
(2013) 09 BOM CK 0197
In the Bombay High Court
Case No : Writ Petition No. 534 of 2012

Mr. Kishorkant Bhattessa and Mr. Jaswinder Singh Sachdev	APPELLANT
Vs	
The State of Maharashtra and Others	RESPONDENT

Date of Decision : 23-09-2013

Acts Referred:

Citation : (2014) 2 ALLMR 349

Hon'ble Judges : S.C. Dharmadhikari, J;G.S. Patel, J

Bench : Division Bench

Advocate : Zal Andhyarujina, Mr. Harish V. Meghani instructed by Namita M. Mestry, for the Appellant; A.Y. Sakhare , Smt. K.R. Punjabi for the Municipal Corporation of Greater Mumbai, Mr. Shoaib I. Memon for Respondent No. 5 and Mr. R.J. Mane, AGP for the State, for the Respondent

Judgement

S.C. Dharmadhikari, J.—By this writ petition, the petitioner is seeking a direction to the Municipal Corporation of Greater Mumbai to take action against an offending hoarding and which is more particularly described in the petition. The petitioner essentially seeks a direction to the Municipal Corporation of Greater Mumbai that it must proceed and deal with the complaint made with regard to dismantling and removing the three hoardings put up and used by respondent Nos. 5 and 6 on the terrace of the building of the said Society.

2. We have heard Mr. Andhyarujina appearing for the petitioners, Mr. Sakhare, learned senior counsel appearing on behalf of the Municipal Corporation of Greater Mumbai and the respondent Nos. 2, 3 and 4 and, equally, we have heard Mr. Memon appearing on behalf of respondent No. 5.

3. After hearing the learned counsel at some length, we find that there is much substance in the complaint of the petitioners that the Municipal Corporation failed to take into account all the Policies and Regulations and prevailing till date in permitting the hoarding at site and rather its retention, when there is enough material to show that the same contravenes the above referred Policies and that allowing it to be retained in the form and shape at site endangers the safety of

the occupants not only of the building of the Society, but all those passing by as well.

4. The argument of Mr. Memon is that the petitioners have by an oblique and back-door method raised the issue of the respondent No. 5's right to use the hoardings. That issue cannot be raised here because the petitioners and the respondent No. 5 have on-going disputes and, which are pending in a competent Civil Court. Our attention has been invited by Mr. Memon to the pendency of a Civil Suit filed by the respondent No. 5. It is submitted that the Society is fully aware of the pendency of the said dispute and that on account of the orders passed therein, it could not have a removal far from dismantling of the hoarding at site. Therefore, they have approached this Court and, by raising the plea of inaction of the Municipal Corporation of Greater Mumbai.

5. It is submitted that the Society was unsuccessful in the past and, now by these proceedings the Society seeks to achieve something, which it has failed to in the pending proceedings.

6. It has also been urged that the hoardings have been erected in the year 2002 as per the guidelines and in terms of the Rules, then prevailing. The hoardings have been erected and the retention thereof is also governed by the same. No fresh Policy or Regulations of the Municipal Corporation would enable the Corporation to take cognizance of the complaint and, particularly, about the height of the hoarding. In such circumstances, this writ petition be dismissed.

7. At the outset, we wish to clarify that we are not concerned with the inter-se civil disputes. The petitioners and the respondent Nos. 5 and 6 may have an on-going dispute as between them in a competent Civil Court and, particularly, about the right to erect a hoarding on the hoarding sites. They may also rely upon the clauses in the agreement in that behalf. We are essentially concerned with the issue of safety and stability of the structure. The occupant's safety and, equally, the safety of all those passing by and residing in the neighborhood is a matter of concern for us. We had before us a complaint in the past with regard to the hoarding sites and, which are placed on the top of buildings or directly facing the road collapsing on account of natural causes or on account of heavy rains and winds, endangering thereby the safety of all those using the roads and footpaths. The occupants of the residential building of the Cooperative Housing Society have also complained that the stability of the structure and building is adversely affected, if hoarding sites are allowed to be erected on the terrace of the buildings. They are precariously placed and/or mounted on the structure. If the structure develop cracks because of passage of time or natural causes, naturally, the hoarding sites cannot be said to be stable and firm as they rest on the structure itself. It is that issue which really concerns us. It is this larger issue not only in relation to the Society before us, but all such buildings and hoarding sites, which have been placed in the City elsewhere.

8. We must first dispose of the contention of Mr. Memon that the Municipal

Corporation has never been directed to take action against other hoarding sites and, similarly placed. Equally, according to him, the parties like the petitioners are selective. They do not complain about hoarding sites being erected initially by others and, later on when the commercial terms fizzled out that they rush to the Courts and, in the garb of seeking directions against the public body to seek removal of hoarding sites of parties like the respondent No. 5. Mr. Memon submits that the right to carry on Trade or Business guaranteed to every citizen by Article 19(1)(g) cannot be jeopardised or interfered with in this manner.

9. While we have clarified amply that we have nothing to do with the ongoing civil disputes between the petitioners and the advertisers, or the persons who have erected the hoarding, we must at once add that there is no equality in illegality. Merely because the Municipal Corporation has not proceeded against offending hoardings in other part of the City, or in the vicinity of the petitioners' building, does not mean that the petitioners or the Municipal Corporation of Greater Mumbai is prevented from taking recourse to law. Merely because something has not been proceeded against, though offending, does not mean that the writ Court should allow other hoarding sites to be retained even if they are unsafe or it must issue a direction to perpetuate or continue any illegality, if it is brought to its notice.

10. In two decisions of the Hon'ble Supreme Court both aspects, namely right of Advertisers and Hoarding Site Owners and plea based on illegality or inaction are dealt with. Firstly, in the case of State of Bihar and Others Vs. Kameshwar Prasad Singh and Another, the Hon'ble Supreme Court held as under:-

30. The concept of equality as envisaged under Article 14 of the Constitution is a positive concept which cannot be enforced in a negative manner. When any authority is shown to have committed any illegality or irregularity in favour of any individual or group of individuals other cannot claim the same illegality or irregularity on ground of denial thereof to them. Similarly wrong judgment passed in favour of one individual does not entitle others to claim similar benefits. In this regard this Court in Gursharan Singh and others etc. Vs. New Delhi Municipal Committee and others, held that citizens have assumed wrong notions regarding the scope of Article 14 of the Constitution which guarantees equality before law to all citizens. Benefits extended to some persons in an irregular or illegal manner cannot be claimed by a citizen on the plea of equality as enshrined in Article 14 of the Constitution by way of writ petition filed in the High Court. The Court observed (Para 9):

Neither Article 14 of the Constitution conceives within the equality clause this concept nor Article 226 empowers the High Court to enforce such claim of equality before law. If such claims are enforced, it shall amount to directing to continue and perpetuate an illegal procedure or an illegal order for extending similar benefits to others. Before a claim based on equality clause is upheld, it must be established by the petitioner that his claim being just and legal, has been denied to him, while it has been extended to others and in this process

there has been a discrimination.

Again in *Secretary, Jaipur Development Authority, Jaipur Vs. Daulat Mal Jain and Others*, this Court considered the scope of Article 14 of the Constitution and reiterated its earlier position regarding the concept of equality holding:

Suffice it to hold that the illegal allotment founded upon ultra vires and illegal policy of allotment made to some other persons wrongly, would not form a legal premise to ensure it to the respondent or to repeat or perpetuate such illegal order, nor could it be legalised. In other words, judicial process cannot be abused to perpetuate the illegalities. Thus considered, we hold that the High Court was clearly in error in directing the appellants to allot the land to the respondents.

In *State of Haryana and Others Vs. Ram Kumar Mann*, this Court observed (Para 3):

The doctrine of discrimination is founded upon existence of an enforceable right. He was discriminated and denied equality as some similarly situated persons had been given the same relief. Article 14 would apply only when invidious discrimination is meted out to equals and similarly circumstanced without any rational basis or relationship in that behalf. The respondent has no right, whatsoever and cannot be given the relief wrongly given to them, i.e., benefit of withdrawal of resignation. The High Court was wholly wrong in reaching the conclusion that there was invidious discrimination. If we cannot allow a wrong to perpetrate, an employee, after committing misappropriation of money, is dismissed from service and subsequently that order is withdrawn and he is reinstated into the service. Can a similarly circumstanced person claim equality u/s 14 for reinstatement: The answer is obviously "No". In a converse case, in the first instance, one may be wrong but the wrong order cannot be the foundation for claiming equality for enforcement of the same order. As stated earlier, his right must be founded upon enforceable right to entitle him to the equality treatment for enforcement thereof. A wrong decision by the Government does not give a right to enforce the wrong order and claim parity or equality. Two wrongs can never make a right.

Equally in the case of *Novva ADS Vs. Secretary, Deptt. of Municipal Administration and Water Supply and Another*, the Hon'ble Supreme Court held, in relation to regulation and Control of Hoardings on Private Property, as under:-

22. So far as public places are concerned, the State has a full right to regulate them, as they vest in the State as trustees for the public. The State can impose such limitations on the user of public places as may be necessary to protect the public generally. (See *Saghir Ahmad Vs. The State of U.P. and Others*,).

23. Hoardings erected on private places also require to be licensed and regulated as they generally abut on and are visible on public roads and public places. Hoarding erected on a private building may obstruct public roads when put up on private buildings; they may be dangerous to the building and to the public; they

may be hazardous and dangerous to the smooth flow of traffic by distracting traffic, and their content may be obscene or objectionable. It is, therefore, not correct that hoardings on private places do not require to be regulated by licensing provisions.

24. Rule 6 of the 2003 Rules put restrictions on the size of hoardings, on their height, the spacing, etc. and the requirement of erection on steel frames. Rule 10 restricts the hoarding to be put on certain places such as educational institutions, places of worship, hospitals, corners of roads, in front of places of historical and aesthetic importance.

25. The power to license is not unfettered and is guided by the above considerations. Under Rule 11 an appeal lies to the State Government for refusing the grant or renewal of licenses. Section 326J of the Act empowers the District Collector to prohibit the erection of hazardous hoardings and hoardings which are hazardous and a disturbance to the safe traffic movement so as to adversely affect the free and safe flow of traffic.

11. That the petitioners have been selective in picking up the respondent No. 5 for a complaint of this nature is something which will be taken care of in the on-going civil dispute and if the Municipal Corporation's action results in removal or dismantling of the hoarding, the parties like respondent No. 5 are not remediless. They can seek appropriate reliefs based on any civil wrong.

12. For the present, we are of the opinion that merely because the hoarding structure has been put up in this case in the year 2002, the Municipal Corporation cannot be said to be prevented from taking an action against it. It is the continuation and retention of this hoarding and, at the same site and, which is complained of as posing a threat to the safety and security of the occupants of the building and to those residing in the vicinity and neighborhood and, equally, passers-by. It is complained that its retention for a long duration and its non removal is hazardous. Such a alleged continuing wrong or a alleged continuing illegality in a matter of great public concern cannot be said to be not covered by the current Policies and Regulations of the Municipal Corporation. We have not been shown any principle of law, which prevents the Municipal Corporation from proceeding against such offending hoardings, even if they are erected prior in point of time or are at site for decades together, if there continuation at the same site is now a cause for concern and, in larger public interest. If that is a cause for concern, then, in matters of safety and security as noted above, we cannot say that the Municipal Corporation is estopped in law from proceeding against such hoardings, if their continuation is in any way in breach or violation of the Policy Regulations prevailing. If they pose a threat to the public safety, then, in the present case, the Policy Guidelines for the grant of permission for display of sky-signs and advertisement framed on 10th January 2008 can be applied and invoked.

13. Therein, our attention has been invited to a specific clause and, which is said

to be clause (6) about maximum height of hoarding board and, particularly, sub-clause (c) thereof, which says that no hoarding shall be permitted henceforth one above another. The photographs annexed to the affidavit in rejoinder of the petitioners prima facie demonstrate that the hoardings are one above the other. The word "henceforth" has been relied upon by Mr. Memon to urge that henceforth means hereafter and denotes futurity. Whatever has been erected even if it is one above another, then, that cannot be touched is the submission because it is existing since decades at the same site. We are unable to agree. We have given enough reasons in the foregoing paragraphs and that when it comes to matters of public safety and, our concern for the lives and properties of the residents of the City and the occupants of the structures and buildings, then, an interpretation which will further the object and purpose and, which will assist the public body in reaching out and taking care of the complaints of the above nature pertaining to the above aspects should be placed on such Policy Regulations. In this context a useful reference can be made to the Principles of Statutory Interpretation of such words and statutes in the work of Hon'ble Justice G.P. Singh in his book Principles of Statutory Interpretation, 11th Edition, page 2008, the learned Author says thus:

The doctrine of fairness was referred to by the Supreme Court in *Vijay Vs. State of Maharashtra and Others*, . In this case a new law which enacted that "no person shall be a member of a Panchayat or continue as such who has been elected as a councilor of Zila Parishad as a member of the Panchayat Samiti" was held to be retrospective and applicable to existing members of a Panchayat. In holding so S.B. Sinha, J. observed: "It is now well-settled that when a literal reading of the provision giving retrospective effect does not produce absurdity or anomaly, the same would not be construed only prospective. The negation is not a rigid rule and varies with the intention and purport of the legislation, but to apply it in such a case is a doctrine of fairness. When a new law is enacted for the benefit of the community as a whole, even in absence of a provision the statute may be held to be retrospective in nature.

(v) Language not always decisive.--In deciding the question of applicability of a particular statute to past events, the language used is no doubt the most important factor to be taken into account; but it cannot be stated as an inflexible rule that use of present tense or present perfect tense is decisive of the matter that the statute does not draw upon past events for its operation. Thus, the words "a debtor commits an act of bankruptcy" were held to apply to acts of bankruptcy committed before the operation of the Act. The words "if a person has been convicted" were construed to include anterior convictions. The words "has made", "has ceased", "has failed" and "has become", may denote events happening before or after coming into force of the statute and all that is necessary is that the event must have taken place at the time when action on that account is taken under the statute. The words "dying intestate" were interpreted by the Judicial Committee not as connoting the future tense but as a mere description of the status of the deceased person without any reference to

the time of his death. So the words, "held as lease", may be only descriptive of land and may apply to lands held on lease prior to or after the coming into force of the Act. The words, "when a person dies", may include a person who died prior to the coming into force of the Act. And the word "is" though normally referring to the present often has a future meaning and may also have a past signification in the sense of "has been".

The real issue in each case is as to the dominant intention of the Legislature to be gathered from the language used, the object indicated, the nature of rights affected, and the circumstances under which the statute is passed.

Pertinently, the Municipal Corporation has not taken this stand before us.

14. The Corporation has brought to our notice that it had issued a notice dated 26th November 2012 on this aspect and on the placement of hoarding structures. Such notice has been issued to the respondent No. 5. The Municipal Corporation must be allowed to pursue its notice and pass appropriate orders in furtherance thereof and, in accordance with law after hearing not only the respondent No. 5 but the petitioner No. 7-Cooperative Housing Society.

15. We are of the view that commercial gains and interests cannot be placed above the concern for safety and security of the occupants in the building and that of the general public. Therefore, just as those erecting hoardings and displaying their advertisements are bound by the Policy Regulations, equally, Cooperative Housing Societies and owners of the buildings are bound by them. They cannot enter into contracts and, for commercial gains and profits, permit violation of the Policy of the Municipal Corporation by allowing putting up of hoardings one above the other. They also cannot commit a breach or violation of the Policy Regulations insofar as other aspects and, particularly, about safety.

16. In these matters, none can claim an absolute right and, the Societies also should not become parties to the agreements by which larger public interest is adversely affected. In the above circumstances, though the reports on record and the opinions of experts differ and, they touch about the stability of the hoardings and the angles or frames and structures on which they are resting, what we have noted is that there are larger issues at stake. Once the Corporation is not bound by any orders earlier but must pursue its notice issued, then, we are not confining or restricting the matter or our directions to only finding out as to whether the structure or the hoarding is safe and stable and is not likely to cause any immediate alarm or danger. We are placing the matters on a higher pedestal and, in terms of the Policy Regulations, equally, rights of those who claim that the hoardings can be put up as per their choice.

17. In these circumstances, we allow the writ petition and, by directing the respondent Nos. 2, 3 and 4 to take action in accordance with law by pursuing its notice dated 26th November 2012. The requisite orders in furtherance thereof be passed as expeditiously as possible and, within a period of three months from today. The orders be passed after hearing both the petitioners and the

respondent No. 5. Both shall be at liberty to place such materials, as are relevant including opinions of experts. However, the Authority {Deputy Municipal Commissioner (Special)} who shall be taking action in furtherance of this notice and, passing requisite orders shall not be bound by any opinions of such experts and, is free to make an independent reference or seek opinion of the Structural Engineers and Consultants.

18. The Municipal Corporation shall not influence itself by the contents of the affidavits filed in this writ petition or any pending civil proceedings between the parties, but, must pass the requisite orders on merits and in accordance with law uninfluenced by the same.

19. To enable the Municipal Corporation to pursue the notice, we set aside the order dated 12th December 2012, a copy of which is at page 83AD of this writ petition. The writ petition is allowed in above terms. No costs.