
(2011) 01 BOM CK 0141
In the Bombay High Court
Case No : Writ Petition No. 340 of 1991

Cuffe Parade Residents Association	Vs	APPELLANT
State of Maharashtra and Others		RESPONDENT

Date of Decision : 06-01-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 21A, 226

Citation : (2011) 2 BomCR 569 : (2011) 1 MhLj 984

Hon'ble Judges : N.D. Deshpande, J; D.K. Deshmukh, J

Bench : Division Bench

Advocate : Aspi Chinoy, B.M. Chatterji and S.M. Sabrad, for the Appellant; K.R. Belosay, for Respondent No. 1, K.K. Singhvi Geeta Joglekar, P.A. Purandare for Respondent No. 3, A.A. Joshi, for Respondent No. 5, Rafiq Dada instructed by., V.A. Sugdare, for Respondent Nos. 8 and 9 and V.A. Thorat instructed by., Prachi Tatake, for the Respondent

Judgement

D.K. Deshmukh, J.—By this petition filed under Article 226 of the Constitution of India, the Petitioners are making grievance against the Government Resolution dated 8-1-1990 deciding to grant lease of the land in City Survey No. 646 admeasuring 5736.77 sq.mts., Backbay Reclamation Block 5, Colaba Division, Bombay. The facts that are relevant and material for deciding this petition are that the Petitioner No. 1 is an Association registered under the Societies Registration Act having residents of Cuffe Parade area as its members. The Petitioner Nos. 2 and 3 are members of Petitioner No. 1. The land admeasuring 5736.77 sq.mts. from Block No. 5, Backbay Reclamation vests in the Government of Maharashtra. The State Government, by Resolution dated 12-3-1980 decided to grant lease of this land for a period of 99 years to the Bombay Municipal Corporation. The ground rent was fixed at Re. 1/- per annum. The Corporation was to pay an amount of Rs. 5,01,965/- to the Government towards the cost incurred by the Government on reclamation and development the plot in question. It was stated that the Corporation shall use the plot "for a Municipal School and Playground only and for no other purposes whatsoever".

The Corporation was to complete the construction of the School building on the plot within a period of four years from the date of possession. The Corporation accepted these terms and conditions, and therefore, possession of the land was handed over to the Corporation on 10-7-1980.

2. After the land was granted on lease to the Corporation, it appears that the Corporation did not construct the school building as per the terms and conditions of the lease within a period of four years. In this situation, Smt. Chandrakaladevi Somani Charity Trust of which the Respondent No. 9 is the Chairman made a proposal on 6-12-1985 to the Municipal Commissioner to construct two school buildings on the said plot, one to be used by the Trust for secondary school and other to be given to the Bombay Municipal Corporation free of cost. This proposal was accepted by the Corporation. The acceptance was communicated by the Deputy City Engineer to the Somani Trust by communication dated 6-12-1985. It was stated that "Your proposal to construct two school buildings on the abovesaid plot and allot one building to the Municipal Corporation to run a free Municipal Primary School and to manage the other building by your trust as a Secondary school is acceptable." It was further stated that "that both the buildings shall be first handed over to the Municipal Corporation free of cost duly completed in all respect out of which the building to be run and managed by your trust will be handed over to the Trust by the Municipal Corporation on nominal rent of Re. 1/- per month on such other terms and conditions that will be finalised by the Law officer of the Corporation in consultation with the Trustees." The Bombay Municipal Corporation addressed a letter dated 2-4-1986 to the Government of Maharashtra stating that though the Government has granted land to the Corporation on lease subject to the condition of Corporation constructing school building thereon within a period of four years, "however the Corporation could not construct the school building on account of financial stringency. Recently, a proposal has been received from Smt. Chandrakaladevi Somani Charity Trust whereby they have offered to construct two schools, one to be managed by the Trust and the another to be managed by the Corporation." It was further stated in the letter that "It may be appreciated that on account of financial stringency, it may not be possible for the corporation to construct the school buildings in near future. If this offer of the Trust is accepted, the corporation would get the building free of cost for running Primary School." The Corporation, thus, requested the Government to accept the offer made by the Somani trust. In this background, on 8-1-1990 the Government issued a Government order. That Government order refers to the Government order dated 12-3-1980 by which lease of the land was granted to the Corporation. It also refers to the proposal made by the Somani Trust to the Corporation as also to the request made by the Corporation to the State Government and then recites thus:

MCGB has been allotted a plot bearing C.S. No. 646 admeasuring 5736.77, Colaba Division, vide Order No. 2577/31570/G8 dated 12-3-1980. Out of the said plot 1/2 plot admeasuring 2868.385 should be retained by MCGB and 1/2

plot admeasuring 2868.385 should be returned to the Collector of Bombay.

The Collector of Bombay on receipt of the 1/2 plot should lease it to Somani Trust for 30 years for construction of school on the following terms and conditions.

One of the conditions on which the lease of 50% of the plot is granted to the Somani Trust is that the Somani Trust at their own expenses construct a school building on the plot of land allotted to the Corporation after using full FSI and hand over that building to the Corporation. It is this order which is challenged in the present petition.

3. The Petitioner No. 1 which is a registered society of the residents of the area was given possession of the suit plot of land by the Corporation on temporary basis for developing it as a children's park. According to the Petitioners, on the land being handed over to the Petitioners, it was developed as children's playground and an amount of Rs. 2,50,000/- was spent for that purpose. Thus, the Petitioners came to be in possession of that plot of land.

4. So far as the aspect of the designation of the land in the development plan is concerned, in the final development plan which was prepared by the B.M.C. as a planning authority, the plot of land was divided into two plots and those two plots were shown as reserved for municipal school and playground. The MMRDA-Respondent No. 4 which become the special planning authority for the area published a revised draft development plan for the area on 10-5-1990. The said plot of 5736 sq.mts was shown as two separate equal plots. Plot No. 119A was reserved for school and Plot No. 119B was reserved for playground. The final development plan was sanctioned by the State Government on 3-6-2000 and the position of plot No. 119A which is reserved for school and plot No. 119B which is reserved for playground was retained. The Petitioners' claim that the plot No. 119B which is reserved as playground in the final development plan cannot be permitted to be developed under the Development Control Regulations by a third party. The plot which is reserved for playground in the development plan as per the Development Control Regulations can be developed either by the owner or by the Corporation. According to the Petitioners, therefore, allotment of plot No. 119B to the Somani Trust is illegal. It is further submitted that both the plots viz. 119A and 119B are the property of the State Government and therefore, this property could not have been allotted by the State Government to the "Somani Trust" without issuing an advertisement and without issuing a public notice. The Petitioners contend that the sole reason why the Government changed its decision of granting lease of the entire plot to the Corporation was "inability of the Corporation to construct school building on the plot due to financial stringency". But in view of the statement made by the Corporation before this Court now that financial stringency does not exist and therefore, there is no reason why the order of the State Government allotting the land to the Somani Trust should continue.

5. It was also contended that the Somani Trust runs a school on the adjoining plot No. 118A and are also in possession of plot No. 118B which is reserved for playground. The Petitioners have claimed that the ground floor of the school building constructed by the Somani Trust on plot No. 118A has been let out by the Somani Trust to third parties for commercial purpose and so far as the playground on plot No. 118B is concerned, that playground is also being regularly let out for functions and receptions and thus, it is being commercially utilised. It was submitted that therefore as the Somani Trust is misusing the land which is allotted to it, the State Government is not justified in allotting the suit land to Somani Trust. The matter was heard by us initially on 1-12-2010 and after hearing the learned Counsel appearing for Petitioners when we called upon the learned Counsel appearing for B.M.C, the learned Counsel stated before us that in view of incorporation of Article 21A in the Constitution of India, the Corporation cannot now say that it does not have fund to establish a primary school. The learned Counsel appearing for BMC, therefore, made a statement before us which is recorded by us in our order dated 1-12-2010, which reads as under:

After having heard learned Senior Counsel appearing for the Petitioners, we heard the learned Senior Counsel appearing for the Municipal Corporation. The learned Senior Counsel appearing for the Municipal Corporation stated that there is a change in the situation that existed in the year 1990 when the Government Resolution which is challenged in the petition was issued. He submitted that now right of Primary Education has been declared as a fundamental right and it is the primary duty of the Municipal Corporation to make arrangement to provide primary education to the children. He stated that the Municipal Corporation, now, is in a position to construct a primary school on the plot in question which was allotted to the Municipal Corporation by Government Resolution dated 12th March, 1980 for construction of a primary school and for being used as playground and therefore, now, the Municipal Corporation does not need any help from anybody for construction of the school building.

2. The learned Advocate appearing for the Petitioners stated that the Petitioners have not challenged the decision of the Government contained in the Resolution dated 12th March, 1980 and therefore, in case the Government decides to revert back to their decision contained in the Government Resolution dated 12th March, 1980, the Petitioners will have no grievance against that in this petition.

3. In view of this statement made on behalf of the Municipal Corporation, in our opinion, it will be appropriate for the learned "A" Panel Counsel appearing for the State to take instructions from the State Government, whether in view of this changed position, the State Government insists on continuing with the decision contained in the Government Resolution dated 8th January, 1990 or the Government is willing to change its decision and revert back to their decision contained in the Government Resolution dated 12th March, 1980. It is accordingly so directed to the learned "A" Panel Counsel to take instructions from

the appropriate authority in the State Government and inform this Court.

When the matter came before us on 7-12-2010 for hearing, on behalf of the State Government an affidavit was filed of Shri. Shivgonda Shrikant Patil, Deputy Secretary, Revenue and Forest Department. In that affidavit he states thus:

I have been informed of the Hon''ble High Courts directions that instruction should be obtained from State Government whether the Government is agreeable to revoke the impugned Government Resolution dated 8-1-1990 under which the State Government had allotted half of the land from Backbay Reclamation Block V, to the Bombay Municipal Corporation for the purpose of construction of school and playground on leasehold basis.

3. I say that the matter will require deliberations at various levels and departments within the Government. At present Assembly Session is in progress at Nagpur. It is likely to conclude by third week of December, 2010 only, thereafter the matter will be taken up for consideration by the concerned departments. I say that without consultation with all concerned departments, it is not possible to arrive at a decision before 7th December, 2010.

Thus, the State Government has not been able to take any decision. Obviously, because the Assembly Session of the Maharashtra Legislative Assembly is being held at Nagpur, can hardly be said to be a reason for the State Government not being in a position to take the decision in view of the stand taken by the Corporation.

6. On behalf of the "Somani Trust" it was contended that the stand of the Petitioners that the land in question is divided into two plots of which Plot No. 119A is reserved for school and Plot No. 119B is designated as playground, is not correct. According to them, both the plots are together designated for "school and playground". According to them, therefore, the order of the State Government allotting 50% of the land to their trust is not invalid. It was also contended that the construction of the school building in the locality both for primary school and secondary school is in the interest of public and, therefore, the decision taken by the State Government is also in public interest. Insofar as the submission made on behalf of the Petitioners that the land could not have been allotted without issuing public notice is concerned, the learned Counsel appearing for "Somani Trust" relied on the judgment of the Supreme Court in the case of Foreshore Cooperative Housing Society Limited, Bombay Vs. Nivara Hakk Suraksha Samiti, Bombay and Others, to contend that it being an isolated plot, issuing of public notice was not necessary.

7. We have also heard the learned "A" Panel Counsel appearing for the State Government. He supported the order of the State Government.

8. Now if in the light of the rival submission, the record of the case is perused, it becomes clear that when first the Government decided to grant lease of the land to the Corporation in the year 1980, it was an open piece of land and because of

the interim order passed by the Court from time to time it continues to be an open piece of land even today. We have perused the record, we find that in the draft development plan of the year 1990 and in the final development plot of the year 2000, the land has been divided into two plots viz. 119A and 119B. Plot No. 119A is designated to be used for school and Plot No. 119B is designated to be used as playground. It is clear from the provisions of the Maharashtra Regional and Town Planning Act that no development of land contrary to the provisions of the development plan and the Development Control Regulations which are statutory in character, can be permitted. Under the Development Control Regulations, if a plot of land is reserved in the development plan for being used as playground, it can be developed either by the owner of the land or by the Corporation. A third party cannot be permitted to develop a plot of land which is reserved in the development plan for being used as playground. Insofar as plot No. 119B is concerned, it is owned by the State Government, and therefore, it can either be developed by the State Government itself or the Corporation can be permitted to develop. No third party can develop the land which is designated to be used as playground. In our opinion, therefore, the order of the State Government dated 8-1-1990 which permits development of land designated as playground in the development plan by the Somani Trust would be illegal. In any case, in our opinion, it being the Government land on the Corporation intimating to the State Government its inability to construct school building on the land, the State Government could not have straight away accepted the proposal of the Somani Trust and granted lease of the land to Somani Trust. As a Government it is bound by the mandate of Article 14 of the Constitution of India and was under a duty to issue public notice intimating the persons who may be interested, the availability of the land for being granted on lease for the aforesaid purpose. So far as the judgment of the Supreme Court in the case *Foreshore Co-operative Housing Society Ltd, Bombay* referred to above, relied on by the learned Counsel appearing for "Somani Trust" is concerned, in that case the land was allotted to a Housing Society pursuant to the Government decision which provided that if what is to be granted to the Co-operative Housing Society is isolated piece of land then issuing of public notice is not necessary. We have not been pointed out any decision of the State Government for allotment of the land reserved for the purpose of school to a public trust or to a Society without issuing public notice. In our opinion, the land which is the property of the State Government cannot be allotted by the State Government without issuing public notice and allotment of land by the State Government which is owned by it, without issuing public notice, so that the persons who may be eligible for the land gets an opportunity to apply for it, would be illegal being violative of the guarantee of Article 14 of the Constitution of India.

9. From the record it is clear that in the year 1980 the State Government decided to give the land on lease to the Corporation. The only reason why 50% of the land was decided to be granted on lease to "Somani Trust" was the financial stringency of the Corporation which was cited as ground for inability of the

Corporation to construct the school. Though in the year 1990, the land was allotted to "Somani Trust", because of the interim order passed by this Court, the land continues to be vacant and the "Somani Trust" has not been able to do anything in relation the land, therefore, so far as the development on the land is concerned, the situation as it existed in the year 1990 continues to exist even today. Now the Corporation has made a clear statement that it is in a position to construct school building on the land on its own and therefore, in our opinion, justification given by the State Government for allotting 50% of the land to "Somani Trust" no longer exists, and therefore, there is no reason why 50% of the land should be allotted to "Somani Trust". In our opinion, due to change in the circumstances and the situation, order dated 8-1-1990 cannot be permitted to continue. The Corporation proposes to construct a primary school on the plot as the primary education has been declared as fundamental right under Article 21A of the Constitution of India. In our opinion, therefore, there is no justification for the State Government to grant lease of 50% of the land to Somani Trust. In our opinion, in the facts and circumstances of the case, therefore, the following order would meet the ends of justice:

The Government Order dated 8-1-1990 challenged in the petition, is set aside. The State Government is directed to continue the land with the Corporation on the same terms and conditions on which it was granted to the Corporation by order dated 12-3-1980. Rule is made absolute accordingly. No order as to costs. At the request of learned Counsel appearing for Respondent No. 9, operation of the order passed today is stayed for a period of ten weeks from today and it is directed that interim order presently operating shall continue till then.