

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.85 OF 2023
WITH
INTERIM APPLICATION NO.1235 OF 2023

MOHAMMED IQBAL ABDUL ... Appellant
Versus
THE MUNICIPAL CORPORATION OF ... Respondents
GREATER MUMBAI AND ANR.

Mr.Pradeep Thorat with Mr.J.S.Yadav i/b. Mr.B.S.Shukla, for the Appellant.

Ms.Smita Tondwalkar, for the Respondents-MCGM.

Mr.Devendra V. Pawar, Junior Engineer (B&F) T-Ward present.

CORAM: G. S. KULKARNI, J.

DATED: FEBRUARY 08, 2023

ORAL ORDER

1. This appeal from order arises from an order dated 18 January 2023 passed by the learned Judge, City Civil Court at Bombay, whereby ad-interim reliefs as prayed in the Notice of Motion taken out by the appellant/plaintiff in L.C.Suit (L) No.14624 of 2022, have been rejected.

2. At the outset, as the facts would demonstrate, the present proceedings reflect an absolute abuse of process of law even in filing the suit in question. This would be clear not only from the averments as

made in the plaint but also from the plea of the appellant/plaintiff which was taken before the City Civil Court and before this Court.

3. The dispute in suit in question is in regard to the action being taken against the unauthorised structure of the appellant/plaintiff by the respondent/defendant municipal corporation by issuance of a notice under Section 351 of the Mumbai Municipal Corporation Act, 1888 (for short '**the MMC Act**') dated 31 December 2019. The notice was in regard to the unauthorised structure in question which is stated to be put up on a land leased out to the grandmother of the appellant one Smt. Rabiya Bai Hakimuliah, under a purported agreement of lease dated Nil executed in the year 1975. The original of the agreement is not available and was not produced before the City Civil Court. A copy of the agreement which has been annexed to the paperbook is also not a complete document inasmuch as paragraphs 2 to 5 of the said agreement itself are missing and hence, are not on record. However, from whatever portion of the said agreement as disclosed by the appellant/plaintiff, it seems that the said land as leased to the grandmother Smt. Rabiya Bai Hakimuliah was only a open piece of land in City Survey No. 668 of Village Nahur, Taluka Kurla. As what is the area of the plot which was leased by such agreement is not borne out by any material, in ascertaining any legal rights in respect of the said land

in favour of the appellant/plaintiff. This apart, such lease agreement is also not a registered agreement. There is also no corresponding document namely the City Survey Records etc, placed for consideration of the trial Court or even before this Court, to show that such lease agreement was given effect to in City Survey Records, or in any other municipal records, so as to demonstrate that some legal rights in respect of the land in question were enjoyed by the appellant/plaintiff. Thus, looking at such lease agreement prima facie it is difficult to accept a plea of the appellant that the said lease agreement could at all be recognized by law and / or under such agreement any tenancy rights in perpetuity, in an immovable property were transferred to the appellant/plaintiff.

4. The appellant/plaintiff despite such basic infirmities appears to have proceeded to undertake construction of commercial premises without obtaining any permission from the municipal corporation to put up construction of any commercial premises of the nature they stand, namely a shop wherein hardware business is conducted by the appellant/plaintiff. There is no document on record which would show that any portion of the said construction has been authorised by the municipal corporation under any sanctioned plan or any other permission granted by the municipal corporation to put up such structure.

5. It also appears from the record that certain portion of the illegal structure belonging to the appellant/plaintiff about 48.38 sq.meters was affected by road widening and the same was demolished keeping aside the structure admeasuring 148.35 sq.meters. However, what is pertinent is that merely because some portion of such illegal construction was demolished for the purpose of road widening, the appellant/plaintiff presuming that he has an absolute right in law, to compensate himself for such action of the municipal corporation, without prior permission/approval from the municipal corporation, put up a vertical construction on the existing structure, by virtue of which the remaining structure (which itself was unauthorised) was vertically extended by undertaking construction. It is such construction which has been objected to be illegal and unauthorised by the impugned notice dated 31 December 2019 issued by the municipal corporation under Section 351 of the MMC Act. The municipal corporation has set out a schedule in the said notice describing the said unauthorised construction undertaken by the appellant/plaintiff. Such schedule reads thus:

“SCHEDULE

Unauthorized vertical extension by using brick masonry wall, M.S.angle, Ladi coba and G.I. Sheet roof ad-measuring as shown in sketch without permission of competent authority situated at Shop No.35, Mapple Wood, MG Link Road, Opp. Runwal Gree Complex, Mulund West, Mumbai, Maharashtra 4000080, India.”

Apart from the above description, the sketch of the unauthorised construction is also set out in the said notice. From the perusal of the said sketch, it appears that the objectionable structure is admeasuring 5.75 meters width and 3.13 meters height.

6. The advocate for the appellant/plaintiff replied by his letter to the said show cause notice issued by the municipal corporation under Section 351 of the MMC Act interalia contending that the objected structure was an authorised structure on the basis of certain documents. The designated officer, Ward “T” of the municipal corporation passed a speaking order dated 20 December, 2022 considering the said documents by discussing each and every document and held that none of the said documents went to show that the objected structure was in any way authorised or legal. A perusal of the speaking order passed by the designated officer indicates that the documents which are placed on record for consideration of the designated officer were mainly photo copies, however, none of the documents indicated that the objected structure, in any manner was legal and/or constructed under any permission of the municipal corporation. It may be observed that the documents such as election card, voters list, electricity bill, assessment bill, water supply bill, census receipt were certainly not relevant, as issue

was not of possession but of brazen illegal construction carried out by the appellant for which such notice under Section 351 of the MMC Act was issued by the respondent.

7. It is on such premise, the appellant/plaintiff approached the City Civil Court by the suit in question whereby such action of the municipal corporation calling upon the appellant/plaintiff to remove and/or demolish the unauthorised construction as put up by the appellant came to be assailed by the appellant/plaintiff. In such suit, the notice of motion in question came to be filed praying for the only interim relief which reads thus:-

“(a) That pending the hearing and final disposal of the suit the defendants, their officers and servants be temporarily restrained by an order of injunction of this Hon’ble Court in pursuance to the notice being No.T/D02T/108/351-MMC ACT/T129N01/31-12-2019 dated 31-12-2019 and speaking order dated 20/12/22, falsely alleging that unauthorized vertical extension by using masonry wall, M.S.angle, Ladi coba and A.C.sheet roof without obtaining prior permission from competent authority from MCGM and thereby called upon the plaintiff to show cause thereto.”

8. Learned Trial Judge by the impugned order has rejected the prayer for ad-interim injunction interalia observing that none of the documents which were produced on record namely electricity bill, assessment bill, water supply bill, census receipt and assignment deed, could show that the structure as objected by the municipal corporation,

was in any manner authorised or protected. It was also observed that the appellant/plaintiff had not produced a single document on record to show that the noticed structure was constructed as per the sanctioned plan and permission of the corporation was accorded to undertake the construction as objected, and accordingly, has rejected the prayer for ad-interim temporary injunction.

9. Mr.Thorat, learned Counsel for the appellant/plaintiff with an extreme vehemence at his command has attempted to argue issues/points which are neither pleaded in the plaint nor any document in that regard forms part of the record before the trial Court or before this Court. Mr.Thorat would submit that the structure in question is not an unauthorised structure and hence, there was no warrant for the municipal corporation to issue a notice under Section 351 of the MMC Act. In supporting his submission to show that the appellant/plaintiff had right, title and interest in respect of the plot of land, Mr.Thorat has drawn the Court's attention to the incomplete/deficient document being photo copy of a lease agreement dated Nil of the year 1975 purportedly executed by the owner of the said land in favour of the appellant/plaintiff's grandmother. As noted above, such lease agreement apart from being not registered, a complete copy of the same is not a part of the record. Further the agreement is silent on any details in

regard to the area of the plot which was leased. Further, on a query made to Mr.Thorat, he has stated that the appellant/plaintiff does not proceed on the ground that the entire construction of the appellant / plaintiff is in any manner authorised by the corporation or is a legal construction. His contention is that however due to certain subsequent developments, namely by virtue of State Government policies, the entire unauthorised construction is required to be presumed to be legal. Mr.Thorat's submission is that under such policy of the State Government, slum structures even commercial are protected as the land in question has been declared to be a slum by the State Government. However, to support such contention Mr.Thorat is not in a position to point out any notification issued by the State Government issued under the Maharashtra Slum Areas (Improvement, Clearance And Redevelopment) Act,1971 declaring the alleged private land in question to be a slum land. In such context, what is now sought to be shown to the Court is a survey which was carried out by the competent authority of the municipal corporation which according to him, recognizes that the area of 48.38 square meters was taken away for road widening leaving area of 148.35 sq. meters available to the appellant/plaintiff. A perusal of such document indicates that it is titled as 'Annexure II' issued by the concerned officers of the municipal corporation, however, such

document of Annexure II in no manner refer to any measurement/area of the structure in question to be certified to be authorised or a legal construction. In other words, such document does not, and in any manner whatsoever, reflect on the legality of the structure in question, much less the objected structure.

10. The next contention as urged by Mr.Thorat is on the basis of an application for a repair permission purportedly made by the appellant/plaintiff to the municipal corporation to which there is an averment which is found in paragraph 12 of the plaint, which states that the appellant/plaintiff after the respondent/defendant demolished the structure for road widening applied for a repair permission. The document for repair permission as placed on record is a mere handwritten application. There is no averment in the plaint that the municipal corporation had received any such application in the year 2019. Certainly, if such an application, which was merely for a repair permission, was not received by the municipal corporation, there was no question that any repair permission could be granted. Further there is no repair permission which has been placed on record being granted by the municipal corporation. In any event a repair permission can never be construed to be any permission to put up the entire first floor or to raise an additional construction namely a vertical extension in the present

case. This would indicate that the structure as objected by the municipal corporation was illegally and unauthorisedly constructed.

11. On a query made to Mr.Thorat as to whether there is any averment in that regard in the plaint that a construction permission was granted by the municipal corporation, his submission is quite peculiar and astonishing. Mr.Thorat states that the concerned Advocate of the appellant/plaintiff may not have possessed any legal acumen in drafting the plaint so as to make appropriate averment in that regard. Such submission of Mr.Thorat, as an officer of the Court cannot be accepted as also such comment on the Advocate who drafted the plaint on instructions, is not in good taste and not fair to him.

12. The next contention of Mr.Thorat is to the effect that although there are no sanctioned plans or any authorization/permission granted by the municipal corporation to the appellant/plaintiff to undertake the objected construction, it ought to be presumed that such construction is a legal construction and it would be required to be presumed to be an authorised construction, considering the policy of the State Government which is popularly known as 'Kurar pattern'. On a query made to Mr.Thorat that whether such a case was pleaded by the appellant/plaintiff in the plaint, Mr.Thorat is unable to point out a single averment to that effect in the plaint. He is also unable to point out any policy of

the State Government which would permit construction of commercial premises.

13. It is on the above contention, Mr.Thorat would submit that the ground plus one commercial structure in question ought to be protected and no action under the impugned notice be taken. He submits that the observations of the learned Judge of the City Civil Court in the impugned order in rejecting the prayer for ad-interim reliefs in that regard are required to be held to be perverse and interfered by this Court in the present appeal.

14. On the other hand, Ms.Smita Tondwalkar, learned Counsel for the municipal corporation has contended that the plaint as filed by the appellant/plaintiff in no manner discloses a case for any interim/temporary injunction to be granted by the Court. She has submitted that the plaint is so defective that there is no description of the suit property. She submits that there is no clarity in regard to the CTS number on which the appellant/plaintiff asserted the right in question much less the plot number. She has submitted that even assuming that the case of the appellant/plaintiff that the structure of the appellant/plaintiff forms part of a notified slum, there is no photopass issued as per the policy of the Government by which it can be considered that it is in fact a recognized slum structure so that at least the basic ground floor structure is

authorised. She has submitted that the large area of 829 sq. feet as per the impugned notice has been constructed illegally. She submits that the City Civil Court has rightly observed that there is not a single document placed on record which would show the authenticity or legality of the structure in question and/or that it was constructed after any lawful permission being granted by the municipal corporation. In support of her contention, Ms. Tondwalkar has placed reliance on the orders passed by the Division Bench of this Court in *Tushar Guru Salien Vs. State of Maharashtra & Ors. (Public Interest Litigation No.67 of 2017 decided on 28 August 2019)*, wherein the Court has observed that a plea similar to the one taken by the appellant/plaintiff could be an acceptable plea only when the structure which was being targeted by the municipal corporation was an authorized structure. It was observed by the Division Bench that the plaint must make an averment that the structure targeted was governed by the sanction. She emphasized that it was categorically observed by the Division Bench that merely pointing deficiencies in the notice or the authority of the person issuing such notice (not as urged in the present case) would be of no consequence. She accordingly submits that the appeal deserves to be dismissed for such reasons.

15. Having heard learned Counsel for the parties and having perused the impugned order as also the plaint and the documents as placed on

record, in my opinion, no case has been made out for interference in this appeal as discussed hereinafter. At the outset, it is required to be noted that the appellant/plaintiff had approached the City Civil Court on absolute vague averments made in the plaint and on documents which do not show a semblance of appellant/plaintiff's right, title and interest or entitlement in respect of the plot in question. As noted above, the agreement itself is not a complete agreement and it is not a registered agreement. The agreement does not show what is the area of plot which was transferred by way of a lease in favour of the appellant/plaintiff's grandmother. This apart, even assuming that the case of the appellant/plaintiff that the land falls under the slum as declared by the State Government, albeit to that effect there are no substantive averments in the plaint, as also no document notifying the land as a slum was placed on record. It needs to be observed that in so far as the objectionable structure is concerned, the appellant/plaintiff had no authority whatsoever in law, to undertake the construction without any authority/permission from the municipal corporation, merely because certain portion of the structure was demolished by the municipal corporation in the road widening. In fact, it appears that the appellant/plaintiff was aware that if he was to put up any construction, he would be required to obtain prior permission from the municipal corporation, which is clear

from the fact that although no application was made by the appellant/plaintiff for undertaking construction of the first floor, however an application for repair permission is stated to be made by him, albeit without showing any details that such application was in fact received by the municipal corporation for its consideration.

16. Perusal of the averments as made by the appellant/plaintiff in the plaint as also considering the documents on record, in my opinion, the Designated Officer of the municipal corporation has considered each and every document submitted by the appellant/plaintiff which are mostly photo copies of irrelevant documents to come to a conclusion that the structure in question could not be said to be in any manner authorised by the municipal corporation and more particularly, a commercial structure.

17. Certainly, the municipal officers are under a solemn duty under the municipal laws to take action against illegal and unauthorized structures, whatever be the nature of such construction. This is clear from the series of orders which are passed by different Benches of this Court and the recent judgment of the Division Bench of this Court of which I was a member in **High Court on its own motion (In the matter of Jilani Building at Bhiwandi) Versus Bhiwandi Nizampur Municipal**

Corporation & Ors.¹ wherein the Division Bench had observed that there are substantive powers conferred on the different municipal officers as also on the government officers under the provisions of law as observed in the said decision, which includes Mumbai Municipal Corporation Act as also under other laws and various Government directives to take timely steps to remove unauthorized and illegal constructions. It was also observed that in so far as the City of Bombay is concerned, the Mumbai Municipal Corporation is the custodian in regard to all affairs in relation to planning of the areas within its municipal jurisdiction, which includes its powers to grant requisite statutory permissions for construction, reconstruction, addition or extension, so as to bring about a regime that unauthorized and illegal structures are not put up and are removed. It was observed that granting of such construction permissions are matters which are required to be dealt with by the planning authority and in the event unauthorized structures are put up, it becomes not only an obligation of the MCGM (planning authority) but also of the competent authority under the provisions of Section 3Z-1 and 3Z-2 of the Slums Act to take action, including lodging of prosecution against such persons who have put up the illegal construction and even against the competent authority or any officer who has aided or abetted

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the construction of illegal and unauthorized structures and had failed to demolish such structures as provided in sub-section (5) of Section 3Z-2 without any sufficient reason. The Division Bench has held that there is an obligation on the municipal authorities to exercise powers even in respect of slum areas to initiate action of demolition if the structures are not authorized and/or are illegal. Thus the contention of Mr.Thorat that the moment the structure is a slum structure, in that event there is a *carte blanche* for slum dwellers to put up any unauthorized construction of any nature, is totally untenable and would be contrary to the law laid down as held by the Division Bench in the above said decision. The relevant observations of the Division Bench read thus:-

“70. As discussed above, there are provisions under the MMC Act as also under the MRTTP Act and the MLRC which confer several powers on the authorities to take action against illegal constructions. We may, however, clarify that a protection which has been conferred by Section 3Z of the Slums Act, to the protected occupiers, cannot be confused or interpreted to mean that the protected occupier enjoys and is granted a complete immunity from putting up unauthorized construction or structure and/or can make illegal additions or alterations. The protection which is granted is to a basic slum structure as may be recognized in the photo-pass. If mere issuance of a photo-pass is interpreted to be a blanket and an unfettered permission to put up any illegal construction, additions or alterations, it would lead to an abuse of the provisions of Section 3Z read with Section 3X-(a)(b)(c). Such can never be the intention of the legislature that the municipal authorities cannot take any action against the unauthorized structures merely because a photo-pass is issued.

... ..

74. We are, thus, of the clear opinion that the MCGM being a Planning Authority for the entire Greater Mumbai area (excluding those areas in which by law other planning

authorities are appointed), the MCGM has jurisdiction to exercise all powers under the MMC Act as also the MRTP Act and the Slums Act, to take action against illegal structures as permissible in law, not only in regard to all such areas within its jurisdiction, but also the slum areas falling under the Slums Act, except when a demolition order has been made under the Slums Act. We find that even Section 4 of the Slums Act would cast no embargo on the MCGM to take appropriate action in regard to any buildings which are unauthorized and/or dilapidated. Per se, Section 4 does not prohibit the planning authority to exercise any of its authority in regard to the structures of the nature Section 4 would contemplate either before the area is declared as a “slum area” or after it is declared as a “slum area”. It is nobody’s case that prior to an area being declared as slum, the planning authority namely the MCGM would not have any authority under the MMC Act and the MRTP Act to take action against unauthorized construction in such areas in regard to structures in these areas. From a holistic reading of the provisions of the Slums Act as discussed above, it is difficult to conceive that merely because an area is declared to be a slum under Section 4, the planning authority would lose its control and authority to regulate the structure by implementing the provisions of the MMC Act and the MRTP Act in the event the structures are dilapidated and/or in any manner unauthorized.

... ..

77. Be that as it may, it is never too late. It is high time that the concerned officials from the MCGM as also the Collectorate become conscious and immediately start taking action on illegal structures and restore a regime of only lawful construction prevailing in the city. In taking such action, the Municipal Officers ought to overcome any extraneous pressures and other obstructive considerations which may be created by certain undesirable elements preventing them from discharging public duties of taking action against such constructions. The iron hands of the Municipal Officers cannot be tied down by such pressures and they need to work relentlessly, as the law would mandate.”

18. In so far as the role of the Civil Court is concerned, the Division Bench has observed that the Civil Court needs to be extremely cautious and needs to have a well considered approach in dealing with the applications for temporary injunction, when any action being taken by

the municipal officers on unauthorized/illegal constructions is assailed.

In such context, the relevant observations of the Division Bench read thus:

“ROLE OF THE CIVIL COURT :

78. We also caution the Civil Courts which might be approached with civil suits/proceedings when the Municipal Corporations/ Planning Authority/ Competent Authority commence action against illegal and unauthorized constructions or actions being taken against dilapidated buildings. The Civil Court needs to be extremely cautious and ought to have a well considered approach in dealing with such suits. When applications for temporary injunction are moved in civil suits which are filed assailing any action being taken by the municipal officers on unauthorized/illegal constructions or actions being taken against dilapidated buildings, the injunction applications ought to be decided without any delay and not later than one week from the date of its presentation, so that in legitimate cases, the actions against illegal structures being taken by the Municipal Officers, are not delayed by any undeserving judicial intervention. In this context, we may usefully refer to a decision of the Division Bench of this Court in Mohd. Talib Habib Shaikh v. Mohammad Siddaqui Haji and Others (2019 SCC OnLine Bom 1265). Justice G.S.Patel speaking for the Bench, made the following observations on the role of the Civil Courts in considering matters arising from unauthorized and illegal construction, also referring to the previous orders passed by the Division Bench: -

“6. We are surprised that when the demolition was scheduled, the persons concerned promptly approached a Civil Court. The Civil Court in Regular Civil Suit No. 716 of 2018 passed an ex parte ad-interim order dated 31st December 2018. That order was served on the Municipal Corporation. That is taken to be a handicap and an obstacle.

7. We are shocked and surprised firstly at the approach of the Municipal Corporation, which by now through its officials is experienced enough to pre-empt the passing of such ex parte orders. The officials should be aware that those constructing buildings unauthorisedly and illegally are bound to go to every Court right up to the highest Court in the country to stall the inevitable.

Therefore, a caveat should have been filed and entered. That was not done. That possibly indicates that the Municipal Corporation is giving its blessing to such construction activity within its limits. If the order of this Court can be neutralised or set at naught and the directions therein set at naught in this manner, then we are equally disturbed by the approach of the Civil Court.

9. We would only invite the attention of the Civil Court to several judgments of this Court as also of the Supreme Court particularly in the case of Shiv Kumar Chadha v Municipal Corporation of Delhi [(1993) 3 SCC 161] wherein the Hon'ble Supreme Court has highlighted the element of public interest which is paramount in matters of this nature and particularly while considering an application for interlocutory orders, including prohibitory directions and injunctions restraining public bodies from demolishing unauthorised constructions or removing obstacles in implementation of a public project.

10. If public interest is not to be considered a vital element as highlighted in this judgment, then possibly everything would be subsidiary. The civil court must be mindful that an illegal construction poses a threat to the public at large and that there is good reason for the statutory requirement that every construction has to be authorised so that it conforms inter alia to safety and other norms."

19. Now coming to the facts of the case, I am of the clear opinion that the action of the municipal corporation is in consonance with what has been observed by the Division Bench in paragraph 81 of the said decision, wherein it has been observed that the illegal encroachments and unauthorized structures are a menace and a potential danger to the city of Mumbai, which is being ruined by encroachments and illegal constructions. In the present case, the entire structure of the appellant/

plaintiff is unauthorised, albeit action is taken only in regard to part of the structure. Once the entire structure is illegal, it is surprising as to how the appellant/plaintiff can complain in regard to the action being taken against the part of the illegal addition or extension as carried by the appellant. The Division Bench in paragraph 81 and 83 in such context has observed thus:-

“81. Illegal encroachments and unauthorized structures are a menace and a potential danger not only to the city of Mumbai, which is being ruined by encroachments and illegal constructions, but also to the other bigger cities. These factors also depict a picture of absolute lawlessness in implementation of the municipal laws. This for more than one reason. Firstly, as seen from the State policies, it creates two categories of citizens, the first category is of those citizens who are law abiding, who would put up lawful construction and possess buildings/structures which are lawfully constructed thereby enjoying only the legitimate and permissible benefits therefrom. The second category is of those persons who brazenly violate law and put up illegal and unlawful constructions and enjoy with impunity such illegal structures, under the blessings of municipal and government officers. There is yet another category of persons, who illegally enter and encroach on public lands, construct unauthorized structures, they continue to reside in such structures for long periods with the blessings of all the authorities, and yet get rewarded under the government policies which offer them a premium on such illegality of encroachment, in entitling them with a free of cost accommodation, under the garb of slum redevelopment as made permissible under the State policies as discussed above. There cannot be a bigger unconstitutionality and breach of the public trust doctrine in such mechanism, under which valuable public largess is siphoned off from the pool of public assets to reward encroachers as also for private benefits.

... ..

83. In our opinion, a scrupulous and determined implementation of the above provision(s) would achieve two

fold objects; firstly that it would deter persons from putting up unlawful, illegal and unauthorized constructions; secondly, the machinery of the municipal corporations to take action against the unlawful and unauthorized constructions would get activated, so as to recover maximum revenue for the municipal corporation, which would certainly be a step in larger public interest. We are not informed by the municipal corporations as to whether so far any action has been initiated under these provisions, so that the legislative object and intent in incorporating such provision, is achieved. If the municipal corporations are not effectively utilizing these provisions and no action is being taken, it is high time that the municipal corporations implement these provisions with full diligence and rigour. This would certainly aid and assist the municipal corporations in reducing the menace of unauthorized constructions, which has engulfed the important cities in the State. Today, it is seen that the municipal corporations and its officers are struggling with the evil of illegal and unauthorized constructions, despite the law providing wide ranging powers to deal with such menace. An undeterred and bonafide will in these public officials to take stern actions as per law, is the need of the hour.”

20. It may be observed that once a construction is unauthorised and illegal, the course of law to be taken in that regard is well settled by the catena of decisions of the Supreme Court [See: *Friends Colony Development Committee V. State of Orissa (2006)3 SCC 581*; *Dipak Kumar Mukherjee V. Kolkata Municipal Corporation and Ors. (2013)3 SCC (Civ) 72*; *Supertech Ltd. vs. Emerald Court Owner Resident Welfare Association and Ors. (2021)10 SCC 1.*] In *Jilani Building at Bhiwandi* (supra), the Division Bench has considered such mandate of law as laid down by the Supreme Court in paragraphs 85 to 87 which reads thus:-

“85. In Friends Colony Development Committee V/s State of Orissa (2006)3 SCC 581, the Court was concerned with an unauthorized construction being undertaken by the builder, as instead of sanction of a four storeyed building, he had constructed a 5 th floor and for which an action came to be initiated against him. On the plea of the builder being accepted by the High Court that he be permitted to make a fresh application and submit a revised plan for approval qua the construction he had already undertaken, the appellant had moved the Supreme Court. It is in such context the Supreme Court made significant observations in regard to the threat to the society, illegal and unauthorized constructions pose. These observations are important not only in the context of unauthorized and illegal constructions but also in the context of the plight of those who purchase premises in unauthorized buildings. The relevant observations are required to be noted, which reads thus:

“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.

22. It can be stated in a way that power to plan development of city and to regulate the building activity therein flows from the police power of the state. The exercise of such governmental power is justified on account of its being reasonably necessary for the public health, safety, morals or general welfare and ecological considerations; though an unnecessary or unreasonable inter- meddling with the private ownership of the property may not be justified.”

(emphasis supplied)

86. Apart from the above observations, what is significant is that the Supreme Court also observed that if the High Court feels that the illegal/unauthorized building activities are so rampant, so as to be noticed judicially, it may suo motu register a public interest litigation and commence monitoring the same by issuing directions so as to curb such tendency and fixing liability and accountability. Such observations are required to be noted, which reads thus:

“(7) The High Court, if it feels that illegal/unauthorized building activities in Cuttack are so rampant as to be noticed judicially, may suo motu register a public interest litigation and commence monitoring the same by issuing directions so as to curb such tendency and fixing liability and accountability.”

(emphasis supplied)

87. In *Dipak Kumar Mukherjee v Kolkata Municipal Corporation and Ors.* (2013)3SCC(Civ.)72, again the Supreme Court was concerned with an illegal and unauthorized construction of buildings and other structures put up by respondent no. 7 in the said proceedings, who had undertaken construction in violation of the sanctioned plans. An order was passed by the Municipal Corporation ordering demolition of the disputed construction. Respondent no. 7 having approached the High Court, an order came to be passed by the High Court directing the competent authority to pass an appropriate order after giving an opportunity of a hearing to respondent no. 7. The Supreme Court held that such an order could not be sustained,

as the construction undertaken by respondent no. 7 was in clear violation of the sanctioned plans and for which a notice was issued by the competent authority of the Corporation and more so because an application for regularization was made by respondent no. 7 after completion of the construction. It is in such context, the Supreme Court considering the position in law as laid down in the earlier decisions emphasized that illegal and unauthorized 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. It was observed that 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. In commenting on the menace of illegal and unauthorized constructions, the Supreme Court considering its decisions in K. Ramadas Shenoy V. Town Municipal Council, Udipi (1974)2 SCC 506, Pratibha Coop. Housing Society Ltd. v. State of Maharashtra (1991)3 SCC 341, Friends Colony Development Committee v. State of Orissa (supra), Shanti Sports Club v. Union of India (2009)15 SCC 705 and Priyanka Estates International (P) Ltd. v. State of Assam (2010)2 SCC 27. the Supreme Court made the following observations:

“29. It must be remembered that while preparing master plans/zonal plans, the Planning Authority takes into consideration the prospectus of future development and accordingly provides for basic amenities like water and electricity lines, drainage, sewerage, etc. Unauthorized construction of buildings not only destroys the concept of planned development which is beneficial to the public but also places unbearable burden on the basic amenities and facilities provided by the public authorities. At times, construction of such buildings becomes hazardous for the public and creates traffic congestion. Therefore, it is imperative for the concerned public authorities not only to demolish such construction but also impose adequate penalty on the wrongdoer.”

(emphasis supplied)”

21. Learned Counsel for the municipal corporation would also be correct in placing reliance on the orders of the Division Bench of this Court in **Tushar Guru Salien Vs. State of Maharashtra & Ors.** (supra)

wherein the Division Bench in similar circumstances had observed thus:-

5] Concerning a property, a suit to enforce or protect an interest in the property which is governed by a Municipal Statute, the interest protected has to be with respect to a plea that prima facie the structure which is being targeted is an authorized structure. Meaning thereby, the plaintiff must make an averment of the sanction obtained from the Corporation and must make an averment that the structure targeted is prima-facie governed by the sanction. Merely pointing out deficiencies in the notice or the authority of the person issuing the notice is neither here nor there. Thus, the *sine qua non* of such kinds of suits is a positive assertion made with reference to the sanctioned building plans.”

22. The contention of Mr.Thorat referring to the Kurar pattern, would not assist the appellant/plaintiff inasmuch as there is nothing on record to show that even applying such pattern any inherent legal right is created in the owner of the structure to put up a vertical construction as objected by the municipal corporation, and that too without permission of the municipal corporation. In fact such argument squarely militates against the law laid down by the Division Bench in *Tushar Guru Salien Vs. State of Maharashtra & Ors.* (supra) as also the decision of the Division Bench in **Jilani Building at Bhiwandi** (supra).

23. For the above reasons, no interference is called for in the impugned order. The appeal is required to be dismissed. However, in the facts of the case, the appeal cannot be dismissed simpliciter. It is

dismissed with cost quantified at Rs.50,000/- to be deposited by the appellant with the Maharashtra State Legal Services Authority, within a period two weeks from today. In the event, the cost is not deposited, the same be recovered as arrears of land revenue by the Member Secretary, Maharashtra State Legal Services Authority. A copy of the order be forwarded to Member Secretary, Maharashtra State Legal Services Authority.

24. At this stage Mr.Thorat has prayed that the ad-interim protection which was granted by the City Civil Court be continued for further period. Considering the gross facts of the case, such prayer cannot be entertained. It is accordingly rejected. The municipal corporation is permitted to take action in accordance with law.

(G. S. KULKARNI, J)