

SUPREME COURT OF INDIA

Esha Ekta Apartments CHS Ltd.

Vs.

The Municipal Corporation of Mumbai

S.L.P.(Civil) No.33471 of 2011

(G.S. Singhvi and Sudhansu Jyoti Mukhopadhaya JJ.)

29.02.2012

ORDER

1. Having failed to convince the trial Court and the High Court to entertain their prayer for restraining respondent no. 1 - Municipal Corporation of Mumbai (for short, 'the Corporation') from demolishing the buildings constructed on Plot No. 9, Scheme 58, Worli, Mumbai, the petitioners have filed these petitions under Article 136 of the Constitution.

2. The petitioners are the Cooperative House Building Societies (for short, 'the societies') and their members, who are said to have purchased flats in the buildings constructed by the developers on the plot in question. Their grievance is that even though the flats were purchased under a bona fide belief that the buildings have been constructed in accordance with law, the trial Court and the High Court did not injunct the Corporation from demolishing the same on the ground that the latter had taken action in furtherance of the orders passed in Writ Petition Nos. 2040/1999, 2402/1999, 2403/1999, 2904/1999, 2949/1999 and 1808/2000.

3. The Corporation leased out the plot in question, of which the total area is 17907.60 sq. meters to M/s. Pure Drinks Pvt. Ltd. on 17.1.1962 for general industrial use. After 18 years and about 11 months, the State Government issued order dated 1.12.1980 under Section 37(2) of the Maharashtra Regional and Town Planning Act, 1966 and sanctioned the change of use in respect of 13049.45 sq. meters land from industrial to residential. Between 1980 and 1982, M/s. Pure Drinks transferred that portion of land to the developers for construction of residential buildings. The building plans submitted by the developers for construction of 6 buildings comprising of basement, ground and 5 upper floors

were sanctioned by the competent authority on 8.6.1981. The amended building plans submitted by the developers for construction of 9 buildings with ground and 5 upper floors were also sanctioned by the competent authority.

4. In 1984, the developers submitted new building plans proposing construction of two buildings on stilts with 24 and 16 upper floors respectively, additional 6th and 7th floors in building no. 2 and additional 6th floor on a portion of building no. 3. The new plans were rejected by the competent authority on 6.9.1984. Notwithstanding this, the developers continued the construction and did not stop their activity despite the stop work notice dated 12.11.1984 issued by the Corporation.

5. After the purchasers of flats formed societies, they along with the societies filed writ petitions for issue of a direction to the Corporation to provide water connections. During the pendency of those petitions, the Division Bench of the High Court took cognizance of the fact that the buildings had been constructed in violation of the sanctioned plans and passed order dated 11.10.2005 and directed the Additional Commissioner of the Corporation to appear in person to explain the reason for not taking action against the illegal construction. That order reads as under:

In all these writ petitions, arguments were heard on behalf of the parties. None appeared for respondent no.4 in Writ Petition No.2904-99, for respondent No.4 in Writ Petition No.2403-99, for respondent Nos.4 and 5 in Writ Petition No.2402-99, for respondent nos.4 and 5 in Writ Petition No.1808-2000. Shri N.V. Patil, Sub-Engineer Building and Proposal (City) was present in Court to assist the Advocate for the Corporation.

2. In the course of the argument, it was revealed by the Advocate for the Corporation on taking instructions that original licence for construction was granted in favour of four persons viz. Shri Manjit Singh Madanjit Singh, Power of Attorney Holder of S. Karanjit Singh, Chief Executive Officer of Pure Drink Pvt. Ltd., Shri Ishwarsingh Chawla of PSD Construction Pvt. Ltd., Shri D.K.Gupta of D.Y. Builders Pvt. Ltd. and Abdula Yusuf Patel. Pursuant to the illegality in construction having been found, notices were issued under Section 53-1 of the M.R.T.P. Act on 20th February, 2002 to all the four persons mentioned above. Thereafter, sanction was granted for prosecution of all the four persons and decision in that regard was taken on 19th May, 2003 by the Executive Engineer (Building Proposal), CT/1 of the Corporation. Meanwhile, the panchanama of the illegal construction was

carried out on 13th November, 2002. Besides, the prosecution was launched against builder, developer and all the occupants of the building and they were convicted on admission of guilt and sentenced by way of imposition of fine from Rs.600/- to Rs.2000/- imposed by the Magistrate. Apart from the above actions, no other action has been taken by the Corporation in relation to the illegal construction. The affidavit-in-reply filed on behalf of the Corporation before issuance of rule in the petition by Shri Kurmi Deonath Sitaram, Executive Engineer, DP(City)(I) discloses that initial approval was granted for six wings consisting of ground plus five upper floors and it was issued on 9th June, 1981 and Commencement Certificate was granted on 10th June, 1981. The amendment plans were approved for nine wings of ground plus five upper floors on 2nd February, 1983. Thereafter, amendment plans proposing stilt plus twenty-four floors and stilt plus sixteen floors with additional sixth and seventh floor to building nos.2 and 4 and additional sixth floor for the part of building no.3 were submitted but they were refused on 6th September, 1984. In spite of that, the constructive activities continued and the work beyond the approved plans was carried out, and therefore Stop Work notice was issued under Section 353-A of the MMC Act on 12th November, 1984. However, the work continued. Again new architect submitted further plan with a fresh notice under Section 337. The same was rejected by the Corporation.

3. The affidavit also discloses the various illegalities committed in the course of construction of the buildings which include construction of additional floors without approval, increase in the height of the building and carrying of construction beyond the permissible limits of FSI, apart from other illegalities. The affidavit, however, does not disclose as to what action, if any, for prohibiting the developer and the owner from proceeding with the construction, was taken as well as what action was taken after illegal construction having been carried out, apart from launching prosecution and issuance of notices. Even in the course of the argument, learned Advocate appearing for the Corporation could not satisfy us about any concrete action having been taken by the Corporation for stoppage of illegal construction or demolition of illegal construction. In fact, the arguments in the matter were heard partly on 27th September and again yesterday and as well as today. On the very first day of the argument, it was orally informed by the learned Advocate for the Corporation that he would ensure the presence of the officer of the Corporation to assist him in order to enable him to give correct detail information in the matter. In spite the officer being present, we are not able to get the detail information regarding the action taken by the

Corporation as also the detail description of the illegalities committed by the builder and any other persons on his behalf in the matter. It is to be noted that undisputedly the records disclose some illegalities in the matter of construction carried out since the year 1984 onwards. In spite of affidavit having been filed in the year 2000, the Corporation has not explained the reason for failure on its part to take appropriate action against the illegal construction and even today. Apart from being assisted by the officer of the Corporation, the Advocate appearing for the Corporation is unable to disclose the reason for the same. We find it necessary to issue notice to the Additional Commissioner to appear in person before us on Friday i.e. 14th October, 2005 at 11.00 a.m. to explain the same along with all records in the matter, as it is informed by the Advocate for the Corporation that Commissioner is out of India.

4. The Registrar General is required to fax the copy of this order to the Corporation apart from the fact that of the same is being noted by the Advocate for the Corporation. At the request of the learned Advocate for the Corporation, Registrar need not send copy of this order by fax as learned Advocate for the Corporation undertakes to the Court that he through the officer present in Court will assure intimation of this order to the Additional Commissioner and consequently, his presence before the Court on 14th October, 2005 at 11.00 a.m.

6. The Commissioner of the Corporation appeared before the High Court on 14.10.2005 and gave an assurance that necessary steps would be taken in accordance with law within a period of two months in relation to the illegal constructions. Thereafter, the Corporation issued notices dated 19.11.2005 to respondent no. 2, the societies and their members under Section 351 of the Mumbai Municipal Corporation Act, 1888 (for short, 'the 1888 Act') requiring them to show cause as to why the unauthorized constructions may not be pulled down and the buildings be brought in tune with the sanctioned plans. In the notices it was also stipulated that if the noticees fail to show sufficient cause, then the Corporation will pull down the illegal construction and also take action under Section 475A of the 1888 Act. The societies and their members sent reply dated 28.11.2005 through their advocate and pleaded that they were in no way responsible for the unauthorized constructions. Deputy Chief Engineer, Building Proposals (City) did not accept the reply sent by the advocate of the societies and their members and passed orders dated 3.12.2005 and 8.12.2005 and directed the petitioners to remove the illegal constructions. Thereupon, the petitioners filed Long Cause Suits for declaring notices dated 19.11.2005 and orders dated

3/8.12.2005 to be illegal. They further prayed for grant of permanent injunction restraining the Corporation, its servants, agents and representatives from taking any action demolishing the buildings. The petitioners also filed notices of motion for grant of temporary injunction. On 17.12.2005, the trial Court passed ad-interim orders and directed the parties to maintain status quo in respect of the suit structures.

7. In the detailed written statement filed on behalf of the Corporation, several objections were taken to the maintainability of the suits. On merits, it was pleaded that the buildings were constructed in violation of the sanctioned plans and the developers did not stop the construction activity despite stop work notice. It was further pleaded that action taken under Section 351 of the 1888 Act was legal and justified because the buildings had been constructed in gross violation of the sanctioned plans. It was then averred that those who purchased the flats knowing fully well that the buildings were being/had been constructed in violation of the sanctioned plans are not entitled to complain against the action taken by the Corporation for removal of the illegal/unauthorized constructions.

8. After hearing the counsel for the parties, the trial Court passed orders dated 23.3.2010 and rejected the petitioners' prayer for temporary injunction. For the sake of reference paragraphs 36 to 39 of the order passed in the case of the petitioners, who have filed SLP(C) No. 33471 of 2011 are extracted below: 36. In so far as claim of the plaintiffs that they are bona fide purchasers of their respective flats and they were not aware about illegal construction raised by the building/Developer is concerned, it is submitted by both the counsels of the defendant no. 2 that the fact of illegal construction itself mentioned in the agreement in between the plaintiffs and developers. In this respect while perusing the agreement produced by the plaintiffs on record revising plans for putting up multi-storied building submitted to the Corporation and for sanction. It means on that day it was made known to the purchaser the revised plan has been submitted. In short on that date the upper floor construction was not sanctioned by the Corporation.

37. Not only this it is appeared from the letter of Jayant Chitnis, Architect who specifically mentioned in his letter that he already addressed a letter dated 5.1.1990 and informed to the concerned developer about the show cause notice issued by the Corporation about the construction of upper floors which were not sanctioned. This letter also addressed to the said society by the said Architect. It means the Architect made aware to the societies as well as the Developer when show cause notice has been issued by the

Corporation when Corporation noticed the construction of illegal upper floors. From this fact it is clear that even on the date of purchase the respective flat owners were aware that the construction of upper floors which is mentioned in the 351 notice were illegal and unauthorized. Till then by adopting the risk of demolition they have purchased the same.

38. From the documentary evidence as well as direction given by the Hon'ble High Court in the abovesaid writ petitions it is clear that on the buildings of the plaintiffs there are certain illegal constructions of upper floors as mentioned in the notice under Section 351. Therefore, at this prima-facie stage plaintiffs have not made out any case to protect their illegal construction.

39. Not only this as per the direction of the Hon'ble High Court the MMC has issued notices and after receiving the reply from the respective societies, the AMC passed order of demolition of such illegal upper floors. Prima facie in the order I found no illegalities carried out by the AMC in passing the same. Considering all the documents and submissions I found no any three cardinal principles available with the plaintiffs for granting ad-interim injunction. Therefore, I answer above points in the negative. Hence, I proceed to pass the following order.

ORDER

- 1) Notices of Motion No. 4807/2005 is hereby dismissed.
- 2) Cost in cause.
- 3) Notices of Motion No. 4807/2005 is disposed of accordingly.

9. The appeals filed by the petitioners were dismissed by the learned Single Judge of the High Court who, after examining the documents filed by the parties, agreed with the trial Court that the constructions made in violation of the sanctioned building plans were illegal and the Corporation did not commit any error by ordering demolition of the unauthorized portions of the buildings. The reasons assigned by the High Court for negating the petitioners challenge to the order of the trial Court are contained in paragraphs 12 to 15 of the impugned which are extracted below:

12. It may be mentioned that for immovable properties authorized construction can be shown only by documentary evidence. No party can contend orally that the construction is authorized without showing documentary evidence. In a case such as this, where flats have been constructed in the building and have been sold under agreements to flat purchasers in a proposed co-operative society under the provisions of MOFA, the documentary evidence must be present to the mind of the flat purchasers upon taking inspection of the plans and specifications statutorily required to be shown and inspected. Consequently in such a case the only documentary evidence would be expected to be with the flat purchasers who, under the specific statutory mandate, would require to inspect the title contained in the sanctioned plan and the specifications. If that is shown in reply to the notice, of course, the notice would not proceed. That essential document which would be only to the knowledge of the party receiving the notice and the party purchasing the flat would have to be shown by that party alone and not by the MMC just because the party orders or directs the MMC to produce the plans which never were.

13. The fact that the flat purchasers purchased flats which are shown not to have been specifically under sanctioned plans shows that they are not bonafide purchasers. The fact that the regularization application has been made itself shows that the admitted position that the structure was illegal which required regularization. No party can apply for regularization of a regular structure. Consequently it is self-contradictory to state that the structure is authorized and yet apply for regularization.

14. In fact a preposterous argument is that the lease of the lessees is not terminated by the MMC who is the lessor and the lessees have malafide sought to complain and get the impugned notice enforced.

15. It is gratifying to note that the learned Judge has passed a legal order upon seeing a blatant defiance of law and the legal procedure throwing to the winds all legal requirements and mandates of construction under the supervision of the planning authority obviously upon the conviction and expectation that such extensive construction, however illegal, would not be demolished.

10. Before proceeding further, we deem it appropriate to mention that in January 2002, Corporation had decided to demolish the buildings constructed in violation of the sanctioned plans. On coming to know of this, the flat buyers made

applications through their architect for regularization of the buildings and gave out that they were prepared to pay concessional penalty. Their applications were rejected by the Corporation. The appeals filed against the orders of the Corporation were dismissed by the State Government and the petitioners have challenged both the orders by filing separate writ petitions.

11. Dr. Abhishek Manu Singhvi, Shri Mukul Rohatgi, Shri Shyam Divan, Senior Advocates and Shri Santosh Paul and Shri Abhimanyu Bhandari, learned counsel for the petitioners argued that the impugned order is liable to be set aside because if the disputed constructions are demolished, the suits will become infructuous and the members of the societies and their families will suffer irreparable loss inasmuch as they will become roofless. Dr. Singhvi, placed before the Court satellite map of the site and argued that if the total constructed area is measured with reference to the area of the plot which was leased out by the Corporation to M/s. Pure Drinks Pvt. Ltd., the construction made by the developers cannot be said to be excessive and the trial Court and the High Court committed serious error in recording a finding that the construction of buildings with 24 and 16 floors is illegal. Learned counsel then referred to the agreements entered into between the flat buyers and the developers to show that the former had purchased the flats under a bona fide belief that the developers will be able to persuade the Corporation to sanction the revised building plans and they should not be made to suffer on account of the wrong, if any, committed by the developers. Learned counsel also pointed out that the writ petitions filed by the petitioners for issue of a mandamus to the Corporation to regularize the illegal/unauthorized construction are pending before the High Court and submitted that till the disposal of those petitions the Corporation should not be allowed to demolish the buildings or the constructions which are said to have been made in violation of the sanctioned plans. In support of this submission, Shri Mukul Rohatgi placed before this Court xerox copies of the order sheets of Writ Petition No. 6550 of 2010. Learned counsel for the petitioners lastly submitted that the Court may consider the desirability of transferring the writ petitions filed by the petitioners for regularization of the construction to this Court so that the issue of regularization may be finally decided and 200 families which are residing in the flats allegedly constructed in violation of the sanctioned plan may not be rendered homeless.

12. Shri Pallav Shishodia, learned senior counsel appearing for the Corporation argued that the action taken under Section 351 of the 1888 Act is perfectly legal because the buildings in question were constructed despite rejection of the revised building plans and the issue of stop work notice. Learned senior counsel emphasized that the Corporation had taken belated action for removing the illegal

construction in the light of the observations made by the Division Bench of the High Court on 11.10.2005 and, therefore, notices dated 19.11.2005 and orders dated 3/8.12.2005 cannot be faulted.

13. Shri Harish N. Salve, learned senior counsel appearing for respondent no. 2 argued that total area of Plot No. 9 cannot be taken into consideration for the purpose of deciding whether the buildings have been constructed in violation of the sanctioned plan because the State Government had allowed change on land use only in respect of 13049.45 sq. meters. Learned senior counsel submitted that the members of the societies who purchased the flats knowing fully well that the buildings had been constructed in violation of the sanctioned plans cannot claim any equity or complain against the action taken by the Corporation for demolition of the illegal/unauthorized structures.

14. We have considered the respective submissions and carefully scrutinized the record. The scope of the appellate Court's power to interfere with an interim order passed by the Court of first instance has been considered by this Court in several cases. In *Wander Ltd. v. Antox India (P) Ltd* 1990 Supp SCC 727, the Court was called upon to consider the correctness of an order of injunction passed by the Division Bench of the High Court which had reversed the order of the learned Single Judge declining the respondent's prayer for interim relief. This Court set aside the order of the Division Bench and made the following observations:

In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion.

15. In *Skyline Education Institute (India) Pvt. Ltd. v. S.L. Vaswani* (2010) 2 SCC 142, the 3-Judge Bench considered a somewhat similar question in the context of the refusal of the trial Court and the High Court to pass an order of temporary injunction, referred to the judgments in *Wander Ltd. v. Antox India (P) Ltd* (supra), *N.R. Dongre v. Whirlpool Corpn.* (1996) 5 SCC 714 and observed:

The ratio of the abovenoted judgments is that once the court of first instance exercises its discretion to grant or refuse to grant relief of temporary injunction and the said exercise of discretion is based upon objective consideration of the material placed before the court and is supported by cogent reasons, the appellate court will be loath to interfere simply because on a de novo consideration of the matter it is possible for the appellate court to form a different opinion on the issues of prima facie case, balance of convenience, irreparable injury and equity.

16. In these cases, the trial Court and the High Court have, after threadbare analysis of the pleadings of the parties and the documents filed by them concurrently held that the buildings in question were constructed in violation of the sanctioned plans and that the flat buyers do not have the locus to complain against the action taken by the Corporation under Section 351 of 1888 Act. Both, the trial Court and the High Court have assigned detailed reasons for declining the petitioners' prayer for temporary injunction and we do not find any valid ground or justification to take a different view in the matter.

17. The submission of Dr. Abhishek Manu Singhvi that the constructed area should be measured with reference to the total area of the plot cannot be accepted for the simple reason that the State Government had sanctioned change of land use only in respect of 13049.45 sq. meters.

18. In view of the above, we may have dismissed the special leave petitions and allowed the Corporation to take action in furtherance of notices dated 19.11.2005 and orders dated 3/8.12.2005, but keeping in view the fact that the flat buyers and their families are residing in the buildings in question for the last more than one decade, we feel that it will be in the interest of justice that the issue relating to the petitioners' plea for regularization should be considered by this Court at the earliest so that they may finally know their fate.

19. We, therefore, direct the petitioners to furnish the particulars of the writ petitions filed for regularization of the construction which are pending before the High Court. The needful be done within a period of two weeks from today. Within

this period of two weeks, the petitioners shall also furnish the particulars and details of the developers from whom the members of the societies had purchased the flats. List the cases on 16th March, 2012 (Friday).

20. If the petitioners fail to comply the aforesaid directions, the special leave petitions shall stand automatically dismissed.