

**Order Below Application Exh.5**  
( Delivered on 02<sup>nd</sup> March, 2017 )

This is an application under Order 39 Rule 1, 2 and Section 94, 151 of the Code of Civil Procedure, 1908 (for short 'the C.P.C.') whereby the plaintiffs have prayed to restrain the defendant from demolishing the building of the plaintiffs.

2. The case of the plaintiffs in brief is as under :

The plaintiffs purchased open plot. On 11.03.2002 they submitted a map to the defendant for grant of permission of construction on the said plot. Till 11.05.2002 the plaintiffs did not receive any communication either refusing or granting the permission from the defendant. Therefore, under Section 189 (4) (6) of the Maharashtra Municipal Councils Act, 1956 the map submitted by the plaintiffs on 11.03.2002 is deemed to have been sanctioned. After 11.05.2002 the plaintiffs received copy of a map purported to be sanctioned on 31.03.2002. In that map there was no markings in red ink showing any area as not permitted. Therefore, the plaintiffs completed their construction. On 31.10.2003 the defendant issued completion certificate.

3. The F.S.I available for the plot of the plaintiffs is 1.8, therefore, the plaintiffs can construct to the extent of  $1565.33 \times 1.8 = 2819.39$  sq m. As against this the built up area of the entire building is only 1537.31 sq. m. The construction on the plot of the plaintiffs is legal and in accordance with the map and permission granted by the

defendant.

4. The political opponents of the plaintiffs are deliberately making false complaints in respect of the construction to various authorities. Therefore, the plaintiffs inquired with the office of the defendant and found that four flats shown on second floor in the map with the defendant are marked in red lines with the remark "not permitted". However, the map submitted to the plaintiffs there were no such markings. On 29.06.2009 there appeared a news on local cable network that the defendant is going to demolish the construction of the plaintiffs on the said plot. It is void ab initio, without jurisdiction and against the provisions of the Maharashtra Municipal Council, Nagar Panchayats and Industrial Township Act, 1965. The plaintiffs have filed the suit under Section 38 of the Specific Relief Act, therefore, no notice to the defendant under Section 304 of the Maharashtra Municipal Act is required. Therefore, the plaintiffs have prayed for as mentioned above.

5. The defendant has filed reply at Exh.38. The defendant has admitted that the plaintiffs have purchased the said plot, the plaintiffs had submitted a map to the defendant on 11.03.2002 for grant of permission of construction on the said plot, on 31.03.2002 the defendant granted permission. Certain directions regarding construction were given to the plaintiffs. Even in the map received by the plaintiffs there were some markings in red ink showing the specific area not permitted, the plaintiffs have constructed despite it. Therefore, the construction is

illegal.

6. The plaintiffs did not follow certain directions regarding F.S.I. and marginal space. The defendant on so many times issued notices to the plaintiffs regarding illegal construction. The plaintiffs deliberately ignored it. Meanwhile Collector office took cognizance and the said issue was raised in legislative assembly. Therefore, the illegal construction made by the plaintiffs was required to be removed or demolished in compliance with the order of the Collector. The illegal construction creates great possibility of accident. It is dangerous to public safety. Therefore, the defendant has prayed to reject the application.

7. Considering the pleadings and documents available on record, following points arise for my determination. I have recorded my findings on each of it for the reasons stated below.

| <b><u>P O I N T S</u></b> |                                                                                                                                | <b><u>FINDINGS</u></b> |
|---------------------------|--------------------------------------------------------------------------------------------------------------------------------|------------------------|
| 1)                        | Whether the plaintiffs prove their case prima facie ?                                                                          | <b>Yes.</b>            |
| 2)                        | Whether balance of convenience lies in favour of the plaintiffs?                                                               | <b>Yes.</b>            |
| 3)                        | Whether irreparable loss will be caused to the plaintiffs if temporary injunction is not granted in favour of the plaintiffs ? | <b>Yes.</b>            |
| 4)                        | What order ?                                                                                                                   | As per final order.    |

## **REASONS**

### **AS TO POINT NOS.1 TO 3 :**

8. The defendant admits that the plaintiffs have purchased the said plot. The defendant also admits that the plaintiffs on 11.03.2002 applied for permission to construct on the said plot. The defendant adds that certain directions were given to the plaintiffs, it was shown in the map supplied to the plaintiffs with red markings that certain portion is not to be constructed. As against this, the plaintiffs claim that there was no such marking. In view of this it was the defendant who could have brought on record map showing such markings. It is because it is the defendant's office which prepared the said map. The original map is with the defendant's office. However, the defendant did not bring on record any such map. Considering the fact that the defendant is an office, the defendant must have prepared a record showing what map did the plaintiffs receive. No such record is filed. Therefore, it does not appear prima facie that the defendant had given a map to the plaintiffs wherein certain markings were in the map and thereby the plaintiffs were not permitted to construct.

9. The plaintiffs claim that F.S.I. is 1.8 and his plot is 1565.33 sq m, therefore, the plaintiffs can construct on 2819.39 sq m. The plaintiffs add that the entire construction of the building is only 1537.21 sq m. The defendant has denied it. However, the defendant did not made it clear as to how much F.S.I. was permitted. It is the defendant who could have

authoritatively given F.S.I. In the absence of it I am of the opinion that adverse inference against the defendant can be drawn. The adverse inference is that F.S.I. is 1.8. Similarly, the area of construction and the area of the plot of the plaintiffs can be relied upon. It prima facie follows that the plaintiffs have constructed on lesser area than available.

10. The defendant claims that the defendant so many times issued notices to the plaintiffs regarding the illegal construction made by the plaintiffs, but the plaintiffs deliberately ignored it. Surprisingly, the defendant did not place on record any single copy to substantiate the said claim. Therefore, it cannot be believed that the defendant has ever issued notices to the plaintiffs regarding the alleged illegal construction made by the plaintiffs.

11. The plaintiffs claim that it was revealed to them that a false complaint has been made to the effect that while making construction the plaintiffs have kept marginal space of 4 m in place of 5 m, which is incorrect. The plaintiffs add that as per government measurement sheet purported to be dated 13.07.2007 there is a marginal space of more than 5 m. Therefore, the complaint is not correct. The defendant has merely denied it. The defendant could have come with a case mentioning the marginal space left by the plaintiffs and whether it is right or wrong. However, the defendant has only denied and did not come with such case. Considering the nature of functions, availability of record and experts with the defendant it was incumbent upon the defendant to come

with such case. In the absence of it I am of the opinion that adverse inference requires to be drawn. The adverse inference is that it appears prima facie that the plaintiffs have kept marginal space more than 5 m as mentioned in government measurement sheet dated 13.07.2007.

12. The plaintiffs claim that front marginal space in the said measurement map is 24 m, though, in fact it is 25 m. The front marginal space has not been shown correctly in the measurement map dated 13.07.2007. Therefore, it requires to be verified by re-measurement. The defendant has merely denied this claim. The defendant has not clarified it. At the cost of repetition, I find that considering the nature of functions, availability of record with the defendant it was incumbent upon the defendant to come with such clarification. Moreover, willingness of the plaintiffs for re-measurement prima facie shows that their claim is genuine.

13. The plaintiffs claim that on 13.07.2007 after measurement the T.I.L.R. office was not certain regarding the measurement of road. The said office again wanted to measure and the said office was making correspondence from time to time with the defendant and others. On 26.07.2007 the T.I.L.R. office issued a letter to Sub Divisional Officer, B. & C., Wani and informed inability to carry out exact measurement. Thus, the plaintiffs claim that the issue of measurement is still pending before T.I.L.R. Office. Unless it is resolved it cannot be said that the plaintiffs have kept the marginal space while constructing on front side. The

defendant has simply denied it without any clarification. The defendant only contends that the silence of T.I.L.R. and P.W.D. office in respect of illegal construction does not lead to inference that the construction of the plaintiffs is legal and permitted one. I do not find substance in it. It is because it is either T.I.L.R. office or P.W.D. office or the office of the defendant who could have said with precision and authoritatively about illegality in respect of construction of the plaintiffs. Therefore, their silence must amount to admission. The admission is that the construction of the plaintiffs is legal. Therefore, there is no hesitation to believe the plaintiffs.

14. The plaintiffs claim that the defendant had applied to Collector, Yavatmal for granting permission of construction on another plot situated abutting on western side of Wani – Yavatmal Road by keeping open marginal space of 4.5 m instead of 10 m. Accordingly, Collector, Yavatmal granted such permission on 19.08.1996 by accepting request of the defendant. The plaintiffs have filed copy of the said order vide list of documents (Exh.4/8). The construction of the plaintiffs is also on Wani – Yavatmal Road. Therefore, the said order is also applicable to the plaintiffs. There cannot be discrimination between two buildings. Thus, the plaintiffs are alleging discrimination by the defendant. The defendant has simply denied it. There is no clarification. The defendant could have come with a case showing that those facts and circumstances in respect of order dated 19.08.1996 are different than the facts and circumstances related to the construction of the plaintiffs. In the absence

of it prima facie there appears discrimination.

15. The learned advocate for the defendant argued that there is no necessity of giving notice to the plaintiffs vide Section 179 (3) of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Township Act, 1965. It is true that Chief Officer have power to remove without notice any projection, obstruction or encroachment. However, it must be evident as to how and on what basis Chief Officer reached to a conclusion that that part is projection, obstruction or encroachment. In the case at hand the defendant did not demonstrate the same. Moreover, the defendant has not made it clear as to what part of the building of the plaintiffs is projection or obstruction or encroachment. Therefore, Chief Officer cannot exercise that power arbitrarily.

16. The learned advocate for the defendant argued that the plaintiffs have filed the application without mentioning cause of action in the application. The plaintiffs have mentioned that on 29.06.2009 there appeared a news in local cable network that the defendant is going to demolish construction of the plaintiffs. I am of the opinion that this is sufficient cause of action. In fact, the plaintiffs allege that the defendant is acting in gross violation of principle of natural justice. I find substance in it. It is because though the defendant claims that several times notices were issued to the plaintiffs in respect of illegal construction, the defendant did not file a single copy of such notice on record. The defendant goes on saying that the Collector took cognizance of the instant



matter and the said issue was raised in Legislative Assembly, therefore, there was order by Collector of removal or demolition of the construction of the plaintiffs. The defendant did not place on record copy of the said order issued by the Collector. Therefore, I find violation of natural justice and existence of cause of action to the plaintiffs.

17. The learned advocate for the plaintiffs relied upon *Raj Restaurant v. Municipal Corporation of Delhi* (AIR 1982 SC 1550). In that case it was found that no notice was issued and opportunity to represent one's case was not given. Therefore, it was held that it was denial of principle of natural justice. In the case at hand I have also found that the defendant did not issue any notice so as to give opportunity to the plaintiffs to represent their case. Moreover, I have also found that though the defendant claims that it was order of the Collector, no such order and its basis have been submitted. Therefore, there is clear violation of principle of natural justice.

18. The defendant could have brought on record the basis of issuance of alleged order of the Collector. However, the defendant did not take any effort to bring it on record, for the reasons best known to the defendant. The basis of issuance of alleged order of the Collector would have helped to know whether the construction of the plaintiffs is illegal or not. In the absence of it and in the absence of any document from the office of the defendant or from any other office it cannot be inferred that the construction of the plaintiffs is illegal. As against this, the defendant

in his reply (Exh.38) states that after inspection the defendant issued completion certificate on 31.10.2003. Had there been any illegal construction, considering the nature of duties of the office of the defendant, the defendant could have come with a specific clarification that the plaintiffs have carried illegal construction after 31.10.2003 or on any particular date of particular description. But the defendant did not come with such clarification. Thus, there is no reason to disbelieve the case of the plaintiffs. It prima facie follows that construction of the plaintiffs is legal and the defendant intended to demolish it without following due procedure of law.

19. The learned advocate for the plaintiffs relied upon M/s. Rajatha Enterprises v. S.K. Sharma (AIR 1989 SC 860). In that case after considering facts and circumstances of that case the Hon'ble Supreme Court has held : "In the circumstances, in the light of what the Commissioner says about the practice of the Corporation in regard to commencement certificate and in the absence of any evidence of public safety being in any manner endangered or the public or a section of the public being in any manner inconvenienced by reason of the construction of the building, whatever may be the personal grievance of the 1<sup>st</sup> respondent, the High Court was not justified, at the instance of the 1<sup>st</sup> respondent claiming himself to be a champion of the public cause, in ordering the demolition of any part of the building, particularly when there is no evidence whatsoever of dishonesty or fraud or negligence on the part of the builder." In the case at hand there is no evidence, at least

documentary, showing that the construction of the plaintiffs is illegal.

20. In view of M/s. Rajatha Enterprises (supra) the learned advocate for the defendant filed on record statement issued by Police Inspector, Police Station, Wani obtained under the Right to Information Act. In that statement it has been mentioned that on 04.03.2012 and on 16.03.2013 there was incident of rash and negligent driving and accordingly offences punishable under Sections 279, 337, 338 have been registered. The spot of the incident has been mentioned in the said statement as in front of Sai Temple, Wani. Relying on this statement the learned advocate for the defendant argued that on account of illegal construction the spot has become accident prone zone. I do not find substance in the said argument. It is because the defendant failed to demonstrate with the help of documents as to what construction of the plaintiffs have made the spot accident prone zone. Moreover, those incidents are attributed to rash and negligent driving of the accused. Had the Investigating Officer found construction of the plaintiffs caused those mishaps he would have implicated the plaintiffs under relevant provisions of law.

21. The learned advocate for the defendant relied upon Sudhir v. Municipal Corporation of Greater Bombay (2010 (2) Mh. L.J. 759) to argue that the Hon'ble Supreme Court has time and again expressed its serious concern over unauthorized and indiscriminate constructions in cities and big towns. There is no doubt about it. However, the defendant

has failed to demonstrate as to how the construction of the plaintiffs is unauthorized.

22. The learned advocate for the defendant relied upon Vinayak v. The Superintendent of Police, Chandrapur (2010 (2) Mh. L.J. 759). In that case the question of removal of unauthorized parking as well as all the illegal obstructions such as approach ways, sign boards/hoardings was for consideration. In the case at hand though the defendant has brought on record two incidents of rash and negligent driving resulting into injuries, as discussed earlier I found that the defendant failed to demonstrate that it is the construction of the plaintiffs which caused those incidents.

23. The learned advocate for the defendant relied upon Pratibha Co-operative Housing v. State of Maharashtra (AIR 1991 SC 1453). In that case the Bombay Municipal Corporation had issued a show cause notice calling upon the Housing Society to show cause within seven days as to why the upper eight floors of the building should not be demolished for violation of F.S.I. In the case at hand there is no such notice at all. Moreover, in that case it was undisputed that there was violation of F.S.I. In the case at hand the plaintiffs claim that their construction is within permissible F.S.I. The defendant merely denies it. There is nothing on record to show that the plaintiffs have violated F.S.I.

24. The learned advocate for the defendant relied upon Municipal

Council, Pusad v. Kundanlal Mohanlal Jaiswal (2007 (3) Mh. L.J. 155). In that case there was encroachment, therefore, Municipal Council, Pusad wanted to remove that encroachment for development work of road widening. Accordingly, Municipal Council, Pusad had issued notice under Section 181 of the Municipal Act. In the case at hand the defendant did not claim that there is any encroachment. So also though the defendant claims issuance of many notices to the plaintiffs, no such single notice has been placed on record. Thus, the facts can be distinguished.

25. The learned advocate for the defendant relied upon Kalyan Dombivali Municipal Corporation v. Prakash Mutha (2008 (3) Mh. L.J. 686). In that case maintainability of Civil Suit vis a vis Section 149 of the Maharashtra Regional Town Plan Act, 1966 was for consideration in view of Order 7 Rule 11 of the Code of Civil Procedure, 1908. Considering facts and circumstances of that case Hon'ble Bombay High Court has held that that suit was not maintainable in view of the bar under 149 of the Maharashtra Regional Town Plan Act, 1966.

26. The learned advocate for the defendant relied upon Seema Arshad Zaheer v. Municipal Corporation of Greater Mumbai (2006 (5) Mh. L.J. 218) to argue that the Hon'ble Apex Court has held that injunction merely on sympathy or hardship would perpetuate and encourage illegality. In that case the Hon'ble Supreme Court has held as below :

“30. It is true that in cases relating to orders for demolition of buildings, irreparable loss may occur if the structure is demolished even before trial, and an opportunity to establish by evidence that the structure was authorized and not illegal. In such cases, where prima facie case is made out, the balance of convenience automatically tilts in favour of plaintiff and a temporary injunction will be issued to preserve status quo. But where the plaintiffs do not make out a prima facie case for grant of an injunction and the documents produced clearly show that the structure are unauthorized, the court may not grant a temporary injunction merely on the ground of sympathy or hardship. To grant a temporary injunction, where the structure is clearly unauthorized and the final order passed by the Commissioner (of the Corporation) after considering the entire material directing demolition, is not shown to suffer from any infirmity, would be to encourage and perpetuate an illegality.”

27. Thus, in Seema (supra) the principle emerges that the structure should be clearly unauthorized, the order of the Corporation must have been passed on certain material directing demolition. In the case at hand there is no order of the defendant directing demolition. In the case at hand order of Collector for demolition is relied upon. But no copy thereof is filed. There is nothing on record to show as to how the Collector reached to the conclusion that the construction of the plaintiffs is unauthorized. The plaintiffs realized the intention of the defendant through cable network. The defendant did not give any notice to the plaintiffs. Thus, the facts can be distinguished.

28. The learned advocate for the defendant relied upon Arun

Natthuram Gaikwad v. Municipal Corporation of Greater Mumbai (2006 (2) Mh. L.J. 500). In that case it was very clear that the construction was illegal, without any authority of law and without any permission of the Municipal Corporation. In the case at hand the defendant admits to have issued completion certificate that too after inspection. There is no claim that the alleged construction was carried out after issuance of completion certificate. There is nothing on record to infer prima facie that the construction of the plaintiffs is unauthorized. Thus, the facts can be distinguished.

29. The learned advocate for the defendant relied upon Mahendra Bapurao Mahadik v. Subhash Krishna Kanitkar (2005 (3) Mh. L.J. 789 (S.C.)). In that case the resolution of Municipal Corporation regularizing unauthorized structure was found without jurisdiction. So also there was clearly unauthorized construction. The learned advocate for the defendant relied upon Shri. Sidharam v. State of Maharashtra (2007 (2) ALL MR 317). In that case Municipal Corporation had issued a notice under Section 351 of the Mumbai Municipal Corporation Act to show cause why the suit shed which was constructed without the permission of the Planning Authority should not be demolished. In the case at hand no such notice is issued. The learned advocate for the defendant relied upon Praveen v. Municipal Corporation of Greater Bombay (2006 (3) ALL MR 6). In that case there was construction without permission. Therefore, Bombay Municipal Corporation had issued notice under Section 351 of the Bombay Municipal Corporation Act. In the case at hand there is no

such notice. Moreover, from the record of Bombay Municipal Corporation Act it was found that the construction involved therein was without permission. In the case at hand no such record of the defendant Corporation is placed on record.

30. The learned advocate for the defendant argued that deemed permission does not authorize to violate Development Control Regulation or bye-laws or regulations. It is true that last proviso of Sub Section (5) of Section 45 provides that any development carried out in pursuance of deemed permission which is in contravention of the provisions of the first proviso, shall be deemed to be an unauthorized development. However, the defendant failed to point out violation of Development Control Regulation or bye-laws or regulations. The learned advocate further argued that deemed permission lasts for a year only. However, the defendant did not claim that the plaintiffs have carried construction after lapse of a period of one year.

31. The learned advocate for the defendant relied upon Friends Colony Development Committee v. State of Orissa (AIR 2005 SC 1). In that case permission was granted to construct a building of four stories, however, a building of five stories was constructed. Therefore, notice under Section 92 of the Orissa Development Authorities Act was issued to show cause why the offending portions be not demolished. In the case at hand the defendant admits to have intended to demolish the construction of the plaintiffs. As noted earlier no notice was issued to the plaintiffs.



Moreover, in that case there was clear violation of the permission. In the case at hand though the defendant intended to demolish the construction of the plaintiffs, the defendant failed to demonstrate as to how the construction of the plaintiffs was unauthorized. If the defendant intends to demolish any construction then it is the defendant who has to show as to how that construction is unauthorized. It is because the defendant is a authority giving authorization for construction.

32. The plaintiffs claim that they have constructed as per the map given to them by the defendant. As against this, the defendant only claims that construction of the plaintiffs is illegal. The defendant does not make it clear as to what part of the construction is unauthorized. The defendant is an authority who can clearly spell about the construction so as to infer about the illegality. The admission of the defendant that the plaintiffs were granted completion certificate after due inspection of the construction burdens the defendant to come with a case clearly depicting unauthorized portion of construction. The admission of the defendant in the absence of discharge of such burden makes the case prima facie in favour of the plaintiffs. Moreover, had the defendant realized unauthorized construction it is the defendant who would have come forward by issuing notice to the plaintiffs for demolition of the alleged construction. However, there is no notice on behalf of the defendant or anybody to the plaintiffs. It follows that without reaching to a conclusion based on certain documents or inspection or report of unauthorized construction the defendant intends to demolish construction of the

plaintiffs. Therefore, I answer point No.1 in the affirmative.

33. In Seema (supra) the Hon'ble Supreme Court has held that where prima facie case is made out, the balance of convenience automatically tilts in favour of plaintiff and a temporary injunction will be issued to preserve status quo. In the case at hand I found prima facie substance in the case of the plaintiffs. If injunction is not granted the defendant may demolish construction of the plaintiffs, that too without there being any report, inspection of alleged unauthorized construction. The defendant may demolish the alleged construction of the plaintiffs without giving opportunity to the plaintiffs. The defendant if at all reaches to a conclusion of unauthorized construction based on certain formalities the defendant may, by following due procedure of law, go for demolition of construction. Granting temporary injunction would not deprive the defendant to have recourse to legal remedy. Therefore, I am of the opinion that balance of convenience also lies in favour of the plaintiffs. Therefore, I answer point No.2 in the affirmative.

34. The defendant has not made it clear as to what part of the building of the plaintiffs is unauthorized construction. If the defendant demolishes the alleged unauthorized construction it may cause harm to the building of the plaintiffs. That loss cannot be compensated in terms of money. If at all the defendant based on certain formalities reaches to the conclusion of unauthorized construction and after following due procedure of law demolishes alleged unauthorized construction, in that

case the plaintiffs would have to bear their loss. But there is no such case. Therefore, demolition may cause such loss to the plaintiffs which cannot be compensated in terms on money. Therefore, I answer point No.3 in the affirmative.

**AS TO POINT NO.4 :**

35. Considering findings of point Nos.1 to 3, temporary injunction requires to be granted as prayed for. However, considering nature of duty of the defendant and effect of temporary injunction it cannot be lost sight of that temporary injunction should not courage unauthorized and illegal construction. Therefore, I am of the opinion that the suit requires to be tried expeditiously. Therefore, issues would be framed on next date. In that regard certain directions require to be given to both the parties. Therefore, I pass following order in response to point No.4.

**ORDER**

1. The defendant or any person claiming through the defendant including their agents and servants are temporarily restrained from demolishing any portion of the suit property, till decision of the suit, without following due procedure of law.
2. The parties are expected to co-operate to dispose the suit within six months or prior to it at the earliest, from framing of issues.

Dated : 02.03.2017.

( R. S. Wankhede )  
Civil Judge (Jr.Dn.)  
Wani, Dist. Yavatmal.