

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO. 2083 of 2021

Pradipkumar s/o Premsukhdas Rathi,
Age : 64 years, Occupation-Business,
R/o Anikat Road, Khamgaon,
Tq. Khamgaon, District Buldhana.

..... **PETITIONER**

...VERSUS...

1. State of Maharashtra,
Through Urban Development-Ministry of
Housing and Urban Affairs, Mantralaya, Mumbai-32.
Through its Secretary.
2. State of Maharashtra,
Through Collector,
Buldhana.
3. Municipal Council, Khamgaon
Through Chief Officer, Khamgaon,
Tq. Khamgaon, District Buldhana.
4. Manoj Jagdish Modi,
Age : 48 years, Occ. Business.
R/o Samta Colony, Bagat Singh Chowk,
Main Road, Khamgaon, District Buldhana.
5. Munawwar Ali Saifuddin Babji,
Age 50- years, Occ. Business.
R/. Babji Villa, Talao Road,
Khamgaon, District Buldhana.
6. Ashfaq Hussain Saifuddin Babji,
Age 58 years, Occ. Business,
R/o. Babji Villa, Talao Road, Khamgaon,
District Buldhana.

7. Vijaykumar Ratanlalji Rathi,
Age 57 years, Occ. Business,
R/o Swami Samartha Complex, Nandura Road,
Khamgaon District Buldhana.
8. Satish Ratanlalji Rathi,
Age 48 years, Occ. Business,
R/o Swami Samartha Complex, Nandura Road,
Khamgaon District Buldhana.
9. Ashok Shamrao Sonone,
Age 58 years Occ. Business,
R/o Shankar Nagar, Khamgaon, District Buldhana.
10. Gajanan Ishwar Bharate,
R/o.Yashodhara Nagar, Khamgaon,
District Buldhana.
11. Vilas Kashiram Ghyar
R/o.Yashodhara Nagar, Khamgaon,
District Buldhana.
12. Sunita Santosh Chincholkar,
R/o.Civil Lines, Kela Nagar, Khamgaon,
District Buldhana.
13. Kirtikumar Chapasi Sangani,
R/o.Vasantwadi, Khamgaon,
District Buldhana.
14. Prafull Krantilal Budhadev,
R/o. Near Central Bank, Khamgaon,
Buldhana.
15. Rahul Harikisan Dangra,
R/o. Near Madan Mohan Mandir, Sarafa, Khamgaon,
District Buldhana.
16. Aashish Vinayakrao Misale,
R/o. G.S.College, Krushi Nagar, Wadi,
Khamgaon,District Buldhana.
17. Prasad Kailash Agrawal,
R/o. Balaji Plot, Khamgaon,
District Buldhana.

Amended as per
order dated
12.10.2022.
Sd/-
Counsel for
Petitioner.
(R.Nos. 10 to 18
added as per Courts
order
dated.12.10.2022)

18. Monika Prasad Agrawal,
R/o. Balaji Plot, Khamgaon,
District Buldhana.

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RESPONDENTS

Shri Anand Jaiswal, Senior Advocate with Shri S.S.Sharma, Advocate for petitioner.

Shri A.S.Fulzele, Additional Government Pleader for respondent nos. 1 & 2.

Shri D.M.Kale, Advocate for respondent no.3.

Shri A.C.Dharmadhikari, Advocate for respondent nos. 4 to 9.

Shri M.G.Bhangde, Senior Advocate with Shri Dhruv Sharma, Advocate for respondent nos. 10 to 18.

Shri H.R.Gadhia, Advocate for intervenor.

CORAM :- A.S.CHANDURKAR AND MRS. VRUSHALI V. JOSHI, JJ.

DATE :- 24.01.2023

JUDGMENT (AS PER A.S.CHANDURKAR, J.)

By this writ petition filed under Article 226 of the Constitution of India the petitioner seeks a declaration that the permission granted to the respondent nos. 4 to 9 by Municipal Council, Khamgaon for construction of a commercial complex is contrary to the Development Control Rules and hence such permission be revoked and consequentially the offending construction be directed to be demolished. In view of the notice for final disposal, the learned counsel for the parties have been heard by issuing Rule and making it returnable forth.

2. The facts relevant for considering the prayers as made in the writ petition are that it is the case of the petitioner that Plot No.3/3 which is situated at Sheet No.25 admeasuring 1206.10 square meters at Khamgaon, District Buldhana

was owned and possessed by one Devkuwarbai Ghanshyamdas Rathi. On 11.07.1990 she sold eastern portion of the said land to the extent of 1097.42 square meters to one Suryakant Selarka by a registered sale deed. Remaining land admeasuring 108.68 square meters remained in her possession as owner. On 13.07.2012 Suryakant Selarka sold 1097.42 square meters to the respondent nos. 4 to 9 herein. After demolishing the existing structure standing on the said land, the respondent nos. 4 to 9 intended to construct a shopping complex thereon. The petitioner having inherited the remaining land admeasuring 108.68 square meters sought information with regard to the construction proposed on the land purchased by the respondent nos. 4 to 9. Such information as sought on 11.08.2020 was denied on 19.08.2020. It was thereafter sought on 14.10.2020 but the same was also denied on 10.11.2020. The petitioner got knowledge that on 24.12.2020 a completion certificate came to be issued by an Architect certifying the construction having been completed on 01.01.2020. It is the case of the petitioner that since the said construction is not in conformity with the Standardized Development Control and Promotion Regulations (for short, Development Control Regulations) and especially Clause 6.2.6.1 thereof, the same has given a cause of action to the petitioner to approach this Court. The petitioner learnt that on 18.12.2018 the Municipal Council had issued a construction commencement certificate and thereafter on 24.12.2020 completion of the structure came to be certified. The respondent nos. 10 to 18 being the persons who have purchased portion of the aforesaid property, they have been impleaded as the respondents herein.

3. Shri Anand Jaiswal, learned Senior Advocate for the petitioner submitted that the construction undertaken by the respondent nos. 4 to 9 was in complete contravention of various provisions of the Development Control Regulations. Inviting attention to the provisions of Clause 6.2.6.1, 6.2.12, 6.2.2 and 12.6 thereof it was submitted that the width of the road adjoining the plot was relevant in the context of the construction undertaken. Its exact width was not disclosed by the Municipal Council as per its communication dated 18.12.2020. In view of the measurements taken by the petitioner, it could not be said that the construction undertaken was in accordance with the Development Control Regulations. The height of the said construction being less than 15 meters there was violation of Clause 12.6 thereof. A site plan had not been brought on record even in the present proceedings though copy of the sanctioned plan had been filed. The Municipal Council in its reply did not indicate the width of the road despite specific averments made in the writ petition. To substantiate its contention that such unauthorized construction ought not to be permitted to stand, the learned Senior Advocate for the petitioner sought to rely upon the decisions in *Dipak Kumar Mukherjee vs. Kolkata Municipal Corporation and others* [2012 (8) Mh.L.J. 107] and *Supertech Limited vs. Emerald Court Owner Resident Welfare Association and others* [(2021) 10 SCC 1].

Referring to the stand taken by the Municipal Council and the other respondents in their reply that there was a remedy of preferring an appeal under

Section 47 of the Maharashtra Regional and Town Planning Act, 1966 (for short, the said Act) that could be invoked by the petitioner for challenging building permit, it was submitted that such remedy could be invoked only by a person who was seeking such permission in view of use of the words “any applicant”. Since the petitioner was not an applicant in the matter of grant of permission, the remedy of filing an appeal was not available. The civil suit filed by the petitioner pertained to the alleged encroachment committed by the respondent nos. 4 to 9 and the same did not preclude the petitioner from filing the present proceedings. Further absence of site plan as well as failure to deny the measurements indicated by the petitioner substantiated the stand of the petitioner. This was also clear from the fact that till date the Municipal Council had not issued an occupancy certificate for the said building. The Municipal Council had been favouring the respondent nos. 4 to 9 in the said matter. It was thus submitted that the prayers made in the writ petition deserve to be granted.

4. Shri D. M. Kale, learned Advocate for the respondent no.3-Municipal Council opposed the aforesaid submissions. He submitted that till date the petitioner had not approached the Municipal Council raising a grievance against the construction in question. The petitioner had approached this Court directly without approaching the Municipal Council. If such grievance would have been raised by the petitioner, the same could have been considered by the Municipal Council. Referring to the reply filed on behalf of the Municipal Council, it was

denied that there was any violation of Clause 12.6 of the Development Control Regulations. The said clause was applicable only to a special building. Since the construction undertaken by the respondent nos. 4 to 9 was of a building with height of 14 meters, it was not a special building. It was denied that the Municipal Council had in any manner favoured the respondent nos. 4 to 9.

5. Shri M.G. Bhangde, learned Senior Advocate for the respondent nos. 10 to 18 opposed the writ petition. It was submitted at the outset that there was considerable delay and absence of proper diligence on the part of the petitioner in filing the writ petition. Building permission was issued by the Municipal Council on 18.12.2018 and the same was valid for a period of one year as per Clause 26 thereof. The construction in question was completed on 01.01.2020 as per the completion certificate. The writ petition was filed only on 18.02.2021 which was beyond the period of two years from grant of building permission. The petitioner had thus acquiesced in the construction and failed to take prompt steps when the construction was going on. It was further submitted that on 28.09.2020 Special Civil Suit No. 53/2020 came to be filed by the petitioner which indicated that he was aware of the construction in question as per pleadings in paragraph 8 of the plaint. In the said civil suit the respondent nos. 4 to 9 were the defendant nos. 1 to 6. Therein, an application for temporary injunction had been moved and the same was dismissed by the trial Court. In Miscellaneous Civil Application preferred by the plaintiff-petitioner before the appellate Court there was a direction to measure

the land in question so as to facilitate proper adjudication of the civil suit. This direction was challenged by the petitioner in Writ Petition No. 4137 of 2020 and the said writ petition was dismissed on 06.01.2021. The actual measurement of the land in question was undertaken on 05.01.2021 as per the report of the Deputy Superintendent of Land Records. It was only thereafter that the present writ petition was filed and this indicated that the same was with a view to get over the aforesaid. The petitioner had failed to point out infringement of any legal right as he had failed to make any request to the Municipal Council seeking redressal of his grievance and there was considerable delay in approaching the Court. In absence of any impeachable material to indicate that the width of road was 12 meters, no relief could be granted to the petitioner. It was then submitted that on 02.12.2020 the State Government had brought into force Unified Development Control and Promotion Regulations for State of Maharashtra. Since these Regulations were in force when the writ petition was filed, the validity of the construction would be required to be considered in the light of the new Regulations. In any event, it was submitted that the construction undertaken by the respondent nos. 4 to 9 was legal and proper and the respondent nos. 10 to 18 having purchased portion thereof, they could not be prejudiced by the act of the petitioner of belatedly challenging the construction. In support of said submissions, the learned Senior Advocate placed reliance on the decisions in *Sheshrao Jangluji Bagde vs. Bhaiyya s/o Govindrao Karale and others* [1991 Supp(1) SCC 367], *Mathew M. Thomas and others Vs. Commissioner of Income Tax* [(1999) 2 SCC 543], *Beg Raj Singh Vs.*

State of U.P. and others [(2003) 1 SCC 726], Ram Kumar Barnwal vs. Ram Lakhan (dead) [(2007) 5 SCC 660], Sawaran Lata and others Vs. State of Haryana and others [(2010) 4 SCC 532], R.S.Madireddy and another vs. Union of India and others [2022 SCC Online Bom 2657], Writ Petition No.481 of 1998 (Vithaldas Hirji Thakkar (since deleted) Bhalchandra Sitaram Fadnaik and anr. vs. Rao S. Wankhede(since deleted) Rajesh Rao S. Wankhade and others) with connected writ petition decided on 05.09.2017 and Writ Petition No. 9040 of 2021(Prasad P.Tapkir and anr. vs. The Asst. Director of Town Planning, Pune and others) decided on 17.11.2022 at the Principal Seat.

Shri A.C.Dharmadhikari, learned Advocate appearing for the respondent nos. 4 to 9 adopted the submissions made on behalf of the respondent nos. 10 to 18.

6. After hearing the learned counsel for the parties and after giving due consideration to the rival submissions, we are of the considered view that the petitioner is not entitled to the reliefs sought in the writ petition for the following reasons:

(a) The petitioner seeks a direction to be issued to the State of Maharashtra through the Collector, Buldhana as well as the Municipal Council, Khamgaon through its Chief Officer to perform its duty by demolishing the construction of the commercial complex undertaken by the respondent nos. 4 to 9 on the ground that it is contrary to the provisions of the said Act as well as the

Development Control Regulations. In effect the petitioner seeks a writ of mandamus to be issued to the said respondents to compel them to perform their statutory duty. It is however seen that it is the specific stand of the Municipal Council in paragraph 5 of the additional submissions filed on its behalf vide affidavit dated 08.11.2022 that till the said date neither the petitioner nor any other person had lodged any complaint about alleged illegal construction made by the respondent nos. 4 to 9. Since no complaint was received by the Municipal Council, it has not made any enquiry in that regard. For seeking a writ of mandamus so as to compel the respondent nos. 1 to 3 to carry out their statutory duty, it would be necessary for the petitioner to first approach the said respondents with a complaint/request to enquire into the matter and consider the grievance with regard to alleged illegal/excess construction undertaken by the respondent nos. 4 to 9. Since such grievance has not been raised by the petitioner before the respondent nos. 1 to 3, no writ of mandamus can be issued to them as it has not been shown that the said respondents have failed to carry out their statutory obligations or any legal duty cast upon them. No such representation or complaint made by the petitioner in that regard has been pointed out.

(b) The building permit has been issued by the Municipal Council on 18.12.2018 through its Chief Officer. Based on this building permit, the respondent nos. 4 to 9 have undertaken the construction work and the building in question is said to be completed on 01.01.2020 as certified by their Architect. The Municipal Council has certified the aforesaid on 24.12.2020. Prior thereto, on 28.09.2020

the petitioner had filed Special Civil Suit No.53 of 2020 in which the respondent nos. 4 to 9 herein have arrayed as defendant nos. 1 to 6. In paragraph 8 of the plaint, it has been averred as under:

“8. It is learnt that the defendants have now started construction of commercial complex/mall viz. Mohan Market since about one and half years. It also appears that the construction of commercial market/mall is either without permission of the competent authority or at least much in excess of the so called permission if any. Moreover the structure which is now seen on the property is and cannot be in accordance with the permission if any and it is in much excess of FSI Rules and Regulations. The structure appears to be more than 4 storied besides underground basement. It is submitted that the entire construction interior and exterior is illegal and in contravention of Municipal Building Bylaws and Rules and Regulations under MRTTP Act. In fact, the said entire structure is liable to be demolished or dismantled.”

The aforesaid pleadings indicate that the plaintiff-petitioner was aware that since about one and half years the construction of the commercial complex had been undertaken by the respondent nos.4 to 9. The plaint is dated 28.09.2020. The plaintiff has sought demolition of the suit property described in paragraph 1(c) of the plaint. The suit property is a building standing on Plot No.3/3 admeasuring 1206.10 square meters which is also the subject matter of the present writ petition. It can thus be seen from the said averments that the petitioner was aware of the construction undertaken by the respondent nos. 4 to 9 but has filed present writ petition only on 18.02.2021. There is no explanation by the petitioner as to why immediate steps were not taken to seek the reliefs sought in the writ petition. The observations in *Sawarn Lata and others* (supra) support the stand of the private

respondents.

(c) Another relevant aspect that has material bearing on the conduct of the petitioner is that the appellate Court on 22.12.2020 passed an order below Exhibit 12 in MCA No.14/2020 under the provisions of Order XXVI Rule 9 of the Code of Civil Procedure, 1908 by which a Commissioner came to be appointed for measuring the suit property. The petitioner was aggrieved by the said order and challenged the same in Writ Petition No. 4137 of 2020. The learned Single Judge refused to interfere with the said order and dismissed the said writ petition on 06.01.2021. It is only thereafter that the present writ petition has been filed. In the meanwhile, measurement of the property was carried out by the Competent Authority on 05.01.2021. It would thus be clear from the aforesaid that the plaintiff has raised a grievance with regard to the alleged illegal construction undertaken by the respondent nos. 4 to 9 before the Civil Court and the matter is being pursued therein. Unless any declaration is obtained by the petitioner, the reliefs sought in the present writ petition cannot be granted. Though it was urged by the learned Senior Advocate for the petitioner that the petitioner had sought removal of encroachment at the instance of the respondent nos. 4 to 9 in the said civil suit and not demolition of the property, we find from the prayers made in the plaint that the petitioner has sought demolition of the structure in question as per prayer clauses (B) and (C) therein. It is true that the Municipal Council is not a party in the said civil suit but as stated above in absence of any complaint made to it by the petitioner, its absence in the civil suit would not come to the aid of the

petitioner to urge that the present writ petition can be maintained for seeking the reliefs sought in it. In this factual backdrop, the decisions relied upon by the learned Senior Advocate for the petitioner cannot come to his aid.

7. For aforesaid reasons, we are not inclined to entertain the writ petition in exercise of extra ordinary jurisdiction under Article 226 of the Constitution of India. We have therefore not gone into the contention raised by the learned Senior Advocate for the respondent nos. 10 to 18 that the legality of the said construction needs to be adjudicated in the light of the Development Control Regulations that have come into force from 02.12.2020 and not the earlier Development Control Regulations that were existing when the building permit was granted on 18.12.2018. That aspect is kept open for being raised in appropriate proceedings if the occasion arises.

8. By observing that the petitioner is free to seek enforcement of his legal right in accordance with law and in the light of the observations made hereinabove, the writ petition stands dismissed leaving the parties to bear their own costs.

Pending civil application also stands disposed of.

(MRS. VRUSHALI V. JOSHI, J.)

(A.S.CHANDURKAR, J.)