Licensed to :- HITESH SHARMA, Client Code :- [9124]

LAWS(MPH)-2016-1-3

***HIGH COURT OF MADHYA PRADESH (AT: INDORE)***

Coram : P.K.JAISWAL,J.K.Jain JJ.

Decided On : January 06,2016

Appeal Type : WP No. 4014 of 2014

Final Verdict : Petition dismissed

Appellants :

***Motilal Rathore***

Vs.

Respondents :

***State of M.P. and Ors.***

***Advocates :***

HITESH SHARMA,DEEPAK RAWAL

***JUDGMENT :***

(1.) This Public Interest Litigation has been filed for quashing the sanction for construction of shop over Nallah, granted by respondent No.3 in favour of respondent No.4.

(2.) Brief facts of this petition are that in auction, Nirmala Saraf and respondent No.4 have purchased two adjoining shops situated over the Nallah, from Municipal Council,Barwani. At the request of Nirmala Saraf on 23/10/1999, Municipal Council had granted lease of the land admeasuring 12X13.8 feet behind the purchased shop. Subsequently Nirmala Saraf had given no objection in favour of respondent No.4 for transferring the said land. Then Municipal Council Barwani had granted lease of the said land to respondent No.4. Thereafter, Municipal Council, Barwani vide order dated 22/03/2014, granted the permission (Annexure P/6) to construct a shop on the said land, which is on the Nallah. Petitioner and other residents of the locality were perturbed and they have submitted representations to various authorities that the construction of the shop is to be made over and above a running Nallah and not only causing obstruction in the free flow of the water but is dangerous for the public at large. On 03/05/2014, respondent No.3 has stayed the operation of the impugned order and directed the respondent No.4 to stop the construction of the shop. It is submitted that sanction for construction of shop over Nallah is illegal and without authority of law and in violation of Section 209 of the Municipalities Act, 1961 (in brief the "Act" 1961), M.P. Nagar tatha Gram Nivesh Adhiniyam, 1973 and also under clause 3 of sub-rule(1) of rule 24 of the M.P. Bhumi Vikas Rules, 2012. The authorities have failed to appreciate the evidence that no construction be made on Nallah, which is very much in use and is running through the heart of the City and on which the people of Barwani



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have easementry right. Illegal construction on the said Nallah, materially affects the right of enjoyment of the property by persons residing in the area. Therefore, it is prayed that the building construction permission dated 22/03/2014 is liable to be set-aside.

(3.) Respondent Nos. 1 and 2 have not filed any reply to the petition whereas respondent No.3 in his reply stated that Nirmala Saraf was granted a lease of 12X13.8 feet of the land. Subsequently, lease was transferred to respondent No.4. The sanction of building permission to respondent No.4 has been granted after obtaining no objection from the respective departments. The land in question belongs to the Municipality and has been given to respondent No.4 as the land was laying vacant. Earlier also shops over Nallah were constructed but due to construction of shops, flow of Nallah has not been obstructed. Number of shops had already been existed over the said Nallah for last so many years but there is no accumulation of water either in rainy season or any other season. There is no violation of any of the provisions of M.P. Bhumi Vikas Rules, 2012 and provisions of "Act" 1961. It is denied that the public is facing serious threat or any right of the public has been infringed. The petition is not Probano Publico and is filed only to frustrate the lease granted to respondent No.4, who is a handicapped person. The petition is filed due to personal animosity with the respondent No.4. Therefore, it is prayed that the petition be dismissed.

(4.) Respondent No.4 in his reply stated that Municipal Council, Barwani has already constructed 200 shops over the said Nallah. Municipal Council has granted the permission for construction of a shop to respondent No.4. Nallah is a small drainage but not a water body. In support filed various documents, photographs & affidavits of the persons of the locality. Municipal Council Barwani has recently constructed about 35 shops over the said Nallah but the petitioner has not challenged these constructions. In case the petitioner has any grievance with the sanction granted to respondent No.4, the petitioner has alternative remedy available under the "Act" 1961. The lease of said land was granted on 23/10/1999 in favour of Nirmala Saraf but petitioner has not challenged this grant. The petitioner has personal interest in this petition. Actually the petitioner has demanded Rs.2 Lacs from respondent No.4 but respondent No.4 denied to fulfill the illegal demand of the petitioner, then petitioner has made the complaint against the respondent No.4 before various authorities and departments. Respondent No.3 has not violated any of the provisions of the concerned laws. The petition is maliciously filed, thus, it be dismissed by imposing cost.

(5.) Petitioner in his rejoinder stated that while granting the impugned sanction for construction respondent No.3 has violated the provisions of proviso to Section 109 (3) of "Act" 1961. Respondent No.3 & 4 admitted in their reply that respondent No.3 has granted the sanction for construction over the Nallah. The Nallah is carrying the water and sewage of the town. It overflows in the rainy season and whenever there is extra water in the Nallah. It is beyond the jurisdiction and power of respondent No.3 to change the use of Nallah and to grant lease or permission for construction on the said Nallah. The construction on leased land shall bound to interfere with the flow of water. The plea of respondent No.3 and 4 that others have been permitted to raise construction over the Nallah, in past, can not be accepted. The constructions made by them are illegal. It is well settled law that there can not be negative equality, merely because some constructions have been permitted in the past does not mean


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further high rise construction should be permitted. The residents of Barwani have a constitutional right to live in a clean city. For this purpose placed reliance on the judgment of Dr. B.L. Wadehra vs. Union of India, 1996 2 SCC 594.

(6.) After hearing learned counsel for the parties, we have perused the record.

(7.) The bone contention of the learned counsel for the petitioner is that respondent No.3 granted sanction (Annexure P/6) dated 22/03/2014 in violation of Clause- (e) & (f) of Sub Section 1 of Rule 24 of M.P. Bhumi Vikas Rules, 2012, Proviso to Section 109 (3) & Section 209 of "Act" 1961.

(8.) In this context we would like to examine that whether respondent No.3 has granted the sanction in violation of proviso to Section 109 (3) & Section 209 of "Act" 1961. Section 109 (3) Proviso of the M.P. Municipalities Act, 1961 reads as under:-

"Provided that no property vesting in the council in trust shall be leased, sold or otherwise conveyed in a manner that is likely to prejudicially effect the purpose of the trust subject to which such property in held.

(9.) From the bare reading of above provision, it is clear that the council shall not lease any property which is likely to prejudicially effect the purpose of the said property. There is contradictory affidavits filed by the parties and from the photographs it can not be held that if the construction is made, it will adversely affect the flow of sewage. However, admittedly more than 200 shops had already been constructed over the said Nallah.

Section 209 of M.P. Municipalities Act, 1961 reads as under:-

Power to require owners to keep drains, etc., in proper order, or to demolish or close privy or cess-pool- (1) All sewers, drains, privies, water-closets, urinals, house- gullies and cesspools within a Municipality shall, unless constructed at the cost of the Council be altered, repaired and kept in proper order at the cost and charge of the owner of lands or buildings to which they belong, or for the use of which they have constructed or continuing; and the Council may, by written notice, require any such owner to alter, repair, and put the same in good order in such manner as it may deem fit.

(2)The Council may, by written notice, require the owner to demolish or close any privy or cesspool whether constructed before or after the coming into operation of this Act, which in the opinion of the Council is a nuisance, or is so constructed as to be inaccessible for the purpose of scavenging or incapable if being properly cleaned or kept in good order.

(10.) From the bare reading of the above Section, it is clear that this Section gives a power to Municipalities to require owners to keep drains in proper order or to demolish or close privy or cess-pool.

(11.) Learned counsel for the petitioner is unable to convince us that the respondent No.3 while granting the sanction for construction, has violated any of the provisions of the "Act" 1961.

(12.) Now we have to consider whether respondent No.3 granted the sanction for construction in violation of provisions of Section 24 of M.P. Bhumi Vikas Rules, 2012, which reads as under :-

Deviation from sanctioned plan- (1) No deviation from the sanctioned plan shall be permissible if the


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construction involved in such deviation-

(a) affects the front Marginal Open Space;

(b) exceeds 10% of the permissible FAR;

(c) comes within the boundary of road or the area affecting the alignment of public road;

(d) comes within the boundary of road or the area affecting the alignment of public road;

(e) comes in the area of any water body (talab), river or Nallahh or stream; and

(f) comes within 30 meters or such distance from the bank of water bodies as may be prescribed in the respective development plan.

(2) for every floor constructed, an increase upto 0.15 meters in the height shall not be counted towards the height of the building.

(3) where a deviation from the sanctioned plan takes place in the construction of the building, local authority may charge such compounding fee, as may be prescribed in the respective Act governing the functioning of such local authority or the rules made there-under.

(13.) Rule 24 provides that no deviation from the sanction plan shall be permissible if the construction involved deviation which is specified in Clause-(a) to (f). This is not the case here. In this case sanction has been granted but construction has not been started by the respondent No.4. Thus, there is no question of deviation from the sanction plan. Besides this, in Clause-(e) of sub Rule 1 of Rule 24, Nallah is used in reference to water body but in the present case the Nallah is used not in reference of water body but in reference of carrying the sewage of the town. In the present case respondent No.3 has not granted sanction for construction over any Nallah, which is for water body. Thus, we are of the view that in granting sanction respondent No.3 has not violated the provision of Rule 24 of M.P. Bhumi Vikas Rules, 2012.

(14.) Admittedly, for last many years 200 shops existed over the Nallah and respondent No.3 had recently constructed 35 shops over the Nallah, but, earlier the petitioner has not taken any objection and even after said construction there is no obstruction in the sewage. The petitioner has not filed any expert's report that the proposed construction of a shop shall obstruct the flow of sewage and the old used construction of more than 200 shops has not obstructed the flow of sewage. Thus, there is no question of negative equality. In such a situation, the judgment of Hon'ble Apex Court in the case of R.S.I.D.I. Corporation vs. S.S. Co-operative Housing Society Jaipur, 2013 AIR(SC) 1226 and Fulji Caur vs. State of Punjab, 2010 AIR(SC) 1937 are not helpful to the petitioner.

(15.) The petitioner has taken the plea that the Municipal Authorities own a duty and obligation under


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the statute to see that the residential area is not spoiled by un-authorized construction. In the present case there is no question of un-authorized construction. Respondent No.3 has granted the lease and thereafter respondent No.2, S.D.O. Barwani and Town and Country Planning Department, Khandwa have granted no objection. Thereafter, respondent No.3 has granted the sanction (Annexure P/6) for construction. The petitioner is unable to convince us that respondent No.3 has violated any of the provisions of the "Act" 1961 or M.P. Bhumi Vikas Rules, 2012.

(16.) Respondent No.4 in his reply alleged that before filing the petition, the petitioner illegally demanded Rs.2,000,00/- but respondent No.4 has denied to fulfill his demand. Thereafter, the petitioner has made complaint against the respondent No.4 in various departments and also filed this petition maliciously with an ulterior motive. This reply is supported by affidavit of respondent No.4, but the petitioner has no dare to contradict this fact in his rejoinder and has not filed any counter affidavit.

(17.) With the aforesaid we are of the view that this petition is not filed for any public interest but filed to victimize respondent No.4, who is a physically challenged person. Thus, we find no merit in the petition and the petition is hereby dismissed. However, we make it clear that in case any expert opined that the construction of a shop would likely to cause obstruction in the flow of sewage of the said Nallah, then the residents of the locality may take appropriate action as per law.

No order as to cost.


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