

MHAU130001572018



(ORDER BELOW EXH.-5 IN RCS No.60/2018)  
(Samina Begum Vs. A.M.C.)

The present application is filed by the plaintiffs under Order-XXXIX Rule-1 and 2 read with section 94 and 151 of the Civil Procedure Code for seeking temporary injunction restraining defendant corporation from taking action on the basis of impugned notice dated 16.08.2018 issued under section 53 of the MRTP Act in respect of house admg. 3000 sq. ft. situated at Survey No. 15, Harsul, Aurangabad (hereinafter referred as suit property) on the basis of impugned notice dated 11.10.2017 till disposal of the suit.

2. Factual matrix giving rise to the plaintiff's application in brief as under :-

According to the plaintiffs, the agricultural land Survey No.15 having total area 27 Acres 16 Gunthas owned by one Babamiya Rahimkhan & after death of said Babamiya his five sons had inherited said land. Out of 5 brothers four brothers shared admg. 5 Acres 22 Gunthas land each and one brother by name Habibkhan shared 5 Acre 21 gunthas land out of entire land of Survey No. 15 in amicable partition between them. It is further contended that the suit house constructed by Bismillakhan on his portion before 1970 for residence of his family. The name of these persons never recorded in the ownership column but their shares are recorded in cultivation column of 7/12 extract. The share of

Bismillakhan admg. 5 Acre 22 Gunthas inherited after his death by his two sons and one daughter by name Muradkhan - the plaintiff No.2, Rahimkhan and Banobee. These two brothers are cultivating the land and taking agricultural crop every year.

3. It is contended by the plaintiffs that the suit house initially fall in the share of plaintiff No.2 Muradkhan. The village Harsul included within limits of Municipal Corporation, Aurangabad in 1982 when it came into existence. The plaintiff No.2 is the husband of plaintiff No.1 and out of love and affection gifted the suit house by way of Hiba dated 01.09.2017 executed a document before a Notary public. The plaintiff No.1 accepted the said Hiba and continued her possession & become owner of suit house. The plaintiff No.1 paying the property tax and her entry is recorded in the tax register. There is family dispute of plaintiff No.2 with purchaser of land Survey No.33. It is further contended that on the influence of one Gaffar Kadri the Municipal Corporation issued notice to plaintiff No.2 and his brother Rahim Khan on 08.03.2011 to submit the ownership documents in respect of construction of house without making inquiry of the complaint. Accordingly Tahsilar, Aurangabad ordered to the concerned village Talathi to draw the spot panchnama in which suit house is noted. Similarly W.P. No. 2283/2006 in respect of cultivation is pending before the Hon'ble High Court Bench at Aurangabad. The suit house is farm house constructed prior to 1970 in land Survey No. 15 and it is constructed for residence and to look after the agricultural land. Therefore in view of section 41 of M.L.R. Code there is no need to obtain the permission for construction of

farm house. According to the plaintiff notice is vague and issued under pressure of Abdul Gaffar Kadri and construction of suit house is prior to the existence of Municipal Corporation and therefore impugned notice dated 16.08.2018 is illegal. However the plaintiff has apprehension of demolition of suit house, hence constrained to file the present application for seeking temporary injunction against the defendant in respect of the suit property & prayed for allowing it.

4. The defendant municipal corporation resisted the application by way of filing say to the application Exh.5 vide Exh.-13 inter-alia denying the contentions in the application. According to the defendant corporation, at the outset, the suit is not maintainable for want of statutory notice under section 487 of M.M.C. Act. The defendant further contended that plaintiffs have not come with clean hands and suppressed the true and material facts from the court and as such not entitled for any discretionary relief. It is further contended that the plaintiffs have made RCC construction to the extent of 3000 sq.ft. in suit land without the permission and approved sanction plan from the Municipal Corporation and construction cannot be said to be an agricultural house. It is further contended that since 1971 onwards all Survey numbers of lands are converted into Gut numbers, as such there exists no Survey numbers to any agricultural lands. So far as collecting tax by corporation is concerned, it does not mean that alleged construction became legal and it cannot be said to be a proof of ownership and legality of the construction. There is no scheme of gunthewari declared by the defendant corporation. The alleged application filed on record is

false, illegal and not admitted by the corporation. Similarly it is not at all under consideration for regularization of construction under gunthewari scheme.

5. According to the defendant corporation one Gaffar Kadri has brought to the notice of corporation that the illegal construction of plaintiff and therefore after the inspection of site and on conformation of illegal construction the defendant corporation has issued notice to the plaintiff on 08.03.2018, calling upon them to submit the documents within three days from the date of service of notice. The applicants failed to comply the said notice and did not produce any document to the corporation. The alleged panchnama appears to be a fair & created document. No such direction appears to have been given for panchnama. The defendant corporation is concerned it is only with illegal construction and if it is established in its inquiry, the corporation has every legal right to demolish the said illegal construction under the powers vested by MMC Act and M.L.R. Code. The constructions of plaintiffs house is new and made in RCC & therefore theory of old construction is put up only to avoid the action of demolition by the corporation and to extract the orders from the court to protect the said illegal construction. Therefore notice under section 53 of the MRTTP Act is legal and proper and application is devoid of merit. Hence prayed for it's rejection.

6. In view of rival contentions of the parties following points arise for my determination and I have recorded my findings thereon for the reasons stated below.

**POINTS**

**FINDINGS**

- |                                                                                             |                    |
|---------------------------------------------------------------------------------------------|--------------------|
| 1. Whether plaintiffs proves prima-facie case in their favour ?                             | In the negative.   |
| 2. Whether balance of convenience tilt in favour of plaintiffs ?                            | In the negative.   |
| 3. Whether plaintiffs will be put into irreparable loss in case of refusal of application ? | In the negative.   |
| 4. What order ?                                                                             | As per final order |

**REASONS**

**AS TO POINT NO. 1 TO 3 :-**

7. In order to substantiate contentions in the application, the plaintiffs placed on record the affidavit vide Exh.-6 and relied on documents vide list Exh.-4,17 & photographs vide Exh.15. Ld counsel of the defendant corporation also produced on record the documents vide Exh.19(1) to 19(5). Heard Ld counsels of both the parties and perused the case laws.

8. It is well settled principle of law that the temporary injunction can be granted when plaintiff has legally enforceable right and there is invasion on his right, but the plaintiff has to come before the Court with clean hands without suppressing material facts from the Court. The prima facie case means the party claiming temporary injunction must establish a probable case for obtaining a relief claimed in a suit on the basis of material placed before the court. In short, prima facie case means probability of success, the bonafide contention and requires further inquiry or investigation.

9. While arguing the case the Ld counsel of the plaintiffs put emphasis on this aspect that there is construction of the house admg. 3000 sq.ft. at Survey No.15 and plaintiffs are having longstanding possession as it is house for residence of family in an agricultural land, therefore section 41 of M.L.R. Code is applicable and there is no need to obtain any permission of construction of farm house in suit land. The Ld. counsel further argued that if any permission is required the same is within the jurisdiction of District Collector and Municipal Corporation has no authority to issue impugned notice under section 53 of the MRTP Act. While arguing the case the Ld. counsel brought to the notice of this court that in view of Hiba i.e. gift by plaintiff No.2 Muradkhan in favour of his wife i.e. plaintiff No.1 Saminabegum, she became the owner of suit property. However, notice issued in the name of plaintiff No.2 Muradkhan and his brother on 08.03.2018 which itself is illegal and not binding on plaintiffs. It is vehemently argued that in view of section 53(1) of MRTP Act it cannot be implemented within a period of one month and arbitrarily without following due procedure of law. While arguing the case the Ld. counsel of plaintiffs placed reliance on various document produced on record vide Exh. 4 & 17 and also the case laws vide Exh.21.

10. On carefully scrutinizing these documents it appears that the plaintiffs have produced on record the notices issued by the Municipal Corporation dated 16.08.2018, 08.03.2018, 29.05.2018, notice reply of plaintiffs dated 05.04.2018, tax receipt of the year 2018-19, memorandum of Hiba dated 01.09.2017, xerox copy of

application for gunthewari dated 21.09.2017, the 7/12 extract of land Gut No.15 since 1960 till 2017, xerox copy of spot panchnama dated 30.07.2001 and xerox copy of electricity bill dated 31.01.2014 vide Exh. 4(1) to 4(13). Besides this the plaintiff also produced on record the document vide Exh.17 viz xerox copy of order of Tahsildar dated 23.08.2001, xerox copy of judgment of S.D.O. dated 07.11.2002, xerox copy of judgment of Dy. Collector dated 16.08.2003, xerox of copy judgment of Additional Collector and xerox copy of W.P. 2283/2006 dated 04.02.2006 vide Exh.17 & the photographs of disputed constructed house vide Exh.15. Similarly the Ld. counsel of plaintiff placed reliance on following case laws.

- (1) Kishor s/o. Ramalu @ Rambhau Telang Vs. The Municipal Commissioner, Nagpur & Ors. Reported in 2016(1) ALL MR 175
- (2) Vandana Creations Pvt. Ltd. Vs. The Municipal Corporation of Greater Mumbai, reported in 2016(6) ALL M R 173.
- (3) Mohammad Munaf Mohammad Hanif Bedre & Ors. Vs. State of Maharashtra & Ors. reported in 2016(6) ALL MR 179.
- (4) Sher Ali and Ors. Vs. Saiyad Israr Ali and Ors. reported in AIR 2006 CHHATTISGARH 146.
- (5) G. Mujer Ahmed and another Vs. Mohammed Zafrulla reported in AIR 2000 Karnataka 318.
- (6) Motilal Mahadev Sharma and others Vs. Municipal Corporation of Greater Bombay reported in AIR 2005 BOMBAY 344
- (7) P.B. Gajendragadkar Vs. Hidayatullah reported in AIR 1965 Supreme Court 555.
- (8) Gondia Municipal Council Vs. Shakarlala Lodhulal Agrawal & others reported in 2005(12) LJSOFT 219.

11. In view of submission of Ld. counsel of plaintiffs and on going through the ratio of above said case laws it appears that those

are not applicable to the present set of fact as in the present case defendant brought to the notice of this court that it is not at all an old construction but it is totally new RCC construction in violation of provisions of M.M.C. Act & M.R.T.P. Act. Similarly it has pointed out that the construction of the height is six meter and its measurement is 15.0 mtr x 16.0 mtr. which itself reflect from panchnama dated 13.08.2018 produced on record vide Exh. 19(1).

12. It is vehemently argued by Ld counsel of defendant corporation that the plaintiffs have not come before the court with clean hands as plaintiffs have made RCC construction to the extent of 3000 sq.ft. illegally over the suit land without permission and approved sanction plan from Municipal Corporation and constructions cannot be said to be an agricultural field. Admittedly the defendant corporation issued notice to the plaintiff on 08.03.2018 and asked for the documents within 3 days from the date of service of notice but plaintiffs have neither complied the said notice nor produced those documents. During the argument the Ld. counsel of the defendant corporation brought to the notice of this court that there is inspection of officers of the defendant corporation who found that it is totally illegal construction in violation of provisions of MRTP Act and not at all old construction, but from the photographs produced on record by the plaintiff itself show that it is totally new RCC construction illegally made by the plaintiffs.

13. So far as section 41 of M.L.R. Code is concerned the Ld. counsel specifically argued that it is in respect of use to which whole of the land for the purpose of agriculture may put his land and the

plaintiff cannot take benefit of this provision as the disputed construction of house is totally illegal construction in respect of which the commissioner has vested a power for taking action under MMC & MRTP Act. The notice issued under section 53 of MRTP Act itself worded very clearly that there should be the compliance within a period of one month, it means to remove the illegal construction by plaintiff themselves. So far as the said notice dated 16.08.2018 is concerned, it has been issued to the occupant within purview of proviso clause of section. 53(1). Admittedly the Muradkhan - plaintiff no.2 is the husband of plaintiff no.1. So it cannot be said that the plaintiff No.1 the wife of plaintiff No.2 has no knowledge of the notice and it is constructive notice as per the provisions of law. The Ld. counsel of defendant corporation put emphasis on the proviso clause of section 53(1) which provide that the planning authority can issue notice to the occupier also. So far as the fact of present case is concerned, it is submitted that whenever the officers of the Municipal Corporation had been to the suit property for inspection, Muradkhan the husband of plaintiff No.1 Saminabegum used to come forward and prevent the officers of Muncipal Corporation from taking action. Therefore plaintiffs cannot take benefit under the garb of not issued the notice in the name of plaintiff No.1 and in the name of her husband. The Ld. counsel of defendant corporation vehemently argued that the theory of loan and execution of Hiba by plaintiff No.2 her husband in favour of his wife i.e. plaintiff No.1 is totally concocted story and has no concern with the alleged illegal construction. On the contrary one Gaffar Kadri has filed complaint

against the plaintiff to the Municipal Corporation and brought to the notice that there total illegal construction of plaintiffs in disputed suit land. However the plaintiff has twisted the fact and not come before the court with clean hands and tried to extract the order and protection to the illegal construction.

14. On carefully scrutinizing these documents it appears that defendant corporation produced on record the panchnama dated 13.08.2018 in respect of illegal construction admg. 15.0 x 16.0 mtr. in RCC slab constructed with cement bricks & iron bar, having the height of 6 meter alongwith compound wall vide Exh. 19(1). The defendant corporation also produced on record the notice issued to the plaintiff dated 16.08.2018 under the MRTP Act for removal of illegal construction vide Exh. 19(2). The panchnama of affixing the notice on the illegal construction of plaintiffs dated 23.08.2018 produced on record vide Exh. 19(3). The photographs of affixing the notice of illegal construction of plaintiff dated 23.08.2018 are produced on record vide Exh. 19(4) & 19(5).

15. Having regard to the arguments advanced by the Ld counsels of both the parties and taking into consideration all the relevant documents, as well as, attending circumstances of the case, it is very much clear that admittedly there is a construction of house approximately 3000 sq.ft in the land at Survey No.15 and on time to time the officers of the Municipal Corporation had been visited to the suit property and issued notice dated 08.03.2018 to the occupant of the suit property. It is seen from the documents of defendant corporation vide Exh. 19(1) & (3) that the officers of Municipal

Corporation have prepared the panchnama of alleged illegal construction dated 13.08.2018 and affixed notice on alleged illegal construction and also prepared the panchnama in respect of the same. It is a matter of record that admittedly plaintiff has not produced on record the construction permission from Municipal Corporation nor the construction permission from Collector in respect of construction of suit house. The Ld. counsel of the plaintiff put emphasis on section 41 of the M.R.L. code that there is no need to obtain any permission from any other authority for construction of farm house in the suit land, but on carefully reading section 41 of Maharashtra Land Revenue Code, it provides that " use to which holder of land for the purpose of agriculture may put his land" it means section 41 is in respect of only for a better cultivation of land. It never indicates for personal residential use of family. Furthermore the provision interprets that the Collector has power only in respect of construction which is not more than 150 meter and height not more than 5 meter. However it is a matter of record that the panchnama produced on record vide Exh. 19(1) itself shows that the construction is more than 6 meter in height and plaintiff himself admitted about 3000 sq.ft. construction( approximately 289 sq.mtrs). It is significant to note here that plaintiff neither produced the permission of collector nor the permissions of Municipal Commissioner. So far as legal aspects are concerned the Municipal Commissioner have vested power to call notice within purview of section 53(5) and the Planning Authority of Aurangabad Municipal Corporation can demolish having power vested to them within

purview of section 53(6) (b) of MRTP Act. It is worth to note here that the notice dated 16.08.2018 Note 3 mentioned that-

“ महाराष्ट्र प्रादेशिक व नगररचना अधिनियम १९६६ चे कलम ५३ (१) नुसार नमूद अनधिकृत विकास हे कायमस्वरूपी अनधिकृत विकास ठरविण्यात आल्यास व कितीही वर्षांनंतर ते उघडकिस आल्यास त्यांचे विरोधात औरंगाबाद महानगरपालिका अनधिकृत बांधकामासंदर्भात जमिन मालक, विकासक, भोगवटादार व जे कोण संबंधित असतील त्यांचेविरुद्ध पोलिस स्टेशनेडं लेखी फिर्याद दाखल करू शकते.

16. The Ld. counsel of the plaintiffs put emphasis on this aspect that suit house constructed before 1970, it is old construction for residence of his family and not a new construction. However, on carefully scrutinizing the panchnama prepared by the officer of the Municipal Corporation produced on record vide Exh.19 dated 13.08.2018 and photographs produced on record by the plaintiff vide Exh. 15(1) itself speaks in volume that it is totally new RCC construction of 3000 sq.ft. bungalow and at no stretch of imagination it can be said to be a old constructed house prior to 1970.

17. In the light of above discussion and on carefully scrutinizing the entire circumstances on record it is very much clear that admittedly on time to time the defendant corporation has issued notices to the plaintiff in respect of alleged unauthorized construction on the suit property which are produced on record vide Exh.-19(2),19(3) & 19(4). In view of documents Exh.-19 and photographs, the Ld counsel of the defendant corporation brought to the notice of this Court that under the garb of agricultural land the plaintiff cannot construct the big bungalow of 3000 sq.ft. having six feet height and ground + one floor in violation of provisions of law.

It is matter of record the plaintiff has neither produced on record the permission of Collector for construction in agricultural land nor the permission of Commissioner of Municipal Corporation. Whatever documents produced on record by the plaintiffs are not sufficient to prove the prima-facie case.

18. At this juncture I would like to take recourse of observations of Hon'ble Apex Court in the case of Majula Kalidas Chauhan & Others Vs. Baroda Municipal Corporation, M.C.C.2000 pg.no.276 in which it has been held that :-

“In case if an illegal and unauthorized construction is protected by Courts and more so exercise of their discretionary powers in equitable jurisdiction will amount to perpetuate illegality. Those persons who take the law in their own hands, consider themselves above law and have went to the extent of raising of illegal and unauthorized construction, if are being protected by courts then certainly the people will get encouraged to indulge themselves in raising of the illegal and unauthorized construction. If the construction are being made in violation of the building rules, regulations and bye-laws and the courts protect such persons when the Corporation has taken action for removal thereof, there will become chaos and enforcement of these rules, regulation, bye-laws etc., will became very very difficult. The rule of law will not be there and much may be said against the judicial Courts also by the bye-laws and take the law in their own hands are being protected in the Courts.”

19. Similarly, Hon'ble Supreme Court in the case of Abhishek Builders and Developers & Others Vs. City and Industrial Development Corporation of Maharashtra Limited & Others, (2012) 0 Supreme (Mah) 1021 observed that :-

“merely because authorities have granted permission for water connection, electricity supply or No Objection Certificate etc., that itself would not lead to the conclusion that, the respondent planning authority should regularize irregular construction.”

20. So far as temporary injunction is concerned, Hon'ble Bombay Court in the case of Sopan Maruti Thopte Vs. Pune Municipal Corporation reported in 1996 CJ(Bom) 520, observed that,

“If the plaintiff has no right, title and interest in the property normally there is a no question of granting equitable relief in his favour. The fact of dispute could hardly be a ground. It should be borne in mind before issuance of any injunction that it is a discretionary and equitable relief. It is not mandatory that for mere asking such a relief it should be given. It is not a charity at the costs of public. At the same time, the procedural lapses, (intentional or unintentional, which do not seriously affect the substantive right of person, ought not to result in ad-interim orders which protect illegality having already been committed by the plaintiff and to give licence of continuing fruits of such illegality for years. The violators of law should not liberally allowed to take protection of court of law by obtaining ad-interim injunction which have the effect of continuing such violation.

21. In view of above preposition of law and considering the aforesaid discussion there is no escape from the conclusion that plaintiff has not at all establish the prima-facie case in their favour. Therefore, question of causing irreparable loss and balance of convenience does not arise. On the other hand if temporary injunction is granted in favour of plaintiffs then it will take on adverse effect ie interfering in the administration of statutory body ie Aurangabad Municipal Corporation. Therefore, I have no hesitation to sum-up that plaintiffs have failed to prove their case within the purview of Order-XXXIX Rule-1 and 2 of the Civil Procedure Code, therefore, I answered point No. 1 to 3 in the negative and proceed to pass the following order.

**ORDER**

1. Application Exh.5 stands rejected.
2. Costs in cause.

Date :- 02.11.2018

Sd/-  
(Dr. Anita S. Newase)  
Civil Judge Senior Division,  
Corporation Court, Aurangabad.

**CERTIFICATE**

I affirm that the contents of this P. D.F. file judgment/order are same, word to word, as per the original judgment/order.

Name of the Stenographer	:	Rajesh R. Deshpande.
Court	:	Civil Court (S.D.) (Corporation), Aurangabad.
Date	:	02.11.2018
Order signed by the presiding officer on	:	12.11.2018
Order uploaded on	:	12.11.2018