

(2015) 04 BOM CK 0337

In the Bombay High Court

Case No : Writ Petition No. 3004 of 2014

Satish Gayacharan Trivedi

APPELLANT

Vs

Gopal Ramnarayan Mundhada and Others

RESPONDENT

Date of Decision : 18-04-2015

Acts Referred:

Maharashtra Regional and Town Planning Act, 1966 — Section 149, 45, 45(5), 47, 51

Citation : (2015) 04 BOM CK 0337

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

Bench : Single Bench

Advocate : N.R. Bhishikar, for the Appellant; M.P. Khajanchi, Advocates for the Respondent

Judgement

A.S. Chandurkar, J—Rule. Heard finally with the consent of the learned Counsel for the parties. This writ petition at the instance of the original plaintiff takes exception to the order dated 2-4-2014 thereby deciding the preliminary issue as regards jurisdiction of the Civil Court to consider the reliefs sought in the plaint. The relevant facts are that according to the petitioner - plaintiff, there is a temple near his house in which various religious activities are regularly conducted. The respondent Nos. 1 to 3 - defendant Nos. 1 to 3 are having their residential house near said temple. In the month of May 2013, the petitioner noticed certain construction activities going on near the residential house of the respondent Nos. 1 to 3. The petitioner learnt that a Hospital was being constructed at said place. According to the petitioner, the sanction for aforesaid construction that was granted by the respondent No. 4 - Municipal Corporation was contrary to the building Bye-laws. According to the plaintiff, said construction activity was likely to result in various difficulties to the persons residing in the vicinity of the same. The petitioner, therefore, filed suit for declaration that the construction undertaken by the defendants was illegal and the same violated the civil rights of the plaintiff. The prayer for permanent prohibitory injunction was also sought seeking to restrain the respondent Nos. 1 to 3 from making any construction on the basis of the sanctioned plan. A mandatory injunction was also sought to stop

the aforesaid illegal construction.

2. The respondent Nos. 1 to 3 filed their written statement and opposed the reliefs as sought. An objection was taken to the tenability of the suit on the ground that jurisdiction of the Civil Court was barred in view of provisions of Section 149 of the Maharashtra Regional and Town Planning Act, 1966 (for short the said Act). Similar stand was also taken by the respondent No. 4 contending that the Civil Court had no jurisdiction to go into validity of the sanctioned plan.

3. The plaintiff moved an application for grant of temporary injunction. After the parties were heard on said application, the trial Court framed a preliminary issue as regards jurisdiction of the Civil Court to try and entertain the suit. Thereafter, by order dated 2-4-2014 the trial Court held that it had no jurisdiction to go into question of the permission granted by the Municipal Corporation to the respondent Nos. 1 to 3 for construction of their building. It held that the Civil Court could not consider the question of illegality of the permission granted by the Municipal Corporation to the respondent Nos. 1 to 3 for undertaking the construction. It held that the suit would be tried only on the aspect of construction being carried out in deviation of the sanctioned plan. It is this order that is impugned by the original plaintiff in the present writ petition.

4. Shri N.R. Bhishikar, the learned Counsel appearing for the petitioner submitted that the trial Court erred in declining to entertain the suit in so far as the relief sought for restraining the respondent Nos. 1 to 3 from making any construction on the basis of the sanctioned plan is concerned. According to him, the suit as filed was perfectly tenable and the bar under section 149 of the said Act was not at all attracted. He submitted that no statutory remedy under provisions of section 47 of the said Act was available to the petitioner to challenge the action of the Municipal Corporation in approving the sanctioned plan. He submitted that as the petitioner was not an applicant as contemplated by section 47 of the said Act, he was unable to file any appeal challenging the order granting permission to the respondent Nos. 1 to 3 to undertake construction. As the said Act did not provide for any statutory remedy whatsoever, the civil suit was perfectly tenable. In support of the aforesaid submissions, the learned Counsel placed reliance on the following judgments:

[1] Mrs. Shameem Shah through her constituted attorney Mr. Abdul Rehman Khan Vs. Brihanmumbai Mahanagarpalika, (2008) 4 MhLj 699 .

[2] Gadre Constructions and Others Vs. Sadashiv Keshav Sathe and Others, AIR 2004 Bom 392 : (2004) 4 ALLMR 374 : (2004) 4 BomCR 596 : (2004) 3 MhLj 875 .

[3] The Commissioner, Akola Municipal Corporation, Akola Vs. Bhalchandra, (2013) 5 ABR 105 : (2013) 5 ALLMR 190 : (2013) 5 BomCR 124 : (2013) 4 MhLj 45 .

[4] Raja Bahadur Motilal and Another Vs. State of Maharashtra and Others,

(2002) 4 ALLMR 429 : (2003) 1 BomCR 251 .

He, therefore, prayed that the impugned order be set aside and it be held that the Civil Court had jurisdiction to try the suit as a whole.

5. Shri M.P. Khajanchi, the learned Counsel appearing for the respondent Nos. 1 to 3 opposed aforesaid submissions and supported the impugned order. According to him, the bar under section 149 of the said Act was clearly attracted inasmuch as the plaintiff was seeking the relief of declaration that the sanction granted to the plan by the Municipal Corporation was illegal. He submitted that as aforesaid provision gave finality to the sanctioned plan, it would not be permissible for the Civil Court to entertain a suit in which aforesaid sanctioned plan was being questioned. He, therefore, submitted that the Civil Court had rightly held that there was no jurisdiction to consider the aspect of legality of the permission granted by the Municipal Corporation vide sanctioned plan to the respondent Nos. 1 to 3. In support of the aforesaid submissions, the learned Counsel relied upon the following decisions:

[1] Kalyan Dombivli Municipal Corporation Vs. Shri Prakash Mutha, (2008) 3 ALLMR 269 : (2008) 3 BomCR 720 : (2008) 3 MhLj 686 .

[2] Bales Sardara Paracha Vs. The Municipal Corporation of Greater Bombay and Tikam Chetvani, (2005) 3 ALLMR 218 : (2005) 4 BomCR 577 .

[3] Nagpur Municipal Corporation Vs. Pandurang Sawarkar, (2012) 4 ALLMR 270 : (2012) 6 BomCR 337 : (2012) 3 MhLj 306 .

[4] Sujala Yeshwant Nitsure and Others Vs. The Municipal Corporation of City of Pune and Others, (1996) 2 BomCR 503 .

Shri M.I. Dhattrak, the learned Counsel appearing for the respondent No. 4 relied upon the averments made in the written statement filed on behalf of the respondent No. 4 and thus, supported the impugned order.

6. I have carefully considered aforesaid submissions and I have gone through the material filed on record. The learned Counsel for the parties agree that the relief sought as per prayer clause (b) in the plaint has been held to be not maintainable for consideration by the Court. Prayer (b) of the plaint reads thus:

"b) For decree of permanent prohibitory injunction the defendants No. 1 to 3 may kindly be restrained from making any construction on this site under the garb of alleged sanction plan dtd. 22/3/2013."

The other relief sought on the basis of violation of the civil rights of the plaintiff and the relief of mandatory injunction to stop any illegal construction has been held to be maintainable before the Civil Court.

7. It would first be necessary to consider averments made in the plaint for the purposes of seeking various reliefs. According to the petitioner, the defendant Nos. 1 to 3 had been granted sanction only for construction of a Clinic, but said

defendants were, in fact, constructing a maternity home. It was pleaded that the sanction granted by the Municipal Corporation to the building plan was contrary to the Rules and Regulations as well as building bye-laws. In para 5 of the plaint, the petitioner has pleaded about various technical aspects that have been violated while granting sanction to said building plan. It is thereafter stated that if said Hospital was permitted to be constructed, there will be no sufficient space for parking and nuisance would be caused to the residents of the area. It was stated that the individual civil rights of the petitioner were being violated and hence, aforesaid suit came to be filed.

In the written statement, the respondent Nos. 1 to 3 took the plea that the jurisdiction of the Civil Court was barred in view of section 149 of the said Act and further that the Civil Court could not go into various technicalities of the matter. Similar stand was taken by the respondent No. 4.

8. Before considering the respective submissions, it would be first necessary to refer to the various decisions relied upon by the respective Counsel. In *Shameem Shah (supra)*, the action of demolition of the suit premises without issuing any notice by the authorities was challenged by filing a civil suit. It was held that bar under section 149 of the said Act would have been applicable if any notice would have been issued to the plaintiff therein. It was held that as no notice was ever issued nor was any order passed in that regard, the bar under section 149 of the said Act was not applicable. The civil suit was held to be tenable. In *Gadre Constructions (supra)*, the plaintiffs therein sought declaration that amalgamation of two plots by the defendants was illegal and, therefore, the building permission granted for said amalgamated property should be revoked. It was held that the dispute between the parties was whether the plaintiff had permitted the defendants to apply for amalgamation of two plots or not. Said dispute arose out of the terms and conditions of the contract that was executed by the plaintiff and hence, bar under section 149 of the said Act was held to be not applicable to the facts of the said case. In *Commissioner, Akola Municipal Corporation (supra)*, it was held that despite bar, the Civil Court had jurisdiction on certain limited grounds namely that the act of issuance of a notice was a nullity or that while issuing such notice, the mandatory provisions of the Act in question had not been complied with or that there was an abuse of exercise of power or the act in question had not been done in good faith. It was further held that all material facts that are necessary to invest the Civil Court with jurisdiction must be pleaded in the plaint. In *Raja Bahadur Motilal (supra)*, it was held that against deemed permission being granted under section 45(5) of the said Act, no remedy of appeal had been provided under the said Act. It was, therefore, held that in such situation, there was no question of any order having acquired finality as contemplated by section 149 of the said Act. It was held that for the purposes of the bar of a civil suit, there should be an order passed or direction issued by an authority under the Act which cannot be questioned in any suit or any legal proceedings. In that context, it was held that a suit or legal proceeding for quashing deemed permission under section 45(5) of the said Act was

maintainable. It is on the basis of aforesaid decisions that the petitioner has sought to urge that the civil suit as filed was perfectly tenable and the bar under section 149 of the said Act was not attracted.

9. As regards the decisions relied upon by the learned Counsel for the respondent Nos. 1 to 3, in Kalyan Dombivli Municipal Corporation (supra), it was held that the declaration sought in the civil suit that the draft development plan published in Official Gazette was illegal and ultra vires the said Act. Along with said prayer, relief of perpetual injunction seeking to restrain the Municipal Corporation from taking any action on the basis of said draft development plan was also sought. It was held that there was sufficient mechanism provided by the said Act for the preparation, publication and sanction of the development plan and the objections that the plaintiff therein had raised could be considered by the authorities under the said Act. It was held that provisions of section 149 of the said Act clearly bar jurisdiction of the Civil Court to consider challenge to the draft development plan. In Bales Sardara Paracha (supra), notice issued under section 55(1) of the said Act for removing the structure in question was challenged by filing civil suit. It was held that provisions of section 149 of the said Act clearly excluded the jurisdiction of the Civil Court in so far as the challenge to any notice or order issued under said Act was concerned, It also held that in the absence of any jurisdictional error in the exercise of power by the Municipal Corporation while issuing such notice, it could not be said that the notice was a nullity. In Nagpur Municipal Corporation (supra), the jurisdiction of the Civil Court was held to be barred under section 149 of the said Act for the purposes of challenging the notice issued under section 53 of the said Act. Similarly, in Smt. Sujala Yeshwant Nitsure (supra), the suit claiming declaration that the permission granted by the Municipal Corporation to the plot holders for construction of marriage hall was held to be barred under section 149 of the said Act.

10. From aforesaid, it is, therefore, clear that if any notice or order issued under said Act by any authority is sought to be challenged before the Civil Court, then in view of the finality given to such order passed or notice issued, the jurisdiction of the Civil Court would be ousted. However, if any action sought to be taken under said Act is alleged to be null and void and sought to be taken without even issuing any notice or passing any order, then the jurisdiction of the Civil Court is not ousted and the Civil Court can examine the validity of such action which is alleged to be null and void. Similarly, the plaint must contain all statements of material facts that are necessary to invest such jurisdiction with the Civil Court.

11. The petitioner while invoking the jurisdiction of the Civil Court has pleaded that grant of sanction by the Municipal Corporation was contrary to the Rules, Regulations and Building Bye-laws. It was also pleaded that the construction, if carried out, would result in causing nuisance to the residents. Certain technical violations were also pleaded while attacking the sanctioned plan. There are no averments challenging authority of the Municipal Corporation to grant sanction

for the construction undertaken by the respondent Nos. 1 to 3. The entire foundation of the petitioner's action is that the sanction as granted by the respondent No. 4 is contrary to law.

According to the petitioner, there is no statutory remedy available to him for challenging grant of sanction under section 45 of the said Act. Hence, according to the petitioner, as the remedy of appeal under section 47 of the said Act cannot be invoked by him, the only remedy available was to approach the Civil Court. Under section 149 of the said Act, every order passed or notice issued by any Authority under said Act is final and cannot be questioned in any suit or other legal proceedings. Non-availability of a statutory remedy to challenge an order passed or notice issued under provisions of said Act by itself cannot be held to be the determinative factor for conferring jurisdiction on the Civil Court especially when such jurisdiction has been expressly barred by provisions of section 149 of the said Act. At this stage, provisions of section 51 of the said Act need to be noticed. Said provision empowers the Planning Authority to revoke or modify any permission granted or deemed to be granted under the said Act to develop land. As held by the Division Bench in *Digambar Sakharm tambolkar and Another Vs. Pune Municipal Corporation and Others*, AIR 1987 Bom 297 : (1987) 1 BomCR 43 : (1987) MhLj 419 , the expression "permission granted under this Act or any other law" is wide enough to cover all kinds of permission granted to develop land. A person aggrieved by any permission to develop land can always move the Planning Authority to revoke or modify such permission. Hence, it cannot be said that no remedy whatsoever is available to a person who seeks to revoke or modify such permission. For aforesaid reasons, said submission cannot be accepted.

12. The trial Court while deciding the preliminary issue as regards jurisdiction of the Civil Court has, therefore, rightly found that the Civil Court had no jurisdiction to go into the validity of permission granted by the planning authority as per the sanctioned plan. It has further rightly found that the Civil Court had jurisdiction to the extent of examining whether the construction carried out by the respondent Nos. 1 to 3 was contrary to the sanctioned plan. In view of aforesaid, the impugned order passed by the trial Court does not call for any interference whatsoever. There is no jurisdictional error committed by the trial Court while holding part of the relief sought by the petitioner to be barred under provisions of section 149 of the said Act. Hence, there is no reason to interfere with the impugned order. Rule, therefore, stands discharged. Parties to bear their own costs.