

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO.1709 OF 2013

Abdul Razzaq Sunesra

versus

Municipal Corporation of Greater Mumbai
and others

Petitioner

Respondents

Mr.Joaquim Reis, Sr.Advocate with Mr.Chaudhari with Mr.Omkar Kulkarni for Petitioner.

Mr.A.Y.Sakhare, Sr.Advocate with Mr.J.Carlos with Mr.Vinod Mahadik for Respondents 1 and 2.

Mr.D.J.Khambata, Advocate General with Mr.Saluja, AGP for Respondent no.3.

CORAM : DR.D.Y.CHANDRACHUD AND
S.C.GUPTE, JJ.

DATE : 17 July 2013

JUDGMENT - (PER : DR.D.Y.CHANDRACHUD, J.) :

1. Rule. Learned counsel for the Respondents waive service. By consent, the Rule is made returnable forthwith. The writ petition is taken up for hearing and final disposal, by consent and on the request of learned counsel.

2. The challenge in these proceedings is to Section 515A of the Mumbai Municipal Corporation Act, 1888 which is brought on the

statute by Maharashtra Act No.II of 2012. The Act received the assent of the President and was published in the gazette on 13 March 2012.

3. The dispute in the present case relates to a structure constructed on a plot of land bearing CTS No.50/A at S.V.Road, Borivali (W), Mumbai-400 092. A notice was issued by the Municipal Corporation on 28 May 2013 under Section 351 of the Act on the ground that the structure is unauthorized. An order was passed on 17 June 2013 requiring the removal of the structure on the ground that it is unauthorized. This order was passed by the Designated Officer after furnishing to the Petitioner an opportunity of showing cause. The Petitioner filed a suit before the City Civil Court. Ad-interim relief was declined by an order dated 26 June 2013 both on the ground that in view of the amendment brought about to insert Section 515A, notices issued under Sections 351 and 354A could not be questioned in a civil court and on the ground that a grievance redressal machinery has been provided under a circular issued by the Municipal Corporation.

4. Section 515A provides as follows :

"515A : Bar of jurisdiction :

Save as otherwise provided in this Act, any notice issued, order passed or direction issued by the Designated Officer, under section 351 or 354A shall not be questioned in any suit or other legal proceedings."

5. The challenge to the constitutional validity of Section 515A is on the following grounds which have been urged at the hearing :

(i) No requirement of a hearing has been stipulated in sub-section 1(A) of Section 351 and in Section 354A;

(ii) Before initiation of an action under Sections 351 and 354A, a designated officer must be satisfied that the structure is unauthorized and he may pass an order of demolition;

(iii) Prior to the insertion of Section 515A, access to the civil courts was not barred, whereas, as a result of the bar of jurisdiction contained in the newly added provision, no civil suit can lie for the purposes of questioning an order, notice or direction issued under Section 351 or Section 354A of the Act;

(iv) Even though a structure is unauthorized, the statute does not mandate that it shall be demolished since under sub-section 2 of Section 351, the designated officer **may** require the removal of the structure. An adequate machinery has not been provided in the statute for adjudication of all issues that may arise in the context of an action initiated against an unauthorized construction and consequently the bar of jurisdiction under Section 515A is arbitrary, and violative of Article 14 of the Constitution.

6. When the petition came up for hearing, it appeared to the Court that in the interests of justice it would be necessary to resolve the

issue of the constitutional validity of Section 515A in order to set at rest the uncertainty arising out of the maintainability of civil suits across the State and in particular in the city of Mumbai in regard to notices, directions or orders under Section 351 and Section 354A. The amending act, it must be noted, has brought about similar amendments to Mumbai Municipal Corporation Act, 1888 and the Bombay Provincial Municipal Corporations Act, 1949. In that view of the matter, we issue notice to the learned Advocate General. The learned Advocate General has appeared before the Court and has accepted the notice. We have accordingly heard the learned Advocate General in defense to the challenge to the constitutional validity of the provisions.

7. On behalf of the State it has been submitted by the learned Advocate General that :

(i) The requirement of compliance with the principles of natural justice does not necessitate a personal hearing. The principles of natural justice require an opportunity to a person who is affected by the proposed action of the State or its authority to put forth a defense and a due and adequate consideration of the defense. In the present case, both Sections 351 and 354A contain safeguards for the issuance of a notice, an opportunity to show cause and require a judicious application of mind by the designated officer to the cause which is shown;

(ii) It is well settled that the jurisdiction of a Court under Section 9 of the Code of Civil Procedure, 1908 to entertain and try an

action of a civil nature can be barred by statute. Where the statutory provision enacts an express bar, as in this case, an analysis of the adequacy of the remedy is not decisive in itself;

(iii) In any event, an adequate remedy is provided in Section 351 and Section 354A and recourse to the writ jurisdiction under Article 226 of the Constitution would be available against an order passed under those provisions; and

(iv) Absence of an appellate remedy does not render a provision unconstitutional.

Hence, it has been urged that Section 515A is constitutional.

8. Sub-sections 1 and 1A of Section 351 provide as follows :

"351. Proceedings to be taken in respect of buildings or work commenced contrary to section 347 :

(1) The Commissioner shall, by notification in the Official Gazette, designate an officer of the Corporation to be the Designated Officer for the purposes of this section and of sections 352, 352A and 354A. The Designated Officer shall have jurisdiction over such local area as may be specified in the notification and different officers may be designated for different local areas.

1A. If the erection of any building or the execution of any such work as is described in section 342, is commenced contrary to the provisions of section 342 or 347, the Designated Officer, unless he deems it necessary to take proceedings in respect of such building or work under section 354, shall :

(a) by written notice, require the person who is erecting such building or executing such work, or has erected such building or executed such work, or who is the owner for the time being of such building or work, within seven days from the date of service of such notice, by a statement in writing subscribed by him or by an agent duly authorized by him in that behalf and addressed to the Designated Officer, to show sufficient cause why such building or work shall not be removed, altered or pulled down; or

(b) shall require the said person on such day and at such time and place as shall be specified in such notice to attend personally, or by an agent duly authorized by him in that behalf, and show sufficient cause why such building or work shall not be removed, altered or pulled down.

Explanation : "To show sufficient cause" in this sub-section shall mean to prove that the work mentioned in the said notice is carried out in accordance with the provisions of section 337 or 342 and section 347 of the Act."

Under sub-section 1A of Section 351, the designated officer is empowered to act in a situation where the erection of a building or the execution of any work of the nature referred to in Section 342 is commenced contrary to the provisions of Section 342 or Section 347. Section 342, inter alia, applies where additions, alterations or repairs are sought to be carried out to a building in which event a notice of intent has to be furnished to the Commissioner of the nature and the extent of the intended work, among other things. Section 347, inter alia, provides that no person shall commence such work without furnishing a notice of intent and without the approval of the

Commissioner (or if the Commissioner has failed to intimate his disapproval within the period prescribed). Before the designated officer initiates steps under Section 351, he is required to issue a written notice calling upon the person who is erecting a building or executing the work or to the person who has erected a building or executed the work to show sufficient cause why the building or the work should not be removed, altered or pulled down. Under clause (b) of sub-Section 1A of Section 351, an enabling provision has been made by which the designated officer may call upon a person to whom a notice is addressed, to attend personally to show cause. The explanation stipulates that the expression 'to show sufficient cause' shall mean to prove that the work mentioned in the notice has been carried out in accordance with Sections 337, 342 or 347. If the person fails to show sufficient cause to the satisfaction of the designated officer, the officer may remove, alter or pull down the work.

9. This provision, as noted in the judgment of the Supreme Court in **Muni Suvrat-Swami Jain S.M.P. Sangh Vs. Arun Nathuram Gaikwad and others**¹ confers an enabling power on the Commissioner and a discretion if sufficient cause is not shown, whether or not to demolish the unauthorized construction. Similarly under Section 354A, if the designated officer is satisfied that the erection of a building or execution of a work has been unlawfully commenced or is being unlawfully carried on, he may issue a notice to stop such erection of work forthwith. Sub-section 2 of Section 354A provides as follows :

1 (2006)8-SCC-590 - Paragraph 57 on pages 611 and 612

"354A. Power of Designated Officer to stop erection of building or work commenced or carried on unlawfully.-

(2) If the erection of the building or execution of the work is not stopped as required by the Designated Officer or permission approved by the competent authority in favour of the erection of the building or execution of the work is not produced within twenty-four hours from the service of notice referred to in sub-section (1), the Designated Officer may, without further notice, remove or pull down the building or work and the expenses thereof shall be paid by the said person or owner of the building or work. The Designated Officer may also direct that any person directing or carrying out such erection or work shall be removed by any police officer from the place where the building is being erected or the work is being executed."

10. Sub-section 2 of Section 354A deals with a situation where the erection of a building or execution of a work is not stopped upon receipt of a notice or where the person to whom the notice is addressed does not produce the approval of the competent authority within 24 hours. In such a case, the designated officer is authorized, without further notice, to remove or pull down the building or the work. Section 354A evidently applies to emergent situations where the designated officer considers it necessary to stop work which has been unlawfully commenced or work which has been unlawfully carried out despite issuance of a stop work notice.

11. Ordinarily a civil court under the provisions of Section 9 of the Code of Civil Procedure, 1908, shall have the jurisdiction to try all suits of a civil nature excepting suits of which cognizance is either expressly or impliedly barred. The conferment of jurisdiction

on civil courts to try suits of a civil nature is, therefore, subject to a law which may be enacted by the competent legislature either expressly barring the jurisdiction or impliedly taking away the jurisdiction of the Court. There is nothing uncommon, as a first principle of law, in a competent legislature barring the jurisdiction of a civil court to entertain a civil suit of a specified nature. The legislature in the State of Maharashtra has introduced Section 515A to exclude the jurisdiction of the civil court in matters involving demolition of unauthorized constructions in order to obviate the inordinately long delays that were occasioned in the taking of steps against illegal structures and constructions due to the pendency of suits before the civil courts. The legislature was entitled to take cognizance of these delays and to enact a suitable statutory provision. In the judgment in **Dhulabhai etc. Vs. State of Madhya Pradesh and another**², the Supreme Court summarized the principles of law governing the interpretation of finality clauses and statutory provisions ousting the jurisdiction of civil courts. In regard to the express bar of jurisdiction, the principle enunciated in the judgment of the Supreme Court is as follows :

"35(2). Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes

² AIR-1979-SC-78

necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the Tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not."

12. In the present case, there is an express bar on the jurisdiction of the civil court in Section 515 A to entertain a suit calling into question any notice, order or direction issued under Sections 351 and 354A. Hence, in view of the law laid down in **Dhulabhai** (supra), an examination of the scheme of the Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is strictly speaking, not decisive. Be that as it may, under Section 351, sufficient safeguards have been provided by the legislature to ensure that the determination by the authority is subject to the observance of statutory parameters. The statute incorporates requirements to ensure that the procedure is fair and that the outcome of the inquiry is based on objective considerations. The conditions which are imposed by the statute ensure firstly that before action is taken, a written notice must be issued to the person who is erecting a building or executing a work. Following the issuance of a notice, the statute secondly mandates that an opportunity to show sufficient cause must be granted in the form of a statement in writing. Thirdly the designated officer is empowered in an appropriate case to allow the person to whom the notice is issued, to show cause in person or through an agent. Fourthly, the designated officer is required to apply

his mind whether the person to whom a notice was issued, has or has not failed to show sufficient cause to his satisfaction. The satisfaction of the designated officer is not a subjective satisfaction but is a satisfaction which has to be arrived at objectively after appreciating the contents of the defense and the cause which has been shown. The officer must, in particular, apply his mind whether work of the description which is mentioned in Section 342 has been commenced contrary to the provisions of Section 342 or Section 347. The officer is thereupon vested with the discretion on whether or not to demolish the structure. This discretion is again a discretion which has to be exercised judiciously and not arbitrarily. Reasons must be recorded in the order of the designated officer. Reasons provide an assurance against an arbitrary exercise of power and allow the decision to be challenged and scrutinized under Article 226 of the Constitution.

13. The absence of an appellate remedy against the decision of an administrative officer does not render a statutory provision unconstitutional. This was settled by the judgment of the Supreme Court in **Organo Chemical Industries and another Vs. Union of India and others**³. In the concurring judgment of Justice Krishna Iyer, the principle was set out as follows :

"34. An appeal is a desirable corrective but not an indispensable imperative and while its presence is an extra check on wayward orders its absence is not a sure index of arbitrary potential. It depends on the nature of the subject matter, other available correctives, possible harm flowing from wrong orders and a wealth of other factors."

³ (1979)4-SCC-573

14. In a subsequent judgment in **M/s.Babubhai & Co. and others Vs. State of Gujarat and others**⁴, the same principle was elucidated in the following observations :

"6. It cannot be disputed that the absence of a provision for a corrective machinery by way of appeal or revision to a superior authority to rectify an adverse order passed by an authority or body on whom the power is conferred may indicate that the power so conferred is unreasonable or arbitrary but it is obvious that providing such corrective machinery is only one of the several ways in which the power could be checked or controlled and its absence will be one of the factors to be considered along with several others before coming to the conclusion that the power so conferred is unreasonable or arbitrary; in other words mere absence of a corrective machinery by way of appeal or revision by itself would not make the power unreasonable or arbitrary, much less would render the provision invalid. Regard will have to be had to several factors, such as, on whom the power is conferred - whether on a high official or a petty officer, what is the nature of the power - whether the exercise thereof depends upon the subjective satisfaction of the authority or body on whom it is conferred or is it to be exercised objectively by reference to some existing facts or tests, whether or not it is a quasi-judicial power requiring that authority or body to observe principles of natural justice and make a speaking order etc; the last mentioned factor particularly ensures application of mind on the part of the authority or body only to pertinent or germane material on the record excluding the extraneous and irrelevant and also subjects the order of the authority or body to a judicial review under the writ jurisdiction of the Court on grounds of perversity, extraneous influence, malafides and other blatant infirmities. Moreover all these factors

4 (1985)2-SCC-732

will have to be considered in the light of the scheme of the enactment and the purpose intended to be achieved by the concerned provision. If on an examination of the scheme of the enactment as also the purpose of the concerned provision it is found that the power to decide or do a particular thing is conferred on a very minor or petty officer, that the exercise thereof by him depends on his subjective satisfaction, that he is expected to exercise the power administratively without any obligation to make a speaking order then, of course, the absence of a corrective machinery will render the provision conferring such absolute and unfettered power invalid. But it is the cumulative effect of all these factors that will render the provision unreasonable or arbitrary and liable to be struck down."

15. The Supreme Court has repeatedly cautioned against the dangers of unauthorized construction and encroachments. In **Pratibha co-operative Housing Society Limited and another Vs. State of Maharashtra and others**⁵, the Supreme Court observed as follows :

"6. the tendency of raising unlawful constructions and unauthorized encroachments is increasing in the entire country and such activities are required to be dealt with by firm hands. Such unlawful constructions are against public interest and hazardous to the safety of occupiers and residents of multistoreyed buildings."

16. In **Dipak Kumar Mukherjee Vs. Kolkata Municipal Corporation**⁶, the Supreme Court has cautioned of the danger posed by illegal and unauthorised constructions to planned development.

⁵ (1991)3-SCC-341

⁶ (2013)5-SCC-336

The failure of the State machinery to take prompt action is liable to give rise to the belief among common citizens that planning law is enforced against the poor and violations by those in the corridors of power are ignored. Hon'ble Mr. Justice G.S. Singhvi delivering the judgment of the Supreme Court observed as follows :

"8. What needs to be emphasised is that illegal and unauthorised constructions of buildings and other structures not only violate the municipal laws and the concept of planned development of the particular area but also affect various fundamental and constitutional rights of other persons. The common man feels cheated when he finds that those making illegal and unauthorised constructions are supported by the people entrusted with the duty of preparing and executing master plan/development plan/zonal plan. The reports of demolition of hutments and jhugii jhopris belonging to the poor and disadvantaged section of the society frequently appear in the print media but one seldom gets to read about demolition of illegally/ unauthorisedly constructed multi-stored structures raised by economically affluent people. The failure of the State apparatus to take prompt action to demolish such illegal constructions has convinced the citizens that planning laws are enforced only against poor and all compromises are made by the State machinery when it is required to deal with those who have money power or unholy nexus with the power corridors."

Taking note of the earlier precedents on the subject, the Supreme Court held that there should be no judicial tolerance of illegal and unauthorised constructions. The same principle has been laid down in another judgment of the Supreme Court in **Esha Ekta Apartments Co-operative Housing Society Vs. Municipal Corporation of**

Mumbai⁷. The Supreme Court considered the provisions specifically of Sections 44 and 45 and Sections 52 and 57 of the Maharashtra Regional Town Planning Act, 1966 and observed as follows :

"46. An analysis of the above reproduced provisions makes it clear that any person who undertakes or carries out development or changes the use of land without permission of the Planning Authority is liable to be punished with imprisonment. At the same time, the Planning Authority is empowered to require the owner to restore the land to its original condition as it existed before the development work was undertaken. The scheme of these provisions does not mandate regularisation of construction made without obtaining the required permission or in violation thereof."

17. The State of Maharashtra and more particularly its urban areas are plagued by a menace of unauthorized constructions. The object of introducing Section 515A was to ensure that recourse to civil remedies is not utilized with a view to abuse the process as would generally result when those responsible for unauthorized constructions use every possible means to ensure that a delay takes place in the disposal of proceedings, once a stay is obtained. In this background, the legislative provision cannot be regarded as being arbitrary.

18. In **Organo Chemical Industries** (supra), the Supreme Court dealt with the provisions of Section 14B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, which empowered the Provident Fund Commissioner to impose damages. The Supreme

7 (2013)5-SCC-357

Court noted that in that case a hearing was given to the affected party; reasons had to be recorded in awarding damages and the writ jurisdiction was available to review the order of the Commissioner. These were amongst other circumstances which weighed in the upholding of the provision. Similarly, in **M/s.Babubhai** (supra), the provisions of Section 54 of the Bombay Town Planning Act, 1954 were upheld, inter alia, on the ground that the power of summary eviction was conferred on a responsible body and was required to be exercised in a objective manner. Besides the quasi judicial power required observance of the principles of natural justice and the passing of a speaking order accompanied by the reasons. This, according to the Supreme Court, would ensure an application of mind to germane or relevant material. The order was subject to the writ jurisdiction.

19. Having regard to these well settled principles, it is not possible to accede to the submission that the bar of jurisdiction which has been enacted by Section 515A of Mumbai Municipal Corporation Act, 1888, as amended, is arbitrary or unconstitutional. The provisions of Sections 351 and 354A contain adequate safeguards, both procedural and substantive, to ensure due notice, an opportunity to represent, the consideration of the cause shown and an application of mind to relevant and germane circumstances. A reasoned order must be passed. The legislature was, in our view, acting in the public interest in ensuring that the urgent need of taking expeditious action against unauthorized constructions does not get lost in a maze of dilatory remedies in civil courts.

20. Before concluding it would be necessary to note that in the present case, the ad-interim relief was refused by the City Civil Court primarily in view of Section 515A, but also on the ground that corrective machinery is available in the form of a representation before the Grievance Redressal Committee. The circular that has been issued by the Commissioner of the Mumbai Municipal Corporation on 4 June 2013 for the setting up of a Grievance Redressal Committee was as a result of the directions issued by this Court to the effect that there should be an appropriate mechanism for redressal of grievances pertaining to unauthorized constructions. The aim of the circular is to redress grievances received from a complainant in respect of action/ non-action on unauthorized constructions. The circular provides in Clause-2.3 that the zonal committee shall not pass any order which will stop/stay the notice action initiated by the designated officer and the on going notice action will continue and be brought to its logical conclusion. Similarly, clause-6.5 requires the owner/occupier against whom a complaint is made to be called to attend the hearing. The circular, therefore, provides a remedy to citizens to complain against unauthorized structures. Be that as it may, the City Civil Court was on its interpretation of Section 515A justified in coming to the conclusion as it did on the bar of jurisdiction.

21. For the aforesaid reasons, we do not find any merit in the challenge to the constitutional validity of Section 515A of the Mumbai Municipal Corporation Act, 1881. The petition shall

accordingly stand dismissed. However, in view of the fact that the Petitioner should, in the interest of justice, be allowed to take recourse to the remedy of a petition under Article 226 of the Constitution for challenging the order passed under Section 351, on 17 June 2013, we direct that action for the implementation of the order shall not commence for a period of two weeks from today.

(DR.D.Y.CHANDRACHUD, J.)

(S.C.GUPTA, J.)

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