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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.9262 OF 2014

Fayaz Khan s/o Ahmed Khan
Age - 50 years, Occ - Business & Landlord,
R/o Deolai, Taluka and District - Aurangabad

PETITIONER

VERSUS

Municipal Corporation, Aurangabad
Through its Municipal Commissioner,
Aurangabad

RESPONDENTS

.....

Mr. Ajeet D. Kasliwal, Advocate for the petitioner
Mr. Umakant K. Patil, Advocate for the respondent

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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 2nd JULY, 2015

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally with consent of learned advocates for the parties.
2. The petitioner purports to impugn an order dated 1st October, 2014 passed by Civil Judge, Senior Division, Corporation Court, Aurangabad, on Exhibit-8, in Regular Civil Suit No. 65 of 2014. The Suit has been instituted for declaration and injunction in respect of notice dated 28th August, 2014, issued by respondent - corporation.

3. While issuing notice on 5th September, 2014, the civil court had passed order thus -

"Seen objection of Nazar. Heard Adv. for plaintiff. Suit be registered by keeping point of jurisdiction to be opened. After appearance of defendant, parties to argue u/o 7 Rule 11 (d) of CPC."

[This text is in accordance with page No. 28 of the writ petition paper book]

4. The petitioner along with the suit, had also filed an application for temporary injunction and it appears that *ad interim* protection in favour of the petitioner has been operating since then.

5. The defendant - respondent has filed say and written statement resisting the suit, contending that there is bar to the jurisdiction of civil court under section 433A of the Maharashtra Municipal Corporations Act, 2012. Section 433A of said enactment reads thus:

"433A. Bar of Jurisdiction.

(1) Save as otherwise provided in this Act, any notice issued, order passed or direction issued by the Designated Officer, under section 260, 261, 264, 267 or 478 shall not be questioned in any suit or other legal proceedings."

6. The petitioner - plaintiff subsequently filed an application

Exhibit-8, seeking review of the order dated 5th September, 2014 referred to hereinabove in paragraph No.3. It is contended in the application that since application for interim relief has been filed and having regard to section 9-A of Civil Procedure Code (Maharashtra Amendment), issue with regard to the jurisdiction would have to be decided and Order VII, Rule 11 (d) of the Civil Procedure Code does not come into play. The order dated 5th September, 2014 was thus sought to be reviewed. Section 9-A of the Code of Civil Procedure as applicable to Maharashtra State reads thus -

“9-A. Where at the hearing of application relating to interim relief in a suit, objection to jurisdiction is taken, such issue to be decided by the Court as a preliminary issue – (1) Notwithstanding anything contained in this Code or any other law for the time being in force, if, at the hearing of any application for granting or setting aside an order granting any interim relief, whether by way of stay, injunction, appointment of a receiver or otherwise, made in any suit, an objection to the jurisdiction of the court to entertain such a suit is taken by any of the parties to the suit, the Court shall proceed to determine at the hearing of such application the issue as to the jurisdiction as a preliminary issue before granting or setting aside the order granting the interim relief. Any such application shall be heard and disposed of by the Court as expeditiously as possible and shall not in any case be adjourned to the hearing of the suit.”

7. This contention was countered by the defendant by filing say referring to section 433A of the Maharashtra Municipal

Corporations Act.

8. The trial court, under the impugned order, as referred to hereinabove, on 1st October, 2014, rejected the application for review, after considering the rival submissions and referring to various authorities relied upon by either side.

9. The court appears to have considered that in case defendant raises question of jurisdiction of the court while temporary injunction application is adjudicated, section 9-A of the Civil Procedure Code may come into play about preliminary issue with regard to jurisdiction, whereas, Order VII, Rule 11 sub clause (d) of the Civil Procedure Code is with reference to statements in the plaint and if it appears from the statements that the plaint is barred by law, then the plaint is liable to be rejected. Learned judge has further referred to various citations *inter alia*, AIR 2003 SC 759 “*Satish Talakchand Shah V. Hirji Bhojraj & Sons Kutchi Oswal Jain*” in order to emphasize that power of rejection of plaint under Order VII, Rule 11 (d) of the Civil Procedure Code can be exercised at any stage of the suit. The court considered that two provisions are on different footings, and the order sought to be reviewed having been passed even before the defendant had entered appearance, it cannot be said that there

is any error apparent or the matter requires review on other considerations. Application Exhibit-8 as such, was rejected.

10. Mr. Ajeet Kasliwal, learned advocate vehemently submits that while the court, under its order dated 5th September, 2014, had specifically referred to that point of jurisdiction has been kept open and while there is application for interim relief, having regard to nature of pleadings on either side, it would be apparent that section 9-A of the Civil Procedure Code would come into play and as such, order dated 5th September, 2014 is required to be reviewed, by framing preliminary issue with regard to jurisdiction of the court, instead of deciding objection with reference to Order VII, Rule 11 (d) of the Civil Procedure Code.

11. Mr. Kasliwal contends that while dealing with the issue of jurisdiction, the petitioner may have an opportunity to lead evidence in respect of the same, which, while the question of bar under Order VII, Rule 11 (d) of the Civil Procedure Code is being considered, may not be possible. He submits that while the proceedings would be considered under Order VII, Rule 11 (d) of the Civil Procedure Code, the same would be detrimental to the interest of the petitioner, for, the court is likely to go by

ostensible appearance of the notice and in case the plaint is rejected or returned, the petitioner would have no alternate efficacious remedy, protecting his interest from the imminent threat of demolition of construction carried out pursuant to the permission granted, particularly having regard to that section 433A of the Maharashtra Municipal Corporations Act also prohibits other legal proceedings. He, therefore, submits that if the question of jurisdiction is decided as a preliminary issue first, then the petitioner will have an opportunity to show that the suit is not barred by law, with reference to section 433A of the Maharashtra Municipal Corporations Act. It is his contention that taking into account the facts involved in the case, wherein since he contends that permission had been granted for construction by the Municipal Corporation and subsequently notice has been issued for demolition with reference to sections 260 and 478 of the Maharashtra Municipal Corporations Act and further that the statute does not provide any remedy against such notice, in such a case, the petitioner will have no remedy and, therefore, bar is not incurred. He submits that facts of the case would show that notice issued is a nullity and, therefore also the bar would not apply.

12. Mr. Kasliwal, learned advocate refers to various judgments

in support of his submissions, viz., 2003 (1) ALL MR 674 “*M/s Sharddha Associates V. St. Patrick's Town Co-operative Housing Society Ltd*”; 2013 (3) ALL MR 56 “*Rajan Dhansukhlal Vora V. Dinesh Bacchubhai Parekh*”; 1998 (4) ALL MR 536 “*Meher Singh V Deepak Sawhny* and 2011 (2) ALL MR 510 “*Mukund Ltd., V. Mumbai International Airport*”. He particularly lays stress on judgment reported in 2013 (5) Bom. C. R. 124 “*Commissioner, Akola Municipal Corporation V. Bhalchandra Govind Mahashabde*”, wherein, according to him, the court has considered that civil court will retain its jurisdiction to adjudicate the case, if order complained of is a nullity. He refers to head note as appearing in said citation, which reads thus -

“Maharashtra Municipal Corporations Act, 2012, Secs. 260, 267 and 433 - Code of Civil Procedure, 1908, Sec. 115 and O. 7, R. 11 - Jurisdiction of Civil Court - Scope - Revision - Against Civil Court rejecting application on ground that (i) Whether a suit challenging notice of pulling down unauthorized construction, issued under section 260 of the Maharashtra Municipal Corporations Act, is barred under provision of section 433-A of said Act? and (ii) Whether a suit is liable to be dismissed under Order 7, Rule 11 (a) and (b) of C.P.C.? Held, if there is a special provision in an Act barring Civil Court jurisdiction, then jurisdiction of civil court stands excluded. But civil court will retain its jurisdiction to adjudicate suit if order complained of is a nullity. Section 433-A of Maharashtra Municipal Corporations Act creates a Bar of Jurisdiction of civil court in matters falling under section 260, 261,

264, 267 or 478 of Act. In instant case notice being under section 260 of Act, jurisdiction of civil court is excluded, but if notice itself is challenged on ground of it being a nullity, civil court can see whether mandatory provisions of M.M. C Act have or not been complied with. Averments in plaint have to be considered as a whole. In case of an omission bar of section 433 of Act will apply. Averments do not disclose in what way notice under section 260 of M.M.C. Act is null or void. Entire reading of plaint as a whole makes it absolutely clear that material facts investing civil court with jurisdiction to entertain, try and decide suit are totally absent and hence suit is liable to be dismissed under Order VII, Rule 11 (a) and (d) of C.P.C.”

13. Mr. U. K. Patil, learned advocate for the respondent submits that the writ petition is premature, in the sense that while the very first notice had been issued by the civil court, the court had made it clear that the court will examine the tenability of the suit *vis-a-vis* provisions of Order VII, Rule 11 (d) of the Civil Procedure Code, making it further clear that and would also keep point of jurisdiction open. He submits that the question of jurisdiction in the present matter would arise only in the case the court decides that the suit is not barred under Order VII, Rule 11 (d) with reference to section 433A of the Maharashtra Municipal Corporations Act. He submits that the issue with regard to jurisdiction may be considered after the bar of section 433A of the Maharashtra Municipal Corporations Act is decided and not

earlier. The order impugned as such, shall not be found fault with. The court has considered relevant aspects, particularly that two provisions operate in different spheres and are on different footings. He, therefore, submits that there is no substance in the writ petition.

14. Taking into account aforesaid submissions, the position emerges that the court has issued notice to the defendant on 5th September, 2014 making it clear that parties would be required to argue the case with reference to Order VII, Rule 11 (d) of the Civil Procedure Code. It appears that having regard to provisions of Order VII, Rule, 11 (d) of the Civil Procedure Code, the court has considered that the question of jurisdiction in the circumstances would be required to be kept open.

15. Taking into account submissions of learned advocate for the petitioner, it appears that the petitioner intends to contend that bar of jurisdiction under section 433A of the Maharashtra Municipal Corporations Act would not apply in the matter, having regard to facts and pleadings in the plaint and will have to be decided having regard to the same and therefore, he deems that it would be appropriate that the court would review the order and decide that the civil court has jurisdiction. In my estimate,

this effort would be required to be made by the petitioner before the civil court while the matter is argued pursuant to order dated 5th September, 2014 passed by the civil court. Such an effort would be required to be made by the petitioner to impress upon the court that the bar under section 433A of the Maharashtra Municipal Corporations Act is not attracted in the present case and as such, the plaint is not liable to be rejected.

16. Looking at rival submissions and taking into account order dated 5th November, 2014, it appears that the court had considered that the matter would lead to said aspects and having regard to that it has been submitted that facts giving rise to the suit would be necessary to be considered and not mere form of notice, it is desirable that both the aspects may be considered simultaneously, which to a fairly large extent would be expedient and would not prejudice the parties and would also remove apprehensions on either side.

17. Having regard to aforesaid consideration, I do not think that the civil court has committed any error in rejecting the request made under Exhibit-8 in Regular Civil Suit No. 64 of 2014.

18. Learned advocate further submits that having regard to

grave danger posed under the notice of demolition of construction, which according to him is carried out under legitimate permission of Corporation, protection, which has been operating shall continue to operate during hearing of proceedings and in case decision is adverse to the interest of the petitioner, the same be continued for a reasonable period, in order to enable the petitioner to take up appropriate proceedings against such decision. The request appears to be reasonable. In view of the same, the interim protection which is operating shall continue to operate during hearing of proceedings and in case the decision is adverse to the interest of the petitioner, the same shall continue to operate for a further period of six weeks.

19. With these observations, the writ petition stands dismissed. Rule stands discharged.

[SUNIL P. DESHMUKH, J.]