

(2005) 04 BOM CK 0095

In the Bombay High Court

Case No : Writ Petition No. 6055 of 2004

Shriniwas Krishna Suvarna

APPELLANT

Vs

Executive Engineer, Transit Camp Division

RESPONDENT

Date of Decision : 20-04-2005

Acts Referred:

Development Control Regulations for Greater Bombay, 1991 — Regulation 33(10), 33(5)

Maharashtra Housing and Area Development Act, 1976 — Section 66, 66(1)

Citation : (2005) 3 ALLMR 321 : (2006) 2 BomCR 392

Hon'ble Judges : S.P. Kukday, J; F.I. Rebello, J

Bench : Division Bench

Advocate : R.A. Thorat, for the Appellant; G.W. Mattos, A.G.P., for the Respondent

Final Decision : Allowed

Judgement

F.I. Rebello, J.—Rule. By consent, heard forthwith.

2. The Petitioner has a stall on land belonging to MHADA which is identified as CTS No. 258(p). It is his case that prior to 1.1.1995 he was carrying on business in the said stall and considering various notifications issued by the State of Maharashtra, the land on which the stall or structure stands is deemed to have been declared slum area. The stall, it is contended is protected pursuant to the policies framed and declared by the State of Maharashtra, giving protection to the structures in existence prior to 1.1.1995. The further case is that the land belonging to MHADA vests and or is under the management and control of Slum Rehabilitation Authority as constituted under the provisions of the Maharashtra Slum Areas "Improvement, Clearance and Re-development) Act, 1971" (hereinafter shall be referred to as "Act"). Reference is then made to notification dated 16.5.1996 by which protection is given to residential structures which existed prior to 1.1.1995. Pursuant to that, the Development Control Regulations, 1991 was amended. The Slum Redevelopment authority it is pointed

out, has also been given status of Planning authority. It is then averred that the word premises is also defined to include structures located on the land belonging to Government, B.M.C. prior to 1.1.1995. By notification of 14.5.1998 protection to residential premises is also extended to commercial premises in existence prior to 1.1.1995. It is the case of the Petitioners that the stall is covered under the notification dated 14.5.1998. Reference is then made to the notification of 9.3.2000 which lists out the requirements to be considered while considering eligibility of the structure for rehabilitation .It. is then set out that by virtue of notification dated 11.7.2001 petitioner is entitled for issuance of photo pass. Referring to Clause 3 it is pointed out, that in respect of the structures in existence prior to 1.1.1995, it is not necessary that the land should be notified as slum area under the Act. All that is required is the existence of norms prescribed for declaring the area as a slum is sufficient.

3. The Respondents it is averred addressed a letter to the Petitioner, allotting alternate side to enable the petitioner to shift his structure. After that allotment, the Petitioner has constructed a stall where the Petitioner is carrying on business. Reference is then made to notification dated 10.7.2002 in the matter of revised policy for issuance of photo pass for the protection of structures prior to 1.1.1995. It is then pointed out that the transit camp of Goregaon is totally demolished by MHADA for the purpose of redevelopment under the slum redevelopment scheme as per report submitted by the Executive Engineer Transit Camp. The report sets out that the stalls in existence on the land should be redeveloped under the S.R.D. scheme. Reference is then made to various averments. It is then pointed out that a notice was served on the Petitioner u/s 66 of the MHADA Act alleging that the stall is erected illegally and the same is required to be removed for the purpose of carrying out redevelopment scheme.

From the pleadings it further appears that MHADA filed a complaint before the competent authority. The Petitioner herein has filed his reply. Evidence was led and thereafter the competent authority was pleased to allow the complaint filed by MHADA. Against that an appeal was preferred which has been dismissed and consequently the present petition.

4. On behalf of the Respondents, one Mr. Sayed Zuber of Mumbai Housing Board has filed an affidavit. Reference is made to the order of the competent authority and appeal preferred and which has been dismissed. It is set out that the Petitioner has illegally and unlawfully erected the structure on the plot of land which is now known as Bimbisar Nagar. The respondents has followed due procedure of law as contemplated u/s 66 of the MHADA Act by filing the case before the competent authority. It is pointed out that the Petitioner is seeking to rely on Government Resolution dated 16.5.21995, 29.5.2001 and 23.8.2001. The said resolutions it is pointed out are applicable and are conferring protection to those structures in existence prior to 1995 and in respect whereon rehabilitation scheme is being implemented under the Maharashtra Slum Areas (Improvement, Clearance and Rehabilitation) Act, 1901 which hereinafter shall be known as the

"Slum Act". The land where the stall existed is neither declared as a slum under the Slum Act nor is the area developed under the slum Rehabilitation scheme. It is pointed out that the slum redevelopment Division of the Mumbai Housing and Area Development Board carries out mass housing project on land belonging to MHADA as well as development of land belonging to MHADA. This development is in consonance with D.C. Regulation 33(5). F.S.I. utilised is 1.2. If the development was under Slum Rehabilitation Scheme then F.S.I. is 2.5 in terms of D.C. Regulation 33(10). It is also set out that before commencing proceedings before the competent authority, the Chief Officer of Mumbai Building Repairs and Reconstruction Board had issued a letter dated 22.12.2003 to the Petitioner inter alia stating therein that the said Board would allot a commercial tenement to the Petitioner at the rate of Rs. 3,000/- per sq. ft. This letter was issued to the Petitioner without prejudice to the rights and contentions of MHADA as regards its stance qua the Petitioner. The Petitioner was called upon to vacate his residence within seven days which Petitioner failed to do so. It is pointed out that no case has been made by the Petitioner for interference by this court and contention of the Petitioner that Section 66 is not applicable, is misplaced. For all the aforesaid reasons, it is pointed out that Petition be dismissed.

It may be mentioned that this petition is being heard along with other petitions in respect of the structures situated in the land area and wherein issues raised are also same or similar. The counsel for all the parties were heard. This court thought it proper to pass the judgment in the present petition as this was the petition which was extensively argued before this court. The judgement in this case would cover the other petitions as questions of law and fact are similar and issues involved are the same.

6. At the hearing of this Petition, on behalf of the Petitioner their learned counsel formulated the the points based upon which the order of the competent authority and Appellate authority are sought to be challenged. They may be summarised as under :

(a) Section 66 of the Maharashtra Housing and Area Development Act, 1976 (MHADA) is only applicable in case of authority premises. In the instant case, the construction put up by the Petitioner is not on authority premises and consequently neither the competent authority nor the appellate authority had jurisdiction to entertain the complaint. It is therefore, submitted that the impugned order is liable to be set aside.

(b) It is submitted that considering Government G.R. dated 16.5.1996, 8.11.2002 and 29.5.2001 and other G.R.s the Petitioner's structure is protected and consequently Petitioner cannot be evicted without being rehabilitated or given alternative premises. In these circumstances, the action of the competent authority/appellate authority is without jurisdiction.

(c) Considering the evidence on record, the structure has not been properly identified and in these circumstances, the impugned orders are liable to be

quashed and set aside.

(d) Reliance is then placed on Regulation 33(10) of the Development Control Regulation. Definition of Slum means those censused or declared and notified in the past or hereinafter under the Slums Act. Reliance is then placed on Sub Clause (B) which sets out that censused shall mean those slums located on the lards belonging to Government, any undertaking of Government or Brihan Mumbai Municipal Corporation and incorporated in the records of the land owning authority as having been censused in 1976, 1960 or 1985 or prior to 1st January, 1995, It is therefore, submitted placing reliance on the Regulations that the Petitioners are entitled to be protected and cannot be evicted from the said land.

(e) Additional ground was taken by one of the Petitioner that in respect of similarly situated persons like Petitioners, the respondent authority has given them alternative structures free of cost and that being the case, the authority cannot now contend that in so far as present petitioners are concerned, that they are not entitled to such relief.

On behalf of the Respondent their learned counsel contends that Section 66 of the Act is very much applicable. A reading of Development Control Regulation and Annexure to Regulation 33(10) would show that it is only applicable to a slum. In the instant case there is no notification of the area as a slum and consequently that contention is also not available. Lastly it is submitted that the averments of the petitioner pleading discrimination, does not disclose the true facts. Even otherwise, it is different scheme altogether known as Walmiki Ambedkar Awas Yojana and therefore, that cannot apply in so far as the petitioners are concerned.

7. We may firstly deal with the first contention as to whether the "authority premises" include the structure of the Petitioner. Section 2(4) of the Act defines authority premises to mean any premises belonging to or vested in the authority or taken on lease by the authority or entrusted or placed at the disposal of the authority for management or use for the purpose of Act. By the explanation, it is set out that it includes any premises taken by persons from the authority under the hire purchase agreement during the period any payments are to be made by such person to the Authority under such agreement or until such agreement is duly terminated. Section 2(27) of the Act defines premises to mean any land or building or part of a building and includes gardens etc. as set out therein. An occupier is defined u/s 2(25) and includes any person who is liable to pay to the owner the damages for use and occupation of any land or building. u/s 66(1)(b), if any person is in unauthorised occupation of any part of premises it is open to the competent authority by following the procedure set out therein, to direct vacation of the premises in unauthorised occupation. A reading therefore, of the various sections would indicate that premises include land. Therefore, authority premises would include land as occupier of land is entitled to pay damages to the authority for occupation of the land. It would therefore, be clear that Section 66(b) can apply in the case of any unauthorised occupation of authority

premises. In the instant case, land belongs to authority. The occupant is in unauthorised occupation of land having put up a structure thereon and is in occupation without any authority and would be entitled to pay damages for use and occupation of the land. We therefore, find no difficulty in holding that the notice u/s 66 could have been issued. The findings therefore, by the competent authority and by the appellate authority that they have jurisdiction in our opinion, cannot be faulted with. Whatever may be the reasons, and findings given by those authorities, considering that we have held that the premises are authority premises, consequently the notice u/s 66(1)(b) could have been served on the Petitioner. The action of the authorities is within jurisdiction. The first contention must therefore, be rejected.

8. The second contention is based on the applicability of G.R.'s. We may first deal with some factual aspect. There is no dispute that the land has not been developed under any SRA Scheme. The SRA Scheme can only be commenced if the land is notified as slum area under the Act and sufficient number of persons occupying the structure on the slum area come forward for the purpose of development or owner himself with support of sufficient number of persons residing thereon seeks to develop the land. In the instant case, the scheme is not SRA scheme. The respondents have clarified that F.S.I. of 1.25 used is for a mass housing scheme whereas F.S.I. for S. R.A. Scheme is 2.5. At any rate, it is not a scheme for a censused or notified Slum.

We then come to the issue as to whether the respondents are entitled to be protected by virtue of the various G.R.s issued from time to time. The first G. R. was issued on 16.5.1996. By that G.R. the Government granted sanction for rehabilitation to hutment dwellers in Mumbai who were residing and whose hutments have been existing and whose name appears in the voter's list of 1976, 1986 and 1985, as well as those hutment dwellers who came to reside after 1985 and whose names appear in the voter's list dated 1.1.1995 and continued to stay at the same address. Thereafter various other G.R.s came to be issued. By G.R. dated 14.5.1998 in respect of hutment dwellers who were eligible under the SRA scheme, a criteria was fixed by the Government. By this G.R. hut holders who were using their huts for commercial and other similar purposes and prior to 1.1.1995 were held eligible under the Slum Rehabilitation Scheme. The next G.R. is dated 9.5.2000. That G.R. provided for carrying out of survey and census of the huts and hut dwellers existing on 1.1.1995 and issuing them identity cards. The next G.R. is dated 11.7.2001. The same is in the matter of revised policy for issuance of photo passes. The scheme known as Photo Pass-2000 is made applicable to those slums on lands belonging to the ownership of the State Government as set out therein which have been declared as slums. The scheme was not to apply to huts on the roads and footpaths. It was also not to apply to huts if twenty five in number or less irrespective of them being together or scattered. We then have the G.R. dated 10.7.2003 which is the revised policy for rehabilitation of eligible hutment dwellers, by giving them on lease lands under their occupation or by giving alternative plot. The G. R. of

10.7.2002 further provides for basic amenities with which we are really not concerned.

A conjoint reading of these various Government resolutions would indicate that the Petitioner herein and others who are parties before the court in various other petitions factually had their structures scattered over the land which is being developed and their hutments numbering twenty five, would not be eligible in terms of the Government resolution for the benefit of a slum rehabilitation scheme if it was being implemented. No facts have been established to show that the Petitioner and the other Petitioners are covered by any of the G.R.s. The Respondents are also not implementing any S.R.A. Scheme. The second contention must be rejected.

9. It was then contended that considering the evidence on record the structures have not been properly identified and in these circumstances, the impugned orders are liable to be quashed and set aside. Each of the Petitioners were served with notice based on the complaint. They preferred appeal against the eviction from the structures. The Petitioners therefore, were aware in respect of which structure the notice was issued. It cannot therefore, be said that there is no identification of the structure. Even otherwise, this is purely a finding of fact. Considering these are findings of fact, this court would not interfere with the same in the exercise of its extra ordinary jurisdiction.

10. The next submission is based placing reliance on Regulation 33(10) read with the Annexure to contend that for the purpose of the regulation, slums shall mean those censused or declared and notified in the past or hereafter under the Slums Act. Appendix Para II (viii) sets out that Censused shall mean those slums located on lands belonging to Government, any undertaking of Government, or Brihan Mumbai Municipal Corporation and incorporated in the records of the land owning authority as having been censused in 1976, 1980 or 1985 or prior to 1st January, 1995. It will be clear from this that what is required is that it must be a slum and in terms of Para II(1) must be censused or declared or notified in the past or hereinafter under the Slum Act. It also includes area/pavement stretches hereafter notified as Slum Rehabilitation Areas. There is no material placed before us to show that at any point of time this area has been notified under the provisions of the Slums Act. There is an elaborate procedure set out under the Act for notifying the slum area by following due procedure. In the instant case, there is no notification. Once that be the case, it will be difficult to accept the argument canvassed on behalf of the Petitioner herein and other Petitioners, that they are entitled to benefit of protection and or rehabilitation. That contention must be rejected.

11. The last ground raised though not raised in this petition but in another petition is that the respondent authority is discriminating between the petitioners on the one hand and other similarly situated persons on the other. In answer to that on behalf of the authority their learned counsel points out that in the other case there is a scheme known as Walmiki Ambedkar Awas Yojana which is

entirely different scheme and the Petitioners herein are not governed by the said scheme. It will therefore, be not possible to accept the contention as urged on behalf of the Petitioner that respondents have practiced discrimination. It is only when two persons are similarly situated and in law entitled to the benefit which is given to one but denied to the other, will the plea of hostile discrimination or arbitrariness on the part of the authorities be considered. In the instant case, that is not so. Once that be the position, it is not possible to accept the said contention.

12. Though the Petitioner has not made put a case for relief on behalf of the respondent authority, it was pointed out that earlier the authority had made an offer to this petitioner and other petitioners that they are willing to accommodate them in the authority premises, if petitioners are willing to pay the cost at the price of Rs. 3000/- per sq. ft. That option was to be exercised within a particular time frame. None of the petitioners exercised that option. It was therefore, pointed out that as the petitioners did not exercise that option, it will not be possible to grant that benefit or premises to the petitioners herein. We asked the learned counsel for the petitioner, if the Petitioners are still ready to accept the offer whether premises are available. The learned counsel for the Respondent on court's query, and on instructions makes a statement that the premises are still available. If that be the case, if the Petitioners within eight weeks from today, apply to the Chief Officer, Mumbai Building Repairs and Reconstruction Board and express their desire to take the premises on payment, at the rate of Rs. 3,000/- per sq. " ft. then M.B.R. & R. Board to allot premises to the eligible petitioners.

On such application being made, the authorities to make allotment within reasonable time thereafter, on the allottees paying the price as fixed by the Board and within the time fixed. On the allotment being made, the allottees to shift to the allotted premises and surrender the hutments in their possession. This will be a pre-condition for occupying the premises if allotted by the Respondents. The applications made, will be disposed of within four weeks on receipt of such representation. It is also brought to our attention that there are only about 12 to 15 shops and if each of the Petitioner has to be allotted a shop, then the shops will have to be divided. The Petitioners at the time of the option must so indicate that they are willing to accept the shop as divided. If all the 25 persons are found eligible and apply, then lots will be drawn in their presence and they will be allotted in terms of the lots.

It is further made clear that if any of the original persons on the authority premises as have transferred the premises to any other person, they will not be entitled to exercise the option as a matter of right. They will however, make a representation to M.D.R. & R. Board within eight weeks from today and considering the facts and circumstances. and as others are being rehabilitated, the M.B.R. & R. Board may also consider the case of such persons who are on the premises through the original persons are no longer in occupation of the premises.

13. The Petitioners have also contended that there is another scheme namely development of the amenity building. On behalf of the respondents, the learned counsel contends that the Petitioners are not entitled to allotment, as a matter of right. If the Petitioners apply and are found eligible, they will also be considered according to law on the same terms under which allotment is made to others. This however, will not mean that time will be extended to them for exercising the option as set out earlier.

14. Needless to say that the protection earlier granted will continue till allotment is made to the eligible petitioners or their applications are rejected, in which event order of eviction based on the order of the Appellate Authority will follow.

15. Rule made partly absolute accordingly. There shall be no order as to costs.