

(2014) 04 BOM CK 0198
In the Bombay High Court
Case No : Second Appeal No. 558 of 2007

Nagpur Improvement Trust	Vs	APPELLANT
Kishorchand		RESPONDENT

Date of Decision : 29-04-2014

Acts Referred:

Maharashtra Regional and Town Planning Act, 1966 — Section 52, 55

Citation : (2014) 4 ABR 6 : (2014) 6 ALLMR 624 : (2014) 5 BomCR 776 :
(2015) 1 MhLj 361

Hon'ble Judges : A.P. Bhangale, J

Bench : Single Bench

Advocate : R.O. Chhabra, Advocate for the Appellant; D.G. Paunikar, Advocate for the Respondent

Final Decision : Dismissed

Judgement

A.P. Bhangale, J.—This appeal is filed by the appellant/Nagpur Improvement Trust (Original Defendant)(hereinafter for brevity referred to as "the NIT"), against the Judgment and Order, dated 16.1.2006 passed by the 3rd Additional District Judge, Nagpur in Regular Civil Appeal No. 111 of 1999, which was disposed of on the ground that it became infructuous. The said appeal arose from the Judgment and Order, dated 19.12.1998 passed by the Joint Civil Judge(J.D.), Nagpur in Regular Civil Suit No. 1699 of 1996. The suit was decreed for declaration that the notice No. DO (West)251, dated 18.6.1996 and notice No. DO (west)252, dated 4.7.1996 issued by the defendants to the plaintiff are illegal, null and void.

2. Brief facts are:-

That the respondent/plaintiff claimed that he is owner of the ground floor of the two storied house no. 569, Nazul plot no. 106/5, City Survey no. 405/1 in ward no. 3, Joshiwadi, Sitabuldi, Nagpur. The plaintiff also claimed that he was in possession of the first floor and one room situated on the second floor. The

respondent (Original plaintiff) had filed the suit for declaration and permanent injunction against the then Planning Authority/the NIT challenging the notices dated 18.6.1996 and 4.7.1996 issued by the appellant/the NIT calling upon the plaintiff that the construction carried out by the plaintiff is unauthorised and liable to be removed or demolished. The notices were challenged as illegal and mala fide. Respondent/plaintiff had carried out the repairs which were required in respect of the premise occupied by him after obtaining the sanction from the Nagpur Municipal Corporation (hereinafter referred to as "the NMC") to carry out the minor repairs. The appellant (Original defendant) had carried out the inspection and then issued the notices which were impugned by the plaintiff as illegal and void. The trial Court accepted case of the plaintiff and declared the notices impugned as illegal.

3. The Government of Maharashtra had permitted the Nagpur improvement Trust, (NIT) being a local authority to exercise powers under the Maharashtra Regional and Town Planning Act, 1966 (hereinafter referred as " the MRTP Act") as the planning authority under the said Act, pursuant to the notification issued by the Government in Urban Development, Public Health and Housing Department bearing no. TPS-2467-19866-M, dated 6th October 1967. State of Maharashtra by notification bearing no. TPS. 2401-855-CR-76-UD-9 issued on dated 27th February, 2002 and published on 11th March, 2002 in the Official Gazette decided to permit the Nagpur Municipal Corporation (NMC) to exercise the power of a planning authority under the MATP Act in the entire area under its jurisdiction except with limited number of seven exceptions namely:

- (a) 1. Eastern Industrial area street scheme covering area of H320.60 R
- 2. Itwara Station Road street Scheme H 4.77R
- 3. Sitabuldi (west) improvement scheme H6.15R
- 4. Abhyankar Road & Buti Mahal street scheme H3.24R
- 5. Wathoda extension Housing accommodation Scheme (New scheme) H170.00R
- 6. Shivangaon-Jaitala Township (New scheme) H 257.00R
- 7. Green Belt control scheme H 6447.00R

Total in Hectares: 7208.76 R

The State Government of Maharashtra notified that notwithstanding provision (a) above, in areas which come under the purview of Nagpur Municipal Corporation as planning authority, NIT will not be required to secure development permission from the Nagpur Municipal Corporation with regard to developments undertaken by it in its capacity as development agency, and for limited purpose, it shall function as planning authority for such developments. This notification became operative since it was published by notification in the official Gazette on 11 March 2002.

4. The appeal was admitted upon the substantial question of law stated as under:-

Whether pending appeal filed by the Nagpur Improvement Trust becomes infructuous in view of the notification issued by the Government of Maharashtra on 27.2.2002 transferring the jurisdiction of certain schemes to the other planning authority i.e. Nagpur Municipal Corporation?

5. The trial court findings were that the notices issued by the NIT were illegal and malafide.

6. The first appellate court's findings were challenged on the ground that it erred to presume that the first appeal became infructuous in view of the subject notification.

7. On behalf of the appellant, it is submitted that the suit itself was not tenable for want of notice required u/s 115 of the Nagpur improvement Trust Act and therefore the suit ought to have been dismissed by the trial Court.

8. On behalf of the respondent (Original Plaintiff), it is submitted that the notices impugned were declared as illegal by the trial Court and the first Appellate Court by the reasoned Judgment held that the appeal became infructuous since the NIT has no longer remained the planning authority in connection with suit property

9. Legal position cannot be disputed in view of the judicial precedents on this subject that if the pre-suit statutory notice is required to be issued and served by the mandate of law before the institution of the civil suit it has to be so issued and served upon the opposite party, unless any exceptional ground is made out as an valid acceptable excuse for non-compliance of the mandatory provision in the fact and circumstances of the particular case. The valid excuse may be upon the plea of the "deemed waiver" on the part of the opposite party. When the suit is instituted for apprehended cause of action i.e. threatened action of Demolition, in such a case, the plaintiff not being able to issue and serve the pre-suit statutory notice, as required under the law is compelled in the facts and circumstances to approach the Civil Court. In a given case, the plaintiff may plead such exception requiring him to immediately approach the Civil Court after having received the notice from the planning/Municipal authority apprehending the urgent demolition of the suit property; when notice of urgent and likely demolition is given by the Municipal Authority or planning authority, public authority as the case may be, it leaves no sufficient notice period for the plaintiff to wait until the expiry of the statutory notice period for the issuance and service of the pre-suit statutory notice according to law as he is apprehending the urgent action by or on behalf of the public/local planning authority to demolish the suit house/structure. The suit on the basis of an imminent apprehension of the demolition/loss of suit house or structure so as to restrain the local planning authority from demolishing the suit house/structure has been held tenable in such a "Quia timet" injunction suits wherein the plaintiff had no any period of time left for to issue and serve the pre-suit statutory notice and then to wait until

the expiry of the statutory notice period. "Quia timet" injunction is granted in a suit for injunction against the defendant in respect of an act threatened but not yet committed. In such a suit, it cannot be possible for the plaintiff to issue and serve pre-suit statutory notice as required under law as act is not yet committed, though threatened. If the plaintiff could not have issued and served written pre-suit statutory notice and could not have waited as required under the law, the civil court may hold the suit tenable on the principle of the "deemed waiver" by the defendant of the pre-suit statutory notice as the defendants by their conduct of threatening action of early demolition prevented the plaintiff from issuing and serving pre-suit statutory written notice as required by law. There is no substantial question of law requiring answer in this regard. The relevant law is clear.

10. Section 55 of the Maharashtra Regional & Town Planning Act, 1966 reads thus:

55. Removal or discontinuance of unauthorized temporary development summarily:

(1) Notwithstanding anything hereinbefore contained in this Chapter, where any person has carried out any development of a temporary nature unauthorisedly as indicated in subsection (1) of section 52, the Planning Authority may by an order in writing direct that person to remove any structure or work erected, or discontinue the use of land made, unauthorisedly as aforesaid, within fifteen days of the receipt of the order; and if thereafter, the person does not comply with the order within the said period, the Planning Authority may request the District Magistrate or the Commissioner of Police, as the case may be, [or authorize any of its officers or servants] to have such work summarily removed or such use summarily discontinued without any notice as directed in the order, and any development unauthorisedly made again, shall be similarly removed or discontinued summarily without making any order as aforesaid.

(2) The decision of the Planning Authority on the question of what is development of a temporary nature shall be final.

11. This section begins with non obstinate clause and it operates irrespective of earlier provisions under Chapter IV of the Maharashtra Regional & Town Planning Act, 1966. Thus, whenever it is found that any person has carried out illegal development of a temporary nature without any permission, from the Planning Authority or not in accordance with any permission or in contravention of any permission such an act is an offence punishable under the Act by imprisonment for a term of one month which may extend up to three years with a fine which is minimum a sum of Rs. 2000/which may extend upto Rs. 5000/-. Such unauthorized or illegal development is treated as continuing offence punishable with recurrent delay fine which may extend to Rs. 200/- per day until the offence is continuing after conviction for the first offending act; in other words such offending act of unauthorized or illegal development of a temporary nature.

12. The next contention on behalf of the appellant, in respect of which the substantial question of law is formulated by this court as stated in Para 5 above, is as to whether the appeal by the NIT became infructuous due to transfer of planning Schemes to the Nagpur Municipal Corporation with the exceptions of certain Schemes for the NIT only as stated in the Notification issued by the Government of Maharashtra. It clearly appears that the effective policy decision was taken by the Government of Maharashtra as published in the Notification (supra) to operate in the Nagpur region. The Notification is in the interest of the public good for effective implementation and enforcement of Town Planning Scheme in City of Nagpur. The NIT ceased to remain the planning authority except in the limited items stated in the Notification operative with effect from 27-02-2002. As of rule, the powers of the planning authority is vested in the Nagpur Municipal Corporation with effect from the date of the notification (except seven items in which the NIT will continue as planning authority as stated in the Notification.)

13. The notification operates prospectively with effect from the date of its issuance. The object is that the development in the city of Nagpur shall be done in organised manner by the Nagpur Municipal Corporation as the planning authority constituted in accordance with the above Notification issued by the State Government of Maharashtra.

14. The argument on behalf of the respondent is that the NIT no longer can claim to function as planning authority except in the seven cases stated item wise in the State Government Notification. (supra). Substantive provision stated cannot be construed as retrospective in nature unless the provision itself indicates the same. Such decision by the State Government is in the larger public interest which has disabled the NIT subject to exceptional seven cases specifically stated in the Notification and generally constituted the Nagpur Municipal Corporation as the "planning authority" for the city of Nagpur. The Notification must be interpreted as prospective with effect from the date of issuance of the Notification in the Official Gazette of the State of Maharashtra. The Nagpur Municipal Corporation so constituted as "Planning authority" with plenary power in the larger public interest would perform its statutory duty to ensure the finalisation of the development plan of the Nagpur City in organised manner primarily for the benefit of the public. Previous action on the part of the earlier planning authority is not totally meaningless merely because there is change of the planning authority. New planning authority/NMC can undertake and perform its statutory duties as contemplated under the Law.

15. However I do not express any opinion on merits of legality or otherwise of the action taken on the part of the NIT as planning authority to demolish alleged illegal construction, since NIT has no longer remained as the planning authority. NMC/new Planning authority constituted pursuant to the Notification can and as "planning authority" is empowered to take appropriate statutory action according to law and follow the due process of law qua the alleged illegal construction

made by the plaintiff. That being so, I refrain from commenting on merits of the matter while I record my conclusion restricting it having accepted the contention on behalf of the respondent that the present Second Appeal by the NIT has become infructuous after the change of the Planning authority and substantial question of law, therefore, is answered in the affirmative accordingly.

16. In the result, therefore, the Second Appeal preferred by the NIT is dismissed as infructuous. No order as to costs.