

(2015) 03 BOM CK 0351

In the Bombay High Court

Case No : Writ Petition No. 3242 of 1998, Civil Application No. 3334 of 2002, Civil Application No. 6968 of 2004 and Civil Application No. 2280 of 2006

Kalpana and Others

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 04-03-2015

Acts Referred:

Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 — Section 3A

Citation : (2015) 03 BOM CK 0351

Hon'ble Judges : Anand Vasant Nirgude, J;V.L. Achliya, J

Bench : Division Bench

Advocate : R.R. Sancheti, Advocate h/f R.R. Mantri, for the Appellant; Y.M. Kshirsagar, AGP, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Anand Vasant Nirgude, J—Heard learned counsel for the parties. The facts leading to this litigation are as under:-

2. This is a petition in the nature of Public Interest Litigation. The petitioners are residents of Nandurbar Town. Nandurbar is one of the major cities of North Maharashtra. Nandurbar is the District Head Quarter. Prior to 1939 there was an open piece of Government land situated near Tahasil Office. The Municipal Council moved an application to the Collector to allot this land for development of garden. The Collector allowed this application and allotted the area of the 3474 Sq.M. to the Municipal Council for the purpose of developing the park/garden. Certain conditions were put. One of them was that the plot should be used only for public garden and same should be kept open to all residents. One Shri Babulal and Shri Rasiklal came forward to provide funds for development of the park. They even installed a statue of their father in the garden that was developed. Thus the park came into existence since 1943. The development plan

for Nandurbar Town under the provisions of Maharashtra Regional and Town Planning Act, 1966 (for short MRTP Act) was sanctioned in January 1979. Even in this plan the petition-plot was shown as public garden. In 1992 the Municipal Council, Nandurbar moved respondent No. 2- Director of Town Planning, Maharashtra State, seeking de-reservation of the petition-plot. They proposed to use this plot for developing a shopping complex, apparently following due procedure of law as prescribed under section 37 of the MRTP Act. The government issued notification accepting the proposal for change of user. The petition-plot which was reserved earlier for existing garden was changed to shopping complex. The petitioner asserted that required procedure for effecting this change was not followed and the change is detrimental to the public interest at large and the change would alter the character of development plan. They sought order from this Court to set aside the order dated 05.02.1993 authorizing change of user. They also sought permanent injunction to stop Municipal Council from developing the shopping complex on the site.

3. It is a Municipal Council who mainly opposed this petition. The Municipal Council stated that though the petition-piece of land was used as garden/park since 1940, due to rapid development of the city some number of commercial establishments came to be established around the petition-plot. There occurred increase in vehicular traffic in this area which required the area of this plot to be used as road. The area of garden thus got reduced. The Municipal Council having regard to all these developments, resolved to convert this plot into a shopping complex unanimously. Thereafter, the proposal was sent to the Director, Town Planning and Collector and same was cleared by them. It is thereafter the Council issued a public notice under section 37 of the MRTP Act for declaring intention of conversion on 17.06.1992. The Council did not receive any objection or suggestion from the public regarding the proposal of modification. Thereafter, the modification was finalized and the notification was issued. The Council also asserted that the modification was permitted not only by the Collector but also by the developer of garden one Shri Rasiklal. The Municipal Council in their additional affidavit also mentioned that during the pendency of the petition second revised final development plan was published in 2007, in which 12 sites are shown reserved for public garden. Pursuant to this, number of new gardens are either developed or proposed to be developed in near future compared to the area that would be devoted for the garden in the city. The area of garden in question is significantly small. It is submitted on behalf of the Council that taking overall nature and character of the development plan of Nandurbar in consideration, the proposed modification is insignificant and should therefore be permitted. Such modification would not change the character of development plan

4. The gist of notification can be narrated as under:-

"Main Road from the Railway Station to Hat-Darwaja, having heavy traffic is passing nearby this public garden. Considering the heavy traffic, widening of this road is essential. For fulfillment of this road purpose, some portion of site of

public garden will have to be included in the road. After transfer of the public garden site, remaining land will not be enough and this location will not be suitable as public garden.

In comparison to increased population, said garden is inadequate and Municipal Council cannot provide necessary amenities required in garden."

5. In order to decide this petition one must read section 37 of the MRTP Act. It reads as under:-

37. Modification of final development Plan -

(1) Where a modification of any part of or any proposal made in a final development plan is of such a nature that it will not change the character of such Development Plan, the Planning Authority may, or when so directed by the State Government shall, within ninety days from the date of such direction, publish a notice in the Official Gazette and in such other manner as may be determined by it inviting objections and suggestions from any person with respect to the proposed modification not later than one month from the date of such notice; and shall also serve notice on all persons affected by the proposed modification and after giving a hearing to any such persons, submit the proposed modification with amendments, if any, to the State Government for sanction.

(1A) If the Planning Authority fails to issue the notice as directed by the State Government, the State Government shall issue the notice, and thereupon, the provisions of sub-section (1) shall apply as they apply in relation to a notice to be published by a Planning Authority.

(1AA) (a) Notwithstanding anything contained in sub-section (1)(1A) and (2) where the State Government is satisfied that in the public interest it is necessary to carry out urgently a modification of any part of, or any proposal made in, a final Development Plan of such a nature that it will not change the character of such Development Plan, the State Government may, on its own, publish a notice in the Official Gazette, and in such other manner as may be determined by it, inviting objections and suggestions from any person with respect to the proposed modification not later than one month from the date of such notice, and shall also serve notice on all persons affected by the proposed modification and the Planning Authority.

(b) The State Government shall, after the specified period, forward a copy of all such objections and suggestions to the Planning Authority for its consideration. The Planning Authority shall, thereupon, submit its say to the Government within a period of one month from the receipt of the copies of such objections and suggestions from the government.

(c) The State Government shall, after giving hearing to the affected persons and the Planning Authority and after making such inquiry as it may consider necessary and consulting the Director of Town Planning, by notification in the Official Gazette publish the approved modification with or without changes, and

subject to such conditions as it may deem fit, or may decide not to carry out such modification. On the publication of the modification in the Official Gazette, the final Development Plan shall be deemed to have been modified accordingly.

(1B) Notwithstanding anything contained in sub-section (1), if the Slum Rehabilitation Authority appointed under section 3A of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 is satisfied that a modification of any part of, or any proposal made in, a final Development plan is required to be made for implementation of the Slum Rehabilitation Scheme declared under the said Act, then, it as may publish a notice in the official gazette and in such other manner as may be determined by it, inviting objections and suggestions from any person with respect to the proposed modification not later than one month from the date of such notice and shall also serve notice on all persons affected by the proposed modification, and after giving a hearing to any such persons, submit the proposed modification with amendments, if any to the State Government for sanction.

(2) The State Government may, make such inquiry as it may consider necessary and after consulting the Director of Town Planning by notification in the Official Gazette, sanction the modification with or without such changes, and subject to such conditions as it may deem fit, or refuse to accord sanction. If a modification is sanctioned, the final Development plans shall be deemed to have been modified accordingly.

6. The question therefore is whether the modification in question would change the character of the development plan. On facts the proposed modification appears unnecessary and illogical. One cannot forget the historical aspect of this particular site for garden. Since 1940 this plot of land is developed and used as garden. The land was given to the Municipal Council for that very purpose. So the modification which proposed the change of user from recreation to commercial is completely opposite to the conditions laid down at the time of allotment of the land. As mentioned above, one of the reasons mentioned by the Council for modification is that the main road from Railway Station to Hat Darwaja has heavy traffic; this road passes by the garden in question; the road is required to be widened for easy facilitation of traffic; if the road is widened, part of garden would be used as road to this extent; the purpose for changing the use of the land from garden to road is quite convincing. But the submission that after road widening the piece of land remains "too small" for a garden has no logic at all. Assuming that after development of road a small piece of land remains in between two roads, the same can easily be developed as traffic island. Such island can easily be developed as green patch. Such user of smaller piece of land would be certainly beneficial to the public at large. It would certainly not create more traffic. But if that small piece of land is used for construction of shopping complex, heavy traffic on the road would become heavier and even the widened road would render insufficient. The use of this plot for shopping complex is contrary to the purpose for which the land was allotted.

Developing a shopping complex would increase the traffic in the area and the purpose of road widening would be nullified completely. The only reason appears for this modification is that the Council would be able to develop shopping complex and earn sizable income by sale or rent of the real estate. If one peruses the surrounding of this plot, one finds that on one side, there is Tahsil Office. On the other side there is a plot allotted to the Police Station/Police Head Quarter. On third side, there is bus-stand and on the fourth side there is a traffic roundabout where a statue of a public figure is installed. The Council is trying to suggest that this is a commercial area. However, we are not ready to accept this contention. This area does not appear to be predominantly commercial. Barring few shops, the entire area is utilized for accommodating the Government offices etc. By suggesting this modification, the immediate purpose of the Council is to increase its income. However, the change that would take place due to this modification would be irreversible. The view of the Council for modification is myopic.

7. Few judgments were shown to us from both the sides, but in our view while making this judgment the factual aspect of the case would dominate. In the case of Bangalore Medical Trust Vs. B.S. Muddappa and others, AIR 1991 SC 1902 : (1991) 3 JT 172 : (1991) 2 SCALE 131 : (1991) 4 SCC 54 : (1991) 3 SCR 102 : (1991) 2 UJ 415 , public park was permitted to be converted into a private nursing home. In the fact of the case, the development of the city is regularized through the provisions of Bangalore Metropolitan Region Development Authority Act, 1976. Certain development scheme was adopted by the development authority. The Act provides that any alteration in the scheme is permissible only if it resulted into improvement of any part of the scheme. The Court held that the private nursing home cannot be an amenity or improvement over necessity like a public park. The exercise of power in conversion of public park into private nursing home, therefore, was contrary to the purpose for which it was conferred under the statute. In the present case Section 37 of the MRTP Act gives rather ample discretion to the planning authority for suggesting and implementing modification in development plan, but while exercising power under section 37 of the MRTP Act, the authority should not lose sight of the statement of object of the MRTP Act, which is cited above. The main object of this Act is to make better provisions for the preparation of development plans and to ensure its effective execution.

8. Learned Counsel for the Municipal Council placed reliance on following judgments.

(i) Sangharsha Krushi Samiti, Nagpur V/s State of Maharashtra and ors, 2007(2)Mh.L.J.681

(ii) Shri Mihir Yadunath Thatte Vs. State of Maharashtra and Others, (2007) 1 ALLMR 537 .

(iii) Parisar an Organisation and Others Vs. State of Maharashtra and Others,

(1990) 1 BomCR 79 .

9. The Division Bench of this Court in the case of Sangharsha (Supra) held that change of user of certain plot of land was restricted to that plot only and therefore it would not amount to changing the character of whole development plan. The relevant portion of this judgment reads as under:-

"22.In the instant case, proceedings were initiated for change of user only in respect of land in question as specified in the development plan and the State Government by the impugned notification dated 30.01.2003 permitted such change of user, which is restricted only to the land in question and, therefore, it does not amount to changing the character of the whole development plan what is prohibited as per provisions of section 37 of the MRTP Act is modification in the development plan of nature, which will change the character of the development plan as a whole and not modification, which is limited in its application. x x x x x x"

10. In the case of Mihir (Supra) a plot of land admeasuring 1.75 Hectare reserved as hill top slope zone was permitted to be changed into residential zone. The Division Bench of this Court held that it would not amount to change in the nature of development plan, though hill top slope zone by itself is distinguishing feature of development plan of the city. Comparatively small change in such zone would not change the character of entire plan. The following part of the judgment in our view is quite relevant for our discussion.

"20.Section 37 of the Town Planning Act empowers the State Government to sanction the modification in the final development plan provided such modification does not change the character of the plan. The words change in the character of plan came up for consideration before the Supreme Court in the case of Bombay Dyeing and Mfg. Co. Ltd. Vs. Bombay Environmental Action Group and Others, AIR 2006 SC 1489 : (2006) 4 CompLJ 4 : (2006) 3 JT 235 : (2006) 3 SCALE 1 : (2006) 3 SCC 434 : (2006) 67 SCL 107 : (2006) AIRSCW 1392 : (2006) 3 Supreme 49 . The Supreme Court said thus-

234. It is also to be borne in mind that whereas the heading of section 37 , prior to amendment, provided for minor modification, the word minor has been deleted and in that view of the matter emphasis should be laid on the fact or as to whether such modification alters the basic character of the development of Greater Bombay or not. It would give rise to a further question, namely, as to whether by reason thereof a radical transformation has taken place as regards its basic features, including its identity, which a fortiori would mean as to whether the modified development plan stands unrecognized from the original one. Such a conclusion could have been arrived at if a green area has been eliminated or a green area has been allotted to be used for commercial purposes as was the case in Bangalore Medical Trust Vs. B.S. Muddappa and others, AIR 1991 SC 1902 : (1991) 3 JT 172 : (1991) 2 SCALE 131 : (1991) 4 SCC 54 : (1991) 3 SCR 102 : (1991) 2 UJ 415 . In that case, this Court, while construing the Town Planning

Act, opined that reservation of open spaces for parks and playgrounds is universally recognized as a legitimate exercise of statutory power rationally related to the protection of the residents of the locality from the ill-effects of urbanization stating: The statutes in force in India and abroad reserving open spaces for parks and playgrounds are the legislative attempt to eliminate the misery of disreputable housing condition caused by urbanization. Crowded urban areas tend to spread disease, crime and immorality."

11. We have discussed the facts at length above. The existence of this garden more than 50 years is a distinction of this town. If we allow destruction of this place, this would certainly affect the very nature of the development plan. The submissions that the Council is developing many other parks will not persuade us to hold otherwise. The additional gardens are indeed required for ever expanding limits of this town. The Municipal Council ought to have developed this piece of land into a beautiful garden to maintain its legacy of 50 years. The park, thus, appears to be a basic character of the development plan of the city. If this part is replaced by shopping complex, this prominent area would stand completely changed and would be unrecognized from its original position.

12. The judgment in the case of Parisar (Supra) was also delivered by the Division Bench of this Court. On facts the Court held that change of user was only in respect of small portion of land and still smaller portion of hill which was a barren land. Other portion of the land was proposed to be developed in the garden. The modification was not of such nature that would change character of development plan.

13. Learned Counsel for the Municipal Council also raised the question of delay and laches but we are not inclined to give much importance to this aspect of the case because though the notification regarding modification was issued much earlier, no development took place in the intervening period and after the petition was filed, this Court passed order to stay further developments.

14. In the result, we allow this petition in terms of prayer clauses (B) & (C). Rule made absolute accordingly.

15. In view of disposal of the writ petition, connected civil applications do not survived and stand disposed of accordingly.