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Emerald Haven Development Ltd Vs. Assistant Director Town Planning (south)

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Court : Karnataka

Decided On : Dec-01-2023

Judge : Suraj Govindaraj

Appeal No. : WP 20852/2023

Appellant : Emerald Haven Development Ltd

Respondent : Assistant Director Town Planning (south)

Judgement :

- 1 - NC:

2023. KHC:43631 WP No.20852 of 2023 R IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE1T DAY OF DECEMBER, 2023 BEFORE THE HON'BLE MR JUSTICE SURAJ GOVINDARAJ WRIT PETITION No.20852 OF2023(LB-BMP) BETWEEN EMERALD HAVEN DEVELOPMENT LTD A COMPANY REGISTERED UNDER THE COMPANIES ACT, 1956 HAVING REGISTERED ADDRESS AT ISPAHANI CENTRE, 4TH FLOOR NO.123, 124 NUNGAMBAKKAM HIGH ROAD NUNGAMBAKKUM CHENNAI-600034 REPRESENTED BY ITS AUTHORIZED REPRESENTATIVE RAMAN MURALI ...PETITIONER (BY SRI: UDAYA HOLLA., SR. ADVOCATE FOR SRI. GEORGE JOSEPH., ADVOCATE) AND1 ASSISTANT DIRECTOR TOWN PLANNING

(SOUTH) BRUHAT BENGALURU MAHANAGARA PALIKE N R SQUARE BENGALURU-560002 2. JOINT DIRECTOR TOWN PLANNING(SOUTH) BRUHAT BENGALURU MAHANAGARA PALIKE N R SQUARE BENGALURU-560002 - 2 - NC:

2023. KHC:43631 WP No.20852 of 2023 3. KAVITHA VISHWANATH W/O G R VISHWANATH AGED ABOUT 62 YEARS R/A NO.559, 9TH CROSS, 3RD PHASE J P NAGAR, BENGALURU-560078 RESPONDENTS (BY SRI. MONESH KUMAR K.B., ADVOCATE FOR R1 & R2; SRI. B.K. SAMPATH KUMAR., SR. ADVOCATE FOR SRI. SURAJ SAMPATH., ADVOCATE FOR R3) THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO ISSUE OF CERTIORARI OR ANY OTHER APPROPRIATE WRIT,

ORDER

OR DIRECTION QUASHING THE IMPUGNED NOTICE BEARING No. JAM NINAYO(DHA)/P/R/551/23-24 DATED 14.09.2023 ISSUED BY THE R1 (VIDE ANNEXURE-A) AND CONSEQUENTLY QUASH ALL ACTIONS PURSUANT TO THE SAME AND ETC. THIS WRIT PETITION COMING ON FOR

ORDER

S AND HAVING BEEN RESERVED FOR

ORDER

S ON 15.11.2023, THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

ORDER

1 The petitioner is before this Court seeking for the following reliefs: a. Issue a writ of certiorari or any other appropriate writ, order or direction quashing the impugned notice bearing No. JamNiNa Yo(dha)/PR/551/23- 24 dated 14.09.2023 issued by the respondent No.1 (Vide Annexure-A) and consequently quash all actions pursuant to the same; b. Issue a writ of certiorari or any other appropriate writ, order or direction quashing the entire proceedings pending before the Bruhat Bengaluru Mahanagara Palike instituted on the basis of the - 3 - NC:

2023. KHC:43631 WP No.20852 of 2023 complaint dated 25.08.2023 filed by respondent No.3 vide Annexure-C against the petitioner; and c. Pass any other order or direction as this Hon'ble Court deems necessary in the interests of justice and equity.

2. The petitioner claims to be the owner of 4 acres of land in Sy.No.63/2 to 63/6 of Basapura Village, Begur Hobli, Bengaluru South Taluk. As regards which the petitioner having obtained a plan sanction has commenced construction and put up around 18 floors excluding the basement floor.

3. On a complaint filed by respondent No.3 on 25.08.2023, respondent No.1- Assistant Director, Town Planning (South) issued a notice on 14.09.2023 stating that there is a complaint which has been received from respondent No.3 as regards 1 acre of land belonging to respondent No.3 having been encroached upon by the petitioner and in that background the respondent No.1 called upon the petitioner to furnish all the necessary documents relating thereto and answer the notice dated - 4 - NC:

2023. KHC:43631 WP No.20852 of 2023 14.09.2023. In the meanwhile, called upon the petitioner to stop further construction. It is aggrieved by the same, the petitioner is before this Court.

4. Sri. Udaya Holla, learned Senior Counsel appearing for the petitioner, would submit that; 4.1. the land in Sy. No.63/2 to 63/6 was earlier part of Sy. No.63 which in all measured 6 acres 31 guntas, out of which 4 acres was sold by the owner thereof on 17.02.1986 namely P.M.Krishnappa and P.M.Chennarayappa in favour of Sumedha Satish Khatkhate represented by the respondent No.3-Kavitha Vishwanath as power of attorney. 4.2. the said 4 acres were thereafter sold to various other persons and subsequently, those persons had entered into an agreement of sale with M/s.Duo Associates (Builders) Pvt.-. 5 - NC:

2023. KHC:43631 WP No.20852 of 2023 Ltd. Thereafter, the owners of the property, along with Duo Associates as a confirming party, executed a sale deed in favour of the petitioner on 29.04.2019 for the said extent of 4 acres and it is in pursuance thereof that the katha has been transferred in the name of the petitioner

and construction taken up. 4.3. Even prior to the said sale, there was a conversion of land from agriculture to non- agriculture residential purposes, which took place on 25.01.2019. Katha came to be issued by the BBMP on 23.07.2019, and a building license and sanction plan came to be issued by BBMP on 21.04.2022. In January 2022, property was subjected to the provisions of the Real Estate Regulatory Authority, and construction commenced thereon. 4.4. After the construction was commenced, a suit was filed by respondent No.3 in - 6 - NC:

2023. KHC:43631 WP No.20852 of 2023 O.S.No.581/2023 seeking a mandatory injunction to remove certain encroachments on the alleged property of respondent No.3 and declaration of respondent No.3 as an owner thereof. But however, in the schedule, it is stated that the property measures 3 acres 30 guntas situated in Sy. No.65/2 (which has to be rectified as part of Sy.No.63); this suit having been filed on 23.01.2023, he submits an interlocutory application for injunction restraining the petitioner from putting up construction in the property is also pending and arguments have already been advanced by the plaintiff therein i.e., respondent No.3 herein and the matter is scheduled for today (15.11.2023) for arguments of the petitioner. 4.5. The BBMP does not have any power to adjudicate as regards encroachment if at all, that would have to be adjudicated in the civil - 7 - NC:

2023. KHC:43631 WP No.20852 of 2023 suit, which is pending. The BBMP cannot, on the basis of a complaint of encroachment, restrain the petitioner from putting up any construction. Moreso when there will be no purpose served by enquiry by the BBMP into the matter, since the BBMP would have no power to decide on encroachment or title of the property. 4.6. he submits that Clause 45 of the Conditions of approval of the plan sanction is not attracted in the present matter since the suit was filed on 23.01.2023 whereas the plan was sanctioned on 21.04.2022 nearly a year prior to the filing of the said suit as on the date on which the plan was sanctioned there was no suit which was pending. He places reliance on Clause 45 and in support of the above, he relies upon the decision of this Court in Deccan Enterprises vs. Commissioner - 8 - NC:

2023. KHC:43631 WP No.20852 of 2023 reported in ILR1993 Kar 3280 more particularly Para 9 thereof.

9. The fact that Rajabalan has filed a suit against the petitioner by itself is no ground for rejecting the application of the petitioner seeking permission to construct a building. None of the grounds enumerated in Section 303 of the Act provides that institution of a suit by a third party against the petitioner is a ground by itself for refusing permission. 4.7. The decision of another Co-ordinate Bench of this Court in the case of Sri.Maheboob vs. The Commissioner and another¹ more particularly Para 16 thereof.

16. In Deccan Enterprises case referred to supra, this Court has held that, an application for grant of building license can be rejected only on the ground enumerated in Section 303 of the Karnataka Municipal Corporations Act, 1976 and the pendency of the Civil suit does not bar the Municipal Corporation/ Commissioner from issuing license or the same itself is not ground to reject the application. There is no merit in the petitions. Therefore petitions are dismissed. 4.8. The decision of the Co-ordinate Bench of this Court in the case of S.Rajachandran Nair & another vs. The Commissioner & others² 1 W.P.No.100105/2018 and connected matter dated 07.02.2018 2 W.P.Nos.2395-2396/2019 dated 08.02.2019 - 9 - NC:

2023. KHC:43631 WP No.20852 of 2023 more particularly Para 5 and 6 thereof which are reproduced here:

5. The respondent-BBMP could not have ventured, deciding the title dispute especially when petitioners civil suit in O.S.No.5429/2017, for declaration of title and consequential injunction between himself and 3rd respondent herein, is pending adjudication before the City Civil Court, Bangalore.

6. In the above circumstances, these Writ Petitions succeed in part; a Writ of Certiorari issues, quashing the impugned order dated 18.12.2018 made by the Joint Commissioner of BBMP at Annexure - A; the entries as before making of the impugned order, shall be restored in respect of the petition property, subject to outcome of the pending suit mentioned above. It is needless to mention that the petitioner shall not seek unnecessary adjournment in the suit proceedings. All contentions of the parties are kept open for being urged in the suit and the observations made hereinabove being confined to disposal of this case, shall not

influence the decision making in the said suit. Costs made easy. 4.9. Relying on the above, he submits that even if a suit had been filed prior to the sanction of a plan Co-ordinate Benches of this Court have held that such suit would not come in the way of sanction of plan and in the present case the - 10 - NC:

2023. KHC:43631 WP No.20852 of 2023 suit having been filed much subsequent to the sanction of the plan cannot be a ground to exercise any powers under Sections 303 and 304 of the Karnataka Municipal Corporations Act, 1976 as it stood earlier and now under Sections 238 and 240 of the BBMP Act, 2020. On all the above grounds, he submits that notice at Annexure-A being without jurisdiction is required to be quashed.

5. Sri.B.K.Sampath Kumar, learned Senior counsel appearing for respondent No.3 would submit that; 5.1. respondent No.3 had purchased property situated to the South of the property of the petitioner under a sale deed dated 24.03.1986 to an extent of 3 acres 30 guntas thus as such there is no dispute as regards respondent No.3 owning 3 acres 30 guntas. However, the Survey number which has been mentioned in the said sale deed being 65/2 is by way of - 11 - NC:

2023. KHC:43631 WP No.20852 of 2023 mistake since Sy.No.63 runs on East to West access and not North to South access and that the Special Tahsildar has submitted a report on 19.11.2021 that there is a error which has crept into the numbering of various survey numbers in the second reclassification survey conducted in the year 1959 which needs to be rectified and it is in that background respondent No.3 had approached the Tahsildar for rectification when the Assistant Commissioner had initiated suo moto proceedings for rectification where the petitioner had impleaded himself as a party respondent on 18.01.2022. 5.2. Though the said proceedings have been dismissed, the report of the Special Tahsildar would require re-numbering of the survey numbers and until then the petitioners would have to be restrained from putting up any - 12 - NC:

2023. KHC:43631 WP No.20852 of 2023 further construction which is what the BBMP has done and as such this Court ought not to intercede in the matter. 5.3. There is false information furnished by the petitioner as regards the identity of the property, boundaries of the property, location of the property and measurement of

the property. Inasmuch as the petitioner has encroached upon 1 acre of land of respondent No.3 and this false information submitted would be a ground for cancellation of the plan which BBMP has initiated proceedings for. 5.4. His further submission is that there is misrepresentation of facts by the petitioner inasmuch as the boundaries in the sale deeds in favour of the vendors of the petitioner and the boundaries in the sale deed in favour of the petitioner differ. The first set of sale deeds - 13 - NC:

2023. KHC:43631 WP No.20852 of 2023 refer to the owners of the land, the second set of sale deeds refer to the survey number and this change in the reference has been made to encroach upon the land of the petitioner to the detriment of respondent No.3 which being a misrepresentation, the plan is required to be cancelled. 5.5. His last submission is as regards the judgments relied upon by the learned counsel for the petitioner is that all those judgments were once rendered prior to the sanction of the plan. In the present case, the plan having already been sanctioned and there being false information submitted, misrepresentation of facts made and there being pending court proceedings the plan would have to be cancelled by the BBMP in terms of Clause 45 of the Conditions of approval.-. 14 - NC:

2023. KHC:43631 WP No.20852 of 2023 5.6. He relies on the decision of the Hon'ble Apex Court in the case of Union of India and Others vs. N.Murugesan³ more particularly Paragraphs 26 and 29 which is reproduced hereunder for reference:

26. These phrases are borrowed from the Scotts law. They would only mean that no party can be allowed to accept and reject the same thing, and thus one cannot blow hot and cold. The principle behind the doctrine of election is inbuilt in the concept of approbate and reprobate. Once again, it is a principle of equity coming under the contours of common law. Therefore, he who knows that if he objects to an instrument, he will not get the benefit he wants cannot be allowed to do so while enjoying the fruits. One cannot take advantage of one part while rejecting the rest. A person cannot be allowed to have the benefit of an instrument while questioning the same. Such a party either has to affirm or disaffirm the transaction.

This principle has to be applied with more vigour as a common law principle, if such a party actually enjoys the one part fully and on near completion of the said enjoyment, thereafter questions the other part. An element of fair play is inbuilt in this principle. It is also a species of estoppel dealing with the conduct of a party. We have already dealt with the provisions of the Contract Act concerning the conduct of a party, and his presumption of knowledge while confirming an offer through his acceptance unconditionally. 3 Civil Appeal Nos.2491-2492/2021 dated 7.10.2021 - 15 - NC:

2023. KHC:43631 WP No.20852 of 2023 29.The aforesaid principle is also required to be adopted while considering a case involving approbation and reprobation.

6. Sri. Monesh Kumar.K.B., learned counsel appearing for the BBMP submits that; 6.1. a complaint having been received from respondent No.3, proceedings have been initiated by issuing a notice to the petitioner, there will be an enquiry which will be conducted by the BBMP into the allegations made by the respondent No.3 and suitable orders would be passed. 6.2. He fairly concedes that the said Clause 45 has not been relied upon by the BBMP in its notice nor any power exercised in terms thereof. 6.3. On enquiry as to what enquiry the BBMP will conduct in terms of the complaint received from respondent No.3, he submits that - 16 - NC:

2023. KHC:43631 WP No.20852 of 2023 enquiry would have to be in terms of whether there is any lacuna in the approval process resorted to by BBMP and while considering the grievance of respondent No.3. 6.4. On these ground, he submits that respondents Nos.1 and 2, having jurisdiction in the matter, have rightly issued the notice towards which a reply has been issued, thereby submitting to the jurisdiction of BBMP. 6.5. The petitioner having accepted the plan sanction is deemed to have accepted all the conditions accompanying such plan sanction, the petitioner cannot approbate or reprobate by having once started construction to find any fault with Clause 45.

7. Heard Sri.Udaya Holla, learned Senior Counsel for the petitioner, Sri.B.K.Sampath Kumar, learned Senior Counsel for respondent No.3 and Sri.Monesh - 17 - NC:

2023. KHC:43631 WP No.20852 of 2023 Kumar.K.B, learned counsel for respondent Nos.1 and 2.

8. The points that would arise for consideration are:

1. Whether the BBMP has any power or authority to enquire into an allegation made for encroachment by a party in relation to a plan sanctioned by the BBMP?.

2. Whether Clause-45 of the terms of approval of the building plan require or contemplate the existence of a litigation prior to sanction of plan or even a litigation post to the sanction of plan could be taken into consideration for invoking Clause 45?.

3. Whether this Court can go into the issue of various disputed facts insofar as wrong numbering in the survey carried out in the year 1959, encroachment or otherwise when a suit in O.S.No.581/2023 renumbered as O.S.No.781/2023 dealing with the very same aspect is pending on the file of I Addl. Senior Civil Judge, Bengaluru Rural?.

4. What order?.

9. I answer above points as under; 10. Answer to point No.1: Whether the BBMP has any power or authority to enquire into an - 18 - NC:

2023. KHC:43631 WP No.20852 of 2023 allegation made for encroachment by a party in relation to a plan sanctioned by the BBMP?. 10.1. The BBMP being a Municipal Corporation or Statutory Corporation can only carry out duties in terms of the BBMP Act, 2020. BBMP is not a judicial authority which can conduct an enquiry into disputed questions of facts. Any aspect as regards the encroachment per se would not be an aspect which comes within the preview of BBMP. However, in the event of there being a violation of the plan sanction i.e., to say that there is a deviation therefrom and excess construction is carried out, an irrespective of whether there is an encroachment or not in so far as the deviation from the plan, the BBMP would have jurisdiction. 10.2. Thus, the aspect of encroachment would have to be looked at from two different - 19 - NC:

2023. KHC:43631 WP No.20852 of 2023 perspectives (1) purely as encroachment (2) encroachment on account of violation of plan sanction. 10.3. Thus, I answer point No.1 by holding that the BBMP would not have any power or authority to enquire into an allegation made as regards encroachment simpliciter made by a party. However, BBMP would have jurisdiction to enquire into whether the construction being put up or put up is in accordance with the plan sanction granted which can be done without reference to any particular encroachment of the property.

11. Answer to point No.2: Whether Clause-45 of the terms of approval of the building plan require or contemplate the existence of a litigation prior to sanction of plan or even a litigation post to the sanction of plan could be taken into consideration for invoking Clause 45?. - 20 - NC:

2023. KHC:43631 WP No.20852 of 2023 11.1. Clause 45 of the plan sanction is extracted hereunder for easy reference; 45. In case of any false information, misrepresentation of facts, or pending court cases, the plan sanction is deemed cancelled. 11.2. A perusal of the said clause would indicate that if there is any litigation which had not been brought to the notice of the corporation or if there is suppression of litigation, then the plan sanction would stand cancelled. Necessarily the said reference to litigation can only to a litigation pending as on a date on which the application for plan sanction was made. Since, if such litigation has been brought to notice of the plan sanctioning authority there might have been a requirement for such authority to issue notice to such litigants and/or the plan sanctioning authority would have been entitled to reject the application for plan sanction.-. 21 - NC:

2023. KHC:43631 WP No.20852 of 2023 11.3. Such a condition can only relate to suppression of fact of pendency of litigation. Since, the party who had approached the corporation has suppressed it. This would require a wanton act on part of the applicant a knowingly having suppressed an existing litigation. 11.4. Even to invoke Clause 45 the corporation would have to issue notice to the persons in whose favour the plan sanction has been granted, give such person an opportunity to respond thereto to hear such person and thereafter pass a reasoned order after

complying with the principles of natural justice, without such compliance no such order can be passed, it being required to be determined if the person or entity who had applied for plan sanction has knowing the existence of such litigation suppressed it.-. 22 - NC:

2023. KHC:43631 WP No.20852 of 2023 11.5. If arguments of Sri.B.K.Sampath Kumar., learned senior counsel appearing respondent No.3 is accepted then merely because of a suit/proceedings is filed after a plan has been sanctioned, it would lead to automatic cancellation of the plan which in my considered opinion is not contemplated under Clause 45. The object of Clause 45 appears to be only to put an applicant to terms that he as to disclose all material facts including the fact of pendency of any litigation/proceedings. It does not therefore contemplate a subsequent litigation. 11.6. Thus, I answer point No.2 by holding that Clause 45 of the terms of approval of the building plan requires or contemplates the existence of the litigation prior to sanction of - 23 - NC:

2023. KHC:43631 WP No.20852 of 2023 plan and does not refer to a litigation post the sanction of plan.

12. Answer to point No.3: Whether this Court can go into the issue of various disputed facts insofar as wrong numbering in the survey carried out in the year 1959, encroachment or otherwise when a suit in O.S.No.581/2023 renumbered as O.S.No.781/2023 dealing with the very same aspect is pending on the file of I Addl. Senior Civil Judge, Bengaluru Rural?. 12.1. The submission of Sri.B.K.Sampath Kumar., learned senior counsel appearing respondent No.3 , is based on a report of the Special Tahsildar dated 19.11.2021 that there is an error which has occurred in the 2nd reclassification survey conducted in the year 1959. It is rather shocking that the special tahsildar has issued such a report on 19.11.2021 finding fault with the survey conducted in the year 1959. It would be for the Principal Secretary, Revenue Department - 24 - NC:

2023. KHC:43631 WP No.20852 of 2023 to look into this matter and take necessary action. 12.2. In so far as the contentions raised by Sri.B.K.Sampath Kumar., learned senior counsel that the land of the respondent No.3 though shown in the sale deed to be that in Sy.No.65/2, the same is by mistake and actually

refers to Sy.No.63. The contentions as regards the boundaries of the property, the dispute raised as regards the location of the property of the petitioner, re-survey the property of respondent No.3 are all matters which are pending consideration in the suit in OS No.581/2023 which is now re-numbered as OS No.781/2023. Thus, all these aspects relating to disputed question of facts of encroachment or otherwise cannot be gone into by this court in a writ proceeding.-. 25 - NC:

2023. KHC:43631 WP No.20852 of 2023 13. Answer to point No.4: What order?. 13.1. The impugned notice having been issued by respondent No.1 on the basis of a complaint filed by respondent No.3, admittedly are not based on Clause 45 of the terms of approval, the corporation could not have initiated a roving enquiry into the matter when even according to the parties there is a suit filed subsequent to the plan being sanctioned which is pending consideration by the jurisdictional court. Even if it were to be under Clause 45 then as held above the litigation being subsequent to the sanction of plan cannot be a basis of enquiry under Clause 45. 13.2. In so far as the allegation that there is misrepresentation made and/or false information submitted by the petitioner at the time of sanction of plan, these are all matter which cannot be adjudicated by respondent No.1. Thus, there would be no purpose served by the petitioner-respondent to the - 26 - NC:

2023. KHC:43631 WP No.20852 of 2023 impugned notice and/or submitting any papers to respondent No.1. 13.3. The plan sanctioned in favour of the petitioner being valid and in subsistence and the construction put up by the petitioner being always subject to the suit now pending in OS No.781/2023, I am of the considered opinion that the corporation-authorities ought to have directed respondent No.3 to seek for necessary reliefs in the said proceedings and not launched a parallel roving enquiry. 13.4. The Civil Court being ceased of title of property, location of the property, right of the petitioner to construct, there being an application for injunction restraining construction, right to sale of the petitioner there being an application seeking for an order restraining the petitioner from putting up of construction, all these aspects would have to be considered in OS No.781/2023.-. 27 - NC:

2023. KHC:43631 WP No.20852 of 2023 The fact that the petitioner is continuing to construct on the said property being fully aware of the pendency of the OS No.781/2023 any action taken by the petitioner would be subject to the principle of lis pendens and petitioner cannot therefore claim any equity. 13.5. However, the petitioner cannot be restrained from putting up the construction merely because a suit has been filed subsequent to plan sanction having been granted until the adjudication thereof. Hence, I pass the following;

ORDER

i. The writ petition is allowed. ii. A certiorari is issued, notice bearing No No.JamNiNa Yo(dha)/PR/551/23-24 dated 14.09.2023 issued by the respondent No.1 at is hereby quashed. iii. The proceedings pending before the BBMP on the basis of the complaint - 28 - NC:

2023. KHC:43631 WP No.20852 of 2023 dated 25.8.2023 vide Annexure-C is hereby quashed. iv. The petitioner shall be bound by any order passed in OS No.781/2023, and any transaction would be subject to the principles of Lis Pendens as contained in Section 52 of the Transfer of Property Act. v. The Petitioner if were to continue with the construction would not be entitled to claim any equities if adverse orders are passed against the Petitioner in the civil suit. Sd/- JUDGE NS/SR List No.:

1. SI No.:

10.

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