

(2017) 06 BOM CK 0116
In the Bombay High Court
Case No : 41 OF 2017

Prashant Dattatraya Wazalwar

APPELLANT

Vs

Smt. Sudha Baburao Lokhande & Anr.

RESPONDENT

Date of Decision : 16-06-2017

Acts Referred:

Code of Civil Procedure, 1908, Section 9A -
Maharashtra Regional and Town Planning Act, 1966, Section 149, Section 53(1), Section 5

Citation : (2017) 06 BOM CK 0116

Hon'ble Judges : S.B.Shukre

Bench : SINGLE BENCH

Advocate : S.S.Sharma, S.D.Khati, A.M.Quazi

Judgement

1.] Rule. Rule made returnable forthwith.
Heard finally by consent of the learned counsel appearing for the parties.

2.] By this revision application, the order dated 16.08.2016 passed below Exhs.8, 11 and 28 by 6th Joint Civil Judge, Junior Division, Nagpur, has been challenged. By this order, the applications vide Exhs. 8, 11 and 28, all of which took an exception to the jurisdiction of the Civil Court to try the suit in present form were rejected. The revision applicant is the original defendant No.3 and his application raising a plea of bar of jurisdiction under Section 9A of C.P.C vide Exh.28 has been rejected.

3.] On perusal of the impugned order as well as the pleadings of the parties, I find that the foundation of the suit is the notice issued under Section 53 (1) of the Maharashtra Regional and Town Planning Act (in short M.R.T.P. Act) by

the respondent Nos. 2 and 3. It is the contention of the original plaintiff i.e. respondent No.1 that this notice is illegal because it has been issued by the Municipal Corporation Officials in collusion with the revision applicant, who is the neighbour of respondent No.1. The respondent No.1 has contended that this applicant had encroached upon some portion of the open space belonging to respondent No.1 and the officials of the Municipal Corporation i.e. respondent No.2 are helping the revision applicant in his design to grab the property of respondent No.1 in an illegal manner. According to the respondent No.1, the construction so far made by her is as per the sanctioned plan and there has been no violation whatsoever committed by her.

4.] The learned Civil Judge, however, has found that whenever it is seen that the notice issued under Section

5. 3(1) of M.R.T.P Act prescribes period which is lesser than the period stipulated in this section which is of not less than 30 days, the notice is void ab initio and therefore, civil suit is maintainable. The learned Civil Judge has relied upon the judgment of this Court rendered in the case of Kishor Ramalu Telang vrs. Municipal Commissioner, Nagpur Municipal Corporation, reported in 2015 (4) Mh.L.J. 836 in this regard.

5.] There can be no two opinions about the principle laid down in the above referred case of Kishor Telang. Whenever notice under Section 53(1) of M.R.T.P. Act prescribing lesser period is issued and the jurisdiction of the Civil Court is challenged on the ground that the notice prescribes lesser period, the Civil Court would have the jurisdiction to entertain and try the suit. But the facts of the instant case are quite different and in my view these facts have not been appreciated at all by the learned Civil Judge.

6.] A careful perusal of the plaint discloses that the respondent No.1 has nowhere contended that the notice is illegal on the ground that it prescribes lesser period. Such ground is certainly a question of fact and not a mere matter of evidence and therefore, the law would require that such fact is specifically pleaded. When the fact is not pleaded, there would not be any question of leading evidence to prove a fact not pleaded. The only ground from the pleadings taken in the plaint raised by the respondent No.1 is that the officials of the Municipal Corporation are helping the revision applicant in achieving his evil intention of taking control of the property of respondent No.1 and that is why the notice in

question has been issued illegally by the officials of Municipal Corporation. This ground would not be enough for bringing the civil suit within the purview of the jurisdiction of the Civil Court. Something more was required, it has been discussed just now, but that has not been done in the present case. Therefore, as rightly submitted by the learned counsel for the revision applicant as well as the learned counsel for respondent Nos. 2 and 3, the view taken by the learned Civil Judge would have to be held as contrary to the settled principles of law and I do so. The civil Court would have no jurisdiction in this case in view of bar of jurisdiction in Section 149 of M.R.T.P. Act. The impugned order so far as it holds that Civil Court has jurisdiction, therefore, would have to be quashed and set aside.

7.] There is also a prayer made in the plaint for issuance of permanent injunction. But this prayer flows from the prayer regarding a declaration that notice issued under Section 53(1) of M.R.T.P. Act is illegal. If the Civil Suit has been seen as barred by law in view of Section 149 of M.R.T.P Act, in so far as such a declaration is concerned, whatever relief that flows from such a declaration would also have to be held as non maintainable before a Civil Court , as a necessary corollary thereof.

8.] In this view of the matter, I am of the view that this application deserves to be allowed by quashing and setting aside the impugned order.

9.] The impugned order is hereby quashed and set aside. The application, Exh.28, is allowed. It is held that Civil Court would have no jurisdiction to entertain and try the suit as filed by respondent No.1. However, liberty is given to the respondent No.1/original plaintiff to approach the Municipal Corporation i.e. respondent Nos. 2 and 3 by making appropriate representations/ applications/appeals for redressal of her grievance in respect of the notice issued under Section 53(1) of the M.R.T.P Act as well as the construction made by her and in case, such representations/ applications/appeals are filed, the same shall be disposed of by the competent authority of the Corporation in accordance with law as expeditiously as possible.