
(2015) 12 SHI CK 0129
In the High Court Of Himachal Pradesh
Case No : RSA No. 482 of 2005

The Executive Officer, Municipal Council, Nahan and Others	APPELLANT
Vs	
Prem Chand	RESPONDENT

Date of Decision : 09-12-2015

Acts Referred:

Bombay Provincial Municipal Corporations Act, 1949 — Section 260, 260(1)(a), 260(2)
Civil Procedure Code, 1908 (CPC) — Section 2(17), 80
Himachal Pradesh Municipal Corporation Act, 1994 — Section 183(2), 184, 2(22)(a), 2(22)(b), 239
Himachal Pradesh Public Premises and Land (Eviction and Rent Recovery) Act, 1971 — Section 2(e), 4, 5
Specific Relief Act, 1963 — Section 38

Citation : (2015) 12 SHI CK 0129

Hon'ble Judges : Rajiv Sharma, J.

Bench : Single Bench

Advocate : Vivekanand, Advocate, for the Appellant

Final Decision : Dismissed

Judgement

Rajiv Sharma, J.—This regular second appeal is directed against the judgment and decree of the learned District Judge, Sirmour, H.P. dated 9.6.2005, passed in Civil Appeal No. 62-CA/13 of 2004.

2. "Key facts" necessary for the adjudication of this regular second appeal are that respondent-plaintiff (hereinafter referred to as the plaintiff) has instituted suit for permanent prohibitory injunction against the appellants-defendants (hereinafter referred to as the defendants) restraining them from interfering in the land comprised in Khewat/Khatauni No. 148/363, Kh. No. 1107, measuring 12.32 sq. meters, situated at Mohalla Amarapur, Nahan, Distt. Sirmour, H.P. and also from implementing the notices No. 1926 dated 26.7.2001 and 2497 dated 22.9.2001. According to the plaintiff, he was owner-in-possession of the suit land which is recorded as "Gair Mumkin Rasta" in the revenue record. The defendants have no right, title or interest in the same. The house of the plaintiff is situated

in the adjoining land of Kh. Nos. 1151 to 1153. The plaintiff has affixed a gate on the suit land in order to prevent the access of cattle etc. The defendants tried to get the gate removed. The defendants vide letter dated 26.7.2001 issued notice under Sections 184 and 183(2) of the H.P. Municipal Act, 1994 (hereinafter referred to as the Act, for short). These were duly replied by the plaintiff on 15.8.2001. The suit land was not mentioned in the notice. The plaintiff has not affixed any gate on Municipal land or street nor any land or street exists there. The defendants again issued notice under Section 239 of the Act for removing the gate from the Municipal lane. The action of the defendants was not only illegal but without jurisdiction.

3. The suit was contested by the defendants. On merits, it was claimed that there existed a public path over Kh. No. 1107. It was used by inhabitants of the surrounding area and public at large.

4. The learned trial Court framed the issues on 16.5.2002. The suit was dismissed vide judgment dated 29.10.2004. The plaintiff, feeling aggrieved, preferred an appeal against the judgment and decree dated 29.10.2004. The learned District Judge, Sirmaur at Nahan, allowed the same on 9.6.2005. Hence, this regular second appeal.

5. The regular second appeal was admitted on the following substantial questions of law on 16.9.2005:

"1. Whether the first appellate Court erred in law in holding that the property in dispute is not a public path?

2. Whether the judgment of the first appellate Court is vitiated by mis-application of the ratio in Narsingh Dass Vs. The State of Himachal Pradesh and Others, ?

3. Whether the plaintiff could file the suit without notice in terms of the provisions of Section 43 of the Himachal Pradesh Municipal Act, 1994?"

6. Mr. Vivekanand, Advocate, on the basis of the substantial questions of law framed, has vehemently argued that the ratio of the law laid down in Narsingh Dass Vs. The State of Himachal Pradesh and Others, , has not been correctly applied by the learned District Judge. He also argued that notice was also required to be issued under Section 43 of the Municipal Council Act, 1994 before institution of the suit.

7. I have heard Mr. Vivekanand, Advocate and have also gone through the judgments and records of the case carefully.

8. Since all the substantial questions of law are inter-connected, hence are taken up together for discussion to avoid repetition of evidence.

9. The plaintiff has appeared as PW-1. He has produced on record copy of jamabandi for the year 1996-97 Ext. PA, certified copy of judgment dated 2.1.2001 passed by the learned Distt. Judge, Sirmaur at Nahan in Civil Misc. Appeal No. 41-CMA/14 of 2000 Ext. PB, and notices of the defendants Ext. PC

and PD and reply thereto Ext. PE and certified copy of order dated 15.6.2000 passed by the learned District Judge, Sirmaur at Nahan in Civil Appeal No. 92-CA/13 of 2000/99 Ext. PH. According to him, he was owner-in-possession of the suit land and adjoining to it, he has constructed a house over land comprised in Kh. Nos. 1151 to 1153 in the year 1962. The suit land is a "Gair Mumkin Rasta". It was made pucca by him. The defendants have never raised any objection at that time.

10. Sh. R.R. Sharma, DW-1 has placed on record certified copy of judgment dated 20.3.2000 passed by this Court in Civil Suit No. 103/1 of 1998/96 Ext. DA. According to him, the suit land is a path and the same was metalled by the defendants in the year 1987-88 out of the Municipal funds and the plaintiff has no right to cause construction over it. The path was used by the inhabitants of the surrounding and the public at large. In his cross-examination, he admitted that the Municipal Council, Nahan has not taken any steps to get the suit land entered in the revenue record as public path.

11. According to the jamabandi for the year 1996-97 Ext. PA, the area of dispute is only 12.32 sq. meters. The plaintiff is recorded as owner-in-possession of the disputed path in the revenue record. The defendants have not rebutted the same. The Executive Officer Sh. R.R. Sharma, DW-1 has also admitted in his cross-examination that in the revenue record, Kh. No. 1107 is recorded in the ownership and possession of the plaintiff as "Gair Mumkin Rasta". The Municipal Council, Nahan has never applied for change of entry before any authority including revenue authority from "Gair Mumkin Rasta" to public path. There is no evidence placed on record by the defendants as to when the disputed path vested in the Municipal Council. DW-1 Sh. R.R. Sharma, has deposed that the road was metalled by the Municipal Council. However, he has admitted that he could not produce any record to prove that. Even in Ext. PC and PD, there is no mention of the khasra number. The first appellate Court has correctly applied the ratio of the judgment in the case of Narsingh Dass Vs. The State of Himachal Pradesh and Others, . The learned Single Judge, while interpreting Sections 2(22)(b) and 55(1)(g) of the Himachal Pradesh Municipal Act, has held as under:

"3. It is plain from Sections 4 and 5 of the Himachal Pradesh Public Premises and Land (Eviction and Rent Recovery) Act, 1971 that an order of eviction is contemplated where a person is in unauthorised occupation of any public premises. By virtue of the definition in Section 2(e) of the Act, the expression "public premises" includes premises belonging to a Municipal Corporation. The Divisional Commissioner has held the land to belong to the Municipal Corporation on the footing that it is a vacant space beside a public street. It seems to me that the relevant provisions of the statute have not been noticed in their entirety. In order to vest in the Municipal Corporation under Section 55(1)(g) of the Himachal Pradesh Municipal Act the land must be a public street. A "public street," as defined by Section 2(22)(b) of the Act, is a street which has been "levelled, paved, metalled, channelled, sewered or repaired out of municipal or

other public funds" (subject to the exceptions mentioned in the definition) or is a street declared by the committee to be, or becomes under the Act, a public street. To be a "street," for the purpose of the Act, it must be, according to Section 2(22)(a) :

"any road, footway, square, court, alley or passage, accessible, whether permanently or temporarily to the public, and whether a thoroughfare or not; and shall include every vacant space, notwithstanding that it may be private property and partly or wholly obstructed by any gate, post, chain or other barrier, if houses, shops or other buildings abut thereon, and if it is used by any person as a means of access to or from any public place or thoroughfare, whether such persons be occupier of such buildings or not, but shall not include any part of such space which the occupier of any such building has a right at all hours to prevent all other persons from using as aforesaid;..... "

The Divisional Commissioner has not found the land to be a road, footway, square, court alley or passage. He has treated it as a street on the ground that it is a vacant space beside a public street. Now, not every vacant space can be described as a street. It must be vacant space where houses, shops or other buildings abut thereon, and if it is used by any person as a means of access to or from any public place or thoroughfare, except that it cannot include space which the occupier of any such building has a right at all hours to prevent other persons from using. If the land satisfies that description, it can be considered as a "street" Then every street is not, a "public street." A street must have been levelled, paved, metalled, channelled, sewered or repaired out of municipal or other public funds, or it must have been declared by the committee, or should have become under the Act, a public street. Those several considerations must be satisfied before the land in question can be identified as a public street. The limited consideration applied by the Divisional Commissioner does not suffice as a basis for the conclusion that the land constitutes a public street. Accordingly, the impugned order of the Divisional Commissioner must be held vitiated by an error of law on the face of the record."

12. The disputed path is 80 ft. long and 8 ft. wide. The disputed path is only 12.32 sq. meters. The plaintiff, while appearing as PW-1 has categorically deposed that he made the path pucca. There is no material placed on record that the path was made pucca by the Municipal Council, from its own funds. There is a detailed procedure, the manner in which the path can become public path under the Municipal Act, 1994. The defendants have failed to prove that the disputed path is a Municipal path or public street or when it vested in the Municipal Council, Nahan.

13. Section 43 of the H.P. Municipal Act, 1994, reads as under:

"43. Suits against municipality and its employees.- No suit shall be instituted against a municipality, or against any employee of a municipality, in respect of any act purporting to be done in its or his official capacity, until the expiration of

one month next after notice in writing has been, in the case of a municipality, delivered or left at his office, and in the case of an employee, delivered to him or left at his office or place of abode, stating the cause of action and the name and place of abode of the intending plaintiff; and the plaint must contain a statement that such notice has been so delivered or left : Provided that nothing in this section shall apply to any suit instituted under section 38 of the Specific Relief Act, 1963 (47 of 1963)."

14. The present suit has been filed for injunction. Thus, the Civil Court had the jurisdiction to decide the lis. The Hon'ble Apex Court in the case of *Devi Singh Vs. Municipal Corporation, Hyderabad*, have held that where in a suit for injunction against a Municipality restraining it from interfering with plaintiff's peaceful enjoyment and possession of the Bazar in suit, the whole controversy was whether the Bazar was the property of the plaintiff and was in his possession at the time of institution of the suit, no notice of suit under S. 447 was necessary as the suit had nothing to do with any act done or purported to be done in pursuance of execution or intended execution of any provision of the Corporation Act. It has been held as follows:

"12. We may dispose of the legal points. As regards the requirement of a notice under Section 447 of the Corporation Act that section provides that no suit shall be instituted against the Corporation, Commr, Municipal Officer or servant in respect of any act done in or purported to be done pursuance of execution or intended execution of the Act or in respect of any alleged neglect or default in the execution of the Act until the expiration of one month next after a notice had been served on the Corporation or Officer concerned in the manner indicated in the section. This is what the High Court said on the point :

"It cannot be gain said that the acts complained of by the plaintiff were acts done by the Corporation in pursuance of its powers and duties under the Act. Under Section 59 of the Act the Corporation is empowered to make provision for public parks, gardens play grounds and recreation grounds, while under Section 56 of the Act the Corporation is empowered to remove obstructions upon public places.

The question whether a notice under the aforesaid section was necessary has to be decided on the averments made. It was never the case of the plaintiff that the defendant Corporation was acting or purported to act under the provisions of the Act. The dispute raised related to the ownership of the property as also its possession. We have not been shown any provision in the Corporation Act by which the Corporation or its officers were entitled to either take possession of another person's property or retain its possession or dispossess a person who is already in possession without having recourse to the ordinary remedies under the law. We are wholly unable to understand how Section 56 of the Corporation Act could be of any avail to the Corporation in the matter of notice under Section 447 of the Act. The whole controversy between the parties centered on the question whether the Bazaar was the property of the plaintiff and was in his possession at the time of the institution of the suit. That had nothing to do with

any act done or purported to be done in pursuance of execution or intended execution of any provision of the Corporation Act. The learned Counsel for the Corporation has not been able to show how the suit as laid and framed attracted the applicability of Section 447 of the Corporation Act. We would, accordingly, hold that under the aforesaid section no notice was necessary any before the institution of the suit."

15. The Division Bench of the Calcutta High Court in the case of Gowardhandas Rathi Vs. Corporation of Calcutta and Another, , have held that where in a suit against the Corporation for declaration and injunction, the relief for permanent injunction restraining the Commissioner from giving effect to his invalid order for demolition of structure is claimed only as an additional relief, the suit is, nevertheless, a suit for permanent injunction within the meaning of Section 54 of the Specific Relief Act. Consequently, such suit would be protected under Section 586(4) and notice under Section 586(1) would not be necessary for the institution of the suit. It has been held as follows:

"15. Every suit, therefore, for a perpetual injunction must involve a determination or a declaration to the above effect, or, in other words, such a declaration would be necessarily involved or implied in the case of every decree for perpetual injunction.

16. In the instant case, the invasion of the plaintiff's right or the commission of the act, contemplated above, would, presumably be the passing of the impugned order, which is challenged in the plaint as invalid, illegal and mala fide, and a finding, determination or declaration to that effect would, whether expressly or impliedly, be necessary for the grant of perpetual injunction to the plaintiff. Indeed, in the instant case, there is an express prayer for such a declaration. That however, in our opinion, would not alter the substantive position. That prayer may well be regarded as ancillary to the main relief of perpetual or permanent injunction, --if not unnecessary as a prayer in the prayer portion of the plaint. The necessary allegation in the body of the plaint to enable the Court to come to a determination of the above basic question would be enough for the purpose of supporting the ultimate decree of perpetual injunction. In law, a declaration by implication or in ex-press terms would not make any difference in substance and, regarded from that point of view, it will not affect or alter the nature of the suit and, accordingly, the instant suit may well be regarded, as, in substance, it is, as a suit for perpetual or permanent injunction. In this view, we would hold that the instant suit would satisfy the test of a suit, instituted under Section 54 of the old Specific Relief Act, corresponding to Section 38 of the new Act. In that view, the instant case would be covered by the protective provision of Sub-section (4) of Section 586 of the Calcutta Municipal Act and, accordingly, would be outside the mischief of Subsection (1) of the said section. The absence or want of a notice under the said statutory provision cannot, therefore, be fatal to the instant suit and the learned trial Judge's view to the contrary is not correct and must be set aside.

17. So far as the question under Section 80 of the Code of Civil Procedure is concerned, it is clear that, for the application of that section and the requirement of notice under the same, it is necessary that the defendant must be a Public Officer. So far as the present case is concerned, this defence is limited to the case of defendant No. 2, as, obviously, the Corporation of Calcutta would not fulfil the description or definition of a Public Officer. As regards the said defendant No. 2, however, the matter, when judged under the relative statutory provision in Section 2(17) of the Code of Civil Procedure, which defines a "public officer" for purposes of the Code, the same can be attracted, if at all, under Clause (h) of the said section. That clause reads as follows:

"(h) every officer in the service or pay of the Government, or remunerated by fees or commission for the performance of any public duty."

The latter part of this clause would not, obviously, apply in the instant case as the Commissioner of the Corporation of Calcutta is not-remunerated by fees or commissions. The question then shortens itself to this: "Is he an officer in the service or pay of the Government?" For this purpose, it is necessary to consider the effect and implication of some of the provisions of the Calcutta Municipal Act. The Commissioner under the said statute, is appointed by the State Government on the recommendation of the State Public Service Commission and upon such terms and conditions as the State Government may determine and he shall not be a member of the Corporation. This is provided in Section 19(1) of the said Act, Sub-section (3) of the said section provides that "Notwithstanding anything contained in Sub-section (2) [which fixes the normal tenure of the Commissioner to a term of five years subject to renewal in appropriate cases to another term of the same period], the State Government may, at any time, remove the Commissioner from office and shall do so if, at a special meeting of the Corporation, called for purpose, resolution for the removal of the Commissioner, in favour of which more than one-half of the total number of members of the Corporation give their votes, is carried." Power of appointment and removal therefore, so far as the Commissioner is concerned, undoubtedly, rests with the State Government. Sub-section (4) of the above section, again, provides that "The Commissioner shall not undertake any work unconnected with his office without the sanction of the State Government and of the Corporation."

16. The Division Bench of the Gujarat High Court in the case of M/S Super Steels, Ahmedabad vrs. Ahmedabad Municipal Corporation, Astodia, reported in AIR 1981 Gujarat 230, while considering the provisions of Bombay Provincial Municipal Corporations Act, 1949 has held that exclusion of jurisdiction of Civil Court is not readily to be inferred unless the finality is attached to the orders of special authorities or tribunals or where there is a bar of jurisdiction of the Court by an express provision or by necessary implications. It has been held as follows:

"5. We are afraid that the contention urged on behalf of the respondent-Corporation is too specious to be adhered to. It is settled position of law which is riot required to be supported by citation of any decisions since it is clear on the

matter of principle as well as authorities that if a Tribunal or an officer acting under a statute commits an error of fact which is a Jurisdictional fact, his decision is always liable to be questioned in Civil Court, except where the jurisdiction of the Civil Court is ousted by clear terms of the statute or by necessary implications (Vide: Raza Textiles Ltd. Vs. Income Tax Officer, Rampur,). This court has, In Municipal Corporation of the City of Ahmedabad v. Patel Prabhudas Dhanjibhai (1960) 1 Guj LR 94, held that S. 260 of the Bombay Provincial Municipal Corporations Act was not of retrospective nature but prospective in its operation and any proceeding in respect of a default under the provisions of the Bombay Municipal Boroughs Act, 1925 can only be continued under the provisions of that Act provided that such provisions of the Act fall within the scope of Appendix IV of the Bombay Provincial Municipal Corporations Act of 1949 and are saved under its S. 493 or Appendix IV. The learned single Judge (Shelat J.) further held that a notice issued under S. 260 of the 1949 Act in respect of the constructions made prior to the said Act coming into operation was not a valid and legal notice. In other words, the proceedings which can be initiated by the Corporation under S. 260 for purposes of the demolition of the unauthorised structure are competent only in respect of the structures which have been constructed after the Corporations Act came into force. This will be undoubtedly a jurisdictional fact inasmuch as the notice under S. 260 would be competent provided it is established that the premises are in existence prior to the application of the said Act. If, therefore, the competent Authority purporting to act under S. 260 decides in fact either in favour of the Corporation for initiation and continuation of the proceedings for demolition of unauthorised structures or in favour of citizens for discharge of notice,, the decision of the said authority would invest the authority with the jurisdiction to continue or not to continue the proceedings, and if in course of deciding that jurisdictional fact, the competent -Authority goes wrong, the citizen has always a right to agitate that question by challenging the decision for demolition in Civil Court. The learned City Civil Judge, however, found himself unable to go into this question since he was bound by the decision of this Court in First Appeal No. 828 of 1973 decided on 12th/13th July, 1977. The learned single Judge in that appeal was concerned with a notice dated Oct. 17, 1970 for demolition of unauthorised structure issued by the Deputy Town Planning Officer under S. 260(1)(a) of the said Act and the consequent order of Nov. 14, 1970 passed under S. 260(2) of the said Act. The owner of the premises aggrieved by the said notice and order had filed a suit in the City Civil Court, Ahmedabad, for a declaration "that the said notice and the said order were bad in law and void and for consequential relief of permanent injunction restraining the Corporation from enforcing the said order. The owner came in appeal being aggrieved with the order of the City Civil Court dismissing the said suit as the learned City Civil Judge was of the opinion that the suit was not tenable. A number of contentions was advanced before the learned single Judge in the course of hearing of the appeal. Contention No. 3 is material for the purposes of this appeal since in the course of discussion of that contention the learned Judge has made some observations which the learned City Civil Judge in

the present case found as denying jurisdiction to the Civil Court to try an issue whether the Act applied to the premises in dispute or not. The contention urged before the learned single Judge in the said appeal was that the demolition order was vague and having been passed without application of mind was bad. The learned single Judge, while dealing with this contention, has recorded as under:

"8.All that he had stated was that the three rooms were old and the Act did not apply. Even if we interpret this layman's reply liberally and hold that there was an implicit specific contention advanced on behalf of the appellant, there is ample material on the record to show that the authority concerned had, before it the concrete evidence, evidencing otherwise Thus, there was sufficient material before the concerned authority to show that what the appellant was contending before it in the form of his structures being more than 22 years old was a clear hoax. The executive officers assigned with the duty of discharging quasi-judicial functions are not expected to write elaborate judgments as is done by the legally trained persons. All that is required is that there should be reasonable material before the Court subsequently to examine the question of application or non-application of mind to enable the Court to hold that all relevant facets were adverted to by the authority and a decision had been arrived at fairly and reasonably. It was up to the appellant and the appellant alone to convince this Court that the said order had been passed without any application of mind.

As a matter of fact, considerable evidence was led before the learned trial Judge, much of it unnecessarily, about the existence of the structure at the site. It was not within the domain of the learned Judge to decide himself whether the structures were 25 years old or not. All that he had to decide was whether the quasi-judicial authority had applied its mind to that contention of the appellant and whether there was any material of probative value before that authority to arrive at the conclusion it reached..... "

The emphasised part of this observation of the learned single Judge has been read by the learned City Civil Judge in the present suit as exclusion of the Civil Court's jurisdiction. It is no doubt true that the learned Judge has said that the question of existence of the structure at the site was not within the domain of the learned Judge but that observation was made in the context of the contention, whether the authority had applied the mind or not. The learned single Judge was not concerned with the question whether the Civil Court has jurisdiction or not. It cannot be urged as has been sought to be done here before us, by the learned Advocate for the respondent-Corporation that the Civil Court has no jurisdiction whatsoever to go into the question as to whether the said Act was applicable to the structure in dispute since it was constructed before the Corporations Act was made applicable. We are afraid this is too specious a contention to which we should readily agree to, obviously for two reasons: In the first place, exclusion of jurisdiction of Civil Court is not readily to be inferred unless the finality is attached to the orders of special authorities or tribunals or where there is a bar of jurisdiction of the Court by an express provision or by

necessary implications. Even such provision as to the finality or exclusion does not exclude the jurisdiction of Civil Court where the provisions of a particular Act have not been complied with or a statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure and where the special remedy does not ensure full and complete relief as available in Civil Court (Vide: Dhulabhai and Others Vs. The State of Madhya Pradesh and Another,). Secondly, in any view of the matter, any error committed by the Tribunal or an authority under the statute on a fact which would invest it or him with the jurisdiction is always subject to judicial scrutiny in the ordinary Civil Court. Unless, therefore, the jurisdiction of Civil Court is ousted by express terms or by necessary implication, it would be wrong on the part of the learned City Civil Judge to read this observation as tantamount to saying that the jurisdiction of the Civil Court is completely barred. We are, therefore, of the opinion that the learned City Civil Court Judge and for that matter the learned, single Judge of this Court were in error :in dismissing the suit without inquiring into the material question raised at issue No. 1 on the ground of want of jurisdiction."

17. In the instant case, the plaintiff, as per the revenue record, is owner-in-possession of land comprised in Khewat/Khatauni No. 148/363, Kh. No. 1107, measuring 12.32 sq. meters, situated at Mohalla Amarpur, Nahan, Distt. Sirmour, H.P. The substantial questions of law are answered accordingly.

18. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.