

Ashwini

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 4660 OF 2014

Suhas Chandrakant Mhatre ...Petitioner

Versus

The State of Maharashtra, through Department ...Respondents
of Revenue and Forest & Ors

Mr Shailendra S Kanetkar, *for the Petitioner.*

Mrs RM Shinde, AGP, *for Respondents Nos 1 & 5-State.*

Ms Swati Sagvekar, *for Respondents Nos 2 to 4-VVMC.*

Mr Siddhesh Pilankar, *i/b Uday Warunjikar, for Respondents Nos 6 to 11.*

**CORAM G.S. Patel &
 Kamal Khata, JJ.**

DATED: 20th March 2024

PC:-

ASHWINI
H
GAJAKOSH

Digitally signed by
ASHWINI H
GAJAKOSH
Date: 2024.03.21
12:41:46 +0530

1. The Petitioner represented by Mr Kanetkar owns an immovable property at Survey No 28A Mouje Malonde, Vasai District Thane. Mr Kanetkar says the land is still agricultural. The case of the Petitioner is that there is an unauthorised construction. Several persons were named in paragraph 2A of the Petition but were not joined as Respondents although the prayer was for implementation by the Vasai Virar City Municipal Corporation ("VVCMC") to take action against these structures. It turns out that the VVCMC has issued a notice under Section 53(1) of the

Maharashtra Regional and Town Planning Act 1966 (“**MRTPA Act**”). The occupants/tenants are now joined as Respondents Nos 6 to 11. They are represented by Mr Pilankar. He states that they had filed Civil Suit No 112 of 2019 before the 2nd Joint Civil Judge Junior Division Vasai challenging this notice and have obtained an interim order.

2. The VVCMC seems to have done absolutely nothing to have that order vacated. It does not seem to have taken the point of lack of jurisdiction or, more accurately a statutory ouster of jurisdiction of Civil Courts. Even worse, Mr Kanetkar’s client has not been joined to that Civil Suit.

3. The difficulty in granting an order to the Petitioner here today is that it would amount effectively to a dismissal of the Suit filed by the occupants.

4. It is not possible for us to exercise appellate powers since we are hearing a Writ Petition under Article 226 of the Constitution of India.

5. However, in exercise of our discretion we will direct the Civil Judge to order an immediate amendment of the plaint in Suit No 112 of 2019 to add the present Petitioner, Suhas Chandrakant Mhatre through his heirs Chandrakant Narayan Mhatre and Vikram Chandrakant Mhatre as defendants to that Suit. It is open to the present Petitioner and to the Municipal Corporation to make an

appropriate application to that Court in regard to the interim order and the Section 53 notices.

6. Before parting with this matter, we must point out that this Court has repeatedly frowned upon Municipal Corporations simply accepting such orders and then saying that there is an injunction and nothing can be done. Mr Kanetkar correctly points out an order of 7th June 2019 in Writ Petition No 2061 of 2018 (*Mohammad Siddaqui Haji Mohammad Momin v Bhiwandi Nijampur City Municipal Corporation & Ors*). One of us, (GS Patel J) was a Member of the Bench that passed that order. It reads as follows:

“1. The Commissioner of Bhiwandi Nijampur City Municipal Corporation should remain in this Court on the next date. The reason for this is simple according to us.

2. A detailed order was passed by the Division Bench of this Court in its final Judgment and Order dated 4th December 2018. Today, the matter is listed for compliance and directions therein.

3. Mr Bubna submits that there is an Affidavit filed on 20th April 2019 which may be treated as an Affidavit of Compliance.

4. The Affidavit is filed by one Sunil Bhoir, designated officer of Ward Committee No.2 of this Municipal Corporation. He says in the Affidavit that the construction upon Plot No. 7, Survey No. 98/20 being House No. 2431 named Sahjeeda Apartment is the subject matter of this Writ Petition whereas the other concerns Plot No. 6 of Survey No. 98/20.

5. Though they are projected to be distinct constructions, the Deponent says these are same. These are two wings of Sahjeeda Apartment building. The regularisation application submitted by Respondent No. 7 has been decided by the Municipal Corporation on 29th August 2018 and the request had been rejected. The decision was communicated to Respondent No. 7. An undertaking was given by Respondent No. 7 to this Court pursuant to which the building was to be vacated to enable the Municipal Corporation to demolish the offending structure. That having not been done, the demolition programme was fixed on 9th January 2019.

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.

8. The Civil Court which is seized of Regular Civil Suit No. 716 of 2018 and Regular Civil Suit No. 717 of 2018 should now list them peremptorily. They shall be listed on 3rd July 2019, high on board on that day. The applications for interim injunction shall be taken up on a day-to-day basis by that Civil Court. Otherwise we will proceed against the Presiding Officer concerned, as also the supporting staff of that Civil Court. Even if no Affidavits are filed, the Municipal Corporation should be ready with the official records and public documents and its Advocate should be thoroughly prepare to argue the cases. If he seeks an adjournment, we will haul up all the Municipal officials concerned instructing him including the Municipal Commissioner responsible for frustrating and defeating the orders of this Court. We are shocked and surprised that the Civil Court had the audacity to pass an ex parte ad-interim order in the teeth of a Division Bench Judgment of this Court which ruled upon the legality and validity of the construction activity. That Respondent No.7 requested the Municipal Corporation to postpone the demolition so as to enable him to make a request for regularising the construction or development activity presupposes that this construction and development is without any permission and approval. Still this Civil Court passes an order of this nature.

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*¹ 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. In the said case, the Supreme Court had observed as follows:

“TEMPORARY INJUNCTION

30. It need not be said that primary object of filing a suit challenging the validity of the order of demolition is to restrain such demolition with the intervention of the court. In such a suit the plaintiff is more interested in getting an order of interim injunction. **It has been pointed out repeatedly that a party is not entitled to an order of injunction as a matter of right or course. Grant of injunction is within the discretion of the court and such discretion is to be exercised in favour of the plaintiff only if it is proved to the satisfaction of the court that unless the defendant is restrained by an order of injunction, an irreparable loss or damage will be caused to the plaintiff during the pendency of the suit.** The purpose of temporary injunction is, thus, to maintain the status quo. The court grants such relief according to the legal principles — *ex debito*

1

(1993) 3 SCC 161.

justitiae. **Before any such order is passed the court must be satisfied that a strong prima facie case has been made out by the plaintiff including on the question of maintainability of the suit and the balance of convenience is in his favour and refusal of injunction would cause irreparable injury to him.**

31. Under the changed circumstance with so many cases pending in courts, once an interim order of injunction is passed, in many cases, such interim orders continue for months; if not for years. At final hearing while vacating such interim orders of injunction in many cases, it has been discovered that while protecting the plaintiffs from suffering the alleged injury, more serious injury has been caused to the defendants due to continuance of interim orders of injunction without final hearing. It is a matter of common knowledge that on many occasions even public interest also suffers in view of such interim orders of injunction, because persons in whose favour such orders are passed are interested in perpetuating the contraventions made by them by delaying the final disposal of such applications. The court should be always willing to extend its hand to protect a citizen who is being wronged or is being deprived of a property without any authority in law or without following the procedure which are fundamental and vital in nature. **But at the**

same time the judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches the court.

32. Power to grant injunction is an extraordinary power vested in the court to be exercised taking into consideration the facts and circumstances of a particular case. **The courts have to be more cautious when the said power is being exercised without notice or hearing the party who is to be affected by the order so passed. That is why Rule 3 of Order 39 of the Code requires that in all cases the court shall, before grant of an injunction, direct notice of the application to be given to the opposite-party, except where it appears that object of granting injunction itself would be defeated by delay.** By the Civil Procedure Code (Amendment) Act, 1976, a proviso has been added to the said rule saying that “where it is proposed to grant an injunction without giving notice of the application to the opposite-party, the court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay...”.

33. **It has come to our notice that in spite of the aforesaid statutory requirement, the courts have been passing orders of injunction before issuance of notices or hearing the parties against whom such**

orders are to operate without recording the reasons for passing such orders. It is said that if the reasons for grant of injunction are mentioned, a grievance can be made by the other side that court has prejudged the issues involved in the suit. According to us, this is a misconception about the nature and the scope of interim orders. It need not be pointed out that any opinion expressed in connection with an interlocutory application has no bearing and shall not affect any party, at the stage of the final adjudication. Apart from that now in view of the proviso to Rule 3 aforesaid, there is no scope for any argument. When the statute itself requires reasons to be recorded, the court cannot ignore that requirement by saying that if reasons are recorded, it may amount to expressing an opinion in favour of the plaintiff before hearing the defendant.

34

35. As such whenever a court considers it necessary in the facts and circumstances of a particular case to pass an order of injunction without notice to other side, it must record the reasons for doing so and should take into consideration, while passing an order of injunction, all relevant factors, including as to how the object of granting injunction itself shall be defeated if an ex parte order is not passed. **But any such ex parte order should**

be in force up to a particular date before which the plaintiff should be required to serve the notice on the defendant concerned. In the Supreme Court Practice 1993, Vol. 1, at page 514, reference has been made to the views of the English Courts saying:

“Ex parte injunctions are for cases of real urgency where there has been a true impossibility of giving notice of motion....

An ex parte injunction should generally be until a certain day, usually the next motion day....”

(Emphasis supplied)

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. In all these circumstances we will request the Civil Court to adhere to our schedule.

11. We are disturbed by the fact that the officials of the Municipal Corporation never bothered to apply for vacating this order. Such orders by the very nature and by the clear wording of Order 39 Rule 3 could not be operative beyond the period of 30 days unless there are specific reasons

assigned for extending the same as the foregoing extract also lays down.

12. We are also disturbed to note that the so-called compliance affidavit is filed by none other than Sunil Bhoir, the very person whose conduct a previous Division Bench of this Court censured in strong terms in paragraphs 4 to 7 of the order dated 18th June 2018. It is no answer at all to say that this Bhoir is the designated officer concerned. The Municipal Corporation cannot be so utterly unmindful of orders of this Court nor can it assume that our orders censuring its officials are inconsequential or irrelevant. The previous Division Bench found Bhoir to be untruthful and said in terms that his statements could not be believed. In these circumstances, we fail to appreciate how the Municipal Corporation could ever have thought it to be appropriate to have a compliance affidavit made by the very officer, Sunil Bhoir, whose conduct was so thoroughly deprecated by this Court.

13. We post this matter for complete compliance on 10th July 2019 on which date the Municipal Commissioner and the said Sunil Bhoir will both remain personally present in Court.”

7. The VVCMC will bear in mind these observations. The Writ Petition is disposed of in these terms. In the facts and circumstances of the case, there will be no order as to costs.

8. We clarify that the Suit and any application therein will proceed on merits. We have not examined the rival contentions in

regard to the Section 53 notice or whether or not the constructions are authorised or unauthorised.

(Kamal Khata, J)

(G. S. Patel, J)