

Maan Singh Vs. Executive Engineer, Housing Board Division No. 1, Jammu and anr.

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Court : Jammu and Kashmir

Decided On : Mar-11-1998

Reported in : AIR1999J& K115

Judge : Arun Kumar Goel, J.

Acts : Jammu and Kashmir Municipal Act, 1951 - Section 229 and 229(6)

Appeal No. : Civil Revn. No. 101/95

Appellant : Maan Singh

Respondent : Executive Engineer, Housing Board Division No. 1, Jammu and anr.

Advocate for Def. : N.A. Chowdhry and; S.S. Nanda, Adv.

Advocate for Pet/Ap. : Surrinder Kaur, Adv.

Disposition : Revision allowed

Judgement :

Arun Kumar Goel, J.

1. This is a revision directed against the judgment dated 18-7-1995 passed by District Judge, Jammu, where by two separate appeals, one filed by respondent No. 1 and the other on behalf of respondent No. 2, have been allowed.

2. Brief facts giving rise to this revision are that Mann Singh, petitioner (hereinafter referred to as the plaintiff) filed a suit for permanent prohibitory injunction under Section 54 of the Specific Relief Act restraining the respondent No. 2 and its Executive Officer (hereinafter referred to as 'thedefendants') from interfering/demolition/altering the construction of the plaintiff in House No. 73-A, Gandhi Nagar, Jammu, on the basis that he is the owner of the said house and he had raised some kacha construction including shops towards the western side of his residential house for the last several years. Since the kacha construction including the shops had fallen due to heavy rains and were in dilapidated condition which resulted in the plaintiff suffering heavily, so he converted the kacha into pakka ones without having raised any new construction and this construction was complete. Further case of the plaintiff was that defendants without adopting the procedure prescribed under rule and law and without hearing the plaintiff are likely to demolish or destroy his properties, thus in this background permanent injunction was prayed for, which if not granted was likely to cause irreparable loss to him. This suit was contested and resisted by the defendants, while controverting the pleas of the plaintiff in the plaint, it was pleaded that the jurisdiction of the civil court is barred and the suit was not maintainable. It was also pleaded on behalf of Municipality, Jammu, that the plaintiff has carried out erection/re-erection of the building without obtaining proper sanction in accordance with the provisions of the Jammu and Kashmir Municipal Act (hereinafter referred to as 'the Act'), not only this but it was further pleaded that since after the issuance of notice in accordance with the provisions of Section 229 of the Act, no cause was shown, therefore, the said defendant was left with no option but for ordering demolition of the unauthorised construction undertaken by the plaintiff in accordance with law. Alternatively, it was pleaded that in case plaintiff has any grievance. Forum for redressal of the same is the J. and K. Special Tribunal and not the civil court.

3. It may also be clarified that the suit was initially filed against Municipality Jammu through its Administrator, however, its Executive Officer was also added as

defendant No. 2. Record of the said defendant shows that the land whereon unauthorised construction was carried out by the plaintiff belongs to Housing Board of the State of Jammu and Kashmir, who was totally oblivious of its duty to protect its property for obvious reasons. It appears that when the suit was filed order of status quo was passed by the trial Court, however, case of the plaintiff is that despite service of the said order of status quo, demolition was carried illegally and unauthorisedly. On the other hand, stand of the defendants is that the demolition had been carried out before service of the order of status quo upon them.

4. Record of the trial Court shows than an application was filed by the plaintiff for restoring status-quo ante. Plaintiff was permitted to take proper steps for restoring the original position of two old shops and the defendants were not to interfere in such restoration of the said shops on the condition that the former would file an undertaking that he shall not claim any compensation and shall remove these shops in case he fails in the suit, remaining prayer made in the application filed by the plaintiff was declined. It was against this order that appeals came to be filed as noted above, wherein impugned order has been passed.

5. At the very outset, learned counsel appearing for Municipality, Jammu, pressed into service the bar of Section 229(6) of the Act. It is appropriate to notice the provisions of Section 229 of the Act, which are to the following effect:

'229. Penalty for disobedience.-- (1) Should a building be erected or re-erected-

(a) without sanction as required by Section 221(1); or

(b) without notice as required by Section 221(2); or

(c) when sanction has been refused; or

(d) in contravention of the terms of any sanction granted; or

(e) when the sanction has lapsed or has been revoked under Section 224; or

(f) in contravention of any bye-law made under Clause (27) of Section 261; or

(g) in the case of a building of which erection has been deemed to be sanctioned under Section 222(4) if it contravenes any bye-law or any scheme sanctioned under the Jammu and Kashmir State Town Planning Act, 1963.

the Executive Officer shall issue a notice in writing stating the reasons, calling upon the person to show cause within a period of three days, if the contravention relates to Clauses (a), (b), (c) or (d) and within five days if contravention relates to Clause (e), (f) or (g) why the building should not be altered or demolished as he may deem necessary to remove the contravention.

(2) The Executive Officer shall cause the notice to be affixed on the outer door or some conspicuous part of the building whereupon the notice shall be deemed to have been duly served upon such person.

(3) If the person to whom notice has been given refuses or fails to show cause within the period specified under Sub-section (1) of its service upon him or if after hearing that person and considering any evidence which he may produce in support of his claim within that period, the Executive Officer is satisfied that the erection of the building is in contravention of the provisions of this Section, he shall by order direct the person to demolish, alter or pull down the building or part thereof so far as is necessary to remove the contravention within seven days, if the person fails to comply with the direction, the Executive Officer shall after the expiry of the said period of seven days cause the building or part thereof to be demolished altered or pulled down as the case may be and may for that purpose use such police force as may be necessary.

(4) Any person aggrieved by the order of the Executive Officer directing the person to demolish, alter or pull down the building or part thereof under Sub-section (3) may prefer an appeal to the Minister Incharge Local Self Government or the authority appointed by him in this behalf within seven days after the date of the aforesaid order of the Executive Officer. The memorandum of appeal need not be accompanied by a copy of order appealed from;

Provided that the Minister Incharge Local Self Government or the authority appointed by him in this behalf shall decide the appeal within ten days from the

date of appeal is filed;

Provided further that the Minister Incharge Local Self Government or the authority appointed by him in this behalf, may either before or after the filing of the appeal, compound the offence and accept by way of compensation such sum as he or it may deem reasonable subject to such rules, regulations and orders as may be prescribed. Where an offence has been compounded no further action shall be taken against the aggrieved person in respect of the offence so compounded.

(5) An appeal against the order of the Executive Officer shall not operate as stay of proceeding under the order appealed from;

Provided that the Minister Incharge Local Self Government of the authority appointed by him in this behalf may stay the enforcement of that order if he is satisfied -

(a) that substantial loss may result to the person applying for stay of execution unless the order is made; and

(b) that sufficient security as the Minister or the authority may determine has been given by the applicant for due performance of the order as may be ultimately binding upon him.

(6) No Court shall have jurisdiction to entertain any application, suit or proceeding in respect of any order or section made or taken under Sub-section (1) of Section 225 or Section 226 or this section.'

In terms of this section, a notice is required to be issued to the person who carries out erection/ re-erection of a building in violation of the provision of law and its service has been permitted to be effected by pasting, whereafter party concerned can show cause and/or object to the notice and after hearing the party and/or taking such evidence the Executive Officer has then to pass an order.

6. In order to invoke the bar of Section 229(6) of the Act, what law enjoins upon the authorities concerned to show as well as to prima facie establish from contemporaneous official record is that the provisions of law have been complied

with not only strictly but in their letter and spirit.

7. Learned counsel for the Municipality, Jammu, Shri Nanda, was required to produce the municipal file wherein order of demolition had been passed. It speaks volumes as well as the callous and cursory manner in which the case has been dealt with by the authority concerned who is required to exercise its authority under the Act.

8. A perusal of the notices issued which are at pages 2, 3, 6 and 7 of the municipal file, shows that the provisions of law regarding service of notices have been followed more in breach than compliance. On all the notices the witness appears to be the same person. It is very strange that every time the person who was deputed to serve notices could find only one witness, in case he can be termed as such. In case it comes to the establishing of the identity of this witness, at least it cannot be made out and the report of the person who effected service is a ritual without its being either legible or intelligible. Effecting service by pasting has to be strictly in accordance with provisions of Section 229(2) (supra). How many attempts were made, there is nothing on the record, in this view of the matter, this Court is constrained to hold that prima facie there is no proper service in accordance with the provisions of Section 229 of the Act before the Jammu Municipality could assume jurisdiction to take any further action in the matter.

9. The matter did not rest here only. May be that the person who was deputed to effect service upon the plaintiff under Section 229(1) of the Act was a person of lower staff of the Jammu Municipality, but when a reference is made to the so-called demolition order , it further shows how the Executive Officer has conducted himself as well as the proceedings. At page 3 of the noting portion of the file produced by Shri Nanda it is clear that a proposal for khilafwarzi case of Maan Singh, plaintiff, was submitted vide notes 5 to 8 on 24/7, vide note No. 9 recommendation was made to issue final notice under Section 229(3) (supra) which was signed by the Executive Officer. Before invoking the jurisdiction whereby demolition could be ordered after the expiry of period granted by the Executive Officer, Municipality, Jammu, on the failure of the person concerned to show cause against the show-cause notice, it is expected that the said Officer

would apply his mind to the facts existing on the file dispassionately and it is thereafter that any order that he may deem just and proper would be passed in accordance with law on the basis of material available with him.

10. In this context it may not be out of place to point out that authority vested in the Executive Officer while passing the order of demolition is not judicial strictly speaking, but can be termed as quasi-judicial inasmuch as the order is likely to affect the civil rights of the party concerned. Even if it be assumed that it is an administrative order still it has to be shown that it is passed after application of mind to the facts which were there on the file.

11. So far application of mind is concerned, it hardly needs to be emphasized that even Administrative Authority like Executive Officer in the present case, is expected to adhere to the principles of natural justice, equity, fair play and good conscience while exercising its such powers. Application of mind by the competent authority, i.e. Executive Officer in the present case was to be reflected by process of reasoning, may be brief to the facts of the case. When all these tests are applied to the case under consideration it is evident that there is no order which can be legally deemed as such. In fact, except for having initialled the endorsement after note No. 9 of the noting portion of the file at page 3 thereof, Executive Officer Municipality, Jammu had not passed any order nor any order could be shown by Shri Nanda from the file which was produced by him, when he was called upon to produce it in court. It has also been pointed out by Shri Nanda that except the said file there is no other file maintained in the office of Municipality, Jammu.

12. While examining the question of exclusion of the jurisdiction of Civil Court under Section 86 of the Punjab Municipal Act, 1911, a learned Single Judge of Punjab High Court in AIR 1952 Punj 378, *The Municipal Committee Ludhiana v. Sir Krishan Raghu Nandan Lal*, held that the exclusion would only be there when the tax levied was under Act. Suit was filed for refund of the tax levied on the plea that the truck of the respondent did not enter the town so it was not liable to pay the same as the action of the Committee was beyond the provisions of the Act.

13. In AIR 1940 PC 105, Secretary of State v. Mask & Co., it was held (at page 110):

'..... It is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if the jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where provisions of the Act have not been complied with, or the Statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure.....'

14. In AIR 1974 SC 1069, Katikara Chintamani Dora v. Gautreddi Annamanaidu, while examining the question of exclusion of Civil Court, the Apex Court observed as under:--

'There is an express bar to the jurisdiction of the Civil Court to adjudicate upon the question whether 'any inam village' is an 'inam estate' or not, and to the extent of question stated in Section 9(1), Madras Act 26 of 1948, the jurisdiction of the Settlement Officer and Tribunal are exclusive. But this exclusion of the jurisdiction of the Civil Court would be subject to two limitations. First, the Civil Court would have the jurisdiction to examine into the cases where the provisions of the Act have not been complied with or the Statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure. The second is as regards the exact extent to which the powers of statutory Tribunals are exclusive.'

15. Before a Full Bench of Punjab and Haryana High Court, question of exclusion of Civil Court arose while examining the order of Collector passed under Rule 6 of the Punjab Security of Land Tenures Rules, in view of the exclusion of jurisdiction of Civil Court under Section 25 of the Punjab Security of Land Tenures Act. It was held by the Court in AIR 1986 Punj & Har 407, State of Haryana and others v. Vinod Kumar and others, that suit would He despite the bar of Section 26 of the said Act, since the respondents had not been afforded an opportunity of being heard before passing the orders questioned in the suit.

16. Exclusion of jurisdiction of the Civil Court is not to be inferred on the ground of availability of remedy and Forum under a Special Act, when the action in question is

taken without complying with the provisions of that Act, ordinarily Civil Court would have jurisdiction to adjudicate every matter. Reference can usefully be made to the decision of the Apex Court reported in AIR 1969 SC 78, Dhulabhai v. State of M. P. Following this decision the Supreme Court in 1997 (1) SCC 68: (AIR 1997 SC 2364) M. P. Electricity Board, Jabalpur v. Vijaya Timber Company held (at page 2365 of AIR):

'7. In the light of the above concurrent findings of all the three courts, we do not think that there is any case for the appellant to sustain the defence it has taken in the written statement.

8. The High Court has given a finding after referring to Section 12 of the Electricity Act, 1910, as well as the provisions of the Electricity (Supply) Act, 1948, that the provisions of the latter Act have no application to the facts of the case as admittedly, the transmission lines were not laid under any approved scheme. The High Court further held that the appellant Board having laid the transmission lines without taking the consent of the plaintiff, cannot be treated as having acted in accordance with the provisions of the Indian Electricity Act to take shelter under those provisions. Therefore, according to the High Court, the remedy of the plaintiff was not to take recourse under the provisions of the Act but to file a civil suit for compensation/damages under the common law. In support of this conclusion, the High Court has relied on a judgment of the Madras High Court in South Madras Electricity Supply Corpn. Ltd. v. T. L. Jagannatha Aiyar (AIR 1960 Mad 374) and also another judgment of this Court in Amalgamated Electricity Co. Ltd. v. N. S. Bathena, AIR 1964 SC 1598.

17. When the present case is examined in the light of the law laid down by the Apex Court as well as by Privy Council and other Courts, it is clear that where the impugned action is not within the framework of the provisions of Act which excludes jurisdiction of Civil Court, such an action can be questioned in Civil Court despite the bar.

18. In the light of what has been discussed above, it is clear that before invoking the bar of jurisdiction under Section 229(6) of the Jammu and Kashmir Municipal Act, 2008 (1951 A. D.) Municipality is required to prima facie show from its

contemporaneous official record that the provisions of law i.e. Section 229 thereof, have been strictly complied with, it is only thereafter that question regarding bar of jurisdiction would arise.

19. In the instant case there is no proper service of notice, as such any subsequent action taken thereon is without any meaning as the basis of taking further action ordering demolition etc. is to follow such notice. That being so, it is held that the civil court has the jurisdiction to adjudicate the matter in controversy on the basis of plea urged in paragraph 6 of the plaint to which a brief reference was made in this judgment.

20. To be fair to the learned counsel appearing for the Housing Board it may be noticed that according to him it is the Housing Board whose property has been encroached upon and under the guise of impugned order its rights are going to be affected. Thus if the orders of status quo as well as of restoration ordered by the trial Court as noticed hereinabove, are allowed to stand, those would cause grave hardship, besides leading to a situation where law breakers would get protection without having any such right. It is made clear that Housing Board is at liberty to approach the Court below for impleading it as a party in accordance with law. As and when such an application is filed it would be disposed of in accordance with law by the trial Court.

21. Now coming to the merits of the case, it is held that keeping in view of the totality of the facts and circumstances of the case, impugned order passed by the lower Appellate Court is not sustainable, therefore, it is ordered to be set aside. Consequently, the order passed by the trial Court on 9-4-1992 is restored.

22. In view of the aforesaid discussion, this revision petition is allowed.

23. Record of the trial Court be sent back forthwith who is directed to proceed in accordance with law, without being in any manner prejudiced by any observation made in this judgment as it is limited for the purpose of disposal of the present revision only. Costs on the parties.

24. Parties are directed to appear in the court below on 31-3- 1998. Registry will ensure that the record is returned to the Court below well in time. This disposes of C. R. No. 98/95 as well.

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