
(2008) 07 BOM CK 0002

In the Bombay High Court

Case No : Writ Petition No. 3748 of 2008

Rajesh Bahvantrao Deshmukh and Others

APPELLANT

Vs

Solapur Municipal Corpn. and Another

RESPONDENT

Date of Decision : 18-07-2008

Acts Referred:

Bombay Provincial Municipal Corporations Act, 1949 — Section 2(5)

Citation : (2008) 5 BomCR 660

Hon'ble Judges : Khanwilkar A.M., J

Bench : Single Bench

Advocate : G.S. Godbole, for the Appellant; Nitin Jamdar, instructed by Vijay Killedar, for the Respondent

Final Decision : Dismissed

Judgement

Khanwilkar A.M., J.—Heard Counsel for the parties.

2. The argument of the petitioners that the interim relief has been wrongly refused by the Appellate Court, even though the Appeal is pending, at the first blush, seems to be attractive. However, in the fact situation of the present case, the order passed by the trial Court which has been upheld by the Appellate Court for the limited purpose of considering interim relief during the pendency of appeal, does not warrant any interference in exercise of writ jurisdiction. This is so because, the petitioners were conscious of the fact that even for putting up a fencing, it was necessary to seek prior approval of the Corporation. The petitioners did apply to the Corporation in that behalf, which request was rejected. The petitioners, however, without formal approval from the Corporation, unilaterally proceeded to erect fencing around the building on the assumption that the portion where the fencing has been put up is within the boundary of the land owned and possessed by the petitioners. The fact as to whether the fencing has been put up within the boundary is not a relevant fact for our consideration. The moot question is: whether the petitioners could have erected such fencing without taking prior permission of the Corporation? The answer is an emphatic

"NO". For, even fencing is covered by the expression "building" as defined by the Bombay Provincial Municipal Corporations Act, 1949. The expression "building" in the Act of 1949 reads thus:

2(5) "building" includes a house, out-house, stable, shed, hut and other enclosure or structure whether of masonry, bricks, wood, mud, metal or any other material whatever whether used as a human dwelling or otherwise, and also includes verandahs, fixed platforms, plinths, doorsteps, walls including compound walls and fencing and the like.

3. Counsel for the petitioners, however, was at pains to argue that only if the fencing results in enclosure of the property, it would constitute building within the meaning of definition "building" reproduced hereinabove. This submission is complete misreading of the said provision. Indeed, in the first part of the provision, the expression hut and other enclosure or structure whether of masonry, bricks, wood, mud, metal or any other material whatever whether used as a human dwelling or otherwise has been mentioned. However, the latter part of the definition of "building" is an inclusive definition. It postulates that it would also include verandahs, fixed platforms, plinths, doorsteps, walls including compound walls and fencing and the like. It is an expansive definition which not only includes but expressly refers to fencing and the like, which is the structure put up by the petitioners without taking prior permission of the Corporation.

4. The trial Court has relied on the decision of our High Court in the case of Pune Municipal Corporation, Pune Vs. Nanasaheb Nagoji Bhosale, , in particular, exposition in paragraph 3 of the said decision to buttress the view taken by it for rejecting the prayer for interim relief.

5. Counsel for the petitioners, however, would rely on observations in Paragraph 2 of the said decision to distinguish the Judgment on the specious reasoning that in that case, the structure erected by the respondent was of fencing or a compound wall partition measuring 5" x 5" in height which consisted of wooden pillars and tin-sheets around the open space admeasuring 60" x 60" in the said property. However, to my mind, the nature of structure cannot be the basis to answer the issue in the context of the definition of expression "building" appearing in the Act of 1949. The definition as aforesaid is an expansive definition so as to include even structure like fencing and the like, whether it is enclosure or otherwise. In other words, even an act of erecting barbed wire fencing around the boundary line would constitute building within the meaning of Section 2(5) of the Act of 1949 for the purpose of the said Act, and that structure can be erected only after taking prior permission of the Corporation. No more and no less.

6. There is yet another facet in this case, for which, no interim order can be passed in favour of the petitioners: The respondent Corporation has issued impugned notice calling upon the petitioners to remove the disputed structure (fencing) also on the ground that the same comes within the public road area.

The plan produced by the Counsel for the respondents clearly indicates that the stated fencing has been put up in area which would obstruct the road (area in road widening).

7. The argument of the petitioners that even if it comes within the road area, the same cannot be usurped by the Corporation without following due process of law, cannot be the basis to grant injunction to the petitioners to permit them to perpetrate the illegality of having erected fencing - which is a building within the meaning of Act of 1949 -without seeking prior permission of the Corporation. In the first place, the petitioners will have to remove the said fencing and agitate all other issues before appropriate forum as and when occasion arises.

8. Suffice it to observe that no indulgence is warranted in this writ petition. Although the Appellate Court has not adverted to the latter aspect of fencing obstructing the road area, the conclusion reached by the Appellate Court will have to be upheld in larger public interest.

9. Hence, writ petition is dismissed.

At this stage, Counsel for the petitioners seeks six weeks time to enable the petitioners to carry the matter in appeal. I see no propriety in acceding to this request when the petitioners have admittedly erected fencing without prior permission; and more so because the same is obstructing road area. Hence, this request is rejected. Additionally, it will not be out of place to record that the fencing is nothing but some wooden logs erected around the boundary and barbed by wire fencing. If that structure is to be removed and even if the petitioners succeed in appeal, it can be re-erected, without causing much hardship to the petitioners. Even for this reason, prayer for continuation of stay is rejected.