SUPREME COURT OF INDIA

A. L. Ranjane

Vs.

Ravindra Ishwardas Sethna

C.A.No.8994 of 1994

(S. N. Variava and Arun Kumar JJ.)

22.11.2002

JUDGEMENT

Arun Kumar, J.

1. These appeals are directed against a judgment and decree passed by the High Court in Letters Patent Appeals No. 110 of 1993, 111 of 1993 and 112 of 1993. So far as the legal aspect of the case is concerned it relates to interpretation of S. 313 of the Bombay Municipal Corporation Act (hereinafter referred to as the 'Act'). Rest of the matter relates to findings of fact arrived at by the High Court which do not call for interference in these Civil Appeals.

2. Briefly, the facts are that the appellant is running a tea-stall for which he has put up a structure on the street at the junction of Kalbadevi Road and Jambulwadi lane. Respondent No.1 is the owner of the building on that corner. The tea stall set up by the appellant on the street abuts the building owned by Respondent No.1. Respondent No.1 filed a suit for declaration, mandatory injunction and permanent injunction with the following prayers:

> "(a) For a Declaration that the suit structure put up by the 3rd defendant is an unauthorized structure and also an encroachment on the plaintiff's rights and property.
>
> (b) For a Mandatory Order and injunction that the defendants do forthwith remove the suit structure along with the paraphernalia, including illegal electric and water connections and the things and articles inside and around the suit structure, including those that are affixed, annexed and attached to the said property.
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> (c) For a permanent injunction restraining the defendants No. 1 and 2 from allowing the suit structures to continue to remain in the vicinity of the Plaintiffs said properties.
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> (d) For a permanent injunction restraining the defendants Nos. 1 and 2 from permitting or sanctioning and allowing any Shed or Stall structure to be put up and to remain in the vicinity of the plaintiffs said properties."

3. The Municipal Corporation of Greater Bombay and its Commissioner were impleaded as Defendants Nos. 1 and 2 while defendant No. 3 in the suit is appellant herein who is running the disputed tea stall. It has come in evidence of the appellant himself that the size of the structure is about 10ft. x 9ft. having a height of 10 ft. It has a pucca flooring of paved tiles. It has rolling shutters on two sides. It has tin roof. On the side of the roof of the structure is installed a water storage tank. The structure has water and electricity connections. It has provision for drainage. The four sides of the structure are embedded in the concrete flooring on the road. It is also admitted that customers enjoy the facilities provided by the tea stall while standing/sitting on the road. Washing of the utensils takes place on the road. The workers of the tea stall bathe and wash their clothes on the road itself in front of the house of Respondent No.1. The objected structure occupies about one-third of the width of Jambulwadi lane. Rain water falling on the roof of the structure splashes on the wall of the building of Respondent No.1 which damages the wall as well as the paint on the wall of the building. Respondent No.1 is also aggrieved by the fact that he cannot repair his building from the side where the structure in question exists because no scaffolding can be put there. Besides this Respondent No.1 plaintiff alleged that the stall is a health and fire hazard because kerosene pressure stove is being used in the stall for making tea and coffee.

4. After framing issues and recording evidence of the parties the trial Court vide judgment dated 30th August, 1988, decreed the suit of the plaintiff respondent No.1. In an appeal filed against the said judgment, the matter was remanded back to the trial Court. The trial Court again passed a decree in favour of the plaintiff on 9th September, 1991. Two appeals were filed against the decree passed by the trial Court –one by the present appellant i.e. the owner of the tea stall while the other was filed by the Municipal Corporation of Greater Bombay and the Commissioner of the Corporation. A learned single Judge of the High Court vide judgment dated 23rd/26th April, 1993 accepted the appeals and dismissed the suit. Respondent-plaintiff filed Letters patent Appeals against the decision of the learned single Judge. These appeals were allowed by the Division Bench of the High Court resulting in the suit of Respondent-plaintiff being decreed. The present appeals arise from the judgment dated 10-10-1994 of the Division Bench of the High Court.

5. The learned Counsel for the appellant argued that the structure in question was duly authorized by the city Corporation, and therefore, the plaintiff could not object to the existence of the structure and the business being carried on therein by the appellant. In this connection it is to be noted that the appellant was initially allowed to put up a sugarcane crusher on the street as a "tolerated structure". The appellant thereafter sought permission for a tea stall in place of the sugarcane crusher in November, 1981. The sugarcane crusher occupied space of 1mtr. x 1mtr. The Ward Officer put up a note to the Superintendent of Licences stating that the appellant was allowed a "tolerated" sugarcane crusher and had asked for permission to put up electric power motor which request was not permissible, therefore, the appellant wanted to convert the sugarcane juice stall into a tea stall. The Ward Officer thereafter put up a note supporting the case of the appellant. The Superintendent of Licences submitted his remarks to the Municipal Commissioner stating that permission for tea stall for an area of 1mtr. x 1 mtr. be considered as a special case and not to be treated as precedent for any other case in view of the "tolerated" sugarcane crusher allowed to the appellant. On 10th

December, 1981, the Municipal Commissioner passed an order that a tea stall licence may be given as a very special case and not to be treated as a precedent. Thus what was permitted was a tea stall of the size of 1 mtr x 1 mtr. which was of the same size as the "tolerated" sugarcane crusher. It appears that the Ward Officer kept on twisting facts in favour of the appellant. In a further note he recommended that the appellant be allowed an area of 2 mtrs. x 3 mtrs. for a tea stall. It was reported by the Ward Officer that the stall would be put up on a foot path and it would be at the dead end of the lane. Both these statements were untrue in as much as neither the stall was on the footpath nor it was at the dead end of the lane. The structure is at the junction of Jambulwadi road with Kalbadevi lane whereas the dead end of the Jambulwadi road is at some distance. There is no footpath at the Jambulwadi lane. Proceeding on the basis of this misrepresentation, the Municipal Commissioner sanctioned the request contained in the note of the Ward Officer vide letter dated 17-2-1982. Further on 27-4-1982 it is recorded that the Municipal Commissioner has directed the Ward Officer to remove water and electricity connections in the tea stall. It was also ordered that the stall has been allowed temporarily as a removable structure and it cannot be allowed to be permanently embedded on the road. If there was permanent embedding, the same was directed to be removed. The appellant continued to pursue the matter regarding water and electricity connections.

6. The fact of the matter is that the size of the tea stall is 2.5 mtrs. x 3.28 mtrs. and it is located at the entrance of the Jambulwadi lane. The stall is about 2 ft. away from the building of the respondent plaintiff. The water tank which supplies water to the stall is supported on iron angles. The High Court noticed that in addition to the place occupied by the stall, considerable space outside the stall would always be occupied by people coming to drink tea as also by other articles which are generally dumped outside such tea stalls on the road. Thus it is obvious that the tea stall is a nuisance on the road besides causing hindrance in the free flow of traffic on the road. It is a source of nuisance for the plaintiff respondent No.1 so far his right to enjoy his property is concerned.

7. Coming to the legal aspect regarding interpretation of Article 313 of the Bombay Municipal Corporation Act we would like to first quote the relevant portion:

> "313(1). No person shall, except with the written permission of the Commissioner
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> (a) place or deposit upon any street or upon any open channel, drain or wall in any street (or in ay public place) any stall, chair, bench, box, ladder, bale or other thing so as to form an obstruction thereto or encroachment thereon;
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> (b) project, at a height of less than twelve foot from the surface of the street, any board, or shelf, beyond the line of the plinth of any building, over any street, or over any open channel, drain, well or tank in any street;
>
> (c) attach to, or suspend from, any wall or portion of a building abutting on a street, at a less height than aforesaid, anything whatever."

8. A bare perusal of the provision contained in clause (a) of sub-sec. (1) of S. 313 of the Act shows that the Commissioner can grant permission for placing or depositing on any street etc. etc. any stall, chair, bench, box, ladder, bale. This provision nowhere authorises the Commissioner to grant permission with respect to a stall/structure of the type described hereinbefore set up by the appellant. The structure for which permission can be granted by the Commissioner has to be similar to items mentioned in the clause. Permission has to be for something which can be read as ejusdem generis with the items mentioned in clause (a). The items mentioned in clause (a) indicate that they are of a temporary nature and are easily removable as and when required. The structure in the present case is of a size which even if not permanently embedded on road, cannot be said to be akin to items mentioned in clause (a). In the present case the structure is embedded on the road its four poles are embedded in the concrete paving on the road. Moreover, the structure has water and electricity connections and permanent water tank meant to store water and ensure permanent supply of water to the stall, is installed on the side of the structure. It has shutters which enable locking of the stall whenever required. No permission can be granted by the Commissioner for setting up such a structure under S. 313 of the Act. Section 313 totally bars any stall or structure of the type put up by the appellant. So permission, if any, granted by the Commissioner is violative of the statute and is, therefore, illegal.

9. We also agree with the High Court that permission of the Commissioner for the tea stall in the present case was obtained by mis-representation of vital facts. The same is vitiated. It is of no avail. The High Court further found in its impugned judgment that the appellant's right to repair and maintain his building, particularly the portion where the stall in question abuts, has been seriously affected. The kerosene pressure stove being used for preparation of tea and coffee in the stall has been found to be a fire hazard. The structure was also found to be causing nuisance for the occupants of the building as well as it was a hindrance in the free flow of the traffic and movement of pedestrians. According to the High Court not only the structure was not permissible under the provision of S. 313 of the Act but also it has prejudicially affected the rights of the appellant qua enjoyment of his property. We fully agree with the findings of the High Court in this respect.

10. The learned counsel for the appellant meekly argued that the suit of Plaintiff-Respondent No.1 was barred by limitation prescribed under Section 527 (1)(b) of the Act. This Section contains a provision regarding notice to be served on the Corporation before filing of such a suit against it and it also prescribes a limitation period for a suit being filed against the Corporation. The issue of limitation raised by the learned counsel for the appellant can be disposed of simply on the basis of the fact that the question of limitation, if at all could be raised by the Municipal Corporation of Greater Bombay and its Commissioner i.e. Defendants Nos.1 and 2 in the suit. So far as the prayer regarding mandatory injunction against Defendant No. 3 i.e. the appellant regarding removal of the structure in question, the bar of limitation does not get attracted. The mandatory injunction granted under the decree passed by the High Court regarding removal of the structure provides complete relief to the plaintiff/respondent No.1. Therefore, we find no substance in the contention that the suit is barred by limitation in view of the provision contained in S. 527 of the Act. The result is that these appeals fail and they are dismissed.

11. The learned Counsel for the appellant made a request that the tea stall was being run by the appellant for a long time and it was the only source of livelihood for the family of the appellant. Therefore he prayed that some time be granted to the appellant to enable him to find some other place to run his business. In view of this request, the appellant is granted time to remove the structure in question by or before 31st January, 2003 subject to his filing the usual undertaking in this behalf within three weeks.

Appeals dismissed.