

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.140 OF 2023
WITH CA/3148/2023 IN SA/140/2023

SHAIKH MOHD SHAFI SHAIKH KAREEM DIED THROUGH LRS
RIZWANA BEGUM MOHD SHAFI
VERSUS
THE AURANGABAD MUNICIPAL CORPORATION THROUGH ITS
MUNICIPAL COMMISSIONER

...
Advocate for Appellant : Mr. N. S. Muthiyan
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CORAM : R.M. JOSHI, J

DATE : APRIL 18, 2023

PER COURT :

1. Heard.
2. Against concurrent findings, this Second Appeal is preferred against dismissal of R.C.S. No. 80/2014 and its confirmation by the First Appellate Court.
3. Plaintiff has filed suit for perpetual injunction restraining Defendant – Corporation from causing damage to the house of the plaintiff and for mandatory injunction directing Corporation not to interfere in the suit property bearing CTS No. 2536 situated at Kaziwada, Near Bhadkal Gate, Aurangabad, till pending disposal of the suit.

4. The suit is filed with the averments that the Plaintiff has purchased the suit property from the Abrar Ahmed in the year 1991 under a registered sale deed with a plan as per the occupancy certificate issued by the defendant - Corporation. The contention of the Plaintiff is that he has not carried out further construction on the suit property. It is averred in the plaint that in the Month of August, 2014 plaintiff gave explanation to the Corporation by making applications and stated that house in which he is residing is not a new construction and that it is the house which was purchased in the year 1991 with construction permission and occupancy certificate granted by the Corporation. It is further alleged that the Building Inspector in collusion with the Sectional Engineer of the Town Planning Department on 07.08.2014 prepared the final notices under Section 478(2) of the Bombay Provincial Municipal Corporation Act, 1949 (for short '**the Act**') and through the signature of the Deputy Engineer of Ward (A) served it to the Plaintiff. It is alleged by Plaintiff in paragraph 13 of the Plaint that first notice under Section 53(1) of the Maharashtra Regional Town Planning Act, 1966 and second notice under Section

478(2) of the Act issued by the Corporation are in collusion with the neighbour and they are null and void since issued without following due procedure of law. It is further alleged that the issuance of such notices are nullity and the mandatory provision of the said Acts were not complied with and the authorities have not acted in conformity with the fundamental judicial procedure and thus, it is an abuse of exercise of power. With these averments, relief was sought for declaration that notices issued to him are not legal and valid.

5. Corporation filed written statement and challenged maintainability of suit for want of mandatory notice under Section 487 of the Act and also resisted contention of Plaintiffs.

6. Before the Trial Court the Plaintiff examined himself whereas no evidence was led by the Defendant – Corporation. Learned Trial Court dismissed the suit by relying upon the admission of the Plaintiff to the extent that there is illegal construction in the suit house other than four rooms, which were purchased by the Plaintiff from erstwhile owner.

7. Learned Counsel for the Plaintiff states that the trial Court has committed error in misconstruing the statement of Plaintiff to be admission of illegal construction. According to him, what has been stated by Plaintiff is that besides four rooms nothing more construction is there to call it as illegal construction. It also stated that corporation has failed to prove notices to be legal. He further submitted that notice under Section 487 of the Act is not mandatory and in the instant case, since the notices issued to Plaintiff are void-ab-initio, non issuance of notice would not affect tenability of suit. According to him, these are substantial questions of law involved in this appeal.

8. Perusal of evidence of Plaintiff shows that there is candid admission to the effect the Plaintiff has purchased the property when it was consisting of four rooms. In the next breath he states that the construction besides these rooms is illegal. There could not be more candid admission than the one given by Plaintiff in this regard. This Court finds no fault on the part of the Trial Court in appreciating the said

evidence on record. The admission of Plaintiff is best evidence and hence, no occasion arose for defendant to show that construction in respect of which notices are issued is illegal. Non examination of witnesses by Corporation does not benefit Plaintiff in any manner.

9. With regard to receipt of notices as well as issuance of notices by Seema Consultancy, it is stated mere acceptance of notice or issuance of notice does not prove the contents thereof. In this regard, it is pertinent to note that no where Plaintiff has challenged the contents of the same and when there is a specific admission of the Plaintiff that the permission granted for the new construction was revoked by the Corporation coupled with the admission of illegal construction apart from four rooms, there is no further evidence needed to prove that notices were rightly issued. Moreover, Plaintiff cannot permitted to take stand that the notices issued by Seema Consultancy on his behalf could be proved by otherside. Thus, this Court does not find substance in the contentions raised in this regard.

10. As regards the issue regarding notice under Section 487 of the Act, it would be necessary to consider the relevant provision which reads thus:

487. Protection of persons acting under this Act against suits.

(1) No suit shall be instituted against the Corporation or against the Commissioner, or the Transport Manager, or against any municipal officer or servant, in respect of any act done or purported to be done in pursuance or execution or intended execution of this Act or in respect of any alleged neglect or default in the execution of this Act:-

(a) until the expiration of one month next after notice in writing has been, in the case of the Corporation, left at the chief municipal office and, in the case of the Commissioner or of the Transport Manager or of a municipal officer or servant delivered to him or left at his office or place of abode, stating with reasonable particularity the cause of action and the name and place of abode of the intending plaintiff and of his attorney, advocate, pleader or agent, if any for the purpose of such suit, for

(b) unless it is commenced within six months next after the accrual of the cause

of action.

(2) *****

(3) *****

11. Aforestated provision creates embargo in institution of the suit against Corporation, until expiration of one month next after notice in writing has been issued. Such notice would be required only in case, suit in pursuance or intended execution of this Act or in respect of alleged neglect or default in execution of Act. There is no challenge to the fact that notices issued to the Plaintiff are issued by Authority Competent to issue them. The challenge to the notice by Plaintiff on the ground of bias or collusion with neighbour, would not take out the same from the fact that it was in pursuance of intended execution of the Act. The definition is wide enough even to cover an act purported to be done in this regard. Thus, n the facts and circumstances of the case, it was incumbent on the part of Plaintiff to issue notice under Section 487 of Act before institution of suit and in absence thereof suit is not maintainable.

12. In the circumstances, this Court finds no error committed by the Trial Court in dismissing the

suit and its confirmation by First Appellate Court. Since no substantial question of law is involved herein, appeal stands dismissed. Pending applications, if any, are also disposed of.

(R.M. JOSHI, J.)

Malani