
(1997) 01 RAJ CK 0052

In the Rajasthan High Court

Case No : Civil Revision Petition No. 1503 of 1996

Shiv Shanker Goyal and Others

APPELLANT

Vs

The Municipal Council, Ajmer

RESPONDENT

Date of Decision : 15-01-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1
Rajasthan Municipalities Act, 1959 — Section 170(1)

Citation : AIR 1997 Raj 176

Hon'ble Judges : Shiv Kumar Sharma, J

Bench : Single Bench

Advocate : S.K. Saxena, for the Appellant; Resham Bhargava, for the Respondent

Final Decision : Allowed

Judgement

Shiv Kumar Sharma, J.—"I will not stop cutting down trees.

Though there is life in them.

I will not stop plucking out leaves. Though they make nature beautiful. I will not stop hacking off branches. Though they are the arms of a trees. Because--I need a hut."

Quoting the above couplet of a Telugu poet, the Hon"ble Supreme Court in Usman Gani J. Khatri of Bombay and Others Vs. Cantonment Board and others, observed that the slogan of the builders and land owners of utilising the maximum area for construction of high rise buildings for fulfilling the need of houses in big urban cities should always be subservient to the building restrictions and regulations made in the larger interest of the whole inhabitants of PUNE and keeping in view the influx of population, environment hazards, sanitation provision for supply of water, electricity and other amenities.

2. But in the present case though the petitioner have not cut the branches of the trees but they obviously need a "hut" and in order to fulfil their need they raised

construction on the basis of "deemed sanction"" of maps by the Municipal Council whereas the case of Municipal Council is that "the maps should not be deemed to have been sanctioned and construction raised by the petitioner was unauthorised and deserves to be demolished.

3. The factual matrix the case may be summarised thus:

(i) Plaintiff-petitioners (for short the plaintiffs) instituted a civil suit in the trial Court against the defendant non-petitioner (for short defendant). Along with the suit an application under Order 39, Rules 1 and 2 read with Section 151, C.P.C. was also filed stating therein that plaintiffs purchased a property bearing A.M.C. No. 221/15 situated at Beawar Road, Ram Ganj, through four sale deeds. The plaintiffs, decided to re-erect the property and for that purpose they submitted four different plans for sanction to the defendant on May 19, 1992. The plans were returned back on September 23, 1992 by the defendant observing that without sub-division of the property, the plans could not be sanctioned. The plaintiffs thereafter, submitted one new map on November 16, 1992, receipt of which was received on November 18, 1992. A notice was then sent by the plaintiffs on May 17, 1993 informing the defendant that in the event of non-sanctioning of map within fifteen days, the construction work will be started. Again on July 27, 1993 the plaintiffs handed over another similar letter to the defendant, in its "city development camp." Thereafter the plaintiff started raising construction treating the silence of the defendant as "deemed sanction" on being threatened by the defendant to demolish the construction, the suit along with interim application was filed praying that defendant be restrained from demolishing the construction.

(ii) The defendant refuting the allegations and stated that maps were returned to the plaintiff on September 23, 1992 with certain objections which were not complied with by the plaintiffs. No notice bearing date May 17, 1993 was ever received by the defendant. The demand made through letter dated July 27, 1993 by the plaintiffs was an administrative demand which was being scrutinised. Therefore map should not be deemed to have been sanctioned and construction raised by the plaintiffs was unauthorised and plaintiffs were not entitled for interim injunction.

(iii) The trial Court vide order dated September 16, 1993 restrained the defendant from demolishing the construction already raised. Simultaneously the plaintiffs were also restrained from raising further construction which was against the Municipal bye-laws.

(iv) The defendant challenged the said order by preferring appeal, which was allowed by the appellate Court vide order dated October 10, 1996, whereby the order of the trial Court was set aside.

(v) Against the said order of the appellate Court present action for filing the revision has been resorted to.

4. Before adverting to the rival contentions, it is necessary to examine the relevant statutory provisions pertaining to "deemed sanction." Sub-section (1) of Section 170 of the Rajasthan Municipalities Act, 1959 (for short the Act) provides that before beginning within the limits of the

"(a) to erect a new building or new part of a building, or

(b) to re-erect or make a material alteration in a building, or

(c) to erect or re-erect any projecting portion of a building in respect of which the board is empowered by Section 166 to enforce a removal or set back, or

(d) to make or enlarge a well.

the person intending so to erect or re-erect or make or enlarge shall give notice of his intention to the board."

Sub-section (8) of Section 170 of the Act provides-

"Should the board neglect or omit for one month after the receipt of a Valid notice under Sub-section (1) or after the receipt of further particulars demanded under Clause (b) of subsection (7) to make and deliver to the person who has given such notice an order of the nature specified in Sub-section (6) such person may by a written communication call the attention of the board to the omission or neglect and, if such omission or neglect continues for a further period of fifteen days from the date of such communication, the board shall be deemed to have sanctioned the proposed work absolutely and such work may be proceeded within the manner specified in the notice:

Provided that nothing in this sub-section shall be construed to authorise any person to act in contravention of any provision of the Act or of any bye-law thereunder."

5. In exercise of the powers conferred by Sub-section (10) of Section 90 read with ss. 170, 172, 173 and 194 of the Act, the Municipal Council, Ajmer framed the Municipal Council, Ajmer (Building) Bye-laws, 1965. The Local self-Government Department vide order dated April 18, 1965 approved the said bye-laws. Rule 2 of the said bye-laws, is *pari materia* to Sub-section (1) of Section 170 of the Act. In addition to its requirement with regard to sub-planned detailed plan and specification, has been incorporated. Other rules provide the details about elevation, material alteration, materials and thickness of walls, Taikhanas, wells, privies, ventilation, drains, receptacle, cess-pools, sandas, openings to street, living rooms, open spaces, frontage, height front of buildings and means of egress.

6. Mr. S. K. Saxena, learned counsel for the plaintiffs, urged that the appellate Court decided the appeal in the manner as if the suit has been finally decided. The matter in hand involves several issues of substantial character which can only be decided in the suit after providing opportunity to the parties for leading evidence. Mr. Saxena, the learned counsel has drawn the attention of the Court

towards Resolution No. 189 of the defendant-Municipal Council whereby the defendant in its general body meeting dated Feb. 2, 1994 resolved to sanction the construction of the plaintiff on the condition of withdrawal of civil suit by them. I have also been taken through the letter dated March 8, 1994, issued to the plaintiffs in pursuance to the aforesaid resolution. Reliance has been placed on *Latika Co-operative Housing Society Ltd. and Others Vs. Commissioner, Corporation of Calcutta and Others*,

7. On the other hand, Mr. Resham Bhargava, learned counsel for the defendant, contended that shortcomings pointed out by the defendant were not rectified by the plaintiffs but at new map was submitted. Mere submission of new plan does not create right of "deemed sanction." Certified copies of application under Order 39, Rule 2-A, C.P.C. filed by the defendant in the trial Court as well as reply to the said application by the plaintiffs have been placed before me showing that construction raised by the plaintiffs was not made in pursuance to the bye-laws. The construction was unauthorised and map should not be deemed to have been sanctioned. Reliance has been placed on *Usman Gani J. Khatri of Bombay and Others Vs. Cantonment Board and others*, and *State of W.B. Vs. Terra Firma Investment and Trading Pvt. Ltd.*,

8. Cases of *Usman Gani (supra)* and *State of West Bengal (supra)* relate to construction to highrise buildings. In *Usman Gani's* case in or about the late 1970's and early 1980's, a large number of builders had started building activities. The Cantonment Board intimated to the builders to be submit the building applications in accordance with the new scheme of building restrictions and the same would be considered and disposed of on merit. The Board forwarded a copy of the plan to the builders for procuring cement only and in clear terms stating that it should not be deemed to have been sanctioned u/s 179 of the Cantonments Act, 1924.

9. In *State of West Bengal's* case (AIR 1995 SCW 1694); (supra) the Hon"ble Apex Court observed thus : "We fail to appreciate as to how the provisions of the Amending Ordinance/ Act can be held to be violative of Article 14 of the Constitution merely on the ground that it imposes a ban on issuing plans of buildings exceeding 13.5 metres in height for a period of one year. Admittedly, that period of one year was over when the writ petition was heard by the learned single Judge. Thereafter the respondent and others were entitled to submit fresh plans for construction of multistoried buildings according to the new Building Rules. The new Building Rules had been framed by an Expert Committee and after consideration of different objections from different sections. How can the respondent claim an absolute or vested right to get his plan passed by writ of a Court, merely on the ground that such plan had been submitted by him prior to 18-12-1989? By mere submission of, a plan for construction of a building which has not been passed by the competent authority, no right accrues."

10. In *Latika Co-operative Housing Society Ltd. and Others Vs. Commissioner, Corporation of Calcutta and Others*, learned single Judge of the Calcutta High

Court observed that for obtaining the benefit of a "deemed sanction" the application must be a valid application containing the site plan and other relevant particulars required under the bye-laws.

11. In the case in hand following disputed questions of fact are involved.-

(a) Whether valid notice under Sub-section (1) of Section 170 of the Act was served by the plaintiff?

(b) Whether objection raised by the defendant on September 23, 1992 come under Clause (b) of Sub-section (7) of Section 170 of the Act, and what is the effect of such objections?

(c) Whether notice dated May 17, 1993 said to have been issued by the plaintiff was received by the defendant?

(d) Whether new site plan submitted by the plaintiffs should not be deemed to have been sanctioned?

(e) Whether construction raised by the plaintiffs was unauthorised?

(f) What is the effect of Resolution No. 189 resolved by the defendant in its general body meeting dated Feb. 2, 1994 whereby the construction was promised to be sanctioned conditionally.

12. The appellate Court has finally decided the serious questions raised in the pleadings by the parties, at the stage of deciding interim application. The trial Court in its order adjudicated the ingredients of prima facie case, balance of convenience and irreparable loss whereas the appellate Court had not dealt with the reasoning that prevailed with the trial Court, in a judicial manner.

13. A prima facie case implies the probability of the plaintiff obtaining a relief on the materials placed before the Court. Every piece of evidence produced by either party has to be taken into consideration in deciding the existence of a prima facie case to justify issuance of a temporary injunction. The learned appellate Court has based its order on the objection of the defendant about "subdivision of the property" whereas in view of *Latika Co-operative Housing Society Ltd. and Others Vs. Commissioner, Corporation of Calcutta and Others*, no such sub-division was necessary. In that case the learned single Judge Hon'ble G. N. Ray (as he then was) observed.-

" It is not necessary that only the owner of land is to make an application for sanction of a building plan under the said Act..... the Corporation of Calcutta is not entitled to refuse to grant permission simply on the ground that the person seeking for sanction is not the owner of land in question."

The trial Court only gave finding about the prima facie case of the plaintiffs whereas the appellate Court had finally observed that no legal right accrued to them.

14. In *Peer Gulam Naseer v. Peer Gulam Jelanee* (1988) 2 R LR 871 this Court

laid down that serious questions raised in the class can be finally decided only after parties have led the evidence. The Court should not have (decided the controversy raised in the pleadings by the parties, finally at the stage of deciding the application for temporary injunction).

15. Taking in view the entire facts and circumstances, the order of the appellate Court is unsustainable. I respectfully disagree with the contentions raised by Mr. Bhargava learned counsel for the defendants. Usman Gani J. Khatri of Bombay and Others Vs. Cantonment Board and others, and the State of West Bengal's case (AIR 1995 SCW 1694) (supra) is not applicable in the present case. Disputed questions of fact can be adjudicated in the suit after leading the evidence by the parties, I am, therefore, of the considered opinion that the appellate Court had committed jurisdictional error in allowing the appeal of the defendant and if the impugned order of the appellate Court is allowed to stand it would occasion failure of justice.

16. In the premises aforesaid, the revision is allowed. The order dated October 10, 1996, passed by the learned Additional Civil Judge (Senior Division) No. 2, Ajmer is set aside and order of the learned Munsif, Ajmer dated September 16, 1993 is confirmed. Costs easy.