

SUPREME COURT OF INDIA

Anjuman E-Shiate Ali

Vs.

Gulmohar Area Societies Welfare Group

C.A.No.6216-6217 of 2019

(Mohan M. Shantanagoudar and R.Subhash Reddy,JJ.,)

17.04.2020

JUDGMENT

R.Subhash Reddy.J.,

1. Both these civil appeals arise out of a common judgment dated 19.07.2017, passed by the High Court of Judicature at Bombay, in writ petition Nos. 2476 of 2015 and 1130 of 2017, as such, they are heard together and disposed of by this common Order. The said writ petitions are filed by way of Public Interest Litigation, for protecting two plots which are the subject matter of the writ petition, originally left towards open spaces, in the layout, approved in the year 1967.

2. The writ petition No. 2476 of 2015, was filed by four petitioners. Petitioner No. 1, is a Trust, registered under the Bombay Public Trust Act, 1950 petitioner No.2 is an Architect, involved in the planning, design and maintenance of public open spaces in the City of Mumbai, petitioner No.3 is a filmmaker and petitioner No.4 is an NGO. So far as the second petition is concerned, petitioner Nos. 2, 3 and 4 were common as in the earlier petition. Petitioner No.1 is a Co-operative Housing Society. The subject matter of the 2015 writ petition is a plot of land, ad-measuring 2,0 sq. meters (2500 square yards), forming part of plot No.6, CTS No. 29 of Survey No.287 situated on 9th Wireless Road, JVPD Scheme, Juhu, whereas the subject matter of the 2017 writ petition, is a plot of land admeasuring 1687.18 sq. yards, forming part of old plot No.3, CTS No.196-A, North-South, 10th Road, JVPD Scheme, Juhu, Mumbai.

3. For the purpose of disposal of these appeals, we refer to the parties, as arrayed in writ petition No. 1130 of 2017.

4. The erstwhile Maharashtra Housing Board (MHB), now Maharashtra Housing and Area Development Authority, (MHADA), framed a scheme covering total land area of 5,80,000/- square yards, under Bombay Housing Board Act, 1948. The said Scheme was called as JVPD Scheme.

5. The 4th respondent-Trust, representing interest of Dawoodi Bohra Community, made a request to the Housing Commissioner, to allot land, in JVPD Scheme. The then Maharashtra Housing Board allotted four plots, bearing plot Nos. 1, 3, 5 and 6 in the said

Scheme, totally ad-measuring 46,850 sq. yards, for allotment to the individuals and housing societies. For dividing the said plots bearing Nos. 1,3,5 and 6, the 4th respondent, through its Architect, submitted a layout plan for approval by the then Bombay Municipal Corporation (now Municipal Corporation of Greater Mumbai) (MCGM). Bombay Municipal Corporation has sanctioned the layout, in which, an area ad-measuring 1687 sq.yards in plot No.3 and an area of 2500 sq.yards, in plot No.6, were shown for the purpose of garden/open space. It is not in dispute the remaining plots in the sanctioned layout, were allotted to individuals and housing societies and such plots are already utilized by making constructions thereon. So far as plot No.6/11 is concerned, there were earlier proceedings in writ petition Nos.1964 of 2007 and 2151 of 2009. Initially, the said plot was allotted by the State Government to one Parasmani Co-operative Housing Society and thereafter on 15.02.2007, the possession of the said plot was given to the 4th respondent-Anjuman E-Shiate Ali (appellant no.1 herein) (for short, 'Anjuman Trust'), a Public Trust. In the said writ petition, there was a settlement between the parties and both the petitions came to be disposed of, in accordance with the consent terms, by order dated 10.11.2014. One of the petitioners, i.e., "Save Open Spaces" (one of the respondents herein) approached the High Court, seeking review of the Order, by filing review petitions. The said review petitions are disposed of, leaving open the issue as to whether such plots can be utilized for construction or not and by further observing that petitioners in review petitions are not bound by the Order in writ petitions. When the appellants were taking steps to use the said plot for making construction, the writ petitioners approached High Court in 2015 by way of a petition, claiming various reliefs inter alia for a declaration that the said plot forms part of mandatory open space in the layout and no construction can be permitted on such plot. So far as plot bearing No.3/14 is concerned, MHADA had granted license for beautification and maintenance of the garden to the 1st petitioner-Society (respondent no.1 herein). When the 4th respondent- Anjuman Trust, approached the Chief Executive Officer (CEO) of MHADA (2nd respondent), for registration of Co-operative Society, same was opposed by petitioner No.1. The Chief Officer, MHB, vide Order dated 24.07.2013, rejected the claim of Anjuman Trust. Aggrieved by the Order passed by the Chief Officer, MHB, appeal was preferred before CEO and Vice President of MHADA, which appeal was opposed by petitioner No.1, on merits as well as on the ground of limitation. The CEO and Vice President, overruling the objections of petitioner No.1, had passed an Order dated 21.03.2017, directing lease of sub-plot No.3/14, in favour of beneficiaries, chosen by Anjuman Trust, for the purpose of construction. At that stage, 2nd writ petition was filed in the year 2017, questioning the orders passed by the CEO and Vice President of MHADA.

6. Primarily, it was the case of the writ petitioners before the High Court that, as these two plots were shown as open spaces/garden in the sanctioned layout, in the year 1967, as such, they cannot be used for constructions. It was alleged that the Anjuman Trust, taking advantage of development plan submitted in 1999 by MHADA, in which the area covered by these two plots also, was shown as residential area, was trying to make constructions. It was further alleged that the 2nd respondent, in collusion with the Anjuman Trust, has allotted the said plots to its nominees. It was pleaded on behalf of the writ petitioners that the usage of the area, as residential purpose, in the development plan of 1999, has nothing to do with the reservations shown in the approved layout of 1967. It was pleaded that as per the Development Control Rules for Greater Bombay, 1967, 15 per cent of the area was to be shown as open space, as such these two plots were shown/ reserved for open

space. The writ petitioners have also questioned the authority of 2nd respondent for passing any Order, on the application filed by the 4th respondent, for granting lease in favour of its nominees.

7. The relief sought in the writ petitions was opposed, mainly on the ground that in view of the development plan prepared in the year 1999 by MHADA, requisite area was already shown towards open spaces, as such, it is not open to look into earlier documents. It was the specific case of 4th respondent, that in the 1999 development plan, as entire area covered by plot No.3 and plot No.6 was shown as residential area, the sub-plot nos. 14 and 11 in these plots, which were shown earlier as reserved for open spaces/garden, can very well be used for making constructions. It was the case of the 4th respondent that open area which is shown in the 1999 development plan, works out to 24.63% of the total area and the same was in accordance with New Development Control Regulations of 1991.

8. The relief sought in the writ petition was opposed by the State Government as well as MHADA, on the ground that as the said sub-divided plots were shown as residential, in the development plan of 1999, there is no impediment for making constructions on these two plots.

9. The Division Bench of the High Court, by considering rival claims of the parties, referring to relevant provisions of Development Control Rules (DCRs), and the provisions of Municipal Corporation Act, has held that these two plots were shown as reserved for garden purpose in the approved layout, in the year 1967, as such, same cannot be used for constructions. It is further held that, while preparing the development plan for entire JVPD scheme in the year 1999, the details of internal layouts, as sanctioned by the BMC, were not shown. Further it is held that, the usage, as mentioned for residential area in the development plan, cannot be understood to mean that the open spaces/garden, as approved in layout of 1967, can be used for constructions. The High Court has also recorded a finding that the 2nd respondent has grossly erred in setting aside the decision of predecessor and directed the Chief Architect to withdraw the revised plans, submitted by MHADA to MCGM, vide Order dated 21.03.2017. Precisely, the High Court has observed that the 2nd respondent had committed error in mixing the issue of reservation, as provided in the development plan and the open space/garden, which was required to be left mandatorily, as per 1967 DCR and 1991 DCR. With the aforesaid findings, the High Court has allowed the writ petitions, and quashed the Order dated 21.03.2017, passed by the 2nd respondent-MHADA and declared that the aforesaid two plots are required to be maintained as open spaces, as per the layout sanctioned in proceedings No. BMC/MCGM/1967 and further declared that no construction activity can be permitted on the aforesaid plots. Consequently, the lease deed executed by 2nd respondent-MHADA, in favour of 5th respondent- Society, was also quashed.

10. We have heard Sri Vikas Singh, learned senior counsel appearing for the appellants; Sri Shiraz P. Rustomjee, learned senior counsel appearing for the respondent nos.1-4; Mr. Ashish Wad, learned counsel appearing on behalf of Municipal Corporation of Greater Mumbai; and Mr. Sanjay Jain, learned Additional Solicitor General appearing on behalf of Maharashtra Housing & Area Development Authority.

11. Having heard the learned counsels on both sides, we have perused the impugned order and other material placed on record.

12. It is contended by learned senior counsel, appearing for the appellants that the obligation to reserve the open space/recreation ground (RG), is on the owner of JVPD Scheme i.e. MHADA and not on appellant no. 1-Anjuman Trust. The appellant no.1's Architect, while liaising with MCGM left two sub-plots i.e. 3/14 and 6/11 temporarily because of MHADA's deficiency in reserving 15% of JVPD Scheme as open space/garden, as per the 1967 DCR.

13. It is submitted that when the layout plan was prepared for the entire area of more than 5,80,000 square yards as per Regulation 23 of 1991 DCR, open spaces shown in the approved layout of 1967, were not shown as open spaces, inasmuch as the area covered by the two plots in question was earmarked as residential area and as such, there cannot be any hindrance for making constructions on the land in question. It is further submitted that on account of failure on the part of the then MHB/MHADA, to prepare layout for sub-plots as per 1967 DCR, appellant No.1 was constrained to prepare the private layout plan for the four big plots at the insistence of BMC and was compelled to leave 10% open space in such layout as a stop gap arrangement. As the obligation to leave/reserve open space in the entire area of JVPD Scheme is that of MHADA, there is no reason or justification for preventing constructions on the plots in question. It is further submitted that about 25% of the land is already shown for open spaces in the development Plan as per 1991 DCR and the High Court has committed error in recording a finding that the earlier two plots are to be continued as open spaces/garden spaces.

14. On the other hand, learned counsel appearing for respondent Nos. 1-4/ writ petitioners, has contended that the approved layout of 1967, is binding on all the parties. It is submitted that the request of Anjuman-E Shiate-Ali (Anjuman Trust) for allotment of plots was accepted by the then Maharashtra Housing Board, on the ground that Anjuman Trust should obtain the necessary sanction of layout/sub-divided plots, for plot Nos. 1, 3, 5 and 6 from the MCGM. It is submitted that having had the benefit of sub-division and utilization of all the plots for the purpose of construction, it is not open for the appellants to plead that, the two plots reserved for open spaces/garden, can also be used for construction. It is submitted that the development Plan as per the 1991 DCR, broadly indicates the usage of land in various zones, as such, the same is no reason to claim for making constructions in the smaller plots/sub-divided plots, which are left as open space/garden in the approved layout. It is submitted that under the Scheme of the Act and Rules/Regulations made thereunder, there is no concept as temporary layout, as claimed by the appellants.

15. It is submitted that the sub-plot Nos. 3/14 and 6/11 were offered voluntarily in the layout plan and the same were legally mandated to be kept as open space/garden by MCGM, as per Development Control Regulation 39(a)(ii) of 1967. Further it is submitted that the obligation to obtain layout, as contemplated under Section 302 of Mumbai Municipal Corporation Act, 1888 ('MMC Act') is not restricted in its application to the owner of the land alone and, in fact, it applies to every person who intends to sell, use any land or permit the same to be used for building purposes or divide the land into building plots. It is submitted that Anjuman Trust is squarely covered by the ambit of the aforesaid

Section. It is submitted that the development Plan of 1999 does not overtake the 1967 layout, which is approved by the Competent Authority, sub-dividing the big plots into smaller residential sites.

16. Sri Sanjay Jain, learned Additional Solicitor General appearing MHADA, has submitted that in view of the subsequent development plan of entire JVPD area, covering an extent of more than 580000 sq. yards of land, by which the sites in question were shown as residential sites, there is no impediment for making constructions on such land. It is submitted that the High Court has committed error in directing the said plots to be continued as open spaces/garden, as shown in the layout of 1967.

17. Having regard to contentions advanced by learned counsels on both sides, the only issue which is required to be considered is whether the two sub-plots bearing Nos. 3/14 and 6/11, which are shown as open spaces/garden in the approved layout of 1967, can be allowed to be utilized for constructions, in view of the subsequent development plan prepared by MHADA.

18. The Anjuman Trust, at first instance, had approached the erstwhile MHB (presently MHADA) for allotment of plots, for the purpose of individual allottees and Co-operative Societies. On such request, an extent of 46850 sq. yards of land was allotted to the Anjuman Trust, which is a part of larger JVPD Scheme. The Regulation No. 39 of 1967 DCR, reads as under:

"39. Layouts or Sub-divisions.-

(a) Layouts or sub-division in residential and commercial zones;

(i) When the land under development ad-measures 3,000 sq. yds. or more the owner of the land shall submit a proper layout or sub-division of his entire independent holding.

(ii) In any such layout or sub-division 15 per cent of the entire holding area shall be reserved for a recreational space which shall be as far as practicable in one place.

(iii) No such recreational space shall admeasure less than 450 sq. yds.

(iv) The minimum dimension of such recreational space shall in no case be less than 25 feet and if the average width of such recreational space is less than 80 feet the length thereof shall not exceed 2% times the average width."

19. For dividing the total land allotted for the use of Dawoodi Bohra Community, covered by plot Nos. 1, 3, 5 and 6, admeasuring 46850 sq. yards, the Architect of the appellants has prepared the layout and submitted it for sanction to the Municipal Corporation. In such layout, an area ad-measuring 1687 sq. yards in plot No.3 and the area of 2500 sq. yards in plot No.6 were shown as open spaces/garden. Since then, the said two plots were kept open for being used for garden purpose only. Subsequently, MHADA has prepared a development plan for the entire JVPD scheme covering more than 5,80,0 sq. yards. The

crux of the appellants' case is that in such development plan, the area covered by these two small plots, which are shown as open spaces/garden in the approved layout, was shown as residential area, as such, they are entitled to make constructions in such two plots also.

20. As rightly held by the High Court, we are also of the view that the two plots, which are shown as open spaces/garden, in the approved layout, cannot be allowed to be used for the purpose of construction. A large area of 46,850 sq. yards was allotted for the purpose of allotting small plots to the members of Dawoodi Bohra Community. The entire area of 46,850 sq. yards was covered by four big plots, bearing nos. 1, 3, 5 and 6. For utilizing such large area, by dividing the same into smaller plots, the Architect of the Anjuman Trust has prepared layout and submitted to competent authority, showing these two small plots as open spaces/garden. It is not in dispute, such layout is approved and all the plots, except these two plots, which are left towards open space/garden were utilized for construction. Having had the benefit of such approved layout, and after making constructions in all the plots, except these two plots, which are left towards open space/garden, the appellants cannot claim that they are entitled to make constructions, based on development plan prepared by MHADA, for the entire JVPD Scheme, which covers more than 5,80,000 sq. yards. It is the case of the appellants that such layout of 1967 was prepared as a temporary measure. There is no such concept as temporary layout in the Scheme of the MMC Act and Regulations made thereunder.

21. During the relevant time, MMC Act, 1888 (Bombay Act No.3 of 1888) was in force. To divide the land into complete plots, statutory approvals were required for the layout as per Section 302 and 302-A of the said Act. As such, the open spaces, which were left towards open space and garden in the approved layout were in conformity with the Regulation No. 39 of 1967 DCR and Sections 302 and 302A of MMC Act.

22. The development plan which is prepared by MHADA for entire area of more than 5,80,000 sq. yards, indicates broadly the usages in different zones. It is well known that such development plans are prepared by showing various zones such as residential, commercial, industrial etc. Merely because in such development plan prepared, in the area shown for residential purpose, authorities have not indicated the open spaces/garden, which were already left in the approved layout in such residential area, appellants cannot claim the benefit of making constructions in the plots which were left towards open space/garden. It is fairly well settled that the open spaces/garden left in an approved layout, cannot be allowed for the purpose of constructions. However, it is to be noticed that if one wants to utilize a big plot within the area of residential usage as indicated in the development plan, it is mandatory to sub-divide such big plots into smaller plots for utilizing them for the purpose of construction. When the layout is to be approved, certain percentage of area is required to be left towards roads, open plots, garden etc. The development Plan prepared by MHADA, cannot be confused with the layout which is approved confining to four big plots, on the application made by the appellants. It is not necessary for only the owner to apply for such layout. In any event, having applied for layout which was approved and after utilizing the 59 plots out of total of 61 plots, it is not open for the appellants to plead that it was not the obligation of the appellants to submit layout. In the layout sanctioned and obtained in the year 1967, the open spaces were rightly reserved as provided under Regulation 39 of 1967 DCR. Further, it is clear from

perusal of 1991 DCR that for different layouts or sub divisions of different sizes in residential and commercial zones, different areas of open spaces are required to be provided. The development plan which was submitted by MHADA and approved on 15.10.1999, is with regard to the entire area covered by JVPD scheme. It appears that while submitting the development plan, the details of internal layouts sanctioned by BMC were not shown. The sub-division of bigger plots, as per the layout sanctioned by BMC, were also not shown in such development plan. Merely on such basis, the appellants cannot claim that the sub-plots which are covered by approved layout, left towards open spaces/garden, can also be used for constructions. The Chief Officer, in his communication, has made it clear that the mandatory open spaces in the approved plan are to be leased out to neighbouring societies for recreation purposes. Further, communication made by MHADA also shows that they have sent the proposal to MCGM for rectification of development plan, submitted in the year 1999, for showing these two plots as garden plot. It is totally erroneous on the part of 2nd respondent-MHADA in passing the order which is impugned in the writ petition, by recording a finding that Anjuman Trust has complete and absolute right in respect of sub-plot No.14 of Plot No.3. It is clear from the material placed on record that the authorities have mixed up the issue of reservation/usage as shown in the development plan and the open spaces as required to be kept in the layout as per the 1967 DCR and 1991 DCR.

23. It is also to be noticed that the open spaces are required to be left for an approval of layout or for the purpose of creating lung space for the owners of other plots where constructions are permitted. The 4 plots bearing Nos. 1, 3, 5 and 6, were sub-divided at the instance of the appellant-Society in its entirety and approval was taken for dividing such land into 61 plots. It is not open to claim for construction in the two plots which are reserved for open spaces/garden spaces also. It is fairly well settled that in an approved layout, the open spaces which are left, are to be continued in that manner alone and no construction can be permitted in such open spaces. The Development Plan which was submitted in the year 1999, as per the 1991 DCR, will not divest the utility of certain plots which are reserved for open spaces in the approved layout. The appellants cannot plead that such a layout was only temporary and as a stop gap arrangement, the said two plots were shown as open spaces/garden and now they be permitted to use for construction.

24. For the aforesaid reasons and in view of the reasons assigned by the High Court in the judgment under appeal, we are of the view that there is no merit in these appeals, accordingly, these appeals are dismissed, with no order as to costs.