
(1958) 08 MP CK 0004

Madhya Pradesh High Court (Indore Bench)

Case No: C.S.A. No. 216 of 1954

Mun. Cor. Indore

APPELLANT

Vs

Motilal

RESPONDENT

Date of Decision: Aug. 19, 1958

Acts Referred:

- Indore City Municipal Act, 1909 - Section 45

Citation: (1959) J LJ 220

Hon'ble Judges: T.C. Shrivastava, J

Bench: Single Bench

Advocate: Jhanjaria, for the Appellant; V.V. Kulkarni, for the Respondent

Final Decision: Allowed

Judgement

T.C. Shrivastav, J.

This second appeal is filed by the Municipal Corporation, Indore, against the decision of the Additional District judge, Indore, who has reversed the judgment of the Additional City Civil judge, Indore, in Civil Suit No. 447 of 1952. That suit was filed by the respondent for an injunction to restrain the appellant from removing certain structures belonging to him.

2. The plaintiff is an excise contractor selling Tadi from the year 1942. It is undisputed that a shed existed on the site from 1942. The plaintiff's case is that it was burnt in 1949 and he reconstructed it. On 15-11-1949 the appellant gave a notice. Ex. P/1 to the respondent-plaintiff that the construction was without the sanction of the Committee and hence liable to be removed. The plaintiff applied for permission which was refused by the defendant. The defendant demolished the structure forcibly but the plaintiff constructed it again. The plaintiff then filed thin suit to restrain the defendant from removing that structure.

3. The defendant admitted that the structure was existing there from 1942 but stated that it was reconstructed without permission and therefore the corporation had the right to

demolish it. Permission to reconstruct the structure has been finally refused and the fore the construction of the structure again by the plaintiff is also unauthorised and is liable to be removed. Permission was refused u/s 45 of the Indore Municipal Act (referred to as "the Act" in this judgment) on the ground that it was prejudicial to the health and safety of the persons dwelling in the locality, and it was pleaded that this being a matter within the discretion of the Municipality, civil court had no jurisdiction to interfere.

4. Both the courts below have concurrently found the following facts:--

(i) the structure is a in-shed which has been at the same place from the year 1942 and the plaintiff has been carrying on his Tadi business therein.

(ii) The walls in the old shed were of Tattss (Bamboo matting) but after the fire the plaintiff substituted tin-sheets for Tattas;

(iii) The structure which was put up in November 1949 was without the sanction of the Committee.

(IV) is second Municipal without been of the and Indore s Sanction has, refused u 45 Act structure thus requisite sanction.

5. On these facts, the trial court was of the view that the structure could be removed by the Municipal Committee and therefore it dismissed the suit. The appellate Court, however, thought that permission has been wrongly refused by the Municipality and therefore the Committee has no right to, demolish the structure. The suit was therefore decreed.

6. It has been observed by the appellate court that the plaintiff holds a licence from the Excise Department and cannot change the site of the shop without consent of that department. It is rightly contended by the appellant that this is a matter between the plaintiff and the Excise Department and is not relevant to the present case If the structure is unauthorised according to the Municipal Act and bye-laws, the Municipality has every right to remove it, in spite of anything that may be in Excise Rules.

7. The only question to be determined in this appeal is whether the discretion exercised by the Committee in refusing permission can be interfered with by a Civil Court The wordings in sec. 45 of the Act leave no doubt that the Legislature intended to entrust the matter entirely to the discretion of the Committee. This is rightly so because the question of a structure being prejudicial to the health, safety or convenience of the people in the locality can be decided after taking into consideration a complex variety of factors which cannot be conveniently investigated by a civil court. It is obviously not the intention of the Legislature that the civil courts should substitute their judgment for that of the committee in such matters.

8. In this connection, I may refer to the decision in Cantonment Board, Kamptee vs. Burjorjee Dada Bhoy Zal. AIR 1935 Nag. 81. That case arose under the Cantonment Boards Act. The plaintiff had challenged the refusal of the Board to sanction a construction as arbitrary. It was held in that case that the civil court had no jurisdiction to interfere in the matter. The reason for this was given thus:

In the instant case a liability not existing under the general law, viz., to obtain the requisite sanction to erect or reerect a building, has been created by the statute and a special remedy has also been provided therein for enforcing it. It is therefore, that remedy alone which the aggrieved party must adopt to seek redress.

Under the Indore Municipal Act also, the liability to take sanction for constructions of new structures arises from the provisions of the Act, which provides special remedies by way of appeal (sec. 131) and revision (sec. 133) to the aggrieved party. The Act thus forms a self-contained Code to govern the matter and the plaintiff must take recourse only to the remedies which are available to him under the Act.

9. In the Cantonment Board Act, there is a provision in Sec. 278 giving finality to the orders of the Board. In the Indore Act, there is a similar provision in Sec. 133 which provides that the order passed by the Government in revision shall be final and "shall not be open to question in a court of Law." It is true that this section does not expressly give finality to the orders of Committee which are not taken up in, revision to Government but, the effect is the same. It is the intention of Act that the series of the remedies provided in Secs. 131 (appeal) and 133 (revision) should be pursued by an aggrieved party and the order passed by the Government ultimately should be final. A party who has not pursued all the remedies cannot be in a better position than one who has. I find that Sec 133 of the Act bars a challenge in civil court of all orders of the municipal authorities.

10. In civil appeal No. 202 of 1954, Chaturvedi, I had, interpreting sub-sec. 5 of Sec 45 of the Act, observed:

It will be obvious that the Legislature has vested the discretion in the Municipal Commissioner

and refused to interfere. In para 7 of the judgment, the learned judge observed that :

the only cases in which such discretion of local boards or authorities have been interfered with or where there were allegations of mala fides or where it was found that though the order made was under guise of exercising discretion, it was a colourable performance and tantamount to a refusal to exercise the discretion entrusted to them by the law.

It appears to me that interference with orders u/s 45 of the Act is possible only on these limited grounds.

11. Shri Kulkarni for the respondents contends that he had alleged in paragraph 4 of the plaint that permission was refused mala fide. It may be mentioned that no issue has been framed on the question whether the power exercised by the Municipality in refusing permission was mala fide or amounted to an abuse of power. Learned Counsel for the parties have stated to me that they do not wish to adduce any evidence on this point and requested that the matter should be decided on the material which is on record.

12. In Ex. P/1, besides the reasons falling u/s 45 of the Act, an additional reason is given that the landlord objects to the construction. The landlord, Bolia Sarkar had allowed this Tadi shop to be there from 1942. His objection, therefore, to the construction of this shed has no significance. Further if is not mentioned as ground for the refusal of permission u/s 45 of the Act. The permission has not, however, been refused on that ground alone. The main ground for refusal is that the construction would be prejudicial to the health and safety of the people of the locality and this is a matter which falls within Sec. 45 of the Act. There is a presumption that the power which is exercised by a public authority is exercised bona fide and the burden of proving that it was otherwise is therefore, on the defendant. The only circumstance on which reliance is placed by the defendant is that the wishes of the landlord have been considered. Though this reason does not fall within Sec. 45 of the Act. I do not think that this fact alone would render the decision of the Committee mala fide or a colourable exercise of power.

13. Accordingly I hold that the refusal by the Municipality to sanction the construction cannot be challenged in civil court. The decision of the appellate court which is based solely on the ground that permission has been unreasonably refused, is thus liable to be set aside.

14. The appeal is allowed. The judgment and decree of the appellate court is set aside and that of the trial court dismissing the suit is restored. The respondent shall pay the costs of the appellant incurred in this Court and both the courts below.