

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.234 OF 2017 with
CIVIL APPLICATION NO.412 OF 2016

Riaz Ismail Omer & ors ...

.. Appellants

vs

Pune Cantonment Board & ors

.. Respondents

Mr.Abhishek Pungliya for Appellants

Mr.K.J.Presswalla I.b Mulla & Mulla Craigie

Blunt & Caroe for Respondent nos.1 and 2

CORAM : A.M.DHAVALA, J

DATED : 3RD SEPTEMBER 2018

P.C.

1. The appellants are the original plaintiffs in Regular Civil Suit no.1700 of 2017 filed before the Civil Judge, Senior Division Pune. The defendants are Cantonment Board and Executive Officer of the Board. The defendant nos.3 and 4 were shown as occupants and notice was issued to them but, they have not participated. The appellants had claimed a perpetual injunction to restrain demolition of the suit premises. By judgment dated 1.12.2004 the learned Civil Judge, Junior Division decree the suit and granted perpetual injunction as prayed. The Cantonment Board preferred Regular Civil Appeal No.681 of 2008. The learned District Judge-9 Pune by judgment dated 18.2.2015 allowed the appeal and set aside the judgment and decree of the trial Court. Hence, this appeal.

2. Proceedings were initiated on the cause of action accrued in view of service of notice dated 13.9.1998. As per the notice issued purportedly under section 185 of the Cantonment Act, 1924 the appellants had constructed three unauthorized structures as follows:

1) "The stilt/parking space has been partitioned by means of aluminium partitions, masonry walls and fixing some rolling shutters etc and is being used as making and sale of furniture items. Aluminium/glazed/masonry partition and masonry walls of stilt parking were proposed to be demolished.

2) The first floor which was sanctioned with 6.0 mtr ht for offices has been converted into two floors i.e. 1st and 2nd floor by putting intermediate slab and also converting into residential flats. It was proposed that intermediate RCC slab of first floor and BB masonry walls shall be demolished.

3) Certain other deviation to sanctioned plan such as stair case on front side additional stair case at middle north side. It was specified that RCC/masonry stair case on front side and at middle north side were to be demolished."

3. Learned Advocate for the appellants submits that point nos.1 and 3 are not attributable to the act of the appellants. Those were carried out by other occupants and he has no control over them and he has no objection for demolition of the same.

4. The appeal is filed only for proposed action no.2 i.e. demolition of slab converting first floor of 6 metre height into two floors.

5. The substantial questions of law proposed were as

follows :

i) The notice was issued without any prosecution under section 184 and in absence of such prosecution, action under section 185 of the Cantonment Act, 1924 was not contemplated.

(ii) The appellate Court has not applied its mind and has not considered the arguments advanced and admissions given by the witnesses for defendants/respondents.

6. Learned advocate for the appellants argued that at the relevant time, there was strange rule that height of the construction should be minimum 6 metres and the appellants were constrained to submit plans as per the said term. In view of the said height, the appellants had constructed another floor. He argued that the construction was irrelevant and it could be compounded but, the said fact was not considered.

7. Per contra, it is argued that no prosecution under section 184 is essential for action under section 185 of the Act. No application for compounding the illegal construction was made and it was not a case of irregularity but, it is a case of illegality as permission could not be granted for more than one plus two floors. Learned advocate for the appellants pointed out that earlier there was permission for ground plus five floors but, subsequently it was not so and the FSI also became 1.

8. Factually, it is not in dispute that the appellants has constructed a slab in the first floor so as to convert the same into two floors and it was converted for residential flats. It was also argued that the notice was not issued within 12 months from the date of completion. Per contra, it was argued that the time limit for construction was already over. The building construction permission was granted on 17.7.1992 and notice of commencement was issued to the board on 3.2.1993. The period for completion was to expire on 9.3.1995. Thereafter, construction was carried out and illegalities were noticed and thereafter notice came to be issued. No report of completion of work was given. The period of 12 months for taking action is to be counted from the date of completion of work. It does not mean that the Cantonment Board authorities should keep a watch and note down construction for each and every part of the construction activities and there should be notice whenever illegalities were found. Section 183 (b) of the Act contemplates notice of completion to be given by the person undertaking construction activities and thereafter inspection is to be done and action is to be taken within 12 months thereafter. Since no such notice was issued, there is no substance in the contention that action was initiated after 12 months from the date of completion. In fact, the builder has not

even produced any material on record as on which date the alleged illegal construction was over.

9. Learned counsel for the respondents pointed out that the entire construction was not complete itself in 1998. From the arguments advanced, it is apparent that the period of construction was over but, no further extension was granted by the Board for carrying out construction. Nevertheless, no notice of completion of work was issued more than 12 months prior to the impugned notice dated 13.9.1998. Therefore, the notice cannot be challenged on the ground of delay.

10. Section 185 of the Act shows that the authority has power to stop erection or re-erection or to demolish a building which would be an offence under section 184 of the Act. It describes the nature of construction which can be demolished. It does not lay down the prosecution under section 184 of the Act a essential condition and pre-requisite for taking action under section 185 of the Act.

11. Reliance on the admission of the defendant's witness about some discrepancy in the notice Exhibit 85 is also not significant

when it is not disputed that construction of slab converting the hall into two floors is illegal as pointed out in the notice. The witness has denied that contents of the notice were not true and correct. He stated that some contents were not correct. As far as material contents of the notice regarding the illegality of the slabs is concerned, it is not in dispute that the same was illegal. If there is a provision for regularization, the appellants ought to have filed an application but, no such application is reported to have been filed. On the contrary, it is submitted that part of construction of the slab was not irregular but, was illegal which could not be condoned or compounded.

12. In the light of these facts, I find that the first appellate Court has committed no mistake in allowing the appeal and setting aside the judgment and decree of the trial Court. No substantial question of law is involved. Therefore, appeal deserves to be dismissed in-limine. Hence, the appeal is dismissed.

In view of disposal of the appeal. Civil application does not survive and is disposed of.

(A.M.DHAVALA, J)