

(2015) 01 BOM CK 0040
In the Bombay High Court
Case No : Second Appeal No. 491 of 2012

Kishor

APPELLANT

Vs

The Municipal Commissioner and Others

RESPONDENT

Date of Decision : 20-01-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11(d), 9
Maharashtra Regional and Town Planning Act, 1966 — Section 149, 17(5), 52, 53,
53(1)

Citation : (2016) 1 ALLMR 175 : (2015) 4 MhLj 836

Hon'ble Judges : A.S. Chandurkar, J.

Bench : Single Bench

Advocate : N.B. Kalwaghe, for the Appellant; S.S. Jachak, Advocates for the Respondent

Final Decision : Allowed

Judgement

A.S. Chandurkar, J.—Heard. Admit on the following substantial question of law:

Whether the bar under Section 149 of the Maharashtra Regional and Town Planning Act, 1966 applies in the present case when the notice issued under Section 53 of the said Act is challenged on the ground that the period prescribed therein falls short of the statutory period and is therefore a nullity? 2. Considering the issue involved the learned counsel for the parties have been heard on aforesaid substantial question of law.

3. The appellant is the original plaintiff who had been issued notice dated 18.11.2010 under the provisions of Section 53(1) of the Maharashtra Regional and Town Planning Act, 1966 (for short the said Act). As per said notice certain deficiencies in the user of the land in question were pointed out and it was stated that within one month from receiving the notice corrective action should be taken. Plaintiff therefore filed suit for declaration that the defendant nos. 1 and 2 were not entitled to demolish the suit property. Further prayer was made to direct the defendant nos. 1 and 2 to grant the sanctioned map. The defendant

nos. 1 and 2 filed preliminary objections under Section 9-A of the Code of Civil Procedure vide Ex. 19. The objection raised was that the trial Court had no jurisdiction to decide the suit in view of the bar contained in Section 149 of the said Act. The plaintiff in his reply took the stand that the construction in question had come up prior to the said Act being enacted. Further stand was taken that the due process of law, rules and regulations were not followed. The trial Court therefore framed the following preliminary issue:

Whether this Court has jurisdiction to entertain, try and decide the present suit? Thereafter the plaintiff examined himself vide Ex. 25. By order dated 17.10.2011 the trial Court recorded a finding that the civil Court had no jurisdiction to entertain the suit in view of bar under Section 149 of the said Act. It, therefore, rejected the plaint under provisions of Order 7 Rule 11(d) of the Code of Civil Procedure.

4. The plaintiff being aggrieved by aforesaid adjudication preferred appeal. First appellate Court confirmed the findings recorded by the trial Court and dismissed the appeal.

5. Shri N.B. Kalwaghe, learned counsel appearing for the appellant submitted that the suit as filed was maintainable and the bar under Section 149 of the said Act was not attracted. He submitted that the notice dated 18.11.2010 under Section 53 of the said Act required the plaintiff to take corrective steps within a period of one month. According to him under provisions of Section 53(1) the notice that is required to be served requires the owner to take necessary steps within such period being not less than one month. He, therefore, submitted that the aforesaid notice that gave cause of action to the plaintiff was not in accordance with provisions of Section 53(1) of the said Act and hence the same could be challenged in the suit. He submitted that if the notice as issued was not in accordance with provisions of said Act, then the bar under Section 149 of the said Act would not apply. In support of his submission that there is a distinction between steps required to be taken within a period of one month and that to be taken within a period being not less than one month and in this regard he relied upon the decision of the Division Bench of this Court in Commissioner of Income Tax Vs. Ekbal and Co., . To buttress his submissions as regards tenability of suit in such circumstances he placed reliance upon the decision of supreme Court in Shiv Kumar Chadha and Others Vs. Municipal Corporation of Delhi and Others, , Addanki Tiruvenkata Thata Desika Charyulu (Since deceased) and after him his legal representatives Vs. State of Andhra Pradesh and Another, and Ramchandra Keshav Adke (Dead) by Lrs. and Others Vs. Govind Joti Chavare and Others, .

6. Smt. S.S. Jachak, learned counsel appearing for respondent nos. 1 and 2 supported the impugned orders. According to her the suit as filed was not maintainable in view of the bar under Section 149 of the said Act. As the plaintiff was seeking relief in relation to a notice issued under Section 53 of the said Act such suit was not maintainable.

Shri V.R. Chaudhari, learned counsel appearing for respondent no.3 and M.M. Deshmukh, learned counsel appearing for respondent no.4 also supported the impugned orders.

7. In the suit as filed, the reliefs sought vide prayers (i) to (iii) read as under:

- i) the decree be passed in favour of plaintiff and against defendant nos.1 to 4.
- ii) To restrain the defendant nos.1 and 2 for demolishing the house property of the plaintiff permanently;
- iii) To declare that the defendant nos.1 and 2 is not entitled for demolishing the house property of the plaintiff.

The objection to bar of jurisdiction was raised under Section 9A of the Code of Civil Procedure by the defendant No. 2.

8. As the issue of jurisdiction relates to the notice dated 18.11.2010 issued under Section 53 of the said Act it is necessary to note its contents. After stating the irregularities/deficiencies in the user of the land in question it has been stated that "within a period of one month" necessary steps to remove said deficiencies should be taken.

It would therefore be necessary to refer to the provisions of Section 53(1) of the said Act. The said provisions in so far as the same are relevant read thus:

53. Power to require removal of unauthorised development

(1) Where development of land has been carried out as indicated in sub-section (1) of section 52, the Planning Authority may, subject to the provisions of this section, serve on the owner a notice requiring him, within such period, being not less than one month, as may be specified, therein after the service of the notice, to take such steps as may be, specified in the notice.

(a) in case specified in clause (a) or (c) of sub section (1) of section 52, to restore the land to its condition existing before the said development took place,

(b) in cases specified in clause (b) or (d) of sub section (1) of section 52, to secure compliance with the conditions or with the permission as modified:

Provided that, where the notice requires the discontinuance of any use of land, the Planning Authority shall serve a notice on the occupier also.

It is, therefore, clear that under Section 53(1) of the said Act the planning authority is required to serve on the owner a notice requiring him to take such steps as may be specified within such period "being not less than one month.

9. The issue therefore to be considered is firstly whether the notice dated 18.10.2011 can be challenged on the ground that the same is not in accordance with provisions of Section 53 of the said Act and if found so whether the bar under Section 149 of the said Act would apply in such a case.

10. While the impugned notice calls upon the plaintiff to take necessary steps within a period of one month, Section 53(1) of the said Act requires taking of steps within a period being not less than one month. In Commissioner of Income-tax (supra) the Division Bench considered the effect of words "within such period not being less than thirty days". While considering aforesaid expression along with the expression "within thirty days", it was observed thus:

In my judgment expressions "within 30 days" and "not less than 30 days" are two quite different things. "Within 30 days" is within two points of time, one at which the period begins and the other at which it expires. On the other hand, "not less than 30 days" is outside these two points of time. There must be an interval of not less than 30 days and that means 30 days clear: see (1885) 29 Ch. D. 204. The period must continue beyond the expiration of the stated time. Whereas "within" the stated period must mean what it says, something less than the moment of expiration. In my opinion, therefore, the notice is invalid and the question referred to must be answered in the negative. 11. From the aforesaid, it is clear that both the said expressions are different. While "within thirty days" is a shorter period, expression "not less than thirty days" connotes larger period of time. It was then held that by using the expression "within thirty days" the noticee did not get thirty clear days period as was contemplated by the expression "not less than thirty days". The factual position in the present case is some what similar. While provisions of Section 53(1) of the said Act prescribe period being not less than one month, the impugned notice grants time for steps to be taken within a period of one month. Thus there is no notice of period of not less than one month as contemplated by Section 53(1) of the said Act. Hence, there is considerable force in the submission of the learned counsel for the appellant that notice dated 18.11.2010 by prescribing a shorter period than the one prescribed by Section 53(1) of the said Act cannot be called a notice under Section 53(1) of the said Act.

12. It is in this backdrop that the applicability of the bar under Section 149 of the said Act is required to be considered. Section 149 of the said Act reads thus:

149: Finality of order

Save as otherwise expressly provided in this Act, every order passed or direction issued by the State Government or other passed or notice issued by any Regional Board, Planning Authority or Development Authority under this Act shall be final and shall not be questioned in any suit or other legal proceedings.

13. In Addanki Tiruvenkata (supra) while considering the question as regards jurisdiction of the civil Court being barred in view of such bar contained in a special statute, in para 26 it has been observed thus:

The scope of the exception here made was the subject of examination by this Court in the case of Firm and Illuri Subbayya Chetty and Sons Vs. The State of Andhra Pradesh, where Gajendragadkar J. speaking for the Court said:

Non-compliance with the provisions of the statute to which reference is made by the Privy Council must, we think, be non compliance with such fundamental provisions of the statute as would make the entire proceedings before the appropriate authority illegal and without jurisdiction. Similarly, if an appropriate authority has acted in violation of the fundamental principles or judicial procedure, that may also tend to make the proceedings illegal and void and this infirmity may affect the validity of the order passed by the authority in question. It is cases of this character where the defect or the infirmity in the order goes to the root of the order and makes it in law invalid and void that these observations may perhaps be invoked in support of the plea that the civil court can exercise its jurisdiction notwithstanding a provision to the contrary contained in the relevant statute.

In Shiv Kumar Chadha (*supra*) the Supreme Court in paragraph 28 of its decision observed thus:

In spite of the bar prescribed under sub sections (4) and (5) of Section 343 and Section 347-E of the Corporation Act over the power of the courts, under certain special circumstances, the court can examine, whether the dispute falls within the ambit of the Act. But once the court is satisfied that either the provisions of the Act are not applicable to the building in question or the basic procedural requirements which are vital in nature, have not been followed, it shall have jurisdiction, to enquire and investigate while protecting the common law rights of the citizens. 14. It is well settled that despite exclusion of jurisdiction of the Civil Court, where the grievance is in relation to failure to comply with statutory provisions, such cases can be examined by the Civil Court. In *State of Kerala Vs. M/s. N. Ramaswami Iyer and Sons*, AIR 1966 SC 1738 in para 8 it has been held thus:

8. It is true that even if the jurisdiction of the civil court is excluded, where the provisions of the statute have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure, the civil courts have jurisdiction to examine those cases: *Secretary of State vs. Mask and Co.* AIR 1940 105 (Privy Council) . In *Firm Seth Radha Kishan Vs. Administrator, Municipal Committee, Ludhiana*, AIR 1963 SC 1547 which considering the aspect of ouster of jurisdiction of the Civil Court by a special statute, it was held as under:

7. Under S. 9 of the Code of Civil Procedure the Court shall have jurisdiction to try all suits of civil nature excepting suits of which cognizance is either expressly or impliedly barred. A statute, therefore, expressly or by necessary implication, can bar the jurisdiction of civil Courts in respect of a particular matter. The mere conferment of special jurisdiction on a tribunal in respect of the said matter does not in itself exclude the jurisdiction of civil Courts. The statute may specifically provide for ousting the jurisdiction of civil Courts, even if there was no such specific exclusion, if it creates a liability not existing before and gives a special and particular remedy for the aggrieved party, the remedy provided by it must

be followed. The same principle would apply if the statute had provided for the particular forum in which the remedy could be had. Even in such cases, the Civil Court's jurisdiction is not completely ousted. A suit in a civil Court will always lie to question the order of a tribunal created by a statute, even if its order is expressly or by necessary implication, made final, if the said tribunal abuses its power or does not act under the Act but in violation of its provisions. Similarly, in *Krishan Lal Vs. State of Jammu & Kashmir*, it was held that violation of a mandatory statutory provision while passing the impugned order would not amount to an act done under the Act. In para 11 it was observed thus:

11. We may not labour much on this point because of the aforesaid legal proposition and also because of what was pointed out by a Constitution Bench in *Dhulabhai v. State of M.P.* That exclusion of jurisdiction of civil court should not be readily inferred. So we agree with Shri Mehta that the High Court erred in law in holding that the civil courts' jurisdiction was barred, in as much as there being violation of mandatory provision as contained in Section 17(5) of the Act, it can well be said that the respondents had no jurisdiction to pass the impugned order and by doing so they committed a "jurisdictional error. 15. From the aforesaid it is clear that the jurisdiction of the civil Court is available for determining the question as to whether infirmity in the action impugned goes to the root of the proceedings making it invalid or where the basic procedural requirements which are vital in nature have not been followed. The jurisdiction to that extent has been held to be preserved.

16. Thus, from the aforesaid, it is clear that the jurisdiction of the Civil Court for the purposes of examining as to whether the statutory requirements have been duly complied or not or whether basic procedural requirements have been followed or not can be examined. In that background, if the notice dated 18-10-2011 is examined, it is clear that the same grants time of period of less than one month to the plaintiff to take corrective steps in terms of the deficiencies pointed out therein. Provisions of Section 53(1) of the said Act prescribe period of not less than one month for taking necessary steps. If the jurisdiction of the Civil Court is invoked for considering the validity of such notice on the ground that the same prescribes a lesser period than that prescribed by the statute and hence clearly contrary to the statute, then the jurisdiction of the Civil Court will not be barred. Hence, aforesaid submission made on behalf of the plaintiff regarding maintainability of the suit will have to be accepted.

17. Before the first appellate Court, it was argued on behalf of the plaintiff that as the period prescribed in the notice was less than that prescribed by the Section 53(1) of the said Act, the notice was contrary to law. The first appellate Court, however, has not specifically adverted to said aspect of the matter and has relied upon provisions of Section 149 of the said Act to hold that the Civil Court had no jurisdiction to entertain the suit. As observed herein above, the jurisdiction of the Civil Court to examine said aspect is not barred by provisions of Section 149 of the said Act. In *Ramchandra Keshav Adke* (supra), in para 25 it

has been observed as under:

A century ago, in *Taylor V Taylor*, Jassel, M. R. adopted the rule that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden. This rule has stood the test of time. The Civil Court was competent to consider validity of the notice dated 18-11-2011 in that background. It is to be noted that as per the application at Exhibit-19, a preliminary issue in that regard was also prayed for being framed.

18. From the aforesaid discussion, it is clear that both the Courts have erred in holding that the suit as filed was not maintainable in view of the bar prescribed by Section 149 of the said Act. From the discussion already made, it is clear that such jurisdiction was not barred. It is however to be noted that as no arguments were advanced in respect of tenability of prayer clause (iv) of the plaint, the trial Court is free to consider the entitlement of the plaintiff in that regard in accordance with law. As the suit has been dismissed after framing the preliminary issue, it would be necessary to direct the Civil Court to entertain the suit on merits.

19. In view of aforesaid, the following order is passed:

(1) The order dated 17-10-2011 passed by the trial Court below Exhibit-1 and confirmed by the first appellate Court in R.C.A. No. 536/2011 by order dated 12-4-2012 is set aside.

(2) The proceedings are remanded to the trial Court for deciding Regular Civil Suit No. 211/2011 in accordance with law.

(3) It is clarified that the suit shall be decided in accordance with law. The trial Court shall independently consider the evidence on record while deciding aforesaid suit.

(4) The order of status quo granted by this Court on 1-11-2012 shall continue to operate till the trial Court decides the application for temporary injunction. It is, however, clarified that said application shall be decided on its own merits and the trial Court should not be influenced by continuation of the order of status quo passed by this Court.

(5) The second appeal is allowed in aforesaid terms with no order as to costs.