
(2000) 12 BOM CK 0028
In the Bombay High Court
Case No : Writ Petition No. 2680 of 1999

Mani D. Seervai Ors.

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 22-12-2000

Acts Referred:

Maharashtra Regional and Town Planning Act, 1966 — Section 154, 39, 47, 59, 61

Citation : AIR 2001 Bom 229 : (2001) 2 ALLMR 444 : (2001) 2 BomCR 566 : (2001) 1 BOMLR 676

Hon'ble Judges : B.P. Singh, C.J;S. Radhakrishnan, J

Bench : Division Bench

Advocate : Mr. C.J. Sawant and Mrs. N.V. Sanglikar, Mr. R.A. Dada and Mr. Divtre, Mr. D.J. Khambatta, Mr. Pradeep Sancheti and instructed by M/S. Federal and Rashmikan, for the Appellant; Mr. R.m. Sawant and Mr. K.R. Belosey, Mr. Virendra Tulzapurkar and Mr. Anand Desai, instructed by M/S. Shah, Desai, Doijode and Phatarphekar, for the Respondent

Judgement

S. Radhakrishnan, J.—In the above Writ Petition, the Petitioners are challenging the Third variation of Town Planning Scheme, being Santacruz Town Planning - II, which variation was notified on 8th July, 1998 and finally the same was sanctioned on 22nd September, 1999.

2. The brief backdrop of the case is that on 1st October, 1922 the Santacruz Town Planning - II Scheme came into force- At that time Dorabji Pestonji Seervai was the original owner of Plots 77-C and 78-B, admeasuring approximately 54,633 sq. yards. It appears that in the year 1944, by way of first variation to the said Scheme the said Dorabji Pestonji Seervai was allotted final Plot Nos. 94 and 83 in place of the original Plot Nos. 77-C and 77-B. In or about 1943. Plot No. 83 came to be sub-divided viz. Plot Nos. 83-A and 83-B. Plot No. 83-A admeasuring approximately 13,712 sq. mtrs. was sold to the Chinois and Plot No. 83-B admeasuring approximately 13,719 sq.mtrs. was retained by the said D. P. Seervai.

3. Thereafter, it appears that in or about 1952-53 the aforesaid Plot No. 83-B was sub-divided into 8 plots, viz.. Plot Nos. 83-B/1 to 83-B/8. The Petitioner Nos. 1, 2, 7 and 10, the late Jehangir D. Seervai, the late Nusserwanji D. Seervai and the late Faredun D. Seervai are the daughters and sons of the said D. P. Seervai, hereinafter called "the said Seervais". Out of the aforesaid 8 plots (from Plot No. 83-B), each of the aforesaid sons and daughters individually owned one plot each of the seven plots, and the eighth plot was owned Jointly. The said 8 plots are referred to as "the Petitioners said plots".

4. In or about 1958-59 the Draft Development Plan was published whereby out of Plot Nos. 83-B/1 to 83-B/8, Plot Nos. 83-B/1 to 83-B/3 were reserved by Respondent No. 2 for a Recreation Ground, and Plot Nos. 83-B/4 to 83-B/8 were reserved partly for Recreation Ground and partly for a 44 wide D. P. Road from their Southern Side. Under the Draft Development Plan, Plot Nos. 83A-1 and 83A-2 belonging to the Chinais were also reserved for a Recreation Ground.

5. On 6th January, 1962, the Second Variation of the Santacruz Town Planning Scheme No. II was approved by Respondent No. 2 and the aforesaid reservation under the first Draft Development Plan was continued in the second variation. On 15th October, 1966 the Final Development Plan of "H" West ward, sanctioned by Respondent No. 1 came into force. In the meanwhile, no steps were taken by Respondent No. 2 for completing the acquisition procedure in respect of Plot Nos. 83B/1 to 83B/8 and/or to pay the compensation to the said Seervais, and the possession of the said plots remained with the said Seervais. On 11th January, 1967 the Maharashtra Regional and Town Planning Act, 1966 came into force. On 14th April, 1969 the Respondent No. 2 had addressed a letter to the said Seervais Informing thereby that the Corporation had no intention of taking possession of their land at that time and that the compensation would be payable only after finalisation of the said Scheme.

6. On 21st March, 1974 and on 27th September, 1974 the Decisions/Awards came to be passed by the Arbitrator appointed by Respondent No. 2 Corporation, whereby the Petitioners' said plots of land were reconstituted i.e. out of original Plot Nos. 83B/4 to B/7. Final Plot Nos. 83B/1 to 83B/9 (admeasuring about 335 sq. mtrs. each) were reconstituted. Out of these reconstituted plots, Final Plot Nos. 83B/1 to 83B/7 were allotted to each of the said Seervais (in lieu of their original plot Nos. 83B/1 to 83B/8 and Final Plot Nos. 83B/8 and 83B/9 were allotted to R. J. Chinai and Ors., and M. M. Chinai and Ors. respectively in lieu of their original Plot Nos. 83A/1 and 83A/2. The said original Plot Nos. 83A/1 and 83A/2 were continued to be reserved for a Recreation Ground.

7. In or about 1975, separate decisions were passed by the Arbitrator deciding the compensation payable to the said Seervais in respect of the plot area taken away from them as a result of the above reconstitution .However, the said decisions were not accepted by the said Seervais and they received the said decisions under protest: Subsequently, it appears that the Tribunal had increased the quantum of compensation payable. Against the said increase of quantum of

compensation payable, the Respondent No. 2 had filed a Misc. Petition No. 593 of 1977 before this Court, which was finally heard and disposed of in 1982. In December, 1976 an intention to revise the Final Development Plan was declared. Thereafter, various representations were made by the said Seervais to Respondent Nos. 1 and 2, (the State of Maharashtra and the Bombay Municipal Corporation) for release of their plots.

8. By letter dated 6th December, 1979 addressed by the Executive Engineer, Town Planning, to the said Seervais stating therein that the Dy. Municipal Commissioner had been pleased to accept their proposal of releasing 85% area of the plots belonging to their family, provided they hand over 15% of the land, free of cost without claiming benefit of F. S. I. to the Corporation. The aforesaid release/reconstitution was accepted by the said Seervais by their letter dated 26th December, 1979.

9. It appears that in consequence of the aforesaid agreement and the release of the said plots, the reconstituted plots allotted by the Arbitrator bearing Plot Nos. 83B/1 to 83B/9 lost their identity, and the Final Plot Nos 83B/8 and 83B/9 (of 335 sq. mtrs. each) allotted to the Chinais were replaced by two other plots of larger area, being Plot Nos. 83A/1 and 83A/2 (part), admeasuring approximately 935 sq. mtrs. and 377 sq. mtrs. respectively.

10. It appears that the implementation of Santacruz T. P. S. No. II (Second Variation) was restricted to the adjoining Plot Nos. 83A/1 and 83A/2 as they were prior to the aforesaid reconstitution, and in or about 1981, a large portion of the said Plot Nos. 83A/1 and 83A/2 (which was under reservation admeasuring approximately 12,400 sq. mtrs.) was converted into a Municipal Garden with a proposed Road (now known as Muktanand Park). In fact no steps were taken by the said Seervais to challenge the Arbitrator's said Award/decisions dated 21st March, 1974 and 27th September, 1974 and/or the Second Variation. The Petitioners variously continued paying the municipal taxes in respect of the said Plot Nos. 83B/1 to 83B/8 and remained in possession of the same.

11. On 14th April, 1981 an order came to be passed in Suit No. 2061 of 1981 in the City Civil Court at Bombay. The said suit was filed by the Petitioner No. 13 against the Respondent No. 2 herein. By the said order dated 14th April, 1981 the Respondent No. 2 Corporation was directed to dispose of an application made by the Petitioner No. 13 for putting up another structure on the Petitioners' said plots. It appears that the said suit had been filed by Petitioner No. 13 pursuant to a notice u/s 354 of the B. M. C. Act issued by the Corporation in respect of a structure previously erected by Petitioner No. 13 on the Petitioners' said plots. Thereafter, the permission to erect such structure was granted by the Corporation in 1981 at which time it significantly did not contend that the Petitioners' said plots were vested in it.

12. Thereafter, on 5th May, 1981 an agreement between the said Seervais and Petitioner No. 13 herein, in respect of the said plots, was arrived at, and

accordingly, the Petitioner No. 13 had taken possession of the said plots. Thereafter, it appears that the Misc. Petition No. 593 of 1977 filed by the Corporation before this Court against the increase of quantum of compensation payable to the said Seervais, came to be disposed of by this Court on 27th August, 1982. On 21st April, 1983 the D. P. remarks were issued by the Corporation to the said Seervais, which infer alia confirmed that as against the reservation of portion of original Plot No. 83B (i.e. 83B/ 1 to 83B/8) for Recreation Ground under the Draft Revision of the Development Plan for H-West Ward, the original Plot No. 83B was demarcated for residential user, except the 15% area reserved for recreation. And out of the portion shown as released for residential user by the said Seervais, there was a provision for 44 wide D. P. Road passing through the Southern Portion of 83B/4 to 83B/8.

13. Thereafter, it appears that on 30th April, 1984 the proposed (draft) Revision to the Development Plan was notified and the suggestions/objections were invited in respect thereof. The Draft Revised Development Plan notified in the Maharashtra State Government Gazette vide Notification dated 24th April, 1984 reflected the aforesaid agreement recorded in the letter dated 6th December, 1979.

14. The Director, Town Planning. Respondent No. 3 herein had issued a direction on 13th November, 1986 stating that "since the Town Planning Schemes are primarily meant for Implementation of the Development Plan, the B. M. C. may please take up variation of these 23 schemes after the Draft Development Plan of Bombay (R) is finally sanctioned by the Government."

15. In or about 1987, pursuant to the two separate agreements entered into between the Respondent No. 4 M/s. Tolaram and Company and the said Chinaiis" for sale of Plot Nos. 83A/1 and 83A/2 and 83B/8 and 83B/9 (along with the Chinaiis entitlement for compensation/F. S, I. in respect of the balance portion of the Plots which were acquired or being acquired and/or developed), the Respondent No- 4 had filed two separate suits in this Court, being Suit Nos. 1238/1987 and 1239/1987 for specific performance of the said two agreements, and the said suits came to be decreed pursuant to the two separate consent decrees obtained by the parties on 16th July. 1987.

16. On 18th January, 1991 and 3rd February, 1992 the Respondent No. 4 M/s. Tolaram and Company, through its Architects, had addressed two letters to the Respondent No- 2 Corporation inter alia conveying its request to grant. D. R. or D. R. C. in respect of the reserved portion of land as they desired to avail of the option of T. D. R. for the said portion. Thereafter, on 7th May, 1992 the Final Revised Development Plan for Gr. Mumbai 1981-2001 as sanctioned by Respondent No. 1 State was notified. The Final Revised Development Plan, infer alia as far as Plot Nos. 83B/1 to 83A/8, and 83A/1 and 83A/2 are concerned, implements the proposals contained in the Draft Revised Development Plan which were implemented and were pursuant to the Agreement recorded in the letter dated 6th December, 1979. By letter dated 13th October, 1992 the D. P.

remarks of Respondent No. 2 Corporation were addressed to the Petitioners" Architects accompanied by a Plan signed by Respondent No. 2 Corporation. The said D. P. remarks and the accompanied Plan shows all the Plots 83B/1 to 83B/8 as residential plots deleting reservation (except the extension to recreation ground).

17. On 2nd March. 1993 the Respondent No. 1 State had issued a directive u/s 154 of the M. R. T. P. Act to the Corporation, which reads as under :

"Development permissions shall be strictly scrutinised in accordance with the sanctioned D. C. Rules of Greater Bombay, even in the area of Sanctioned Town Planning Scheme pending the procedure of variation of the Scheme."

18. In the year 1994 the Corporation had prepared and circulated amongst its various officers the draft third variation of the T. P. Scheme -Plan Nos. 1 to 4. The said third variation draft Plan No. 4 shows the reservation, being extension to R.G. from D. P. Nos. 83-B1 to 3 and release of approximately 85% of the Petitioners" said land and separately showed the released (reconstituted) Plot Nos. 83A/1 and 83A/2. On 3rd May. 1993 the Respondent No. 2 Corporation had given Its remarks and comments regarding the sewerage and water drains/ nallahs etc. for the proposed building on the plot bearing C. T. S. No. O/345/A to G/345/H (i.e. Plot Nos. 83B/1 to 83B/8).

19. Thereafter, on 15th June, 1993 the Corporation had sanctioned the layout Plan of the Petitioners in respect of the Petitioners" said plots, It appears that the said Seervais had also made an application for approval of the Building Construction Plan. However, as the same was not granted by the Coporation, the said Seervais have filed an appeal u/s 47 of the M. R. T. P. Act, which is still pending. Subsequently, the Petitioners had received a notice on 30th November, 1996 from the Corporation to stop the work being carried out on the said plots till further orders, and by another letter dated 2nd August, 1997 the Corporation had informed the Petitioner No. 5 that the lay-out approved by the Corporation was to be revoked.

20. On 15th October, 1993 the said Chinais had filed the Writ Petition No. 2048/1993 in this Court against the Respondent No. 1 and others wherein they had sought directions for taking steps to have the third variation of the said Scheme and to allot them a larger plot of land and to allow them T. D. R. In the said writ petition the Respondent No. 1 State had filed an affidavit in reply which had contained several erroneous statements and had suppressed the material facts. By the said affidavit it was inter alia stated that the rights, if any, between the said Chinais and the Petitioner No. 13 herein or any other persons in the Plot in question, were required to be referred to Arbitration as per the provisions of the M. R, T. P. Act. The aforesaid Writ Petition No. 2048/1993 was allowed to be withdrawn by this Court on 7th January, 1994 without prejudice to the rights and contentions of the parties. On 28th February. 1995, the Respondent No. 2 Corporation had forwarded a report to Respondent No. 1 State, inter alia

recommending grant of permissions for development of original Plot Nos. 83B/1 to 83B/8 (to the extent of 85% area subject to 44 feet wide D. P. Road) to the said Seervais. Thereafter, on 12th December, 1995 the Petitioners had learnt and verily believed that the recommendation of the aforesaid report dated 28th February, 1995 was considered by the Respondent No. 1 State, and the Secretary to the Ministry of Urban Development had accorded its approval for development of the released portions of Plot Nos. 83B/1 to 83B/8, inter alia on the basis that the same were no longer required for public purpose. The Respondent No. 2 Corporation by its letter dated 17th January, 1996 had confirmed that the areas had been Jointly demarcated on site. A Plan was also annexed alongwith the said letter showing the Petitioners' said plots in accordance with the agreement contained in the letter dated 6th December, 1979 and the final Revised Development Plan 1981/2000.

21. On 19th October, 1996 the Respondent No. 1 State, after recording that it was satisfied that it was necessary to bring the proposals of the said Scheme in consonance with the revised development plan by undertaking a third variation to the said scheme, had issued directions to the Corporation to undertake variation of the said scheme. On 8th July, 1998 a Gazette Notification was published by the Corporation purportedly pursuant to the aforesaid directions of the Respondent No. 1 State. On inspection of the Plan, the Petitioners had found that a purported variation was proposed whereby the said plots were sought to be reconstituted contrary to the agreement recorded in the letter dated 6th December, 1979 and the final Revised Development Plan. By the purported proposed reconstitution, there was not only reconstitution of the plots within the portions reserved for recreation and residential purposes respectively, but in fact, the area demarcated for residential user and recreation ground were also interchanged viz., the Plot Nos. 83A/1 and 83A/2 on the eastern side of the existing garden allotted to the said Chinai were converted from residential to recreation ground, and the area reserved for recreation ground to the north of Plot Nos. 83B/1 to 83B/8 the user was converted from recreation to residential. Therefore, the said Seervais, on 18th August, 1998 had conveyed their objections and representations to Respondent No. 1 State with a copy to Respondent No. 2 Corporation in respect of the aforesaid notification.

22. Thereafter, it appears that, on 15th October, 1998 a hearing fixed before the Respondent No. 2 Corporation was attended by the Petitioner No. 5 and the Architect on behalf of the said Seervais. At that hearing, the directions dated 27th May, 1996 purportedly Issued by the Respondent No. 1 State In relation to the proposed third variation were produced by Respondent No. 2 Corporation.

23. It appears that, several representations (dated 15.10.1998, 16.10.1998, 9.11.1998, 18.11.1998, 27.5.1999 and 28.7.1999) were made by or on behalf of the said Seervais, infer alia requesting for a personal hearing and drawing attention to the fact that pursuant to the agreement recorded in the letter dated 6th December, 1979 the Petitioners said plots already stood allotted to the said

Seervais and could not be allotted to others.

24. Ultimately, the Respondent No. 1 State had Issued the order dated 22nd September, 1999 sanctioning the third variation of the said Scheme. The said order dated 22nd September, 1999 has been impugned in this Petition.

25. Mr. Dada, the learned Counsel for the Petitioners made the following submissions. He broadly made the following submissions :-

Submission-1.

The Santacruz Town Planning Scheme No. II (Second Variation) came into force on 15th February, 1978. This Variation was effected after a full consideration of all factors by an Arbitrator duly appointed under the M. R. T- P. Act.

After a judicial consideration of all factors (including Chinai's original holding being almost equal to Seervai's original holding) the Arbitrator reconstituted the plots by accepting the principle of allotment of one plot of equal area (335 sq. mtrs.) to each of the original plot holders i.e. 7 Seervais and 2 Chinais.

The Chinais did not challenge the above 1978 basis of allotment. This was thus accepted by them as being an "equitable distribution" of the re-constituted plots.

The Impugned Third Variation completely displaced the above principle of allotment as judicially determined (1974-1978) and arbitrarily seeks to predetermine the rights of parties on an alleged equitable basis, after 26 years. This redetermination of rights is sought to be justified on the basis that the allotments are made "family-wise" (i.e. Chinais and (Seervais), ignoring the individual 7 Seervai plot-holders since 1953.

The attempt in the impugned Third Variation to restore the Chinais to a pre-1978 (Second Variation) position is arbitrary and unreasonable, particularly considering that this exercise is sought to be done after about 26 years.

The 3rd Variation changes the judicially settled Individual plot areas of the 9 plots. Each Seervai plot to be about 922 sq. mtrs. and each Chinai Plot to be about 2369.25 sq. mtrs. and also changes the proportion of 2/9 and 7/9.

Submission - II

The impugned Third Variation could not have been effected in exercise of powers u/s 91. It is not a "minor" or "insubstantial" variation. Such a variation involving drastic re-constitution of plots and redetermination of rights could have been effected only by recourse to making of a new scheme by way of variation section 92 of the Act.

Submission III

In any event, re-constitution of plots and redetermination of settled rights, and the alteration of the basis on which the rights of parties were Judicially determined under the 1978 Second Variation and could not have been done

except after the appointment of an Arbitrator u/s 91(6) of the Act. (See the procedure prescribed under sections 59. 61. 67, 68, 72, 74. 82 and 86 of the said Act.)

Submission IV

For the above reasons, the impugned Third Variation is liable to be set aside as being in excess of powers conferred by the Act, as being inconsistent with the Act and being unreasonable and arbitrary.

Submission V

The impugned Third Variation is liable to be challenged on these grounds notwithstanding that such a variation, u/s 86(3) of the Act takes effect "as if enacted in the Act".

Submission VI

The 1979 decision to release 85% of the original 8 plots to the Seervais by variation of T. P. Scheme (to reflect such release), was not a unilateral/unauthorised act of an Individual officer of the B.M.C. but was accepted, acted upon and re-affirmed by the B. M. C. and the State Government :

(i) Implementation of the Santacruz T. P. Scheme No. II (Second Variation) which came into force with effect from 15.2.1978 was restricted to Plot Nos. 83A/1 and 83A/2 [originally held by the Chinais). Thus, in 1981. 12,400 sq. mtrs. out of 13.712 sq.mtrs. of original Plot Nos. 83A/1 and 83A/2 were converted into a Municipal Garden (Muktanand Park) with a proposed road. This left a balance of 1312 sq.mtrs. on the eastern side of original Plot No. 83A, corresponding to the two Plot Nos. 83A/1 and 83A/2 (shown for the Chinais under the 1979 release letter). The Chinais retained possession of only this 1312 sq. mtrs.

(ii) No steps were ever taken by B. M. C. to take possession of the original 8 plots [viz, 83B/1 to 83B/8) or for payment of compensation to Seervais. The Awards dated 21.3.1974 and 27.9.1974 (Exhibits D/78 and D-1/81) reconstituting the original 8 plots were never acted upon.

(iii) The Property Register Cards In respect of the original 8 plots viz. 83 B/1 to B/8 continued in the names of each of the said Seervais.

(iv) In lieu of the released 85%. alternate land on the South West side of the released 85% was reserved for a Recreation Ground. This is shown in Green on the Executive Engineer's Plan dated 22nd September, 1980 (Exhibit F/87) for modification of the proposed reservation of the draft Revised Development Plan for "H" West Ward. The released 85% is marked "R" (Residential) and is shown in Red.

(v) The Seervais continued to regularly pay and the B. M. C. continued to regularly raise Bills and to collect Municipal Taxes in respect of the 8 original plots.

26. Mr. Dada, the learned Counsel for the Petitioners, relied upon an unreported Judgment of a Division Bench of this Court in *Rust Kapadia and others v. State of Maharashtra and others*, wherein it is categorically held that the Development Plan has to definitely prevail over anything and everything including the Town Planning Scheme.

27. Mr. Dada also relied upon the Apex Court Judgment in *Punjab Communications Ltd. v. Union of India and others*, with regard to the doctrine of legitimate expectation, has analysed various cases, and has held as under :

"The doctrine of legitimate expectation in the substantive sense has been accepted as part of our law and that the decision maker can normally be compelled to give effect to his representation in regard to the expectation based on previous practice or past conduct unless some overriding public interest comes in the way."

"The reliance must have been placed on the said representation and the represented must have thereby suffered detriment."

"The result is that change in policy can defeat a substantive legitimate expectation if it can be justified on Wednesbury reasonableness."

"The legitimate substantive expectation merely permits the Court to find out if the change in policy which is the cause for defeating the legitimate expectation is irrational or perverse or one which no reasonable person could have made."

28. The learned Counsel for the Petitioners then referred to and relied upon another Apex Court judgment in *State of Kerala v. K. M. C. Abdulla & Co.*, wherein it is held that the power to frame rules is conferred by the Act upon the State Government and that power may be exercised within strict limits of the authority conferred.

29. Finally, Mr. Dada relied on the judgment in *Asstt. Collector, Central Excise v. M/s. Ramakrishnan Kulwant Rai*, wherein it is held that the delegated authority must exercise its authority strictly within the limits of the authority.

30. Mr. Tulzapurkar appearing for Respondent No. 4, who is a successor of Chinai's group, strongly contended that the petitioners challenging the notifications and seeking the Writ of Mandamus are both misconceived and not maintainable, especially when the Petitioners are challenging the Third variation to the Town Planning Scheme, which by the reason of the provisions of Maharashtra Regional and Town Planning Act, 1966 has become final and has to be treated as part of M. R. T. P. Act itself.

31. Mr. Tulzapurkar relying upon section 86(3) of the M. R. T. P. Act contended that a Development Plan when sanctioned would remain a creature under the statute, whereas a Town Planning Scheme and/or its variation when sanctioned becomes a part of M. R. T. P. Act itself.

32. The learned Counsel contended that the challenge to a Town Planning

Scheme, when sanctioned, can be entertained by the High Court under Article 226 of the Constitution of India only on limited grounds such as failure to comply with the limited statutory essentials resulting in total lack of Jurisdiction.

33. In that behalf, Mr. Tulzapurkar referred to and relied upon *Dungarlal Harichandra v. State of Gujarat and others*, wherein it is held as under :

"It is only the fundamental breaches, that is, where minimum statutory essentials are not complied with, which result in a total lack of jurisdiction, and not other procedural errors or defects that would render a Scheme, which had become a legislative measure and a part of the Act, liable to attack or challenge in a Court on the ground that it is null and void."

34. The learned Counsel contends that the challenge to Third Variation to Town Planning Scheme is invalid because it is contrary to the alleged agreement contained in the letter dated 6th December, 1979 is liable to be rejected for the following reasons :

(i) There is, in fact, no valid agreement. The correspondence does not amount to any agreement between the Petitioners and the 2nd Respondents.

(ii) The Executive Engineer of the 2nd Respondents who wrote the letter dated 6th December, 1979 had no authority to enter into such agreement. The Bombay Municipal Corporation in the Affidavit of Anand Nabar has disputed such Agreement. The 4th Respondent in the Affidavit in Reply of Sunil Tolaram Kukreja have contended that the Executive Engineer of the 2nd Respondents had no authority to enter into the agreement of the nature and has stated "I understand there exist internal findings to this effect in the records of the 2nd Respondents which may be called for and seen by this Hon"ble Court."

(iii) The Petitioners had not taken any steps for a period of 20 years to enforce the alleged Agreement. In any event, the Executive Engineer of the 2nd Respondents had filed an Affidavit dated 5th November. 1993 in Writ Petition No. 2048 of 1998 from which it became apparent that the 2nd Respondents were not accepting the purported Agreement. It is further to be noted that the said Writ Petition was withdrawn because of the statement made by the Executive Engineer of the 2nd Respondents in the said Affidavit that the objections of the 4th Respondents would be considered when the Third Variation to the Town Planning Scheme would be considered. The said Executive Engineer in the said Affidavit had categorically stated that the plot in question as per the Second Variation of the Town Planning Scheme vested in Respondent No. 2 and that unless and until the Third Variation was undertaken and finalised, no portion of the plot in question could be allotted or permitted to be developed either by the Petitioners or the 4th Respondents herein or any other interested person. Thus, there was a repudiation of the alleged Agreement by the 2nd Respondents in 1993 and no steps were taken by the Petitioners herein for enforcement of the purported Agreement. The 2nd Respondents proceeded thereafter to have a Third Variation made to the Town Planning Scheme and in the said matter the

petitioners appeared and made their representations and participated in the proposals for the Third Variation. The Petitioners are by their conduct estopped from claiming any rights under the purported Agreement.

(iv) On account of gross delay and laches, the Petitioners are not entitled to seek any reliefs from this Hon"ble Court on the basis of the purported Agreement. The purported Agreement was arrived at in the year 1979 and the present Petition had been filed in the year 1999.

(v) In any event, the purported Agreement is not enforceable as it is contrary to public policy :

(a) The purported Agreement provides for releasing 85% of the area reserved for recreation ground which is 16,462 sq. yards, which reservation was sanctioned as per the Second Variation to the Town Planning Scheme in the year 1978. The purported Agreement provides for the Town Planning Authority getting the benefit of not being required to make payment of compensation for the 15% of the land remaining reserved. The effect of the purported Agreement is to confer a substantial benefit on the petitioners in consideration of Town Planning Authority deriving benefit of not being required to pay compensation for the 15% of the reserved area being retained for recreation ground, both the acts being done at the cost of the public purpose.

(b) The Town Planning Authority which proposed the Second Variation to the Town Planning Scheme and which Second Variation was sanctioned in the year 1978 was of the opinion that the plot should be reserved for recreation ground. This was in keeping with the Development Plan sanctioned in 1967. The Town Planning Authority which is a public body, while exercising powers under the M. R. T. P. Act, in effect performs statutory functions by exercising statutory powers as if it is a trustee for the general members of the public. It cannot act for its own purpose or for its own benefit.

35. Mr, Tulzapurkar, the learned Counsel relied upon M/s. Dwarkadas Marfatia & Sons v. Board of Trustees of the Port of Bombay, of the Supreme Court, wherein it is held as under :

"Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended."

36. Mr. Tulzapurkar also relied on Harijan Layout Sudhar Samiti v. State, of our High Court, wherein it is observed.

"A duly approved scheme prepared in accordance with the provisions of the Act, is a legitimate attempt on the part of the Government and the Statutory Authorities to ensure quite place free from dust and drain where children can run about and the aged and the infirm can rest, breath fresh air and enjoy the beauty of nature."

Thereafter, Mr. Tulzapurkar referred to another Apex Court Judgment in Secretary, Jaipur Development Authority, Jaipur v. Daulat Mat Jain, on a similar line :-

The intention behind the Government actions and purposes is to further the public welfare and the national interest. Public good is synonymous with protection of the interests of the citizens as a territorial unit or a nation as a whole."

37. Mr. Tulzapurkar, then contended that the Executive Engineer while entering into the purported agreement was acting against the interests of general public and the same resulted in conflict of interest and duty. The said agreement was contrary to public policy. He relied on Associated Cement Companies Ltd. v. State of Rajasthan & Anr., wherein it is held :

"It can safely be said that the Government does not possess power depriving the residents of a particular part of their right to be governed by a body such as, municipality or panchayat and participate in its affairs and get persons elected to various posts in the local bodies."

38. Mr. Tulzapurkar also relied upon K. Ramdas Shenoy v. Chief Officers, Town Municipal Udipi & Ors., wherein the Supreme Court has held in paragraph 28 as follows:

"It has to be remembered that a Scheme in a residential area means planned orderliness in accordance with the requirements of the residents."

39. The Counsel, then referred to Bangalore Medical Trust v. B. S, Muddappa & Ors., in which it is held :

"Reservation of open spaces for parks and playgrounds is universally recognised as a legitimate exercise of statutory power rationally related to the protection of the residents of the locality from the ill-effects of urbanisation."

40. Therefore, Mr. Tulzapurkar submitted that as the said purported agreement was contrary to public policy, the same was not enforceable. Hence, the petitioners are not entitled to challenge the Third Variation to the Town Planning Scheme on the ground that the Petitioners' rights under the purported agreement are adversely affected.

41. Mr. Tulzapurkar then submitted that the Third Variation to the Town Planning Scheme has been effected after following the provisions of the M. R. T. P. Act. The M. R. T. P. Act provides for bringing a Town Planning Scheme in accord with the Development Plan. In the instant case, the purpose of bringing the Town Planning Scheme in accord with the Development Plan has been achieved. The sanctioned Development Plan of 1967 showed the entire area admeasuring 13,263.36 sq. metres and area of 11,191.12 sq. metres as reserved for recreation ground. The said plan provided for D. P. Road having an area of 2331.65 sq. metres. The Second Variation to the Town Planning Scheme which

was initiated In the year 1957 and sanctioned in the year 1978 was required to be altered to bring It In accord with the Development Plan. In the year 1992, the Development Plan was revised and in order to bring the Town Planning Scheme sanctioned in the year 1978 in accord with the revised Development Plan of 1992, the Third Variation to the Town Planning Scheme was proposed and sanctioned. The effect of the Third Variation is to make the Town Planning Scheme match with the revised Development Plan. While doing so, the Town Planning Authority considered it fit to show the areas viz., two small area of 935 sq. metres and 377 sq. metres as part of the contiguous recreational ground and to show an area of 1270.5 sq. metres for residential purpose. This is permissible under Development Control Regulations for Greater Bombay, 1991 at Regulation 11(4) and 21. While bringing the Town Planning Scheme in accord with the revised Development Plan of 1992, powers u/s 59(2) of the M. R. T. P. Act are exercised so as to effect small changes in the Development Plan. The action of the Government and the Town Planning Authority is perfectly valid, equitable and in no manner affects the rights of the petitioners.

42. Mr. Tulzapurkar submitted that the Petitioners have never challenged the Second Variation to the Town Planning Scheme. After the Second Variation, the Petitioner"s land was reduced from 13,719.50 sq. metres to 2,345 sq. metres. The Second Variation provided for compensation to the Petitioners for" reduction in the area. As a result of the Third Variation to the Town Planning Scheme, the area of the Petitioners in fact had increased to 6,454 sq. meters. Therefore, the Petitioners are in no way adversely affected. As regards the 4th Respondents, as contended in the earlier Petition, the Second Variation to the Town Planning Scheme had adversely affected the 4th Respondents and the Town Planning Authority had reduced the area of the 4th Respondents to bare 670 sq. metres from the original area of 13,712 sq. metres after the First Variation. The following table brings about the effect of the three Variations to the Town Planning Scheme:-

Area of Seervai"s Land (sq. metres) Area of Chinai"s land (sq- metres)

1. Original Plot 13719.50 13712
2. After 1st Variation 13719.50 13712
3. After 2nd Variation 2345.00 670
4. After 3rd Variation 6454.00 4378.50

It is thus clear that in terms of the Affidavit filed by the 2nd Respondents in the earlier Writ Petition on the basis of which, the 4th Respondents, who were the Petitioners had withdrawn the Petition, the Third Variation Proposal was made to effect equitable distribution so that no injustice was done to the 4th Respondents. Even after the Third Variation to the Town Planning Scheme, between the Petitioners and the 4th Respondent, the Petitioners have been given additional benefit in the form of larger area than that was allotted to the 4th

Respondents.

43. Mr. Tulzapurkar finally submitted that the Town Planning Authority and the Government have acted within their jurisdiction, there is no illegality and no violation of any provisions of law and, therefore, the Third Variation to the Town Planning Scheme cannot be challenged on any ground whatsoever.

44. Dealing with the Petitioners' contentions, Mr. Tulzapurkar submitted as follows :-

The Notifications are contrary to Directive u/s 91 of the M. R. T. P. Act are factually not correct. The TP Variation III is to bring the Scheme In accordance with Revised Development Plan of 1992.

45. Then Mr. Tulzapurkar, while dealing with the contentions that Notification is contrary to previous representations and the Agreement of 1979 to release 85% of the plot submitted that the alleged representations or contracts are unenforceable for the reasons set out in detail hereinabove.

46. As far as the Petitioners claim, that they are entitled to reliefs on the principles of legitimate expectation, Mr. Tulzapurkar submitted that the principle is not applicable to the facts of the present case. Legitimate expectation cannot give rise to a claim if the expectation is not legitimate or is as a result of Illegitimate acts of the authorities. For the 4th Respondent's submission No. 3, the Petitioners cannot rely on the principle of legitimate expectation. He contended that the expectation is born out of illegitimate conception.

47. Mr. Tulzapurkar, relied on Union of India v. Hindustan Development Corporation, to contend that the expectation is neither justifiable nor protectable.

48. While dealing with contentions of Petitioners that there is no vesting of the plot in B. M. C. and Seervais continue to be the owners after 2nd Variation. Mr. Tulzapurkar contended that in view of Section 88(a) and (b) of the M. R. T. P. Act, the contention is untenable. The vesting takes place and the old rights are extinguished and new rights come into existence on sanction of the T. P. Scheme. All alleged acts of showing ownership of Seervais are contrary to law and there can be no estoppel against statute. The provisions of M. R. T. P. Act mandate vesting and divesting without further acts. In this behalf he relied upon The Municipal Corporation of Creator Bombay & Anr. v. The Advance Builders (India) Pvt. Ltd.. in support.

49. As far as the contention of the Petitioners that the 3rd Variation is not a minor variation and it is vitiated by non-appointment of Arbitrators Mr. Tulzapurkar submitted that it is a minor variation as explained in the earlier submissions.

50. He also stated that in order to make the T. P. Scheme in accord with D. P., the Planning Authority is obliged to make variation u/s 39 and therefore the question whether it is major or minor does not arise. All that is required to be

done is to follow the provisions of Section 92 and section 92 does not require appointment of Arbitrator in every case.

51. Mr. Tulzapurkar then stated that the Petitioners never contended when they were heard in the matter of the 3rd Variation that the Arbitrator ought to be appointed. The variation as regards the areas of Seervais and Chinais was (1) Incidental, (2) dictated by need to act fair and equitably, (3) in keeping with the affidavit in the earlier Writ Petition No. 2048 of 1993, (4) increasing the areas, and (5) not affecting the Scheme as a whole, and confining it only to the plots of Seervais and Chinais. Hence there was no need to appoint Arbitrator. In any event this is not a nullity and the variation cannot be challenged on the alleged irregularity. He again referred to *Dungarlal Harichandra v. State of Gujarat* and others,.

52. Mr. Tulzapurkar submitted that at the relevant time the entire plot was vested with the Corporation, as inter alia stated on affidavit by the Corporation In Writ Petition No. 2048 of 1993 as such there was no purpose to be achieved by appointing an Arbitrator.

53. Mr. Tulzapurkar for all the foregoing reasons prayed for discharge of Rule In the above matter.

54. Mr. C. J. Sawant for the Respondent Municipal Corporation has submitted that the Town Planning Scheme has to be brought in conformity with the Development Plan. He emphasised the primacy of the Development Plan. He also submitted that there was no firm commitment or concluded contract with the Seervais as sought to be alleged. The learned Counsel fully concurred with the arguments of Mr. Tulzapurkar. Mr. Sawant also strongly refuted that in this case there is no question of application of the doctrine of legitimate expectation.

55. Mr. R. M. Sawant. the learned Government Pleader also concurred with the arguments of Mr. Tulzapurkar and submitted that there was no change of user from that of residential to recreation. He also strongly refuted the contention that there was a need to appoint an Arbitrator to determine various rights. He also submitted that the third variation of the Scheme brought the Scheme in consonance with the Development Plan.

56. After giving a deep consideration to all the aforesaid contentions and submissions of various Counsel, it is clear that the Respondent Corporation has sought to bring the said Town Planning Scheme, by the said third variation, to be in conformity with the Development Plan.

57. In this context, it is vital to note that Section 39 of the M. R. T. P. Act provides that the Planning Authority shall vary such a Scheme suitably u/s 92, to the extent necessary by the proposals made in the final development plan. Similarly, Sec. 92 of the M. R. T. P. Act, provides for the variation of the Town Planning scheme, at anytime, irrespective of the fact that the final Scheme has been sanctioned by the State Government.

58. By the second variation of Town Planning Scheme, the Petitioners land was reduced from 13719.50 sq metres to 2345.00 sq. metres, and the Petitioners never challenged the same. But now by the third variation, infact the Petitioners land area has increased from 2345.00 sq. metres to 6454.00 sq. metres, hence there could be no grievance whatsoever. Even looking at it from another angle, it will be noticed that Seervais" original land area was 13719.50 sq. metres, which was reduced to 6454.00 sq. metres after the third variation. On the contrary, original land area of Chinais was 13712 sq.metres, which was reduced to 4378.50 sq.metres by the third variation. Therefore factually the said Seervais have not been prejudiced or affected by the third variation, on the contrary, they have benefitted, as can be seen from the above details.

59. We do not find anything arbitrary or unreasonable as sought to be contended by Mr. Dada. Similarly, we do not find any justification in the contention that third variation to reconstitute or redetermine the settled rights could only be done by an Arbitrator u/s 91(6) of the M. R. T. P. Act. As pointed out hereinabove, there is an obligation and duty to bring the Town Planning Scheme in consonance with the Development Plan, and what has been done is only minor modifications so as to achieve conformity with the Development Plan, as contemplated u/s 39 read with section 92 of the M. R. T. P. Act.

60. As pointed out hereinabove, the modifications adopted were only minor and the same were permissible, especially when the same has been adopted mainly to achieve conformity of the Town Planning Scheme with that of Development Plan.

61. We are in full agreement with Mr. Tulzapurkar that once there is a variation in the Town Planning Scheme and the same is duly sanctioned, it is to be construed as If the same Is enacted in the Act, as provided in Section 86(3) of the M. R. T. P. Act. Section 86 of the M. R. T. P. Act provides for sanction by the State Government with regard to the said Town Planning Scheme. Sec. 86(3) provides that once the said sanction is notified, the Town Planning Scheme shall have the same effect as if enacted in the said M. R. T. P. Act. To put in other words, once the said Town Planning Scheme is sanctioned by the State Government, and duly notified, it should be construed as if the said Town Planning Scheme is part of M. R. T. P. Act itself. In the light of the above legal provision, unless there is something which is patently illegal or without authority of law, there cannot be any interference with the same.

62. We also do not find any substance in the contention of the learned Counsel for the Petitioners that the authorities have exercised powers not conferred upon them. On the contrary, we find that the authorities have rightly exercised their power to bring the Town Planning Scheme in conformity with the Development Plan.

63. The submission of Mr. Dada that variation to Town Planning Scheme is invalid as the same is contrary to the alleged agreement contained in the letter dated

6th December, 1979, cannot be sustained, because the same cannot be construed as an agreement. Even if it is construed as an agreement, the Petitioners did not take any steps to enforce the same for nearly twenty years. The Respondent Corporation through its Executive Engineer's affidavit dated 5th November, 1993 In Writ Petition No. 2048 of 1993 has clearly stated that the Respondent Corporation is not accepting the purported agreement. Hence the said purported agreement will be of no assistance to the Petitioners. Mr. Tulzapurkar had rightly contended that the enforcement of the purported agreement would be against public policy. The Town Planning Authority which is a public body, while exercising powers under the M. R. T. P. Act, in effect performs statutory functions by exercising statutory powers as if it is a trustee for the general members of the public and it cannot act for its own purpose or for its own benefit.

64. As far as the contention of the Petitioners with regard to legitimate expectation, the same cannot be made applicable to a claim. If the expectation is not legitimate or is as a result of illegitimate acts of the authorities. In the Instant case, in the facts and circumstances of the case, the doctrine of legitimate expectation will not apply at all.

65. As regards the contention of the Petitioners that there is no vesting of the plot in B. M. C. and Seervais continue to be the owners after the second variation, cannot sustain, in view of the provisions in Section 88 (a) and (b) of the M. R. T. P. Act. The vesting takes place and the old rights are extinguished and new rights come into existence on the sanction of Town Planning Scheme. To counter the arguments of the Petitioners, Mr. Tulzapurkar, the learned counsel for the Respondent No. 4 rightly relied upon State of Gujarat v. Shantilal, wherein it is held that when the Scheme comes into force all rights in the original plots are extinguished and simultaneously therewith ownership springs in the reconstituted plots. Mr. Tulzapurkar also relied on Municipal Corporation of Greater Bombay v. Advance Builders, wherein the Supreme Court has held that all lands in the area which is subject to the Scheme to whomsoever they might have originally belonged, would absolutely vest in the local authority, if under the Scheme, the same are allotted to the local authority.

66. We are also in agreement with Mr. Tulzapurkar that as has been held in various judgments of the Supreme Court, quoted hereinabove, reservation of lands as recreation grounds will have to prevail over the interest of individual plot-owners, especially in larger public interests and to improve the quality of air in this highly congested and polluted city wherein these small green open spaces act as lungs, and they are very essential for our existence.

67. Under the aforesaid facts and circumstances, we do not find any merit in the above Writ Petition, hence, the Rule stands discharged, however, with no order as to costs. The Petitioner No. 2 has expired on 1.10.2000. The interim order dated 28.10.99 to continue for a period of six weeks from today.

68. Parties to act on an ordinary copy of this order duly authenticated by the Associate.