

(2012) 11 BOM CK 0069

In the Bombay High Court

Case No : Second Appeal No. 534 of 2011 and Civil Application No. 1048 of 2011

Parisar

APPELLANT

Vs

Pune Municipal Corporation

RESPONDENT

Date of Decision : 26-11-2012

Acts Referred:

Bombay Provincial Municipal Corporations Act, 1949 — Section 2, 202, 203, 204, 205
Civil Procedure Code, 1908 (CPC) — Section 91

Citation : (2013) 1 ALLMR 328 : (2013) 2 MhLj 85

Hon'ble Judges : Mridula Bhatkar, J

Bench : Single Bench

Advocate : Ajit Kulkarni and Hitesh Vyas, for the Appellant; Abhijeet P. Kulkarni, for the Respondent

Final Decision : Dismissed

Judgement

Mrs. Mridula Bhatkar, J.—Heard. Admit. By consent of parties appeal is heard finally at the stage of admission. Second Appeal is filed against the judgment and Order dated 30.6.2011 of the First Appeal Court, Pune in Civil Appeal No. 293 of 2008 thereby confirming the judgment and decree passed in R.C.S. No. 725 of 2000 passed by the trial Court.

2. The appellant is a Society registered under the Societies Registration Act, 1860 working for the conservation of nature and environment. The respondent is a Corporation established under the Bombay Provincial Corporations Act, 1949. (Hereinafter called as "BPMC ACT") The respondent-Corporation took a decision to construct new roads running parallel to river Mutha in the heart of the Pune city. The suit road is one of such roads and its construction started in the year 2000. The said decision was detrimental to the existence of river Mutha, so appellant society filed a suit for declaration that the Corporation has no right to construct road or structures in Mutha river bed and for perpetual injunction. In the suit the appellants have also prayed for other directions to be given to the Corporation to conserve Mutha river bed and green belts surrounded and also to

conserve heritage structures at the Mutha river bank. The suit was contested by the respondent-Corporation by filing written statement on different grounds. The issues in respect of the power of the Corporation to construct such roads & possibility of the pollution of the water were framed. So also the issues about the maintainability of the suit for want of Section 487 of the BMC Act and as the suit involved a public interest, therefore, on the ground of the locus-standi of the appellant and the jurisdiction of the civil Court, were framed on the basis of the contentions raised by the Corporation in the written statement. The appeal Court also determined the points on the same line and the appeal and the suit both, were dismissed by the courts below.

3. On perusal of judgments of both the courts and the evidence adduced by both the parties, a substantial question of law is formulated as under:-

While exercising power to construct new public streets u/s 205 of the BMC Act of 1949, is it mandatory for the Corporation to follow the procedure u/s 37 of the MRTP Act of 1956 or not ?

4. The learned Counsel for the appellants submitted that the Corporation has no authority to construct any road without following procedure u/s 37 of the Maharashtra Regional Town Planning Act (Hereinafter called as "MRTP Act"). He submitted that the appellate Court has committed an error in understanding the term new public street used in section 205 of the BMC Act of 1949. The appeal Court and the trial Court both, ought to have read section 205 of the BMC Act in context with sub-section 52 of Section 2 of the Act. The decision of the Corporation to construct a new road from Sambhaji pool to Shivaji pool in river bed of Mutha is not at all protected u/s 205 of the Act. The order of the Collector was obtained post facto i.e. after the construction of the road. The learned Counsel for the appellants submitted that earlier in the first Development Plan, a similar road was shown from the other side of the river Mutha running parallel to the suit road. However, Corporation took a decision to cancel that road and decided to construct a similar road on the other side of river Mutha i.e. the suit road. The learned Counsel argued that while deleting the other parallel road shown in the final Development Plan, the respondent-Corporation followed the procedure contemplated u/s 37 of the MRTP Act. However, while constructing the suit road, it did not follow the same procedure. In fact, it was mandatory to follow procedure u/s 37 to construct a new road which was not shown in the final Development Plan. He submitted that the vehicular traffic on the suit road will pollute the water of the river and will also affect the river plants fish and other lives in the river. He relied on the judgment of the Division Bench of this Court in Writ Petition No. 283 of 2005 in the case of Sadanand Varde and Others Vs. State of Maharashtra and Others, . Then further he relied on the judgment in the case of Vijay Krishna Kumbhar Vs. The State of Maharashtra and Others, . In paragraph-87 of the judgment in Vijay Krishna Kumbhar (supra) the Division Bench of this Court has dealt with section 37 of the MRTP Act exhaustively. It is held that a deletion of reservation with regard to a particular plot of land requires

Corporation to follow a procedure u/s 37 of the MRTTP Act. There was deletion and/or shifting a reservation of a primary school contained in the development plan of Pune city. Therefore, the Division Bench has taken a view that action of cancellation or shifting reservation carried out without compliance of the provision of section 37 of the Act was wholly illegal. He relied on the judgment of the Division Bench in PIL No. 41 of 2011 in the case of Baner Area Sabha & Anr. Vs. Pune Municipal Corporation & Anr decided on 26th April, 2012. This was pertaining to construction of storm water drainage system for Pune. In the said judgment, Division Bench of this Court though has permitted Corporation to carry out the work for storm water drainage system, it directed Pune Municipal Corporation to carry out the said work in conformity with the recommendation of Ministry of Environment and Forest. The learned Counsel for the appellants also relied on the judgment in the case of M.C. Mehta Vs. Kamal Nath & Ors delivered on 12.5.2000. In this matter issue of determination of quantum of pollution of water due to construction by the Motel in the river bed and on the banks of river vyas was determined. While determining that issue, Court made valuable observations in respect of water pollution. The learned Counsel relied on the judgment in the case of Shri K. Ramadas Shenoy Vs. The Chief Officers, Town Municipal Council, Udipi and Others, . The Supreme Court has held that municipal authorities owe a duty and obligation under the Statute to see that residential area is not spoilt by un-authorised construction. He also relied on the judgment in the case of Smt. Fatima Joao Vs. Village Panchayat of Mercedes and Another,

5. Per contra, the learned Counsel for the Corporation submitted that suit itself is not maintainable. The prayer of injunction made in the suit does not survive as the 80% of the road is already constructed and put in use for vehicular traffic since long. He submitted that no notice was given u/s 487 of the Bombay Provincial Municipal Corporations Act 1949. The notice cannot be dispensed with as the authority has acted under the Act and Appeal court has held that for want of notice the suit is bad. There was no urgency. He relied on the judgment of the learned single Judge of this court in the case of Kolhapur Zilla Rajya Abkari Parvana Dharak Samajik Seva Sangh Vs. Kolhapur Municipal Corporation, on the point of Section 487 of Bombay Provincial Municipal Corporations Act 1949. The learned Counsel submitted that even the objections u/s 91 of the CPC though the locus of the appellants is challenged and that issue is decided against the appellants, respondent-corporation at this stage does not press it. He further submitted that the construction of new street was not carried out u/s 37 of the MRTTP Act but the Corporation has carried out construction invoking Section 205 of the Bombay Provincial Municipal Corporations Act, 1949 (BPMC Act).

205. Power to make new public streets-The Commissioner, when authorised by the Corporation in this behalf, may at any time-

(a) lay out and make a new public street;

(b) agree with any person for the making of a street for public use through the land of such person, either entirely at the expense of such person or partly at the

expense of such person and partly at the expense of the Corporation, and that such street shall become, on completion, a public street, which shall vest in the corporation;

(c) construct bridges and sub-ways

(d) divert or turn an existing public street vested in the Corporation or a portion thereof.

6. The learned Counsel for the respondents relied on Bombay Environmental Action Group Vs. State of Maharashtra reported in 2001(4) Mh.L.J. 260 in which the Division Bench of this Court held that the construction of Andheri Flyover in Andheri was allowed with some directions to the municipal authority. It was held that the laws or rules are required to be modified time to time as per forthcoming new challenges due to scientific and modern development. Every change cannot be considered as ecological disaster.

7. The word street as interpreted by the learned Counsel for the appellant is very narrow. Sub-section 52 of Section 2 reads as follows:-

(52) "public street" means any street-

(a) heretofore levelled, paved, metalled, channelled, sewerred or repaired out of municipal or other public fund, or

(b) which under the provisions of section 224 is declared to be, or under any other provision of this Act becomes, a public street.

8. There is no restrictions on the power of the Corporation for construction of a new street. It cannot be read as the Corporation has power only to renew or repair the existing roads. The submissions of the learned Counsel for the appellant on the point of Section 22-A of the MRTP Act are not correct and the appeal Court has considered the said section. Section 22-A is in respect of the modification of the substantial nature in the final Development Plan and as per section 22-(b) the word new road is inserted by way of amendment in final development plan. However, this amendment is with effect from 5.4.2011 and the suit is filed in the year 2000. Retrospectively section cannot be attracted. A different name can be used for a "street". It can be road, an avenue, boulevard. However, the nature or purpose does not change. He further pointed out that the learned Counsel for the appellant has wrongly mixed up section 206 along with Section 205 which speaks about the width of the road. However, length of the road decides width of the road. Section 206 is not applicable. The length of the present road is 1.07 square meters and width is 80 feet. He relied on the judgment in the case of Kolhapur Zilla Rajya Abkari Parvana Dharak Samajik Seva Sangh Vs. Kolhapur Municipal Corporation, . He submitted that for the purpose of modification and the steps u/s 37 if at all the user is changed then it is necessary to take steps. However, there is no user in respect of the said impugned land. He further submitted that the Corporation has taken due care before constructing the road. The road is not in the river bed as averred but it is

on the bank of the river. He drew attention to the admissions given by plaintiff nos. 1 & 2 which are dealt with by the appeal court in paragraph-22 of the judgment. He submitted that in the case of Bombay Environmental Action Group Vs. State of Maharashtra reported in 2001 (4) Mh.L.J. 260 the construction of bridges is not considered as a substantial modification u/s 37 of the MRTP Act. While deleting the road on the other side of the bank of the river which was earlier shown in Final Development Plan, Corporation took steps contemplated u/s 37 of the MRTP Act. However, it is not necessary for the Corporation to take steps u/s 37 of the MRTP Act while constructing a new road. He further argued that Corporation took care of calling reports from various authorities that there should not be any breach of environmental rules and regulations. He pointed out that in the year 1956 the first development plan of Pune city came in to existence. Thereafter in 1987 2nd Final Development Plan was prepared. In 2007 thereafter 3rd final development plan was prepared. In that final development plan, existing roads and the reservation along with the proposed development are required to be shown. He drew attention to the Resolution of the General Body of the Corporation in respect of the construction of the suit road. The permission of the Collector, Government was taken as the land of the river was owned by the Government. Necessary permissions of the different authorities were also obtained before constructing road. The Corporation gave sanction on 21.1.2000 to construct the road. The work commenced on 1.2.2000 and 80% of the work was completed on 27.4.2000 and suit was filed on 24.4.2000.

9. On perusal of judgments of both the courts and the evidence adduced by both the parties, a substantial question of law is formulated as under:-

While exercising power to construct new public streets u/s 205 of the BMC Act of 1949, is it mandatory for the Corporation to follow the procedure u/s 37 of the MRTP Act of 1956 or not ?

10. Undisputedly the Corporation has to meet the needs of the people to provide necessary amenities. The suit is based on the age old conflict between the process of Urban Development & Township Vs. Preservation of Environment and Nature. Growing population demands more and more facilities of transportation and therefore, the burden on the local bodies increases on large scale. Population gets crowded in some cities in certain localities and so the pressure on the civic bodies to provide civic amenities rises very high. Transportation and communication are the key issues which are required to be dealt with by the Government and the authorities. Therefore, construction of the new roads is always for the public purpose which is very much real and not illusory need. Section 205 of the BMC Act provides power to the Corporation to make new public streets. The submissions of the learned Counsel that public street is defined in Sub-section 52 of Section 2 and it does not contemplate construction of a new public street but it is only restricted to the repairing, levelling, paving, channeling of the streets which are already in existence and therefore, the Corporation has no power to construct a new road u/s 205, are totally un-

foundable are not acceptable. Sub section 52 of Section 2 of the BMC Act of 1949 defines public street as follows:-

(52) public street means any street-

(a) heretofore levelled, paved, metalled, channelled, sewerage or repaired out of municipal or other public fund, or

(b) which under the provisions of section 224 is declared to be, or under any other provision of this Act becomes, a public street;

11. This definition includes any street which is levelled, paved metalled, channelled, sewerage or repaired out of municipal or other public fund. In Sub-section 52-(b) of Section 2, it is mentioned that the streets under the provisions of 224 also become public streets. Section 224 is a power of the Corporation to declare a private street when sewerage as a public street. So this definition states that if the streets in the private societies are repaired or sewerage out of municipal or other public funds, they are also public streets. The definition of street under Sub-section 52 of Section 2 is not a restrictive definition but it is an inclusive. The roads which are in existence but are repaired, channelled or sewerage out of municipal or public funds so also the roads which are private roads of the societies which are sewerage by public funds are considered as public streets. This definition cannot be stretched to restrict the powers of the Corporation which flow from Section 205. Chapter-XIV of BMC Act is in respect of streets. The chapter is captioned..... the word "construction" is absent in the definition clause of sub-section 52 of Section 2 of the Public Street. Therefore, restrictive interpretation of Sub-section 52 of Section 2 is not in consonance with the scope of the chapter-XIV of the Act. Therefore, taking help of Section 52(2) of the Act while interpreting Section 205 is erroneous. Section 202 to 216 in chapter XIV of the Act are on the aspects of construction, maintenance and improvement of the streets. Section 205 is specifically about the power of the Corporation to make new public streets. These words are to be read as per their literal meaning. Thus by applying a Golden rule of interpretation the section is to be understood. The meaning of the words conveyed in ordinary sense is to be construed. Thus, the Corporation gets the power under sub-section (a) of Section 205 of the BMC Act. This power is an independent one that Corporation enjoys

12. The argument is made that though the Corporation has power to construct new public street, this power cannot be used unless Corporation follows procedure laid down u/s 37 of the MRTP Act. Section 37 of the MRTP Act reads as under:-

37. [Modification] of final Development Plan

(1) Where a modification of any part of or any proposal made in a final Development Plan is of such a nature that it will not change the character of such Development Plan, the Planning Authority may, or when so directed by the State

Government [shall, within ninety days from the date of such direction, publish a notice] in the Official Gazette [and in such other manner as may be determined by it] inviting objections and suggestions from any person with respect to the proposed modification not later than one month from the date of such notice; and shall also serve notice on all persons affected by the proposed modification and after giving a hearing to any such persons, submit the proposed modification (with amendments, if any) to the State Government for sanction.

13. Section 37 is about the modification of the final Development Plan. In the final Development Plan of Pune city, the suit road is admittedly not shown. However, in the last final Development Plan a similar road running across the river but on the other side of the river was shown. When Corporation took decision to cancel the construction of that road and wanted to delete that road from the final Development Plan, admittedly Corporation followed procedure u/s 37 of the Maharashtra Regional Town Planning Act. The submissions made by the learned Counsel for the appellants that if deletion amounts to modification in a final Development Plan then the addition of the similar road on the other side of the river bound to be a modification of the final Development Plan. Though apparently these submissions appear convincing on close scrutiny of the legal position of the relevant sections of the MRTTP Act are found incorrect and fallacious. The learned Counsel for the appellants has relied on the judgment of the Division Bench in the case of *Sadanand Varde and Others Vs. State of Maharashtra and Others*, wherein Division Bench of this court has held that additions and subtractions lead modifications. Section 31 of the MRTTP Act pertains to sanction of the draft Development plan and it states that if there are such modifications then they are to be published in the official Gazette. By way of amendment, section 22-A was substituted in the Act with effect from 5.4.2011. Section 22-A explains what is meant by modification of a "substantial nature". Section 22-A(b) of MRTTP Act reads as follows:-

(b) insertions of a new road or a new reservation or modification of a reserved site or a proposed road widening resulting in inclusion of any additional land not so affected previously.

14. Thus, by section 22A insertion of new road is considered as substantial modification and this being a substantial modification the competent authority is required to follow a procedure u/s 37 of the MRTTP Act. Thus insertion of the road in final Development Plan being substantial modification, the authority has to take proper steps u/s 37 of the Act. However, section 22A has come into force in 2011. Therefore, the provision cannot be applied retrospectively but has prospective application. In the absence of specific meaning of substantial modification, construction of a new road and insertion of the same cannot be said as a substantial modification as per the Act prior to insertion of Section 22-A.

15. MRTTP Act is enacted for the purpose of proper township and so the development plan is prepared to give the exact idea to the citizens and the people in that locality that how the Corporation is going to develop the city and

what are the proposed constructions and reservations in the area. The act aims at the control and systematic growth of the settlement. Thus, the object of publishing final Development Plan is to make the development policy transparent, known to the public so the persons who have any suggestion or objection can come forward. The purpose of the plan is mainly that the persons who are going to affect due to the development and township should get the notice of such development. If there are certain reservations to provide clean and beautiful settlement to the people then it should be known to the people. Thus for the new settlement, appropriate authority has to acquire the land of the people so the authority has to follow the procedure laid down under the MRTP Act and so also State has to adopt a procedure laid down under the Land Acquisition Act. Acquisition of the land for the public purpose is a necessary evil, hence allowed under the Act. If for the purpose of construction of road, or road widening if such acquisition is required then u/s 37 it is necessary for the planning authority to invite the objections and suggestions from any persons in respect of proposed modification and shall also serve notice on all the persons affected by the proposed modification and after giving hearing to such persons, the planning authority to submit proposed modification to the State Government for sanction. Thus section 37 states two things that the planning authority within 90 days from the date of direction given by the State Government, shall invite objections and suggestions from the person with respect of the proposed modification; within one month from the date of the notice; Secondly it shall also serve the notice on all persons affected by the proposed modification and planning authority to give hearing to such persons and submit proposed modification to the State Government. Thus calling suggestions from any person is one aspect and it is mandatory on the planning authority to give notice to the affected persons. The word "affected persons" contemplates that the persons who are directly affected due to the acquisition, reservation, construction or widening etc. In the present case the suit road is constructed on the bank of the river. The suit road is not in the river bed because suit road is on the bank of the river. No land is required to be acquired from any person. Thus there is no affected person contemplated u/s 37 of the Act and therefore, no notice was required. The submissions of the learned Counsel for the appellants that the people at large are directly affected as the river is not protected and ecological balance of the city is spoiled and so the notice was required do not hold any substance. Assuming that every citizen in the city of Pune has interest in the river and river bank being a public place, considering the object and spirit of Section 37 of the MRTP Act, they cannot be treated as an affected persons to whom to give notice is a mandate under the Act. The word "affected" in the section contemplates a special, personal or specific damage or loss hence it is not necessary for the planning authority to give a notice or even to give a public notice u/s 37. The Planning Authority may invite suggestions in respect of the proposed development. It appears from the submissions of the learned Counsel for the Corporation that the construction of the proposed parallel road which was shown in the development Plan much earlier but it could not be materialized as

the proposed road was running through the city and in the process of acquisition of the land many citizens were going to be affected so it could not be materialized. Therefore, the planning authority decided to construct the road on the bank of the river on the other side of the river but authority shifted it and constructed on the opposite side of the river which did not require acquisition of any land and so the construction of the road was completed within a short span of 2 to 3 months.

16. Needless to say that the cause of the appellants to preserve the natural resources in the city and improve quality of township by maintaining ecological balance is laudable. It is true that peoples' participation in the township is necessary. However, the objection raised by the appellant cannot sustain legally. The Bombay Provincial Municipal Corporation Act 1949 has provided a particular procedure u/s 205 of the Act which is to be followed by the planning authority when new road is constructed and record shows that the necessary permission from the competent authority or Government were obtained by the Corporation. I am informed that road is already put in the use for vehicular traffic. The learned Counsel for the appellants pointed out that as per the condition imposed by the State Government the road is required to be used only for the two wheelers but the four-wheelers are allowed on the street. However, it is not the issue before the Court as it is entirely within the authority of traffic department so also it is a matter of self discipline and awareness of the public at large towards the preservation of natural sources and maintenance of the ecological balance in their city.

Hence, appeal is dismissed.

17. In view of dismissal of the appeal, Civil Application also disposed of. Learned Counsel for the appellant prays for stay of the order for eight weeks. In view of the finding given and as a road is already put in use since last about 10 years, no stay is granted. However, in respect of the portion of the impugned road which has remained to be constructed, Corporation to maintain status-quo for a period of eight weeks.