

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH**

Regular Second Appeal No.1849 of 2011 (O&M)

Date of decision: 22.4.2015

Municipal Council, Kharar

... Appellant

Versus

A.P.J. Public School and another

... Respondents

CORAM: HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr.Amit Singh, Advocate,
for the appellant.

Mr.Sushil Saini, Advocate,
for respondent No.1.

1. To be referred to the Reporters or not? **Yes.**
2. Whether the judgment should be reported in the Digest? **Yes.**

RAJIV NARAIN RAINA, J.

The dispute between the Municipal Council, Kharar and the A.P.J. School in this second appeal is with respect to an encroachment made over a public street leading to the school campus. The plaintiff-school brought a suit against Municipal Council, Kharar and others praying for permanent injunction restraining the Council from interfering in the peaceful possession of their land measuring 22K-10M situated in the area of Mundi Kharar and from demolishing any building constructed on the land in dispute on the basis of an illegal notice dated 13th October, 2003 issued by the municipality to the school under Section 172 of the Punjab Municipal

Act, 1911 (for short 'the Act'). A restraint order was also sought against the defendant Council from initiating any proceedings against the plaintiff-school on the basis of the illegal notice to remove alleged unauthorized constructions. It is, therefore, manifest that the suit was instituted against a show cause notice as to why construction beyond sanctioned plan should not be removed.

2. It was the plaintiffs' case as explained by them in the plaint that the street upon which the alleged encroachment had been made is presently the space of the plaintiff-school which is really a path to the plot where the school stands and for its convenient use. The Council pleaded in defence of the suit that the building was constructed by the plaintiff-school in violation of the site plan sanctioned by the Council and notice regarding the same was issued by a subsequent notice dated 23th May, 2003 under Section 195-A of the Act. It was further countered that the plaintiff has encroached upon the street of the Municipal Council, Kharar illegally and have constructed a room, for which, the plaintiff-school has been served earlier notice under Section 172 dated 13th October, 2003 under the Act. The encroachment is said to have been made forcibly and illegally on 5th May, 2000. Since the plaintiff-school did not care to take steps to remove the encroachment, the Municipal Council had to issue a notice under Section 220 of the Act dated 16/18th August, 2004 calling upon the plaintiff-school to remove the encroachment from the street within 6 hours from the date of receipt of the notice, against which action the suit was instituted in the civil court.

3. The learned Civil Judge, Junior Division, Kharar vide judgment and decree dated 3rd August, 2009 decreed the suit and found no evidence of

encroachment over public street. Neither was there any mention of any public street in the revenue record with respect to the alleged encroachment. The Municipal Council failed to prove on the file of any encroachment made by the school authorities.

4. Aggrieved by the decree, Municipal Council, Kharar filed an appeal before the Additional District Judge, SAS Nagar [Mohali]. An issue arose before the appeal court at the outset as to the maintainability of the appeal since court found no resolution had been passed by the Council authorizing any person to file the appeal and, therefore, there was no properly constituted appeal before the lower appeal court. The appeal was dismissed on a procedural technicality for want of resolution leading to improper presentation of the first appeal by the municipality against the decree of the trial court.

5. The appeal court relied upon the judgments of this Court in **Garib Chand v. Municipal Committee, Budhlada**, reported in 1979 Revenue Law Reporter 341 and **The Municipal Committee, Ludhiana v. Surinder Kumar**, reported in 1970 Current Law Journal 631 to come to the conclusion that without a resolution, an appeal was not maintainable as there would be violation of Order XLI Rule 1 of the Code of Civil Procedure in this. On this short ground, the appeal has been dismissed.

6. It is argued by learned counsel for the appellant that the issue in the suit was with respect to unauthorized construction. The question whether there is any unauthorized construction made or not made in violation of sanctioned plans, or an offending construction on public street and whether such construction is liable to be demolished or not, would be a

question within the exclusive domain of the authorities constituted under the Act. It is submitted that the Act provides in detail regarding the procedure to be adopted by the municipal authorities in such matters such as issuance of notices and taking decisions thereafter after hearing the alleged offender. The municipal authorities are required to operate within the statutory framework of the Act and rules and bye-laws framed thereunder. In case, any person is aggrieved by a decision or action of the council, the Act makes provision for appeal prescribed in Sections 225 to 227. Section 225 provides as under : -

“Appeals from order of committed : - (1) Any person aggrieved

- a) by the refused of a committee under section 193 to sanction the erection or re-erection of a building or
 - b) by a notice from a committee under section 171 requiring a street to be drained leveled, paved flagged, metalled or provided with proper means of lighting or declaring a street to be a public street, or under section 195 requiring the alteration or demolition of a building or]
 - c) by any order made by a committee [or any Executive Officer] under the powers conferred upon [it] by sections 107, 116, [121], 123 [or 124] may appeal within thirty days, from the date of such prohibition notice or order to such officer as the State Government may appoint for the purpose of hearing such appeals or any of them, or failing such appointment [-] to the Deputy Commissioner [--] and no such refusal, notice or order shall be liable to be called in question otherwise than by such appeal.
- (2) The appellate authority may if it shall think fit extend the period allowed by sub section (1) for appeal;
- (3) The order of the appellate authority confirming setting aside or modifying the refusal, notice or order appealed from shall be final.

Provided that the refusal, notice or order shall not be

modified or set aside until the appellant and the committee have had reasonable opportunity of being heard.”

7. Chapter XII of the Act provides for control over the actions of the Committee by the Deputy Commissioner and the State Government. It is argued that jurisdiction of Civil Court is barred. When Section 225 of the Act and Section 9 of Code of Civil Procedure are read together, the position becomes clear. Issue of maintainability of the suit has not been decided which goes to the root of the jurisdiction. The Municipal Council acted within its right in issuing notice to the respondents under various provisions of the Act for violations of the law. In spite of receipt of notices, the plaintiff-school chose not to file any reply to them offering justification, if any, for its malfeasance.

8. The trial Court had decreed the suit on the premise that the statements and the documents on file show that the plaintiff-school is owner in possession of the suit property. Assuming this to be a correct statement, still there is no escape for the plaintiff-school since its building must still conform to the sanctioned building plans. In the sanctioned building plan, there is a street existing, over which, is constructed the encroachment complained of in the show cause notices etc.

9. The term, “street” is defined in the Act as follows and includes every vacant space notwithstanding that it may be private property and partly or wholly obstructed by any gate post, chain or other barrier : -

“Street”, shall mean any road, footway, square, court, alley, or passage accessible, whether permanently or temporarily to the public, and whether a thoroughfare or not; and shall

include every vacant space, notwithstanding that it may be private property and partly or wholly obstructed by any gate, post, chain or other barrier, if houses, shops or other buildings about thereon, and if it is used by any person as a means of access to or from any public place or thoroughfare, whether such persons be occupiers of such buildings or not, but shall not include any part of such space which the occupier of any such building has a right at all hours to prevent all other persons from using as aforesaid: and shall include also the drains or gutters therein, or on either side, and the land, whether covered or not by any pavement, verandah or other erection, up to the boundary of any abutting property not accessible to the public.”

10. The municipal authorities are duty bound to see that no street is encroached upon and the offender cannot be heard to say that he has a right to encroach upon a public street since the street does not fall on the municipal land. It is urged by the counsel that the learned trial Court fell in grave error in concluding that the street was on the land owned by the plaintiff. This assumes tacit admission of factum of existence of a street and if it were used as a passage accessible to public, whether permanently or temporarily and whether a thoroughfare or not, it was included in the definition of term 'street'.

11. Therefore, it is urged that the appeal could not have been rejected on maintainability for want of resolution since the appeal was filed by the Municipal Council through its Executive Officer who is the Principal Officer of the Committee who in the normal course, acts on behalf of the Committee and therefore his authority was implied. It is pointed out that even in the suit, the appellant was impleaded as defendant through the

Executive Officer. Moreover, the Council has fully ratified the action for filing the appeal in subsequently extending full authority to the Executive Officer to act on its behalf in this regard vide resolution dated 17th December, 2010. Besides, no such objection of the Executive Officer defending the Council was raised at the trial stage. It is submitted that procedures are meant to advance justice and not to defeat it. If the appeal was improperly presented, the Council ought to have been given a reasonable opportunity to remove the defect or deficiency, if any, as it was curable.

12. It is settled position in law that the doctrine of ratification removes the original defect and acts in the past. This aspect was ignored by the lower appellate court. If proper authority ratifies an act, it will relate back to the time when the action was taken without authority. The doctrine of relation back was applied by the Supreme Court in **Punjab University v. V.N.Tripathi and another** and connected appeal **Punjab University v. Shimla Devi (Smt)**; reported in (2001) 8 Supreme Court Cases 179. In this case, the Senate of the Panjab University had, subsequently, ratified the filing of an appeal against the order of the Sub Judge, First Class, Chandigarh quashing an order of dismissal of the plaintiff's services by awarding reinstatement to service. The law laid down is that when the initial action is *void ab-initio*, then no amount of ratification could validate the order but where the ratification was valid, it would relate back to the date of the original act. The University Senate had cured the defect and ratified the filing of the appeal against the trial court decree. The case was thus remanded back to the appellate court to decide the case on merits.

13. Learned counsel further relies on a decision of the learned Single Judge of this Court rendered in **Municipal Committee v. Om Parkash and another**; 2010 (2) PLR 793 : 2010 (3) RCR (Civil) 502 where it was held that when the Municipal Committee issues notice to the plaintiff for carrying out construction without approval of the Municipal Committee in violation of building bye-laws, the remedy against these notices is to file reply and, thereafter, to avail the remedies provided under the Act, 1911 and the jurisdiction of the Civil Court was specifically barred under Section 172-A (12) of the Act and also impliedly barred under the third proviso to Section 195 read with Section 225 of the Act. The present suit was not instituted under the Specific Relief Act, 1963. Where a suit could be instituted under Section 54 of the erstwhile Specific Relief Act, 1877, which is equivalent to Section 38 of the Specific Relief Act, 1963 but was one under Section 9 of the Code of Civil Procedure, 1908 then it was barred since Section 9 provides that all suits are maintainable before the Civil Court unless barred by law. Moreover, the doctrine of ratification has been considered in company law jurisdiction by Justice M.C.Chagla in **East & West Insurance Company Limited v. Kamla Jayanti Lal Mehta**, AIR 1956 Bombay 537 where the learned Judge speaking for the Bench of the Bombay High Court drew the subtle distinction between invalid acts and those acts which are done by someone lacking the necessary authority. In the first case, ratification will not hold water. However, in the second type of cases, the persons with requisite authority may adopt a resolution validly passed, thereby ratify it. The Court held : -

“This is not a case where a valid resolution has been passed

by some one lacking the necessary authority. In that case the persons with the requisite authority may adopt the resolution validly passed and thereby ratify it. But where the objection to the resolution is not the wanting of authority but illegality in the very making of it, in the very passing of it, then it is impossible to accept Mr. Engineer's contention that the doctrine of ratification can validate a resolution which when it was passed was invalid.”

14. However, where law requires previous “approval”, a subsequent ratification cannot save it [see AIR 1977 SC 1233 & AIR 1973 SC 2389]

15. There is merit in the contentions of the learned counsel for the municipality that resolution No.113 dated 17th December, 2010 extending full authority to the Executive Officer [P-7] to act on its behalf was sufficient to have saved the appeal by principle of relation back. Therefore, substantial questions of law as to presentation and maintainability of the suit arise in this case calling for interference. The saving resolution was passed by the appellant municipality prior to the dismissal of the appeal and ought to have been taken into consideration but was not.

16. Still further, learned counsel relies on the decision of the Supreme Court in **High Court of Judicature for Rajasthan v. P.P. Singh and another;** (2003) 4 SCC 239 to advance his argument that even where the action was illegal initially, it can be ratified by a competent body to safeguard its vulnerability.

17. In **Ashok Kumar Das and others v. University of Burdwan and others;** (2010) 3 SCC 616 the Supreme Court considered the issue of *ex post facto* ratification of administrative action and considered if it was

permissible. The Court went into the meaning and distinction of the terms, “approval”, “prior approval” and “permission”. The Court observed that when the word, “approval” is in contradistinction to “prior approval” and “permission”, approval can be *ex post facto* also. The action taken before “approval” stands invalidated only if *ex post facto* approval is not granted by the competent authority. Even if approval is granted, the action already taken remains legal and valid. In view of the legal position as explained above, the judgment and decree of the lower appellate court from where this appeal arises, is not sustainable in the eyes of law and it is, therefore, set aside. Nevertheless, this Court is also of the opinion that the suit itself was not maintainable in view of the statutory remedies available under the Act read in the light of the observations in **Municipal Committee v. Om Parkash and another** (supra) and, therefore, parties deserve to be put back to the position of the show cause notices. The proceedings before the civil court aborted statutory action of the municipality and was in judicial overreach.

18. Resultantly, the suit proceedings are nullified. The suit is dismissed. The respondents will be at liberty to file a detailed reply within one month from the date of receipt of a certified copy of this order, to the show cause notice and the Municipal Council, Kharar would take a fresh decision in accordance with law untrammelled by anything said by the Courts below. The appellants will also consider the respondent's application for revised sanction in accordance with law and the Municipal Council, Kharar would examine if violations, encroachments etc., if any, stand on the disputed street after carrying proper demarcation in the presence of both the

parties and thereafter see, in case encroachment is confirmed, whether they are either compoundable or removable. However, till such time as a final decision is not taken on the show cause notice etc including final notice, if it deserves to be issued, and the appeals, if any, that may be preferred by the respondents in case orders are adverse to them and till are decided, the structures of the respondents will not be open to demolition. In case, final orders as may be passed after hearing the respondents, are adverse to their interest they will be given breathing time of one month from the date when the final order is communicated to the respondents to enable them to take recourse to legal remedies as may be available to them under the law.

(RAJIV NARAIN RAINA)
JUDGE

April 22, 2015

Paritosh Kumar