
(2011) 08 BOM CK 0035
In the Bombay High Court
Case No : Writ Petition No. 3934 of 2011

T.R. Ranka and ors

APPELLANT

Vs

Chief Officer and Others

RESPONDENT

Date of Decision : 12-08-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Maharashtra Regional and Town Planning Act, 1966 — Section 53
Municipalities Act, 1965 — Section 173, 173(1), 173(2), 173(3), 174

Citation : (2012) 1 BomCR 615

Hon'ble Judges : Dharmadikari S.C., J

Bench : Single Bench

Advocate : R. Narula with Y.K. Sharma, instructed by Jhangiani, Narula and Asso, for the Appellant; B.D. Joshi, for respondent Nos. 1 and 2. S.N. Bhosale, A.G.P., for respondent No. 3/State., for the Respondent

Final Decision : Dismissed

Judgement

Dharmadhikari S.C., J.—Rule. Respondents waive service. By consent, Rule made returnable forthwith. By this writ petition under Articles 226 and 227 of the Constitution of India, the petitioners are challenging the show cause notice dated 20.4.2011 and the order dated 4.6.2011 passed by the Chief Officer of the Ambarnath Municipal Council. The petitioners claim to be owners/tenants of the shops and they are carrying on business in the name and style as set out in the cause title of the petition. The respondent No. 1 is the Chief Officer of the Municipal Council, Ambarnath and the respondent No. 2 is the Municipal Council established under the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (in short, the Municipalities Act, 1965).

2. It is the case of the petitioners that they have constructed the shops on a piece of land which belongs to the Zilla Parishad, Thane. They have individually obtained the permissions from the Zilla Parishad as well as the Municipal Council for construction of their respective shops and these shops have been constructed

way back in the year 1968-1970. The petitioners are also paying the annual rent to the Zilla Parishad and the property and other taxes to the Municipal Council from 1970 till date.

3. It is further stated that the petitioners have also obtained the registration certificates under the Bombay Shops and Establishments Act, 1948. It is the case of the petitioners that their shops are situate on the western side of the Ambarnath Railway Station. There is 18 meters wide D.P. Road in front of their shops. It is their case that there is a strip of three feet width between the shop line and road line. This three feet wide strip is between the shutters of shops and road line in front of the shops. The sketch map has been relied upon and it is submitted that after construction of Sky-Walk, the congestion of pedestrians on the road has been reduced.. Even the Development Plan shows the width of road as 18 meters (60 feet). There are site plans which are also sought to be relied upon.

4. It is then alleged that the Ambarnath Municipal Council in its General Body meeting held on 26.6.2006 claimed to have passed a resolution No. 39 whereby, administrative approval has been granted for construction of gutter of 1.80 meters width and pathway thereon on both sides of the road, by removing the portions of shops. In pursuance to the said resolution, the road is being developed as per sections 176 and 177(1)(b) of the Municipalities Act, 1965.

5. It is stated that in furtherance of this resolution, the respondent No. 1 issued a show cause notice dated 20.4.2011 inter alia stating that it has been decided to construct the gutter and pathway of 1.80 meters width on both sides of the road and for that purpose an area of 1.70 x 3.00 square meters is required to be taken and any construction which is coming in way will have to be removed. Therefore, the show cause notice calls upon the petitioners as to why their respective shops should not be demolished to the extent of 1.70 x 3.00 square meters within 15 days from the date of receipt of the said show cause notice. It is stated that if the petitioners do not show sufficient cause or co-operation in the matter, the respondent No. 1 will take possession of an area specified above for construction of 1.80 meters gutter and pathway thereon. Such show cause notices have been issued and received by the petitioners and therefore, a reply was forwarded on 30.4.2011 in which it was stated that the land on which the shops are constructed belongs to the Zilla Parishad, Thane and the petitioners have constructed the shops with the permission of the Municipal Council. The petitioners have been regularly paying the rent of the land to the Zilla Parishad and the property and other taxes to the Municipal Council. It was further stated in the reply that since the owner of land is Zilla Parishad, Thane, the Municipal Council ought to have taken permission of the Zilla Parishad before taking any action under the Municipalities Act, 1965. The petitioners also sought a personal hearing in the matter.

6. Thereafter, a personal hearing was given to the petitioners and an order came to be passed dated 4.6.2011. It is this order which is challenged in this writ

petition on several grounds.

7. Mr. Narula, learned Counsel appearing on behalf of the petitioners, submitted that there is no road-line prescribed and the requirement of section 176 has not been complied with. Inviting my attention to the sanctioned plan at page 33, it is submitted that the action is motivated. It is nothing but vengeance on the part of the authorities inasmuch as the petitioners have pointed out that the resolution was passed on 26.6.2006, but the resolution states that as per the Development Plan which is approved on 25.7.2005 for Ambarnath City, the road from Ambarnath Railway Station to Kalyan-Badlapur Road has been shown as 18 meters wide and in fact the said road is 18 meters wide. No arrangement has been made for the construction of gutter and pathway on both sides of the road. Since the said road is busy for 24 hours and it is not sufficient for the traffic, it is, therefore, proposed by the Town Planning Department that a gutter and pathway thereon of the width of 1.5 meters be constructed by removing any encroachment on the road. The respondent Nos. 1 and 2 resolved to construct 6 feet of gutter and pathway thereon, on both sides of the road. No where it is mentioned that the petitioners have encroached upon the road as it is clear that under the Town Planning Scheme, the road is of 18 meters width and the existing road is also 18 meters width. The petitioners have pointed out that they have on two occasions surrendered 15 feet and 4 feet land for the purpose of road widening. They have also pointed out that the show cause notice and the demolition order u/s 189(8) of the Municipalities Act, 1965 and section 53 of the Maharashtra Regional and Town Planning Act, 1966 were challenged by filing several civil suits and the learned Judge of the Civil Court was pleased to grant stay against the operation of the notices. In some suits, the judgment has been delivered setting aside the notices. It is now clear that having not been able to succeed before the Civil Court and to facilitate the Mumbai Metropolitan Regional Development Authority (in short, "MMRDA"), the action has been initiated. The same is, therefore, contrary to law. Section 177 of the Municipalities Act, 1965 is not applicable in this case. He submits that once there is already road existing of 18 meters width and the petitioners' land was required for that purpose alone, then, in the garb of making a provision for drainage and pathway, the show cause notices cannot be issued. Once the show cause notice refers to sections 176 and 177 of the Municipalities Act, 1965, but the road is already existing of sufficient width at site, then, for drainage and pathway, the action cannot be initiated. The impugned order is, therefore, contrary to law. It is vitiated by non application of mind and deserves to be set aside on that ground alone. The said order is clearly without jurisdiction.

8. On the other hand, Mr. Joshi, learned Counsel appearing for the respondent Nos. 1 and 2, submits that there is no substance in the argument of the petitioners. The show cause notice and the order passed thereon is clear. It has been pointed out that the Town Planning Scheme has been sanctioned for Ambarnath City on 11.8.2008. The said scheme is being implemented from 1.9.2008. In accordance therewith on the western side, from the Ambarnath

Railway Station to Kalyan-Badlapur Road, the width of Lokmanya Tilak Road is proposed as 18 meters. There is a public road admeasuring 18 meters in width, but on either side of the road, there is no provision for gutter and pathway. Therefore, the show cause notice was issued and the impugned order has been passed. Mr. Joshi submits that in the affidavit in reply all circumstances have been pointed out. The Zilla Parishad has no objection for surrendering the land. The petitioners are objecting for obvious reasons. They have encroached upon the area which has not been made part of the lease or which in any event is to be utilized for making a provision for gutter and pathway thereon. Therefore, the writ petition at their instance should not be entertained. Mr. Joshi has invited my attention to section 173 of the Municipalities Act, 1965 and the judgment of a Division Bench of this Court reported in Shankara N. Shetty and Others Vs. The State of Maharashtra and Others, .

9. With the assistance of the learned Counsel appearing for the parties, I have perused the petition and annexures thereto, so also, the affidavit in reply. Section 173 of the Municipalities Act, 1965 falls in Chapter XI titled "Streets & Open Spaces". It confers power in respect of public streets. The word "street" is defined in section 2(48) to mean any road, footway, square, Courtalley or passage, accessible whether permanently or temporarily to the public and thereafter, the inclusive part is set out. The word "public street" is defined in section 2(42) to mean inter alia any street over which the public have a right of way. The word "drain" is defined in section 2(10) whereas the word "sewage" is defined in section 2(47) of the Municipalities Act, 1965. Drain carries sewage as is clear from these definitions. Sub-section (1) of section 173 states that it shall be lawful for a Council to lay out and make new public streets including tunnels, bridges, sub-ways and other works subsidiary to public streets, so also, to widen, open, extend or otherwise improve any public street or any work subsidiary to a public street and also to divert or close temporarily any public street and subject to the provisions of section 173(2), close any public street permanently. Section 174 confers power to declare any street as public street subject to objections by owners and section 175 confers power to require repairs etc. of private streets and declare it as public street. Then comes section 176 which reads thus:

176. Regular lines of a public street.

(1) The Chief Officer shall subject to the approval of the Council prescribe a line on each side of every public street within the municipal area.

(2) The Chief Officer shall give a public notice of the proposal to prescribe such line for any street and shall also put up a special notice thereof in the street for which such line is proposed to be prescribed. The Council shall before approving the line of the street consider all objections or suggestions in respect of the said proposal made in writing and delivered at the municipal office within one month from the date of the publication of the notice under this sub-section.

(3) The line for the time being so prescribed shall be called "the regular line of

the public street".

(4) The Chief Officer may from time to time in the manner laid down in sub-sections (1) and (2) prescribe a revised line in substitution of any regular line of street already prescribed and any reference in this Act to the regular line of the public street shall be deemed to include a reference to such revised line.

(5) No resolution approving a regular line of a public street under sub-section (1) or approving a revised line under sub-section (4) shall be passed by the Council, if such line or revised line has the effect of reducing the width of the street or shifting any such line towards the centre of the street, without the previous sanction of the Collector.

(6) (a) Except under the provisions of section 180, no person shall construct or reconstruct any portion of any building within the regular line of a public street or within such distance behind the regular line of public street as may be prescribed by by-laws, without the permission of the Chief Officer;

(b) Where the Chief Officer refuses permission to construct or reconstruct any building in any area within the regular line of the public street, such area shall, with the approval of the Council, be added to the street and shall thenceforth be deemed part of the public street and shall be vested in the Council;

(c) Compensation, the amount of which shall, in case of dispute, be ascertained and determined in the manner provided in section 330 shall be paid by the Council to the owner of any land added to a street under Clause (b) for the value of the said land, and to the owner of any building or any loss, damage or expense incurred by such owner in consequence of any action taken or order passed by the Chief Officer under this subsection: Provided that, no such compensation shall be payable in respect of any building or portion thereof in respect of which a notice has been issued under sub-section (1) of section 195.

[7] The provisions of sub-sections (8), (9), (10) and (11) of section 189 shall mutatis mutandis apply to any building or portion of a building constructed in contravention of the provisions of Clause (a) of sub-section (6).

10. A bare perusal of this section shows that the Chief Officer shall subject to the approval of the Council prescribe a line on each side of the public street within the municipal area and how that is to be done is provided by further sub-sections. Then there are several provisions enabling the Municipal Council to deal with setting back the projecting buildings, setting forward to regular line of street and surface projections, obstructions and encroachments in respect of public streets, so also, prohibition of projections other than surface projections upon streets etc. Section 184 falling in the same chapter states that a notice can be issued requiring the owner of any building or land on any street to put up and keep in good condition proper troughs and pipes for receiving and carrying the water from the building or land and for discharging the same so as not to cause any damage to the street or inconvenience to persons passing along the street. Further section 186 speaks of displacing pavements etc.

11. A combined reading of all these provisions would make it clear that the street and open spaces can be earmarked, designated and provided by the Municipal Council and it shall be lawful for it to do so. It is not as if these powers cannot be resorted to as contended by the petitioners in the facts of this case.

12. The notices in each of these cases stated that 18 meters wide road has already been provided. However, on both sides of the road, there is no provision for gutter and pathway and when the water accumulates on the road, there is no outlet for the same. This inconveniences the vehicular traffic, so also, pedestrians. Therefore, a resolution was passed by the Municipal Council on 26.6.2006 wherein it was resolved that although there is 18 meters wide road, but on both sides of the same there is no provision for gutter or pathway. Similarly, some shops are falling within the road line. The road is busy road throughout and there is traffic for 24 hours. In these circumstances, the encroachments should be removed so that 18 meters wide road be made with the provision of gutter on which pathway should be constructed. This resolution was passed by the General Body of the Municipal Council and in fact what has been decided is that on both sides of the road there should be 6 feet wide gutter and pathway thereon for pedestrians.

13. Therefore, in pursuance of this resolution, a show cause notice was issued. The reply thereto was that the land belongs to the Zilla Parishad and the petitioners have constructed their shops thereon. They are regularly paying the rent to the Zilla. Parishad. If the land belongs to the Zilla Parishad and the structures are put up after taking due permission from the Municipal Council and same are standing at site for past 40 to 45 years, then, the show cause notice is bad in law because there is no encroachment. What the Municipal Council is doing is to extend the width of road. However, one meter wide area is already available in front of all shops which can be taken and the petitioners have no objection for the same. Taking away any land portion beyond one meter for putting up gutter, would cause breakage of pakka shops which are put up with bricks and furnitures are also fitted, with huge expenses. In these circumstances, what the Municipal Council is seeking to do is to take away the land by affecting their tenancy rights. For all these reasons, the impugned show cause notices are illegal and arbitrary and should be withdrawn forthwith. It was pointed out that the MMRDA has constructed Sky-Walk/ sky over bridge from the Ambarnath Railway Station to Kalyan-Badlapur Road for convenience of pedestrians and they can safely reach without any inconvenience to the Tilak Road. There is no rush particularly at the time of arrival and departure of trains. In these circumstances, the notices be withdrawn forthwith.

14. While it is true that the petitioners' shops are existing for long time, yet what the Municipal Council demands from them is to hand over the portion on either side of the road for putting up gutter and pathway. Firstly, no document was produced showing any tenancy created by the Zilla Parishad in favour of the petitioners and secondly, there is no objection from the owner of the land i.e.

Zilla Parishad. Once the petitioners have not produced the relevant documents indicating the area covered by their lease and the rent that is charged and the period for which such occupancy rights have been created in their favour, then, the petitioners cannot be heard to say that the notice is bad in law. The petitioners have been informed that each one of them will be compensated by providing appropriate areas /portions so that their total entitlement, if any, is not adversely affected.

15. I have perused the affidavit that has been filed and there is much substance in the contentions of Mr. Joshi that inspite of taking the petitioners into confidence and making several oral requests, they are not allowing the Municipal Council to make a provision for the public amenity, namely, storm water drainage and footpath. It is as a last resort that the notice was issued and the hearing has taken place on 24.5.2011 and 1.6.2011 and it is only thereafter, the impugned order has been passed on 4.6.2011 which is well reasoned. The petitioners cannot challenge these notices by urging that this amounts to dispossessing them from the land in their possession. There is no encroachment, according to the petitioners. However, they are not the owners of land. They have not shown any document as to how they have derived the rights to occupy the land and use it for commercial purpose. They do not indicate as to how these shops have been constructed. May be that they have all valid permissions for construction of the shops, but the land/does not belong to them admittedly. If the owner of the land does not dispute the power of the Municipal Council to initiate such measures nor is there any challenge to the resolution passed in the year 2006 by the General Body of the Municipal Council, either by the petitioners or Zilla Parishad, then, it is difficult to agree with Mr. Narula that the impugned order is illegal or arbitrary or discriminatory. In the impugned order, it has been categorically observed that certain portions of shops have projected on the road. The photographs have also been perused. The resolution has been referred to and observing that even when the road is provided and which is 18 meters in width, yet, for avoiding inconvenience to those using the road by plying the vehicles or walking, by accumulation of water, that the gutter and pathway needs to be provided. That is how the resolution has been passed. It has been pointed out that a provision has been made considering the increase in population. If these civic amenities are not provided by the Municipal Council, it would be charged with failure to carry out its duties as set out In the Municipalities Act, 1965. Ultimately, the petitioners are shop keepers whose shops are abutting the main road. However, when they do not dispute the power to prescribe the regular line of the street nor do they challenge the authority of the General Body to make a provision for gutter and pathway on either side of the road, then, it will not be open for them to urge that the impugned order contravenes their rights. Their rights flow through the Zilla Parishad. It may be that the Municipal Council recognizes the rights of the Zilla Parishad and therefore, does not dispute the use and occupation of the petitioners, but that does not prevent the Municipal Council from resorting to the powers that are conferred by law so as to implement the

decisions and resolutions of the General Body. Precisely that has been done in the instant case. In these circumstances, I am of the view that there is no merit in the contention of Mr. Narula that the show cause notice is issued without authority of law and therefore, the Chief Officer lacked jurisdiction while passing the impugned order.

16. The show cause notice refers to sections 176 and 177(1)(b) of the Municipalities Act, 1965. While section 176 provides for prescribing a regular line of public street, what section 177 enables the Council is to set back the projecting buildings. Ultimately, all such powers as are conferred by section 173 in relation to public streets empower the Municipal Council to lay out and make new public streets including tunnels, bridges, subways and other works subsidiary to public streets, so also, to widen, open, extend or otherwise improve any public street or carry out any work subsidiary to a public street. If such is the sweep of the powers conferred by section 173 and other enabling provisions, then, it is futile to urge that the show cause notice is bad in law. It is not as if any work subsidiary to public street cannot be undertaken or carried out by resorting to the subject provisions. It is not as if the resolution of the General Body is in any way bad in law because of lack of power or authority. If the Municipal Council lays out and makes new public street and other works subsidiary to public street, then, it can always resolve to make a provision for gutter and pathway. In absence of any challenge to this authority by the owner of land and further the petitioners not being in position to establish the exact area that is covered by the tenancy or lease created by the Zilla Parishad, then, all the more it is not open for them to challenge the subject notices. Mr. Narula's argument overlooks not only the factual position, but section 173(3) in which there is specific provision enabling the Municipal Council to layout, make, widen, open, extend or otherwise improve the public street. Thus, in addition to the land required for a carriage way and foot ways and drains thereon, the Municipal Council may also acquire the land required for the construction of buildings to form the street. Therefore, the argument that the notice and the impugned order is vitiated by lack of jurisdiction and power, must be rejected.

17. It is not necessary to decide any wider question inasmuch as the petitioners are being compensated in terms of the resolution of the Municipal Council and the observations in the impugned order. The order itself states that if any proposals for new construction are forwarded by the Zilla Parishad, Thane (land owner), then, the Municipal Council will grant Floor Space Index (FSI) in terms of the rules and regulations for loss of the area, if any, on account of the provision for gutter and pathway. Therefore, the petitioners can, through the Zilla Parishad, Thane, make a request and if such request is made, I have no doubt in my mind, that in " terms of the impugned order and applicable rules and regulations, the Municipal Council will duly consider it.

18. Having held that the Municipal Council has not acted contrary to law nor is the impugned order vitiated by any error apparent on the face of record or

perversity, this writ petition must necessarily fail and it is, accordingly, dismissed but without any order as to costs. Rule is discharged accordingly. Today, after the judgment is pronounced, the learned Advocate appearing on behalf of the petitioners states that the ad interim order granted be continued so as to enable the petitioners to challenge this order in Higher Court or adopt appropriate proceedings. None is present on behalf of the respondents and particularly, the contesting respondents. In the light of the fact that there was an ad interim protection from 23rd May 2011, the interest of justice will be served if the said ad interim order is continued for a period of six weeks.