

(1995) 07 AP CK 0055

In the Andhra Pradesh High Court

Case No : Second Appeal No. 402 of 1993

Machilipatnam Municipality

APPELLANT

Vs

Inampudi Lakshmikanthamma and Another

RESPONDENT

Date of Decision : 28-07-1995

Acts Referred:

Andhra Pradesh Municipalities Act, 1965 — Section 228, 228(2), 228(3), 59, 64
Andhra Pradesh Municipalities Rules — Rule 11(3)

Citation : (1995) 3 ALT 29

Hon'ble Judges : G. Bikshapathy, J

Bench : Single Bench

Advocate : M. Prabhakara Rao, for the Appellant; T. Veerabhadrayya, for the Respondent

Final Decision : Allowed

Judgement

G. Bikshapathy, J.—The present second appeal has been filed assailing the judgment and decree in A.S. No. 113/86 dated 2-2-1993 on the file of the First Additional District Judge, Machilipatnam, setting aside the decree and Judgment in O.S. No. 50/79, dated 29-9-1986 on the file of the First Additional District Munsif, Machilipatnam, dismissing the suit with costs. For the sake of convenience the parties herein are referred to as they are arrayed in the suit.

2. The Plaintiff filed suit for declaration that the notice No.B. A.425 / 75 dated 1-2-1979 issued by the first defendant as illegal and unenforceable and also for declaration that the G.O. Rt. No. 42, MA. dated 10-1-1979, as illegal and not binding on the plaintiff and for consequential permanent injunction restraining the first defendant from implementing the notice dated 1-2-1979.

3. The averments of the plaint, in nut-shell are, that the plaintiff is the owner of the house bearing No. 17/392, Buttaipet, Machilipatnam, having purchased the same under a registered sale-deed, dated 27-10-1975. As the house was in dilapidated condition she intended to make necessary construction for proper enjoyment of the house. Accordingly, she filed an application for approval of the

plan from the Municipality, which was duly sanctioned on 15-12-1975. However, the plaintiff constructed a barn-room and thereafter sought for permission from the 1st defendant and the same was refused on 16-7-1976. Thereafter the 1st defendant issued notice dated 1-2-1979 for demolition of the unauthorised construction. It was stated in the notice, if the directions contained therein are not complied with within a week, the construction will be removed departmentally without further notice and expenses will be recovered from the plaintiff. In the said notice the G.O. Rt. No. 42, MA, dated 10-1-1979 was also referred to. In this G.O. the Government have stated that the construction of bath-room is unauthorised and they should be removed. The internal and external drainage system be diverted in the eastern side waste land of the plaintiff. It is averred in the suit that the notice dated 1-2-1979 is illegal and invalid and the same is in violation of Section 228 of the A.P. Municipalities Act and no opportunity was given to the plaintiff before issuing the impugned notice. The plaintiff further stated that the Government order issued on 10-1-1979 is also illegal and void as she was not afforded any opportunity before issuing the said CO., which has the effect of demolition of the premises.

4. The 1st defendant filed written-statement contending that the suit is not maintainable and that she cannot file a suit without exhausting the remedies available under the provisions of A.P. Municipalities Act (hereinafter referred to as "the Act"). The suit is bad for non-joinder of parties. The structures raised by the plaintiff are in violation of the building rules and they are liable to be demolished. Bath-room referred to in the impugned notice, as well as in the plaint is clearly an unauthorised construction and is in gross violation of building Rule 11(3). The application of the plaintiff was rejected on 11-8-1976 and it was booked as unauthorised construction No. 15 of 1976 on 1-6-1976. The construction of bath-room is deliberately done in violation of the Rules and hence the structures are liable to be demolished.

5. The Government was impleaded subsequently as the 2nd defendant and a written-statement was also filed on behalf of the Government.

6. The trial Court framed the following issues for trial:

- (1) Whether the plaintiff is entitled to the declaration and injunction as prayed for?
- (2) Whether the suit is not maintainable?
- (3) To what relief?

The following additional issues were framed on 2-2-1981.

- (1) Whether the plaintiff is entitled for declaration that the G.O. Rt. No. 43, M.A., dated 10-1-1979 is liable to be quashed?
- (2) To what relief?

The following further additional issue was framed on 4-6-1986.

(1) Whether the suit against the defendant is maintainable for noncompliance of provisions of Section 80 C.P.C.?

7. P.Ws. 1 and 2 were examined and Exs. A-1 to A-11 were marked on behalf of the Plaintiff. Two witnesses were examined and Exs.B-1 to B-19 were marked on behalf of the Defendants.

8. On consideration of the evidence adduced by both parties and on perusal of the documentary evidence the trial Court found that the construction was made by the plaintiff in violation of the provisions of the Building Rules. Consequently it also held that the Notice dated 1-2-1979 and the G.O.Rt. No. 43, M.A., dated 10-1-1979 are legal and valid. It also held the other issues against the plaintiff, except the issue No. 1. Accordingly, the suit was dismissed with costs by the judgment dated 29-9-1986.

9. Aggrieved by the said Judgment and Decree, the plaintiff filed an appeal in A.S. No. 113/86. The learned first appellate Court set aside the Judgment of the trial Court and allowed the appeal with costs thereby invalidating the Notice and the G.O. issued by the defendants No. 1 and 2.

10. Against the said order of the appellate Court, this second appeal has been filed by the 1st defendant, Municipality.

11. Sri E. Manohar, the learned senior Counsel appearing for the Municipality contends that the appellate Court erred in setting aside the Judgment and decree of the trial Court and the appellate Court misinterpreted the provisions of the Act. On the other hand Sri T. Veerabhadrayya, the learned Counsel for the plaintiff argued that the notice issued Under Section 228 of the A.P. Municipalities Act dated 1-2-1979 was based on the directions of the Government in G.O.Ms. No. 43, dt.10-1-1979. The said G.O. was issued in violation of principles of natural justice and hence it is null and void. The consequential notice dated 1-2-1979 issued on the basis of illegal order cannot stand on a higher footing and the said notice has to be automatically held invalid. It is his categorical submission that he is not touching on the merits of the case. He also contended that the finding of the appellate Court that the Municipality has no power to demolish in case of unauthorised or illegal constructions, but only it has to launch prosecution (is not correct).

12. In this regard, it is pertinent to extract Section 228 of the A.P. Municipalities Act. It reads as follows:

"228. Demolition or alteration of building work unlawfully commenced, carried on or completed :-

(1) If the (Commissioner) is satisfied:-

(i) that the construction or reconstruction of any building or well-

(a) has been commenced without obtaining the permission of the Commissioner or the Chairman, as the case may be, or where an appeal has been made to the

council, in contravention of any order passed by the Council; or

(b) is being carried on, or has been completed, otherwise than in accordance with the plans or particulars on which such permission or order was based; or

(c) is being carried on, or has been completed, in breach of any of the provisions of this. Act or of any rule bye-law made under this Act or of any direction or requisition lawfully given or made under this Act or such rules or bye-laws; or

(ii) that any alterations required by any notice issued u/s 217 have not been duly made: or

(iii) that any alternation of or addition to any building or any other work made or done for any purpose into or upon, any building, has been commenced or is being carried on or has been completed in breach of Section 227, he may make a provisional order requiring the owner or the builder to demolish the work done or so much of it as in the opinion of the said officer, has been unlawfully executed or to make such alterations as may, in his opinion, be necessary to bring the work into conformity with the Act, bye-laws, rules, direction or requisition as aforesaid, or with the plans and particulars on which such permission or order was based; and may also direct that until the said order is complied with, the owner or builder shall refrain from proceeding with the building or well.

(2) The said officer shall serve a copy of the provisional order made under sub-section (1) on the owner of the building or well, together with a notice requiring him to show cause within a reasonable time to be named in such notice why the order should not be confirmed.

(3) If the owner fails to show cause to the satisfaction of the said officer, he may confirm the order with such modification as he thinks fit to make, and such order shall then be binding on the owner.

A reading of the section would clearly indicate that in case a construction or reconstruction of any building is done without proper permission from the competent authority or if the construction is done in breach of provisions of the Act, or in violation of the sanctioned plan, the provisional order is, therefore, required to be issued to the owner or the builder requiring him to show cause within a reasonable time as to why the notice (sic. order) should not be confirmed. Thereafter a final order has to be passed under sub-section (3) of Section 228 of the Act after considering the representation of the owner. It has to be seen whether there is infraction of Section 228 of the Act and whether the G .O. is in violation of principles of natural justice. It is not in dispute that originally the plan was sanctioned on 15-12-1975 as submitted by the plaintiff. On 1-6-1976 a provisional order was passed u/s 228 of the Act bringing to her notice the illegal constructions. As the reply was found to be unsatisfactory, provisional orders were confirmed by final notice dated 16-7-1976, Ex.B-3. It appears that the plaintiff again submitted plan for construction of bath-room etc., on 5-7-1976, obviously after receipt of the notice dated 1-6-1976. The said plan

was rejected in letter dated 11-8-1976. Thus it is found that the notice of the Municipality dt.16-7-1976 became final more especially when the permission was rejected vide order dated 11-8-1976. The plaintiff did not choose to challenge the order. The neighbour also appears to have made complaints to the Municipality and also to the Government alleging illegal construction of bath-room etc. The Government after making necessary enquiries and after calling for the report from the concerned authorities directed the Municipality to demolish the bath-room and other illegal constructions. According to the learned Counsel for Municipality, the Government is empowered to issue instructions by virtue of powers conferred u/s 59 of the Act. No notice need be issued to the owner as held in K. Ramadoss v. The Commissioner, Vizianagaram Municipality, 1962 (1) An.W.R.43. He further submits that the notice - Ex.A-4 can alternatively be considered as order under Sections 149 to 155 of the Act under which the Municipality can remove the illegal constructions.

13. A careful reading of Ex.B-4 - final notice clearly indicates that a provisional notice u/s 228 was issued to the plaintiff on 1-6-1976 and as the appellant - Municipality was not satisfied with the explanation, final notice was issued u/s 228 and Section 340 of the Act. The said notice has not been challenged so far. Sri Manohar argues that the notice dated 1-2-1979 is not in pursuance of Section 228, but the same was issued under Sections 149 to 155 of the Act. I cannot accept this extreme contention. Under the notice Ex.A-4 reference was made to order dated 16-7-1976 (Ex.B-3) which is a notice u/s 228 of the Act. As can be seen from the sequence of events, the plaintiff was issued with provisional notice on 1-6-1976 and final notice was passed on 16-7-1976. Hence the contention of the learned Counsel for the plaintiff that there is violation of Section 228(2) of the Act can (sic. cannot) be accepted.

14. Next, the submission whether the G.O. - Ex.B-1 is violative of principles of natural justice has to be considered. A reading of the G.O. would indicate that the neighbours made complaint about the unauthorised construction of bathroom and septic tank causing damage to his building. The area was also polluted on account of discharge of drainage water through open channel. As already observed by me it is open for the Government to issue appropriate instructions to the Municipality under Sections 59 and 64 of the Act. The G.O. itself states that the action should be taken as per the provisions of the Act. Therefore, it cannot be said that the G.O. was issued without hearing the plaintiff. What is to be seen is whether the provisional notice has been issued before the final notice is sent. I have already pointed out that there is sufficient compliance of Section 228 of the Act. The very preamble of the notice says that there was violation of building Rule 11(3) for which a notice was given. Hence, it is open to the Municipality to act on the notice issued earlier by it for demolition of the premises. Therefore, I find de-hors the Government order, the Municipality is competent to issue notice and the said notice is quite legal and valid. The question whether the G.O. is in violation of principles of natural justice becomes academic. Even otherwise, the G.O. is not the foundation of the notice dated

1-2-1979.

15. With regard to the next contention in respect of the illegal construction in violation of the sanctioned plan or without any plan thereof, the only course left for the Municipality is that the owner of the building is liable for prosecution and no demolition can be resorted to. Similar issue was considered by this Court in Sri Sarvodaya College, Nellore v. The Commissioner and Special Officer, Nellore Municipality 1990 (1) An.W.R. 411.

16. In the case of 3 3 ACES, Hyderabad Vs. Municipal Corporation of Hyderabad, a Full Bench of this Court had considered the scope of Section 452 of Hyderabad Municipal Corporation Act is not mandatory. The process of demolition should not be resorted to unless overwhelming public interest was involved. Section 452 is analogous to Section 228 of A.P. Municipalities Act. The Full Bench while following the Judgment of the Supreme Court in Pratibha Co-operative Housing Society Ltd. and another Vs. State of Maharashtra and others, held that Section 452 of Hyderabad Municipal Corporation Act cannot be said to be mandatory as a matter of law. In para 28 and 31 of the Full Bench it is stated as follows:

28. As aforesaid, the provisions of the Act, Bye-laws and the Regulations made under the Act are issued/framed by the competent authority to be observed and not to be breached. Their object is, systematic, orderly and methodical development of the cities which is in the interest of the society at large and there is no gainsaying the fact that the public interest should prevail.

31.....

We have already referred to the latest judgment of the two-Judge Bench of the Supreme Court - State of Maharashtra's case and extracted the relevant passages which clearly lays down "that tendency of raising unlawful constructions and unauthorised encroachments is increasing in the entire country and such activities are required to be dealt with by firm hands." In view of the above Judgments, we are also of the opinion that though the word used in Section 452 of "The Act" is "May" and it is not mandatory the same must be understood in the light of the above observations extracted from the judgments of the Supreme Court. Having regard to the above observations of the Supreme Court, if in any given case, the Commissioner comes to the conclusion that the construction deserves to be demolished, that decision having been taken in public interest should not be interfered with normally by the Courts.

32. Having regard to the above, we are of the opinion that it cannot be said as a matter of law, that the power reserved u/s 452 of the Act is not mandatory."

17. In view of the above decisions, it is not open to the plaintiff to contend that the word "may" occurring in sub-section (3) of Section 228 cannot be construed as shall. Accordingly, I reject the contention of the plaintiff.

18. In the very same Judgment, the Full Bench also issued certain guide-lines to deal with the illegal constructions, including demolitions. Guide-line No. 1 reads

as follows:

"In cases where applications have been duly filed in accordance with law, after fulfilling all requirements, seeking permission to construct buildings and permission was also granted by the Corporation, the power of demolition should be exercised by Corporation only if the deviations made during the construction are not in public interest or cause public nuisance or hazardous or dangerous to public safety including the residents therein. If the deviations or violations are minor, minimal or trivial which do not affect public at large, the Corporation will not resort to demolition."

19. In the instant case, the permission for construction of bath-room has been refused. Therefore, the gravamen of unauthorised construction stands on higher footing. Moreover, it is a case of drainage water being released into open drain having the effect of pollution and causing public nuisance which is also hazardous and dangerous to the public health and safety, more particularly to the residents therein. Therefore, the decision of the Full Bench is of no avail to the plaintiff.

20. The appellate Court has not appreciated the relevant provisions of the Act in proper perspective: If the finding of the appellate Court is to be accepted, then there can be any amount of illegal constructions which cannot be demolished under any circumstances. The attitude of the plaintiff in constructing the bath-room is in deliberate violation of law and calls for severe action. It would cause any amount of pollution and cause damage to public health, if these types of constructions are encouraged. A person who violates the building rules with impunity and makes construction deliberately cannot get away with the payment of fine or prosecution. Thus, I am of the firm opinion that interpretation given by the appellate Court is erroneous and contrary to various decisions. In the light of the above discussion, I hold that the Judgment and decree of the appellate Court is erroneous and the same is liable to be set aside.

21. In the result, the Second Appeal No. 402 of 1993 is allowed and the judgment and decree of the first additional District judge, Machilipatnam passed in A.S. No. 113 of 1986 is set aside. The Judgment and decree of the first additional District Munsif, Machilipatnam passed in OS. No. 50 of 1979 dated 29-9-1986 is confirmed. In the circumstances there shall be no order as to costs.