

(2013) 11 MAD CK 0167

In the Madras High Court

Case No : W.A. No. 925 of 2011 and M.P. No. 1 of 2011

Kirubakaran, Ashokan, Sunanthini and Dr. Murugan
represented by their Power of Attorney Agent, Sunanthini

APPELLANT

Vs

The Commissioner (East), Corporation of Coimbatore

RESPONDENT

Date of Decision : 13-11-2013

Acts Referred:

Citation : (2013) 6 CTC 441 : (2013) 5 LW 597 : (2013) 8 MLJ 257

Hon'ble Judges : N. Paul Vasanthakumar, J;K. Ravichandra Baabu, J

Bench : Division Bench

Advocate : R. Muthukumaraswamy, for Mr. Karthick and M/s. T.S. Gopalan and Co, for the Appellant; P.H. Arvind Pandian, Additional Advocate General assisted by Mr. J. Sathyanarayanaprasad, for the Respondent

Final Decision : Dismissed

Judgement

N. Paul Vasanthakumar, J.—This writ appeal is preferred against the order made in W.P. No. 12536 of 2008 dated 30.4.2010, dismissing the writ petition filed by the appellants, who have prayed for issuing writ of mandamus directing the respondent to remove the Board placed by the respondent on 20.2.2008 in Housing Plot in S. Nos. 177/1, 178/1, 185 in Kothari Layout, Sowripalayam Village, Singanallur Municipality, now within the limits of Coimbatore Corporation, forthwith and desist from attempting to encroach into the properties belonging to the appellants. The case of the appellants before the learned single Judge was that an extent of 5.37 acres in Kothari Layout was developed as housing plots in S. Nos. 177/1, 178/1, 185 of Sowripalayam Village, Singanallur Municipality, now within the limits of Coimbatore Corporation, by one E.V.K. Ranga Rao, son of R. Ethirajulu and the said layout was approved by the Deputy Director, Town and Country Planning, Coimbatore, in his proceedings dated 5.7.1976. The layout disclosed 34 housing plots, roads and an area of 53.80 cents, reserved for public purpose. According to the appellants, the predecessors-in-title were in possession of the area earmarked for public purpose (an extent of 53.80 cents)

till 1980 and the said property was not gifted/handed over to Singanallur Municipality. Municipality also did not take any steps to take possession of the said land within one year from the grant of sanction/layout approval. On formation of Corporation of Coimbatore, the said area comes under the Corporation limits. According to the appellants the said property was sold for the purpose of construction of hospital to G. Kirubakaran and Dr. Murugan by sale deed dated 3.4.1980, disclosing the fact that the property was earmarked for public purpose. The said property was further divided among the family members of G. Kirubakaran and Dr. Murugan. The said Kirubakaran, Ashokan and Sunanthini were in possession of 30 cents, 8.5 cents and 8.5 cents respectively, and the remaining 7 cents were in possession of Dr. Murugan. The wife of the said G. Kirubakaran is also a Doctor. Similarly, Dr. Murugan and his wife are also practising as Doctors in U.K. According to the appellants, after retirement, the said Doctors would return to Coimbatore and commence medical practice by constructing a hospital in the area purchased by them in the year 1980. On 20.2.2008 the Officers of the Corporation of Coimbatore put up a Board in the property/site stating that the property is belonging to Corporation and it was not used for public purpose. According to the appellants no notice or personal hearing was given by the Corporation before putting up the Board. The property was fenced and tax was also paid by the appellants. There is no dispute about the ownership of 53.80 cents of land and after 20.2.2008, a representation was addressed by the appellants to the respondent to remove the Board. Though the said communication was acknowledged, no action having been taken, the appellants filed the writ petition with the above said prayer.

2. The said writ petition was resisted by the respondent by filing counter affidavit stating that the property having been earmarked for public purpose at the time of layout approval, the predecessor-in-title were ceased to be the legal owner of the land and the land was intended for the benefit of the residents of the house plots and also the public in general. The layout approval having been granted with the condition that 53.80 cents be earmarked for public purpose, the owner of the land is not expected to transfer or sell the same to any third party. Insofar as the contention that the appellants are planning to construct a private hospital in the area, which is earmarked for public purpose, is illegal in the light of the judgment of the Supreme Court reported in Bangalore Medical Trust Vs. B.S. Muddappa and others, wherein the Supreme Court held that a Private Nursing Home is essentially a commercial venture and profit-oriented industry. Section 250(2) of the Coimbatore City Municipal Corporation Act, 1981 creates an obligation that owner shall reserve 10% layout area for common purpose, in addition to the area provided for laying streets. The entire area being 5 acres and 37 cents, as per Section 250(2), the land owner reserved an area of 53.80 cents for public purpose, which is a statutory duty cast upon the land owner, who has sought for layout approval. The board was erected in the place reserved for public purpose as per guidelines issued by the Division Bench of this Court in the Judgment reported in Sri Devi Nagar Residences Welfare Association Vs.

Subbathal and Others The respondent being a party in the said judgment, implemented the guidelines issued and the appellants have admitted that the said land is not utilised for public purpose from the year 1976 i.e. for over 32 years. Even in the affidavit filed in support of the writ petition, intention of the appellants is only to construct private hospital, which cannot be a public purpose. It is further stated in the counter affidavit that by putting up board in the site cannot be treated as taking over possession and the meaning conveyed was to show that the property is to be used only for public purpose and the promoter having not put on use the land reserved for public purpose, the Corporation is entitled to make it as a public park or for public usage, and therefore there is no violation of any right of the appellants as their purchase itself is illegal.

3. The learned single Judge relying upon the statutory provision viz., Section 250(2) of the Coimbatore City Municipal Corporation Act, 1981, held that a promoter is obliged to reserve 10% area for common use i.e., public purpose in addition to the area provided for laying streets and an area of 5.83 cents out of the 5 acres 37 cents was earmarked for the said purpose. The learned single Judge placed reliance on the decision of the Division Bench of this Court reported in Sri Devi Nagar Residences Welfare Association Vs. Subbathal and Others and dismissed the writ petition by distinguishing the judgment relied on by the appellants during the course of arguments, against which this writ appeal is preferred.

4. Mr. R. Muthukumaraswamy, learned Senior Counsel appearing for the appellants argued that proposing to utilise the land earmarked for public purpose for the construction of private hospital, which will provide treatment free of cost for certain percentage of patients, will definitely serve public purpose. During the course of the hearing the learned Senior Counsel submitted that the appellants are willing to file an affidavit to construct hospital in the said place with an assurance to give free treatment to certain percentage of patients and therefore the Board put up by the respondent is to be removed and the contention of the respondent that the land is not used for public purpose cannot be countenanced. The learned Senior Counsel also prayed for time to file an affidavit to that effect pursuant to which an affidavit was also filed on 24.10.2013 by the second appellant on behalf of appellants 1, 3 and 4, stating that in the said land hospital will be constructed by submitting proper plan to the authorities and 50% of the patients who would visit the hospital, would be provided free treatment and only from the remaining 50% patients fee will be collected for treatment. The learned Senior Counsel also relied on the judgment of the Hon''ble Supreme Court reported in The State of Bombay Vs. Ali Gulshan, in support of his contention. The learned Senior Counsel also argued that without issuing any notice to the appellants who are in possession of the subject land, the respondent is not justified in putting up the board in the lands belonging to the appellants.

5. Mr. P.H. Arvind Pandian, learned Additional Advocate General on the other hand relied on the Division Bench Judgment of this Court reported in Sri Devi

Nagar Residences Welfare Association Vs. Subbathal and Others wherein the Division Bench held that the land reserved for public purpose in a layout or in a development plan or master plan approved by the local body, cannot be used for any other purpose than the one specified therein. In the said decision it is further held that the Corporation has the right to manage the land which was earmarked for school, park, etc. and the Corporation shall not have any right to change the user, which shall be for the beneficial enjoyment of the residents of the colony. In answer to the affidavit filed by the appellants, the respondent filed a memo objecting the proposal to construct hospital in the property in dispute. Learned Additional Advocate General also relied on the judgment of the Supreme Court reported in Bangalore Medical Trust Vs. B.S. Muddappa and others, and contended that establishing a Private Nursing Home cannot be treated as public purpose as it is a commercial venture. The learned Additional Advocate General also prayed time for filing an affidavit of undertaking to state that the reserved area will not be used for any commercial purpose and submitted that the Corporation has passed a resolution viz., Resolution No. 57 dated 23.7.2008 and further action was taken on 12.9.2008 and prayed for dismissing the writ appeal.

6. We have considered the rival submissions of the learned Senior Counsel appearing for the appellants and the learned Additional Advocate General appearing for the respondent Municipal Corporation.

7. It is not in dispute that layout approval for housing plots in S. No. 177/1, 178/1 and 185 in Kothari Layout of Sowripalayam Village, Singanallur Municipality, now within the limits of Coimbatore Corporation, measuring an extent of 5 acres and 37 cents was approved by the Deputy Director, Town and Country Planning, Coimbatore on 5.5.1976 containing 43 housing plots, subject to the condition that 53.80 cents of land be reserved for public purpose, which is a requirement u/s 250(2) of the Coimbatore City Municipal Corporation Act, 1981, whereunder the owner is having an obligation to reserve 10% of the layout area for the common public, in addition to the area earmarked for laying streets. The said 10% of land reserved by the owner for common public purpose cannot be utilised either by the Promoter or by the allottees, either jointly or individually, for any other purpose. The appellants are said to be the purchasers of the said 53.80 cents of land. Neither the promoter nor the purchaser utilised the land for public purpose as on the date of the notice put up by the respondent on 20.2.2008.

8. The Division Bench of this Court in Sri Devi Nagar Residences Welfare Association Vs. Subbathal and Others considered the earlier decisions of the Supreme Court and held that "public purpose", though cannot be precisely defined, broadly means the general interest of the community as opposed to the interest of an individual. In the Judgment of the Supreme Court reported in The State of Bihar Vs. Maharajadhiraja Sir Kameshwar Singh of Darbhanga and Others, it is held that public purpose will be construed to promote the welfare of the people at large and if there is dispute regarding public purpose, the Courts

have jurisdiction, and it is their duty to determine the matter whenever a requisition is made to acquire the land according to the spirit of the times in which particular legislation is enacted. The Supreme Court in the decision reported in *The State of Bombay Vs. R.S. Nanji*, also took a similar view. When the use of land earmarked for public purpose was unauthorisedly allotted to a School, the Supreme Court set aside the same and the said decision is reported in *Dr. G.N. Khajuria and others Vs. Delhi Development Authority and others*, . The Division Bench in the above referred judgment held that, "a portion of land reserved for public purpose in a layout or in a development plan or master plan approved by the Local Body cannot be used for any other purpose, than the one specified therein."

9. In the decision reported in *R. Chandran Vs. State of Tamil Nadu*, the First Bench of this Court considered the proposal for conversion of public park and play ground into an underground car park by the Corporation of Chennai, under the Tamil Nadu Country Planning Act, 1971 and Section 2(34) of the Development Control Rules, etc., and held that if an area is specified as a open space, the Corporation may at best get a right as a "custodian of public interest" to manage it in the interest of society in general and in breach of this custodianship, any attempt to change the user of such land would be impermissible under law and would be against the public interest and thus restrained Corporation of Chennai from constructing underground car park in the playground in question situated at Venkatnarayana Road, T. Nagar, Chennai-17. The SLP filed against the said order was also dismissed by the Hon"ble Supreme Court.

10. In the decision reported in *K. Rajamani, R.M. Chinna Alamu rep. by Power Agent V. Ramasamy and R.M. Meenakshi rep. by Power Agent V. Ramasamy Vs. Alamunagar Residents Welfare Association, The State of Tamil Nadu and The Special Commissioner Town and Country Planning Department*, similar issue arose and the Division Bench set aside the Government Order granting permission to change the user of the land from public purpose to housing plot in respect of a land in Coimbatore and in paragraph 22 held thus.

22. The contention of Mr. K.M. Vijayan, learned Senior Counsel for the Appellants is that the law relating to open space would be available only in case of apartments, where the purchaser of an apartment would have right to seek for maintenance of public space as such, as he/she has an undivided share in the open land as well and that law is not applicable to a layout. In our opinion, the said contention is totally on a misconception. The purpose for leaving open space is not only to meet the future developmental activity, but also to meet the recreational activity of the inhabitants. The provision of open space in a development plan is to provide green space as well which is an essential feature in the development of an area. In a layout leaving of certain area of land as open space for use of park is in conformity with the Development Control Rules. Hence, there cannot be a different yardsticks to the de-reservation of land left for

open space in the case of an apartment and layout. Only in this context, the provisions of Section 432(10)(b) of the Coimbatore City Municipal Corporation Act relating to the power of the Municipal Corporation to make bye-laws in respect of protection of avenues, trees, grass, other appurtenances of public streets and other places was referred to by the learned Judge which, in our considered view, requires no interference. Hence, the learned Judge has rightly quashed the order of the Government in de-reserving the land earmarked for public purpose in the layout into housing plots and we are not inclined to interfere with the same." Thus, it is evident that the land earmarked for public purpose cannot be used for private use by any one, including the Local Body restricting the usage of the public.

11. In this case, the contention of the appellants are that they are proposing to construct a hospital in the subject land, which will serve public purpose and an affidavit is also filed in writ appeal stage stating that 50% of the patients in the proposed hospital will be treated free of costs. Whether the establishment of a Private Nursing Home in an open space reserved for public park will serve public purpose was already considered by the Hon"ble Supreme Court in the decision reported in Bangalore Medical Trust Vs. B.S. Muddappa and others, . The argument advanced on similar line that the Hospital with Research Centre and free service being more important from social angle, the inhabitants in the locality cannot be said to suffer any injury, much less substantial injury, was totally rejected by the Hon"ble Supreme Court.

12. The learned Senior Counsel for the petitioner relied on the Judgment of the Supreme Court reported in The State of Bombay Vs. Ali Gulshan, to substantiate his contention that acquisition of sites for building hospital or educational institutions by private benefactors will be a public purpose. The said observation made by the Hon"ble Supreme Court cannot be taken advantage of by the petitioner as the issue involved in the said case was as to whether acquisition of land by the then Government of Bombay for housing a member of the staff of a foreign consulate was public purpose or not. The Hon"ble Supreme Court while answering the said issue in favour of the State made only an observation, without going into the types of hospitals or types of the Schools, which are intended to be established for public purpose.

13. "Public purpose", though cannot be given a precise definition, Section 3(f) of the Land Acquisition Act, 1894 gives the meaning of the expression "public purpose", which is an inclusive definition. Section 3(f)(vi) to (viii) reads as follows:

3(f)(vi) the provision of land for carrying out any educational, housing, health or slum clearance scheme sponsored by Government or by any authority established by Government for carrying out any such scheme, or, with the prior approval of the appropriate Government, by a local authority, or a society registered under the Societies Registration Act, 1860 (XXXI of 1860), or under any correspondent law for the time being in force in a State, or a co-operative

society within the meaning of any law relating to co-operative societies for the time being in force in any State;

(vii) the provision of land for any other scheme of development sponsored by Government, or, with the prior approval of the appropriate Government, by a local authority;

(viii) the provision of any premises or building for locating a public office.

The said provision was interpreted by the Hon"ble Supreme Court in the decision reported in *Ganapathi National Middle School Vs. M. Durai Kannan (dead) by LRs. and others*, wherein the question arose was as to whether an educational institution aided by the State Government is inclusive of "public purpose". The Hon"ble Supreme Court held that such school receiving aid is an instrumentality of the State, and therefore lands can be acquired for such aided school for "public purpose". In another decision reported in *Humanity and Another Vs. State of West Bengal and Others*, the Hon"ble Supreme Court while considering the setting up of private school, observed that it may have some element of public interest and may not be a totally business enterprise, but profit motive cannot be ruled out. In paragraph 26 the Hon"ble Supreme Court held thus,

26. The setting up of a private school may have some elements of public interest in it but a Constitution Bench of this Court has held in *T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others*, that the right of a citizen, which is not claiming minority rights to set up a private educational institution is part of its fundamental right to carry on an occupation under Article 19(1)(g). Such an enterprise may not be a totally business enterprise but profit motive cannot be ruled out.

(Emphasis Supplied)

14. In this case, even as per the affidavit filed by the second appellant on behalf of other appellants also, it is stated that after establishing a private hospital, 50% of the patients will be treated free of cost, which means only 50% of the hospital will serve public purpose and remaining 50% of the hospital will be for the benefit of the appellants. Thus, it is manifest that not for public purpose alone or public interest alone the hospital is proposed to be established. Therefore, we are not inclined to accept the contention raised by the learned Senior Counsel appearing for the appellants that if permission to use the land is given for constructing a private hospital, it will serve public purpose.

15. The respondent has also filed an affidavit stating that the said land will not be used for any commercial activity. The said stand of the respondent is hereby recorded. In the light of the above findings, we are unable to find any reason to interfere with the order of the learned single Judge dated 30.4.2010 made in W.P. No. 12536 of 2008 and the same is hereby confirmed. The writ appeal is dismissed. No costs. Connected miscellaneous petition is also dismissed.