

(2002) 09 BOM CK 0063

In the Bombay High Court

Case No : Writ Petition No. 3046 of 2002

Prabhudas Narayan Gedam and Others

APPELLANT

Vs

Municipal Council

RESPONDENT

Date of Decision : 05-09-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Constitution of India, 1950 — Article 226, 227, 32

Citation : (2003) 1 ALLMR 624 : (2003) 2 BomCR 301 : (2003) 1 MhLj 275

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

Bench : Single Bench

Advocate : B.R. Gavai, Government Pleader as Amicus Curiae, M.P. Khajanchi, for the Appellant; A. Shelat, for the Respondent

Final Decision : Dismissed

Judgement

S.A. Bobde, J.—Rule is made returnable forthwith. Heard by consent of parties.

2. This petition is directed against the order dated 8-8-2002 by which the learned Additional District Judge, Chandrapur, declined to grant interim injunction to the petitioners restraining the respondent/Municipal Council from acting on the notice for eviction served upon them u/s 179(5) of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965.

3. The petitioners approached the Civil Court. The learned Civil Judge, Jr. Dn., Bhadrawati, found that the petitioners to be trespasser and having no right to occupy the land. On the application of well settled principles of grant or refusal of injunction, the learned Civil Judge refused injunction to the petitioners. The petitioners were found to have made random encroachment on the side of the road causing inconvenience and hardship to the public. The petitioners then carried an appeal to the Court of District Judge, Chandrapur. In the appeal they preferred an application for interim injunction which has been rejected by the learned Additional District Judge. By the impugned order, the learned Additional District Judge found that the encroachment made by the petitioners was

removed in the drive in the year 1999 by the Municipal Council. Thereafter the petitioners had again encroached on that land and started doing business by erecting temporary structures on that place. The learned Additional District Judge also rejected the petitioners' contention that merely because they are paying the market tax of Rs. 2/- they do not have any right to the land. The learned Additional District Judge has, therefore, concurred with the finding of the Civil Judge, Jr. Dn., and refused the interim injunction sought for. The Appeal is, however, pending.

4. Mr. Khajanchi, learned counsel, for the petitioners submitted that while refusing interim injunction to the petitioners, the learned Additional District Judge has given a finding on all the points which really ought to have been given at the time of final decision of the Appeal against the refusal of injunction. Mr. Shelat, learned counsel, for the respondent/Municipal Council rightly submits that it was the petitioners who invited these findings while seeking injunction. The learned Additional District Judge was, therefore, bound to consider the grant or refusal of injunction sought by the petitioners on the known principle for dealing with such application for injunction.

5. Having considered the question, it appears Mr. Shelat is right in supporting the order of the learned Additional District Judge. The learned Additional District Judge had to consider the grant or refusal of injunction on the basis of well settled principle. That necessarily involved consideration of the existence of a prima facie right in plaintiffs' favour, the balance of convenience between the parties and the irreparable injury that may be caused to the plaintiffs if the injunction is withheld. The impugned order is slightly more elaborate than was strictly necessary. I do not see any illegality on that count.

6. Moreover, the learned counsel for the respondent has raised the question of propriety of the petitioner's invoking extra ordinary jurisdiction of this Court under Article 227 of the Constitution of India in such matter. Since after the curtailment of the jurisdiction of this Court u/s 115 of the Civil Procedure Code, 1908 by a recent amendment brought into force on 1-7-2002, the number of petitions under Article 227 of the Constitution of India against the decisions of the Civil Court has appreciably increased, I thought it proper to hear the matter on this point at some length. This Court, therefore, requested Mr. B.R. Gavai, learned Government Pleader, to act as amicus curiae. The learned amicus has also addressed this Court, on the scope of the jurisdiction of this Court under Article 227 of the Constitution of India, as understood and applied by the Supreme Court, since the time such question started being raised.

7. Having heard the learned counsel for the parties, the position that emerges seems to be as follows :

The one principle that has been applied throughout by the Courts and in particular the Supreme Court while interpreting Article 227 of the Constitution has been that the power conferred by that Article is conferred on the High Courts

to keep the subordinate Courts within the bounds of their authority and not for correcting mere errors. (See Waryam Singh and Another Vs. Amarnath and Another,). Soon thereafter the Constitution Bench of the Supreme Court in the case of Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, made the following observations in regard to the issuance of writ of certiorari under Articles 226 and 227 of the Constitution of India. Their Lordships observed :

(1) "Certiorari" will be issued for correcting errors of jurisdiction, as and when an inferior Court or Tribunal acts without jurisdiction or in excess of it, or fails to exercise it.

(2) "Certiorari" will also be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice.

(3) The Court issuing a writ of "certiorari" acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the Court will not review findings of fact reached by the inferior Court or Tribunal, even if they be erroneous. This is on the principle that a Court which has jurisdiction over a subject-matter has jurisdiction to decide wrong as well as right, and when the Legislature does not choose to confer a right of appeal against that decision, it would be defeating its purpose and policy, if a superior Court were to re-hear the case on the evidence, and substitute its own findings in "certiorari". These propositions are well settled and are not in dispute."

In particular, the Supreme Court approved the following observations of Lord Cairns in 1878 4 AC 30 --

"If there was upon the face of the order of the court of quarter sessions anything which showed that that order was erroneous, the Court of Queen's Bench might be asked to have the order brought into it, and to look at the order, and view it upon the face of it, and if the court found error upon the face of it, to put an end to its existence by quashing it."

and the following observations of Lord Summer in 1922 2 AC 128:

"That supervision goes to two points; one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise". The Supreme Court, also relied upon the following observations of Denning, L.J. "It will have been seen that throughout all the cases there is one governing rule: "certiorari" is only available to quash a decision for error of law, "if the error appears on the face of the record"."

and its own earlier observations in T.C. Basappa Vs. T. Nagappa and Another, as follows :

"An error in the decision or determination itself may also be amenable to a writ of "certiorari" but it must be a "manifest error apparent on the face of the proceedings", e.g., when it is based on clear ignorance or disregard of the

provisions of law. In other words, it is a patent error which can be corrected by "certiorari" but not a mere wrong decision."

On the question as to what could be said to be an error apparent on the face of the record, Their Lordships cited with approval the observations of Chief Justice Chagla in -- *Batuk K. Vyas Vs. Surat Borough Municipality and Others*, that no error could be said to be apparent on the face of the record if it was not self evident and if it required an examination or argument to establish it. Their Lordships further observed as follows :

"This test might afford a satisfactory basis for decision in the majority of cases. But there must be cases in which even this test might break down, because judicial opinions also differ, and an error that might be considered by one Judge as self-evidence might not be so considered by another. The fact is that what is an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case."

Right from that point onwards, it has been well established that power under Article 227 can be exercised to correct an error of law of the nature referred to above, but that it is essential that it should be something more than mere an error and something that must be manifest on the face of the record.

8. Apart from the above, it has been held that the power would be exercised in the following cases:

(i) Where there is an illegal refusal to exercise jurisdiction (See *Dahya Lal and Others Vs. Rasul Mohammed Abdul Rahim*,); (ii) Where the findings are so perverse that there is an error apparent on the face of the record (See *The Provincial Transport Service Vs. State Industrial Court*,);

(iii) When the order is violative of the fundamental basic principles and fair play or where a patent and flagrant error in procedure or law has crept in or where the order passed results in manifest injustice (See *Trimbak Gangadhar Telang and Another Vs. Ramchandra Ganesh Bhide and Others*,);

(iv) When the finding is based on pure assumption and conjectures and on no evidence (see *K.R. Chinna Krishna Chettiar Vs. Shri Ambal and Co., Madras and Another*,

(v) When there is an error of jurisdiction or flagrant violation of law laid down by the Supreme Court, the High Court can set aside the order passed by the Tribunal to do justice between the parties (See *Vadivelu Vs. Sundaram and Others*,);

One may add with respect, that the power under Article 227 would be exercised if there was a violation of the law laid down by the High Court also. In *Chandavarkar Sita Ratna Rao Vs. Ashalata S. Guram*, the Supreme Court while disapproving the appreciation of evidence by the High Court observed as follows :

"In our opinion therefore, in the facts and circumstances of this case on the question that the High Court has sought to interfere, it is manifest that the High Court has gone into questions which depended upon appreciation of evidence and indeed the very fact that the learned trial Judge came to one conclusion and the Appellate Bench came to another conclusion is indication of the position that two views were possible in this case. In preferring one view to another of factual appreciation of evidence the High Court transgressed its limits of jurisdiction under Article 227 of the Constitution. On the first point, therefore, the High Court was in error."

(vi) If the findings reached by the subordinate courts are patently erroneous and de hors the factual and legal position on record, such findings cannot be countenanced and High Court would be failing in its Jurisdiction if it did not set aside such patently illegal findings. (See M/s. Savita Chemicals (Pvt.) Ltd. Vs. Dyes and Chemical Workers Union and Another,).

9. Considering the position that emerges, negatively, it has been held that it would not be proper to exercise the power under Article 227 in the following circumstances -

(a) Where the attempt is to convert the jurisdiction conferred by this Article into an appellate jurisdiction (see Nirban Chandra Bag v. Mahendranath Ghugu AIR 1963 SC 7595

(b) Where there is no question or assumption of excessive jurisdiction or refusal to exercise jurisdiction or any irregularity or illegality in the procedure or any breach of any Rule of natural justice, but if anything, it may merely be an erroneous decision which error is not apparent on the face of the record. (See Satyanarayan Laxminarayan Hegde and Others Vs. Millikarjun Bhavanappa Tirumale,);

(c) Where the High Court is called upon to correct an error of fact or law as an appellate Court or Tribunal, it will not review or reweigh the evidence upon which the determination of the inferior Court or Tribunal purports to be vested or to correct errors of law in the decisions. (See (i) Mohd. Yunus Vs. Mohd. Mustaqim and Others, and (ii) Mohan Amba Prasad Agnihotri and Others Vs. Bhaskar Balwant Aher (D) Through I.Rs., :

(d) The High Court, while exercising jurisdiction under Article 227 would confine itself to the scrutiny of records and proceedings of the lower Tribunal and not rely on fresh material. The power under Article 227 cannot be used to upset conclusions of facts, however erroneous those may be, unless such conclusions are so perverse or so unreasonable that no Court could have ever reach them. (See Mrs. Rena Drego Vs. Lalchand Soni, Etc.,).

(e) Merely a wrong decision may not be a ground for the exercise of jurisdiction under Article 227 unless the wrong is referable to grave dereliction of duties and flagrant abuse of power by the subordinate courts or Tribunals resulting in grave

injustice to any party (See *M/s. Estralla Rubber Vs. Dass Estate (Pvt.) Ltd.*, and *(Ouseph Mathai and Others Vs. M. Abdul Khadir,)*. In the last mentioned case, i.e. Ouseph Mathai's case, their Lordships have taken note of the importance of restricting exercise of power under Article 227 and in paragraph 7 have made the following observations :

"Extraordinary powers appear to have been exercised in a routine manner as if the power under Article 227 of the Constitution was the extension of powers conferred upon a litigant under a specific statute. Such an approach and interpretation is unwarranted. By adopting such an approach some High Courts have assumed jurisdiction even in matters to which the legislature had assigned finality under the specific statutes. Liberal assumption of powers without reference to the facts of the case and the corresponding hardship to be suffered by a litigant has unnecessarily burdened the courts resulting in accumulation of arrears adversely affecting the attention of the court to the deserving cases pending before it."

While dealing with the scope of the powers of this Court under Article 227, it may be appropriate to consider the effect of the recent amendment to Section 115 of CPC by which the jurisdiction of the High Court to interfere with the orders passed in a case by a subordinate Court has been curtailed. It is settled law that the power of judicial review, as enshrined in Article 32 and Articles 226 and 227 of the Constitution, is a part of the basic structure of the Constitution of India vide. *L. Chandra Kumar Vs. Union of India and others*, . After considering its earlier decisions in *His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala*, and *Minerva Mills Ltd. and Others Vs. Union of India (UOI) and Others*, the Supreme Court concluded as follows :

"We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded. We also hold that the power vested in the High Courts to exercise judicial superintendence over the decisions of all courts and tribunals within their respective jurisdictions is also part of the basic structure of the Constitution. This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation, is equally to be avoided."

Therefore, any amendment to the CPC would leave the judicial power under Article 227 unaffected. However, the power under Article 227 must necessarily be understood in the light of the judgments cited above which state clearly that this extra ordinary jurisdiction be exercised only in appropriate cases. The power conferred upon the High Courts u/s 115 of CPC are of judicial character and now has been curtailed by the legislation. This curtailment, however, would have no effect upon the powers conferred on the High Court by Article 227, even if they

appear to overlap with the powers u/s 115 of Civil Procedure Code, because such powers as falling expressly within Article 227 cannot be fettered even by a constitutional amendment. Where two views are possible the High Court would be transgressing its limit in preferring one view to another on factual appreciation of evidence.

10. The High Court is not concerned with the decision of the lower Court or Tribunal but with its decision-making process. The High Court would interfere to see whether the lower Court/Tribunal has jurisdiction to deal with the matter and if so, whether the impugned order is vitiated by procedural irregularity (See *Sugarbai M. Siddiq and Others Vs. Ramesh S. Hankare (D) by Lrs.,*).

11. Having regard to the aforesaid position of law, I am of view that this is certainly not a case for exercise of the jurisdiction of this Court under Article 227 of the Constitution of India and the Writ Petition is, therefore, liable to be dismissed and is accordingly dismissed. No order as to costs.

This Court expresses its gratitude to Mr. B.R. Gavai, the learned counsel, for acting as *amicus curiae* and for the able assistance rendered to the Court.