



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 313 OF 1992

Shah Nawaz Khan s/o Alam Khan
(deceased through LRs)

- (1) Smt. Nazneen Begum w/o Shah Nawaz Khan
- (2) Qaisar Khan s/o Shah Nawaz Khan
- (3) Shahab Khan s/o Shah Nawaz Khan
- (4) Nader Khan s/o Shah Nawaz Khan
- (5) Smt. Farzana Begum d/o Shah Nawaz Khan
(w/o Ismail Khan)
- (6) Smt. Shabana Begum d/o Shah Nawaz Khan
(w/o Abdul Noor Khan)
- (7) Smt. Rizwana Begum d/o Shah Nawaz Khan
(w/o Bashiruddin Shaikh) .. Appellant

versus

The Chief Officer,
Municipal Council,
Aurangabad
now Municipal Corporation, Aurangabad
through its Dy. Commissioner .. Respondent

Mr. S. V. Adwant, Advocate for the Appellants.
Mr. Umesh Bhadgaonkar, Advocate for the Respondent.

CORAM : R. M. JOSHI, J.
DATE : 14th FEBRUARY, 2025.

JUDGMENT :

1. This appeal under Section 100 of Code of Civil Procedure takes exception to the judgment and decree passed by the First Appellate Court in Regular Civil Appeal No. 319/1986 dated 22.10.1991 whereby the appeal came to be allowed and order passed by the Trial Court decreeing the suit and granting perpetual and mandatory injunction came to be set aside.

2. Parties are referred to as Plaintiff and Defendant/Municipal Council (Now Municipal Corporation) for the sake of convenience.

3. The facts in this case are not in dispute. Plaintiff is the owner of house bearing Municipal No. 3-10-95, C.T.S. No. 10213, situated at Shahgunj, Aurangabad. The house is bounded to the East – Road Shahbazar to Nawabpura, West - Open land and way to approach public street, North – Road of Bhaji Mandi public street and to the South – Public street. There is a footpath to the edge of the road of northern side of the house, which is meant for public use. It is the case of Plaintiff that Defendant had leased out north west corner some portion from regular line to the persons running hotels, stalls etc. It is also claimed by the Plaintiff that the Defendant

intends to lease out entire portion from the southern side beyond regular line towards the centre of the street. It is claimed by Plaintiff that due to leasing out of said portion the width of footpath which is available for public use is going to be reduced. It is also claimed that on account of encroachment caused on the public road, it has become difficult for outlet of the rain water from the compound of the Plaintiff. Plaintiff claims his house to be surrounded by compound wall. On these amongst other contentions, Plaintiff filed suit for perpetual and mandatory injunction asking Defendant to remove structure erected on the footpath.

4. Defendant resisted the claim. In the written statement, no dispute is made with regard to the description and ownership of the Plaintiff's house. It is however denied that any portion of the footpath was leased out or there is any intention of the Defendant to lease out the same. A specific plea is raised that for want of notice under Section 304 of the Maharashtra Municipalities Act, 1965 (for short 'the Act'), the suit is not maintainable.

5. Learned Trial Court decreed the suit. Insofar as objection raised by Defendant about maintainability of the suit, it

was held by the learned Trial Court that the suit is filed for removal of encroachment and it is a duty of the Defendant/Municipal Corporation. It is observed that the Defendant has shown its intention to remove encroachment however, on account of possibility of occurrence of law and order situation, the action is deferred. It is held by the Trial Court that the Court has jurisdiction to direct the Municipal Council to remove unauthorised construction and hence it is held that the suit is maintainable.

6. Defendant, being aggrieved by the said judgment and decree preferred first appeal. A specific point was raised before the First Appellate Court about maintainability of the suit for want of notice under Section 304 of the Act. Learned First Appellate court has taken into consideration said provision of the Act, and held that since the Plaintiff is seeking action of removal of encroachment which is the duty and responsibility of the Defendant, the suit is duly covered by the provisions of Section 304 of the Act. The Court has also referred to sub-section 4 of Section 304 of the Act to hold that the said exemption would be applicable only in case of suit for simplicitor injunction. With these findings, the First Appellate court reversed the judgment and decree passed by the Trial Court and the

suit came to be dismissed for want of statutory notice under Section 304 of the Act.

7. By order dated 28.08.1992, this Court has admitted the appeal on following substantial questions of law i.e. Ground Nos. 5, 10, 12 and 13 which are reproduced as under :-

(i) (5) That the learned Additional District Judge exceeded his authority in allowing the appeal against a dead person. The Appellants say and submit that the judgment and decree under appeal as such is void. This is a substantial question of law.

(ii) (10) That the substantial question of law is as to what is the correct interpretation of section 304 of the Maharashtra Municipalities Act, 1965 and whether in view of sub-section (4) of the said Section the present suit is maintainable.

(iii) (12) That it should have been appreciated that Section 49 sub-Section (2) of the Maharashtra Municipalities Act, 1965 imposes a duty on the Municipal Council and it is obligatory on the Municipal Council to comply with the said provisions. Whereas the sub-Section (3) of the said Section is apparently discretionary, the

substantial question of law therefore, is what is the correct interpretation of sub-section (4) of Section 49 of the Maharashtra Municipalities Act.

- (iv) (13) That it ought to have been held that sub-section (4) of Section 49 embraces and relates only to claims involving suits embodying the claims under sub-section (3) of Section 49 only.

8. Learned counsel for Plaintiff submits that the First Appellate Court has committed error in not considering the provisions of Section 304(4) of the Act in proper perspective. It is his submission that once the suit is filed under the provisions of Specific Relief Act, there is exemption to the notice as contemplated by sub-section 4 of Section 304 of the Act. It is his submission that time and again this Court as well as the Hon'ble Supreme Court has upheld the powers of the Court to direct removal of encroachment. Thus, it is his submission that the judgment and decree passed by the First Appellate court is erroneous and contrary to the law laid down by this Court as well as Supreme Court, and hence, the same deserves interference. To support his submissions, he placed reliance on following judgments :-

- (i) K. Ramdas Shenoy vs. Chief Officer, Town Municipal Council, Udipi, AIR 1974 SC 2177
- (ii) Pratibha Co-operative Housing Society vs. State of Maharashtra 1991(3) SCC 341
- (iii) Sindhu Education Society vs. Municipal Corp. of City of Ulhasnagar, (2001) (1) Mah. L.J. 894.
- (iv) Smt. Fatima Goao vs Village Panchayat Mercedes and another AIR 2000 BOM 444.

9. Learned counsel for Respondent supported the impugned judgment.

10. In order to appreciate the submissions it is necessary to take note of provisions of Section 304 of the Act which read as under :-

304. (1) No suit shall lie against a Council or against any committee constituted under this Act, or against any officer or servant of a Council in respect of any act 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) unless it is commenced within six months next after the accrual of the cause of action; and

(b) until the expiration of one month after notice in writing has been, in the case of a Council or its committee, delivered or left at the municipal office and, in the case of an officer or servant of a Council, delivered to him or left at his office or place of abode; and all such notices shall state with reasonable particularity the causes of action and the name and place of abode of the intending plaintiff and of his advocate, pleader or agent, if any, for the purpose of the suit.

(2) At the trial of any such suit,-

(a) the plaintiff shall not be permitted to adduce evidence relating to any cause of action save such as is set forth in the notice delivered or left by him as aforesaid;

(b) x x x

(3) x x x

(4) Nothing in clauses (a) and (b) of sub-section (1) shall apply to any suit under section 38 of the Specific Relief Act, 1963 [XLVII of 1963] or under sub-section (1) or (2) of section 96 of this Act.

11. This provision indicates that no suit shall lie against a Council in respect of any act done in pursuance or execution or intended execution of the Act unless it is filed within six months from accrual of cause of action and until expiration of one month notice in writing delivered at municipal office. It is thus clear that for the purpose of maintaining the suit against a Council, two conditions must be complied with i.e. firstly the suit must be filed within a period of six months from accrual of cause of action and the same shall not lie until expiration of one month after notice in writing has been issued to the Council.

12. Learned counsel for Plaintiff has not disputed the said position of law with regard to maintainability of the suit only on compliance of these two requisite conditions. He however argued that the case of Plaintiff is covered by sub-section 4 of the said provision. Sub-section 4 indicates that nothing in clauses (a) and (b) of sub-section (1) shall apply to any suit under Section 38 of the Specific Relief Act. It would be relevant to take note of Section 38 of the Specific Relief Act which reads as under :-

Section 38 - Perpetual injunction when granted

(1) Subject to the other provisions contained in or referred to by this Chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.

(2) When any such obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II.

(3) When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the court may grant a perpetual injunction in the following cases, namely:--

(a) where the defendant is trustee of the property for the plaintiff;

(b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

(c) where the invasion is such that compensation in money would not afford adequate relief;

(d) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

13. Perusal of these provisions show that it is open for the Plaintiff to file a suit for perpetual or mandatory injunction in case

his personal right is being violated or interfered with. Admittedly, sub-sections (2) and (3) of Section 38 of the Act have no application to the case in hand. As far as the instant case is concerned, perusal of pleadings shows that there is no relief sought by the Plaintiff in respect of his personal right or property i.e. suit property. What has been asked is to call upon the Council to take action against the unauthorised construction carried out on footpath. The said averment in the plaint more than sufficiently demonstrates that the act of removal of encroachment is a duty and responsibility of the Council. In order to seek any direction in this regard, the embargo created by sub-section 1 (a) and (b) of Section 304 would apply. Since the present suit is not for the purpose of asserting any individual right of the Plaintiff in respect of his property, the suit is not covered by provisions of sub-section 4 of the Act. The contention of counsel for Plaintiff therefore deserves no acceptance.

14. There cannot be any quarrel on the preposition sought to be canvassed by learned counsel for Plaintiff that it is the responsibility of the Council to remove unauthorised construction on the road, footpath etc. so also to follow process of law before leasing out any property. With acceptance of said proposition, the present

case gets duly covered by Section 304(1)(a)(b) of the Act. The Court, therefore, is required to see whether suit in absence of mandatory notice is maintainable. Under Section 304 of the Act, service of notice is a precondition to maintain the suit. As held by Hon'ble Supreme Court from time to time while dealing with similar mandatory notice before filing suit against Government or a public office, that the legislative intent of the provision is to give Government a sufficient notice of the suit, which is proposed to be filed so that it may reconsider the decision or decide whether to accept claim/contention of Plaintiff. It is also held that the object of the provision is advancement of justice and securing public good by avoidance of unnecessary litigation.

15. Once admittedly the issue raised before the Civil Court is in respect of act done or intended to be done in execution of the Act and where no notice is issued prior to institution of suit as contemplated by Section 304 of the Act, suit must fail. Consequently, First Appellate Court committed no error in dismissing the suit. The substantial question of law (ii) recorded above therefore stands decided accordingly. As a result of decision of the issue of maintainability of suit, other issues need not be gone into.

16. Appeal, therefore, stands dismissed.

17. Pending application, if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge

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