

Vina Khapde
(P.S.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.9936 OF 2024

Sou. Shital Balaram Khedekar

.. Petitioner

Versus

Khed Municipal Council and anr.

.. Respondents

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- Mr. Drupad S. Patil a/w Mr. Namitkumar S. Pansare for the Petitioner.
- Mr. Sumit S. Kothari for the Respondent No.1.
- Mr. J. P. Patil, AGP for the Respondent No.2 – State.

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CORAM : MILIND N. JADHAV, J.

DATE : JULY 26, 2024

P.C.:

1. Heard Mr. Patil and Mr. Kothari, learned Advocates for the respective parties.

2. The present Writ Petition impugns twin Exhibit's-5 orders. Order passed by the learned Trial Court is appended at page no.84 and order passed by the learned District Court is appended at page no.119 of the Writ Petition. Petitioner is the Plaintiff before the Trial Court. Perusal of these two orders show that they are exhaustive and have been passed in great detail.

3. Mr. Patil, learned Advocate appearing for plaintiff would submit that plaintiff constructed a ground plus two storey structure on a plot of land belonging to him. He had approached the respondent no.1 – Khed Municipal Council for seeking building permission which

was not given. He constructed the house and made an Application to the Council under the provisions of the Maharashtra Regional and Town Planning Act, 1966 (for short “**the MRTP Act**”) seeking regularisation of the construction carried out by him.

4. Mr. Kothari, learned Advocate appearing for respondent no.1 – Council has strongly refuted the contention of plaintiff. He would submit that the refusal or decline of permission has been considered by both the Courts below while passing the twin Exhibit "5" orders after due consideration and therefore, this Court may not interfere with the findings of facts which have been returned by the Courts.

5. At the core of the lis between the parties is the Application filed by plaintiff for seeking building permission from respondent no.1- Council. That Application is dated 13 May 2020 which is appended at page no.22-A of the Petition. To that Application, letter dated 14 May 2020 is appended at page no.23 of the Petition, perusal of which shows that the Chief Officer of the Council has written to the Sub-Divisional Officer (SDO), *interalia*, informing him about the building permission sought by the Plaintiff and further opining that such building permission can be given and has recommended that such building permission be given or any other decision be taken by the SDO. On that Application / letter submitted by the Council, the SDO has appended his remark in handwriting which, *interalia*, states that

such permission can be given by the Council only, to whom the application is made. Both learned Advocates have referred to this letter and addressed submissions thereon. According to plaintiff by virtue of this letter, the Council has opined that permission to construct upto plinth should be given or any other permission may be given, whereas Mr. Kothari would argue to the contrary and would submit that the said letter is no indicator of any permission having been given whatsoever.

6. Mr. Kothari has persuaded me to consider the conduct of the plaintiff in the present case and would submit that in the first instance plaintiff filed online Application dated 13 May 2020, but since the said Application was *sans* the requisite documents which were required to be uploaded on the website of the Council, the plaintiff was informed by letter dated 14 May 2020 by the Engineer of the Council to upload the requisite documents. He would submit that between May 2020 and December 2020, plaintiff commenced and completed construction and only thereafter on 9 December 2020, another Application was filed with the Council seeking permission for renovation through a different Architect on behalf of plaintiff. One of the primary grievance vehemently argued by Mr. Kothari is that plaintiff is the owner of land admeasuring 51 sq. mtr according to the sale deed appended at page no.169 of Writ Petition, but he has constructed a structure having a total area admeasuring 150 sq. mtrs. on that land, thus violating the

available FSI ceiling of 1.5% for construction. He would submit that compliance of the inadequacies in letter dated 14 May 2020 addressed by the Council was thereafter done by plaintiff on 22 January 2021 and this was only after a statutory notice under Section 53 of the MRTTP Act was issued by the Council to him.

7. Mr. Kothari would draw my attention to letter at page no.177 of the Writ Petition wherein plaintiff's Application and proposal stands rejected by the Council. He would submit that thereafter two specific events occurred on 27 January 2021, on which date Application was made on behalf of plaintiff intending to have the said construction regularised and on 29 January 2021 on which date plaintiff's Architect sought refund of the development charges. Nothing much turns on these and the Council replied to the letter written by the Architect and informed that the development charges can only be refunded in accordance with law.

8. In the aforesaid background, plaintiff apprehending coercive action, filed the suit in the Trial Court. On perusal of the said plaint, it is seen that cause of action on the basis of which reliefs are sought by plaintiff is on the basis of deemed permission, when his Application was not responded to by the planning authority within 60 days and on another ground i.e. situation and location of his property was in Gaothan area and therefore under the provisions of certain extant

resolutions of the State Government, he would be entitled to carry out construction on the suit property. Exhibit-5 Application of Plaintiff stands rejected by both the Courts below. Substantial efforts seem to have been put in by the Courts below while determining both injunction Applications. One of the reason to note this fact is because this Court has been handling the CPC roster from January 2022 onwards, but has never come across the Trial Court and the District Court putting in such massive effort in determining an injunction Application by rendering a detailed judgment in such a cause of action.

9. Be that as it may, one issue which strikes at the root of the matter is undoubtedly the maintainability of such suit proceedings. On being asked, Mr. Kothari would candidly inform the Court that the Council has not filed any Application under Order 7 Rule 11 of CPC to challenge maintainability of the suit proceedings in view of the cause of action in view of the clear bar under Section 149 of the MRTP Act. The principal submission advanced by Mr. Kothari is that construction being beyond the permissible limit, it is illegal and therefore rejection of injunction is correct as it would set a wrong precedent rather precedent to be adopted and followed by similarly placed delinquent parties who would replicate the plaintiff's action. In support of his submission, Mr.Kothari has placed before me a decision of the Division Bench of this Court in *Court On its Own Motion Vs. State of*

Maharashtra and ors.¹ and drawn my attention to paragraph no.17 therein, *interalia*, vehemently contending that in that decision the Division Bench of this Court has held that something (pertaining to construction) which is impermissible in law cannot be regularised and in the present case according to the Council a substantial portion of the construction which has been raised by plaintiff is unauthorized rather impermissible in law and therefore this Court should not protect the plaintiff.

10. With the able assistance of both the learned Advocates appearing for the respective parties, I have perused the twin impugned Exhibit's 5 decisions. What is seen is that admittedly plaintiff is the owner of an area admeasuring 51 sq. mtr. as per the Sale deed which has been placed on record by the Council and in that view of the matter plaintiff would be entitled to carry out the construction on his plot. The question is whether he has carried out construction without applying for permission or whether the permission is rightly refused and when? Here in this case, both parties have vehemently relied upon the recommendation of the plaintiff's Application dated 14 May 2020 seeking permission for construction by the Council, which is appended at page no.25 of the Petition. It is seen that the Council has infact recommended that plaintiff be granted permission to construct upto plinth level as it is deemed fit by the Council and in that view of

¹ 2012 (1) 233 Mh.L.J. (PIL No.34 of 2010 and WP No.125 of 2011 (Nagpur Bench of this Court))

the matter the Council recommended plaintiff's case for building permission to the SDO and/or for any other decision thereon. I agree that the submission of Mr. Kothari that the said letter does not accord permission to plaintiff and therefore it cannot be construed in any other manner. However this is one of the reason as to why the MRTTP Act has checks and balances in the Act itself, and the concept of deemed permission is meant for such cases only. It is trite that when the Application is made for permission it undoubtedly has to be in consonance with law, the Act and also the Rules. One of the reason for providing a window of 60 days is to enable the parties making the Application to satisfy and overcome any inadequacies in the Application that is made. In the present case, it seems that on the date when the Council has recommended Plaintiff's case to the SDO for permission, on the very same day i.e. 14 May 2020, the Council has put a remark online on the Application of plaintiff that the inadequacies regarding 4 relevant documents needed to be complied with by plaintiff. It is seen that a dwelling house has been constructed by plaintiff. I am informed by Mr. Patil that the family of the plaintiff that is her husband and children are residing in the dwelling house. At this interim stage in the above facts, without ascertaining the alleged excess construction carried out by the plaintiff, refusing injunction would lead to the Council demolishing the entire structure. It is also not the Council's case that Plaintiff is not entitled to put up a structure

on the land which belongs to her ownership. Hence, *prima facie*, on the basis of the available material on record, I am inclined to stay both the impugned orders as upholding them would deal to punitive action against the Plaintiff.

11. Needless to state that the Council shall be at absolute liberty to take out an appropriate Application that would be available to it in law as against plaintiff's suit proceedings in the trial Court. In view of the above observations and findings, the twin impugned Exhibit's 5 orders which are appended at page nos.84 and 199 stand stayed.

12. Liberty to the Council to seek expeditious disposal of the Writ Petition.

13. Since impugned orders have been stayed, the Council shall not take any coercive steps against Plaintiff for demolition of his structure without recourse to the Courts of law.

14. At the request of Mr.Kothari, I am also inclined to pass a further direction. Mr. Kothari would submit that the Council would file an Application under Order 7 Rule 11 on the issue of jurisdiction of the trial Court to maintain the said Suit proceedings filed by plaintiff, and if that is done this Court be pleased to give direction for disposal of the said Application expeditiously. If any such remedy is available to the Council and if the Council files any such Application, the said Application shall be expressly dealt with by the learned trial Court as

expeditiously as possible and shall be disposed of after hearing both sides strictly in accordance with law within a period of three months from the date of filing of such Application.

15. In view of the above, the Writ Petition stands **Admitted**. Rule is issued. Issue notice of Rule. Mr. Kothari waives service of notice on behalf of respondent no.1 – Khed Council. Mr. J.P. Patil, AGP waives service of notice on behalf of respondent no.2 – State.

16. Petition to come up in the normal course.

17. Liberty to the Council to apply.

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[MILIND N. JADHAV, J.]

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