
(2003) 12 BOM CK 0037

In the Bombay High Court

Case No : Public Interest Litigation No. 102 of 2001

Vijay Krishna Kumbhar

APPELLANT

Vs

Collector and Others

RESPONDENT

Date of Decision : 17-12-2003

Acts Referred:

Bombay Provincial Municipal Corporations Act, 1949 — Section 79
Constitution of India, 1950 — Article 14

Citation : AIR 2004 Bom 129 : (2004) 2 ALLMR 31 : (2004) 5 BomCR 904 :
(2004) 2 MhLj 636

Hon'ble Judges : C.K. Thakker, C.J.;Abhay S. Oka, J

Bench : Division Bench

Advocate : G.S. Godbole, for the Appellant; P.M. Patil, A.G.P. for No. 1, Virendra Tulzapurkar, R.G. Ketkar, for Nos. 2, 4, 7 and 9 and S.S. Hardikar, for Nos. 5 and 6 and A.K. Baheti and S.J. Rairkar for No. 8, for the Respondent

Judgement

C.K. Thakker, C.J.—Rule. Mr. P.M. Patil, learned Assistant Government Pleader, appears and waives service of notice of rule on behalf of respondent No. 1. Dr. Virendra Tulzapurkar, Senior Advocate, instructed by Mr. R.G. Ketkar, appears and waives service of notice of rule on behalf of respondent Nos. 2, 4, 7 and 9. Mr. S.S. Hardikar, learned counsel, appears and waives service of notice of rule on behalf of respondent Nos. 5 and 6. Mr. A.K. Baheti, learned counsel, appears and waives service of notice of rule on behalf of respondent No. 8.

2. In the facts and circumstances and with the consent of learned counsel, the matter was taken up for final hearing forthwith.

3. This petition is filed by the petitioner claiming to be pro bono public for an appropriate writ, direction or order ordering Pune Municipal Corporation, respondent No, 2 herein, to cancel sham and bogus lease executed by the Corporation in favour of respondent No. 6 by directing the Corporation to issue tenders by calling competitive bids from all interested persons for granting lease for Sports Complex. Further reliefs have also been sought.

4. The case of the petitioner is that he is a citizen of India and Journalist by profession. He is Editor of weekly news publication "Bimb Pratibimb". He is a resident of Pune City. He claims to be believing in protecting general public interest and in raising issues concerning society. The petitioner considers it to be his duty to prevent malpractices by public authorities for personal benefits and at the cost of public exchequer. According to him, since the Officials of respondent No. 2-Corporation flouted various rules and regulations for committing illegal acts and granting undue benefit to respondent Nos. 5 and 6, he was constrained to approach this Court. The petitioner has stated that he has no personal interest in the subject matter of the litigation.

5. According to the petitioner, there was a plot near Parvati Nala in the city of Pune which was vacant. Since the land did not belong to any one, it belonged to the Government. According to the petitioner, respondent No. 8, who is an Architect moved the Corporation for sanctioning of a plan for a building on the plot without the signature of the owner and without specifying the area. Respondent No. 5 who was ex-President of the Standing Committee and Councillor of respondent No. 2-Corporation put the said proposal to develop the plot at the cost of Corporation fund. The Assistant Engineer of the Corporation, without verifying the ownership as well as area, sanctioned the plans for construction of Sports Complex on 28th October, 1999. A letter dated May 29, 2000 (Exh. d) shows that the proposal of Sports Complex was sanctioned without verifying ownership and exact area of the plot. Since an architect had prepared a plan, the letter was sent to the Building Department. A letter dated 9th June, 2000 by the Deputy Engineer (Exh. E) reveals that the proposal had been rejected on several grounds. Surprisingly, however, the Corporation was again moved under the pressure of respondent No. 5, who insisted to get the plans sanctioned. A resolution No. 1982 was passed by the Standing Committee of the second respondent on 5th December, 2000 to accept the proposal made by respondent No. 5. The General Body accepted the recommendation. Finally, a resolution was passed by the General Body of respondent No. 1 and a lease deed was executed in favour of Shiv Shakti Pratishthan, respondent No. 6 granting Sports Complex On lease for thirty years at the monthly rent of Rs. 26,000/-.

6. The petitioner stated that respondent No. 6 is running commercial activities by charging rates as high as other commercial club for gymnasium, swimming pool and other activities. It is also the assertion of the petitioner that the construction cost was made from municipal funds by violating rules of construction and an amount of Rs. 2.75 crores was invested (Rs. 70 lakhs construction + Rs. 2.05 Crores-land). Though the petitioner vide his letter dated 8th August, 2001 demanded documents and made enquiries as to the action taken by the Corporation, the latter did not give reply which constrained the petitioner to approach this Court. The petitioner submitted that the entire action of the respondent-Corporation and its officers is illegal, contrary to law and deserves to be set aside. It was also submitted that the land belongs to the Government and Corporation could not have made construction over it nor it could have executed

lease deed in favour of respondent No. 6. that too without inviting tenders and considering competitive bids. The action is, therefore, mala fide and has been taken only with a view to extend undue and undeserving benefits to ex-President of Standing Committee and sitting Councillor of the Corporation. The action hence, requires to be quashed and set aside by directing the respondent-Corporation to take appropriate proceedings in accordance with law.

7. The petition was instituted on 3rd October, 2001. Pursuant to the notice issued by the Court on November 7, 2001, respondents appeared. Affidavits and further affidavits were filed and the matter was called out for hearing. Since all the parties were present and there was exchange of affidavits, with the consent of parties, we had heard the matter finally.

8. In an affidavit filed by the State Government, respondent No. 1 herein, the stand of the State Government is that the land in question belongs to the Government. It is not transferred to Pune Municipal Corporation for any specific purpose. It was then stated : "The Pune Municipal Corporation has, therefore, no authority to allow the construction on the said land. The explanation in this regard has, therefore, been called from the Pune Municipal Corporation vide this office letter dated 18-10-2002. The same is still awaited." The said letter-cum-notice dated 18th October, 2002 is also annexed to the reply.

9. An Affidavit is filed on behalf of Corporation and its Officers (Respondent Nos. 2, 4, 7 and 9) by the City Engineer of the Corporation, inter alia, contending that Ambil Odha/Nala is situate within the limits of Pune Municipal Corporation. The Revenue and Finance Department of the State of Maharashtra vide an order dated 11th July, 1932 handed over the nala to the Corporation for maintenance. According to the deponent, there were several encroachments around the nala and illegal hutments were constructed. In order to ensure that there is no further encroachment and construction of illegal hutments. Garden Department of the Corporation addressed a letter dated 11th March, 1992 to Collector, Pune, requesting him to issue "No Objection Certificate" for developing nala garden and jogging track. The Collector, Pune, vide his reply dated 21st May, 1992 issued "No Objection Certificate", subject to the condition that garden should be developed in such a way as to ensure free flow of water and the nala is not obstructed. It was also stated that the Corporation should not carry out any temporary or permanent construction in the stream of the nala which would affect free flow of nala. Pursuant to the said "No Objection", the Corporation started development of mala garden and jogging track. For the said purpose. Corporation appointed respondent No. 8-Architect, for preparation of building proposal for construction of gymnasium and swimming pool, keeping in mind the provisions of Section 44 of the Maharashtra Regional and Town Planning Act, 1966. Being the local authority, it was exempted from making an application in writing for permission to carry out development on any public land. The proposal prepared by respondent No. 8 was then submitted to the then City Engineer, respondent No. 7, who sanctioned it on 28th October, 1999. The Assistant

Engineer, in pursuance of the approval by City Engineer, proceeded with the construction work. Around December, 2000, construction work was completed. The Standing Committee vide its Resolution No. 1982 dated 5th December, 2000 recommended the General Body to give Sports Complex (gymnasium and swimming pool) on lease for a period of thirty years to respondent No. 6 on the terms and conditions as also annual rent to be determined by City Engineer. The General Body accepted the recommendation. Accordingly, Resolution No. 405 was passed by the General Body and annual rent of Rs. 3,15,000/- (Rs. 1,65,000/-Gymnasium Rs. 1,50,000/-swimming pool) was fixed and an agreement was entered into between the Corporation and respondent No. 6.

10. It was also stated by the deponent that the petition lacks bona fide. The construction of Sports Complex and Cultural Centre had already been completed long back. Lease deed had been executed in favour of Respondent No. 6. Moreover, the action of construction of Sports Complex had been taken with a view to ensure that there is no further encroachment and construction of illegal hutments. The Corporation undertook the project of development of nala after taking prior permission of the Collector. The action had been taken in larger interest and the petitioner cannot make grievance against such an action of public authority. It is denied that Officers of Corporation have unduly benefitted respondent Nos. 5 and 6 as alleged by the petitioners. The allegations were baseless, reckless and without any foundation whatsoever. It was, therefore, prayed that the petition deserves to be dismissed.

11. Respondent No. 8, in his counter, submitted that he had been unnecessarily arraigned as respondent as he has nothing to do with execution of lease deed in favour of respondent No. 6. He is merely an Architect doing his business in the name and style of "Anand Upalekar and Associates" and is in the list of Architects maintained by the Corporation. He, therefore, submitted that he has been unnecessarily and vexatious dragged into the litigation by the petitioner and compensatory costs may be awarded to him.

12. Respondent No. 5 filed three affidavits. In an affidavit dated 25th June, 2002, he contended that the petition was not in the nature of public interest litigation but was filed by the petitioner with ulterior motives, keeping in mind elections of the Corporation in which 5th respondent was elected and was a sitting Councillor for many years. The action has been taken for personal gain and for cheap publicity and for damaging public image of respondent No. 5 so that he may not get re-elected. Respondent No. 5 also stated that as a Corporator from the ward in which the nala situated, he made proposal for development work in the larger interest of residents of Pune and for benefits of citizens. By doing so, he had not done anything wrong. All actions have been taken by him in larger interest and the petitioner was making unnecessary hue and cry about construction of sports Complex which was legally done by the Corporation. It was stated that a Resolution was passed by the Standing Committee which was approved by the General Body of Corporation. He also stated that construction of Gymnasium-

cum-Sports Complex was legal as the construction was not carried out on the flow of nala but on adjacent land which was in possession of Municipal Corporation. According to him, he had never insisted for flouting of Development Control Regulations or doing anything illegal at any time. He never pressurised any one for any purpose whatsoever. The Resolution to construct Sports Complex was passed by the Corporation for the benefit of the residents of the locality and such an act can never be termed illegal or unlawful. He denied of having managed intellectually or otherwise to get allotted Sports Complex on lease for thirty years from the Corporation at nominal rent to an organisation headed by him. He also denied that commercial activities were being carried on by respondent No. 6 for personal benefits from the Complex.

13. Regarding respondent No. 6 (in whose favour lease deed executed for thirty years by the Corporation), the deponent stated that it is a Public Trust registered under the Bombay Public Trust Act, 1950, and he is the Works President of the said trust but not in the capacity of Councillor or Corporator. He denied that he is doing profiteering business in the Complex. According to him, the rates charged by Corporation by way of rent from respondent No. 6 are much higher than any other earlier lease of other swimming pools. He also stated that the complex had not been demanded by anybody for about three months after it was inaugurated. The complex was given on lease as per rates prescribed in ready reckoned and even in earlier lease deeds of other swimming pools, tenders were never invited, All the properties in past were leased without inviting tenders. He also repeated what was stated by the Corporation that with a view to ensure maintenance of the plot and prevention of unauthorised encroachment and illegal structure, beautiful nala garden has been developed by the Corporation which was in larger public interest.

14. The deponent also refuted the allegations that substantial amount was spent by the Corporation for the construction of Sports Complex. It was stated that tenders were invited for construction of Sports Complex and lowest tender of Rs. 48,66,978.60 was accepted. It was not true that an amount of Rs. seventy lakhs was spent. Public fund has thus not been diverted for personal benefits as alleged by the petitioner. It was, therefore, submitted that the petition deserves to be dismissed.

15. In a rejoinder, the petitioner denied the averments made in the counter-affidavits filed by contesting respondents and reiterated that the action of the respondents was illegal and contrary to law. It was also stated that tenders ought to have been invited by observing the provisions of Section 79 of the Bombay Provincial Municipal Corporations Act, 1949. According to the petitioner, the Sports Complex had been constructed in "green belt" wherein no such construction was permissible.

16. In further affidavit of respondent No. 5, he denied having misused his position as Chairman or even as a Member of Standing Committee of respondent No. 1-Corporation. According to the said respondent, had the petitioner really

wanted to stop alleged illegal activities of respondents, the petitioner would have filed the petition much earlier before completion of work as the work was not completed within a day or two and being Journalist, he was well aware of sanctioning and starting of construction work of Sports Complex. Respondent No. 5 has also stated that it is a practice followed by respondent No. 2-Corporation to give properties of Corporation on rent as decided by the City Engineer on the basis of ratable value of property.

17. A sur-rejoinder is filed to the said affidavit by the petitioner stating that respondent No. 5 was the Chairman of the Standing Committee and he had not intentionally disclosed the period during which he was the Chairman, The fifth respondent had thereby misused his political position in public office and the action deserves to be interfered with.

18. In an additional affidavit, respondent No. 5 stated that he was not the Chairman of the Standing Committee of the Corporation when the resolution of construction of Sports Complex as well as Cultural Centre was passed. He also stated that he was not the member of the Standing Committee on December 5, 2000 when the Resolution recommending lease for 30 years in favour of respondent No. 6 was passed by the Standing Committee. He stated "I say that I have not taken part in the meeting of the Standing Committee dated December 5, 2000. I say that the copy of my alleged letter dated December 5, 2000 is not available with me. I am unable to produce the same." A prayer was, therefore, made to dismiss the petition.

19. We have heard the learned counsel for the parties.

20. The learned counsel for the petitioner contended that all actions taken by Respondent Corporation and its officers are illegal, contrary to law and inconsistent with the provisions of the Act. It was also contended that no construction could have been made on the land by the Corporation as admittedly the land did not belong to Corporation. In any case, when construction was made and substantial amount from public exchequer was spent, it was incumbent on Respondent Corporation to call for tenders and on the basis of the competitive rates by bidders, the Sports Complex should have been given on lease. In the instant case, respondent No. 5 as a sitting Corporator and member of Standing Committee took undue advantage and pressurised the General Body to pass a resolution so that lease deed may be executed at a throwaway rate in favour of respondent No. 6 in which respondent No. 5 is the President. The first respondent readily obliged respondent No. 5 by accepting the recommendation and approved the resolution passed by the Standing Committee and executed lease deed for thirty years in favour of respondent No. 6. Such an action could never have been taken and it deserves to be set aside by issuing appropriate directions to respondents to take appropriate action in accordance with law.

21. On behalf of the respondent-Corporation, Dr. Tulzapurkar, Senior Advocate, supported the action of the Corporation. It was contended that from the record it

is amply clear that the land was virtually lying vacant. It was nala land. There was unauthorised encroachment over the said land. Illegal structures had been made by hutment dwellers and increasing day by day. It was the Corporation who took initiative and requested the Government to allot the said piece of land so as to ensure that there is no further encroachment and illegal construction. The Government realised that the proposal submitted and prayer made by the Corporation was reasonable and accordingly land was given to the Corporation on certain terms and conditions. According to the counsel, if there is non-observance of terms and conditions on which the land was transferred by way of allotment in favour of the Corporation, it is a matter between the Corporation and the State Government and the petitioner has no concern whatsoever. It was also stated that construction was made in accordance with law and such construction is not on Government land but land belonged to the Corporation. According to the Corporation, there is no violation or breach of terms and conditions on which the land was given as flow of nala has remained unobstructed. Regarding construction, it was stated that lowest tender of respondent No. 5 was accepted and the construction was carried out. There was, therefore, no illegality in allotting work to respondent No. 5. As to execution of lease in favour of respondent No. 6, the counsel submitted that considering the report of City Engineer on the basis of prevailing rates, the amount was fixed. It was the consistent practice of the Corporation and the petitioner cannot make grievance against such consistent practice followed in the instant case also. It was, therefore, submitted that the action is legal and valid and the petition deserves to be dismissed.

22. On behalf of respondent No. 5, it was contended that the petition has been filed by the petitioner for cheap publicity and to damage the image and reputation of respondent No. 5. It had been filed so that respondent No. 5 does not get re-elected. Unfortunately, however, he had failed in such attempt and respondent No. 5 has been re-elected in subsequent election as well. The counsel denied that respondent No. 5 has taken undue advantage of his position as being Councillor of the Corporation and a member of the Standing Committee. A recommendation was made by the Standing Committee after considering the matter in its entirety and once a resolution was passed by General Body, there was no question of taking undue advantage by respondent No. 5. The action of giving Sports Complex for thirty years on the basis of valuation prepared by the City Engineer can never be termed arbitrary or illegal and the petition should be dismissed with exemplary costs.

23. In the facts and circumstances, in our opinion, the petition deserves to be allowed. From what has been stated by the petitioner in the petition as also from the record, in our opinion, there does not seem to be any dispute that the land belongs to Government. It is also clear from the fact that it was the respondent-Corporation who prayed to the Government to grant the land. The proposal was accepted by the Government and the land was given to the Corporation for the purpose of developing garden. This is further clear from the affidavit in reply filed

by City Survey Officer No. 1 Pune wherein it was stated that the land belongs to Government and was not transferred to respondent-Corporation. It was also stated that the Corporation had no authority, to allow construction on the said land. According to the State Government, construction of Sports Complex had been made on the land and hence a notice had been issued on 18th October, 2002 alleging therein that the construction could not have been made. The Corporation, hence, was asked to show cause as to under what authority such construction has been made by the Corporation.

24. It is thus clear that though the respondent-Corporation had no right to make construction, in violation of the terms and conditions, such construction had been made. It is stated in the affidavit on behalf of the State Government that it had not received reply so far. The said affidavit was filed on 27th January, 2003. An appropriate decision, therefore, will be taken by the State Government after the reply will be filed by the respondent-Corporation and we leave the matter there.

25. It has also come on record that initially the proposal for construction of Sports Complex was rejected which is clear from a communication by Deputy Engineer of Respondent No. 2 Corporation vide communication dated 9th June, 2000 (Exh. E). A subsequent letter dated 7th July, 2000 (Exh. F) by the Deputy City Engineer, Building Construction Department, however, shows that respondent No. 5 was insisting to get the Resolution passed. A request was accordingly made to pass appropriate orders to sanction the proposal of the building.

26. It is further clear that it was respondent No. 5 who had addressed a letter on 5th December, 2000 to get the lease deed executed for a period of thirty years in favour of respondent No. 6. Though in the further affidavit in reply, respondent No. 5 has stated that he did not have a copy of the letter said to have been written by him in December, 2000, and hence was not in a position to produce the same, it has come on record that the Standing Committee passed a resolution No. 1982 on 5th December, 2000 i.e. on the same day on which the proposal was made by respondent No. 5 to grant lease deed in favour of respondent No. 6. We, therefore, asked the learned counsel for respondent No. 2 Corporation to produce the relevant documents and accordingly xerox copy of the letter dated 5th December, 2000 addressed by respondent No. 5 as also Resolution No. 1982 passed by the Standing Committee on the same day have been produced on record. From both the documents, it is clear that respondent No. 5 had written a letter on 5th December, 2000 and on the same day Standing Committee had passed a Resolution granting lease for thirty years. It is not in dispute that on the basis of the said resolution passed by Standing Committee, General Body vide its resolution dated 26th December, 2000 unanimously approved the recommendation of the Standing Committee and Sports Centre was given on lease for a period of thirty years to respondent No. 6 on the conditions and rates to be determined by City Engineer.

27. It is not in dispute that before granting lease in favour of respondent No. 6,

neither tenders were invited, nor competitive bids called nor such rates taken into account and all the persons interested in getting such lease were not informed by the Corporation. It is the case of the respondent-Corporation that it is the consistent practice of the Corporation to execute lease on the basis of valuation report prepared by City Engineer and in the instant case also, the same consistent pass practice has been followed.

28. To us, however, the contention of the learned counsel for the petitioner is well-founded. Even if there is a practice of not inviting public bids, since it is not in consonance with the provisions of the Act, it cannot be approved. In this connection it may be profitable to refer to the relevant provisions of the Act. Chapter VIII of the Act deals with Municipal Property. Whereas Sections 76 to 78 provide for acquisition of property, Sections 79 to 81 with Disposal of Property. Section 79 enacts that with respect to disposal of property belonging to Corporation (other than property vesting in the Corporation exclusively for the purposes of Transport undertaking), the provisions of the said section would apply, Clause (c) deals with cases of lease, sale, let out on hire or otherwise conveying any property, movable or immovable belonging to the Corporation. Clause (d) relates to right in immovable property of the Corporation to be sold, leased or otherwise transferred. Keeping in view the above provisions in the light of the settled legal position, it would not be proper for the Corporation to execute a lease in favour of respondent No. 6 for a period of 30 years at a time and that too, in pursuance of a prayer made by respondent No. 5, a sitting Corporator.

29. In this connection, we may refer to recent observations made by one of us (C. K. Thakker, C. J.) in Writ Petition No. 5202 of 2003 decided on August 22, 2003 (reported in 2003 AIHC 4735 Pune Ganesh Festival Janotsav v. Pune Municipal Corporation. There, certain places were allotted to persons/institutions in connection with Ganesh Utsav for few days. Tenders were not invited and no competitive bids were before the Corporation. When the action was challenged, it was contended that it was not for very long period. Since the action was for few days, and several actions had been taken and the festival was about to over, the Court did not interfere with the action. Considering the larger-interest of the Corporation and public exchequer, however, one of us (C.K. Thakker, C. J.) observed :

"Before parting with the matter, we may observe that the allotment of the above places is not for a day or two. It is for important festivals and for few days. Though the provisions of Section 79(c) of the Act do not apply to such allotment, it would be appropriate if respondent No. 1-Corporation and the authorities under the Act would consider to frame rules/guidelines/norms for allotment of such places by inviting tenders, issuing advertisements" or by adopting any other appropriate mode, method or manner so that there are competitive bids before the Corporation, and on the basis of such bids, the Corporation may be able to take proper decision in accordance with law. Such process will also ensure openness and transparency. As the action has already been taken this year and

we are of the view that the same is not unlawful, we are not interfering with it. We, however, hope that the Corporation may consider laying down proper rules/guidelines/norms for further."

30. The law is well settled on the point and it is not necessary to refer to other judgments, though the learned counsel for the petitioner rightly relied upon several judgments including the following leading decisions on the point.

(i) Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, ,

(ii) Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another, .

31. For the foregoing reasons, in our opinion, the petition deserves to be allowed and is accordingly allowed. The action of respondent No. 2 Corporation of granting lease in favour of respondent No. 6 for a period of 30 years is hereby quashed and set aside. It is, however, clarified that it is open to respondent No. 2-Corporation to take appropriate action in accordance with law, in the light of the observations made hereinabove.

32. Rule is made absolute accordingly to the extent indicated above. In the facts and circumstances, however, there shall be no order as to costs.

Parties be given copies of this order duly authenticated by the Associate/Sheristedar/ Private Secretary.