SUPREME COURT OF INDIA

Indore Municipal Corp.

Vs.

Hemalata

C.A.No.5031 of 2005

(R.V.Raveendran Aftab Alam JJ.)

24.02.2010

JUDGEMENT

R.V.Raveendran, J.

1. The respondents are the owners of property bearing khasra No. 92/2 and 93 of Palasiahana (within the Municipal limits of Indore City) measuring about 0.441 hectares or 3601.4 sq.m. Mohan Lal Khimati and three others, who were originally the owners, made an application for grant of permission for development of the said land by construction of a residential-cum-commercial building, to the Town & Country Planning Department, Indore Division. The Joint Director, Town and Country Planning, by order dated 7.2.2005, granted permission in regard to the building plan for residential-cum-commercial purposes subject to approval of the said building plans by the Indore Municipal Corporation (`Corporation', for short) subject to the following conditions:-

> "(i) The land can be used for residential-cum-commercial use, if Municipal Corporation approves the building plans.
>
> (ii) The ground coverage area (covered area) will be 33% of the land area; and the floor area ratio will be 1.5.
>
> (iii) The height of the building will not be more than 12.0 M.
>
> (iv) Space for parking should be provided as per the ratio specified in Land Development Rules with reference to the floor area of construction.
>
> (v) Open Margin Space should be provided as per development Rules, that is 4.5M on the front (Western) side, 3 M on the east, 6 meters on the north and on the south (Mahatma Gandhi Road).

Thereafter, on 21.2.1995 the Municipal Corporation granted permission for commercial use by construction and development of the said land as per the building maps."

2. In pursuance of it, development and construction work was commenced on 30.5.1997. By communication dated 31.5.1997, the Joint Director, Town and Country Planning, amended condition No. (v) of the permission letter dated 7.2.1995 by confirming that the Department had no objection for the construction being made with the front side of the building being on the M.G. Road, (that is southern side), and consequently leave a marginal open space of only 3 M. on the western side. The said communication also mentioned that having regard to Rule 56(6) of Land Development Rules and Table 5 thereunder, for buildings of a height of more than 10 M. (but less than 15 M.), the open space on both sides and at the rear should be 3 M. and therefore, the department had no objection for modifying the approval of the building plan by keeping the margin space on the western side, (that is on the Fiftysix Shops Road) as 3 M. The Municipal Corporation by its letter dated 7.6.1997 granted permission to proceed with the construction work as per Dakhla No. 613 dated 13.5.1997 making it clear that there will be no construction upto a depth of 75 feet from M.G. Road front. When the building construction reached plinth level, a notice dated 10.6.1998 was given by the owners for inspection of building. Accordingly, a joint inspection was conducted by the Joint Director, Town & Country Planning and the Building Officer of the Municipal Corporation on 13.11.1998. Their report in regard to such inspection submitted to the Municipal Corporation and the Director of Town & Country Planning confirmed that there was no objection for the setback area on the western side (on the side of Fiftysix Shops Road) being reduced to 3 M, in accordance with Rule 56(6). The report also recorded that the margin open space (setbacks) were as under:-

S.No.	Direction	As per sanction	On the spot
1	On the North	6.0 Mtrs.	6.0 Mtrs.
2	On the South	23.0 Mtrs. (23+12)	35.0 Mtrs.
3	On the West	3.0 Mtrs.	3.0 Mtrs.
4	On the East	3.0 Mtrs.	3.05 Mtrs.

3. On 5.3.1999, the respondents notified the Municipal Coporation that the structure was completed and requested for a service certificate to enable them to apply for service connections. At that stage, the Building Officer issued a show cause notice dated 13.4.1999 and 24.4.1999 to the respondents alleging the following irregularities/violations in construction:

"(i) the margin area on the western side (Fiftysix Shops Road) ought to have been 4.5 M. as the front elevation was stated to be towards the side of the said Fiftysix Shops Road. But by suppressing this fact, the respondents had obtained approval for 3 M.

setback instead of 4.5 M. setback, from the Town & Country Planning Department, contrary to the provisions of the Madhya Pradesh Bhumi Vikas Rules, 1984 (`Rules' or `Land Development Rules', for short).

(ii) What was sanctioned was a construction area of 4373.39 sq.M., service area of 2998.79 sq.M. and balcony area of 465 sq.M. As the land area was 3601.7 sq.M. out of which 45.72 sq.M. were left for road widening, the respondents were entitled to coverage of 33% of 3555.98 sq.m. which meant that the area that could be constructed in each floor was only 1173.43 sq.m. and for a permissible FAR of 1.5, respondents were entitled to construct in all 5333.97 sq.M. But the total constructed area including service area and covered balcony was 7837.18 sq.m. and thereby the FAR was increased from 1.5 to 2.20 contrary to the rules.

The respondents gave detailed replies dated 19.4.1999 and 29.4.1999 denying any irregularity in construction. Between 27.10.1999 and 30.10.1999, the completed structure consisting of the basement, lower ground floor, upper ground floor, first floor and second floor, was inspected by a Joint Inspection Team consisting of four officers of the Municipal Corporation (the City Engineer/Building Officer, Zonal Officer, Sub-Engineer and Architect) and four officers of the Town & Country Planning Department (Joint Director, Assistant Director, Senior and Junior Surveyor-cum-Land Measurers). On such inspection, they recorded the area to be constructed as per the sanctioned plan and the area actually constructed by the respondents. It was found that the actual construction did not exceed the sanctioned area. The particulars recorded in the joint report in that behalf are extracted below:

Sl.No. Floor Constructed area Actual constructed Remarks as per sanctioned area on the spot building map

1. Parking and (Basement) Utilities 2335 sqm --- 2335 sqm

2. Lower 1172.33 sqm 1093.84 sqm Less than sanctioned Ground

3. Upper 1172.66 sqm 1104.97 sqm Less than sanctioned Ground

4. First 1172.78 sqm 1136.47 sqm Less than sanctioned Floor 6

5. Second 1172.78 sqm 1136.47 sqm Less than sanctioned Floor

4. The respondent also submitted a complaint dated 4.2.2000 to the State Government stating that the second appellant was biased and even though the construction was in accordance with the sanctioned plan under building permissions, the Building Officer had issued show cause notice dated 13.4.1999 to harass them and cause them loss. Acting on the said complaint, the State Government by communication dated 4.2.2000, suggested to the Municipal Corporation that the issue may be sorted out by posting some other Building

Officer. Thereafter, the Building Officer (second appellant) passed an order dated 11.4.2000, directing as follows:

> "(i) The respondent shall not have shutters of any shops in their building opening on to the Fiftysix Shops Road and the respondents shall construct a wall towards the said Fiftysix Shops Road with only two openings for pedestrians and shall not use their building with any doorways towards the Fiftysix Shops Road.
>
> (ii) The respondent shall demolish 647.64 sq.m. of excess area of construction as only 1815.16 sq.m. of the constructed area could be considered as the service area.
>
> (iii) The sanction of Map (Dokhala No.825) by the Municipal Corporation permitting respondents to construct shops on all floors, was violative of the land use provision, and therefore the respondent shall construct the residential units on the second floor.
>
> (iv) The respondents shall amend the plans incorporating the above and get a sanction of the amended plans, after demolition of the excess area."

5. The said order was challenged by the respondents in a writ petition before the High Court. A learned Single Judge of the High Court by order dated 26.4.2001 allowed the writ petition and quashed the show cause notice dated 13.4.1999 and the order dated 11.4.2000. He held that the two inspection reports by the officers of the Municipal Corporation and Town and Country Planning Department established that there were no violations and the construction was in accordance with the sanctioned plan and there was no justification to issue such show-cause notice or pass an order directing demolition. The appeal filed by the Municipal Corporation was dismissed by a Division Bench by the impugned judgment dated 22.11.2004.

6. The said judgment is under challenge in this appeal. The appellant raised the following four contentions before us:

> "(i) The sanction of the development/construction plan for commercial use as against residential-cum-commercial use was contrary to the Rules and the direction in the order dated 11.4.2000 that the premises should be converted to residential-cum-commercial use was justified.
>
> (ii) The direction to close the openings and construct a compound wall on the Western side, (that is facing the Fiftysix Shops Road) was justified as the respondents had left a set back of only three meters on the western side and therefore it could not be treated as the frontage but only a side of the building.
>
> (iii) As the construction made by the respondents was in excess of the permissible FAR, the excess area of 647.64 sq.m. had to be demolished.

(iv) The interpretation of the High Court in regard to section 299 of the Madhya Pradesh Municipal Corporation Act, 1956 (`Act' for short) was erroneous.
Re : Contention (i)"

7. The appellants contend that the use of the premises exclusively for commercial purpose would violate the Land Development Rules, which require the land use to be in conformity with the development plan. It was contended that the initial sanction by the Town and Country Planning Department was for construction of residential-cum-commercial building;

> "that though the Municipal Corporation had sanctioned a plan for construction for commercial purposes on 21.2.1995, renewed on 13.5.1997, at the time of renewal dated 16.4.1998, it was made clear that the permission was for residential-cum-commercial purposes; and that in deviation thereof, the respondents had constructed a commercial building instead of residential-cum-commercial building."

8. The respondents submitted that this alleged irregularity was not the subject-matter of the show-cause notice; that they never disputed the fact that the sanction was for residential-cum-commercial use; and that as the actual completion having been held up on account of the show-cause notice and the order dated 11.4.2000 and as occupancy certificate is yet to be issued, the question of the building being put to any objectionable user does not arise. It was submitted that only if the respondents failed to use the building in accordance with the sanctioned/permitted user, there can be a cause to take action against them.

9. The fact that the sanction is for a residential-cum-commercial purpose, is not disputed by the respondents. They have never claimed that they will use the building contrary to the permissible user. Even before the completion of the construction and obtaining of occupation certificate, without issuing a show-cause notice alleging such misuse, an order has been issued alleging a violation of the permitted user. There is no occasion for the second appellant to assume that the respondent is likely to violate the sanctioned user. After the issue of occupancy certificate, if there is any violation of sanctioned use, it is always open to the Municipal Corporation to take appropriate action in accordance with law at that stage. The finding in the order dated 11.4.2000 that there has 10 been a violation of the Rules in this behalf, is unwarranted and at all events premature.

Re : Contention (ii)

10. The Town Planning Department granted the planning permission requiring the respondents to leave margin open space of 3 m. on the Eastern and Western sides, 6 m. on the Northern side and open space as required by the rules on the southern side vide the Planning Permission dated 7.2.1995 as amended by order dated 31.5.1997. Rule 56 of the Rules deals with exterior open spaces. Sub-rules (1), (2) and (3) deal with residential buildings. Sub-rule (5) provides that the open spaces mentioned in sub-rules (1) to (3) shall apply to residential buildings, up to a height of 10 m. The building of the respondents is a residential-cum- commercial building of the height of 12 m. Therefore, the provisions of sub-

rules (1) to (3) of Rule 56 will not apply. Sub-rule (6) of Rule 56 provides that in respect of all buildings of a height of above 10 m., the open spaces on the sides and the rear, shall be as given in Table 5 and spaces shall be governed by Rule 62(a), depending upon the height of the building. Table 5 requires that in regard to buildings of a height of more than 10 m. (but less than 15 m.) the margin open space to be left around the building, except on the front side, shall be 3 m. It is evident from the order dated 31.5.1997 of the Joint Director that it had sanctioned a 11 marginal open space on the western side as 3 m. As the Southern side will be the front of the building (facing M.G. Road) and the western side will be one of the sides of the building, the margin on that side should be only 3 m. It is thus seen that the margin open space required to be left on the Western side both under the rules and as per the sanction granted by the Town and Country Planning Department and the Municipal Corporation was only 3 m. The assumption of the appellants that if any doors are opened on the western side, the western side will become the front side of the building and in that event, there should be 4.5 m. setback on that side, is without basis. Similarly the assumption of the appellants that if the western side should be treated as one of the sides of the building and not the front, there cannot be any doorways on that side is also equally baseless.

11. The property has roads on two sides that is, on the south and the west. The sanctioning authority had accepted that the frontage is to the South and in fact required that there should not be any construction to a depth of 75 ft. on the southern side, which has been complied with. The rules do not contain any provision that the entrances or doors should be only on the front side or that there cannot be any entrances on other sides.

> "In fact, Rule 14 provides that no permission shall be required for opening any doors on any side. Therefore, the insistence by the Municipal 12 Corporation that the open margin space on the western side should be 4.5 m. nor require that no door or shutter on the western side of the building, is not in pursuance of the Rules and in fact, unreasonable. It follows therefore that the order dated 11.4.2000 directing the respondents to close all doors on the western side and to construct a compound wall on the western side, is wholly unauthorised, arbitrary and unreasonable."
> Re : Contention (iii)

12. The extent of construction is a question of fact. The learned Single Judge and Division Bench after examining the records have concluded that there was no excess construction. Therefore, this Court re-examining the said question of fact does not arise. However, as elaborate arguments have been addressed with reference to the documents, we will briefly refer to them. The sanctioned plan enables and authorises the respondents to construct a building with a plinth area of 1172.78 sq.m. The plan also sanctions service areas. The sanctioned building plan permits construction of about 1173 sq.m in each floor, that is the lower ground floor, upper ground floor, first floor and second floor. It is also not in dispute that the actual constructed area is only 1093.84 sq.m., 1104.97 sq.m., 1136.47 sq.m. and 1136.47 sq.m. in the said four floors. Thus the actual constructed area in each of the floors is less than the permissible and sanctioned area. Sanctioned building plan also permits

construction 13 of a basement with parking and utilities measuring 2335 sq.m. and the actual constructed area is the same without any excess.

13. A joint inspection report dated 1.11.1999 by four senior officers of the Municipal Corporation and four officers of the Directorate of Town & Country Planning confirms that the area constructed is less than what was sanctioned and that there is no violation. In view of it, the allegation of the Building Officer in the impugned notice and order that there was 647.64 sq.m of excess construction, is without basis.

14. When the Department of Town and Country Planning and the Municipal Corporation which are the sanctioning authorities, have sanctioned construction of a building with a basement of 2335 sq.m. and upper floors of 4690.55 sq.m. and the construction is less than the sanctioned area, the question of appellants holding that there was excess construction, does not arise. Further, having regard to the applicable bye- laws, the service area and open balcony area will have to be excluded.

> "The sanctioned plan shows the total area of the plot as 3601.74 sq.m. and as per the permissible FAR, 5402.61 sq.m. could be constructed. The total area constructed is only 4471.75 sq.m and even if the balcony area is included, it will be less than the area permissible as per the FAR. As far as coverage area is concerned, 33% of 3601.74 sq.m. will be 1188.57 sq.m. Even if 45.72 sq.m. left for road-widening is deducted and site area 14 is taken as 3556 sq.m., 33% coverage will be 1173.48 sq.m. The sanctioned plan permits a ground floor coverage of 1173 sq.m. Therefore, neither the land coverage percentage is exceeded, nor the permitted FAR is exceeded, nor the sanctioned construction area is exceeded. The third ground also therefore does not have any merit. The learned Single Judge and the Division Bench considered these aspects and rightly rejected the contention of the appellants."

15. Learned counsel for the appellants submitted that the appellants had appointed a private agency to measure and submit the total constructed area and as per their report, the actual constructed area had exceeded the permissible constructed area and they sought permission to produce the said report as additional evidence and the Division Bench erroneously refused to accept the same. As many as eight officers, that is four officers of the Municipal Corporation and four officers of the Town and Country Planning had held detailed joint inspection on 27.10.1999 to 30.10.1999 wherein the actual constructed area was recorded in detail.

> "The inspecting officers included the Building Officer of the Municipal Corporation and the Joint Director of the Town & Country Planning. It is of some interest to note that the Building Officer (second appellant) who prepared the said inspection report after four days of extensive measurement, is the same officer who passed the impugned order dated 15 11.4.2000. The appellants never contended that the said joint inspection report was erroneous. When the said report has been acted upon and accepted, there is no justification for the appellants to get a private report during the

pendency of appeal before the High Court to contend that the actual constructed area was marginally more than the sanctioned constructed area. Obviously, the appellants cannot say that the inspection report prepared by the second appellant showing the actual constructed area is to be ignored. The Division Bench of the High Court rightly rejected the request of the appellant to produce the said private report as additional evidence."

Re : Contention (iv)

16. The last contention relates to the power of Municipal Commission under section 299 of the Madhya Pradesh Municipal Corporation Act, 1956 (`Act' for short). The High Court has held that the power to direct modification of the sanctioned plan can be used by the Commissioner before the work has been commenced and the directions given on 11.4.2000, almost at the completion of the construction of the building, was contrary to the provisions of section 299 of the Act.

17. The appellants contended that section 299 enabled the Commissioner to direct modification of the sanctioned plan at any time 16 before actual completion and issue of completion certificate. The respondents on the other hand submitted that section 299 consists of two parts and that both parts contemplate the Commissioner acting before the work is commenced. It is submitted that the first part of section 299 enables the Commissioner to revoke the permission or direct modifications before the work has commenced and that the second part of the section enables the Commissioner to direct that the work shall not be proceeded with unless and until all questions connected with the respective location of the building and street has been decided to its satisfaction. It was further submitted that the first part of the section clearly states that any revocation should be before the work has commenced; that the section also implies that the power under the second part should be exercised before the commencement of the work, as it is related to the location of the building and the street; and that if the dispute is not in regard to the location of the building or the street, the question of exercising power under second part of section 299 does not arise.

"According to them, once a building has been sanctioned and the work has been commenced, after identifying the location and street, the Commissioner has no power to revoke or modify the sanction under section 299 of the Act, though he may have such power under some other provision, for other reasons. It is further submitted that where a sanction is given by the Department of Town and Country Planning, the 17 Commissioner of the Corporation or a Building Officer of the Corporation cannot revoke or modify it. It is unnecessary to examine the scope of section 299 of the Act in this case as it does not arise for our consideration."

18. The respondents have alleged that some officers of the Municipal Corporation have tried to prevent them from completing and using their building at the behest of some businessmen on the Fifty Six Shops Road, whose business is likely to adversely affected by the

completion and functioning of shops in their building. The appellants have denied any malafides or bias and stated that the officers of the Corporation were only doing their duty to implement the municipal rules and regulations. We do not find it necessary to examine or record any finding in this regard, for disposal of this appeal.

19. We find that the appellants have not made out any case to interfere with the concurrent findings of the learned Single Judge and the Division Bench. The appeal is therefore dismissed.