

(2000) 10 GUJ CK 0101

In the Gujarat High Court

Case No : Special Civil Application No. 537 of 1992

Sardar Patel Nagar Co-op. Development Mandal

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 06-10-2000

Acts Referred:

Citation : (2001) 2 GLR 1048

Hon'ble Judges : P.B. Majmudar, J;B.C. Patel, J

Bench : Division Bench

Advocate : R.N. Shah, for the Appellant; D.P. Joshi, for Patel Advocates for Respondent No. 1, Prashant G. Desai and Harin P. Raval, for the Respondent

Final Decision : Allowed

Judgement

P.B. Majmudar, J.—Petitioner is a Co-Operative Society (hereinafter referred to as the Society) registered under the provisions contained in the Co-Operative Societies Act, and is known as Sardar Patel Nagar Co-Op. Development Mandal. The members of the said Society are the residents of the locality known as Sardar Patel Nagar.

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2. Respondent No.2 in this petition is Ahmedabad Municipal Corporation, - AMC, for brevity hereinafter-, Respondent No.3 is Deputy Estate Officer of AMC, and respondent No.5 is Nest Hotel Pvt. Ltd. By filing this petition, the petitioner has prayed for a direction to the respondents No. 2 and 3 not to grant permission to the respondent No.5 for making use of the said premises other than the purpose for which it is reserved. The petitioner has further prayed for direction against the respondents No.2 and 3 to submit a report indicating whether the respondent No.5 has put up construction in accordance with the provisions of the building byelaws or not, and not to grant permission to use the said premises if it is not constructed as per the building byelaws. It is specifically prayed that unless and until parking space is provided and the illegal constructions / encroachments are

removed from the public road, permission should not be granted.

3. The petitioner has averred that the respondent No.5, by ignoring the provisions of building regulations and more particularly with regard to parking and FSI erected a building in the residential area and Respondent No. 5 wants to use the premises in contravention of the provisions contained in the Bombay Provincial Municipal Corporations Act, 1949 (hereinafter referred to as the BPMC Act) and its building regulations. It is specifically alleged that respondent No.5, in contravention of the building Rules and Regulations, by converting open space which was meant for parking, has covered the same with an oblique motive. The petitioner has contended that the area is situated behind Navrangpura Telephone Exchange, C.G. Road, Ahmedabad and is a predominantly residential locality, as made clear in the Gujarat Town Planning and Urban Development Act (hereafter referred to as the TP Act). A grievance is made by the petitioner that in the area which is meant for residential zone, persons are entitled to erect building for the purpose of residence, and not for hotel or for commercial complex.

4. It is further averred in the petition that the President of the Society is a practising Chartered Accountant since 1959; He was President of the Chartered Accountants Association and General Secretary of Income Tax Appellate Tribunal Bar Association. He was also member of the Managing Committee of Gujarat Chamber of Commerce. He was Chairman of the Textile Committee. At one point of time, he was also a member of the Institute of the Chartered Accountants of India and Member of Central Direct Taxes & Advisory Committee headed by the Finance Member and has rendered services in several public fields. The members of the Association are Doctors, Advocates, Manufacturers and they are occupying the premises since 1947. Respondent No.5 was highly interested in converting the plot to commercial from residential use. It is also averred in the petition that renowned Poet Shri Umashankar Joshi who fought throughout his life against pollution and insisted for better environment, also has a bungalow in the said Society. Members of the Society were aggrieved as the respondent No.5 was erecting the building contrary to the building byelaws. In the petition, it is further pointed out that the Municipal Corporation has allowed the builders to put up construction in contravention of the building byelaws, rules and regulations. An instance has been quoted with regard to a building known as "Klassic Hotel" where the members of the Society made various applications from 25.1.1988 but nothing was done by the Municipal Corporation against the said Hotel and has allowed construction of the building in contravention of the FSI prescribed in the Byelaws as a result of which the Hotel is running its business without providing any parking space. It is averred that the residents of the building are the sufferers. He has also indicated that in Bungalow No. 37 situated in Sardar Patel Nagar, Behind Telephone Exchange, which is in a bye-lane of C.G. Road, unauthorised construction was started and on making inquiries, the petitioner learnt that the respondent No.5 is erecting this unauthorised building. It is averred in the petition that there was a cellar which has been converted into dancing hall. No parking space is provided in the building. Respondent No. 5 has

encroached upon the land for public road, and is using the said space for parking. The said road is of 40 ft. width and if used for the purpose of parking in this fashion, it would cause obstruction to the traffic and would create several problems. Letters were addressed to the AMC and also the respondent No.1 State of Gujarat. Copy of the letter addressed to the Municipal Corporation is annexed with the petition at Annexure "C". Deputy Estate Officer of the Corporation informed by giving a vague reply to the Secretary of the petitioner Society that a plan was approved vide "Raja Chitty" No. 56 dated 12.7.1990 in sub-plot No. 37 of Final Plot No. 2 in TP Scheme No. 20 - Sardar Patel Nagar, Ahmedabad, for constructing a hotel and guest house and that the construction is at present going on. Copy of the said letter is annexed at Annexure "B". In view of the averments made in the petition and the documents annexed with the petition, learned Single Judge, on 28.1.1992, passed an order as under:-

"Respondents No. 2 and 3 are directed to furnish to the petitioner a copy of the approved plan for construction in the Final Plot No. 92 for constructing hotel and guest house, as referred to in the letter of the Estate Officer, Ahmedabad Municipal Corporation dt. 23.8.91, on payment of usual charges immediately. On the petitioner's depositing an amount of Rs.1,000/- (Rupees one thousand only) in this Court, towards charges for preparing the report of the existing construction, the respondents No. 2 and 3 are directed to prepare the report of the existing construction on or before 31.1.1992. Matter is adjourned to 31.1.1992. Direct Service permitted."

5. The report was filed by the Corporation with copies of notices u/s 267 and 260(1) of the BPMC Act and were ordered to be taken on record. It seems that after hearing the learned advocates, on 18.3.1992, learned Single Judge passed an order as under:-

"Mr. Desai, learned advocate appearing on behalf of the Municipal Corporation states that appropriate action would be taken by the Municipal Corporation or on before 16th April 1992. S.O. to 20th April 1992."

6. Prohibitory order issued by the AMC under provisions of section 267 of the BPMC Act is placed on record along with the report. Reading the same it is very clear that without permission, unauthorised construction has been carried out. Plan of the cellar as well as the hollow plinth are annexed and in the map, the portion of the construction which is unauthorised and without permission, has been indicated in Red colour. In the report, it is indicated that the plan was approved on 18.4.1991 and permission was granted on 6.5.1991. As per the plans, in the cellar, parking was to be provided, and there was provision for air-conditioning plant also. In the hollow plinth parking as well as electric sub-station were required to be provided. As the construction which was carried out was not as per the plan, the same was rejected on 25.7.1991. On the third floor, additional construction was carried out which was not permitted. Therefore, notice u/s 260 of the Act was served on 14.8.1991. Later on it was found that the construction carried out was as per the revised plan. It was inspected on

30.11.1991 and Building Use Permission was also granted. Thus, as per the plan, cellar was required to be used for parking and Airconditioning plant room; hollow plinth was required to be used for parking and also for electric sub-station. However, the report clearly indicates that after the permission was granted, in the cellar and in the hollow plinth, unauthorised changes were made and therefore prohibitory order was issued on 2.1.1992 and intimation was also given to the police. Complaint was filed in the Court of Metropolitan Magistrate on 18.1.1992. It is indicated in the report that instead of the ramp for entering parking space, stair case was constructed. In the Air Conditioning Plant room, construction was carried out and partition walls were provided. Construction was carried out and the wooden partition and bricks partition were erected. The entrance was provided towards road. Notice was given u/s 269(1) of the BMC Act.

7. On behalf of the respondent No.5 affidavit is filed. It is contended that initially parking was to be provided in the cellar as well as hollow plinth over and above the airconditioning plant, electric sub-station in cellar and hollow plinth. It is further submitted by Mr. Raval, learned advocate appearing for the respondent No. 5 that the plans were approved and as per the approved plans, if the building commencement certificate and the permission for construction was granted, the work was carried out. It is stated that thereafter there was a revised plan and even today, according to his contention, the building is erected as per the building byelaws. Mr. Raval submitted that there is no contravention of the FSI and there is no encroachment upon the road. In further affidavit, it is submitted by the respondent No.5 that on 2.11.1991 an amount of Rs.5,80,412/- by way of cheque No. 409045 drawn on Syndicate Bank in favour of the Municipal Commissioner, was paid to the Municipal Corporation. It is also contended that on the same date a further sum of Rs.34,560/- was deposited with the Corporation. The said was also paid by cheque. Xerox copy of both the receipts are produced along with the affidavit. It is contended that the amount was deposited for covering of balcony area and parking place. As the amount has been paid, the respondent No.5 is entitled not to provide parking and is entitled to use the parking space for purposes other than parking. It is required to be noted that the sum and substance of the arguments of the learned advocate for the respondent No. 5 is that as the said amount was paid, the construction has been regularised.

No other points are urged by the learned advocate appearing on behalf of the respondent No.5. We have heard at length and considered the arguments advanced by the learned advocates appearing in this matter.

8. On behalf of the Corporation, learned advocate Mr. Desai submitted that the said amount of Rs.5,80,412/- was taken towards deposit as the respondent No. 5 committed default in carrying out the construction and made changes for which notice was issued on 14.8.1991. Respondent No.5 erected construction which was not permitted on the third floor. Thereafter, he carried out the changes and

the building was put as per design of the plans approved and only after receipt of the amount, the revised plan was sanctioned. The amount was taken by the AMC so as to assure that the respondent No. 5 may not commit default but may maintain the building as per the plans so as to see that the Corporation is not required to take any coercive steps. The complete revised plans were produced on 12.11.1991 which were approved on 30.11.1991, that is, only after the respondent No. 5 erected the building as per the revised plans. Thus, the amount was not received by the Corporation for permitting the respondent No. 5 to convert the use of cellar and hollow plinth, as has been contended on behalf of the respondent No.5.

9. Floor Space Index is also provided in clause (22) in Chapter II which reads as under.

"(22) "Floor Space Index" of a plot, building unit or premises shall mean the ratio of the combined gross floor area of storeys including the area of all walls as well as mezzanine floors of a building on a plot, building unit or premises to the total area of the plot, building unit or premises.

Provided that the following shall not be counted towards computation of floor space index:-

- (i) space under a building constructed on stilts (plinth on pillars) and used as a parking space.
- (ii) A basement or a cellar,
 - (a) used for air-conditioning plant room, safe deposit vault of a bank and parking space
 - (b) constructed below residential buildings and to be used as storage space.
- (iii) Electric cabin or an electric sub-station, water pump room garbage shaft, elevators (lifts), stairs, electric meter room.
- (iv) projections, architectural features, chimneys and elevated water tanks.
- (v) Minimum area required as an entrance lobby under these regulations.
- (vi) Ramps leading to cellar or upper floors.
- (vii) Chowks open to sky.
- (viii) Well, borings and tube-wells.

Thus, reading the proviso it is clear that it specifically provides that space under a building constructed on stilts (plinth or pillars) and used as parking place or a basement or cellar used for air conditioning plant, safe deposit vault of a bank and parking place or constructed below residential building, to be used as a storage space and the place meant for such other things shall not be counted towards computation of floor space index. But the shop or the room constructed

for the use of habitation or business purpose is not exempted in calculating the FSI. Similarly, by closing the gallery by means of construction, whatever the nature of construction may be, the FSI would be increased as gross floor area would be increased.

10. So far as parking place is concerned, Chapter XV of the Regulations known as Regulations (Conditions and Restrictions) Controlling the Development of the Area under the TP Scheme provides for the byelaws which are in addition to the existing building byelaws as may be amended from time to time by the Local Authority which includes AMC. It provides that off street parking space for vehicles shall be provided whenever a new building is constructed; when the use of old building is changed to any other use or when new additions are made to the existing building for use mentioned in the table as prescribed in Chapter XV. If a building is constructed for office building, professional consulting rooms, bank and commercial building, restaurant, residential hotels, shops on upper floors, it is necessary to provide parking space of 5.5 mtr X 2.5 mtr for every 100 sq. mtr of floor space or part thereof for parking motor vehicles. It is also necessary to provide for parking space of 2.0 mtr X 0.5 mtr for every 20 sq. mtr or part thereof for parking motor cycles. Similarly, for cycle parking, parking place of 2.0 mtr X 0.5 mtr. is required to be provided for every 10 sq. mtr or part thereof. Thus, in a building consisting of 100 sq. mtr, one has to provide parking as under:-

For motor vehicles 13.75 sq. mtr. For Motor Cycles 05.00 sq. mtr. For Cycles 10.00 sq. mtr Total 28.75 sq. mtr. -----

The above provisions are mandatory provisions. Breach of these provisions is not permissible. So far as FSI is concerned, there is no relaxation. Clause 45.A of Part 1 of the Regulation provides that parking place as required under the TP Scheme or building byelaws shall be provided. Thus, it is mandatory to provide parking space. That is required to be provided considering the FSI.

11. Mr. Rawal, learned counsel submitted that the amount was paid to the Corporation for permitting the respondent No. 5 to make the use of parking space for other purposes. The deposit clearly reveals that it was given by way of security deposit (khatri deposit). There is nothing in the receipt to indicate that the amount was accepted for the purpose of converting the use of parking space for any purpose other than parking. No document is placed on record to show that the amount was recovered by the Corporation for permitting the respondent No. 5 not to provide parking. As indicated, the amount was accepted by way of security deposit in view of the breach committed by the respondent No.5. Thus, there is no merit in the contention raised by Mr. Rawal on behalf of the petitioner. In view of the aforesaid provision indicated with regard to parking, it is the bounden duty of the respondent No. 5 to provide parking and it cannot use the public road for the purpose of parking. Any construction carried out by the respondent No. 5 in the cellar and in the hollow plinth contrary to the plans sanctioned by the Municipal Corporation is illegal and unauthorised, and the

cellar and the hollow plinth cannot be used for any purpose other than parking. Under the circumstances, it is directed that the Corporation (AMC) shall forthwith take appropriate action to see that the respondent No. 5 uses the cellar and the hollow plinth only for the purpose for which there is sanction in the plans, i.e. parking, by removing the unauthorised construction of whatsoever nature in the cellar and hollow plinth. It is further directed that the Corporation shall consider the use of more FSI than permissible as indicated in the reply and shall see that excess FSI is not used and shall see that parking is provided as per the FSI.

12. This petition stands allowed accordingly with cost. Rule made absolute accordingly.

13. The Corporation shall make a report of the action taken within a period of one week from today. For that purpose only, this matter is ordered to be notified on Board on 13/10/2000.

Mr. Dipak M. Sabnani, Managing Director of Nest Hotel Private Limited, respondent No.5, is present in the Court. Mr. Rawal, learned counsel, on his instructions stated that within a period of 15 days, he will put the building as per the sanctioned plans. He further states that he will file affidavit and an undertaking to that effect today. In view of this, the directions given in paragraph 13 of the judgment will not be implemented, but it is directed that if within 15 days from today the unauthorized construction is not removed by the respondent No.5, the respondent Corporation shall at once thereafter remove the unauthorized construction. For reporting, this matter is ordered to be notified on 20th October 2000.