being RCA No.111/2021. In the proceedings before the Appellate Court as the petitioner had a benefit of a temporary injunction during the

pendency of the proceeding before the Trial Court, an application for *ex-parte* injunction was made, which came to be allowed by order dated 26.10.2021 and an ad-interim *ex-parte* injunction restraining the defendant from demolishing the suit property was passed on 30.10.2021. Subsequently, an application was made for extension of the status quo. By order dated 04.01.2023 considering the statement of the Building Inspector of the Corporation the status quo was continued till the next date i.e. on 17.01.2023. On 17.01.2023, the Appellate Court recorded that in view of the oral submissions of the Counsel there is no objection for extending the status quo till the date of judgment and hence, the order based on the oral submission is extended till the date of Appeal. It appears that, subsequently there were certain applications which were moved by the Corporation which prompted the petitioner to seek an application for continuation of order of status quo till the decision on merits on Appeal. This application below Exhibit-26 seeking continuation of order of status quo, which came to be rejected is challenged before this Court.

4. On 08.02.2023 the petition was circulated urgently at 02.30 pm stating that the Municipal Corporation was going to demolish the construction i.e. shop of the petitioner. During the hearing at 02.30 pm, learned counsel for the respondent-Municipal Corporation submitted that the shop has been demolished. Photographs were produced on record. This position was disputed by the learned counsel for the petitioner, who submitted that only the shed had been demolished and the part of shop was intact. This Court considering that the demolition

process is already going on and it is not possible to stop the demolition, listed the petition for further consideration.

5. Today during the hearing, the learned counsel for the petitioner has reiterated its submission that the entire premise has not been demolished and part of the premise is still intact. Learned counsel for the Corporation in the absence of any instructions is unable to make any statement. However, it needs to be noticed that in spite of the order of this Court dated 08.02.2023 recording the rival submissions as regards demolition, no affidavit of the responsible officer of the Corporation has been placed on record.

6. Heard the learned counsel appearing for the parties.

7. Learned counsel appearing for the petitioner submits that it is evident from the material on record that the order of the status quo was continued by the Trial Court and was continued even by the Appellate Court. As such, during the pendency of the RCA No.111/2021 there was need for continuation of the order of status quo, failing which the entire proceedings will be rendered infructuous. He has invited the attention of this Court to the orders, which were passed from time to time extending the status quo.

8. Per contra, learned counsel appearing for the respondent-Corporation opposes the prayer. He would submit that the construction of the shop is unauthorized construction and no protection can be granted. He has relied upon the decision of the Apex Court in a case of **Esha Ekta Apartments Co-operative Housing Society Limited and others Vs.**

Municipal Corporation of Mumbai and others; Civil Appeal No.7934 of 2012; dated 27.02.2013.

9. Considered the submissions of the learned counsel appearing for the parties.

10. The position which is borne up from the record is that during the pendency of the RCS No.96/2015, there was an order of temporary injunction in favour of the petitioner. A perusal of the decree dated 13.10.2021 shows that respondent-Corporation had not adduced any evidence as also the petitioner had remained absent and as such, based on material on record the Trial Court had dismissed the suit. In the Appeal which was filed against the dismissal of the suit, an application was filed for order of status quo and understandably so in as much as the entire issue would have been rendered infructuous in event the demolition is carried out by the Municipal Corporation by terming it as an unauthorized construction. The order of 04.01.2023 records no objection of the Building Inspector of the Municipal Corporation to the order of extension of status quo till the next date. The order of the Appellate Court on 17.01.2023 appears to record that there is no objection of the learned counsel for the respondent, whereas the say which is at page no.120 of the petition shows that the respondent-Corporation had filed its say and had objected in as much as it is stated that even the order of status quo is not in force and it has been discontinued and as such, the matter be kindly decided on its merits. Considering the say of the respondent the findings of the Appellate Court that there is no objection for extending status quo appears to be contradictory to the material on record. Be that as it may. In application filed for

continuation of order of status quo till the date of decision on merits, the Appellate Court has recorded that there is no substance in the submission of the petitioner that he has a *prima facie* case for balance of convenience in his favour. The Appellate Court has rejected the application seeking order of status quo on the ground that no irreparable loss would be caused to the applicant.

11. It is settled position that in order to claim an order of temporary injunction there has to be *prima facie* case, balance of convenience and irreparable loss shown. In the present case as far as *prima facie* case is concerned, it is the case of the respondent-Corporation that the construction of the shop is an unauthorized construction and is on the service road, which forms part of 60 meters D.P. road. From the material on record atleast in the petition there is nothing to show that the construction of the petitioner was on the 60 meters D.P. road. The notice of removal of encroachment has not been brought to the attention of this Court. The admitted position from the record appears to be that the shop of the petitioner was protected from time to time and this protection continued even in the appellate proceedings. Based on certain applications which do not form part of the record it appears that an application for continuation of the order of status quo till the decision on the Appeal was made in spite of order of the Appellate Court dated 17.01.2023 granting status quo till the decision in the Appeal. Considering that the entire subject matter is the shop, which according to the respondent-Corporation is unauthorized and according to the petitioner is not on 60 meters D.P. road, the entire proceedings will be rendered infructuous in event the application for status quo is not granted.

Alongwith the establishment of *prima facie* case, it is also necessary to consider the balance of convenience and irreparable loss. In the present case by considering the material on record even if no *prima facie* case is made out, it is evident that irreparable loss will be caused to the petitioner in event the order of status quo is not passed.

12. This Court is informed that Exhibit-5 application is kept for hearing before the Appellate Court and it would be in the interest of justice that till the decision on Exhibit-5 application in RCA No.111/2021, the order of status quo be passed. As far as decision which has been relied upon by the learned counsel for the respondents there is no quarrel with the proposition that there cannot be any regularization of illegal and unauthorized construction. The decision was rendered in case of the structures which were constructed by the developer and sold to third party and as such, there was a construction on large scale and it was held that there was no scope for regularization of the illegal and unauthorized constructions. In the present case what we have in hand is a shop on a leased property. It is the contention of the Municipal Corporation that the said shop is an unauthorized construction and is constructed on 60 meters D.P. road. It is not disputed that development plan road is a proposed road and it has still to be ascertained as to whether the shop which is constructed by the petitioner is an unauthorized one and is incapable for regularization.

13. In light of the above, the impugned order dated 25.01.2023 is quashed and set aside. The order of status quo

which was passed on 17.01.2023 by the Appellate Court is continued till the decision on the application below Exhibit-5.

14. Considering the facts of the case and in particular the contention of the Municipal Corporation that the shop is an unauthorized construction and is constructed on the proposed D.P. road of 60 meters, the Appellate Court is requested to decide the Exhibit-5 application expeditiously and in any event within a period of four week from next date of hearing before the Appellate Court.

15. Writ Petition stand disposed of in the above terms.

16. Needless to state that, as the order of status quo has been passed, the petitioner is also restrained from carrying out any re-construction or any other further activities in respect of this leased land and the structure and whichever position the said structure is today, status quo to be maintained. It is made clear that the photographs which are referred to in the order dated 08.02.2023 are the photographs which have been produced by the petitioner and not by the Municipal Corporation.

(SHARMILA U. DESHMUKH)
JUDGE