

(2017) 01 BOM CK 0131
In the Bombay High Court
Case No : 958 of 2013

Smt. Sushila J. Tiwari & Ors.

APPELLANT

Vs

Assistant Commissioner & Ors.

RESPONDENT

Date of Decision : 04-01-2017

Acts Referred:

Constitution of India, Article 226 -
Power of High Courts to Issue certain writs
Maharashtra Regional and Town Planning Act, 1966, Section 149 - Finality of orders
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Citation : (2017) 01 BOM CK 0131

Hon'ble Judges : G. S. Kulkarni

Bench : SINGLE BENCH

Advocate : Nilesh Acharya, Moin Khan, S.G.Surana, Ameet A. Palkar

Judgement

1. The Appellants Plaintiffs have filed this appeal challenging the order dated 7 March 2012 passed by the learned Judge, City Civil Court at Bombay, on a draft Notice of Motion in L.C.Suit no.1039 of 2012. By the impugned order, the learned Trial Judge has rejected the Notice of Motion, taken out by the appellants seeking a relief of a temporary injunction. The learned Trial Judge further directed that the plaint be returned to be presented before proper forum.

2. The Appellants' suit is for declaratory and injunctory reliefs. The prayers as made in the plaint are as under: "a. That this Hon'ble Court may be pleased to declare that the Application and proposal submitted to SRA (Defendant no.7) by Defendant no.3 (Joseph Santimano) on behalf of Defendant No.2 (Nisarg CHS) for implementing DCR33(10) scheme on "Suit Property" is illegal, null, void and this Honourable Court further be pleased to quash and set aside the said DCR33(10) proposal of Defendant no.2 on "Suit property".

b. That this Honourable Court may be pleased to declare that the impugned Certificate of ANNEXUREII dtd. 13092006 issued in respect of the "Suit Property"

by Defendant No.1 cannot be enforced, implemented on "Suit Property" in any manner and this Honourable Court be further pleased to quash and set aside the said certificate of AnnexureII.

c. That this Honourable Court may be pleased to declare that the First LOI dtd. 9th August 2007 and subsequent Revised LOI dated 9th March,2011 and subsequent development permissions issued on "Suit Property" by SRA are illegal, null and void and this Honourable Court be further pleased to quash and set aside the said First LOI dated 9th August,2007 and subsequent Revised LOI dated 9th March,2011, issued in respect of the "Suit property" by SRA.

d. That the Honourable Court be pleased to grant an order of permanent injunction against Defendant Nos.1, 2, 3, 4, 5 and 7 from implementing, enforcing the revised LOI dtd.09.03.2011 and Certificate of AnnexureII on "suit property" in any manner.

e. Pending the hearing and final disposal of this Suit, this Hon"ble Court may be pleased to pass an order of temporary injunction staying the effect, operation and implementation of the Certificate of ANNEXUREII and Revised LOI dated 9th March,2011 in respect of the "Suit Property" in any manner.

f. Pending the hearing and final disposal of this Suit, this Hon"ble Court may be pleased to pass an order of temporary injunction restraining the Defendant Nos.1, 2, 3, 4, 5 and 7 from entering into the "suit property" and/or acting upon or implementing the Certificate of ANNEXUREII and/or Revised LOI dated 9th March,2011 in any manner on the "Suit Property".

g. Interim and adinterim reliefs in terms of prayer clauses (c) and (f) above may be granted in favour of the Plaintiffs;

h. Cost of the suit be provided for;

i. Any other relief as this Hon"ble Court deems fit and proper may be granted in the facts and circumstances of the case;"

3. As seen from the averments in the plaint the dispute pertains to a "slum rehabilitation scheme" alleged to be undertaken on land C.S.No.89(pt), Matunga Division, F/North Ward, G.T.B.Nagar, Sion Koliwada, Mumbai, admeasuring 2165.47 sq.meters (suit property). The case of the Plaintiffs is that the land belongs to the Municipal Corporation for Greater Mumbai. The Slum Rehabilitation Authority had carried out census of hutments and had issued photopasses in respect of the structures situated on the said land. There is an adjoining plot bearing C.S.no.88 (pt.), which also had 67 number of structures thereon and which admeasures 1405.07 sq.meters. It is the case of the Appellants that this land belongs to the Central Government. The Appellants have impleaded the Assistant Commissioner of Municipal Corporation as Defendant No.1, the Municipal Corporation for Greater Mumbai as Defendant No.6, the Slum Rehabilitation Authority as Defendant No.7 and the State of Maharashtra as Defendant No.8. Apart from these Defendants, society formed by the slum

dwellers namely Nisarg SRA Coop. Housing Society Limited and its Chief Promoter have been impleaded as Defendant Nos.2 and 3. M/s.Grace Aashiyana Builders and the Architect have been impleaded as Defendant Nos.4 and 5.

4. The case of the Appellants as made out in the plaint is that there was a alleged meeting of the residents of the structures situated on the above two plots, held on 27 November 2005. This meeting is referred as a General Body meeting. The Appellants have stated that by a resolution passed in the said meeting, Defendant No.2 Nisarg SRA Coop. Housing Society Ltd. was proposed to be formed and Defendant No.3 Joseph Santimano was allegedly elected as a Chief Promoter of Defendant No.2 society. By a further resolution of the General Body, Defendant No.4 was appointed as a developer for implementing the slum rehabilitation scheme on the said plots and defendant No.5 was appointed as an Architect. The case of the Appellants is that, to their knowledge, there was no general body meeting held on 27 November 2005 and that the general body minutes were falsely and fraudulently prepared by defendant no.3 - Joseph Santimano and his associates in collusion with Defendant No.4 (builder). Also there are interpolations on the said General Body Resolution. Thus, the case is that false and fabricated records are prepared and a development proposal is submitted to the Slum rehabilitation Authority to obtain "Annexure II" and to implement a slum rehabilitation scheme under Regulation 33(10) of the Development Control Regulations for Greater Bombay.

5. It is the further case of the Appellants, in the plaint, that Annexure II was issued on 20 September 2006 by Defendant No.1 certifying the various structures and their categories. The Appellants allege that the Annexure II also contains false facts about the structures which are situated on the suit property. It includes structures which are on the Central Government land (C.S.No.88(pt)) and therefore, the Competent officer was not authorised to issue Annexure II in respect of structures on the Central Government land. It is alleged that the Annexure II also records wrong number of structures as existing on the suit property. It is alleged that this has created a situation that there is no consent of 70% of the occupants of the suit plot of land for issuance of Annexure II. The Appellants therefore contend that Annexure II was issued malafide and there is a fraud played by the defendants in connivance with each other. It is the Appellants' case that there is gross non compliance of the provisions of Mumbai Municipal Corporation Act as also the provisions of Regulation 33(10) of the Development Control Regulation for Greater Mumbai. It is alleged that the approval of any development in respect of the suit plot is illegal and a nullity. The LOI and the revised LOI dated 9 March 2011 were granted on the basis of Annexure II which was fraudulently prepared by Defendant No.1 in collusion with Defendant Nos.2,3, 4 and 5.

6. On the basis of the above averments as made in the plaint, the Plaintiffs approached the City Civil Court with the above prayers. Defendant Nos.2 to 4 appeared and filed reply and contended that the City Civil Court did not have

jurisdiction to try and entertain the suit, in view of the provisions of Section 42 of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 (for short "the Slum Act") as also Section 149 of the Maharashtra Regional and Town Planning Act, 1966. Defendant Nos. 2 to 4 also contended that the suit was not maintainable for want of statutory notice under Section 164 of the Maharashtra Cooperative Societies Act as also the suit is barred by limitation.

7. On 31 January 2012 the learned Trial Judge considering the objections raised on behalf of Defendant Nos. 2 and 4 framed the following preliminary issue: "Whether this Court has jurisdiction to try and entertain the present suit?"

8. By consent of the parties, the suit was thereafter adjourned to 21 February 2012 for hearing of preliminary issue. By the impugned order dated 7 March 2012 the learned Trial Judge considering the decision of the Full Bench of this Court in the case "Tulsiwadi Navnirman Coop. Housing Society Ltd. & Anr. Vs. State of Maharashtra & Ors." 2007(6) Mh.L.J. 851 held that the appropriate forum for the Appellants to redress their grievance would be High Power Committee and not the Civil Court and, therefore, rejected the notice of motion as also directed that the plaint be returned to be presented before proper forum. Being aggrieved by this order the Appellants are before this Court.

9. The learned Counsel for the Appellants in assailing the impugned order submits that though a preliminary issue as to the jurisdiction of the Court was framed, the impugned order clearly demonstrates that the said issue was not decided. It is submitted that the Trial Court was not correct in directing return of the plaint to be filed before the proper forum, relying on the decision of the Full Bench in Tulsiwadi Navnirman Coop. Housing Society Ltd. & Anr. Vs. State of Maharashtra & Ors. 2007(6) Mh.L.J. 851 (supra). It is submitted that the Full Bench decision cannot be construed to bar a civil suit as said decision would be applicable, when a party approaches the High Court invoking the jurisdiction under Article 226 of the Constitution of India, raising disputes in respect of a slum redevelopment. Learned Counsel for the Appellants submits that various issues were raised by the Appellants in the suit including the allegation of fraud, being played by the defendants. It is therefore, submitted that the conclusion as drawn by the learned Trial Judge is wholly erroneous.

10. On the other hand Mr. Surana, learned Counsel for Respondent Nos. 2 and 3 and Mr. Ameet A. Palkar, learned AGP for the State had supported the impugned order contending that the proper forum in respect of such issue would be High Power Committee.

11. Having considered the rival contentions and having perused the impugned order, the averments as made in the plaint and the relevant documents on record, I am of the opinion that the approach of the learned Trial Judge in passing the impugned order directing that the plaint be returned to be presented before proper forum, in the facts of the case, is ex facie erroneous. This is for two fold reasons. Firstly by order dated 31 January 2012 the learned Trial Judge

had framed a preliminary issue on the jurisdiction of the Court to try and entertain the suit in question. However, perusal of the impugned order clearly indicates that though a preliminary issue is framed, the same has not been decided by the learned Trial Judge. Further what is more pertinent is that the preliminary issue, as framed and noted above, is also vague. It is quite clear that the defendants had raised more than one objection to the maintainability of the suit. The objection was of a statutory bar under the Slums Act, M.R.T.P. Act and also the Maharashtra Cooperative Societies Act. If these were the nature of objections, then, an appropriate issue on jurisdiction of the Court to try and entertain the suit, was required to be framed and not a general issue. This was necessary, so that the parties could be heard, on such specific issue in regard to the jurisdiction of the Court. However, this basic exercise has not been undertaken. The parties are required to be clear of the very basis on which the Court would consider such a preliminary issue of jurisdiction. The learned Trial Judge however proceeded on such vague premise, and by the impugned order overlooking the substantive directions which are issued by the Full Bench in its decision in "Tulsiwadi Navnirman Coop. Housing Society Ltd. & Anr. Vs. State of Maharashtra & Ors." (supra) held that the plaint be returned to be presented before proper forum. The learned Trial Judge in issuing such directions has completely overlooked that the High Power Committee is not a Civil Court so that the plaint can be returned to be presented as per the provisions of Order 7 Rule 10 and 10A of the Code of Civil Procedure. The learned Trial Judge was completely oblivious to the aspect, whether in the facts of the case, the powers under Order 7 Rule 10 of the Civil Procedure Code could be invoked to return the plaint, and that too, to the High Power Committee. It is well settled that the issue of jurisdiction is a mixed question of law and fact. It is accordingly, required to be decided taking into consideration the averments as made in the plaint, and in the context of the objections which are raised to the maintainability of the suit as reflected in the preliminary issue to be framed.

12. In the above circumstances, in my opinion, the Trial Court could not have proceeded to simplicitor nonsuit the appellants, considering the directions given by the Full Bench in "Tulsiwadi Navnirman Coop. Housing Society Ltd. & Anr. Vs. State of Maharashtra & Ors." (supra), inasmuch as the basic concern of the Full Bench in the said decision was parties invoking the jurisdiction of the High Court under Article 226 of the Constitution of India, in matters concerning the rehabilitation of slum dwellers and the scheme framed under the relevant statute. It would be appropriate to note the relevant observations of the Full Bench as contained in paragraphs 98, 109, 110 and 118 of the decision which reads thus: "98. We do not intend to lay down any broad principles as each of them are well settled. Therefore, under the garb of filing Writ Petition against S.R.A./State/B.M.C./MHADA/MMRDA if the applicant/petitioner is ventilating a purely private grievance or dispute so also raising an issue which is not possible of being resolved in writ jurisdiction, then, he can always be directed to avail of private law remedies. Merely because, a Letter of Intent is issued by the S.R.A.

to the applicant does not mean that in all cases and for all times to come, the applicant/developer is the agent of S.R.A. and the S.R.A. is capable of being dragged into writ jurisdiction along with private developer by an aggrieved party. If the aggrieved party, who has essentially a grievance against the builder/developer approaches the S.R.A. and the State requesting for their intervention in the dispute and they refuse to do so on untenable and false grounds or that they act arbitrarily capriciously or malafide, writ jurisdiction could be permitted to be invoked in appropriate cases. This is because, the aggrieved party has full recourse to the remedy of a suit or Arbitration provided in the contract and by impleading the State/SRA/Public Body, it can seek appropriate declarations and reliefs. The bar under Section 42 of the Slum Act cannot straight away be held to be applicable to such cases. We do not wish to go into the interpretation so also the ambit and scope of Section 42 for the purpose of present reference. Suffice it to state that doors of a civil court cannot be shut to a litigant unless the jurisdiction of civil court is ousted by express provision or necessary implication.

109. Compared with the dimensions of the litigation generated and lack of adequate and proper remedy within the statute compels us to observe that the State may consider objectively legislative amendment to Maharashtra Slum Area (Improvement, Clearance and Redevelopment) Act, 1971, MHADA, MRTPA, not only to provide for appropriate forum for remedying the grievances of the persons but also to some extent collective working of these authorities.

110. During the interregnum period constitution of the authority would serve the ends of justice and would result in reducing avoidable litigation.

118. In the result, we answer the question framed hereinabove as under:

A) While exercising the Jurisdiction and powers under Article 226 of the Constitution of India in matters concerning Rehabilitation of Slum Dwellers and schemes framed under relevant statutes, distinct yardsticks cannot be carved out nor separate parameters laid down by this Court.

B) However, the limits and restrictions which are placed on the writ jurisdiction of this Court by Authoritative pronouncements of Supreme Court would govern the writ petitions challenging the orders, actions/inaction of the Authorities in charge of implementing and/or monitoring the slum rehabilitation scheme.

C) It is clarified that ordinarily a petition under Article 226 of the Constitution of India can be filed and depending upon the facts and circumstances of each case, this Court can decide to intervene, even if, alternate remedy provided above is not exhausted by the petitioner. However, such intervention should be minimum and the Court must abide by the Rule of caution and Prudence enunciated by the Supreme Court in this behalf. In exceptional and deserving cases, this Court would exercise its powers and no general rule can be laid down in that behalf.

D) As far as disputes and questions involving the slum dwellers and Slum Rehabilitation Authority/Public Body/State, Cooperative Housing Society of Slum

Dwellers and Developers, Registered Cooperative Housing Society of Slum Dwellers on one hand and proposed Cooperative Society on the other, Developers and S.R.A./State, a Writ petition under Article 226 of the Constitution of India would not lie or would be entertained unless and until the parties exhaust the remedy of approaching the High Powered Committee referred to above.

E) The only exception that can be made to Clause (D) above, is with regard to Writ petitions challenging the validity and legality of the Rules, Regulations and Policy Circulars/directives issued under the Statutory provisions or the vires of the Statutory provisions themselves. In such cases, the Court would not insist upon exhaustion of remedies stipulated above. Similarly, if a High Powered Committee/Authority refuses to act on the representations/applications despite proof of the same having been received, then, in appropriate cases, directions can be issued to the said Authority. However, the parties must satisfy this Court that they had made a grievance with regard to inaction of High Powered Committee to the State Government and it has also refused to issue any directions to either that Authority or SRA. Thus, if the State inaction is also alleged, then, the petition can be entertained. However, grant of relief would depend upon this Court satisfying itself about the promptness or sense of urgency shown by the aggrieved party apart from its bonafides in approaching this Court.

F) Needless to state that the Rule of Prudence and caution evolved by the Supreme Court with regard to exhaustion of alternate remedy would always be applicable. If the disputes and questions raised involve factual aspects or necessitate leading of oral and documentary evidence, then, this Court can refuse to interfere in writ jurisdiction leaving open to the parties, remedy of suit in competent civil court or Arbitration.

G) It is clarified that purely private disputes or those involving contractual rights, brought before this Court by way of writ petitions, will have to be ordinarily resolved by recourse to civil suit or arbitration and this principle would apply even to petitions where the State, S.R.A., B.M.C., MHADA etc. are impleaded as parties.

H) An exhaustive category of such cases and disputes cannot be framed and the General principles governing writ jurisdiction would be applicable having regard to the facts in each case."

(emphasis supplied)

13. A perusal of the above directions clearly indicate that the Full Bench has clearly held that the doors of a Civil Court cannot be shut to a litigant unless the jurisdiction of the Civil Court is ousted by express provision or necessary implication. It is held that if the disputes and questions raised, involve factual aspects, which requires, leading of oral and documentary evidence, then, the Court would refuse to interfere in the writ jurisdiction leaving open to the parties, remedy of suit in a competent civil Court or arbitration. Thus, simplicitor relying

on the decision of the Full Bench in Tulsiwadi Navnirman Coop. Housing Society Ltd. & Anr (supra), the learned Trial Judge could not have nonsuited the Appellants.

14. It may also be noted that the principles regarding exclusion of jurisdiction of the Civil Court are laid down by the Constitution Bench of the Supreme Court in the case "Dhulabhai Vs. State of M.P., AIR 1969 SC 78. The Supreme Court in a subsequent decision in the case of "M.P. Electricity Board, Jabalpur Vs. M/s.Vijaya Timber Co."AIR 1997 SC 2364 considering an issue of a statutory remedy visavis the jurisdiction of a Civil Court, referring to the said decision of the Constitution Bench in Dhulabhai Vs. State of M.P. (supra), in paragraph 9 has observed thus: "It is wellsettled that the exclusion of jurisdiction of civil court cannot be readily inferred and the normal rule is that civil courts have jurisdiction to try all suits of a civil nature except those of which cognizance by them is either expressly or impliedly excluded. A Constitution Bench of this Court in Dhulabhai vs. State of M.P. (1968 3 SCR 663) had laid down several propositions in this regard. The first proposition is apposite for the facts of this case. It reads as under:

"(1) Where the Statute gives finality to the orders of the special tribunals, the civil Court's jurisdiction must be held to be excluded, if there is adequate remedy to do what the civil Courts would normally do in a suit. Such a provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

15. In view of the above deliberation the impugned order cannot be sustained and would be required to be quashed and set aside. The appeal would thus be disposed of by the following order: ORDER

I. The impugned order dated 7 March 2012 is quashed and set aside.

II. L.C.Suit No.1039 of 2012 and the draft Notice of Motion is restored to the file of the City Civil Court at Bombay.

III. The learned Trial Judge is directed to frame an appropriate preliminary issue as to the jurisdiction of the Court, to try and entertain the suit.

IV. The learned Trial Judge shall hear the parties on the preliminary issue and decide the preliminary issue within a period of three months.

V. All contentions of the parties on the merits of the matter are expressly kept open. Civil Application No.1139 of 2013 and Civil Application No.1141 of 2013 would not survive and are accordingly disposed of.