

HON'BLE SMT JUSTICE ANIS
SECOND APPEAL No.610 OF 2000

J U D G M E N T:

This Second Appeal is directed against the judgment and decree dated 02.03.2000, passed in A.S.No.210 of 1995, by the IV Additional District Judge, Visakhapatnam, whereby and whereunder the learned Additional District Judge has dismissed the appeal confirming the judgment dated 29.11.1995, passed in O.S.No.192 of 1995, by the I Additional Subordinate Judge, Visakhapatnam.

Appellant herein is the plaintiff and respondent herein is defendant No.1 in O.S.No.192 of 1995. The parties hereinafter will be referred to as they are arrayed before the trial Court for the sake of convenience.

Originally, the appellant/plaintiff filed the suit in O.S.No.192 of 1995 before the I Additional Subordinate Judge, Visakhapatnam seeking permanent injunction restraining defendant Nos.1 & 2 from interfering with the peaceful possession and enjoyment of the plaint schedule property in any manner or demolishing the construction made therein.

According to the plaintiff, he is the absolute owner of 350 Sq. yards in plot No.HIG 30 in Green Park layout in Allipuram extension ward within the limits of first defendant. The said layout was formed by the Coromandal Fertilisers Limited, Employees House Building Society Limited having purchased the land from P.L.Ganapathi Rao and thereafter having obtained approval from the second defendant. The said land was sold to the plaintiff by the Society under registered sale deed dated 24.12.1983 and also under registered rectification deed dated 06.08.1984. Later on, the

plaintiff applied to the first defendant for permission to construct the ground and first floors in the year 1988 and also submitted a plan. The first defendant approved the said plan on 23.03.1988 and permission was accorded for commencing the construction of the house. The plaintiff commenced the construction and completed the construction of the building according to the approved plan and building rules. While the construction was going on, the first defendant served a notice on 10.10.1988 to the plaintiff under Section 452 of the Greater Hyderabad Municipal Corporation Act, 1955 (For short 'the Act') alleging that certain deviations were made by the plaintiff in the construction. The plaintiff gave a reply on 03.11.1988 to the first defendant denying the allegations. During the course of construction, the officials of the first defendant used to visit the property and inspect the same at every stage. The first defendant also assessed the building to property tax. The Director, town planning also visited the building and satisfied that the construction is in accordance with the plan. Plaintiff stated that notice under Section 452 of the Act has no application to the newly constructed building and the provision that applies is only Section 433 of the Act. Therefore, the notice issued by the first defendant is illegal and void under law. The plaintiff also stated that he is also paying taxes to the property with effect from 01.04.1989. All of a sudden on 08.07.1989, the first defendant along with large number of labour and police came to the suit schedule property without any prior notice and started demolishing the portico, the parapet wall, the compound wall, shutters, ground floor doors and windows, structures, pump shed and other structures inspite of the protest made by the plaintiff. Thereafter, the officials of the first defendant left the same proclaiming that they would come again and demolish the

remaining building. The acts of the defendant are high handed and illegal and acted without any jurisdiction. The first defendant cannot take any action without issuing notice under Sections 454 and 639 of the Act and second defendant has no jurisdiction. In view of the threat made by the officials of the first defendant, the plaintiff is constrained to file the suit as the threatened demolition is not in accordance with the provisions of the Act. So, no notice under section 685 of the Act is necessary to the first defendant. Therefore, the plaintiff filed the present suit seeking injunction.

The brief averments made in the written statement filed by the first defendant are as follows:

The defendant stated that the suit is not maintainable for want of notice under Section 685 of the Act and liable to be dismissed. The defendant admitted that plaintiff applied for permission to construct a building and the same was accorded. While constructing, the plaintiff has encroached into N.H.5 road margin by constructing the compound wall and pump shed. The plaintiff has deviated from the approved plan by covering the parking space by constructing with the brick walls and providing doors and windows and two shutters towards western side road. The plaintiff was permitted to construct a portion in an extent of 1.05 mtrs X 5.32 mtrs. But, whereas, the plaintiff has covered the building line of 10 feet as required to be left under the zoning regulations and constructing a portico measuring about 3.05mtrs X 5.32 mtrs. The building line also was not observed while constructing the ground and first floors. Thus, the plaintiff has violated the approved plan, building bye-laws and zoning regulations. So, a notice under Section 452 of the Act was issued on 10.10.1988. Plaintiff did not comply with the notices and hence

a notice under Section 636 of the Act was issued on 04.11.1988, which was served on plaintiff on 23.11.1988. The plaintiff did not bring the construction in conformity with the approved plan and zoning regulations. The plaintiff was duly warned to regularize the constructions made by him. After giving sufficient time and opportunity to the plaintiff, the first defendant removed the unauthorized construction. Therefore, the removal of unauthorized constructions is not illegal. Issuing notice under Section 454 and 639 of the Act are not mandatory. There is no cause of action to file the suit by the plaintiff. Therefore, the first defendant prayed the Court to dismiss the suit.

First defendant filed written statement after framing all the issues and the plaintiff has not pressed the suit against the second defendant. So, the suit against second defendant was dismissed.

Basing on the pleadings, the trial Court formulated four issues. Plaintiff himself examined as PW.1 and got marked Exs.A1 to A43 on his behalf. On behalf of the first defendant, no oral or documentary evidence was adduced.

In so far issues 2 & 3 are concerned, the trial Court held as the plaintiff not pressed the suit against the second defendant, hence the suit was dismissed against defendant No.2 and likewise the suit is not bad for want of notice under Section 685 of the Act. These two findings become final and neither the second defendant nor the first defendant has questioned the findings of the trial Court regarding those issues.

The trial Court after considering the oral and documentary evidence granted permanent injunction restraining the first defendant and its officials from demolishing the remaining portion

of the suit building left after demolition dated 08.07.1989 and directed the plaintiff to remove the restored portions within one month on the ground that prior to filing of the suit some portion of the property was demolished by the Municipal Corporation on the ground that plaintiff deviated the sanctioned plan and plaintiff has not challenged the said demolition and also held that whether the demolition made by the first defendant is legal or illegal cannot be decided in the suit because it is beyond the scope of the suit and plaintiff has not placed any material to show that the constructed building in accordance with the plan.

Aggrieved by the finding of the trial Court, the plaintiff filed A.S.No.210 of 1995 on the file of the IV Additional District Judge, Visakhapatnam. The first appellate Court dismissed the appeal on the ground that the plaintiff filed the suit only for permanent injunction and the plaintiff has not challenged the demolition in the suit and held that trial Court rightly confined relief only to grant permanent injunction in favour of the plaintiff in respect of the remaining portion of the building other than the restored portion of the construction made by the plaintiff as per orders of this Court in I.A.No.999 of 1090 dated 06.10.1989.

Aggrieved by the findings of the trial Court as well as the first appellate Court the plaintiff filed the present second appeal. This Court admitted the second appeal on 21.07.2000 on the following substantial questions of law:

1. Whether on a true interpretation the plaint, the question of legality or otherwise of the demolition which has already taken place, is germane to the suit?
2. Whether, when the defendant asserted in its Written Statement that the demolition was legal and both parties adduced evidence in support of their respective case, the

relief of injunction with regard to the demolished portion can be refused?

3. Whether, in the absence any evidence in support of the case of the defendant that notices u/s.454 and u/s.639 of the Hyderabad Municipal Corporation Act were issued, the demolition can be held valid?

The learned counsel for the appellant argued that the appellant made the constructions in his land as per the sanctioned plan issued by the Visakhapatnam Municipal Corporation without any deviation. But the officials of the respondent without any manner of right demolished some portion of the property without issuing prior notice under Section 454 & 639 of the Act and the Corporation also without following the procedure demolished the part or the property of the appellant. It is also argued the respondent Corporation has not adduced any evidence in support of the plea and notices under Sections 454 & 639 were not issued before demolition of the property taken place. Therefore, prayed the Court to allow the appeal.

On the other hand, the learned counsel for the respondent argued the plaintiff has not issued any notice under Section 685 of the Act. Pending suit the plaintiff obtained injunction and constructed the demolished portion. Therefore, the trial Court after considering this aspect rightly decreed the suit for the part of the property. It is also argued the plaintiff has not sought for any mandatory injunction and not challenged the notice under Section 452. Demolition also has taken place prior to filing of the suit and no steps have been taken to seek the mandatory injunction. Therefore, there is no substantial question of law involved in this case and prayed the court to dismiss the appeal.

Now the point that arose for consideration is whether the

appellant established any substantial question of law as prayed in the appeal?

POINT : A perusal of the record shows that the appellant is the plaintiff, who filed the suit seeking grant of permanent injunction restraining defendant Nos.1 & 2 from interfering with the peaceful possession and enjoyment of the plaint schedule property in any manner or demolishing the construction made in the suit property. There is no dispute of the fact that the appellant/plaintiff is the absolute owner of 350 Sq. yards in plot No.HIG 30 in Green Park layout in Allipuram Extension ward, Visakhapatnam. Said layout was formed by the Coromandal Fertilisers Limited, Employees House Building Society Limited. Plaintiff purchased the plot from the Society under registered sale deed dated 24.12.1983. Later on, the plaintiff applied to the respondent for permission to construct the ground and first floor and also submitted the plan. The respondent sanctioned plan on 23.03.1988 and appellant/plaintiff commenced and completed the construction of the building. It is also an admitted fact that the defendant issued a notice dated 10.10.1988 alleging that there were certain deviations in the construction and asked the appellant to explain the same. On 03.11.1988 the appellant gave reply. On 08.07.1989 the officials of the respondent came to the suit schedule property and demolished part of the building i.e., portico, the parapet wall, the compound wall, shutters, ground floor doors and windows on the ground that the plaintiff encroached the part of the N.H.5 land. After the said act, the plaintiff filed the present suit seeking permanent injunction.

Plaintiff was examined as PW.1 and categorically stated that he constructed the building in accordance with the sanctioned

plan issued by the respondent and has taken a plea that the respondent cannot take any action without issuing the notice under Section 454 & 639 of the Act.

Section 454: Enforcement of provisions concerning buildings and works:-

The Commissioner may, at any time, during the erection of a building or the execution of any such work as aforesaid, or at any time within three months after the completion thereof, by written notice specify any matter in respect of which the erection or re-erection of such building or the execution of such work may be in contravention of any provision of this Act or of any rule, or bye-laws made thereunder and require the person erecting or re-erecting or executing or who has erected or re-erected or executed such building or work is not at the time of the notice the owner thereof, the owner of such building or work to cause anything done contrary to any such provision, rule or bye-law to be amended or to do anything which by any such provision, or bye-law may be required to be done but which has been omitted to be done.

Section 639: Works, etc., which may person is required to execute may in certain cases be executed by the Commissioner at such person's cost:-

(1) When any requisition or order is made, by written notice, by the Commissioner or by any municipal officer empowered under Section 119 in his behalf, or under any section, sub-section or clause of this Act, mentioned in sub-section (2), a reasonable period shall be specified in such notice for carrying such requisition or order into effect, and if, within the period so specified, such requisition or order or any portion of such requisition or order is not complied with, Commissioner may take such measures or cause such work to be executed or such thing to be done as shall, in his opinion, be necessary for giving due effect to the requisition or order so made; and, unless it is in this Act otherwise expressly provided, the expenses thereof shall be paid by the person or by any one of the persons to whom such requisition or order was addressed.

(2) The sections, sub-sections and clauses of this Act referred to in sub-section (1) are the following, namely:-

Section 300, sub-section (5), Section 302, Section 303, Section 305, sub-section (1), clause (b), Section 316, sub-section (2), Section 322, sub-section (1), Section 325, Section 335, Section 352, sub-section (2), Section 353, sub-section (5), Section 354, sub-section (3), Section 355, sub-section (1) & (2), Section 359, Section 394, Section 397, sub-section (2), Section 398, Section 406, Section 416, Section 417, sub-section (2) Section 418, sub-section (1), Clause (d), Section 420, sub-section (3), Section 421, sub-section (1), Section 422, sub-section (3), Section 429, sub-section (2), Section 445, sub-section (2), Section 453,

Section 454, Section 456, Section 483, sub-section (1), (2), (3) and (4), Section 493, Section 495, Section 496, Section 497, Section 502, Section 504, Section 505, sub-section (2), Section 508, Section 509, sub-section (1), Section 519, sub-section (1), Section 532, Section 554, sub-section (1).

(3) The Commissioner may take any measure, execute any work or cause any anything to be done under this section, whether or not the person who has failed to comply with the requisition or order is liable to punishment or has been prosecuted or sentenced to any punishment for such failure.

A perusal of the above provisions of law shows that it had no bearing to the fact of the present case. Originally, the appellant filed the suit against the respondent also against the Urban Development Authority, Visakhapatnam. During the course of trial, the appellant has not pressed the suit against the second defendant Urban Development Authority, Visakhapatnam. Hence, the suit against the said defendant No.2 was dismissed. It is also born out from the record that an issue has been framed with regard to the non-issuance of notice under Section 685 of the H.M.C.Act before filing the suit is bad. But the trial Court gave a finding that non-issuance of the notice under Section 685 of the H.M.C.Act is not bad for filing of the suit. The respondent herein has not filed any cross-appeal regarding findings in issue No.3. Therefore, the finding of the trial Court and also the first appellate Court become final.

It is an admitted fact that before filing of the suit itself, the respondent demolished a portion of the property constructed by the plaintiff on the ground that those constructions are against the permission and plan. Appellant/plaintiff with the permission of the trial Court in I.A.No.999 of 1989 got repaired the demolition portion of the suit building. It is also an admitted fact that appellant filed O.S.No.119 of 1990 before the trial Court seeking damages for the illegal acts of demolition. During the pendency of the suit, the

appellant has not pressed the suit even for damages. Admittedly, the appellant has not challenged the notice issued by the respondent Corporation as bad in law. Further, prior to filing of the suit itself, some portion of the property demolished. Appellant/plaintiff not filed the suit seeking relief of mandatory injunction. No amendment of plaint sought. Both the Courts concurrently held that plaintiff is entitled for the injunction for the remaining structure which was constructed in accordance with the sanction plan. Further, appellant/plaintiff has not challenged the demolition of the portion of the building by defendant No.1 as illegal. Therefore, the appellant/plaintiff has not made out any substantial question of law in this second appeal and the appeal is liable to be dismissed.

Accordingly, the second appeal is dismissed. No order as to costs.

Miscellaneous Petitions, if any, pending in this Second Appeal shall stand closed.

ANIS, J

Date: 19.08.2016
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