

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CIVIL APPLICATION (CAW) NO.659/2023

IN

WRIT PETITION NO.54/2023 AND CONNECTED WRIT PETITIONS

Pawan Sukhlal Jain

...Versus...

The Deputy Municipal Commissioner (Revenue), Nagpur Municipal
Commissioner, Nagpur

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions
and Registrar's orders

Court's or Judge's orders

Shri Anjan De, Advocate for petitioner/applicant
Shri J.B. Kasat, Advocate for respondent

CORAM : AVINASH G. GHAROTE, J.

DATE : 29/03/2023

1. Civil Application No.659/2023 seeks recall of the order dated 03/03/2023, whereby Civil Application No.621/2023 filed by the respondent seeking leave to place a document on record has been allowed.

2. Shri Anjan De, learned counsel for the petitioner submits that the learned District Judge acting under Section 81-F of the Maharashtra Municipal Corporation Act (for short, the MMC Act”, hereinafter) does not act as a persona designata but acts in the capacity of a Judicial Officer and therefore the order dated 03/03/2023 needs to be recalled. To substantiate

this position, learned counsel relies upon the judgment in the case of *Life Insurance Corporation of India Vs. Nandini J. Shah and others (2018) 15 SCC 356*, which was considering the provisions of Section 9 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 which uses similar expression as occurring in Section 81-F of the MMC Act. He therefore submits that since the expression “Appellate Officer”, used in a para materia provision has been held not to be a *persona designata* but a pre-existing judicial authority, the impugned order is required to be recalled. Reliance is also placed on *Terapalli Dyvasahata Kumar Vs. S.M. Kantha Raju (Dead) thr. L.Rs. & anr. (2018) 11 SCC 769*, which considers the expression “District Court concerned”; *Mukri Gopalan Vs. Cheppilat Puthanpurayil Aboobacker (1995) 5 SCC 5*.

3. Shri J.B Kasat, learned counsel for the respondent opposes the application contending that the application though styled as one for recall, in fact is one for review and does not satisfy the requirement for the same and thus is required to be rejected.

4. To appreciate the position it is necessary to note the language of Section 81-F of the MMC Act. The same for the purpose of ready reference is reproduced as under :

“Section 81-F (1) An appeal shall lie from every order of the Commissioner, made in respect of any Corporation premises, under section 81-B or section 81-C, to an appellate officer, who shall be the District Judge or such other judicial officer in the City of not less than ten years’

standing, as the District Judge may designate in this behalf.

5. In **Nandini J. Shah** (supra) the hon'ble Apex Court was considering section 9 of the Public Premises (Eviction of unauthorised occupants) Act, 1971. Sec.9 reads as under :

“9. Appeals.—(1) An appeal shall lie from every order of the estate officer made in respect of any public premises under [section 5 or section 5B] [or section 5C] or section 7 to an appellate officer who shall be the district judge of the district in which the public premises are situate or such other judicial officer in that district of not less than ten years standing as the district judge may designate in this behalf.”

6. A comparison of the aforesaid two provisions would demonstrate that the provisions, in so far as they provide an appeal and the authority to whom, the same is provided, are in pari materia.

7. The hon'ble Apex Court, in **Nandini J. Shah** (supra) after considering **Mukri Gopalan** (supra) has held as under :

“35. Sub-section (1) of Section 9 is the core provision to be kept in mind for answering the point in issue. It postulates that an appeal shall lie from every order of the Estate Officer, passed under the Act, to an Appellate Officer. As to who shall be the Appellate Officer, has also been specified in the same provision. It predicates the District Judge of the district in which the public premises are situated or such other judicial officer in that district of not less than 10 years' standing as the District Judge to be designated for that purpose. The first part of the

provision does suggest that the appeal shall lie to an Appellate Officer, however, it does not follow therefrom that the Appellate Officer is persona designata. Something more is required to hold so. Had it been a case of designating a person by name as an Appellate Officer, the concomitant would be entirely different. However, when the Appellate Officer is either the District Judge of the district or any another judicial officer in that district possessing necessary qualification who could be designated by the District Judge, the question of such investiture of power of an appellate authority in the District Judge or Designated Judge would by no standards acquire the colour or for that matter trappings of persona designata. In the first place, the power to be exercised by the Appellate Officer in terms of Section 9 is a judicial power of the State which is quite distinct from the executive power of the State. Secondly, the District Judge or designated judicial officer exercises judicial authority within his jurisdiction. Thirdly, as the Act predicates the Appellate Officer is to be a District Judge or judicial officer, it is indicative of the fact of a pre-existing authority exercising judicial power of the State. Fourthly, the District Judge is the creature of Section 5 of the Maharashtra Civil Courts Act, 1869, who presides over a District Court invariably consisting of more than one Judge in the district concerned. The District Court exercises original and appellate jurisdiction by virtue of Sections 7 and 8 respectively, of the 1869 Act and is the principal court of original civil jurisdiction in the district within the meaning of CPC, as per Section 7 of that Act. As per Section 8 of the Act of 1869, the District Court is the court of appeal from all decrees and orders passed by the subordinate courts from which an appeal lies under any law for the time being in force.

36. As per Section 16 of that Act, the District Judge can refer to any Additional District Judges subordinate to him, any original suits and proceedings of a civil nature, applications or references under Special Acts and miscellaneous applications. The Additional District Judges have jurisdiction to try such suits and to dispose

of such applications or references. Section 17 of that Act envisages that an Additional District Judge shall have jurisdiction to try the appeals as may be referred to him by the District Judge. Section 19 of that Act, is a provision to invest power on the Additional District Judges, with powers of District Judge. The hierarchy of judicial officers of the District Court can be culled out from the 1869 Act.

37. On the similar lines, the Bombay City Civil Court has been constituted under Section 3 of the Bombay City Civil Court Act, 1948, with jurisdiction to receive, try and dispose of all suits and other proceedings of a civil nature arising within Greater Bombay except a suit or proceedings which are cognizable by the High Court referred to therein and by the Small Cause Court. Section 7 of this Act envisages that when the City Civil Court consists of more than one Judge, each of the Judges may exercise all or any of the powers conferred on the court by the said Act or any other law for the time being in force. Clause (b) of Section 7 stipulates that the State Government may appoint any one of the Judges to be the Principal Judge and any two other Judges to be called the Additional Principal Judges. The Principal Judge has been given authority to make such arrangements as he may think fit for the distribution of the business of the Court among the various Judges thereof. In other words, the District Judge or the Principal Judge exercises judicial power of the State and is an authority having its own hierarchy of superior and inferior courts, the law of procedure according to which it would dispose of matters coming before it depending on its nature and jurisdiction exercised by it, acting in judicial manner. The District Judge or Principal Judge of the City Civil Court is the officer presiding over the court and derives his description from the nomenclature of the court. Even if the District Judge/Principal Judge of the City Civil Court might retire or get transferred, his successor-in-office can pick up the thread of the proceedings under Section 9 of the 1971 Act from the stage where it was left by his predecessor and can

function as an appellate authority. The District Judge/Principal Judge of the City Civil Court and other judicial officers of these courts possessing necessary qualifications constitute a class and cannot be considered as persona designata. The Appellate Officer, therefore, has to function as a court and his decision is final in terms of Section 10 of the 1971 Act. The legislative intent behind providing an appeal under Section 9 before the Appellate Officer to be the District Judge of the District Court concerned in which the public premises are situated or such other judicial officer in that district possessing necessary qualification to be designated by the District Judge for that purpose, is indicative of the fact that the power to be exercised by the Appellate Officer is not in his capacity as persona designata but as a judicial officer of the pre-existing court.

39. Indeed, the expression used in Section 9 is “Appellate Officer” and not “appellate authority” as has been used in Section 6-C of the Essential Commodities Act, 1955, considered by the Supreme Court in Thakur Das [Thakur Das v. ,State of M.P., (1978) 1 SCC 27 : 1978 SCC (Cri) 21] . That, however, would neither make any difference nor undermine the status of the District Judge or the designated judicial officer so as to reckon their appointment as persona designata. The thrust of Section 9(1) is to provide for remedy of an appeal against the order of the Estate Officer before the District Judge who, undeniably, is a pre-existing authority and head of the judiciary within the district, discharging judicial power of the State including power to condone the delay in filing of the appeal and to grant interim relief during the pendency of the appeal. Though described as an Appellate Officer, the District Judge, for deciding an appeal under Section 9, can and is expected to exercise the powers of the civil court.

58. In other words, the Appellate Officer while exercising power under Section 9 of the 1971 Act, does not act as a persona designata but in his capacity as a pre-existing

judicial authority in the district (being a District Judge or judicial officer possessing essential qualification designated by the District Judge). Being part of the district judiciary, the judge acts as a court and the order passed by him will be an order of the subordinate court against which remedy under Article 227 of the Constitution of India can be availed on the matters delineated for exercise of such jurisdiction.”

8. What has been held in ***Nandini J. Shah*** (supra), considering the similarity of the language and the expression ‘Appellate Officer’, as used in Sec.9 of the Act of P P 1971 and sec.81-F of the MMC Act, would equally be applicable to the present matter and the ‘Appellate Officer’ as contemplated by sec.81-F of the MMC Act, would not be acting as a persona designata, but as a pre-existing judicial authority in the District.

9. ***Nandini J. Shah*** (supra) also takes into consideration that there is no express indication on the PP Act of 1971, about the procedure to be adopted or followed by the appellate officer, in the following words :

“49. The fact that there is no express indication in the 1971 Act about the procedure to be adopted or followed by the Appellate Officer, it would not follow therefrom that the District Judge or designated judicial officer who hears the appeals under Section 9, does so not as a court but as a persona designata. For the reasons already alluded to we have no hesitation in holding that the remedy of appeal under Section 9 before the Appellate Officer is not as a persona designata but to a pre-existing judicial authority. In that case, the procedure for hearing of the appeals will be governed by the provisions under the 1971 Act and the Rules framed

thereunder and including the enactment under which the judicial authority has been created, such as the Maharashtra Civil Courts Act and the City Civil Courts Act. (See para 26 of Maharashtra State Financial Corpn. [Maharashtra State Financial Corpn. v. Jaycee Drugs & Pharmaceuticals (P) Ltd., (1991) 2 SCC 637] , reproduced in the earlier part of this judgment in para 30). Such a pre-existing judicial authority, by implication, would be bound to follow the procedure underlying the said enactments and also observe the doctrine of fairness in affording opportunity. Since the edifice on which the conclusions reached by the Delhi High Court, that an Appellate Officer is persona designata and not a court, cannot be countenanced in law, the Bombay High Court decisions in Nusli Neville Wadia case [Nusli Neville Wadia v. New India Assurance Co. Ltd., 2010 SCC OnLine Bom 271 : (2010) 2 Mah LJ 978 : (2010) 4 Bom CR 807] and also Prakash Securities (P) Ltd. [Prakash Securities (P) Ltd. v. LIC, 2012 SCC OnLine Bom 633 : (2012) 4 Bom CR 1] , cannot hold the field to that extent for the same logic.”

10. In the instant case there is no procedure laid down to be followed by the Appellate officer. Though sec.81-L(e) of the MM Act, provides for the Commissioner, with the approval of the Standing Committee, to make regulations for the manner in which appeals may be preferred under section 81-F and the procedure to be followed in such appeals admittedly no such regulations have been framed, in light of which what has been stated in **Nandini J. Shah** (supra) regarding the procedure to be adopted by the ‘appellate officer’, in respect of appeals under sec.9 of the PP Act 1971, would equally hold true, in respect of appeals under sec.81-F of the MMC Act.

11. ***Terapalli Dyvasahota Kumar*** (supra) is not of much assistance as it considers a totally different expression, i.e. “District Court Concerned”, which in itself contemplates the Court.

12. In ***Steel Authority of India Ltd. / Exalt Service Pvt. Ltd.*** 2019 SCC OnLine Cal 9290, while considering the provisions of the PP Act, 1971, and the plea of applicability of sec.151 CPC to it, a learned Single Judge, held as under :

“38. There is no dispute with regard to the proposition of law that the provision of section 151 of the Code of Civil Procedure recognizes the inherent power of every Civil Court to pass necessary orders to subserve the ends-of-justice and to prevent abuse of process of the Court and such inherent power can be exercised by a Civil Court unless expressly prohibited by any other provisions of the Code as has been held by the Apex Court in the decision reported in (2004) 11 SCC 168 (supra). But in view of the specific object and scope of the provisions of the said Act of 1971 that those provisions would only govern the relationship between the public undertakings covered under the said Act of 1971 and their occupants to the extent they provide for eviction of unauthorised occupants from public premises, recovery of rent or damages for such unauthorised occupation, and other incidental matters specified under the Act of 1971 as has been held by the Hon'ble Apex Court in the decision reported in (2011) 13 SCC 446 (supra), the scope of the said Act of 1971 cannot be enlarged by invoking the inherent power of the Civil Court recognized under the provisions of section 151 of the Code.”

The plea regarding availability of the inherent powers u/s 151 of CPC, thus has been negated.

13. Even if it is held that the ‘appellate officer, as contained in Sec.81-F of the MMC Act, is not a persona designata, but is a pre-existing judicial authority in the District, as held in ***Nandini J. Shah*** (supra), still the question remains as to whether the provisions of C.P.C, would be applicable to proceedings before it. ***Nandini J. Shah*** (supra) holds that such a pre-existing judicial authority, by implication, would be bound to follow the procedure underlying the said enactments and also observe the doctrine of fairness in affording opportunity. It would therefore mean that the procedure laid down in the relevant statute under which the ‘appellate officer’, has been created, will have to be the procedure to be followed while deciding an appeal under sec.81-F of the MMC Act. Since no regulations have been framed under sec.81-L(e) of the MMC Act, what would be followed would be the doctrine of fairness in affording opportunity and the appeal under sec.81-F, would not be governed by the provisions of sec.96 read with O.41 CPC.

14. The plea that by virtue of sec.434 of the MMC Act, the entire CPC including the provisions of sec.96 and O.41 would be applicable to an appeal u/s 81-F of the MMC Act, has to be construed in light of the language of sec.434 of the MMC Act,

which for the sake of ready reference is reproduced as under :

“434. (1) Save as expressly provided by this Chapter the provisions of the Code of Civil Procedure, 1908 relating to appeals from original decrees, shall apply to appeals to the Judge from the orders of the Commissioner and relating to appeals from appellate decrees shall apply to appeals to the District Court.

(2) All other matters for which no specific provision has been made under this Act shall be governed by such rules as the 1[State] Government may from time to time make after consultation with the High Court.”

15. The language of sec.434 (1) of the MMC Act, appears to be clear, in as much it applies the provisions of CPC relating to appeals from original decrees (i.e. sec.96 and O.41 thereof) to appeals to the Judge, from the orders of the Commissioner. It also mandates that the provisions of CPC relating to appeals from appellate decrees (i.e. sec.100 and O.XLII) shall apply to appeals to the District Court. In this context it is necessary to state that sec.2(29) of the MMC Act, defines a ‘Judge’ to mean as under :

“2 (29) “the Judge” means in the City of Pune the Judge of the Court of Small Causes, and in any other City, the Civil Judge (Senior Division) having jurisdiction in the City. ”

16. Section 81-F of the MMC Act, reads as under:

“81-F (1) An appeal shall lie from every order of the Commissioner, made in respect of any Corporation

premises, under section 81-B or section 81-C, to an appellate officer, who shall be the District Judge or such other judicial officer in the City of not less than ten years' standing, as the District Judge may designate in this behalf.

17. Thus the 'Judge', as defined in sec.2(29) of the MMC Act, is quite different than the one as contemplated by sec.81-F of the MMC Act. Sec. 434 MMC Act, applies the CPC to the extent as indicated therein to appeals to the 'Judge' which would mean a 'Judge', as defined in sec.2(29) of the MMC Act and before whom proceedings/appeals are to be filed under Chapter XXVI of the MMC Act, under sec.405 and 414 thereof. In so far as appeals u/s 81-F are concerned the procedure would be either governed by the regulations as framed under sec.81-L-(e) of the MMC Act, or Sec.434(2) of the MMC Act and in absence thereof by the doctrine of fairness in affording opportunity as held in ***Nandini J Shah*** (supra).

18. This would be further apparent from the fact that Chapter VIII-A comprising of sec.81-A to J did not form part of the original MMC Act, which already contained sec.434, but was inserted by Mah. 8 of 1970, s. 2. It is also necessary to note that the inquiry as contemplated by the provisions of sec.81-B is a summary enquiry.

19. It is also necessary to note that the application for permission to file document has been filed in this Court where the proceedings are not controlled by the provisions of CPC. and opportunity as required by law was afforded to the petitioners, before the order permitting to place the document on record was passed.

20. The order dated 3/3/2023 regarding non-applicability of sec.434 MMC Act, to appeals u/s 81-F of the MMC Act, though has been based on the premise that the 'appellate officer' was a persona designata, which in view of ***Nandini J Shah*** (supra) is incorrect, even then in view of the above discussion, it would be apparent that sec.434 of the MMC Act, would not be applicable to appeals u/s 81-F of the MMC Act, in view of the language of sec.434(1) and sec.2(29) of the MMC Act, which defined a 'Judge'. I, therefore do not see any reason to recall the order dated 03/03/2023. The civil application is, therefore, rejected.

(AVINASH G. GHAROTE, J.)

MP Deshpande