

(2013) 03 KAR CK 0033
In the Karnataka High Court
Case No : M.F.A. No. 523 OF 2013 (CPC)

Dr. C.M. Balakrishnan

APPELLANT

Vs

Sri G. Narayan and The Commissioner, Bangalore Mahanagar
Palike

RESPONDENT

Date of Decision : 13-03-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 151
Karnataka Municipal Corporations Act, 1976 — Section 321(1), 321(2), 321(3), 482

Citation : (2013) 6 KarLJ 147 : (2013) 2 KCCR 1516

Hon'ble Judges : S.N. Satyanarayana, J

Bench : Single Bench

Advocate : M. Narayanappa, for the Appellant; Amaresh A. Angadi, for C/R1, Sri K.N. Puttegowda, for R2, Sri R. Nataraj, for the Respondent

Judgement

S.N. Satyanarayana, J.—Plaintiff in OS. No. 8120/2012 on the file of XXVII Additional City Civil Judge, Bangalore (CCH-9) has come up in this appeal impugning the order dated 15.12.2012 passed on IAs. 2 to 5 in the said suit. The undisputed facts leading to this appeal are that plaintiff in original suit is owner of property bearing No. 21, Grover Road, Frazer Town, Bangalore. The first defendant in the said suit is owner of property bearing No. 22 situated in the same road adjacent to the property of plaintiff in the same locality, which is more fully referred to as suit schedule property. The original suit in OS. No. 8120/2012 is filed by plaintiff who is appellant herein seeking to restrain first defendant from constructing the building on his property without leaving setbacks contrary to sanctioned plan. Also for mandatory injunction to remove unauthorized construction put up in the set back area of said building. The suit was filed on 16.11.2012 along with an application under Order 39 Rules 1 and 2. An application was also filed in the said suit seeking dispensation of mandatory notice to second defendant-BBMP as required u/s 482 of Karnataka Municipal Corporation Act. The said notice was allowed, thereafter, I.A. for temporary injunction was taken up for consideration and an order of status-quo regarding

construction was granted on 16.11.2012 itself.

2. In the meanwhile, based on the complaint lodged by plaintiff, officers of second defendant-BBMP, issued provisional notice dated 8.11.2012 to first defendant. The first defendant immediately filed reply to said notice, thereafter filed writ petition in W.P. No. 47916/2012 seeking stay of provisional notice issued u/s 321(1) and (2) of Karnataka Municipal Corporation Act. This Court in its writ jurisdiction passed an interim order staying the operation of provisional notice dated 8.11.2012 by order dated 5.12.2012. Later first defendant received final order dated 20.11.2012 in the said proceedings, which was served on him on 6.12.2012. Hence, he filed an appeal against the said final order passed u/s 321(3) of the Karnataka Municipal Corporation Act before the Karnataka Appellate Tribunal in Appeal No. 1373/2012, on 28.12.2012. Subsequently, on 4.1.2013 an interim order was granted by the Appellate Tribunal in the said appeal. Subsequently, on 5.12.2012 the writ petition which was filed by first defendant in WP. No. 47916/2012 came to be disposed of reserving liberty to petitioner therein to pursue his relief in the appeal which he had already filed and pending before the Appellate Tribunal.

3. Simultaneously, first defendant filed an application in original suit in IA. 3 seeking vacation of the interim order of status quo regarding construction passed on 16.11.2012. In the meanwhile, two more applications also came up for consideration, i.e., one filed under Order 6 Rule 7, CPC seeking amendment of plaint in IA-4 and another application under Order 26 Rule 9 CPC to appoint Commissioner for local inspection in IA-5. The court below took aforesaid three applications along with IA. 2 filed under Order 39 Rules 1 and 2 CPC by plaintiff seeking grant of temporary injunction against first defendant questioning unauthorized construction in his property. Thereafter, disposed of all the four applications by its common order dated 15.12.2012, wherein IA. 2 filed by plaintiff under Order 39 Rules 1 and 2 was dismissed, IA. 3 filed by first defendant under Order 39 Rule 4 r/w 151 CPC was allowed and status-quo order granted earlier was vacated, IA. 4 filed by plaintiff seeking amendment to plaint was allowed and IA. 5 filed by plaintiff seeking appointment of Court Commissioner was kept in abeyance. Plaintiff being aggrieved by the aforesaid common order so far as it pertains to IAs. 2 and 3 has come up in this appeal impugning the same on the ground that it is irregular and illegal.

4. In this appeal, an application was filed initially in IA. 1/2013 which came to be allowed by order dated 21.1.2013 granting interim order which was to be in force till 1.3.2013. It is seen that interim order which was granted till 1.3.2013 was not continued and thereafter an application in IA. 2/2013 is filed on 1.3.2013. Since there were two reliefs sought in the said application, on 12.3.2013 by seeking liberty of this Court to replace the said application IA. 3/13 is filed restricting the said application filed in IA. 2/2013 for the relief which is modified in IA. 3. For both applications objections are filed by first respondent herein. It is necessary to place on record that when this matter was taken up for

consideration this Court felt factual position is required to be assessed before deciding the appeal. Hence, this Court called upon the Standing Counsel appearing for BBMP, Sri. K.N. Puttegowda to take notice for second respondent-BBMP and directed him to keep the officers of BBMP present before the Court. Accordingly, the Assistant Executive Engineer and Assistant Engineer of BBMP were present before the Court on 6.3.2013. On that day this Court passed an order directing the said officers to go over to suit schedule property, inspect the same and to give report of factual position regarding construction activity going on in the said place. In response to the same, on 7.3.2013 a report was submitted by said officers with set of photographs, for which objections was filed by 1st respondent. In the meanwhile, another set of photographs were filed by appellant herein to demonstrate that construction activity is continued on the suit schedule property inspite of their being interim order on two earlier occasions i.e., when the interim order granted by appellate Tribunal was in force and also when it was in force in this appeal.

5. When there was no consensus between the parties regarding the correctness or otherwise of the report and photographs submitted by officers of BBMP and as objection was raised regarding the correctness of the same by the counsel for first respondent with an allegation that there is collusion between the officials of corporation and appellant, this Court felt it is necessary to appoint an officer of this Court as Commissioner to inspect the disputed property under construction. Accordingly, learned Counsel Sri. R. Nataraj was appointed as Court Commissioner on 8.3.2013. A set of instructions were given to him to inspect the disputed property and to submit his report. While doing so it was made clear that counsel for parties should also be present and assist him. Based on that, learned counsel Sri. R. Nataraj submitted his report on 11.3.2013. Thereafter, this matter came up on 12.3.2013 and again to-day to consider application for interim relief. However, with the consent of counsel for all the parties i.e., appellant, first respondent and second respondent the appeal itself is taken up for final disposal.

6. On going through the material on record, construction taken-up by first respondent on suit schedule property is not in dispute. It is also not in dispute that appellant herein who is plaintiff in the court below is immediate neighbour of first respondent and owner of adjacent property situated on the right side of suit schedule property. His grievance is that suit schedule property is being constructed without leaving setback and putting up construction abutting his property till the end of boundary of suit property. It is his case that, though the court below initially granted interim order of status-quo regarding construction, subsequently, on filing of application for vacating the interim order, relying upon the photographs produced, has come to a conclusion that construction is already completed.

7. This court on going through the material accumulated by way of report submitted by the officers of BBMP, photographs submitted by appellant, first respondent and the report and photographs of Court Commissioner, it is seen

that at the time of filing of suit in November 2012 the construction on suit schedule property was not completed and it was half way through. It is seen from some of the documents that even during the period when injunction was there possibility of construction being taken place cannot be ruled out. However, the correctness or otherwise of same is required to be decided in the original suit which is pending. But, it is also seen that possibility of construction being continued even during the period when this appeal is filed and interim order being in force between 21.1.2013 to 1.3.2013 also cannot be ruled out, for the reason that photographs relied upon by first respondent which are not disputed by appellant herein and which is corroborated by photographs of BBMP officers and Court commissioner what is to be seen is the construction in the front portion of building was complete even as on the date when application for vacating Interim Order was taken-up for consideration in the month of December 2012. However, whether construction on other portion of said building was also completed is a matter which is required to be decided on appreciation of evidence to be recorded in the pending suit, as stated supra.

8. However, if each of the documents which are now accumulated in this proceedings subsequent to filing of this appeal are looked in to and if the same are analysed, this Court comes to the following conclusion.

First of the document is report which is filed by the officers of BBMP which was on 7.3.2013, wherein 20 photographs are produced in which officer of BBMP who was entrusted with the work of inspecting the property is also seen in some of the photographs which are taken in the cell phone and prints are secured and filed in to the court. In which, he has also produced copy of the provisional notice and final order passed by the BBMP along with copy of the sanctioned plan. Without going into any of the materials, if plan is looked in to, the admitted plan which is available on record clearly discloses the staircase which is required to be constructed in the building under construction is located inside the building to be constructed on suit schedule property, whereas all the photographs which are produced by first respondent clearly shows that the staircase is not located inside the building but it is constructed to the extreme end of one side of property, which by itself appears to be deviation from the sanctioned plan. Whether this deviation is beyond scope of regularization will have to be decided in the original suit.

9. So far as construction activity is concerned, if the report of Commissioner ignoring other photographs is looked in to, it is clearly stated by Court Commissioner that though no materials are immediately seen at the place of construction, the construction appears to be complete leaving little setback. From the photographs which are produced by him it appears debris is not removed and construction is still in progress in many places i.e., the kitchen is full of paint materials etc. The photograph at page 1 of the report discloses that construction materials are strewn all over the place of construction and they are still lying there. Photograph at page No. 2 is the photograph of front portion of suit

property which is produced before the court below while deciding the applications in IA. Nos. 2 to 5 and based on which court below has come to the conclusion that construction is complete. When this court perused the said photographs, it also felt that construction is complete. However, when it comes to photographs at page 3, 4, 5 and 6, it shows that construction activity is still going on with the plastering on the side of the wall not being completed and floor near side wall not being completed. In the photograph which is produced at page 6 the construction material and other labour implements are strewn all over the place to show that the work is going on. Same is the situation in two photographs which are shown at page 7 and 8. Out of that, first photograph shows the flooring is not laid fully, in second photograph paint boxes are still kept open with half finished painting and they show that painting activity is going on. Similar is the situation in other two photographs which are at page 9, it shows painting is yet to be finished and there are high pedestal chairs used for the purpose of painting the ceiling and open paint boxes kept at the spot. The photographs at page 10 clearly show the incomplete stage of staircase, where flooring is not completed. The photograph at page 11 is of the roof which shows tiles being stored and sand being dumped for completion of the roof. So far as photograph at pages 12 and 13 are concerned, they are again showing the incomplete stage of construction regarding the staircase. The two photographs at pages 15 and 16 shows debris strewn all over the place and un-removed from the place of construction. Similar is the situation in photograph at page 17, where the completion of staircase is still under way.

10. With this, one thing is clear i.e., the construction work is not complete as insisted by the first respondent throughout i.e., before the court below and as well as before this Court. Some of these photographs also clearly discloses that though in some places set back is left on the ground floor, in the first floor level there is no setback and construction is extended till the edge of property at first floor level. There is also possibility of deviation so far as staircase being put outside of the building, whereas sanctioned plan shows the place of staircase being inside of the building.

11. With all these things there appears to be clear indication of deviation. As rightly pointed out by first respondent. Though deviations may be there but for those deviations he can seek regularisation under the provisions of Karnataka Municipal Corporation Act. However, till such time the deviations which are prima facie found are either accepted and regularized or in the alternative same is rejected and first respondent is called upon to remove the deviation, he cannot complete the construction in whatever manner and cannot occupy the building. In that view of mater, there is serious error on the part of court below in not properly appreciating the material available on record.

12. The counsel for first respondent tried to substantiate that in the proceedings before Appellate Tribunal, it has stayed the provisional notice and final order, therefore there is no impediment for him to complete the construction of his

building. This court is unable to accept the same. What is stayed in the appeal pending before Appellate Tribunal is demolition work or implementation of direction issued in the provisional notice and final order passed in the proceedings initiated u/s 321(1) to 321(3) of Karnataka Municipal Corporation Act. The stay in that proceedings would not enure to the benefit of owner of property to proceed with the construction. Further the stay of further proceedings cannot be construed as permission to go on with the construction activity. It only means that unless the correctness or otherwise of the order u/s 321(3) is decided in the said appeal, the officers of BBMP cannot take steps to demolish the deviated portion as observed in its final order passed u/s 321(3) of Karnataka Municipal Corporation Act.

13. In any event, such stay of said final order would not enure to the benefit of owner of property to take further construction of the building. If he is doing so, he is doing the same at his risk, by completing the building during the period of stay before the Appellate Tribunal will not give him a right to seek equities at the time of disposal of appeal pending before Appellate Tribunal to seek regularization of construction in the deviated portion. If regularization could be done, it is always open for Corporation to collect the compounding fee and to regularize the same to the extent it is permissible under the Act. Under such circumstances, it can not accept deviation beyond the permitted level of percentage for compounding, merely on the ground that the building is completed, pursuant to interim stay granted in the proceedings before appellate authority. If such contentions are accepted and construction in deviated portion is allowed to continue as above, it would result in opening of flood gates to the proceedings under the provisions of Karnataka Municipal Corporation Act and in flouting the interim order passed in original suit and also in proceedings before other authorities, rendering the said litigations as exercise in futility. This would also encourage illegal construction contrary to sanctioned plan and impugning provisions of relevant Act governing the same.

14. It is seen that all the judgments which are sought to be relied on by the counsel for parties cannot be considered at this stage for the reason what is now observed is the correctness or otherwise of order passed by the court below on IAs. 2 and 3 and not regarding the maintainability of suit or the right of the parties to proceed with this litigation. In that view of matter, the proper stage to consider those judgments would be at the time of disposal of original suit. With these observations, the application filed in IA. 3/2013 and this appeal are allowed. The impugned order of the court below so far as it pertains to IAs. 2 and 3 is concerned, it is modified and held that the owner of suit schedule property/ first respondent herein shall seek disposal of appeal pending before Karnataka Appellate Tribunal at the earliest and shall pursue the proceedings before BBMP to get the deviated portion, if any, compounded. Thereafter, he shall proceed to complete the construction and take necessary steps to occupy the same. Till such time, 1st respondent shall not take up further construction activity on the suit schedule property, he shall not either occupy the same by himself or permit

others to occupy the said portion till the entire dispute is resolved in the original suit and as well as in the appeal pending before Karnataka Appellate Tribunal.