

(2000) 10 GUJ CK 0021

In the Gujarat High Court

Case No : First Appeal No's. 24 to 31, 33, 35 to 40 and 42 to 45 of 1999 with 7057 to 7064, 7067, 7112, 7126 to 7133, 7198 to 7200 of 1998 with C.A. No's. 4840 and 10000 of 2000 & First Appeal No's. 7057 to 7064, 7067, 7112, 7126 to 7133, 7198, 7199 and 7200 of 1998 and 24 to 31, 33, 35 to 40 and 42 to 45 of 1999 and CA 4840 and 10000 of 2000

Ahmedabad Municipal Corporation

APPELLANT

Vs

Nevandrai Hasmatrai

RESPONDENT

Date of Decision : 19-10-2000

Acts Referred:

Bombay Provincial Municipal Corporations Act, 1949 — Article 14, 21, 38, 41, 46
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, Order 41 Rule 28(1), 35(3) , 96

Citation : (2001) 1 GLR 204

Hon'ble Judges : Y.B. Bhatt, J

Bench : Single Bench

Advocate : Prashant Desai and Mrugen Purohit, for the Appellant; M.B. Gandhi, Trusha M. Gandhi, S.R. Divetia Shirish Joshi, Kalpana R. Shah and Devanand Devnani, for the Respondent

Final Decision : Dismissed

Judgement

Y.B. Bhatt, J.—These are appeals u/s 96, CPC, at the instance of the Ahmedabad Municipal Corporation (original defendant) who challenges the common judgement and decrees passed by the trial court in a group of suits filed by various plaintiffs.

2. Since all the suits were based on almost identical pleadings and common issues of fact and law arose in those suits, the trial court consolidated those suits, treated Civil Suit No.1066/86 as the main matter, recorded the evidence in the said matter, and decided all the suits in favour of the respective plaintiffs by the common judgement. It is this common judgement which is the subject matter of the present appeals. As aforesaid, since common issues of fact and law arise in these appeals, the same can be disposed of by a common judgement.

3. There is no serious factual controversy involved in these matters, as also no serious controversy as to the findings of fact that may have been recorded by the trial court in the impugned judgement and decree.

4. However, only for the sake of clarity and appreciation of the legal controversy, a certain background of historical facts as they appear in the impugned judgement require to be noted. The main suit viz. Civil Suit No.1066/86 was filed by Ahmedabad Sindhi Cabin Association, Revadi Bazar, whereas other suits were filed by the individual members of the said association. The subject matter of the suit and the relief claimed in the suit are for the purpose of challenging and obtaining a declaration to the effect that the notice issued by the defendant Corporation dated 5th October 1985 to the various plaintiffs is illegal, unauthorised, arbitrary, void, etc. and for a permanent prohibitory injunction restraining the defendant Corporation from enforcing the said notice.

5. It is averred in the plaint (and noted here only for background reasons) that the members of the association were displaced persons on the date of partition of India and Pakistan and the Government took initiatives in cooperation with the defendant Corporation in providing accommodation at various places where they could run their business. Therefore, at Revadi Bazar where they are presently located, these plaintiffs were accommodated. It is averred that few pucca shops were constructed by the Corporation itself and then allotted to some of the members, whereas other members constructed their own cabins or kuchha shops as licensees on the land in question. It is also averred that many persons who could not obtain licences were also permitted to construct such kuchha shops and conduct their business from such cabins. It is averred in the plaint that inspite of this situation, the defendant Corporation started taking action to evict such persons without following the due process of law and without serving them with any notice. With a view to take concerted measures, the plaintiff association was formed.

5.1 It was then averred in the plaint that on the basis of various representations, the defendant Corporation passed a Resolution on 15th November 1976, through the Standing Committee, to regularise these cabins on various terms and conditions, in furtherance of which some licences were also granted to some of the cabin holders. It was then averred in the plaint that due to the change of political party in power, the defendant Corporation changed its stand, the licences were cancelled and/or revoked and/or licence fees were not accepted, etc. The plaintiffs, therefore, apprehended that the said Resolution may be cancelled or substituted by some materially different or contradictory resolution, and on this apprehension the plaintiffs decided to file a suit. This was Civil Suit No.3121/1977 (hereinafter referred to as the previous suit or earlier suit) for declaration and permanent injunction to restrain the defendant Corporation from cancelling or suspending the said Resolution. The said suit was decided by the City Civil Court by its judgement and decree dated 1st July 1980 (Exh.207 in the present suit). The final order is quoted hereinbelow:

"Plaintiffs" suit is dismissed so far as the prayer of declaration and omni bus injunction is concerned. However, the suit is partly decreed and the defendants are restrained by an injunction from evicting the plaintiffs from their respective cabins and/or from demolishing their cabins without giving previous proper and reasonable notice in due process of law. Looking to the peculiar facts and circumstances of the case, there would be no order as to costs. Decree accordingly."

5.2 The main bone of contention between the parties before the trial court as also in the present appeals rests around the correct and proper interpretation of the aforesaid final order in the previous suit.

6. It is common ground or at least no contention is raised to the contrary, that the judgement and final order in the previous suit would be binding on the parties, or at the very least would be binding on the defendant Corporation inasmuch as the Corporation was a party to the previous suit.

7. It is not necessary to go into a detailed discussion of the treatment given by the trial court in its impugned judgement and decree as regards the interpretation of the final order in the previous suit, (Exh.207) in the instant suit.

8. Suffice it to say that, shorn of verbiage, redundancies and repetitions in the discussion, the trial court has taken a view that the phrase used in the final order in the previous suit "without giving previous proper and reasonable notice in due process of law" should be interpreted or construed to mean that such notice should be in the nature of a show-cause notice.

9. The trial court in the impugned judgement was conscious of the fact that the final order in the previous suit did not specifically contemplate the issuance of a show-cause notice. The trial court has, by its own interpretation of the principles of natural justice, and on the interpretation of various decisions, which according to the trial court were relevant and to the point, arrived at its own interpretation of what the direction given in the earlier suit would mean or should mean. This interpretation of the trial court is based upon its own interpretation as to the requirements of the principles of natural justice. The trial court thought it appropriate to record its own and independent finding that a mere notice would not serve or satisfy the principles of natural justice, unless it also happens to be a show-cause notice. The trial court found that only a show-cause notice calling upon the recipients of the notice to show-cause against the proposed removal of the encroachments, and offering them a hearing on the subject, would satisfy the requirements of the principles of natural justice.

10. It requires to be noted, on the factual aspects of the matter, that the impugned notice is dated 5th October 1985 and is at Exh.21 on record. It also requires to be noted that the said notice came to be issued inasmuch as the recipients thereof i.e. the plaintiffs in the suits are encroachers/trespassers on the land which is a public street, and designated as such in T.P. Scheme No.5, Kalupur. It is also not disputed that the scheme has become final as sanctioned

by the State Government, and therefore becomes part of the Gujarat Town Planning and Urban Development Act vide section 65, sub-section (3) of the said Act.

11. The trial court has recognised and accepted the fact that Section 231 of the Bombay Provincial Municipal Corporation Act, in pursuance of which the impugned notices have been issued, confers power upon the Corporation to remove encroachers/trespassers without prior notice. However, it held that the plaintiffs would be entitled to not merely a notice, but to a show-cause notice, due to its own interpretation of the final order passed in the previous suit.

12. It therefore follows that if the right created in favour of the plaintiffs by the final order passed in the previous suit is to be strictly and literally construed, the plaintiffs would be entitled only to "previous proper and reasonable notice", but if the principles of natural justice are to be incorporated in such final order passed in the previous suit, (according to the impugned judgement), it would necessarily require a show-cause notice.

13. This is the entire crux of the matter and the entire outcome of the suit and the validity of the impugned judgement rests upon this factor, and the correct interpretation thereof.

14. Before advertng to the correct legal position it may be noted that on a question of fact it is common ground or at least not disputed that the impugned notice (Exh.21), (i) was issued by the defendant Corporation and served upon each of the plaintiffs/occupants, (ii) the notice draws sustenance from and derives power from section 231 of the Bombay Provincial Municipal Corporations Act, and (iii) gives 30 days time to the recipients to take appropriate measures to remove the encroachments as stated in the notice, failing which such structures would be removed by the Corporation without any liability as regards damage or damages that may ensue.

15. Thus, the central issue revolves around the statutory powers of the defendant Corporation u/s 231 of the BPMC Act, the obligation cast upon the Corporation by the previous judgement, and reconciliation of these two factors with the requirements of the principles of natural justice.

16. All the aforesaid three factors have been taken into consideration, discussed, and in my opinion also reconciled by the decision of the Supreme Court in the case of Ahmedabad Municipal Corporation Vs. Nawab Khan Gulab Khan and others, .

17. It may be noted that the Supreme Court has in the said decision taken into consideration the interplay of various statutory and constitutional provisions including Articles 14, 21, 41, 38, 39, 46 and 226 with Section 63(i)(19) and section 231 of the Bombay Municipal Corporations Act.

17.1 In paragraph 20 of the aforesaid decision the Supreme Court has stated as under:

"20. Empirical study of urban and rural population in India discloses that due to lack of civic facilities and means of livelihood people from rural areas constantly keep migrating to the urban areas resulting in mushroom growth of slums and encroachment of the pavements/footpaths etc. Every Municipal Corporation has statutory obligation to provide free flow of traffic and pedestrians" right to pass and re-pass freely and safely; as its concomitance, the Corporation/Municipality have statutory duty to have the encroachments removed. It would, therefore, be inexpedient to give any direction not to remove or to allow the encroachment on the pavements or footpaths which is a constant source of unhygienic ecology, traffic hazards and risk prone to lives of the pedestrians. It would, therefore, be necessary to permit the Corporation to exercise the statutory powers to prevent encroachment of the pavements/footpaths and to prevent construction thereon. As held earlier, the Corporation should always be vigilant and should not allow encroachments of the pavements and footpaths. As soon as they notice any encroachment they should forthwith take steps to have them removed and would not allow them to settle down for a long time. It is stated in their affidavit that they are giving 21 days notice before taking action for ejectment of the encroachers. That procedure, in our view, is a fair procedure and, therefore, the right to hearing before taking action for ejectment is not necessary in the fact situation. But the Commissioner should ensure that everyone is served with a notice and as far as possible by personal service and if it is not possible for reasons to be recorded in the file, through affixture of the notice on the hutment, duly attested by two independent panchas. This procedure would avoid the dispute that they were not given opportunity; further prolongation of the encroachment and hazard to the traffic and safety of the pedestrians."

17.2 The aforesaid observations make it amply clear that if 21 days notice before taking action for ejectment of encroachment is given, such a procedure would be deemed to be a fair procedure, and further hearing would not be necessary. In paragraph 9 of the said decision the Supreme Court has observed as under:

"9. The Constitution does not put an absolute embargo on the deprivation of life or personal liberty but such a deprivation must be according to the procedure, in the given circumstances, fair and reasonable. To become fair, just and reasonable, it would not be enough that the procedure prescribed in law is a formality. It must be pragmatic and realistic one to meet the given fact situation. No inflexible rule of hearing and due application of mind can be insisted upon in every or all cases. Each case depends upon its own backdrop. The removal of encroachment needs urgent action. But in this behalf what requires to be done by the competent authority is to ensure constant vigil on encroachment of the public places. Sooner the encroachment is removed when sighted, better would the facilities or convenience for passing or re-passing of the pedestrians on the pavements or footpaths facilitating free flow of regulated traffic on the road or use of public places. On the contrary, the longer the delay, the greater will be the danger of permitting the encroachers claiming semblance of right to obstruct removal of the encroachment. If the encroachment is of a recent origin the need

to follow the procedure of principle of natural justice could be obviated in that no one has a right to encroach upon the public property and claim the procedure of opportunity of hearing which would be a tardious and time-consuming process leading to putting a premium for high-handed and unauthorised acts of encroachment and unlawful squatting. On the other hand, if the Corporation allows settlement of encroachers for a long time for reasons best known to them, and reasons are not far to seek, then necessarily a modicum of reasonable notice for removal, say two weeks or 10 days, and personal service on the encroachers or substituted service by fixing notice on the property is necessary. If the encroachment is not removed within the specified time, the competent authority would be at liberty to have it removed. That would meet the fairness of procedure and principle of giving opportunity to remove the encroachment voluntarily by the encroachers. On their resistance, necessarily appropriate and reasonable force can be used to have the encroachment removed. Thus considered, we hold that the action taken by the appellant Corporation is not violative of the principle of natural justice."

17.2 It also requires to be noted that the aforesaid observations of the Supreme Court are made specifically in the context of section 63(i)(19) of the BPMC Act read with section 231 of the said Act, as specifically considered in para 6 of the said decision.

17.3 It requires to be noted that the decision in the case of Nawab Khan (supra) has specifically considered and interpreted the requirement of principles of natural justice as interpreted in Volga Tellis" case. It may be that in a given set of circumstances as in the present case, the requirements of natural justice may range far and wide, as against a specific statute (section 231 of the BPMC Act in the instant case) which by necessary implication negates at least some of those principles (by not requiring any notice whatsoever and permitting summary eviction). Therefore, it was necessary to harmonise these two principles, which would appear to be in conflict at least to some extent. In my opinion, it was for this purpose that the Supreme Court in the case of Nawab Khan (supra) discussed the requirements of natural justice on the one hand, and the imperatives of the fact situation contemplated by section 231 of the BPMC Act, and ultimately concluded that 2 weeks or 10 days notice would meet the requirements of such a situation.

18. It would therefore follow that the impugned notice, though it draws power and sustenance from Section 231 of the said Act (which does not require any notice at all and confers summary power of removing encroachments), nevertheless gives 30 days time to the recipients to remove the encroachments. This notice is, therefore, more generous and beneficial to the encroachers since the Supreme Court has expressed an opinion in the aforesaid decision that two weeks or 10 days time can be considered to be reasonable time. It also follows that having given 30 days notice to the encroachers, the requirements of reasonableness as also the requirements of principles of natural justice as

interpreted in the case of Nawab Khan (Supra) are completely met. It further requires to be noted and emphasised that on giving such a notice, all the principles of natural justice are satisfied, and that therefore no personal hearing or consideration of representations in regard to the notice are necessary.

19. In my opinion, therefore, the impugned notice fully satisfies all the tests laid down by the Supreme Court for meeting the requirements of the principles of natural justice harmoniously with the statutory power conferred by section 231 of the said Act.

20. The basic premise, therefore, adopted by the trial court that only a show-cause notice would meet the principles of natural justice is found to be fallacious in view of the Supreme Court decision in the case of Nawab Khan's case (supra).

21. The impugned judgement and decree therefore are not sustainable and require to be quashed and set aside and the suits of each of the plaintiffs require to be dismissed. It is accordingly so held and directed. The appeals are consequently allowed with no order as to costs.

22. Learned counsel for the respondent in First Appeal No.7057/98 has filed Civil Application No.10000/2000 and has presented the same for hearing at this stage, wherein he seeks to bring on record additional evidence consisting of material annexed to the civil application, with a prayer that the said documents be exhibited and taken into consideration at the time of final hearing of the group of first appeals.

22.1 It was urged in this context that the two Resolutions of the appellant Corporation dated 15th November 1976 and 1st November 1988 (Exh.100 and 101 respectively), confer certain additional rights to all and sundry i.e. to those who are formerly licensees whose licenses have been revoked by conduct or by law and also confer rights to other encroachers who had no semblance of right at any point of time. Indirectly, he therefore suggests that this brings about hostile discrimination between persons who are similarly situated.

22.2 In the context of the aforesaid application it must be noted that the averments made in the application, as sought to be supported by the documents annexed thereto, constitute new averments and new pleas which are totally absent in the plaints. Such averments, if taken into consideration at this stage, would raise new issues which did not exist and were not raised before the trial court. Such issues are not basic and fundamental to the controversy in the suit as presented in the plaint, and consequently the trial court had no opportunity to record or appreciate any evidence on such issues. Consequently the trial court was not required to and has in fact not given any findings thereon. In fact, although the suit plaint makes a reference to Exh.100, there is absolutely no reference to the same in the prayer clause nor is there any prayer to enforce the same by way of mandatory injunction. The substance of this application is, therefore, to introduce an absolutely new case into the appeal, which had never existed before the trial court. Furthermore, the prayer if granted would give rise

to pleadings and contentions that would radically alter the fundamental nature and character of the suit. This would, in turn, give rise almost to a fresh suit on a fresh cause of action. This is not permissible in a pending appeal.

22.3 Furthermore, when the prayers made in the application are read in conjunction with the documents sought to be produced and treated as evidence on record, it is found that the same would be outside the scope and would not satisfy the requirements of Order 41, Rule 27(1)(aa). Furthermore, such a course of action would also require consideration of Order 41, Rule 28, and this would merely enable the respondents-original plaintiffs to protract the litigation, which is in contravention of the spirit of the decision in Nawab Khan's case (*supra*). For these reasons I am not inclined to grant the said application. The said application is accordingly rejected with no order as to costs.

23. At this stage a request is made on behalf of the respondents-original plaintiffs that they should be granted some time to comply with the impugned notices, and if such time is not granted, the appellant Corporation forthwith and this would cause tremendous loss and damage to the shopkeepers particularly during the Diwali festival. On the facts and circumstances of the case I am of the opinion that some breathing time is necessary to enable the original plaintiffs to comply with the impugned notices. Hence it is directed that the notices issued by the Corporation and challenged in the respective suits shall not be implemented upto 20th November 2000.