

SUPREME COURT OF INDIA

Rikhabsao Nathusao Jain

Vs.

Corpn. of the City of Nagpur

Civil Appeal Nos. 6192-6197 of 2008 arising out of SLP (Civil) No. 22073-22078 of 2005

(S.B. Sinha and Cyriac Joseph)

22/10/2008

JUDGMENT

S.B. SINHA, J:

1. Leave granted.
2. Width and amplitude of jurisdiction of the District Judge in terms of Section 286 (5) of the City of Nagpur Corporation Act, 1948 (for short "the Act") is in question in these appeals which arise out of judgments and orders dated 24.09.2004 and 6.04.2005 passed by the High Court of Judicature at Bombay, Nagpur Bench.
3. The dispute between the parties herein arose due to refusal to grant sanction of a building plan filed by respondent No. 2. Appellant is his neighbour. Appellant is owner of a house bearing No. 585 and respondent No. 2 is owner of a neighbouring house bearing No. 586.

4. A part of the land on which the constructions were said to have been raised by respondent No. 2 belonged to the Corporation of City of Nagpur (for short "the Corporation") itself. Respondent No. 2 and his predecessors, however, are said to be in possession thereof for a long time and acquired an indefeasible title thereto.

5. Respondent No. 2 allegedly had submitted a plan for construction of a building. It was not approved within a period of sixty days. On the premise that the said plan would be deemed to have been sanctioned, he raised constructions. Appellant filed an application before the District Judge, Nagpur in terms of Section 286(5) of the Act on or about 1.08.1983, inter alia for the following reliefs:

"(i) Grant of mandatory injunction against the non-applicant No. 1 and 2 directing them to remove the un-authorized & illegal work carried out by them and restraining them in future from undertaking any authorized and illegal work in contravention of the provisions of Nagpur Corporation Act and the by-laws made thereunder.

(ii) Injunction restraining the non-applicant NO.1 from giving sanction to the building proposal,if any, submitted by non-applicant No.2 without first deciding the objection raised by the applicant;

(iii) Injunction restraining the non-applicant No.1 from giving sanction to extension, modification, alteration, constructions or such other things in future, without first hearing the applicant."

Appellant also filed an application seeking an interim order of injunction restraining respondent No. 1 - Corporation from granting any sanction of building plan submitted by respondent No. 2 as also an order of injunction restraining him from proceeding with illegal construction.

6. Respondent No. 1 - Corporation in its written statement before the learned District Judge contended that the plan submitted by respondent No. 2 was not in conformity with Bye-Law No. 4 of Building Bye-Laws. It was furthermore contended that the said plan had been returned to him on 4.08.1983.

7. The said application was transferred to the Court of Second Extra Assistant Judge. It was heard on or about 3.10.1983 and posted for judgment on 12.10.1983. As on the said date, the Presiding Officer was on leave, the matter was posted for judgment on 21.10.1983. By an order

dated 21.10.1983, the learned Judge passed the following order:

"...Hence by invoking the principle of natural justice and the inherent powers vested in me under Section 151 of the Civil Procedure Code, I hereby direct the Non-applicant No. 1 Corporation through its Administrator to consider site plan or building plan submitted by N.A. 2 Pannalal and pass suitable order granting sanction for the proposed construction keeping in view the rules and byelaws framed by the Corporation in regard to construction or erection of buildings on sites together with objections, if any, from Rukhabdas Jain within fifteen days from receipt of this order. After receipt of suitable order or sanction given by the Corporation in respect of construction proposed by the Non applicant No. 2 Pannalal on his concerned site, judgment will be pronounced in this case in the light of the said order or sanction given by the Corporation. Till then the judgment is deferred. Meanwhile, the interim injunction order dated 2.8.1983 to continue."

On the premise that the said order was not complied with, a show cause notice was issued on 17.11.1983 for initiation of a proceeding under the Contempt of Courts Act against the Executive Officer of the Corporation in the following terms:

"This court had served upon you order dated 21.10.1983 in Misc. Civil Application No. 249 of 1983, on 21.10.1983 vide outward No. 348 of 1983, to consider the site plan/ building plan submitted by Non-applicant No. 2 - Pannalal S/o Trilokchand Khedkar of house No. 586, Circle No. 9/14, Ward No. 36, Ladpura, Itwari, Nagpur and to pass suitable order granting sanction for the proposed construction etc. In the very order you were directed to comply with the said order within 15 days from receipt thereof. However, from the statement of the learned Advocate for N.A. No. 2 Pannalal it appears that you have not complied with the said order, nor any compliance report submitted by you in this Court so far. The noncompliance on your part of the said order may amount to contempt of court. You are, therefore, directed to show case, why suitable action for contempt of court be not taken against you within 3 days from receipt of this notice."

8. Respondent No. 2 submitted a plan on 19.11.1983, which happened to be a Saturday. On 21.11.1983, i.e., Monday next, the plan was sanctioned in favour of respondent No. 2.

9. An application for vacation of stay was filed on 1.12.1983 and by an order dated 4.02.1984, the order of interim injunction was vacated. A civil revision application was preferred thereagainst before the High Court. The High Court by an order dated 20.06.1984 directed disposal of the injunction application within fifteen days from the said date, stating:

"Mr. Rajkarne states that he will pull down the offending structure should the order finally go against him. On this statement, the ad-int. injunction is vacated. The Assistant Judge should decide

the application within fifteen days. Revision disposed of."

10. The Miscellaneous Civil Application filed by appellant was dismissed by an order dated 23.07.1984 inter alia on the premise that having regard to Section 275 (3) of the Act, respondent No. 2 was entitled to start and carry on constructions relying on or on the basis of the deemed sanction. As regards the question that respondent No. 2 had no title over the property, it was held:

"41. If according to the appellant, the N.A. No. 2 has no title to the property on which he is raising construction and which he showed to be of his own in the site plan submitted to the Corporation the N.A. No. 2 has not left open required space adjoining his building thereby contravening by law No. 32 he has shown excess area in his site plan and obtained sanction by deceit and fraud, the sanction given to the N.A. No. 2 by N.A. No. 1 in respect of proposed construction is illegal and

invalid since it is in contravention or various provisions of the Act and byelaws thereunder, it is open to the applicant to file a separate suit, claiming declaration that the said sanction is invalid because of above reason and further claiming injunction of the nature as sought in the present application, wherein all those points can be conclusively decided. Considering the limited scope of Sec. 286 (5) of the Act, in my opinion, this is not competent forum to entertain and decide all these points."

11. Appellant, aggrieved by and dissatisfied with the said decision of the learned District Judge, preferred an appeal before the High Court. By a judgment and order dated 5.09.1996, the said appeal was allowed and the matter was remitted, directing:

"15. Admittedly, because of the vacation of the stay, the incomplete construction stated to have been completed by the respondent No.2. Undisputedly, no party has led any evidence in the matter. Under the circumstances, in fairness and interest of the parties, the matter be remanded to the Trial court for fresh consideration and decision and in view of the provisions under Section 286(5) of the City of Nagpur Corporation Act, giving opportunity to the parties to lead evidence and of hearing. As held that the order dated 02.01.1983 is illegal, arbitrary and perverse, the sanction accorded by Nagpur Corporation in view of the directions of the trial Court, be treated that there is no sanction to the already returned application proposed plan. The trial Court is also directed to consider the two applications filed by the appellant in this Court for amendment to the original application under Section 286 (5) of the City of Nagpur Corporation Act. The proceeding under the provisions of Section 286 (5) of the City of Nagpur Corporation Act was instituted in the year 1981. Considering the pendency of more than 15 years, I direct the trial Court to decide the matter within six months from the receipt of the writ of this Court."

12. A Letters Patent Appeal marked as LPA No. 115 of 1996 preferred thereagainst by respondent No. 2 was allowed and the learned Trial Judge was permitted to proceed with the trial.

13. Pursuant to or in furtherance of the said direction, the learned Trial Judge upon hearing the parties allowed the Misc. Civil Application No. 249 of 1983 directing the Corporation to remove the unauthorized construction made by respondent No. 2. An appeal was preferred thereagainst. The said appeal marked as First Appeal No. 476 of 1997 was directed to be heard with LPA No. 115 of 1996 by an order dated 23.03.1998. A Letters Patent Appeal was also filed questioning the order of the learned Single Judge dated 23.03.1998. All the three appeals were taken up for hearing together and by reason of the impugned judgment, the appeals preferred by respondent No. 2 have been allowed. A review application filed by appellant has been dismissed.

14. Dr. Rajeev B. Masodkar, learned counsel appearing on behalf of the appellant, in support of these appeals, contended:

(i) Having regard to the limited jurisdiction exercised by the learned District Judge, an order of mandatory injunction could not have been passed and that too without any application having been filed therefor.

(ii) As respondent No. 1 passed an order of sanction on the threat of contempt; the same should not have been given effect to.

15. Mr. Shivaji M. Jadhav, learned counsel appearing on behalf of respondent No. 1 supported the contention of Dr. Masodkar.

16. Mr. M.N. Rao, learned senior counsel appearing on behalf of respondent No. 2, on the other hand, submitted:

(i) Appellant, having not challenged the order of the Corporation dated 21.11.1983 granting sanction in favour of the respondent No. 2, is estopped and precluded from raising the contention as regards propriety of order dated 17.11.1993 before this Court for the first time.

(ii) As the District Judge exercises a statutory appellate power, he must be held to have an implied power to grant mandatory injunction.

(iii) In any event, as an order granting sanction has been passed by respondent No. 1, the

questions raised before this Court have become academic.

17. We may at the outset notice the relevant provisions of the Act.

The Act was enacted to consolidate and amend the law relating to the municipal affairs of the City of Nagpur. Sections 273, 274 and 277 whereof read as under:

"273. (1) No person shall-erect or re-erect any building; orcommence to erect or re-erect any building; ormake any material external alteration to any building; or construct or reconstruct any projecting portion of a building which the Commissioner is empowered by Section 284 to require to be set back or is empowered to give permission to construct or re-construct-unless the Commissioner has either by an order in writing granted permission or has failed to intimate within the prescribed period his refusal of permission for the erection or re-erection of the building or for the construction or re-construction of the projecting part of the building; after the expiry of one year from the date of the said permission or such longer period as the Commissioner may allow or from the end of the prescribed period as the case may be: Provided that nothing in this Section shall apply to any work, addition or alteration which the Corporation may by bye-law declare to be exempt. (2) If a question arises whether a particular alteration in or addition to an existing building is or is not a material alteration, the decision of the District Court, Nagpur, shall be final anc conclusive. (3) No appeal shall be admitted under this Section unless the matter has first been determined by the Commissioner.

274.(1) Every person who intends to erect or re-erect a building shall submit to the Commissioner an application in writing for approval of the site together with a site plan of the land, and in the case of land which is the property of the Government, or of the Corporation, a certified copy of the documents authorizing him to occupy the land, and if so required by the Commissioner the original document or documents; and an application in writing for permission to building together with a ground plan, elevation and section of the building and a specification of the work to be done. (2) Every plan of any building to be constructed wholly or partly of masonry, submitted under sub-section (1) in token of its having been prepared by him or under his supervision, bear the signature of a licensed surveyor. (3) Every document submitted under sub-section (1) shall be prepared in such manner and shall contain such particulars as may be prescribed. (4) Nothing herein contained shall require a person to comply with the provisions of clause(b) of sub-section (1) until such time as the site has been approved by the Commissioner or such person as he may appoint.

"277. (1) The Commissioner shall not grant permission to erect or re-erect any building unless and until he has approved of the site thereof on an application under Section 274. (2) The Commissioner may refuse permission to erect or re-erect any building - (a) if the plans and specifications submitted with the application show that such building is not in accordance with a

town-planning scheme sanctioned under Section 271 or with any provisions of this Act, or any rule or by-law made hereunder, or any provision of any law for the time being in force: or (b) if in his opinion the erection or re-erection of such building would be in nuisance or injurious to the inhabitants of the neighbourhood or to the public: or (c) unless and until any plans, specifications or particulars called for by him are supplied."

Sections 286(5), 287 and 377 of the Act are as under:

"286. (5) Nothing in this section shall affect the right of the Corporation or any other person to apply to the District Court, Nagpur, for an injunction for the removal or alteration of any building on the ground that it contravenes any provision of this Act or of the bye-laws made thereunder, but if the building is one in respect of which plans have been deposited and the plans have been passed by the Commissioner or notice that they have been rejected has not been given within the prescribed period after the deposit thereof and if the work has been executed in accordance with the plans, the Court on granting an injunction shall have power to order the Corporation to pay to the owner of the work such compensation as the Court thinks just, but before making any such order the Court shall cause the Commissioner if not a party, to be joined, as a party to the proceeding."

"287. Save as otherwise expressly provided in this Act or rules made thereunder, no Civil Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Chapter required to be settled, decided, or dealt with by the Corporation, or the Commissioner."

"377. Procedure in inquiries before Civil Courts- (1) For the purposes any appeal, inquiry or proceeding under this Act, the High Court and the District Court, Nagpur, may exercise all the powers conferred on them by the Code of Civil Procedure, 1908, and the Central Provinces and Berar Courts Act, 1917, as the case may be, and shall observe the procedure prescribed in the said enactments, so far as it is not inconsistent with the provisions of this Act.

(2) The costs of every appeal, inquiry, or proceeding under this Act shall be payable by such parties and in such proportions as the Court may direct and the amount thereof shall, if necessary, be recoverable as if it were due under a decree of the Court."

18. The law relating to town planning having regard to the necessity to have a planned township keeping in view the ecology thereof has assumed great significance. The statutory authorities under the Act, therefore, must be allowed to exercise their statutory powers reasonably and in good faith. It, however, would not mean that the right of an owner of the land to raise constructions over the land would not be attended to for a long time. Erection or re-erection of a building must precede grant of an express sanction of building. The statute provides as to how and in what manner an

application for grant of sanction of building plan should be dealt with. Section 275(3) of the Act, however, raises a legal fiction specifying the period of sixty days within which an application for grant of sanction of building plan should be considered by the appropriate authorities of the Corporation. The legislature, therefore, considered the said period of sixty days to be reasonable one during which the application for grant of sanction for a building plan should be attended to and appropriate order thereupon should be passed. However, there cannot be any doubt whatsoever that when queries are raised or defects are pointed out in the building plan, the owner of the land must reply thereto and/or remove the defects pointed out.

19. A building plan deemed to have been sanctioned must also satisfy the conditions laid down in the building bye-laws.

This Court in *Commissioner of Municipal Corporation, Shimla v. Prem Lata Sood and Others*, [(2007) 11 SCC 40] stated:

"44. There cannot be any doubt whatsoever that an owner of a property is entitled to enjoy his property and all the rights pertaining thereto. The provisions contained in a statute like the 1994 Act and the building bye-laws framed thereunder, however, provide for regulation in relation to the exercise and use of such right of an owner of a property. Such a regulatory statute must be held to be reasonable as the same is enacted in public interest. Although a deeming provision has been provided in sub-section (1) of Section 247 of the 1994 Act, the same will have restricted operation. In terms of the said provision, the period of sixty days cannot be counted from the date of the original application, when the building plans had been returned to the applicant for necessary clarification and/or compliance with the objections raised therein. If no sanction can be granted, when the building plan is not in conformity with the building bye-laws or has been made in contravention of the provisions of the Act or the laws, in our opinion, the restriction would not apply despite the deeming provision."

20. We will proceed on the basis that a deemed sanction would amount to an order granting sanction of a building plan. However, the jurisdiction of the District Judge can be invoked if a building is erected or re-erected in contravention of any town planning scheme or building bye-laws. Indisputably, right of a neighbourer is also a valuable right. He, in the event a building plan has wrongly been sanctioned, is entitled to file an appropriate application before the District Court for an injunction for removal or alteration of any building plan on the premise that the same was in contravention of any provisions of the Act or bye-laws made thereunder.

21. The core question which, thus, arises for our consideration is as to whether the jurisdiction of the District Court in this behalf is limited.

22. The Court indisputably has all incidental powers so as to enable it to proceed in accordance with law. It is, however, difficult to conceive that its jurisdiction is plenary in nature. The jurisdiction of the civil court in terms of Section 287 of the Act is barred. If the contention that the District Judge has all the powers, whether incidental or supplemental, as has been advanced by Mr. Rao is correct, it is difficult to comprehend as to why the legislature has barred the jurisdiction of the civil court. Keeping in view the nature of jurisdiction conferred upon the District Judge as also in view of the fact that the Civil Court's jurisdiction has been excluded in determining the said question, we have no other option but to hold that the jurisdiction of the District Judge is limited. If a jurisdiction is confined to grant of mandatory injunction, the court may in a given case also exercise its power to pass prohibitory injunction. We would also assume that if an order of injunction can be passed in favour of the applicant, in a given case, it may be passed in favour of the non-applicant also. But, such a power must be exercised whether in favour of the applicant or non-applicant, having regard to the scope of the limited jurisdiction to be exercised by the District Judge in terms of Section 286(5) of the Act. It is, therefore, difficult to comprehend that it has an implied power to grant mandatory injunction and that too suo motu.

23. We have noticed heretofore that the matter was heard and judgment was reserved by the learned District Judge. Respondent No. 2 did not file any application for a direction upon respondent No. 1 to consider his application for grant of sanction of the building plan. The learned Judge passed the order suo motu. It is one thing to say that it was done with a view to enable him to pass an appropriate order for the purpose of finding out as to whether the building plan conformed to the building bye-laws or not, but the court cannot shut its eyes to the fact that respondent No. 1 found the said plan to be defective and returned the same to the respondent No. 2 for curing the defects.

24. We are, however, not oblivious of the fact that whereas respondent No. 2 filed an application for grant of building plan on or about 10.11.1981 the same was returned in August, 1983. It appears from the records that respondent No. 2 started constructions upon demolition of the old structure in July, 1983.

25. It is one thing to say that the learned District Judge could direct respondent No. 1 to point out as to the provisions of the building bye-laws which are said to have been violated so as to consider the merit of the application filed by appellant but it would be another thing to say that it had the jurisdiction to direct it to reconsider the matter of granting sanction of building plan without the defect pointed out by it rectified.

We may, furthermore assume that even that was within the purview of the jurisdiction of the learned District Judge. For the said purpose, we may notice the nature of implied power, which the civil court is entitled to exercise. An implied power on the part of civil court is conceived of having regard to the interest of the parties, as for example, power to admit appeal includes power to stay [See Income Tax Officer, Cannanore v. M.K. Mohammed Kunhi AIR 1969 SC 430] or power to

grant maintenance includes power to grant interim maintenance [See Savitri w/o Govind Singh Rawat v. Govind Singh Rawat [(1985) 4 SCC 337], but we should not also be unmindful of the fact that the power to grant injunction is a special power which may be found to be absent in certain jurisdictions, as for example, the provisions of the Consumer Protection Act [See Morgan Stanley Mutual Fund v. Kartick Das (1994) 4 SCC 225]

26. Even however assuming that the court has the implied power to grant injunction and that too mandatory in nature de'hors the provisions of Section 286(5) of the Act, certain principles therefor must be borne in mind.

We may, in this regard, only notice the legal principles as enunciated by this Court, from time to time in this behalf. In Metro Marins v. Bonus Watch Co. (P) Ltd. [(2004) 7 SCC 478], this Court held:

"9. Having considered the arguments of the learned counsel for the parties and having perused the documents produced, we are satisfied that the impugned order of the appellate court cannot be sustained either on facts or in law. As noticed by this Court, in Dorab Cawasji Warden v. Coomi Sorab Warden it has held that an interim mandatory injunction can be granted only in exceptional cases coming within the exceptions noticed in the said judgment. In our opinion, the case of the respondent herein does not come under any one of those exceptions and even on facts it is not such a case which calls for the issuance of an interim mandatory injunction directing the possession being handed over to the respondent. As observed by the learned Single Judge the issue whether the plaintiff is entitled to possession is yet to be decided in the trial court and granting of any interim order directing handing over of possession would only mean decreeing the suit even before trial. Once the possession of the appellant either directly or through his agent (caretaker) is admitted then the fact that the appellant is not using the said property for commercial purpose or not using the same for any beneficial purpose or the appellant has to pay huge amount by way of damages in the event of he losing the case or the fact that the litigation between the parties is a luxury litigation are all facts which are irrelevant for changing the status quo in regard to possession during the pendency of the suit."

[See also Divisional Forest Officer v. M. Ramalinga Reddy, (2007) 9 SCC 286] In Tanusree Basu v. Ishani Prasad Basu [(2008) 4 SCC 791], this Court held:

"16. It is now a well-settled principle of law that Order 39 Rule 1 of the Code of Civil Procedure (Code) is not the sole repository of the power of the court to grant injunction. Section 151 of the Code confers power upon the court to grant injunction if the matter is not covered by Rules 1 and 2 of Order 39 of the Code."

27. Unfortunately, this aspect of the matter has not been considered by the High Court. So far as the submission of Mr. Rao that the questions raised by appellant have become academic in view of the fact that the order granting sanction was not challenged, is concerned, suffice it to point out that in a case of this nature, appellant was entitled to take recourse to the doctrine of 'dependent order'. If the order granting mandatory injunction is to be found illegal and without jurisdiction, any order of sanction passed by the statutory authority may also be held to be illegal.

In *G. Ramegowda, Major and Others v. Special Land Acquisition Officer, Bangalore* [(1988) 2 SCC 142], this Court held:

"10. We might, perhaps, deal with the latter submission of Shri Veerappa first. The fact that the main appeals are themselves, in the meanwhile, disposed of finally on the merits by the High Court would not by itself detract from and bar the consideration of the correctness of the order condoning the delays. This is an instance of what are called "dependent orders" and if the order excusing the delays is itself set aside in these appeals, the further exercise, made in the meanwhile, by the High Court finally disposing of the appeals, would be rendered nugatory. The submission of Shri Veerappa is, therefore, insubstantial."

28. We are, however, not oblivious that the said proposition of law is not absolute, as has been noticed by a Division Bench of this Court in *Ajay Bansal v. Anup Mehta* [(2007) 2 SCC 275], wherein it was held:

"14. A decree passed subsequent to the refusal of leave to defend could either be under Order 37 Rule 3(6) of the Code or it could be based on the affidavit evidence on the side of the plaintiff and the documents produced or even based on oral evidence formally proving, say, the execution of a promissory note by the defendant. It may not be proper or necessary to apply the theory of "dependent order" in such circumstances. For one, the theory may not apply. Even if this Court were to set aside the order of the court below and give the defendant leave to defend the suit, the decree that is passed may not go automatically. It may have to be set aside. Secondly, the defendant can always go to the court which passed the decree and move under Rule 4 of Order 37 of the Code to reopen the decree."

The doctrine, therefore, must be applied having regard to the fact situation obtaining in each case.

29. As the Division Bench of the High Court in the intra-court appeal did not consider any of the contentions of the parties and proceeded to dispose of the same on a wrong premise that the court of the District Judge had the jurisdiction to pass such an order, we are of the opinion that the impugned

judgment cannot be sustained and is set aside accordingly. The matter is remitted to the learned District Judge for consideration of the matter afresh on the merit of the original application filed by appellant in accordance with law, albeit keeping in view the subsequent events and also necessity, if any, to adjust the equities between the parties.

30. The appeals are allowed with costs to be payable by the respondent No. 2. Counsel's fee assessed at Rs. 25,000/-.