

(2016) 08 MP CK 0024
In the Madhya Pradesh High Court
Case No : Writ Appeal No. 275 of 2010

Rajesh Gadia

APPELLANT

Vs

Indore Municipal Corporation

RESPONDENT

Date of Decision : 22-08-2016

Acts Referred:

Madhya Pradesh Bhumi Vikas Rules, 1984 — Rule 2(44), Rule 2(45), Rule 2(46), Rule 24

Madhya Pradesh Municipal Corporation Act, 1956 — Section 5(7)

Citation : (2016) 3 JabLJ 220 : (2016) 4 MPLJ 679

Hon'ble Judges : Shri P.K. Jaiswal and Shri D.K. Paliwal, JJ.

Bench : Division Bench

Advocate : Shir S.R. Saraf, learned Senior Counsel with Shri Rizwan Khan, learned counsel, for the Respondent No. 3-Abhilasha Residential Society; Shri Rishi Tiwari, learned counsel, for the Respondent Nos. 1 and 2; Shri A.K. Sethi, learned Senior Counsel with Shri

Final Decision : Disposed Off

Judgement

P.K. Jaiswal, J. - Both these writ appeals are filed against the order dated 13.07.2010 passed in W.P. No. 7072/2009 & W.P. No. 8494/2009 whereby, learned Writ Court arrived at a conclusion that the builder has encroached the parking area and had directed the Municipal Corporation to make available the parking area to the residents of the building in question as per the sanctioned map and also directed that the Municipal Corporation shall take appropriate action in accordance with law.

2. Since the controversy involved in these two writ appeals are similar and, therefore, this common order shall govern the disposal of W.A. Nos.275/2010 and 276/2010.

3. The facts of the case are that the respondent No.3 is a society of flat owners who have purchased flats in a building known as "Abhilasha Apartment" situated at 585/2, M.G. Road, Indore constructed by the appellant ? M/s Kalpataru

Builders. A map was sanctioned by respondent No. 1 on 24.12.1982 in respect of M/s Abhilasha Apartment and the ground floor of the apartment, as per the sanctioned map was covered parking area.

4. On 01.12.1985, the respondent No.2 issued notice to the appellant that construction was not as per sanctioned map. The appellant challenged the said show cause notice by filing an appeal before the Appellate Committee of Municipal Corporation, Indore. On 20.01.1986 (Annexure-P/1), compounding fee of Rs.20,000/- was imposed. The construction was completed on 01.10.1986 and on 04.10.1986, completion certificate was issued by the Municipal Corporation. The order of compounding was challenged by filing further appeal before the State Government. On 24.01.1997 (Annexure-P/4), the appeal has been decided by the State Government and issued the following directions :-

Hkou Lokeh us ;g mYys[k fd;k gS fd fufeZr Hkou ds vklikl 15 gtkj oxZQqV Hkwfe [kkyh iM+h gqbZ gS vkSj ;fn ;g ekuk tkrk gS fd mlus uD"ksa esa nf"kZr ikfdZax LFky dks ?ksj fy;k gS rks bl [kqyh Hkwfe dks ikfdZax ds fy, fn;k tk ldrk gSA Hkwfe fodkl fu;eksa ds vuqlkj fufeZr {ks= dk 16 izfr"kr {ks= ikfdZax ds fy, miyC/k k djuk pkfg;sA bl x.kuk ls ikfdZax ds fy;s yxHkx 3000 oxZQqV Hkwfe miyC/k djkbZ tkuk pkfg;s] tSlk fd uxj fuxe bankSj ds izfrfuf/k Jh feRry ,oa Jh "kekZ us le{k esa mifLFkr gksdj rLnhd dh gSA

mijksDr ds ifjizs{; esa bl funsZ"k ds lkFk izdj.k lekIr fd;k tkrk gS fd fu;ekuqlkj 3000 oxZQqV ikfdZax Lisl Hkou fuekZrk }kjk miyC/k djkbZ tk,A

5. The respondent No.3 challenged the said order by filing the writ petition No.69/1997 and a consent order was passed on 26.09.2003. The writ petition was disposed of by passing the following order :-

That the respondents shall provide 3,000 sq. ft. covered parking area to the flat owners for parking purposes within the building premises and also for parking their vehicles either in the constructed area or in front of the building and the respondents shall also file affidavit to this effect before the Commissioner, Municipal Corporation, Indore within 30 days from today that within six months the respondents shall provide covered parking area to the flat owners of the building within the campus in accordance with law.

6. Against non-compliance of the order passed by the learned Writ Court, Contempt Petition No.71/2004 was filed and on 28.09.2004, the same was dismissed. The order of dismissal was upheld by the Apex Court on 28.02.2005. Thereafter, another Contempt Petition No.123/2005 was filed, which was dismissed on 21.11.2006 with some observations. Again W.P. No.8181/2006 was filed and the same was dismissed on 03.01.2007 and, thereafter, M.C.C. No.42/2007 was preferred which was also dismissed on 24.08.2009.

7. On 13.11.2009, a removal notice has been issued by the Municipal Corporation (Annexure-P/14) directing the builder to remove the unauthorized construction and against which another writ petition has been preferred and the

same has been registered as W. P. No.8494/2009 and an interim order has been passed in the matter restraining the Municipal Corporation from taking further action in the matter. Notice dated 13.11.2009 reads as under :-

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QazV ekftZuy vksiU Lis"K ds :i esa 9-14 eh0] lkbZM ,e0vks0,l0 ds :i esa 4-57&4-57 eh0 rFkk csd ,e0vks0,l0 ds :i esa 4-57 eh0 j[kdj foLr`r ekufp= Lohd`r fd, x, FksA xr o"kksZa esa Hkwry ij NksM+h xbZ Lohd`r dOgMZ ikfdZax dks vkids }kjk nhokjsa [kM+h djsd ,oa njokts] f[kM+dh ,oa "kVj yxkdj vius vf/kiR; esa ysrs gq, vukf/kd`r dCtk dj fy;k gSA bl d`R; ls vfHkyk"kk vikVZesUV ds jgokfl;ksa dks feyus okyh dOgMZ ikfdZax lqfo/kk ls oafNr gksdj ikfdZax leL;k dk lkeuk djuk iM+ jgk gSA blh leL;k ls xzflr gksdj vfHkyk"kk vikVZesUV ds jgoklh la? k }kjk jkT; "kklu] ekuuh; mPp U;k;ky; ,oa loksZPp U;k;ky; rd viuk i{k j[kk x;k] ysfdu ns[kus esa vk;k gS fd fofHkUu Lrjksa ls izkIr fu.kZ;ksa dks feF;k izLrqrhdj.k (Mis Representation of Facts) djrs gq, vkus vius i{k leFkZu esa nLrkostksa dks fuekZ.k djs dk iz;kl fd;k gSA mnkgj.k ds rkSj ij jkT; "kklu ds izeq[k lfpo LFkkuh; "kklu foHkx ea=ky; }kjk ikfjr vkns"K fnukad 24-01-1997 esa Hkou fuekZrk Lokeh ds :i esa vkids }kjk ;g mYys[k fd;k x;k Fkk fd fufeZr Hkou ds vklikl 15000 oxZQhV Hkwfe [kkyh iM+h gS vkSj uD"ksa esa nf"kr ikfdZax LFky dks ?ksj fy;k gS rks [kqyh Hkwfe dks ikfdaZax ds fy;s fn;k tk ldrk gSA ,slk dFku izeq[k lfpo ds le{k j[kus dk vk"K; ;g Fkk fd iz"uk/khu fufeZr Hkou ls vfrfjDr [kkyh Hkw[kam ftls vkus 15000 oxZQhV n"kkZ;k gS mlesa ls Hkwry ij Lohd`r dOgMZ ikfdZax {ks=Qy (2"x35"x25")+(56"x27")= 3262 oxZQhV yxHkx 3000 oxZQhV miyC/k dj,axs ftls jgoklh la?k dh leL;k dk lek/kku gks ldsxk ysfdu vkids }kjk iz"uk/khu Hkou ds QazV ,e0vks0,l0 30 QhV x 140 QhV esa 22 QhV x 127 QhV Hkwfe ij Vhu "ksM cukdj QzaV ,e0vks0,l0 esa voS/k fuekZ.k djrs gq, jkT; "kklu ds vkns"K dk feF;k izLrqrhdj.k djrs gq, vU; Hkwfe ij ikfdZax miyC/k djkus dk iz;kl fd;k gSA bl feF;k izLrqrhdj.k ls fofHkUu U;k;ky;ksa dks Hkzfer djs dk iz;kl Hkh fd;k gSA vkus bl d`R; ls QzaV ,e0vks0,l0 ftlesa fd, x, fdlh Hkh izdkj ds fuekZ.k dk u rks iz"keu fd;k tk ldrk gS vkSj uk gh Lohd`fr iznk; dh tk ldrh gSA lFk gh bl Vhu "ksM ds dkj.k ;fn Hkfo"; esa fdlh izdkj dh vfXu nq?kZVuk gksrh gS rks Qk;j Qk;fVax ds vkokxeu esa vojks/kd ds :i esa gksxkA

vr% i= izkfIr ds 7 fnol esa voS/k fuekZ.k dj cuk, x, fVu "ksM dks gVk, ,oa vfHkyk"kk vikVZesaV dh ry eafty (Hkwry) ij Lohd`r dOgMZ ikfdZax ls Hkh voS/k vf/kiR; dks fjDr djrs gq, fufeZr nhokjsa dk Lo;a gVkdj ikfdZax ds fy, [kqyk djsaA D;ksafd orZeku esa vklikl dksbZ Hkwfe u rks vkids vf/kiR; dh vksj uk gh futh LokfeRo dh Hkwfe fjDr ikbZ xbZ gS ftl ij "kklu }kjk tkjh vkns"K dk ikyu orZeku lFkfr esa gks ldsA

8. The contention of the respondent No.3 is that the notice has rightly been issued by the Municipal Corporation as marginal open space has been covered by the builder and the same has not been constructed keeping in view the M. P. Bhumi Vikas Rules, 1984 as well as the bye-laws framed by the Municipal

Corporation from time to time.

9. In W.P. No. 7072/2009 filed by the respondent No.3, it has been stated that in spite of the fact that the covered parking area was sanctioned in the map of M/s Abhilasha Apartment, the builder converted it into godowns and offices and they did not provide 3000 sq. ft. of the covered parking area for parking purposes and instead of that a tin-shed was constructed on marginal open space which is contrary to the provisions of the M.P. Bhumi Vikas Rules, 1984. It is also stated that earlier W.P. No. 69/1997 was preferred and a consent order was passed on 26.09.2003 on an assurance of the builder that 3000 sq. ft. of land of parking area shall be provided within the campus in accordance with law but he did not provide the aforesaid 3000 sq. ft. of area as per the consent order. The area which has been provided by the builder is again within the areas which is marginal open space and as the area is reflected as marginal open space in the sanctioned map, the same cannot be used for parking purposes. With the aforesaid, the Society has prayed for issuance of a writ directing the respondent Nos. 2 and 3 to provide parking area in the ground floor itself i.e., within the building as per the sanctioned plan. Thereafter, the Municipal Corporation, Indore has issued the notice dated 13.11.2009 directing the builder to remove the unauthorized construction and against which another Writ Petition No. 8484/2009 has been preferred.

10. The contention of the Society is that the notice had rightly been issued by the Municipal Corporation and prayed for demolition of the unauthorized illegal construction and directions to the respondents to provide 3000 sq. ft. of parking area in the ground floor of the plot in accordance with law.

11. A reply has been filed on behalf of the builder and it has been stated that the writ petition under Article 226 of the Constitution of India is not maintainable as earlier an order was passed in W. P. No.69/1997. It has been further stated that the writ petition has been filed after a period of 16 years from the date of earlier order was passed in 2003 and the petition deserved to be dismissed on the ground of delay and laches also.

12. The builder has admitted that there is no area as per sanctioned map dated 24.12.1982. Thereafter, a notice was issued by the Municipal Corporation and the Appellate Committee has allowed the appeal and compounding fee to the tune of Rs.20,000/- was also accepted. The contention of the builder that once they paid the compounding fee, a valid completion certificate has been issued and, therefore, the question of providing space or the question of demolishing construction does not arise. They have provided the parking area of 3000 sq. ft. in front of the building, as directed by the learned Writ Court vide order dated 26.09.2003 (W.P. No.69/1997). Learned Writ Court gave a finding that as per sanctioned map dated 24.12.1982, the ground floor of the building was reserved for parking. The parking area was blocked by the builder by raising walls and converting it into godowns. The order dated 26.09.2003 passed in W. P. No.69/1997 makes it very clear that the builder was required to provide 3000 sq.

ft. covered parking area to the flat owners for parking purposes within the building premises and also for parking their vehicles either in the constructed area or in front of the building in accordance with law.

13. Learned Writ Court has held that the compounding fee accepted by the Municipal Corporation will not absolve the builder and the builder is certainly required to provide parking area in the ground floor itself as per the sanctioned map. Learned Writ Court allowed the writ petition holding the following :-

28. In the present case the builder has encroached upon the parking area which is in the ground floor of the building in question and he has covered the parking area into godowns, creating all kind of problems to the flat owners. The builder instead of clearing the encroached area has now encroached the marginal open space. Keeping in view the provisions of Bhumi Vikas Rules of 1984, this Court is of the considered opinion that the respondent/Municipal Corporation, Indore deserves a command to remove the walls which has blocked the parking area in the ground floor and to ensure that the parking area as sanctioned by the sanctioned plan is made available to the petitioner. Not only this, the marginal open space which has been covered by the builder has to be treated as marginal open space as no construction can take place in open space, keeping in view the provisions of the Bhumi Vikas Rules, 1984.

29. The respondent/Corporation shall take appropriate action in accordance with law positively within a period of 30 days from the date of receipt of certified copy of this order.

30. With the aforesaid directions the present writ petition is allowed with a cost of Rs.10,000/- to be paid by the respondent No.2 and 3 to the petitioner within a period of 30 days from the date of receipt of certified copy of this order.

31. As this Court has arrived at a conclusion in W.P. No.8494/09 that the builder has encroached the parking area and has directed the Municipal Corporation to make available the parking area to the residents of the building in question as per the sanctioned map, therefore, interference with the notice dated 13.11.09 issued by the Building Officer, Municipal Corporation, Indore for removal of unauthorized constructions raised by the petitioner in the parking area does not arise. The writ petition No. 8494/09, is accordingly dismissed.

14. Learned Senior Counsel has drawn our attention to the order dated 26.09.2003 and submitted that the builder has to provide 3000 sq. ft. covered parking area to the flat owners for parking purposes within the building premises and also for parking their vehicles either in the constructed area or in front of the building and the builder has to file affidavit to this effect that within six months, they shall provide covered parking area to the flat owners of the building within the campus in accordance with law. He submits that the builder has constructed the parking area in front of the building and he is not supposed to provide any parking area in any other person's land or in any other person's premises. The order dated 26.09.2003 passed by the learned Writ Court has been obeyed.

15. Learned Senior Counsel for the builder has urged that the learned Writ Court has committed an error in not considering that there is violation of the order passed by the Writ Court as well as the order dated 24.01.1997 passed by the State Government. The writ petition filed by the society was not maintainable. Learned Writ Court erred in entertaining the writ petition and passing the impugned order. He submits that it was not the case of the society before the Writ Court that 3000 sq. ft. parking area was not provided in terms of the order passed by the Writ Court as well as the State Government and prayed that writ petition was filed after a period of 15 to 16 years and instead of dismissing the writ petition on the ground of delay and laches, learned Writ Court erred in dismissing the writ petition of the builder.

16. In reply, Shri Rishi Tiwari, learned counsel for the Indore Municipal Corporation has drawn our attention to the order passed in the writ petition and provisions of Rule 2 (43), (44), (45) and (46) of the M.P. Bhumi Vikas Rules, 1984 and submitted that space for marginal open space is not available for parking purposes. He further submitted that tin-shed has been constructed by the builder, which is not permissible because tin-shed amounts to construction of building as defined under Section 5(7) of the M.P. Municipal Corporation Act, 1956. To appreciate the contention of the Municipal Corporation, we reproduce Section 5(7) of the Act of 1956 as under :-

5(7) "building" includes a house, outhouse, shed, hut and other enclosure or structure whether of masonry, bricks, wood, mud, metal or any other material whatever, whether used as a human dwelling or otherwise, and also includes verandahs, fixed platforms, plinths, doorsteps, walls including compounding walls, and fencing and the like but does not include a tend (or a temporary shed erected on ceremonial or festive occasions).

17. He has also submitted that the builder has to provide parking area as per sanctioned map. The compounding fee was accepted against which certain constructions were made contrary to the sanctioned map but cannot violate the provisions of the M.P. Bhumi Vikas Rules, the Municipal Corporation Act and the resolution/guidelines framed therein.

18. In respect of maintainability of the writ petition, Shri S.R. Saraf, learned Senior Counsel has drawn our attention to the decision of the Hon'ble Supreme Court in the case of Commissioner, Karnataka Housing Board v. C. Muddaiah reported in (2007) 7 SCC 689 and submitted that the writ petition was very much maintainable in view of the law laid down by the Apex Court. He has also drawn our attention to the impugned order and submitted that Writ Court relying on the decision of the Apex Court in the case of Commissioner, Karnataka Housing Board v. C. Muddaiah (supra), K.R. Shenoy v. Udupi Municipality reported in 1974 SC 2177, Priyanka Estates International (P) Ltd. v. State of Assam reported in 2010 (2) SCC 27 and Mahendra Baburao Mahadik v. Subhash Krishna Kanitkar reported in AIR 2005 SC 1794 and has rightly observed that in case any construction is in absolute violation of sanctioned or approved plans, the

necessary consequences is demolition and Courts cannot approve such illegal activities and prayed for dismissal of the writ appeal.

19. We have heard the learned counsel for the parties and perused the record. In view of the admitted fact that tin-shed has been constructed and no front marginal open space and marginal open area as provided under the Rules of 1984 has been provided by the builder, all these question were considered by the Writ Court. The order dated 24.01.1997 and 26.09.2003 are very clear and specific. Even after giving an undertaking/affidavit in pursuance to the order passed by the Writ Court, the building was examined by the officers of the Municipal Corporation and they found that out of 30" x 140" tin-shed of 22" x 127" was illegally constructed on marginal open space. No parking space was available as per sanctioned map and construction of tin-shed was within the meaning of "building" as defined under Section 5 (7) of the Municipal Corporation Act, 1956.

20. In the present case, the builder has constructed the tin-shed over the front marginal open space, which is not permissible and he has to provide covered parking area. The compounding was not done of the 6th floor and illegal construction of offices and godown were made over the parking area. The builder has illegally constructed the tin shed on the name of so called parking area in the marginal open space and not in the parking area. There should be ratio of permissible built up area or plot in all floors to the total plot area of the land. There has to be marginal open space as per the Rules of 1984 and no construction over the marginal open space is provided and no tin-shed is permitted to be constructed in the open space. The action of the Municipal Corporation and the impugned direction made by the learned Writ Court is in accordance with the provisions of the Rules of 1984, the Act of 1956 and bye-laws made therein.

21. Considering these facts, Municipal Corporation has rightly issued show cause notice dated 13.11.2009, which we have reproduced herein above. As per Rule 24 of the M.P. Bhumi Vikas Rules, 1984, no deviation shall be permitted relating to front marginal open space, building height and parking/public utility space. Rule 24 of the Rules of 1984 reads as under :-

24. Deviation during construction : If during the construction of a building any departure (excepting for items as given in clause (I) of proviso to sub-rule (1) of Rule 14) from the sanctioned plan is made the authority may permit such deviations at the time of issuing of occupancy permit, but no deviation, shall be permitted by the Authority relating to the following building control parameters :-

- (a) Front M.O.S.
- (b) Building Height
- (c) Parking/Public utility space.

22. Learned Writ Court has considered each and every aspect of the matter and

gave a finding by passing a valid and elaborate order, in view of the law laid down by the Apex Court, which has been cited by us in the preceding paragraphs, no case to interfere with the well reasoned order of the Writ Court or illegal act of the builder, as prayed in these writ appeals, are made out. Both these writ appeals have no merit and are accordingly, dismissed. A copy of this appeal be kept in other connected appeal. No costs.