

(2013) 04 BOM CK 0106

In the Bombay High Court

Case No : Writ Petition No. 2711 of 2012

Ram Sajivan Gupta and others

APPELLANT

Vs

State of Maharashtra and others

RESPONDENT

Date of Decision : 22-04-2013

Acts Referred:

Constitution of India, 1950 — Article 226
Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 —
Section 3(K), 3B(3)

Citation : (2013) 4 ABR 468 : (2013) 5 ALLMR 55

Hon'ble Judges : A.S. Oka, J;A.R. Joshi, J

Bench : Division Bench

Advocate : Tushar Kochule instructed by Ms. Anjali Awasthi, for the Appellant; Geeta Shastri, A.G.P., Ms. K.R. Punjabi for B.M.C. and J.G. Reddy, for the Respondent

Final Decision : Dismissed

Judgement

1. By this petition under Article 226 of the Constitution of India, the petitioners have challenged the State Government Resolution dated 15th November, 2007 as well as Government Resolution dated 12th March, 2009. The Government Resolution dated 15th November, 2007 has been purportedly issued on the basis of the directions issued by the Full Bench of this Court on 1st November, 2007 in Writ Petition No. 1326 of 2007. Under the said Notification, a committee described therein as High Level Committee or High Power Committee (in short "HPC") was constituted. The HPC was constituted to look into the illegalities under the Slum Rehabilitation Scheme in relation to a property known as Tulsiwadi in Mumbai. On the basis of the order dated 18th December, 2008 passed by this Court on Notice of Motion No. 126 of 2007 taken out in the said Writ Petition No. 1326 of 2007, another HPC was constituted. The HPC was empowered to look into all the grievances of the slum dwellers in relation to Slum Rehabilitation Scheme. It was directed that the HPC shall hold minimum two meetings every week. It was clarified that the HPC will discharge quasi-

judicial functions. Apart from the challenge to the aforesaid two resolutions, a prayer was made for referring the following questions to the Larger Bench of this Court which may be constituted by the Hon"ble the Chief Justice;

Questions of Law

I. Whether u/Sec. 3K of the Slum Act, the State Government possesses powers to create, establish, appoint a quasi-judicial or judicial body viz. High Power Committee and Whether Judgment given in the matter of Indira SRA Co-Operative Housing Society Vs. Shivkripa Builders and Developers and Others, is per incuriam and hence not binding precedent?

II. Whether Full Bench of this Hon"ble Court, in Tulsiwadi Navnirman Coop. Housing Society Ltd. and Another Vs. State of Maharashtra and Others, (Para Nos. 114(d), 118(D) and 121) has purported to put condition before the Single Bench and/or Division Bench of this Hon"ble Court in exercise of their discretionary powers under Article 226 of the Constitution of India, hence, this judgment and subsequent direction given to Registry on 1.11.2007 purporting to amend the Article 226 and Rule 636 of the Bombay High Court Original Side Rules is per incuriam and hence not binding precedent?

The learned Counsel for the petitioners submitted that the impugned Government Resolutions provide for deciding the disputes in relation to Slum Rehabilitation Schemes under the Regulation No. 33(10) of the Development Control Regulations for the city of Bombay (hereinafter referred to as the Development Control Regulations). He pointed out that the Development Control Regulations have been framed by exercising power under the Maharashtra Regional and Town Planning Act, 1966 (hereinafter referred to as "the MRTP Act"). He urged that the said Slum Rehabilitation Scheme has nothing to do with the rehabilitation scheme u/s 3B(3) of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 (hereinafter referred to as "the Slum Act"). He urged that there is no power vesting in the State Government either under the MRTP Act or under the Development Control Regulations to constitute a HPC. He pointed out that by Judgment and Order in the case of Indira SRA Co-Operative Housing Society Vs. Shivkripa Builders and Developers and Others, this Court held that the HPC has been constituted by the State Government by exercising power u/s 3-K of the Slum Act. He urged that on plain reading of Section 3-K, the power thereunder of the State Government is confined to giving special directions as to policy. He urged that the said power does not extend to creating HPC and conferring quasi judicial power on the HPC. He urged that the power to decide a lis cannot be conferred on HPC. He urged that the law laid down by the Apex Court in the case of Shri A.P.D. Jain Pathshala and others v. Shivaji Bhagwat More and others decided on 4th July, 2011 is crystal clear. He submitted that as held by the Apex Court, the High Court while exercising the jurisdiction under Article 226 of the Constitution of India does not have power to direct creation of a quasi judicial forum. He urged that the law is well settled that the State Government by issuing executive order cannot

constitute a quasi judicial forum without there being any statutory provision in that behalf. He urged that the decision of the Division Bench of this Court in case of Indira SRA Co-operative Housing Society (supra) is per incuriam. He pointed out that though a SLP filed before the Apex Court against the said decision was disposed of by a judgment and Order dated 8th November, 2011, the Apex Court did not grant any leave and did not decide the issue on merits. He therefore, submits that the doctrine of merger will not apply. He submitted that the Full Bench of this Court while deciding the case of D.R. Patil Vs. State of Maharashtra and Others, did not decide the issue on merits and observed that the petitioner in the said case was not entitled to challenge the constitution of HPC. He, therefore, submitted that the legal position which emerges is that there is no statutory power vesting in the State Government to constitute the HPC and in any event, Section 3-K of the Slum Act cannot be the source of power to constitute HPC.

2. We have heard the learned A.G.P. for the State Government, the learned Counsel for the Municipal Corporation and the learned Counsel for the respondent Nos. 7 and 8. They have supported the impugned notifications constituting the HPC. The learned A.G.P. for the State pointed out that now the Slum Act has been amended by Maharashtra Act No. 11 of 2011 and the Grievance Redressal Committee has been constituted under the said statute. It was pointed out that all disputes in relation to the eligibility of slum dwellers, transit accommodation etc., will have to go before the Grievance Redressal Committee.

3. We have carefully considered the submissions. We have perused the Judgment and Order dated 1st November, 2007 in the case of Tulsiwadi Navnirman Co-operative Housing Society delivered by a Full Bench of this Court. It will be necessary to make a reference to paragraphs 114 and 115 of the said decision which read thus:

114. That apart, with a view to remove all apprehensions in the minds of slum dwellers and other aggrieved parties, we suggested to the learned Advocate General that the State should immediately set up a monitoring agency/mechanism so that the power to supervise and issue directions available in the Slum Act can be exercised effectively. In all fairness, learned Advocate General stated that directions be issued in that behalf. The State should immediately put a monitoring agency in place.

(a) Considering that the Eligibility criteria is determined by the District Collectorate and in cases of land belonging to public body by the Competent Authority thereof, the scheme works with co-operation and co-ordination of these 122 Authorities. It is, therefore, of utmost importance that the SRA acts as a Chief Co-ordinator and the Government, being the ultimate and final body, which establishes authority like SRA and sets up public authorities like MHADA, MMRDA etc. should have a final word.

(b) The Government and all such bodies have a duty to undertake and implement these projects. The implementation is not restricted only to sanction and approval of plans and grant of permission. The Government must see to it that the purpose of establishing SRA is achieved and slum dwellers are rehabilitated, so that the government and private lands are slum free. Equally the pavements, which are meant for use of residents and tax payers are cleared. In other words, if the Government does not want proliferation of slums, then it has to take steps to ensure Coordination and Harmony amongst the Agencies and Authorities.

(c) It would be of utmost importance that the Government sets up high power committee consisting of a person, preferably a Principal Secretary, to be nominated by the Secretary, who shall be assisted by Chief Executive Officer/SRA. CEO/Vice-President of MHADA and CEO/Vice-President of MMRDA and Commissioner of Municipal Corporation, Gr. Mumbai.

(d) That any complaint about eligibility of slum dwellers, eligible slum dwellers being denied tenement, developers not undertaking and completing the project as per the permission and approval so also within the stipulated time frame, transit accommodation being unavailable or not provided for etc. shall be addressed to this Committee and

grievances be looked into by it accordingly. The Courts cannot be approached straightway unless and until abovementioned Committee is first moved by the aggrieved person in the form of an application/complaint in writing. If the grievance is not redressed or complaint/representation is not attended to, then and in that event this Court can be approached under Article 226 of the Constitution and not otherwise. Ordinarily, no person can approach this Court directly without exhausting the above remedy.

115. In the result, we are of the opinion that writ jurisdiction is available in matters of Rehabilitation of Slum Dwellers but the limits of exercise of power should be confined and restricted to matters, which remain unresolved despite the remedies of Appeals etc. being exhausted. Similarly, in the illustrations given by learned Advocate General, this Court can be approached only if the decision of SRA or State is permissible for being interfered with on the settled principles in writ jurisdiction. We have given illustrations and categories of case wherein a prerogative writ may be issued so as to ensure smooth and effective implementation of Slum Rehabilitation Scheme. However, the writ jurisdiction will not be available where the dispute is essentially private or contractual and the State Government, SRA and other local bodies are impleaded as parties only to file writ petition. In other words, when the main relief is not sought against these bodies, yet, they have been impleaded as parties and the dispute is mainly and essentially between private parties involving purely private law, then, writ petition is not the remedy.

(Underline added)

4. Thus, paragraph 114 indicates that in fact the State Government represented by the learned Advocate General solicited directions from the Full Bench. Accordingly, the State Government on its own issued a Notification dated 15th November 2007 constituting HPC. We may note that further direction was issued by the Full Bench on 18th May 2008 in Notice of Motion No. 126 of 2008 taken out by the State Government in the same case of Tulsiwadi Navnirman Co-operative Housing Society Limited (supra). The prayer of the State was that in addition to the Committee constituted earlier, additional HPC be permitted to be constituted. Thus, the creation of HPC is by the State Government based on observations made by the Full Bench of, this Court. There is no writ issued by this Court to constitute HPC.

5. It is true that in the subsequent Judgment of the Full Bench in the case of D.R. Patil Vs. State of Maharashtra and Others, the argument which is canvassed in the present petition was made but the same was not decided on merits.

6. Then comes the decision of Indira SRA Co-Operative Housing Society Vs. Shivkripa Builders and Developers and Others, . Paragraph 9 of the said decision reads thus:

9. Now the question that deserves consideration is whether the State Government by executive fiat could have constituted the High Power Committee. Mr. Grover, in this regard, heavily relied upon the decision of the Apex Court in The Secretary, Sh. A.P.D. Jain Pathshala and Others Vs. Shivaji Bhagwat More and Others, . The issue before the Apex Court in that case was about the validity of the constitution of the Grievance Committee to decide the grievance relating to selection, appointment, reappointment or mid year cancellation of appointment of Shikshan Sevaks. Initially, the Grievance Redressal Committee was merely a mechanism to hear grievances of Shikshan Sevaks and give its recommendation to the Education Department, so that the department could take appropriate action. However, the High Court by subsequent directions modified the scheme and made significant changes in the constitution and functioning of the Committee. Under this modification, the Committee was required to be headed by retired District Judge. The High Court also directed that an opportunity should be given to the parties, and lastly it directed that the Committee should be only adjudicatory authority and excluded the jurisdiction of the Civil Courts to entertain any suit or application in regard to the disputes relating to selection, appointment, reappointment or cancellation of appointment of Shikshan Sevaks. The question that was raised before the Apex Court was whether the High Court can direct the State Government to create quasi judicial forum and whether creation of such a forum by an executive order, by the State Government, in pursuance of such a direction is valid? The issue regarding exclusion of the jurisdiction of civil courts can be directed by the High Court was also subjudice before the Apex Court. The Apex Court on the basis of the uncontroverted facts concluded that the High Court under Article 226 of the Constitution of India does not have power to create quasi judicial forum nor does

the State Government exercises any executive function for the purpose of creating quasi judicial body. In the present case, we have already concluded that the constitution of the High Power Committee is not a result of the direction of the High Court and the said High Power Committee was constituted by the State Government, on its own, taking into consideration the observations of the High Court in Tulsiwadi's case (supra). The submission of Mr. Grover that the High Power Committee could not have been constituted by the State by executive fiat is also without any merit. The Full Bench in Tulsiwadi's case (supra) considered the provisions of Section 3(K) of the Slum Act which deals with the power of the State Government to issue directions to the SRA. We have also considered the provisions of the said Section. Perusal of the said Section, makes it clear that the State Government is not only authorized to issue directions to the SRA but the State Government is also authorised to suspend execution of any resolution or any order of the Authority which in its opinion, is in contravention of or in excess of the powers conferred by the Slum Act or any other Act for the time being in force, or is likely to lead to abuse or misuse of or to cause waste of the fund of the authority. The Government Resolution dated 15th November, 2007 under which the High Power Committee is constituted by the State Government makes it clear that the High Power Committee consists of the Secretary of the State and other high officials of the Government. The source of the power of the High Power Committee can be traced to the provisions of Section 3(K) of the Slum Act. The Full Bench in Tulsiwadi's case (supra) has not taken away the remedy of the parties to approach the High Court under Article 226 of the Constitution of India. It is only expected that before approaching the High Court under Article 226 of the Constitution of India, the parties should try to resolve their dispute by intervention of the High Power Committee. The object and intention of the High Court as well as the State Government in constituting the High Power Committee seems to be very laudable viz. to minimize the litigation in the High Court and to provide speedy remedy to the parties. In our opinion, the judgment of the Apex Court in The Secretary Sh. A.P.D. Jain Pathshala's case (supra) stands on different footing. The said judgment does cover case like Tulsiwadi (supra).

(Underline supplied)

The decision of the Division Bench in the case of Indira SRA Co-Operative Housing Society Vs. Shivkripa Builders and Developers and Others, , (supra) binds this Court. The submissions made in this petition have been considered and decided by the Division Bench in the said decision. We find no reason to take a different view. All that the State Government has done is that considering the large number of Slum Redevelopment Schemes especially in the City of Mumbai, a mechanism has been evolved for redressal of grievances of slum dwellers in relation to Slum Rehabilitation Schemes. Hence, this is not a fit case to exercise extraordinary jurisdiction under Article 226 of the Constitution of India for quashing the decision of establishing HPC. We find no merit in the petition and the same is rejected.