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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 3351 OF 2005

1. **MR. NATVAR T. PATEL,**
age 54 years
2. **MRS. MEENA AHUJA,**
age 57 years
3. **MR. VISHWAS GOPAL NAWARE,**
52 years
4. **MR. RAJENDRA S. SAWALE,**
42 years
5. **MR. SANJEEV ISHWARI KHANDLWAL,**
40 years
6. **MRS. NEETA SHETTY,**
29 years
7. **MR. S. K. SUNDERAM,**
47 years
8. **MRS. MADHULIKA ROONGTA,**
47 years
9. **MR. VINAY P. JHUNJUNWALA,**
50 years

10. MRS. RASHMI R. AMBAVANE,
46 years
11. MRS. SHOBHA NARENDRA SHAH,
48 years
12. MR. KISHOR KUMAR PODDAR,
44 years
13. MRS. VIDYA BIPIN KARNIK,
52 years
14. MR. SUSHIL G. DRAUKA,
42 years
15. MR. SUDESH SANJEEVA SHETTY,
46 years
16. MR. SRINIVASAN PADMANABHAN,
48 years
17. MR. MANDAR SHETYE,
30 years
18. MR. JANAK SHAH,
48 years
19. MR. H. MUSALE,
63 years
20. MRS. SUNITA SULTANIA,
36 years
All above adults,
R/o. Tarangan Complex
Off Eastern Express Highway,
Behind Cadburys Factory
Thane (W) 400 606.

...PETITIONERS

~ versus ~

1. THE STATE OF MAHARASHTRA
2. THE COMMISSIONER,
Thane Municipal Corporation,
Thane.
3. M/S. KALPATRU PROPERTIES (THANE)
PVT. LTD.,
Having their office at
Siddhachal, Vasant Vihar,
Pokhran Road No. 2, Thane (W)

...RESPONDENTS

WITH
CIVIL APPLICATION NO. 751 OF 2014
IN
WRIT PETITION NO. 3351 OF 2005

MR. NATVAR T. PATEL,
and others

... PETITIONERS

~ versus ~

THE STATE OF MAHARASHTRA
and others

...RESPONDENTS

AND

M/S. TARANGAN TOWERS CHS LTD.,
Through its Secretary

...APPLICANT/
INTERVENOR

APPEARANCES

FOR THE PETITIONERS	Mr Amol P. Mhatre.
FOR THE APPLICANT IN CAW/751/2014	Mr Yash Dewal.
FOR RESPONDENT NO.1- STATE	Ms Rupali Shinde, AGP.
FOR RESPONDENT NO.2-TMC	Dr Milind Sathe, Senior Advocate, <i>i/by Mr Mandar Limaye.</i>
FOR RESPONDENT NO.3	Mr Girish Godbole, Senior Advocate, <i>a/w Mr Narayan Sahu, Mr M. S. Federal, Mr Shrinivasan Mudaliar, Mr Dinkar Desai and Ms Hiral Tanna, i/by Federal & Company.</i>

CORAM : M. S. Sonak &
Kamal Khata, JJ.

RESERVED ON : 27 September 2024
PRONOUNCED ON : 07 October 2024

JUDGMENT (Per M S Sonak J):-

1. Heard learned counsel for the parties.
2. This Petition shows the extent to which the Commissioner of Thane Municipal Corporation (“TMC”) has gone to help the third Respondent, a builder/developer and a

mall owner by way of regularising a patently unauthorised construction put up by the third Respondent on a public Nallah/drain. The Petitioners, who are some of the residents in Tarangan Housing Complex, Thane, constructed by the third Respondent, have challenged the regularisation order dated 05 February 2005 communicated by the Executive Engineer, Sewerage and Drainage Department, TMC, by instituting this Petition.

3. One of the grounds raised in this Petition was that the Executive Engineer of TMC has no power or authority to regularise. However, in the affidavit filed on behalf of TMC, it is stated that the Commissioner of TMC ordered the regularisation, and the Executive Engineer has only communicated the decision of the Commissioner of TMC. Accordingly, the grounds for the Executing Engineer's lack of authority were not seriously pressed before us on behalf of the Petitioners.

4. Mr. Mhatre, the learned counsel for the Petitioners, submitted that the impugned regularization order is patently arbitrary and ultra vires the provisions of the Maharashtra Regional and Town Planning Act, 1966 ("MRTP Act"), Maharashtra Municipal Corporations Act, 1949 ("MMC Act"), and the Development Control Regulations of Thane Municipal Corporation ("D.C.R. of TMC"), as applicable. He submitted that legal malafides vitiate the impugned order.

5. Mr Mhatre submitted that the impugned order is based on the premise that the regularisation is to provide access to the Tarangan Housing Complex. He submitted that this complex always had direct and substantial access until the third Respondent blocked it by constructing a mall and a multiplex theatre. The unauthorised construction was only to divert the focus from the third Respondent, who blocked the existing access. He submitted that for this purpose, the municipal/public property had been constructed upon unauthorisedly and by defying the stop work order issued by the TMC.

6. Mr Mhatre submitted that the TMC had filed a solid reply before the Civil Court pointing out the high-handed action of the third Respondent and how the patently unauthorised construction was made on a municipal Nallah/drain. The Reply also highlighted how the construction was made within the Nallah, thereby obstructing the water course. However, by ignoring its statements on the affidavit, the Commissioner of TMC has proceeded to regularise this patently unauthorised construction by relying on the provisions that were not even remotely attracted to the facts and circumstances of the present case.

7. Mr Mhatre submitted that the Commissioner's purported exercise of powers under Section 45 of the MRTP Act, read with Section 227 of the MMC Act, was misconceived. Under these provisions, the impugned regularisation order would

never have been made. He submitted that this is a case of abuse of powers and legal malafides.

8. Mr. Mhatre submitted that the reliance placed in the TMC's affidavit on Regulation 47(7) of the DCR of TMC was also misplaced. He submitted that it was not even the case of the third Respondent - builder/developer that the subject plot was landlocked. There is ample material on record demonstrating that the subject plot was not land-locked. He submitted that the third Respondent could not block the existing access, projected some difficulties for access based upon such unauthorised blockage, put up a patently unauthorised construction, and then sought regularisation. In any event, the TMC Commissioner cannot abuse his powers and grant regularisation by invoking the provisions that were not even remotely attracted to the present case.

9. Mr. Mhatre relied upon several decisions in support of his submissions. Upon his submissions and decisions, Mr Mhatre submitted that the impugned regularisation order dated 05 February 2005 should be struck down.

10. Dr. Milind Sathe, the learned Senior Counsel for the Respondent—TMC—defended the impugned order by submitting that parties who make unauthorised constructions can always apply for regularization under Section 53(3) of the MRTP Act. He submitted that such a power is to be exercised

having regard to the provisions of Sections 44, 45, and 53 of the MRTTP Act.

11. Dr. Sathe submitted that the impugned regularisation order is made having regard to the provisions of Section 227(1)(b) of the MMC Act. He submitted that since the subject plot was abutting on the street, the Commissioner has regularised the connecting passage from the plot over or across any street or portion thereof. He submitted that the Commissioner has acted intra-vires, and there is no illegality in the impugned regularisation order.

12. Dr Sathe submitted that the subject plot was landlocked, and therefore, the Commissioner has also exercised powers under Regulation 47 of the DCR of TMC. He submitted that the impugned regularisation order provides access to the Tarangan Housing Complex and benefits the Tarangan Housing Complex. Dr. Sathe referred to the TMC's Affidavit dated 04 September 2024, in which the contentions now raised by him have been pleaded.

13. Dr. Sathe submitted that this Petition may be dismissed for all these reasons.

14. Mr. Godbole, the learned Senior Counsel for the third Respondent, submitted that in the plans as initially approved, the Municipal Nallah or drain was permitted to be covered by an RCC slab. Therefore, he submitted that the third

Respondent—the builder/developer did nothing illegal in constructing the RCC slab.

15. Without prejudice, Mr Godbole submitted that the third Respondent applied for regularisation. He submitted that there was no infirmity in the regularization order because the Commissioner has ample powers to regularise an allegedly unauthorised structure, given the provisions of Sections 45 and 53(3) of the MRTP Act, read with several enabling powers under the MMC Act.

16. Mr Godbole submitted that the Petitioners are some disgruntled members of the Tarangan Housing Complex. He submitted that the majority of the members of this Housing Complex support the separate access now provided to the Housing Complex. He pointed out that even an intervention has been filed by the Society of the Housing Complex opposing the grant of any reliefs in this Petition.

17. Mr. Godbole submitted that though the subject plot was never landlocked, nor was the Tarangan Housing Complex or any buildings therein abutting any street, the Commissioner had the powers to regularize the alleged unauthorised structure because such regularisation was in the public interest, or at least the interest of the residents of the Tarangan Housing Complex.

18. Mr. Godbole submitted that the proposed structure does not obstruct the free water flow in the Nallah/drain. He submitted that since the Nallah/drain passes through the subject plot, the same is a part of the property of the third Respondent. He submitted that common access to the shopping mall, multiplex theatre, and the Tarangan Housing Complex would lead to chaos and inconvenience for the Petitioner and the other residents of the Tarangan Housing Complex. He, therefore, submitted that even assuming that there was any procedural irregularity in making the impugned order of regularisation, this Court, in exercising its jurisdiction under Article 226 of the Constitution, should not interfere.

19. Mr. Godbole relied on the *Central Council for Research in Ayurvedic Sciences and another Vs. Bikartan Das and others¹* and *Jaipur Vidyut Vitran Nigam Ltd. And others Vs. MB Power (Madhya Pradesh) Limited and others²*, to submit that the extraordinary jurisdiction under Article 226 of the Constitution should not be exercised where the Petitioners' motives are not above board. Further, even if some defect is found in the decision-making process, the power under Article 226 of the Constitution must be exercised with great caution and only in furtherance of public interest and not merely on making a legal point. He submitted that the Court should always keep the more significant public interest in mind to decide whether or not its intervention is called for. The Court

¹ 2023 SCC OnLine SC 996

² 2024 SCC OnLine SC 26

should intervene only when it concludes that overwhelming public interest requires interference.

20. Mr. Godbole submitted that this Petition may be dismissed for all the above reasons.

21. Mr Yash Dewal, the learned counsel for the Intervenor, submitted that the intervenors support the impugned regularisation order dated 05 February 2005. He submitted that a separate access provided by the third Respondent by constructing over the Nallah/drain is in the interest of the intervenor and the majority of its members. He submitted that serious complications would arise if the impugned regularisation order is upset. Accordingly, he urged that this Petition be dismissed.

22. The rival contentions now fall for our determination.

23. The circumstances leading to the challenge to the impugned regularisation order dated 05 February 2005 are referred to hereafter:-

23.1 The third Respondent has developed and constructed the “Tarangan Housing Complex” on the part of land bearing final plots Nos. 25, 31 and 23 of Town Planning Scheme No.1, Mangal Pande Road, which is a Service Road on the Eastern Express Highway, Thane (West).

23.2 This final plot is abutting the Service Road. The Tarangan Housing Complex, therefore, had direct access to this Service Road. This fact is borne out from the material on record and was not even disputed by Mr. Godbole, the learned Senior Counsel for the third Respondent.

23.3 Later, however, the third Respondent decided to build a shopping mall and a multiplex theatre on a portion of the same final plot. Such construction substantially blocked access to the Tarangan Housing Complex.

23.4 The third Respondent, therefore, covered the public drain/Nallah abutting the final plot for passing through the final plot and constructed a separate access to the Tarangan Housing Complex. For this purpose, the third Respondent put up an RCC slab on a portion measuring 90 x 30 feet on the Nallah (drain), which is admittedly a natural watercourse flowing through the area.

23.5 The Petitioners, therefore, filed Regular Civil Suit No.649 of 2004 in the Court of Civil Judge Senior Division, Thane, for various reliefs, including relief for an injunction to restrain the third Respondent from carrying out such illegal and unauthorised

construction and to demolish the construction already carried out.

23.6 The TMC issued stop-work notices to the third Respondent to stop the illegal construction on and in the Nallah/public drain. Ignoring the stop-work notices or defying them, the third Respondent completed the unauthorised construction.

23.7 The TMC, therefore, issued a show cause notice dated 14 May 2004 to the third Respondent, requiring it to show causes as to why no action should be taken to demolish the unauthorised construction carried out by the third Respondent on and in the Nallah/public drain.

23.8 After considering the cause shown by the Petitioners, the TMC, by order dated 09 August 2004, ordered the demolition of illegal construction by the third Respondent.

23.9 The third Respondent instituted a Special Civil Suit No.211 of 2004 in the Court of the Civil Judge Senior Division, Thane and sought an injunction against the TMC from implementing the demolition order dated 09 August 2004.

23.10 In the suit, the TMC filed a reply dated 16/18 August 2004 to the application for temporary injunction. In this reply, which was verified by Shri Ajit Karnik, Executive Engineer of TMC, it was stated that the third Respondent had carried out a patently illegal construction, defying the stop work order issued by the TMC. The Reply proceeds to state that the RCC slab over the Nallah is an unauthorised construction and is obstructing the flow of water in the Nallah.

23.11 During the pendency of the suit, the third Respondent applied for regularisation of the unauthorised construction in an application dated 20 August 2004. By impugned order dated 05 February 2005, the Executive Engineer of TMC communicated that the unauthorised construction had been regularised to provide access to the Tarangan Housing Complex. This order states that during an emergency if the unauthorised construction is required to be demolished, the third Respondent should not raise any objection.

23.12 The impugned regularisation order dated 05 February 2005 is challenged in this Petition.

24. One of the grounds raised in this Petition was that the Executive Engineer of TMC has no power or authority to

regularise. However, in the affidavit filed on behalf of TMC, it is stated that the Commissioner of TMC ordered the regularisation, and the Executive Engineer has only communicated the decision of the Commissioner of TMC. Accordingly, the grounds for the Executing Engineer's lack of authority were not seriously pressed before us on behalf of the Petitioners.

25. There is ample material on record to establish that the construction put up by the third Respondent over and even within the municipal Nallah/drain is illegal and unauthorised. The record shows that when this unauthorised construction commenced, the TMC issued stopped work orders to the third Respondent—builder/developer. However, in defiance of such stop work orders, the third Respondent proceeded to complete the unauthorised construction covering the municipal Nallah/drain and providing RCC columns within the municipal Nallah/drain.

26. The third Respondent did not even dispute that the TMC issued stop work orders to the third Respondent. This position was asserted on affidavit by none other than Shri Ajit Karnik, Executive Engineer of TMC, in his reply dated 16 August 2004 filed before the Civil Judge, Senior Division, Thane in Special Civil Suit No.211 of 2004 instituted by the third Respondent challenging the demolition order made by the TMC regarding the unauthorised construction which is now ordered to be

regularised by the impugned regularisation order dated 05 February 2005 by the Commissioner of TMC.

27. Mr. Godbole, by referring to certain plans and the endorsements made thereon, did try to contend that the original approved plans had permitted the construction of the RCC slab over the municipal Nallah/drain and RCC columns to sustain this slab within the municipal Nallah/drain. However, on perusing the plans, we have been unable to accept this contention. Based on some truncated plans or an isolated endorsement of one of the plans, it is not possible to accept Mr Godbole's contention about the unauthorised construction not being unauthorised at all because the same was approved in the original plans.

28. The TMC, in the affidavit filed on its behalf on 04 September 2024, has not stated that the construction involving the casting of the RCC slab over the municipal Nallah/drain or the RCC columns within the municipal Nallah/drain was approved in the original plans sanctioned by the TMC. The TMC has repeatedly asserted that this was a patently illegal and unauthorised structure constructed by the third Respondent – builder/developer in defiance of the stop-work orders issued by the TMC.

29. If the third Respondent – builder/developer was serious about the structure/construction being legal and authorised or covered by the sanctioned plans, there was no question of the

third Respondent applying for regularisation. The regularisation was applied because even the third Respondent knew that the construction covering the municipal Nallah/drain with an RCC slab or RCC columns within the Nallah was illegal and unauthorised. Therefore, Mr Godbole's contention about regularised construction being legal and authorised construction even before the impugned regularisation order was made cannot be accepted.

30. The record shows that in the original approved plans for the Tarangan Housing Complex, access was provided from the portion directly abutting the service road. However, at a later point, the third Respondent obtained permission to construct a shopping complex (mall) and a multiplex theatre on a portion of the subject plot. This substantially blocked the access otherwise available to the subject plot.

31. The Petitioner has placed on record the complaints dated 07 June 2004, 10 June 2004, 12 July 2004, and 02 August 2004, all addressed to the Commissioner of TMC, protesting against the permission granted to the third Respondent for the construction of a shopping complex (mall) and a multiplex theatre by seriously affecting the access to the Tarangan Housing Complex. Such complaints are collectively in Exhibit-A (pages 20 to 31 of the Petition's paper book).

32. Based upon the complaints made by the ad hoc committee members of the Tarangan Housing Complex, the

TMC issued a show cause notice dated 14 May 2004 to the third Respondent – builder/developer. The show cause notice at Exhibit-B (pages 32 and 33) states that the TMC officials, on inspection of the site, found that the third Respondent was involved in illegal and unauthorised construction over the municipal Nallah/drain without bothering to obtain any permissions from the TMC. The show cause notice required the third Respondent to show cause as to why the unauthorised construction involving the RCC box and column covering an area of 28.00 x 94.00 sq. feet should not be demolished.

33. The third Respondent – builder/developer filed his reply to the show cause notice dated 14 May 2004 on 18 May 2004. This reply is annexed to the Affidavit filed on behalf of the third Respondent at Exhibit R-3/8 (pages 112 and 113). The third Respondent, in its reply dated 18 May 2004, submitted that the Nallah water flow was obstructed due to debris dumped by the nearby residents, sweepers, passers-by etc. and this was creating a nuisance for nearby residents and also due to its proximity to service road, it was also accident prone for vehicles. The reply states that the third Respondent architect had submitted a letter along with a drawing for Nallah covering, and the Commencement Certificate issued on 23 March 2004 includes part of the Nallah covering by RCC slab. The reply admits the construction of columns in the Nallah. The reply states that the third Respondent was now providing a concrete floor in the Nallah bed.

34. The third Respondent also instituted a civil suit questioning TMC's action. Based on the civil suit's pendency and even without any interim order, the third Respondent requested the TMC to defer its action. The TMC, upon due consideration of the third Respondent's reply and specific orders made by the Civil Court and after satisfying itself that there was no restraint order from the Civil Court, issued a demolition order on 09 August 2004.

35. At this stage, we must refer to the Written Statement and the reply to the application for temporary injunction filed by the TMC before the Civil Judge, Senior Division at Thane in Special Civil Suit No.211 of 2004 instituted by the third Respondent – builder/developer seeking to restrain the TMC from taking any action against the construction of RCC slab over the municipal Nallah/drain and the RCC columns to sustain such slab within the municipal Nallah/drain.

36. The TMC, in its written statement, duly verified by Shri Ajit Karnik, Executive Engineer of TMC, has stated, among other things, the following:-

(i) In paragraph 13 of the written statement, the TMC has stated that the third Respondent commenced the construction of a shopping complex (mall) and a multiplex theatre without complying with the terms and conditions of the permission granted. (see paragraphs 4 and 13);

(ii) The TMC denied that the third Respondent had not violated any rules and regulations and/or terms and conditions imposed while issuing the commencement certificate. Accordingly, the TMC defended the stop work notices issued to the third Respondent (see paragraphs 17 and 18 of the written statement);

37. The TMC's reply dated 16 August 2004, is most relevant, and therefore, some of the extracts from this reply are transcribed below for the convenience of reference:-

2. The defendant states that the defendant corporation has granted sanction to the plan dt. 24.3.2004. The said permission has been granted pursuant to the application bearing inward no. 41191, dt. 17.12.2003 received on 19.12.2003. In the said application there is no mention of proposed slab over Nalla.

3. The defendant states that the plans submitted alongwith the application, dt. 19.12.2003 shows 'Nalla covered with R.C.C. Slab'. Merely the said working cannot be construed being permission granted for construction of R.C.C. Slab on the said Nala. The defendant states that the said sanction plan also shows existing structures on the western side of the Bnala which does not mean that any sanction is accorded for the said structures or the said structures are regularized under the said sanction, when in fact the said existing structures are unauthorised constructions.

4. The defendant states that in the permission dt. 24.3.204 the description of the scope of permission is given at the top most portion of the permission which does not include slab over Nala. In any case assuming without admitting the contention of the plaintiff to be true. No commencement certificate was issued for the construction

of the said Nala. No detail plans for construction of slab over the said Nala are ever submitted or approved by the defendant corporation. The said Nala is a public Nala carrying water from hilly area as well as drainage from the surrounding areas. For carrying out any construction on the said nala detail plans and specification are required to be furnished which has not been done by the plaintiff.

5. The defendant further states that there exist an access to the said property the same has been closed down by the plaintiff to enable him to undertake the work of commercial building from the service road.

6. The defendant states that in the circumstances stated herein above one can safely conclude that the work undertaken by the plaintiff of covering the said Nala was and is totally illegal. The defendant states that the Executive Engineer of the drainage department of the corporation during their inspection revealed that R.C.C. Columns were being erected in the said Nala by the plaintiff. The drainage department has not given any permission for the said construction. The drainage department also found that the obstruction has caused to the flow of the said Nala because of the said construction carried out in the nala.

7. The defendant states that the officers of the encroachment department again carried out the inspection and revealed that 10 R.C.C. Block and columns were erected in the said Nala. The said columns being erected within the said nala there could be obstruction in the work of cleaning. The said construction was carried out without taking due permission from the concerned departments was totally illegal. The said construction being in progress the defendant corporation issued notice under Sec. 267 (12)(2)(3) of B.P.M.C. Act and under Sec. 260(1)(2) of B.P.M.C. Act, 1949 both dt. 14.5.2004. The contents stated in the said notices are true, legal and valid.

8. The defendant states that inspite of the fact that ntoce under section 267 of B.P.M.C. Act was issued, the plaintiff continued with the construction of the slab on the Nala. The defendant states that on 25.5.2004 again the inspection was carried out and it revealed that work of centering for construction of the slab was in progress. The defendant states that the said centering was partly

removed by the corporation on 25.5.2004. The defendant states that the plaintiff however completed the construction of the said slab without complying with the notices issued by the Corporation. The defendant in the circumstance therefore issued notice, dt. 9.8.2004 of 24 hours to the plaintiffs.

9. The defendant states that in fact under sec. 230 & 231 of B.P.M.C. Act, 1949 no notice is necessary to remove or demolish any construction carried out on the Nala. The defendant corporation however has given full opportunity to the plaintiff by way of following principles of natural justice.

10. The defendant states that thus it is clear from all the above facts that the construction in and on the said nala carried out by the plaintiff is totally illegal and the defendant corporation is entitle to take action against the same.

18. With respect to para 7, it is emphatically denied that it is denoted in the sanctioned plan that the Nala coming within the said road to be covered by R.C.C. slab. It is denied that the slab over the Nala is covered under the said plan and is part and parcel of the sanctioned plan. It is denied that the said plan sanctioned on 24.3.2004 is the subject matter of the present suit and/or is specifically covered in the said prayer. It is denied that the defendant are restrained from creating any hurdle or obstruction in the construction work in pursuant to the sanctioned plan.

19. With respect to para 8 it is denied that the plaintiffs in total defiance and disobedience to the order of injunction illegally, high handedly and without any cause issued notice, dt. 14.5.2004 through its Ward Officer under Sec. 260(1)(2) of B.P.M.C. Act and therefore falsely contended that the said R.C.C. slab over the nala is unauthorized construction. It is denied that vide the said notice a threat of demolition was also given. It is denied that issuance of the said notice was absolutely uncalled for, unwarranted and otherwise in defiance of the order of injunction. It is denied that allegations were absolutely false and frivolous to the knowledge of defendant. Reply given by the notice is matter of record. It is denied that any sanction is granted for the construction of the said Nala and/or commencement certificate is issued for the construction of the said Nala. It is denied that there is any necessity to

construct a slab on the said nala. It is emphatically denied that access to the said complex would otherwise cut off if the slab is not erected. It is emphatically denied that the erection of the said slab was otherwise just and necessary for having free access from the said complex. It is denied that the access road with the slab on the nala is the only access to the said complex, It is denied that the said slab is nothing but a matter of easement of necessity. It is denied that the construction of the slab by no stretch of imagination can be called as unauthorized construction. It is denied that the defendants are duly satisfied by the reply given by the plaintiff. It is denied that defendants did not give any opportunity of hearing to the plaintiff pursuant to the first notice. It is denied that an impression was created that the first notice would Inever be acted upon as alleged.

24 It is denied that irreparable loss and injury would be caused to the plaintiffs. If the defendants are allowed to act upon the notices and that the access of the said complex would be cut off and thereby obstruction in the enjoyment of easement by necessity would be created. The Plaintiff has admitted that the slab is unauthorized construction.

VERIFICATION

I, Shri Ajit Karnik, Ex Engineer, of the defendant corporation do hereby solemnly declare and state that the contents of the foregoing paragraphs of the written statement are true and correct to the best of my knowledge, information and belief and I believe the same to be true and in testimony whereof, I have put my hand hereto at Thane on 16.08.04

Filed in Court
Dated 16.08.04

Sd/-
Defendant

Sd/-
Advocate for the Defendant

38. Thus, at least as of 16 August 2004, the TMC was quite clear and stated the following in the affidavit:-

(i) That there was no sanction for constructing any

RCC slab over the municipal Nallah/drain;

(ii) In any event, there was no commencement certificate ever issued by the TMC for constructing the RCC slab on the municipal Nallah/drain;

(iii) There was neither any sanction nor commencement certificate for constructing RCC columns within the municipal Nallah./drain;

(iv) That the third Respondent – builder/developer had access which was closed down by the third Respondent to enable it to undertake the work of commercial building from the service road;

(v) That accordingly, it could be safely concluded that the work undertaken by the third Respondent of covering the Nallah was illegal and unauthorised;

(vi) That the Executive Engineer of the Drainage Department of TMC, during their inspection, saw that RCC columns were being erected in the municipal Nallah by the third Respondent - builder/developer. This was without any permission from the Drainage Department of TMC;

(vii) That the Drainage Department of TMC found that the obstruction was caused to the flow of the said Nallah because of the constructions carried out by the third

Respondent – builder/developer in the municipal Nallah;

(viii) The officers of TMC (Encroachment Department) again inspected the site and revealed that 10 RCC blocks and columns were erected in the municipal Nallah. This construction was carried out without obtaining due permission from the concerned department and was illegal. This construction was obstructing the Nallah;

(ix) The stop work notices were issued to the third Respondent – builder/developer after the inspection revealed that the third Respondent was carrying on the work of illegal construction. A portion of the illegal construction was also removed by the TMC but the third Respondent – builder/developer proceeded to complete the work ignoring the notices issued by the TMC;

(x) Under Sections 230 and 231 of the BPMC Act, 1949, no notices are necessary to remove or demolish any construction on the Nallah. Still, the TMC issued notices to comply with the principles of natural justice;

(xi) In paragraph 10, the TMC asserted that it was clear from all the facts pleaded that the construction in and on the Nallah carried out by the third Respondent *“is totally illegal and the defendant corporation is entitle to take action against the same”*;

(xii) The TMC denied that any sanction was granted for

constructing a slab over the Nallah or columns inside the Nallah. In any event, there was no commencement certificate for such works;

(xiii) The TMC denied that the construction over the Nallah was necessary for providing an access road or that the said slab was the access road;

(xiv) The TMC denied the allegations of easementary right claimed by the third Respondent. The TMC claimed that the third Respondent admitted that the slab was unauthorised construction.

39. While the suit was pending, the third Respondent applied for regularisation of the unauthorised construction by application dated 20 August 2004. Based on the application dated 20 August 2004, the third Respondent communicated the impugned regularisation order dated 05 February 2005, which is impugned in the present Petition.

40. The Executive Engineer of the Drainage Department of TMC signs the impugned regularisation order dated 05 February 2005. However, the affidavit filed on behalf of TMC explains that the Municipal Commissioner took this decision, which was only communicated by the Executive Engineer of the Drainage Department.

41. The impugned regularisation order dated 05 February 2005 is in Marathi (Exhibit E on page 41). However, a translation is provided on page 41A, and the same is transcribed below for the convenience of reference:-

Exh.E

Translated from Marathi

THANE MUNICIPAL CORPORATION

Mahapalika Bhavan, Dr. Almeida Road, Chandanwadi,
Panch-pakhadi Thane 400 602.

Ref. No.Tha.Ma.Pa.Karya.Aki/2.Vi./1486

Dt:

5.2.2005

To,
M/s. Kalpataru Properties (Thane) Pvt.Ltd.,
111, Maker Chambers, IV
Nariman Point, Mumbai 400021.

Sub: Regarding regularisation of the Slab laid on the Nalla in front of the Plot for access road to the Plot situated adjacent to the Service Road near Cadbury at Tarangan Housing Complex, under Development Proposal No. 93150.

Ref: Letter dated 21.8.2004 from M/s. Kalpataru Properties (Thane) Pvt. Ltd.

At the place under subject above, slab has been laid on the Nalla without permission and the Commissioner on 13.1.2005 has given his approval for regularisation of the slab on the Nalla by charging penal charges. Therefore, the said slab is being regularised on the following terms and conditions :-

1. The said road is to be used as access to the residential complex.

2. No construction of any nature such as Compound Wall, Watchman Cabin etc. is to be made on the said slab.

3. If in emergency the slab is to be demolished, the Developers and flat holders will not have any objection for the same.

Sd/-
Executive Engineer
Drainage Department.

42. In the affidavit filed in this Petition, there is no explanation whatsoever for the volte-face of the TMC. As noted above, in the written statement and the reply filed before the Civil Court, the TMC had vehemently asserted hardly a few months earlier that the construction was wholly illegal and unauthorised. Further, such construction was unnecessary to provide access to the residential complex. Further, this unauthorised construction was done with impunity by defying the stop-work orders issued by the TMC. Even after the TMC demolished portions of unauthorised construction, the third Respondent reconstructed the portion without obtaining permission from the authorities. The construction of RCC columns in the Nallah obstructed the free flow of water.

43. Still, the impugned regularisation order states that the regularisation is granted because the road is to be used to access the residential complex. The Commissioner, who has issued the impugned regularisation order, owed an explanation for this volte-face of TMC. The Commissioner had to either state that a false affidavit or reply was filed

before the Civil Court or justify the impugned regularisation order despite what was said in the affidavit/reply of the TMC before the Civil Court. As noted earlier, there was no explanation whatsoever for this drastic volte-face. This is sufficient to strike down the impugned regularisation order dated 05 February 2005 because the same is arbitrary and a product of complete non-application of mind. Vital and relevant considerations have been deliberately ignored, and the impugned order is premised on irrelevant and even non-existing material.

44. In the affidavit filed in this Petition on 04 September 2024, i.e. almost 20 years after the institution of this Petition, the impugned regularisation order is sought to be justified by referring to Section 227 (1)(b) of the MMC Act, 1949.

45. Section 227 of the MMC Act 1949 reads thus:-

“227. Projections over streets may be permitted in certain cases.

(1) The Commissioner may give a written permission, on such terms as he shall in each case think fit, to the owner or occupier of any building abutting on any street-

(a) to erect an arcade over such street or any portion thereof, or

(b) to put up a verandah, balcony, arch, connecting passage, sun- shade, weather-frame canopy, awning, or other such structure or thing projecting from any story over or across any street or portion thereof:

Provided that no permission shall be given by the Commissioner for the erection of an arcade in any

public street in which the construction of arcades has not been generally sanctioned by the Corporation.

(2) The provisions of section 226 shall not be deemed to apply to any arcade, verandah, balcony, arch, connecting passage, sun-shade, weather-frame, canopy, awning or other structure or thing re-erected or put up under and in accordance with the terms of a permission granted under this section.

(3) Commissioner may at any time, by written notice require the owner or occupier of any building to remove a verandah, balcony, sub-shade, weather-frame or the like put up in accordance with the provisions of sub-section (1) and such owner or occupier shall be bound to take action accordingly but shall be entitled to compensation for the loss caused to him by such removal and the cost incurred thereon.”

46. The TMC’s defence of the impugned regularisation order by referring to Section 227 of the MMC Act, 1949, is nothing but a red herring. It was not even the third Respondent – builder/developer’s case that anyone was concerned with “any building abutting on any street”. Section 227 (1) empowers the Commissioner to give written permission on such terms as he shall in each case deem fit, “*to the owner or occupier of any building abutting on any street*”. Therefore, by reading the expression “connecting passage” in Section 227(1)(b) of the MMC Act, 1949, entirely out of context, the TMC cannot attempt to impart any validity or even respectability to the impugned regularisation order dated 05 February 2005.

47. Though Dr Sathe, learned Senior Counsel for the TMC, did rely upon Section 227 of the MMC Act, 1949, Mr Godbole, the learned Senior counsel for the third Respondent, fairly admitted that Section 227 would not apply because, in this

matter, we were not even concerned with projection over streets by the owners or occupiers of any buildings abutting on any street. It is quite unfortunate that the TMC should attempt to mislead the Court by relying upon a provision which has no nexus with the purported exercise of powers by the Municipal Commissioner in making the impugned regularisation order. This also shows the extent to which the Commissioner of TMC was prepared to help a builder and developer at the cost and prejudice of the municipal Nallah/public drain by raising frivolous defences, which even the builder found embarrassing to justify.

48. The other defence raised by the TMC, which is equally unfortunate, is reflected in paragraph 11 of the TMC's affidavit filed on 04 September 2024, and the same reads as follows:--

11. I say that it is important to note that the Nalla flows from Yeoor hills and it passes through Tarangan Complex and also crosses Eastern Express Highway and goes beyond it. I say that the Corporation, by putting slab on it, has really converted into a culvert by which storm water flows and goes beyond Eastern Express Highway. I say that Regulation 47 of the Development Control Regulations of Thane Municipal Corporation contemplates width of means of access. I say that Regulation 47(7) reads as follows:

47(7):- In the case of a plot, surrounded on all sides by other plots i.e. a land-locked plot which has no access to any street or road, the Commissioner may require access through an adjoining plot or plots which shall, as far as possible be nearest to the street or road, to the land locked plot, at the cost of owner of the land-locked plot and such other conditions as the Commissioner may specify.

I say that in view of the fact that there is no access to the Complex from the Highway, in terms of the aforesaid DCR

Regulations the Commissioner has powers to regularize or grant permission. I say that it is also pertinent to note that the initial plan submitted to the Corporation by the Petitioner included the construction of a slab over the Nalla. I say that, it is pertinent to note that the impression given by the Petitioner that, the Nalla is being closed permanently is not correct. However the Corporation has given permission to regularize covered Nalla by constructing slab. Due to which there is a smooth flow of drain water, right from Yeoor Hills beyond Eastern Express Highway. I say that thus the order dated 05.02.2005 issued by the Executive Engineer, Drainage Department is on the basis of approval, dated 13.01.2005 given by the Commissioner TMC which is in consonance with the DC Regulations and in accordance with the provisions of The Maharashtra Municipal Corporation Act, 1949.

49. Again, from the plans shown to us by Mr. Godbole, learned Senior Counsel for the third Respondent, it is evident that the subject plot was not at all the land-locked plot. In response to our repeated queries, Mr Godbole agreed that it was not even the third Respondent's case that the subject plot was landlocked. If the subject plot was land-locked, then there was no question of the TMC giving permissions for constructing the Tarangan Housing Complex, a vast shopping complex (mall) and a multiplex theatre on such a plot. Since the subject plot was not a land-locked plot with no access to any street or road, Regulation 47(7) of the DCR of TMC was not even remotely attracted. Still, the TMC and its Commissioner have referred to Regulation 47(7) only to mislead all concerned, including this Court. Such a submission on the affidavit indicates the extent to which the TMC and its Commissioner are prepared to help a builder/developer and consequently fritter away the municipal property. Again, even this frivolous defence was too embarrassing for even the builder to endorse.

50. The contention that, in this case, we are only concerned with a municipal Nallah or drain, which is not valuable municipal property, is entirely misconceived. Ultimately, the municipal Nallah/drain serves a public purpose. Any obstruction to the municipal Nallah/drain seriously affects the public interest. As it is, there is frequent flooding in urban areas mainly because the Nalas and drains are choked up with filth and unlawful constructions made on its banks and also, as this case would indicate, within the Nala itself.

51. The Municipal Commissioner may have been given substantial powers under the MMC Act of 1949. However, the Municipal Corporation and its Commissioner are trustees of the power and property they wield and, therefore, have to exercise such powers in the interest of the corporation and the members of the public, which the corporation is duty-bound to serve. Such powers can never be exercised to benefit the builders and developers at the cost of public amenities like Nalas and drains being choked or otherwise encroached upon. That would amount to abuse of such powers.

52. Thus, based upon Regulation 47(7), the impugned regularisation order cannot be sustained. It is, in fact, an admitted fact that the subject plot abuts a service road followed by a Highway or an Expressway. Therefore, the subject plot is not land-locked. Still, invoking Regulation 47(7) by the TMC or its Commissioner is quite unfortunate and discloses a complete non-application of mind. Therefore,

upon due consideration of Dr Sathe's submissions and those contained in TMC's affidavit, we regret our inability to appreciate or accept them. None of the contentions or submissions can sustain the impugned regularisation order or even impart it a modicum of respectability.

53. The Municipal Commissioner has, in fact, acted contrary to the law laid down by the Hon'ble Supreme Court on the subject of regularisation of patently unauthorised and illegal constructions put up with impunity by professional builders and developers. Dr Sathe submitted that builders/developers, when served with a notice for demolition of an unauthorised structure, have the right to seek regularisation. He seems to suggest that this is some unqualified right that a builder/developer undertaking an unauthorised construction has under the Scheme of Section 53 of the MRTP Act.

54. In *Sou Motu Writ Petition No.2 of 2023 (High Court on its own Motion Vs. The State of Maharashtra)* disposed of on 8th & 11th March 2024, the Division Bench comprising of G. S. Patel & Kamal Khata, JJ has rejected such an argument in solid terms. The Court held that such an argument is based on a fundamentally flawed premise, one of reductionism and isolationism: that what somebody does on a piece of land has no effect or impact on anything else. Therefore, planning permissions are just an irritant, a legacy of the licensing raj. Anybody can and should be able to build anything anywhere without needing to seek or obtain permission, and then, only after confronted with a municipal notice, should be allowed to

seek 'retention' or 'regularisation' on a narrow view of what is 'permission' under extant building control regulations (with no regard to overall planning consideration).

55. The Court, by referring to the decision of the Hon'ble Supreme Court in *Friends Colony Development Committee Vs. State of Orissa & ors*³ held that consistent violations of sanctioned building plans and construction deviations to the prejudice of the planned development of the city and at the peril of the occupants of the premises constructed or the inhabitants of the town at large poses a severe threat to ecology and environment and at the same time to infrastructure. The Division Bench referred to yet another decision of the Coordinate Bench in *Sakib Ayub Khan Vs. Kalyan Dombivli Municipal Corporation*⁴, in which it was held that where there is complete illegality and construction is without any permission, there is no question of permitting a regularisation.

56. In Suo Motu Writ Petition No.2 of 2023, the Division Bench has held that regularisation cannot be granted as a matter of course. It cannot be said, as a general rule, that, and this is important, illegal construction must be regularised if FSI is available or can be generated in the form of TDR from other sources. The decision refers to several other precedents of the Hon'ble Supreme Court and the Division Benches of this Court, cautioning against liberal use of the powers of

³ (2004) 8 SCC 733

⁴ 2023 SCC OnLine Bombay 706

regularisation and retention of unauthorised works in the building. The Court held that exercising the discretionary power allowing regularisation must not result in a license to break existing laws. The individual right has to be balanced with the requirements of society. Private interest must be subordinated to the public good. Regularisation cannot be allowed routinely by imposing fines or taking compensation.

57. In *Sandeep Vilas Ranade Vs. Pune Municipal Corporation*⁵, we have held that the benefit of regularisation is never to be extended to the parties who violate the building or environmental regulations brazenly and with impunity. The Hon'ble Supreme Court has repeatedly warned against such regularisation and even directed against officials who regularised such constructions without adequate cause. The Court has held that such indiscriminate regularisation discriminates against the law-abiding citizens who refuse to pay bribes and follow the due, though long, process of securing permission from all prescribed authorities before putting up any construction.

58. In *Esha Ekta Apartments Cooperative Housing Society Limited and Ors. Vs. Municipal Corporation of Mumbai and ors.*⁶ the Hon'ble Supreme Court observed that it was highly regrettable that provisions in various municipal laws for planned development of areas have been violated with impunity in all the cities, big or small. The Court referred to

⁵ Writ Petition No.5816 of 2023 and other connected matters) decided by us on 26 Jun 2024.

⁶ (2013) 5 SCC 357

its repeatedly cautioning the authorities concerned against arbitrary regularisation of illegal constructions by way of compounding or otherwise.

59. In *Royal Paradise Hotel (P) Ltd. Vs. State of Haryana*⁷ the Hon'ble Supreme Court held that no authority administering municipal and other laws can encourage violations. The Court held that compounding illegal constructions should not be done when violations are deliberate, designed, reckless, or motivated. Marginal or insignificant accidental violations unconsciously made after trying to comply with all the law requirements can alone qualify for regularisation, which is not the rule but a rare exception.

60. In *Dipak Kumar Mukherjee Vs. Kolkata Municipal Corporation and ors.*⁸ the Hon'ble Supreme Court observed that the common man feels cheated when he finds that those making illegal and unauthorised constructions are supported by the people entrusted with the duty of preparing and executing the master plan/development plan/zonal plan. The failure of the State apparatus to take prompt action to demolish illegal constructions put up by economically affluent people has convinced the citizens that planning laws are enforced only against the poor and all compromises are made by the State machinery when it is required to deal with those who have money and power or unholy nexus with the power corridors.

⁷ (2006) 7 SCC 597

⁸ (2013) 5 SCC 336

61. In *Shanti Sports Club Vs. Union of India*⁹ the Hon'ble Supreme Court has emphasised that no compromise should be made with the town planning scheme and no relief should be given to the violator on the ground that he has spent a substantial amount on the construction of the buildings. The Hon'ble Supreme Court remarked that, unfortunately, illegal constructions continue to mushroom despite repeated judgments of the Supreme Court and the High Courts. After that, pleas are for regularisation based on compassion and hardship. The Court observed that it is high time that the executive and political apparatus of the State take a severe view of the menace of illegal and unauthorised constructions.

62. In *Friends Colony Development Committee* (supra), the Hon'ble Supreme Court has held that municipal laws permit deviations from sanctioned constructions being regularised by compounding, but that is by exception. Unfortunately, with the lapse of time and frequent exercise of the discretionary power conferred by such exception, the exception has become the Rule. Only such deviations deserve to be condoned as are bona fide. Deliberate deviations do not deserve to be condoned and compounded. Therefore, compounding of deviations ought to be kept at a bare minimum.

63. Mr Godbole's reliance on the decisions in *Bikartan Das* (supra) and *Jaipur Vidyut Vitran Nigam Ltd* (supra) is not very well placed. Here, the decision-making process was

⁹ (2009) 15 SCC 705

entirely flawed. The impugned regularisation order is vitiated by arbitrariness, non-application of mind and even legal malafides. There are no pleadings about actual malafides; therefore, we refrain from commenting on the same. The interference proposed in this case is not because the Petitioners have merely made some legal point. The Petitioners have not only made out legal and factual points which warrant interference, but non-interference in a matter of this nature would be contrary to what the Hon'ble Supreme Court expressed in Dipak Kumar Mukherjee (supra). Non-interference would embolden the Municipal Commissioners to liberally and arbitrarily abuse the powers of regularisation.

64. As noted earlier, this is a case where, despite stop work orders from the TMC, the third Respondent, with impunity, proceeded with the illegal and unauthorised construction over the municipal Nallah and also into the municipal Nallah. Besides, the TMC, after filing a solemn affidavit and pleadings before the Civil Court containing the high-handed unauthorised construction carried out by the third Respondent, has proceeded to regularise such unauthorised construction. The attempt to justify the impugned regularisation order by reference to the provision of Section 227 of the MMC Act, 1949 or Regulation 47(7) of DCR of TMC was also deplorable and virtually amounts to misleading all concerned. The TMC, in this case, tried to make out a false case, which even the third Respondent – builder/developer found difficult and embarrassing to endorse.

65. For all the above reasons, we allow this Petition and strike down the impugned regularisation order dated 05 February 2005.

66. The rule is made absolute in terms of prayer clause (a) of this Petition, which reads as follows:-

“(a) This Hon’ble Court be pleased to issue appropriate writ, order or direction, thereby quashing and setting aside the Order, dated 5.2.2005, passed by the Executive Engineer, Sewerage & Drainage Department, Thane Municipal Corporation, Thane (Exh.E hereto.)”

Civil Application No.751 of 2014 for intervention filed by the Intervenor – M/s. Tarangan Towers CHS Ltd is also disposed of now that we have heard the counsel for the intervenor.

67. The TMC and the Third respondent must pay the Petitioners Rs 1,00,000/- each in costs within four weeks from today. Thus, the total costs to be paid to the petitioners shall be Rs 2,00,000/-.

68. All concerned must act on an authenticated copy of this order.

(Kamal Khata, J)

(M. S. Sonak, J)