
(2009) 02 BOM CK 0081

In the Bombay High Court

Case No : Writ Petition No's. 2225 and 2239 of 2008

Devendra Yashwant Kamble and Others

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 09-02-2009

Acts Referred:

Development Control Regulations for Greater Bombay, 1991 — Regulation 33(10)
Maharashtra Regional and Town Planning Act, 1966 — Section 30(1)
Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 —
Section 14(1), 33, 35, 38, 3B

Citation : (2009) 5 BomCR 402

Hon'ble Judges : Vazifdar S.J., J

Bench : Single Bench

Advocate : Prakash G. Marathe, for the Appellant; Milind More, A.G.P. for respondent Nos. 1 and 2 in W.P. 2225/08, G.D. Uttangale, instructed by Uttangale and Co. for respondent No. 3, Madhubala Kajale, A.G.P. for respondent Nos. 1 and 2 in W.P. 2239/08 and V.M. Thorat, Sr. C. and A.R. Pande, for the Respondent

Final Decision : Dismissed

Judgement

Vazifdar S.J., J.—By an Order dated 13.10.2008 A.M. Khanwilkar, J. noted that a question of law, which I will refer to shortly, arises in the present case. The learned Judge noted that if the question is answered in favour of the petitioner it could necessarily follow that the impugned action would not have been taken against the petitioner.

The learned Judge further observed that as a short question is involved, instead of admitting the petition it would be appropriate that it is kept for final disposal at the admission stage. Accordingly, and with the consent of the parties, the writ petitions are disposed of finally at the admission stage.

2. Further, the question involved in both the writ petitions is common. Both the writ petitions are therefore disposed of by this common order.

3. There are six petitioners in Writ Petition No. 2225 of 2008 and four petitioners in Writ Petition No. 2239 of 2008. Respondent Nos. 2 and 3 are the Administrators and Divisional Commissioner, Konkan Division, Mumbai and The Chief Executive Officer, Slum Rehabilitation Authority, Bandra, Mumbai. Respondent No. 4 M/s. Shree Gajraj Housing Nirman Pvt. Ltd. is a developer appointed by a Co-operative Housing Society.

4. The petitioners in both the writ petitions have challenged an Order dated 29.8.2008 passed by respondent No. 2 upholding an Order dated 8.10.2007 passed by the Deputy Collector (Encroachment and Removal) and Competent Authority, Bandra, Mumbai, under Sections 33 and 38 of the Maharashtra Slum Areas (I.C.&R.) Act, 1971.

5. On 18.12.2004 respondent No. 4 the developer and the Co-operative Housing Society, made a proposal to the Slum Rehabilitation Authority for a scheme to redevelop the property under Regulation 33(10) under the scheme of the Development Control Regulations, 1991 under the Maharashtra Regional and Town Planning Act, 1966.

On 3.2.2006 the Additional Collector (Encroachment) issued the Annexure II. Upon complying with the provisions, 1054 applications were received alleging that they were eligible to be accommodated under the proposed scheme. The Annexure II is issued in respect of 808 persons who were found eligible. It is important to note that 784 out of these 808 persons found to be eligible, constituting about 97%, gave their consent for the development of the property as per the said proposal.

6. All the six petitioners in Writ Petition No. 2225 of 2008 have been found to be eligible whereas, four petitioners in Writ Petition No. 2239 of 2008 have been found to be ineligible. The petitioners in Writ Petition No. 2239 of 2008 have filed appeals before the authorities, which are pending. By this order, I propose protecting their rights in the event of their being found to be eligible ultimately.

7. On 29.5.2006 a letter of intent was issued by the Slum Rehabilitation Authority, which is a Planning Authority under the Maharashtra Regional and Town Planning Act, 1966, in favour of respondent No. 4. The scheme involves the construction of three rehabilitation buildings. Two of these buildings comprise of a ground and twelve upper floors. The third rehabilitation building comprises of a ground and seven upper floors. The Letter of Intent was revised on 25.8.2006.

On 4.10.2006 the Slum Rehabilitation Authority, issued the I.O.D. On 19.10.2006 the commencement certificate was issued.

8. It is important to note that in order to enable the construction of the first rehabilitation building, transit camps were made available and 300 persons have already been shifted to the transit camp. This was part of the first phase which involved construction of the first building. Thus, these 300 persons are already out of their homes, in the said transit camps. The construction of the building has

been completed. Certain finishing works remains to be completed and the completion certificate also remains to be issued.

9. To proceed with the next phase, the petitioners were required to shift from their existing accommodation. They however refused to vacate the premises in their possession. The six petitioners in Writ Petition No. 2225 of 2008, who were found eligible, were also required to shift to the transit accommodation. Thus, proceedings were instituted u/s 33 of the Slum Rehabilitation Act in respect of these ten petitioners.

On 8.10.2007 the Deputy Collector (Encroachment) passed an order u/s 33. This order was challenged in an appeal u/s 35.

By an Order dated 29.8.08, the Divisional Commissioner confirmed the Order dated 8.10.2007. It is this Order dated 29.8.2008 which is challenged in this Writ Petition.

10. The main contention on behalf of the petitioners is that the entire scheme is void in as much as the area in respect whereof the scheme has been sanctioned has not been declared to be a slum u/s 4 of the Slum Rehabilitation Act. This is the point of law which has been noted by A.M. Khanwilkar, J. in the said Order dated 13.10.2008. Certain interim reliefs were also granted directing the respondents to maintain status quo in respect of the suit property. It was clarified that the respondents would be permitted to carry on further construction but without claiming any equity. It was further made clear that no construction activity on the site, which was originally occupied by the petitioners would be commenced, if already not started.

11. The question of law raised on behalf of the petitioners is no longer res integra. It is concluded by two Division Bench judgments of this Court.

12. Mr. Marathe, the learned Counsel appearing on behalf of the petitioners relied upon paragraph 17 of a judgment of a learned Single Judge of this Court in the case of (Smt. Ramkali Sitaram Kushawaha (Kachhi) and Ors. v. The Deputy Collector (ENC) and Competent Authority and Ors.) 2004(3) Bom.C.R. 14 (O.S.) : 2004(2) All.M.R. 320. which reads thus:

17. The reference to the Development Control Regulation No. 33(10) is also of no help for the respondents to justify action u/s 14(1) without compliance of Section 5 of the said Act. Clause II(i) of the said Regulation provides that slums shall mean those censused, or declared and notified, in the past or hereafter under the said Act and slums shall also mean areas/pavement stretches hereafter notified as Slum Rehabilitation Areas. Sub-clause (ii) of Clause II provides that if any area fulfills the conditions laid down in Section 4 of the said Act to qualify as slum area and has been censused or declared and notified shall be deemed to be and treated as Slum Rehabilitation Areas. Referring to these provisions, it was sought to be contended that the same clearly provides as to which areas can be treated as slum rehabilitation area. At the outset, it is to be noted that the

Development Control Regulation No. 33(10) is issued under the Planning Act and not under the said Act. The provisions of law contained in the said Act cannot be construed by referring to the Regulations issued under totally the different Act. Secondly, the provisions of Clause II are not deeming provisions relating to the slum rehabilitation areas but they merely provide for areas which can be treated as the slum rehabilitation areas. The Sub-clause (i) of Clause II clearly provides that those provisions are for the purpose specified in Clause I which precludes Clause II. In fact, Sub-clause (i) of Clause II begins with the expression "For this purpose, ..." which clearly signifies that whatever has been stated subsequent to the said expression "For this purpose" is for the purpose specified in the preceding paragraph. The paragraph preceding the Clause (i) of II relates to the eligibility for rehabilitation under the scheme. It does not relate to any area to be considered as the slum rehabilitation area within the meaning of the said expression under the said Act. Sub-clause (a) of Clause I thereunder provides that "for redevelopment of slums including pavements, whose inhabitants' names and structures appear in the electoral roll prepared with reference to 1st January, 1995 or a date prior thereto, but where the inhabitants stay at present in the structure, the provisions of Appendix IV shall apply on the basis of a tenement in exchange for an independently numbered structure." Sub-clause (b) thereof provides that "Subject to the foregoing provisions, only the actual occupants of the hutments, shall be held eligible, and the so called structure owner other than the actual occupant if any, even if his name is shown in the electoral roll for the structure, shall have no right whatsoever to the reconstructed tenement against that structure." In other words, Sub-clauses (a) and (b) of Clause I relate to the eligibility of the persons for the new tenements in exchange of the old tenements, and for that purpose, which areas can be identified for the purpose of the slum rehabilitation have been specified in Clause II. That by itself does not amount to say that any such area is declared as or is deemed to be the slum rehabilitation area within the meaning of the said Act. Being so, even on mere applicability of the G.R. dated 9th April, 1998, it would act ipso facto transform an area already declared as a slum area under the said Act into a slum rehabilitation area, in the absence of proper declaration u/s 30(1) of the said Act. These Regulations cannot stand on higher pedestal than that of G.R. dated 9th April, 1998.

13. Mr. Marathe submitted that in view of this judgment the present scheme is bad in law as there is admittedly no declaration under the Slum Rehabilitation Act.

14. Even assuming that the judgment supports Mr. Marathe's submission, it is of no assistance to the petitioners in view of two subsequent Division Bench judgments of this Court.

15. In *Amba Chawl Wadi Rahiwasi Seva Sangh, registered society Vs. Municipal Corporation of Greater Mumbai and Others*, the facts and the submissions were almost identical to those in the present case.

(A) The petitioners had challenged a scheme of rehabilitation approved by the B.M.C. and the Slum Rehabilitation Authority. The petitioners also challenged an order passed under Sections 33 and 38 by the Additional Collector under the Slum Rehabilitation Act and the order passed in the appeal u/s 35.

The Corporation there decided to retain the property and therefore put up a proposal for redeveloping the area and redeveloping the slum areas on the said property. A society submitted a proposal to redevelop the property. The slum had been censused.

(B) The facts in the present Writ Petition are almost identical. In the present Writ Petitions also the area is admittedly censused. Further, in the present Writ Petitions also, admittedly, the area belongs to the State Government. In the case before the Division Bench also the scheme was proposed under Regulation 33(10) of the Development Control Rules and had been sanctioned.

(C) The same contentions were considered by the Division Bench. It was contended in that case that the land had not been declared as a slum area as required u/s 4 of the Slum Act and that unless there is such a declaration, no redevelopment or rehabilitation can be undertaken. Reliance was placed inter-alia on the judgment of the learned Single Judge in Ramkali's case, referred to above. It was further contended that the orders passed under Sections 33 and 38 were therefore illegal as the area had not been declared a slum. It was contended that on a proper construction and interpretation of Regulation 33(10) it follows that only an area which is declared a slum area prior to 1971 or first declared a slum under the Slum Act, would constitute a slum and that since the area has not been declared a slum area prior to 1971 or under the Slum Act, the rehabilitation thereof could not be undertaken.

(D) On the other hand, on behalf of the respondents, it was contended that the Corporation had the authority to decide to develop a plot which is a censused slum and to rehabilitate the slum dwellers; that once the area had been censused as a slum, the machinery available under the Slum Act was put into operation in order to evict the unauthorised slum dwellers and there was no need to declare the area as a slum u/s 4 of the Slum Act since the provisions of Sections 33 and 38 have been invoked only in order to avail of the machinery available under the Slum Act. (E) The Division Bench upheld the contentions on behalf of the respondents which are identical to the submission raised on behalf of the respondents before me. The Division Bench held as under:

7. Development Control Regulation 33(10) permits redevelopment of slums whose inhabitants' names and structures appear in the electoral roll prepared on or before 1.1.1995. A slum has been defined in 33(10)11 to mean those areas which have been censused or declared and notified in the past or under the Slum Act after it was enacted in 1971. Therefore, a slum is not just an area which has been declared a slum u/s 4 of the Slum Act. The issuance of a notification u/s 4 of the Slum Act is not a prerequisite for an area to be considered a slum

rehabilitation area. Censused slums have also been defined as those which are located on lands belonging to the Government or any undertaking of the Government or the Brihanmumbai Municipal Corporation and which have been censused in 1976, 1980, 1985 or prior to 1.1.1995. There is no dispute that the present area is owned by the Corporation. Nor is there any dispute that the slums located thereon have been censused prior to 1995.

8. The submission made on behalf of the petitioners that the provisions of the Slum Act cannot be invoked unless there is a declaration made u/s 4 that the area is a slum area, is without merit. The provisions of Sections 33 and 38 of the Slum Act have been invoked by the respondents in order to evict the slum dwellers from the area which is a censused slum. It is only the machinery which is available under the Slum Act that is being utilised for the purposes of removing the occupants from a land which is declared a slum area. In fact under the D.C. Regulations steps can be taken to evict those hutment dwellers who do not join a rehabilitation project willingly. The provisions clearly stipulate that if the hutment dwellers do not join the scheme within 15 days after a slum rehabilitation project has been approved, then action under the provisions of the Slum Act including Sections 33 and 38 as amended from time to time can be taken against the hutments. All those who do not join the project lose the right to any built up tenement and their tenement can be taken over by the Slum Rehabilitation Authority and can be used for accommodating those slum dwellers from other slums who cannot be accommodated in situ. The Corporation on 24.5.1996 issued a letter of "no objection" after verifying the proposal of respondent No. 3 for rehabilitation of the slum area. After completion of various other formalities the Slum Rehabilitation Authority approved the project on certain terms and conditions. The impugned orders have been passed after the slum rehabilitation project was approved by the Slum Rehabilitation Authority (SRA). Factually what has been done is recourse taken to the provisions of Sections 33 and 38 of the Slum Act for the purposes of implementing the development plan or project undertaken under D.C. Regulations in relation to a censused area. That being permissible in law, mere use of machinery provided under the Slum Act cannot be faulted. Therefore, there is no substance in the contentions of the petitioners that without a notification u/s 4 of the Slum Act the provisions of the Act cannot be used at all.

(F) It was submitted that the main issue before the Division Bench as to whether the petitioners could have been proceeded against under Sections 33 and 38 of the Slum Act and the submissions on behalf of the petitioners presently did not really fall for the consideration of the Division Bench.

(G) I am unable to agree. It is for this reason that I have earlier set out the submissions on behalf of the parties before the Division Bench in considerable detail. In fact, in that matter, the scheme itself had been challenged. The above observations of the Division Bench were made in the context of the submissions recorded therein, which I have also referred to. The challenge to the proceedings

under Sections 33 and 38 was based on the contention that there was no declaration passed under the Slum Act. Thus, in any event, it would not be open for me to ignore the observations of the Division Bench on this issue.

16-A. In Om-Sai Darshan Cooperative Housing Society (Proposed) and Chandrakant Ramchandra Thakur Vs. The State of Maharashtra, SRA Section and Others, , the Division Bench held as under:

16. The following questions arise for consideration in this petition:

(i) Whether the issuance of notification u/s 3-C(1) of the Slum Act is a condition precedent for sanction of slum redevelopment scheme governed by D.C. Regulation 33(10)?

(ii) What is the meaning of the slum rehabilitation area for the purpose of D.C. Regulation 33(10)?

(iii) Whether the petitioner No. 1- proposed society is entitled to grant of sanction to develop a particular area out of CTS 539/C-1? 17. So far as the first question is concerned, Shri. Govilkar, the learned Counsel for the petitioners has placed reliance on the decision of the learned Single Judge of this Court in the case of Ramkali Sitaram Kushawaha and Ors. v. Deputy Collector (ENC) and Competent Authority and Ors. (supra) The learned Single Judge amongst other questions framed following question (b) in paragraph 4. It reads thus:

(b) Whether declaration of general scheme of rehabilitation u/s 3-B and/or the Development Control Regulation No. 33(10) issued under the Planning Act, exempts requirement of declaration u/s 3-C of the said Act?

While dealing with the said question, the learned Single Judge held thus in paragraph 15:

...It is, therefore, clear that mere declaration of a general scheme for rehabilitation of slum areas u/s 3-B ipso facto would not amount to declaration of any specific area as the slum rehabilitation area, and for the same reason, slum rehabilitation scheme declared u/s 3-B cannot be made applicable to an area in the absence of compliance of the provisions of Section 3-C(1) of the said Act to such area. At the same time, mere publication of general scheme of rehabilitation would not bring any area within the scope of Section 3-D. For the purpose of applicability of Section 3-D, it would be necessary for the concerned authority to declare the area to be slum rehabilitation area u/s 3-C(1) of the said Act. In the absence of compliance of the provision u/s 3-C(1), question of applicability of Section 3-D does not arise. Undisputedly, the respondents have not issued any declaration u/s 3-C in respect of the area in question, and the same has not been declared as the slum rehabilitation area u/s 3-C of the said Act....

(Emphasis supplied).

18. ...

19. In the present case we are dealing with the scheme of slum redevelopment which is governed by Regulation 33(10). A General Scheme u/s 3-B of the Slum Act can be framed either by the State Government or by SRA with the prior approval of the State Government. However, the scheme under Clause 33(10) is to be approved in individual cases by the SRA. Clause (II) of Annexure to the said Regulation provides that for the purpose of Regulation 33(10), a slum means that area which is either censused or one which is declared and notified under the Slum Act. It provides that the slum shall also mean areas pavement stretches hereafter notified as slum rehabilitation areas. The clause provides that if any area fulfills conditions laid down in Section 4 of the Slum Act to qualify as a slum area and has been either censused or declared and notified as slum, it shall be deemed to be and treated as Slum Rehabilitation Areas. The said clause also provides that censused means those slums located on lands belonging to Government, any undertaking of Government, or to Brihan Mumbai Municipal Corporation and incorporated in the records of the land owning authority as having been censused in 1976, 1980, or 1985 or prior to 1st January 1995. Thus for the purpose of scheme under Regulation 33(10), the following areas are Slum Rehabilitation Areas; (a) any area which fulfills the conditions laid down in Section 4 of the Slum Act which is declared and notified as such and (b) slum rehabilitation area declared as such by the Slum Rehabilitation Authority fulfilling the conditions laid down in Section 4 of the Slum Act to qualify as slum area and/or required for implementation of any slum rehabilitation project. Regulation 33(10) slums including pavements. The slums are defined by Clause II. The slums mean either censused slums or slums declared and notified as such under the Slum Act. Clause II also defines the word censused which means slums located on lands belonging to Government, any undertaking of the Government or Mumbai Municipal Corporation and incorporated in records of the land owning authority as having been censused in 1976, 1980 or 1985 or prior to 1st January 1985.

20. On plain reading of the Annexure to Regulation 33(10) it is obvious that for sanction of a scheme governed by the said Regulation in respect of a parcel of land, it is not necessary to have a declaration of the particular parcel of land as a slum rehabilitation area in exercise of power u/s 3-C(1) of the Slum Act. The Slum Rehabilitation Scheme can be sanctioned in respect of a slum as defined in Clause II of Annexure to Regulation 33(10). Under the said Annexure there can be a scheme for a viable stretch of pavement also. The learned Single Judge deciding Ramkali's case was not concerned with a scheme under D.C. Regulation No. 33(10). The proposition laid down by him will have to be read as one confined to the situation before him. Question No. 1 is therefore answered in the negative. The question No. 2 has been also answered in the foregoing paragraphs.

(B) Thus, in this case too therefore, the Division Bench has already expressly held that it is not necessary to have a declaration of a particular parcel of land as a slum rehabilitation area under the Slum Act and that the Slum Rehabilitation

Scheme can be sanctioned in respect of a slum as defined under Regulation 33(10).

17. It was submitted that the judgments have not considered paragraph 17 in Ramkali's case. It would make no difference to the binding effect thereof to this case.

In the present case, there is no dispute that the scheme has been approved u/s 33(10). This is clear from the Letter of Intent dated 29.5.2006 which expressly states that the same is issued u/s 33(10). In view of the above Division Bench judgments it must be held that the judgment in Ramkali's case does not apply to a case which falls within Regulation 33(10).

18. It was then submitted that the authorities under the Slum Act as well as under the Environmental Protection Act have issued notices to respondent No. 4. I express no opinion on the same. Needless to add, that the concerned authorities will deal with the said issues in accordance with the provisions of law.

19. I am informed that the petitioners in Writ Petition No. 2225 of 2008 have shifted to the transit accommodation. Needless to add, they will be accommodated in their permanent alternative accommodation in accordance with the scheme when the same is ready.

20. As far as the petitioners in Writ Petition No. 2239 of 2008 are concerned, Mr. Thorat states that without prejudice to the rights and contentions of respondent No. 4 they will be provided transit accommodation subject to the outcome of their appeals, if any, filed or which may be filed.

In other words, in the event of their succeeding in the appeal, they will be given the permanent accommodation in accordance with law.

21. In the event of the petitioners in Writ Petition No. 2239 of 2008 being found to be eligible, respondent No. 4 undertakes to provide the alternative accommodation as per the provisions of the Slum Rehabilitation. The undertaking is accepted.

22. Subject to what is stated above, the writ petitions are dismissed. The Order dated 13.10.2008 shall continue upto and inclusive of 16.3.2009.