

(2002) 03 MP CK 0111
In the Madhya Pradesh High Court
Case No : L.P.A. No. 352 of 1997 (G)

Municipal Corporation Gwalior

APPELLANT

Vs

Anil Sharma and Others

RESPONDENT

Date of Decision : 07-03-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Madhya Pradesh Municipal Corporation Act, 1956 — Section 295(3)

Citation : (2002) 2 MPJR 46

Hon'ble Judges : S.S. Jha, J; R.B. Dixit, J

Bench : Division Bench

Advocate : P.D. Bidua, for the Appellant; H.D. Gupta and Mr. A.M. Naik, Nivedita Sharma, for the Respondent

Final Decision : Allowed

Judgement

S.S. Jha, J.

This judgment shall also govern the disposal of WRIT PETITION No. 849 OF 2001 (SHRIRAM COLONY MOHALLA SUDHAR SAMITI VS. STATE OF MADHYA PRADESH AND OTHERS).

This appeal is filed by the Municipal Corporation against the order of Single Judge. The brief facts of the case are as under :

Respondents no. 1 to 3 have filed a writ petition before the Single Bench, challenging the inaction of appellants in not deciding the revised layout plan and granting permission for construction. Respondents / petitioners contended that their grandfather Late Shri Ramawtar Sharma was the owner of lands; out of which he carved out number of plots and developed a colony, which is known as "SHRIRAM COLONY" Said Ramawtar Sharma bequeathed the ownership of the lands owned by him in the said colony to the respondents / petitioners. It is further contended that on 17th March, 1989 Department of Town & Country Planning, Gwalior allotted plots no. 71,72,73 and 74 in the name of petitioners.

The name of petitioners was mutated in the records of Municipal Corporation, Gwalior. Petitioners wanted to surround the said plots no. 71 to 74 by erecting a boundary wall only through the length and width of the plots at the corner end. An application was submitted with the Officer of ward No. 11 on 20th March, 1990 for seeking permission for construction of the boundary wall. The said application was acknowledged by Ward Officer on 20th March, 1990 itself and was entered in the Inward Register at serial no. 1074. No sanction for construction was received from the respondent no. 1 Municipal Corporation, Gwalior or Ward Officer in pursuance of the application dated 20th March, 1990. Petitioner then served a notice to the Commissioner, Municipal Corporation, Gwalior and copy of the notice was sent to the Ward Officer regarding intention of the petitioners. It is further contended by counsel for the petitioners that since there was a deemed permission as contemplated in Section 295 (3) of the Municipal Corporation Act, petitioners after notice proceeded with erection of the boundary wall. The boundary wall was constructed on 27th April, 1990. It is contended that as soon as erection of boundary wall was completed, objection was raised by the residents of colony and some complaints were made to the various Authorities, challenging the act of petitioners. On 19th June, 1990 members of the Municipal Corporation along with aid of local police reached the aforesaid plots and demolished the boundary wall. Authority of Municipal Corporation has also carried away the material with them. Petitioners contended that this act is contrary to law, arbitrary and petitioners have been put to financial loss of Rs. 70,000/-. Petitioners are entitled for costs of Rs. 50,000/- towards the materials which were carried away by the officers of the Municipal Corporation. After demolishing the wall, petitioner no. 1 contacted the Collector, Gwalior, Administrator and Commissioner of the Municipal Corporation, Gwalior and showed them the documents which he possessed. Thereafter, vide Annexure P/7 detailed communication was sent to the Corporation. On account of this action petitioners filed a WRIT PETITION No. 954 OF 1990. While the petition was pending, petitioners submitted an application along with plans to Joint Director, Town & Country Planning, for revision of layout plan. The said Authority vide letter dated 23rd January, 1991 accepted the layout plan and intimated the same to the petitioners as well as to the respondents. After sanction of the revised layout plan, petitioners submitted the same to the Commissioner, Municipal Corporation. Municipal Corporation, informed the petitioners that since petition is pending before the High Court, therefore, revised layout plan cannot be considered. Petitioners have now challenged the action of respondent no.1 in not considering the layout plan as erroneous and refusal to exercise jurisdiction vested in it. Earlier petition was disposed of on 24th November, 1992 and respondents in that petition were directed to consider the matter afresh on facts, rights and entitlement of petitioners and pass appropriate order on the revised layout plan. After dismissal of the petition, petitioner along with copy of the order, submitted an application before the Municipal Corporation on 16th December, 1992 and requested to pass appropriate orders in view of the revised layout plan. Even then Municipal Corporation has not passed any order,

therefore, petition was filed.

Petition was opposed by respondents. However, respondents also mentioned the fact before the Single Bench" that a civil suit between the petitioners and other party is pending in the Civil Court, where temporary injunction is granted restraining petitioners in the writ petition from carrying out any construction and they were directed to maintain status quo.

Learned Single Judge has held that in his opinion the order passed by the Civil Court would not stand in the way of petitioners. The order, which has been passed on an application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, is to the effect that no construction is to be raised on the park in question. He further held that the park in this case would be the park which not come into existence on account of revised layout plan having been sanctioned. On the submission of the petitioners that they would not raise any construction on the park as per the revised layout plan, the Court directed that the application can be disposed of in terms of the provisions of Municipal Corporation Act and petitioners would be at liberty to take resort to the deeming provision also in case application is not processed in terms of Section 295 of the Act. Petition was allowed. It was further directed that in the event of any building application being submitted, the Corporation shall process the same in accordance with law and shall not reject the application merely on the ground that earlier a different layout plan was sanctioned. Thus, learned Single Judge has virtually accepted the revised layout plan.

Counsel for the appellants submitted that the order suffers from material irregularity. When dispute was pending between some of the residents of the colony and the respondents before the Civil Court, it was not proper for the Writ Court to interfere in the matter. Disputed questions of fact required determination. He submitted that once layout plan is accepted and the management of colony is transferred to the Municipal Corporation then layout plan cannot be changed without prior notice to Municipal Corporation, Gwalior. It is further submitted that the area earmarked for special purpose, such as, park, school building and other public amenities, cannot be converted for different purpose. The said colony came into existence before Madhya Pradesh Gram Tatha Nagar Nivesh Adhiniyam, 1973 (hereinafter, referred to as the Adhiniyam) came into force.

Contention of counsel for the appellants is that once the colony was handed over to the Municipal Corporation then all rights over the public street and management of park in the colony vest with the Municipal Corporation. After handing over the colony by Late Ramawtar Sharma to the Municipal Corporation, petitioners have no right, title and interest in the said colony. Petition is misconceived and deserves to be dismissed and the appeal should be allowed.

Counsel for appellants then submitted that question of deemed permission does not arise in the case. Application for any construction should be accompanied

with the plan which is to be sanctioned by the Commissioner, Municipal Corporation. Application simplicitor without the plan is no application in the eyes of law and, as such, there was no question of deemed sanction. Counsel for appellants then referred to the provisions of Adhiniyam and invited attention to the provisions of Madhya Pradesh Bhumi Vikas Rules (hereinafter, referred to as the Rules). He invited attention to rule 25 of the Rules and submitted that the authority sanctioning the layout plan is competent to revoke permission issued under the provisions of these rules wherever there has been any incorrect statement or any misrepresentation of any material fact in the application on which the permission was based. Under rule 27 it is provided that the authority may either sanction or refuse the plans and specification or may sanction them with such modifications or directions as it may deem necessary and thereupon shall communicate its decision to the person giving the notice.

Counsel for appellants then invited attention to Section 24 of the Adhiniyam and submitted that development and use of land is controlled by the State Government and submitted that subject to provisions of sub-section (1) and the rules made under the Adhiniyam, the overall control of development and use of land in the planning area shall vest in the Director with effect from such date as the State Government may, by notification, appoint in this behalf. He invited attention to the definition of word "Director" in Section 2 (h) of the Adhiniyam, and submitted that "Director" would mean the Director of Town and Country Planning. Counsel for appellants, therefore, submitted that any change in revised layout plan can only be ordered by the Director and not by Joint Director. He invited attention to Section 30 of the Adhiniyam and submitted that u/s 30 grant or refusal of permission vests with the Director and Section 33 relates to lapse of sanction.

Counsel for appellants then submitted that once the colony was completed and handed over to the appellant-Corporation then any change in layout plan after a period of 16 years was not permissible without hearing the Municipal Corporation. Counsel for appellants referred to the judgment in the case of Dr. V.K.Bansal & Ors. vs. Special Area Development Authority & Ors., reported in 2000 (1) MPJR 73. In this case, attempts were made by Special Area Development Authority, Bhilai, Durg to convert an open space to a residential area or colony contrary to the previous Scheme violating the promise to the people of the locality and above all destroying the quintessence of human life, health. The court held in para of the judgment that the approved scheme which has been finalised, cannot be changed from time to time. In the return, it was stated that the plan was revised and in the same breath it was stated that a development scheme has been approved by the Director under order, Annexure R-1. Various layouts have been brought on record where from it was found that the area in question has been earmarked as an open space. It is difficult to determine whether it is a park or not but there is no iota of doubt that the area has been preserved for open space. Once the people at large have been made aware of a scheme and after lapse of 16 years, it is not appropriate on the part

of a public authority to take a stand that no records are available to show whether the scheme was approved or not. An open space is essential and the residents of the colony had the hope and aspirations to utilise the open space and to gain the benefits of open space for fresh air, light and avoidance of congestion. While delivering the judgment, Court has referred to the judgment of this Court in the case of Kantilal and Others Vs. Chairman, Town Improvement Trust, Ratlam and Others, ; and the judgment in the case of Bangalore Medical Trust Vs. B.S. Muddappa and others, , and the Court held that action of converting the open space covered under the original scheme towards a residential area is illegal and unsustainable.

In the case of Mayank Rastogi etc. vs. V.K. Bansal and others, reported in AIR 1998 SC 716, it is held that merely because at an earlier point of time when the respondent had constructed his house the plot had been shown as an open space cannot give a right to the respondent to ask the High Court to prevent the construction on that area when the respondent has chosen not to challenge the change in the land use from open space to residential as per the approved plan.

In the case of Dr. G.N. Khajuria and others Vs. Delhi Development Authority and others, , it is held that the area originally was marked for park only but subsequently was allotted for school; though notice was issued to school to vacate the park, no follow-up action was taken. The allotment was held to be not proper and change of nature of land was not accepted. Counsel for appellants, therefore, submitted that once the land has been handed over to the Municipal Corporation for management, layout plan could not be changed at all. Before revision of plan Municipal Corporation should have been heard. In spite of objection of Municipal Corporation, Joint Director, Town & Country Planning has approved the plan without considering the objection of appellant-Municipal Corporation. It was further pointed out that the residents of said colony, who have purchased the plots keeping in mind the open space and the place earmarked for park, were required to be heard before layout plan is altered. State Government and Director, Town & Country Planning have not been impleaded as party in the petition.

Respondents in their reply supported the order of Single Bench and submitted that since their title has been upheld and the land which was not being used as park, has rightly been held to be owned by the petitioners/ respondents and Single Bench was justified in holding that according to revised layout plan, petitioners shall not carry out any construction on the land earmarked for park in the revised plan. Respondents referred to the judgment in the case of Pt. Chet Ram Vashist (Dead) by Lrs. Vs. Municipal Corporation of Delhi, , and submitted that the condition in the layout plan that area specified for park and school shall vest with the Corporation is illegal. The judgment was delivered while considering the scope of Section 313 of Delhi Municipal Corporation Act.

Counsel for respondents referred to the judgment in the case of Mayank Rastogi (supra), and also invited attention to the judgment of this Court in the case of

Anupam Shahakari Griha Nirman Samithi Maryadit, Raipur Vs. State of Madhya Pradesh and Others, , wherein the Court quashed Draft scheme prepared by the cooperative society.

In the case of Dadar Avanti Co-op, Housing Society Ltd., Bombay Vs. Municipal Corpn. of Greater Bombay and others, , while considering the scope of Maharashtra Regional and Town Planning Act, it was held that change of user can be permitted only if the Regulation in force at time change of user is intended permits such change. It is further held that change of user cannot be permitted on ground that change of user could have been granted when original plan of the building was sanctioned.

Shri A.M. Naik, Advocate, appearing in the writ petition, submitted that the coloniser is estopped from changing the area of the park. Once the layout plan is approved and residents of colony have purchased the plots knowing full well about the layout plan amenities of park, plot for school building and left out space, the same cannot be changed and coloniser is stopped by promissory estoppel from changing the nature of layout plan. He referred to the judgment in the case of Nirmal Kumar Moulik and Others Vs. Sm. Champabala Roy and Others, .

Counsel for petitioner in writ petition referred to the judgment in the case of Om Kumar and others vs. Union of India, reported in AIR 2000 SC 3689, and invited attention to the Wednesbury principle and principle of proportionality and submitted that when a statute confers discretion to an Administrator to take a decision, scope of judicial review would remain limited. Interference is not permissible unless one or other of the following conditions were satisfied, namely, the order was contrary to law, or relevant factors were not considered; or the decision was one which no reasonable person could have taken. These principles are known as Wednesbury principles. In this case, it is further held that the principle of proportionality originated in Prussia in the nineteenth century and has since been adopted in Germany, France and other European countries. "Proportionality" means the question whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the Legislature or the Administrator so as to achieve the object of the legislation or the purpose of the administrative order. Under the principle, the Court will see that the Legislature and the administrative authority, maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of person keeping in mind the purpose which they were intended to serve.

Counsel for the petitioner in the writ petition submitted that as per Notifications No. 24 and 75 power has not been conferred upon Joint Director. He invited attention to Section 65 of M.P. Town Improvement Trust and submitted that colony was constructed under the old Act and, therefore, under the provisions of Section 65 the layout plan under the said Act has attained finality and cannot be

subjected to revision. Reference was made to the judgment in the case of Virender Gaur and Others Vs. State of Haryana and Others, , wherein it is held that the land earmarked for open space has to be used and permission is granted for construction of Dharmashala and starting construction it was held that the Government is not bound to sanction lease of the land which is vested with the Municipality. The Government as well as Municipality is obliged to maintain and protect environment, manmade as well as natural. He invited attention to Section 2(n) of the Adhiniyam, wherein definition of word "owner" is defined.

Respondents in the petition submitted that the petition is not maintainable. There are unexplained delay and laches. Petition suffers from delay and laches. Respondents relied upon the judgment in the case of Rabindranath Bose and Others Vs. The Union of India (UOI) and Others, ; and, Aflatoon and Others Vs. Lt. Governor of Delhi and Others, , in support of their contention.

After giving anxious thought to the entire case, it is apparent that Shriram Colony came into existence before Act of 1973 came into force. Layout plans were accepted and certain lands were left open for park and school and certain open space was left in the said layout plan. After new Act came into force, certain applications have been filed by the coloniser for changing the user of land. Such change will not be permissible unless all the affected parties, namely, Municipal Corporation and the residents of colony, who have purchased the plots keeping in mind the open space and land reserved for park and open space are heard. Some revision in plan was submitted to the Joint Director, Town & Country Planning, Gwalior. It was the duty of Joint Director to notice Municipal Corporation and persons affected and after hearing them should pass orders regarding change in plan. However, as held by the Apex Court in the cases of Bangalore Medical Trust and G.N. Khajuria (supra), it is the duty of the authority to maintain ecological balance, as such, permission could not be granted. The coloniser could not point out any rule at the relevant time to reduce the area earmarked as park. The coloniser cannot take advantage of revised layout plan or can claim any right under the will unless it is established that the deceased has left behind certain open lands. If the intention was to keep open space and reserve the area for school and park in the colony then it will not be appropriate to change the user of land.

It is also surprising that when the parties, who had filed the civil suit, were not before the writ Court, writ Court could not have interfered with the orders passed by the civil court. However, in the facts and circumstances of the case, we hold that nature of land cannot be changed and land reserved for school and park in the original plan cannot be changed and any order of the Joint Director changing the layout plan is without jurisdiction and is quashed.

It is more surprising that the State Government and Joint Director, Town & Country Planning were not impleaded in the petition, against which Letters Patent Appeal is filed. However, they are parties in writ petition no. 849/01. Therefore, action of Joint Director Town & Country Planning in revising the layout

plan is quashed. It is further directed that the area of park and school shall not be reduced. Since appellant / Corporation has stated that the park is under its management, Municipal Corporation is directed to maintain the park and ensure that there should not be any encroachment over the said park.

As regards inordinate delay is concerned it was for the coloniser to point out that the authority allowed revision of layout plan after affording opportunity of hearing to the residents of the colony; therefore, as and when they learnt about revised layout plan and construction was started on the open space, some of them have filed civil suit and then writ petitions have been filed.

In view of the judgment in the case of V.K. Bansal (supra) and other judgments of the Apex Court. nature of land which is earmarked for public amenity cannot be changed. As far as open space is concerned, which, according to the coloniser, was not left as open space for public amenity, should be held to be in the ownership of coloniser. This question is a disputed question of fact and in our opinion, this question shall be examined by the Municipal Corporation and Director, Town & Country Planning jointly after examining the original layout plan and considering whether permission to convert the open land into plots can be granted. It may be mentioned that any mutation in municipal record is not a mutation of title, as such, no right is conferred upon coloniser to claim himself to be the owner of the plots. It may be mentioned that if some application is filed by coloniser for converting open space other than the land earmarked for park or septic tank, the application shall be considered jointly by the Director, Town & Country Planning and Municipal Corporation after inviting objections from the local residents. While examining the left out open space, both the authorities shall consider the intention of original layout plan and shall record reasons for allowing carving out of plots or refusing carving out of plots upon open space.

In the result, appeal succeeds and is allowed. Order of Single Bench is set aside and the parties are directed to act in the manner stated above. There shall be no orders as to costs.