

(2016) 09 BOM CK 0086

BOMBAY HIGH COURT

Case No: First Appeal No. 488 of 2014.

Vandana Creations Pvt. Ltd., A
Company registered under the
Companies Act, 1956, having its
Office at Shop No.2, Rajdoot
Khar Co-operative Housing
Society Ltd., Linking Road, Khar
(West), Mumbai - 400 052.
Through its Director Nanji Vershi
Faria of Mumbai

APPELLANT

Vs

RESPONDENT

Date of Decision: Sept. 14, 2016

Acts Referred:

- Maharashtra Regional and Town Planning Act, 1966 - Section 149, Section 53(1)

Citation: (2016) 6 ALLMR 173

Hon'ble Judges: Dr. Shalini Phansalkar Joshi, J.

Bench: Single Bench

Advocate: Mr. Rakesh M. Pandey, a/w. Mr. Dhananjay Shukla, Advocates, for the
Appellants; Mr. Mohit Jadhav, a/w. Mrs. Madhuri More, Advocates, for the Respondent

Final Decision: Disposed Off

Judgement

Dr. Shalini Phansalkar Joshi, J. (Oral)—This appeal takes an exception to the Judgment and Order dated 16th April 2014 passed by the City Civil Court, Mumbai in L.C. Suit No.1717 of 2013. By the impugned order, Trial Court has rejected the plaint on the count that jurisdiction to entertain the same is barred, in pursuance of Section 149 of Maharashtra Regional and Town Planning Act, 1966, (for short "the M RTP Act"). Needless to state that, appellant original plaintiff is aggrieved by the order.

2. Brief facts of the appeal are to the effect that the appellant is the owner of Shop No.2, situate in Rajdoot Co-operative Housing Society, 57, Linking Road, Khar (West), Mumbai - 400052. He has purchased the said shop from the Builder, namely, M/s. Ankur Developers, by virtue of an agreement dated 9th December 2010. Since the purchase of the said shop, the appellant is carrying on his business activities therein, after obtaining requisite permissions and licenses from the respondent Municipal Corporation.

3. On 17th May 2013, the respondent-Municipal Corporation served on the appellant the notice dated 7th May 2013, issued under Section 53(1) of the MRTP Act. By the said notice, the appellant was informed about certain unauthorized works carried out by him in the said shop premises and he was called upon to demolish or remove the same within the period stipulated therein; that of one month therefrom. The appellant has challenged this impugned notice by filing suit for declaration and injunction before the Trial Court contending, inter alia, that the said notice is issued without any application of mind; hence, it is illegal and bad in law. It is submitted by the appellant that the building proposal and plan for the said building was approved and in the year 2006 itself the occupation certificate was also issued in the year 2012. The appellant has produced on record the commencement certificate and occupation certificate also to prove that, in the year 2007 itself, the commencement certificate was granted. In the year 2009, occupation certificate was granted upto 9th floor and IOD was granted in the year 2006. Thus, the case of the appellant is that, when the construction was completed by the Builder and Developer himself, way back in the year 2009 and occupation certificate was also issued in the year 2009, the impugned notice, alleging therein that appellant has carried out some unauthorized constructions, which are beyond the approved plans dated 22nd May 2012, was totally illegal and on this count, it is required to be quashed and set aside.

4. Along with the suit, the appellant had also filed Notice of Motion seeking relief of interim injunction restraining respondent-Municipal Corporation from taking any action in pursuance of the impugned notice.

5. This Notice of Motion came to be resisted by the respondent Municipal Corporation herein challenging the jurisdiction of the Trial Court to entertain such suit on the count that it is barred by section 149 of the MRTP Act.

6. The Trial Court thereupon framed specific preliminary issue under Section 9A CPC relating to its jurisdiction to entertain the suit in view of bar under Section 149 of MRTP Act by its order dated 17th July 2013. The Trial Court observed that, as the said issue is clearly the question of law, it can be decided on the basis of oral submissions of the advocates for the parties.

7. Accordingly, after hearing the oral submissions advanced by learned counsel for both the parties, the Trial Court has upheld the contention of respondent-Municipal Corporation herein that the suit is not tenable, in view of the bar under Section 149

of the MRTP Act. Accordingly, by its impugned order, the Trial Court was pleased to reject the plaint with costs.

8. This order of the Trial Court is challenged in this appeal by learned counsel for the appellant, by advancing two fold submissions. In the first place, it is submitted that, when the Trial Court was pleased to frame the preliminary issue under Section 9A CPC relating to its jurisdiction to entertain the suit, it was incumbent on the part of the Trial Court to give an opportunity to both the parties to lead oral evidence. The Trial Court has, however, not done so and on this very ground itself, the impugned order of the Trial Court is required to be quashed and set aside.

9. Secondly, it is submitted that, in the present case, extending of such opportunity to the appellant by the Trial Court was utmost essential, as, without leading evidence, the appellant was not in a position to prove that the impugned notice was issued malafide or it was a nullity. By placing reliance on the decision of this Court in the case of Laxman Barkya Wadkar v. Mumbai Municipal Corporation of India in First Appeal No.1635 of 2010, along with connected matters, (Coram : A.S. Oka, J.) (P.C. dated 5th May 2011), it is urged that, if the notice is a nullity, then, the Civil Court alone has the jurisdiction to entertain the suit, which is filed to challenge the legality and validity of the said notice. Here in the case, it is urged that, if the opportunity was given to the appellant to prove that the impugned notice was a nullity or issued without jurisdiction, then, the suit of the appellant would have been definitely maintainable. He has urged that, such issue of jurisdiction cannot be decided without leading evidence and, therefore, as no such opportunity was extended to the appellant to lead evidence, the impugned order of the Trial Court has resulted into miscarriage of justice.

10. Further submission of learned counsel for the appellant is that the impugned notice mentions the sanctioned plan for the said construction as of the year 2012, specifically dated 22nd May 2012. By referring to the various documentary evidence produced by the appellant, like, the occupation certificate, the completion certificate etc., it is urged that, it was way back in the year 2006, the plans were approved. Therefore, according to learned counsel for the appellant, the impugned notice displays non-application of mind also and on this count also, the said notice was a nullity. It is urged by learned counsel for the appellant that, in the reply filed to the Notice of Motion, the respondent-Municipal Corporation has not at all attempted to explain this inconsistency in the date of the sanctioned plan mentioned in the said notice. The only ground on which the suit and the notice of motion was challenged by the respondent Municipal Corporation was about the maintainability thereof, having regard to the bar laid down under Section 149 of the MRTP Act. Thus, in sum and substance, the submission of learned counsel for the appellant is that, the interest of justice can be served only if the appellant is given an opportunity to prove that the impugned notice is a nullity and for that purpose, recording of oral evidence being essential, matter needs to be remanded to the Trial Court for fresh

hearing.

11. Per contra, learned counsel for the respondent-Municipal Corporation has submitted that recording of oral evidence is not a sinequa-non or must in each and every case, when even the preliminary issue is framed. According to him, issue of jurisdiction can be decided on oral submissions and also on perusal of the documentary evidence. In the instant case, it is submitted that the appellant has not made any application or prayer before the Trial Court, seeking permission or opportunity to lead oral evidence. He has relied upon only the voluminous documentary evidence and on the basis of the same and, especially, on the basis of the legal position, as laid down by this Court in various of its authorities relied upon by learned counsel for the appellant, the Trial Court has decided the preliminary issue and no illegality can be found therein.

12. It is urged by learned counsel for the respondent-Municipal Corporation that, even bare perusal of the plaint does not make out a *prima facie* case to show that the impugned notice was a nullity or can be called as nullity, having been issued without jurisdiction on the part of the respondent-Municipal Corporation to take action against the unauthorized constructions. It is argued that, the appellant has not even tried to show that the unauthorized constructions mentioned in the notice were legal, authorised or he has obtained any permission for the same. He has not even replied to the said notice and rushed to the Court. It is urged that, there was no necessity, in such situation, for giving any opportunity to the parties to lead oral evidence, because such evidence was not at all essential in this case. According to learned counsel for the respondent Municipal Corporation, therefore, the impugned order of the Trial Court, being just, legal and correct, does not call for any interference, as the Trial Court has, after considering all the aspects, rejected the plaint.

13. Having considered the submissions advanced by learned counsel for the appellant and respondent-Municipal Corporation, in my opinion, it would be useful to refer to the impugned notice dated 7th May 2013, which is produced in the paper-book at Appendix-6, Page No.329. The said notice is specifically issued under Section 53(1) of the MRTP Act and by the said notice, the appellant's attention is drawn to the following unauthorized constructions made by the appellant, in his shop premises :

- (i) Unauthorized additions and alterations on ground floor and basement of Shop No.2 beyond BCC accepted plans under No.CE/2186/WS/AH dated 22.5.2012.
- (ii) Merging of the AHU passage, lifts (2 Nos.) and staircase block area at ground floor in the existing Shop No.2.
- (iii) Proposed earth filing area in basement is converted into the extension to the store approved for departmental store.

(iv) Part basement portion approved for office store is converted into part departmental stores.

14. As per the said notice, appellant is informed that the said unauthorized constructions undertaken or carried out were without the permission required under the MRTP Act and it was also not in accordance with the permission granted as per the approved plans under No.CE/2186/WS/AH dated 22nd May 2012 by H/West Ward. The appellant was, therefore, called upon to restore the work to its original position as per OCC Plans approved and the BCC (Building Completion Certificate) accepted under No.CE/2186/WS/AH dated 22nd May 2012. It was specifically informed to the appellant that if he fails to comply with the aforesaid requisition, he will be liable for prosecution under the MRTP Act and the aforesaid requisition will be carried out at the risk and costs of the appellant.

15. It is not disputed and cannot be disputed that the respondent Municipal Corporation, being the Town Planning Authority, is fully justified and within its jurisdiction to issue such notice, whenever any unauthorized construction is noticed or reported to it, by any citizen or the resident. Here in the case, notice also shows that such unauthorized works, as carried out by the appellant, being reported, the respondent-Municipal Corporation was constrained to issue the notice. That jurisdiction of the Municipal Corporation to issue such notice, being the Town Planning Authority, cannot, at all, be disputed or challenged.

16. Now whether such construction is authorised and legal or carried out after obtaining necessary permission from the respondent-Municipal Corporation, the burden to show it was lying on the appellant. He has to either give reply to the said notice by showing that this construction is legal and not at all unauthorized. The appellant has, admittedly, not given any reply to the said notice and straightway rushed to the Court. At-least in the Court, he should have, relying upon the sanctioned plan or some other document, shown that this construction was reflected in the approved sanctioned plan. He has not done that also. In such situation, merely saying that the impugned notice is illegal and bad in law is not sufficient, without, in some way, justifying in which way it is illegal or bad in law. On the bare perusal of the plaint also, it is nowhere stated that the said construction or the work alleged to be unauthorized in the notice is in existence or is carried out in accordance with the sanctioned plan.

17. In the light of this factual position, it cannot be disputed that the bar under Section 149 of the MRTP Act to the maintainability of the suit challenging the said notice gets clearly attracted to the facts of the present case.

18. In view of the law laid down by this Court in the case of **Prathamesh Tower Co-operative Housing Society Limited v. Gorai Road (Borivali) Shree Ganesh Co-operative Housing Society Ltd. & Ors., 2013 (4) Mh.L.J. 918**, it was clearly held that, as the MRTP Act is a self-contained Code, to provide the remedies when the

notice is issued under the MRTP Act, jurisdiction of the Civil Court is expressly and clearly excluded under Section 149 of the said Act. It was further held that, under the provisions of MRTP Act, it is statutory responsibility of the local Planning Authority to execute the final development plan effectively without delay and hence the Planning Authority is adequately armed under the statutory provisions to take prompt and effective steps to remove unauthorized development, if unauthorized development in the form of illegal construction contrary to the Town Planning Scheme is noticed in the city. Therefore, Legislature, in its wisdom has made all the acts done by the Planning Authority to implement the Town Planning Scheme "final" under the provisions of the MRTP Act and, therefore, all such notices and orders giving the statutory finality are specifically made immune from being challenged or questioned in any Civil Court, in view of the provisions under Section 149 of the MRTP Act. Once, therefore, such notice is issued, then, the only remedy available to the party is to approach the Municipal Corporation and do the needful as called upon in the said notice, or even to obtain the permission under the said Act to carry out or retain the alleged unauthorised work. Thus, the jurisdiction of the Civil Court is expressly and clearly excluded under Section 149 of the MRTP Act.

19. The only eventuality in which such notice can be challenged in the Civil Court is *prima facie* showing that the said notice is a nullity or issued without jurisdiction; as held by this Court in the case of Laxman Barkya Wadkar (*supra*). In this decision, this Court has clearly laid down that the jurisdiction of the Civil Court is excluded in view of the bar created under Section 149 of the MRTP Act except in a case when there is an allegation made in the plaint that action of issuing notice under Section 53(1) or Section 55 of the MRTP Act is nullity or without jurisdiction. It was held that, to invoke its jurisdiction, the Court has to be satisfied *prima facie* that the action impugned appears to be nullity or without jurisdiction. However, in the instant case, there is absolutely no pleading, supported with the material to aver that the impugned notice issued by the respondent Municipal Corporation is without jurisdiction or nullity. Mere averment in the plaint that it was illegal or bad in law does not make it nullity or without jurisdiction. This argument that notice is a nullity also appears to be advanced just by taking benefit of the law laid down in the case of Laxman Barkya Wadkar (*supra*), giving a leave-way to the party to challenge the notice on the ground of nullity or being without jurisdiction.

20. In the instant case, therefore, once it is accepted that the Municipal Corporation, being a Planning Authority under the MRTP Act, is bound to take action against unauthorized constructions, the notice issued to remove such unauthorized constructions, that too, under the express provisions of Section 53(1) of the MRTP Act, can never be called as nullity or issued without jurisdiction.

21. As to the submission that the Trial Court has not given an opportunity to the appellant to lead oral evidence, in this respect also, it has to be held that, the Trial Court has rightly observed that the preliminary issue of jurisdiction in this case can

be decided on legal submissions. It was essential for the appellant, on bare reading of the plaint and on the basis of the documents produced by him, to *prima facie* show that the impugned notice was a nullity or issued without jurisdiction. The appellant has not done that. Hence, no purpose could have been achieved by giving him an opportunity of leading oral evidence. Though it is true that whether the notice is nullity or not, it can be decided on evidence being led; however, evidence need not be always oral evidence. It can be documentary evidence also. Here in the case, whatever documents, the appellant wanted to rely upon, he has produced the same along with the plaint and those documents do not make out the case that the impugned notice was either nullity or without jurisdiction.

22. Therefore, looked at it from any angle, it cannot be said that the impugned order passed by the Trial Court, rejecting the plaint suffers from any illegality or calls for any interference. The Appeal, therefore, holds no merit and hence stands dismissed.

23. In the circumstances, parties to bear their own costs.

24. At this stage, learned counsel for the appellant submits that whatever interim protection was granted during pendency of this appeal be extended for a further period of twelve weeks from today, so that the appellant can approach the Hon'ble Supreme Court against the order passed by this Court.

25. Learned counsel for the respondent-Municipal Corporation strongly objects to the extension of such interim relief on the count that the unauthorized construction carried out by the appellant is causing danger to the safety of the building itself. The livelihood of the persons residing therein is also being endangered due to merging of the passages, lifts, staircase area; and the changes made in the basement etc. According to him, hearing of the appeal was expedited only with an intention to ensure that the safety and security of the building and the persons residing therein is guaranteed or maintained.

26. It may be true that, there was interim protection granted to the appellant during the pendency of the appeal, but then the fact remains that the appellant is at present also not remediless. As held in the case of Prathamesh Tower Co-operative Housing Society Ltd. (*supra*), he can still approach the respondent-Municipal Corporation and get the necessary permission. So, proper course would be, giving him time not only to approach the Supreme Court but also to apply to the respondent-Municipal Corporation for permission under Section 44 r/w. Section 53 of the MRTP Act. Hence, for availing either of these two remedies, interim protection granted earlier by this Court is continued only for a period of four weeks from today, with further clarification that no further extension will be granted.