

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3275 OF 2023

M/s. Durgamata Welfare Society ... Petitioner  
*Versus*  
Vasai Virar Municipal Corporation ...Respondent  
Mr. Anil Mishra a/w. Mr. Arun B. Upadhyay for the petitioner.

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CORAM: G. S. KULKARNI  
& R.N. LADDHA, JJ.  
DATED: 15 March, 2023

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Oral Order (Per G. S. Kulkarni, J.)

1. The present proceeding is a third round of litigation before this Court. The petitioner-Society is espousing a cause of residents, who are occupying rank unauthorized structure. The petitioner has left no stone unturned since the year 2010 to continue to occupy such illegal structure.
2. It is not in dispute that the structure in question has been categorized as an illegal and unauthorized structure for almost 13 years initially by CIDCO and now by the respondent, of which the petitioner is well aware. The petitioner purportedly concerned for its occupants, however, at all material times, resisted vacating of the structure whenever an action was sought to be taken against the structure by the concerned authorities including by the respondent. Earlier the petitioner had filed a Civil Suit, bearing Regular Civil

Suit No. 32 of 2010 before the Court of Civil Judge, Junior Division at Vasai, *inter alia* praying that due process of law be followed by the respondent in taking any demolition action. In such suit, initially orders of interim protection were granted, however, later on, the suit was dismissed by an order dated 25 March, 2019 by the learned Civil Judge Junior Division, Vasai. Such order has attained finality. The said order read thus:

*“This suit was fixed for hearing, however, no evidence has been adduced by the plaintiff. Hence, the suit was kept for dismissal order. Today, plaintiff and its counsel are present before the court. They submitted that appropriate order may be passed. Till today, plaintiff neither led evidence nor filed adjournment application on record today to adjourn the matter. Considering the conduct of the plaintiff, it appears that plaintiff is not interested to proceed with the suit. Hence, the suit is dismissed in default for want of prosecution and it is accordingly disposed of. No order as to cost.”*

3. Be that as it may, again when the Municipal Corporation initiated steps to seek eviction of the residents of the structure in question, the petitioner approached this Court in Writ Petition No. 3164 of 2016, which came to be disposed of by an order dated 8 January, 2020 passed by a Division Bench of this Court *inter alia* directing the Municipal Corporation that if the subject construction is found to be unauthorized, the Municipal Corporation shall take appropriate steps by following due process of law.

4. The petitioner-Society was aggrieved by such order, hence it filed a Review Petition bearing (St.) No. 1333 of 2020. The said Review Petition also

came to be dismissed by this Court by its order dated 23 January, 2020, in which the following relevant observations were made by the Division Bench:

*“3. Today, the learned Advocate appearing for the Petitioner Society states that the order be reviewed since there is an order of stay passed by the City Civil Court. However, the order of City Civil Court, on the basis of which the Review Petition is filed is neither annexed to the Review Petition nor produced in Court. Even otherwise, by order dated 8th January, 2020, the Corporation is directed to take appropriate steps by following the due process of law. In view thereof, the question of reviewing the order does not arise and the Review Petition is dismissed. A copy of this order be served on the Vasai Virar Municipal Corporation, by the Advocate for the Petitioner.”*

5. It appears that the Municipal Corporation was also showing some laxity in removing the unauthorized construction on the resistance of the members of the petitioner-Society to vacate the premises. In these circumstances, a Contempt Petition bearing (St.) No. 98026 of 2020 came to be filed by the landlord before this Court. A Division Bench of this Court disposed of the Contempt Petition, recording a statement as made on behalf of the respondent-Municipal Corporation that the Municipal Corporation shall comply with the order dated 8 January, 2020 passed by the Division Bench of this Court within a period of 8 weeks from the date of the said order.

6. It appears from the record that consequent to such statement being made and on the conspectus of series of orders passed earlier in different proceedings, the respondent-Corporation, so as to follow due process of law, issued notice

dated 3 February, 2021 to the petitioner, a copy of which is annexed at Exhibit K, *inter alia* intimating the petitioner that the structure being unauthorized why an action under sections 52, 53, 54 and 55 of Maharashtra Regional and Town Planning Act (for short “MRTP Act”) be not initiated against the said structure.

7. Thereafter, again a notice dated 21 June, 2022 came to be issued to the occupants calling upon them to show cause as to why within 7 days the unauthorized and illegal construction should not be pulled down as per the provisions of MRTP Act. Although such notices are annexed to the petition, however, it appears that no reply to such notices was furnished, as none are annexed to the petition, as also no averments to that effect are made in the memo of the petition.

8. Thereafter on 14 December, 2022 making a reference to the order dated 8 January, 2020 passed by this Court in Writ Petition 3164 of 2016 and to the order dated 1 March, 2021 passed in Contempt Petition (St.) No. 98026 of 2020, and to the series of notices as issued earlier, the Corporation called upon the occupants of the said illegal structure to vacate the building within 7 days. Such notice of the Corporation was replied by one Kartikesh Gaurishankar Mishra. A perusal of the contents of the reply hardly make out any justification to sustain the illegal construction and its occupation by persons with whom the

petitioner is concerned. It also appears that another letter dated 19 December, 2022 was addressed on behalf of the petitioner by Advocate Arun Upadhyay to the Municipal Corporation. A perusal of said letter does not indicate that there was any justification which could be offered as to why the Municipal Corporation ought not to proceed further by following due process of law and remove the structure in question. It is in fact surprising to see the reckless allegations being made in such reply against the municipal officers and more particularly in paragraph 3 of the said letter. We notice that it has become a trend that moment the municipal officers initiate action in accordance with law, reckless allegations of corruption are sought to be made against the officers of the Corporation. If such complaints are genuine, nothing prevents persons making such complaints to approach the police authority, if material to that effect is genuinely available. In the present case, already there were orders passed by this Court on the proceedings as noted above, requiring the Municipal Corporation to take action against unauthorized and illegal construction as per law.

9. Thus, the whole attempt of the petitioner by hook or crook was to stall the action being taken by the Corporation to remove the unauthorized construction so as to continue to remain in illegal occupation, whenever the Corporation activated its machinery and resorted to take action against such unauthorized structure, by following due process of law. The petitioner was

heard on such notices and consequent thereto the impugned order dated 24 February, 2023 came to be passed by the Assistant Commissioner. The impugned order is a detailed order. It has made references not only to several earlier notices issued to the occupants/petitioner, but also to a public notice issued in the local newspaper declaring the structure to be illegal and calling upon the occupants to vacate the structure. The impugned order also refers to all the legal proceedings which were adopted by the petitioner and records that the petitioner had failed to obtain any orders against the Corporation in such proceedings. It is observed that there is no justifiable reason whatsoever to accept the case of the petitioner merely because they were occupants of such illegal structure for some time having electricity bills etc., as such documents would not show that the structure was legal, i.e., constructed after obtaining permission from the municipal corporation. The impugned order accordingly observes that there was no case made out by the petitioner against an action being taken against the structure in question under sections 52, 53 and 54 of MRTP Act, and that such unauthorized construction was required to be removed without further delay. It is on such conspectus, the petitioner has filed this petition.

10. We have heard learned counsel for the petitioner. We have also perused the record. The learned counsel for the petitioner has limited submissions to be made. He is unable to point out a single document which would go to show

that the construction in question is in any manner authorized or legal. Learned counsel for the petitioner is not in a position to dispute that in successive legal proceedings filed by the petitioner, could not result in any orders being passed in favour of the petitioner which could restrain or create any embargo on the municipal corporation from proceeding to remove such brazen illegal construction. He, however, submits that the illegal construction ought not to be removed. In fact the submissions as made by the learned counsel for the petitioner are only on equity and moreso they are in desperation.

11. Insofar as the legal position in regard to unauthorized constructions is concerned, in a catena of decisions, the Supreme Court has held that the law would not recognize such constructions and the municipal authorities would be required to take appropriate action to demolish such construction as they are a menace. In such context a reference can be made to the decisions of the Supreme Court in *Friends Colony Development Committee V. State of Orissa*<sup>1</sup>; *Dipak Kumar Mukherjee vs. Kolkata Municipal Corporation and Ors.*<sup>2</sup> and High Court on its own motion (In the matter of Jilani Building at Bhiwandi) Versus Bhiwandi Nizampur Municipal Corporation & Ors.<sup>3</sup>.

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**1** (2006) 3 SCC 581

**2** (2013) 3 SCC (Civ) 72

**3** 2022 SCC OnLine Bom 386

12. In *Jilani Building's case* (supra), the Division Bench has considered mandate of law as laid down by the Supreme Court in the said decisions, in paragraphs 85 to 87. The relevant observations of the Division Bench 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)

13. In a recent decision of a Division Bench of this Court in **Kaalkaa Real Estates Pvt. Ltd. & Anr. vs. Municipal Corporation of Greater Mumbai**<sup>4</sup>, the Court also considering the decisions of Supreme Court in *M.I. Builders (P) Ltd. vs. Radhey Sham Sahu*<sup>5</sup>, *Savitribaiphule Shikshan Prasarak Mandal, Kamlapur vs. Solapur Municipal Corporation & Anr.*<sup>6</sup>, *Supertech Ltd. vs. Emerald Court Owner Resident Welfare Association and Ors.*<sup>7</sup> and *Esha Ekta Apartments Co-op. Housing Society Ltd. vs. Municipal Corporation of Mumbai*<sup>8</sup> observed that no laxity can be shown by the Courts in matters pertaining to unauthorized and illegal constructions. The common thread running through the said decisions is to the effect that if a construction is unauthorized and/or is put up not following the procedure in law, the same cannot be sustained and would be required to be demolished. It would be

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**4** 2023(1) Bom. C.R. 126

**5** (1999) 6 SCC 464

**6** 2019 SCC Online Bom. 1771

**7** (2021) 10 SCC 1

**8** (2013) 5 SCC 357

relevant to note the observations of the Division Bench referring to such decisions, which reads thus:

“85. Supreme Court also considered in the said judgment, a judgment in case of M.I. Builders (P) Ltd. vs. Radhey Sham Sahu (1999) 6 SCC 464 holding that no consideration should be shown to the builder or any other person where construction is unauthorized. Such a discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorized 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. 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. It is held that a discretionary power must be exercised having regard to the larger public interest.

88. This Court in case of Savitribai Phule Shikshan Prasarak Mandal, Kamlapur Vs. Solapur Municipal Corporation & Anr., 2019 SCC OnLine Bom 1771 has held that the jurisdiction under Article 226 of the Constitution of India is not only extraordinary but equitable and discretionary as well. It will not be permitted to be invoked so as to subvert the law or to make a mockery of the rule of law. If this Court allows the Petitioner to retain the construction activity carried out at site or the Municipal Corporation to tolerate it we would be not only acting contrary to law but making a mockery of the rule of law.

93. Supreme Court in case of Supertech Limited vs. Emerald Court Owner Resident Welfare Association & Others, (2021) 10 SCC (1) dismissed the civil appeal filed by the applicant whose construction was declared as unauthorized and its writ petition was dismissed by the High Court. The Supreme Court held that the 'rampant increase in unauthorized constructions across urban areas, particularly in metropolitan cities where soaring values of land place a premium on dubious dealings has been noticed in several decisions of the Supreme Court. This state of affairs has often come to pass in no small measure because of the collusion between developers and planning authorities.' Supreme Court held that the 'regulation of the entire process is intended to ensure that constructions which will have a severe negative environmental impact, are not sanctioned. Hence, when these regulations are brazenly violated by developers, more often than not with the connivance of regulatory authorities, it strikes at the very core of urban planning, thereby directly resulting in an increased harm to the environment and a dilution of safety standards.' Supreme Court held that 'illegal construction has to be dealt with strictly to ensure compliance with the rule of law.'

96. The Supreme Court further adverted to the judgment in case of Esha Ekta Apartments Coop. Housing Society Ltd. v. Municipal Corporation of Mumbai, (2013) 5 SCC 357 where it was held that an unauthorized construction destroys the concept of planned development, and places an unbearable burden on basic amenities provided by public authorities. The Supreme Court accordingly held that it was imperative for the public authority to not only

*demolish such constructions but also to impose a penalty on the wrongdoers involved.”*

*(emphasis supplied)*

14. Adverting to the above well settled principles of law, we may observe that the petitioner has failed to show any material as to on what basis in law a rank unauthorized and illegal structure can be protected, and the wheels of the municipal corporation in taking action of demolition can be stopped by the writ Court. The Court certainly cannot grant a relief opposed to law. In fact, the frame of the present petition itself is totally misconceived as the petitioner also attempts to take an order behind the back of the owner of the land, on whose complaint the action of removing illegal construction has been initiated, as he is not made a party to the present petition.

15. We are thus of the clear opinion that the reliefs as prayed for by the petitioner are not only reliefs sought against the provisions of law, but they are in the teeth of the settled principles of law as laid down by the Supreme Court and this Court on unauthorized constructions as noted by us hereinabove. In such circumstances, the Court would not exercise its discretionary and extraordinary writ jurisdiction in granting any reliefs to protect unauthorized and illegal construction.

16. We may observe that neither the Court nor the law can wield any sympathy in favour of persons who knowingly occupy illegal structures and/or

attempt to further enhance and add to the illegal construction and thereafter claim equity. We would observe that such class of persons are a greedy lot, as opposed to those persons who occupy constructions which are undertaken as per the provisions of law and which are legal. The Court cannot create two categories of citizens, one who are permitted to occupy illegal constructions much less under the orders of Court and others who are law abiding citizens who necessarily under a fear of law, reside only in legal and authorized constructions. The Court would not exercise writ jurisdiction to bring about such societal imbalance and discrimination. The law is required to be applied equally and implemented.

17. For the aforesaid reasons, we are certain that this petition is an absolute abuse of process of law. We have thus no hesitation but to dismiss the petition with costs of Rs.50,000/- to be deposited by the petitioner with the Maharashtra State Legal Services Authority within a period of two weeks from the day a copy of this order is available on the website of the High Court, failing which the amounts be recovered from the petitioner as arrears of land revenue.

18. At this stage, learned counsel for the petitioner states that the respondent-Corporation be directed not to take any coercive action against the structure in question. In the facts of the present case, more particularly even

earlier proceedings initiated by the petitioner having been failed, such request as made on behalf of the petitioner cannot be accepted. It is accordingly rejected. It would be open to the Municipal Corporation to proceed to take further action in accordance with law after a copy of this order is available on the website of the High Court.

19. A copy of this order be forthwith forwarded to Vasai Virar Municipal Commissioner for further appropriate action to be taken in pursuance of the earlier order passed by this Court in Writ Petition No. 3164 of 2016.

20. Writ Petition is dismissed.

(R.N. LADDHA, J.)

(G. S. KULKARNI, J.)