

(2017) 04 BOM CK 0183

In the Bombay High Court

Case No : 2961 of 2016 And Writ Petition No 3219 of 2016

M/s. Gowardhan Infrastructure Pvt. Ltd., through Director
Shri Jatin Malviya, & Anr.

APPELLANT

Vs

The State of Maharashtra, through its Secretary, Department
of Urban Development, Mantralaya, & Ors.

RESPONDENT

Date of Decision : 21-04-2017

Acts Referred:

[Maharashtra Regional and Town Planning Act, 1966](#), [Section 31](#), [Section 42](#), [Section 37](#), [Section 47](#), [Section 31\(1\)](#), [Section 37](#)

Citation : (2017) 04 BOM CK 0183

Hon'ble Judges : B. R. Gavai, A. S. Chandurkar

Bench : DIVISON BENCH

Advocate : S. P. Dharmadhikari, R.V. Malviya, N. Rode, S.K. Mishra, A.M. Kukday

Final Decision : Dismissed

Judgement

1. Pursuant to notice for final disposal issued in both the Writ Petitions, we have heard the learned counsel for the parties at length by issuing Rule and making the same returnable forthwith. Since common issues arise in both these Writ Petitions, they are being decided by this common judgment. For sake of convenience, the facts in Writ Petition No. 2961 of 2016 are being referred to.

2. The Petitioner-Firm is the owner of Plot No. 133, Ward No.23 which is situated in an industrial area at Lakadganj, Nagpur. The Development Control Regulations of the Nagpur Municipal Corporation were sanctioned by the State Government under Section 31 (1) of the Maharashtra Regional & Town Planning Act, 1966 [for short, "the said Act"] on 31st March, 2001. A minor modification to the same was effected on 20th July, 2007 under provisions of Section 37 (2) of the said Act. Clause 14.2.1 of the Development Control Regulations came to be modified in the matter of change of user in industrial zones. Lands in industrial zones were permitted to be utilized for residential purpose or residential with shop line. As

the Municipal Corporation had certain doubts in the manner in which the said Regulations were to be applied, it sought clarification in this regard from the State Government on 15th October, 2008. When the matter was pending with the State Government, the Municipal Corporation issued a Circular dated 17th January, 2009 in which it was stated that till the time necessary instructions were received from the State Government, pending applications for sanction would be decided by applying 2.5 FAR for commercial use, 2 FAR for mixed user and 1 FAR for residential use. The petitioner submitted its Building Plan for sanction on 10th May, 2012 proposing mixed user for commercial and residential purposes. This plan came to be rejected by the Asstt. Director of Town Planning on 10th May, 2013, on the ground that sanction had been sought for mixed user and not for exclusive commercial use. The petitioner being aggrieved filed an appeal under Section 47 of the said Act. By order dated 19th August, 2014 passed in Writ Petition No. 3346 of 2014, this Court directed the State Government to decide said appeal within a period of four months. The appeal filed by the petitioner came to be dismissed as being barred by limitation. This order, in turn, came to be challenged by the petitioner in Writ Petition No. 5360 of 2015. This Court by judgment dated 30th November, 2015 held that the appeal was filed within limitation and directed the same to be decided on merits. The Honourable Minister of State for Urban Development by his order dated 26th February, 2016 allowed the said appeal and held that sanction was liable to be granted to the petitioner in the light of Circular dated 17th January, 2009 issued by the Municipal Corporation. As the Building Plan submitted by the petitioner was not being sanctioned in terms of the order passed in the appeal, the petitioner has filed the present Writ Petition seeking a Writ of Mandamus against the Municipal Corporation and the Asstt. Director of Town Planning to approve the Building Plan as per Circular dated 17th January, 2009 by complying with the order of the Appellate Authority dated 26th February, 2016.

3. Shri S. P. Dharmadhikari, learned Senior Counsel for the petitioner, submitted that the respondent nos. 2 and 3 were not justified in refusing to sanction the building plan of the petitioner in the light of the order passed by the Appellate Authority on 26th February, 2016. It was submitted that the petitioner's plan submitted on 10th May, 2012 was required to be sanctioned by applying the Circular dated 17th January, 2009 issued by the Municipal Corporation. He submitted that as the Municipal Corporation had certain doubts in the matter of implementing Regulation No. 14.2.1 [as amended on 20th July, 2007], it had sought clarification from the State Govt. For the purposes of deciding pending applications, the Municipal Corporation itself had issued Circular dated 17th January, 2009 and in terms thereof, it had sanctioned various plans in the industrial zones. The petitioner was being unnecessarily discriminated and its application dated 10th May, 2012 was not being sanctioned in terms of the aforesaid Circular. By referring to the additional affidavit filed on record giving instances of sanction being granted in Industrial Zones on the strength of Circular dated 17th January, 2009, it was submitted that the Planning Authority

could not adopt a pick and choose attitude in the matter. The petitioner having succeeded in the statutory appeal preferred by it, the order passed by the Appellate Authority was binding on the Municipal Corporation and it was bound to implement the same. It was also urged that the position as was prevailing when the application for sanction was moved ought to be applied and any subsequent changes could not be taken into consideration to the prejudice of the petitioner. It was, thus, submitted that the petitioner was entitled for a writ of mandamus to enable the order passed by the Appellate Authority to be taken to its logical conclusion.

4. Shri S.K. Mishra, learned Senior Counsel for the respondent nos. 2 to 4, vehemently opposed the aforesaid submissions. He submitted that the petitioner was not entitled to rely upon the Circular dated 17th January, 2009 issued by the Municipal Corporation, inasmuch as subsequent thereto, notice under Section 37 (1 AA) of the said Act had been issued which was thereafter followed by notification under said provision dated 3rd October, 2016. On that count, the Circular dated 17th January, 2009 ceased to have any legal effect. He submitted that pursuant to the clarification sought by the Planning Authority on 16th May, 2016, the State Government, on 31st January, 2017 had clarified that the FAR as per Regulation 14.2.1 in the Development Control Regulations was to be applied as per Notification dated 3rd October, 2016. He referred to the provisions of the said Act, and especially Sections 31, 37 and 43 thereof. He brought to the notice of the Court the fact that the petitioner in Writ Petition no. 2961 of 2016 had already undertaken construction without there being any proper sanction for the same. He also submitted that the said petitioner had also submitted a fresh map for sanction on 17th March, 2016 which implied that the petitioner had accepted the rejection of the earlier plan dated 10th May, 2012. He referred to the affidavit filed on behalf of respondent nos. 2 and 3 dated 4th January, 2017 to urge that the subsequent plan dated 17th March, 2016 was not in consonance with the plan submitted initially on 10th May, 2012. According to him, therefore, there was no question of implementing the order passed by the Appellate Authority, inasmuch as the petitioner itself had submitted a fresh plan for sanction. He, therefore, submitted that considering the subsequent Notification dated 3rd October, 2016 issued by the State Govt., the relief sought by the petitioners could not be granted. Shri N.R. Rode, learned Asstt. Govt. Pleader for the respondent no.1, supported submissions made on behalf of the Planning Authority. He submitted that pursuant to the order dated 12th July, 2016 passed in the Writ Petitions, the respondent no.1 had filed affidavit dated 4th February, 2017 in which it was stated that pursuant to the clarification sought by the Planning Authority vide its letter dated 16th May, 2016, the same had been answered by communication dated 31st January, 2017 by referring to the notice issued under Section 37 (1AA) of the said Act as well as subsequent Notification dated 3rd October, 2016. As per the aforesaid, the FAR permissible would be according to that which was permissible for residential use. He, therefore, submitted that the Writ Petition was liable to be dismissed.

5. We have heard the learned counsel for the parties at length and we have gone through the documents filed on record. After giving due consideration to the respective submissions, we find that the petitioners would not be entitled to the reliefs sought by them in the Writ Petitions.

6. The relief sought by the petitioners is in the nature of Mandamus seeking directions against the Planning Authority to sanction and approve the building plans submitted by the petitioners on the basis of Circular dated 17th January, 2009, as directed by the Appellate Authority in its order passed under Section 47 of the said Act. Before examining the respective contentions, it would be necessary to refer to the following observations of the Honourable Supreme Court in para 7 of its judgment in *Renu & others Vs. District & Sessions Judge, Tis Hazri & another* [(2014) 15 SCC 731], the relevant portion of which is quoted below:-

"7.It is trite law that unless an aggrieved party has an enforceable legal right under a statute or rule, a mandamus cannot be issued to an authority to do something."

It is, therefore, necessary for the petitioners to first demonstrate that they have an enforceable legal right under the said Act on the basis of which a writ of mandamus could be issued so as to direct the respondents to take a particular action. We are not oblivious of the fact that the legality of the Circular dated 17th January, 2009 is not under challenge before us and in fact, the said Circular is the basis for seeking relief by the petitioners. However, as the petitioners seek a writ of mandamus praying for enforcement of the said Circular, it would be, therefore, necessary to examine the same in the backdrop of the provisions of the said Act.

7. It is not in dispute that initially the Development Control Regulations of the Municipal Corporation were sanctioned by the State Government under Section 31 (1) of the said Act vide Notification dated 9th April, 2001. Thereafter, a minor modification in Regulation No.14.2.1 was sanctioned by the State Government on 20th July, 2007 under provisions of Section 37 (2) of the said Act. This modification pertained to change of user in an industrial zone. On account of certain doubts in the mind of the Planning Authority, it sought clarification from the State Government on 15th October, 2008. The Municipal Commissioner on 17th January, 2009 issued a Circular in which it was stated that till the time the clarification received from the State Government, FAR for commercial user would be 2.5, FAR for mixed user with commercial use would be 2.00 and for exclusive residential use, the FAR would be 1.00.

8. The exercise of preparing a Development Plan and the further exercise of modifying the same under the provisions of Chapter-III of the said Act has been treated to be a quasi legislative act. Under Chapter-III of the said Act, the manner in which a Development Plan has to be prepared has been laid down. Once the Development Plan comes into operation, it is called the Final

Development Plan and under Section 31 (6) of the said Act, the same is binding on the Planning Authority. Modification of the Final Development Plan can only be made in the manner prescribed by Section 37 of the said Act. Under Section 42 of the said Act, it is the duty of the Planning Authority to take steps as may be necessary to carry out the provisions of the Final Development Plan. In other words, the hands of the Planning Authority are tied once the Final Development Plan comes into force or is modified in the manner laid down under the said Act.

9. The facts indicate that the Development Control Regulations dated 31st March, 2001 were subjected to minor modification by the State Government in exercise of powers under Section 37 (2) of the said Act. This was done by issuing Notification dated 20th July, 2007. As per provisions of Section 37 (2) of the said Act, on a modification being sanctioned by the State Government, the Development Plan shall be deemed to have been modified accordingly. Thus, the effect of the Notification dated 20th July, 2007 was to modify the Development Control Regulations that were initially sanctioned under Section 31 of the said Act. Once the Final Development Plan stood modified, there was no source of power with the Municipal Commissioner as Planning Authority to issue a Circular stipulating the manner in which Floor Area Ratio [FAR] could be worked out in a manner at variance with the Development Control Regulations. No such source of power with the Planning Authority to issue such Circular has been pointed out. Therefore, there is no legal basis to support the issuance of Circular dated 17th January, 2009. As the Development Control Regulations had come into force from 9th April, 2001 subject to minor modification vide Notification dated 20th July, 2007, plans for sanction were liable to be considered in the light of the said Development Control Regulations as modified on 20th July, 2007. The issuance of Notification dated 17th January, 2009 by the Municipal Commissioner that was to operate only till such period clarification was received from the State Government cannot give any legal right to the petitioners if it provides for a particular modality which is not provided for by the Development Control Regulations as modified. We, therefore, find that the entire basis of seeking relief on the part of the petitioners by relying upon Notification dated 17th January, 2009 is without legal support.

10. There is another reason as to why the Municipal Corporation cannot be directed to implement the order passed by the Appellate Authority dated 26th February, 2016. When the appeal was pending before the Appellate Authority, the respondent no.1 issued a notice on 18th January, 2016 in exercise of powers under Section 37 (1AA) (a) of the said Act. As per this notice, a further modification was sought to be made in Regulation No. 14.2.1 (b). Thus, on the day when the Appellate Authority decided the appeal filed by the petitioners under Section 47 of the said Act, the State Government had already issued notice proposing further modification in the Final Development Plan in exercise of powers under Section 37 (1AA) (a) of the said Act. The notice dated 18th January, 2016 had the effect of governing the matter with regard to grant of FAR by modifying earlier Notification dated 20th July, 2007. The State Government

having exercised its powers after being satisfied in public interest that an urgent modification was necessary in the Development Control Regulations cannot be expected, by a subsequent order, to direct the Planning Authority to sanction a building plan in a manner not in consonance with the proposed modification. It may be stated that after passing of the order by the Appellate Authority, the notice issued under Section 37 (1AA) (a) of the said Act has become final and further notification in exercise of powers under Section 37 (1 AA) (c) of the said Act has now been issued on 3rd October, 2016. In that view of the matter, it is clear that the Planning Authority cannot be compelled by issuing a writ of mandamus to consider sanctioning a plan on the basis of Circular dated 17th January, 2009 in the teeth of minor modifications dated 20th July, 2007 and 3rd October, 2016.

11. Since it has been found that the Circular dated 17th January, 2009 cannot be the basis for grant of sanction of the building plans submitted by the petitioners and that the building plans of the petitioners were liable to be considered in the light of Regulation No. 14.2.1 [as amended on 20th July, 2007] and the subsequent Notification dated 3rd October, 2016 under Section 37 (1AA) of the Act, the entire basis of the petitioners of seeking relief does not survive. Though it was strenuously urged by the learned Senior Counsel for the petitioners that building plans from the same industrial zone of other applicants had been sanctioned by the Planning Authority by relying upon the Circular dated 17th January, 2009, having found that said Circular cannot be the basis for grant of sanction in favour of the petitioners, said contention also cannot be accepted. It is well settled that there cannot be parity on the basis of an earlier wrong application of the statute or an irregular decision. Reference in that regard can be usefully made to the following observations of the Honourable Supreme Court contained para 8 of its decision in *Basawraj & others Vs. Special Land Acquisition Officer* [(2013) 14 SCC 81], the relevant portion of which is quoted below:-

"8. It is a settled legal proposition that Article 14 of the Constitution is not meant to perpetuate illegality or fraud, even by extending the wrong decisions made in other cases. The said provision does not envisage negative equality but has only a positive aspect. Thus, if some other similarly situated persons have been granted some relief/benefit inadvertently or by mistake, such an order does not confer any legal right on others to get the same relief as well. If a wrong is committed in an earlier case, it cannot be perpetuated. Equality is a trite, which cannot be claimed in illegality and therefore, cannot be enforced by a citizen or court in a negative manner. If an illegality and irregularity has been committed in favour of an individual or a group of individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher or superior court for repeating or multiplying the same irregularity or illegality or for passing a similarly wrong order. A wrong order/decision in favour of any particular party does not entitle any other party to claim benefits on the basis of the wrong decision."

12. Thus, merely because some persons were granted sanction on the basis of this Circular dated 17th January, 2009, the same cannot be relied upon in the present facts in the light of what has been held herein above. Hence, on this count also, the petitioners are not entitled for any relief, whatsoever. In view of what has been discussed herein above, we do not find any merit in the Writ Petitions. The same are accordingly dismissed. Rule stands discharged with no order as to costs.