

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.133 OF 2015

IN

PUBLIC INTEREST LITIGATION NO.131 OF 2008

M/s. Lake View Developers & Ors. ... Applicants

In the matter between

Kamlakar Motiram Satve & Anr. ... Petitioners

Vs.

The State of Maharashtra & Ors. ... Respondents

ALONGWITH

ORDINARY ORIGINAL CIVIL JURISDICTION

PUBLIC INTEREST LITIGATION NO.91 OF 2008

Mr. Rajendra Thacker ... Petitioner

Vs.

State of Maharashtra & Ors. ... Respondents

ALONGWITH

ORDINARY ORIGINAL CIVIL JURISDICTION

PUBLIC INTEREST LITIGATION NO.21 OF 2008

Medha Patkar ... Petitioner

Vs.

The State of Maharashtra & Ors. ... Respondents

D D Madon, Sr. Adv., a/w. Mr. Chetan Kapadia, Adv. a/w. Mr. S V Doijode, Adv. a/w. A V Doijode, Adv. a/w. Mr. P A Kabadi, Adv. a/w. Ms. Falguni Thakkar, Adv. i/b. Doijode & Associates for applicant. Mr S G Deshmukh, Adv. for the petitioner in PIL No.131 of 2008. Mr. Rohit Joshi, Adv. i/b. M/s. Gouri Godse, Adv. for respondent Nos.5 & 6 in PIL No.131 of 2008. Mr. Suresh Pakle, Adv. a/w. Ms. Trupti Puranik, Adv. for BMC respondent No.4 in PIL No.131 of 2008. Ms. Kiran Bagalia, Adv. for MMRDA. Mr. Vinay Bhorge, Adv., i/b. Utangale & Co. for respondent No.3 in PIL No.131 of 2008.

**CORAM : MRS. ROSHAN DALVI &
MRS. MRIDULA BHATKAR, J.J.**

DATE OF RESERVING THE ORDER : 12th OCTOBER, 2015

DATE OF PRONOUNCING THE ORDER : 29th OCTOBER, 2015

ORDER

1. The applicants have applied for directions with regard to the numbers of flats to be constructed by the applicants as directed in clause 'f' and 'h' of the judgment dated 22nd February, 2012. The applicants have required the Court to modify the order for construction of 1511 and 1593 flats of 40 and 80 Sq. mtrs. to 1060. Flats of 40 Sq. mtrs. and 1060 flats of 80 Sq. mtrs. having aggregate area of 127280 Sq. mtrs. and correspondingly to sell 160 flats of 40 Sq. mtrs. and 159 flats of 80 Sq. mtrs. to the State Government @ 135/- psf as per the aforesaid judgment.

2. Under the judgment the reasons for directing construction of precisely 1511 flats of 40 Sq. mtrs. and 1593 flats of 80 Sq.mtrs. which would consume FSI of 1,87,990 Sq.ft. have been set out. The applicants claim that the arithmetical calculation made by the Court is erroneous. They claim that not 1,87,990 Sq.ft. but 1,20,260 Sq.mtrs (wrongly stated as 1,20,280 in prayer (a) of C A No.133 of 2015) of flats of 40 / 80 Sq.mtrs. are required to be constructed. The arithmetical calculation is explained by counsel on behalf of the applicants by taking the Court through the calculation made by the Court under the judgment of which one of us (Roshan Dalvi, J) was a party. It would have to be seen whether the calculation put by the applicants is correct and whether, therefore, the arithmetical error is

to be corrected by a modification of the order with regard to the number of flats to be constructed, under clause 'f' of the judgment.

3. The calculation made by the Court is set out in paragraph 45 to 49 of the judgment and the further calculations is set out in paragraph 51 of the judgment. It may be enumerated thus :

Paragraph 45 : Total permissible FSI is 1. The plot of 7,38,609.29 Sq.mtrs. has to be developed. After legitimate deduction the net area of the plot is 4,04,838 Sq.mtrs.

Paragraph 46 : A rebate for selling and amalgamation of 15% total area allowed as per the order dated 18th August, 1989 of the government is allowed. That would be for construction of 60,730 Sq.mtrs. being 15% of the total area 4,04,838 Sq.mtrs. leaving of balance of 3,44,110 Sq.mtrs. of construction.

Paragraph 47 : For 8 Hectors of land accepted by the central government out of 50 hectors of land offered to it the FSI was allowed to be deducted. This would constitute 80,000 Sq.mtrs. of area leaving a balance of 2,64,110 Sq.mtrs. of construction.

Paragraph 48 : Construction of 689 flats of 40 Sq.mtrs. and 607 flats of 80 Sq.mtrs. consuming FSI 76,120 Sq.mtrs. had been made and hence had to be deducted leaving an area of 1,87,900 Sq.mtrs. of FSI left for construction and directed to be constructed strictly as per the contract. This would allow construction of 1511 flats of 40 Sq.mtrs. and 1593 flats of 80 Sq.mtrs.

4. The contract stipulates construction for only residential premises of the aforesaid area as affordable housing. Hence under the contract there was to be no construction of commercial nature. The applicants nevertheless put up construction for commercial nature and claimed rebate to the extent of 15% of the total FSI for commercial construction. This would be to the extent of 60730 Sq.mtrs. of

construction. The applicants claim that commercial construction already put up must also be allowed to be deducted to the extent of 15% thereof from the construction now to be put up. The application is impertinent. The entire lis relates to wrongful construction against the spirit of the contract. It is because of such wrongful construction that the order of injunction against any further construction is passed. It would be not only be travesty, but mockery of justice if construction put up wholly against the contractual obligations is to be allowed, rebated or discounted. That has not been done in the judgment. It cannot be done in any order. It is, therefore, that in paragraph 51 of the judgment the case of the applicants for the 15% of the total construction as commercial premises under the Development Control Rules (DC Rules) of the MMC was separately considered.

5. The commercial construction has far exceeded the 15% limit which has been observed in the judgment from the look at the photographs of such construction. The judgment shows that it does not require to make accurate arithmetical calculations for the extent of the commercial construction.

6. Indeed in normal circumstances such commercial construction to that extent of 15% would be allowed. Such construction may also be required in such a residential complex. However the fact remains that such construction was not contemplated under the contract. Hence even the purchasers of the residential units, who must abide the contract, would require to purchase any of the flats upon the footing that the entire construction would be only residential.

7. Only because such commercial construction may be of necessity in such a residential locality and is allowed under the D C Rules, the judgment has observed that such construction may be allowed to be “later adjusted” against the 15% area of the total land under the construction allowable as commercial construction.

8. The reason behind making an adjustment later is to be first understood. Commercial construction in a residential complex is allowed only to the extent of 15% of the total construction under the D C Rules though not under the contract itself. No further commercial construction can be allowed under the D C Rules. This Court did not consider the breach, if any, of the D C Rules. It had to contend with the breach of the contract alone. This commercial construction was seen to have far exceeded the 15% limit. If only a part of such construction was to be allowed, that could be “later adjusted” against the total commercial construction. Hence that would have no bearing upon the total residential construction. It is, therefore, that it was dealt with later in the judgment and separately from the rest of the aspects of rebate or allowances.

9. Hence the 15% of the commercial construction wholly wrongly put up cannot be countenanced at any stage after the judgment and before the construction which was directed to be put is put up as per the directions when it has been specifically disallowed in the judgment. It is only after construction to the extent of 1,87,900 Sq.mtrs. of FSI which will beget 1,511 and 1,593 flats of 40 / 80 Sq.mtrs. is completed that this aspect may be considered by the planning authority for adjustment to the extent of 60,730 of Sq.mtrs. of commercial construction but no further.

10. Deducting 60,730 Sq.mtrs. of construction from 1,87,900 Sq. mtrs. of construction would leave only 1,27,170 Sq.mtrs. free as per applicants' case for construction of 40 / 80 Sq. mtrs. of flats. The judgment specifically records in paragraph 51 that after legitimate deductions as shown above the only construction that can be put up was 40/80 Sq.mtrs. of flats. That would, therefore, be 1511 and 1593 flats of 40/80 Sq.mtrs. and no less.

11. The applicants were directed under the judgment to file statements and plans from time to time for construction of buildings having the aforesaid flats so that they would be under the supervision of the Court in the aforesaid PILs for the directions issued.

12. The applicants made one such note / report with annexures before the Court on 19th April, 2012. The applicants contended that they would require to construct 1,27,260 Sq.mtrs. of flats of 40 / 80 Sq.mtrs. The applicants submitted the calculations to Court in annexure III of their note / report. The applicants also showed the number of flats that were to be constructed according to the applicants at the foot of the statement, which is the number of flats that they claim to construct even in this application. The applicants contended before the Court (in which one of us Roshan Dalvi, J was a party) that under paragraph 51 of the order dated 22nd February, 2012 credit should be given for the commercial construction to be put by the applicants since 15% of the construction could be commercial construction under the D C Rules. That was opposed seriously by the petitioners. No order for giving of the credit though applied for was granted. Such credit is once again applied for in this application by the modification in the number of flats required to be

constructed stating to be aggregating to an area of 1,27,260 Sq.mtrs.

13. Aside from the fact that an application once made and rejected and in which no order is passed cannot be made again, it has been considered on merits upon the applicants further case for the same relief.

14. The applicants contend that they had taken out civil application No.168 of 2012 in which an order came to be passed by the Division Bench of this Court on 4th October, 2012 stating that the Court “had directed” the applicants to construct a built up area of 1,27,260 Sq.mtrs of flats admeasuring 40 / 80 Sq.mtrs each. Mr Madon on behalf of the applicants would contend that when the Court has stated that it had directed so, it must be taken to have directed so. Such an astounding contention cannot be accepted. It is for the Court to see what has been directed in the order dated 19th April, 2012 as aforesaid. The order dated 19th April, 2012 has not accepted the contention of the applicants specifically made for giving the credit for the aforesaid wholly wrongful commercial construction which came under flak. The order dated 19th April, 2012 only directed construction of flats of 40 /80 Sq.mtrs as per order dated 22nd February, 2012 with top most priority and directed the applicants to submit revised plans in that behalf and the MMC to consider those plans expeditiously by 15th June, 2012 for commencing and completing such construction.

15. Mr. Madon fairly conceded that the order dated 18th June, 2012 had not so directed and has not relied upon that order. It is seen that both the orders dated 19th April, 2012 and 18th June, 2012 have

not directed any rebate for commercial construction or directed the applicants to put up 1,27,260 of Sq. mtrs. 40 / 80 Sq.mtrs.

16. It was for either of the parties to get the correction of the order dated 4th October, 2012 if they so desired. Even if it was not corrected, it can be seen at any time by a mere look of the orders.

17. It would now have to be seen how the Court came to make such an inadvertent error. The applicants actually submitted what they called an “inadvertent omission” in what they called the interim order dated 22nd February, 2012 which recited a part of paragraph 51 of the judgment dated 22nd February, 2012. What the applicants set out is only the later part of the said para. The paragraph has taken exception to the commercial construction at all to be made upon the strict reading the contract. In view of the additional area and additional TDR which can be loaded by the applicants in construction, the Court has observed how the construction which is wholly disallowed under the agreement can “at best be allowed to be later adjusted”. Such part has not been shown as inadvertent error. Upon the case of an inadvertent error by the Court, which case has been made even in this application again, the applicants made a calculation of the total area which was to be constructed upon any such calculation. The applicants rightly considered the initial 7,38,609.29 Sq.mtrs. of permissible FSI, the net plot area of 4,04,838 Sq.mtrs. The amalgamation allowed on 60,730 Sq.mtrs., the Central Government's acceptance of 80 /40 Sq.mtrs., the already constructed un-amalgamated units of 76,120, all of which have been considered in paragraph Nos.45 to 49 of the judgment to arrive at the net area to be constructed on 1,87,990 Sq. mtrs. The applicants have thereafter

sought to deduct 60,730 Sq. mtrs. for 15% of the area of commercial construction to arrive at the figure of 1,27,260 Sq. mtrs. of area to be constructed for the flats and thus derived 1060 plus 1060 of 40/80 Sq.mtrs. of flats. There has been no order passed upon such report / note submitted by the applicant as per annexure III thereto. It is because the applicants actually made a calculation titled "calculation as per the High Court order" in annexure III of their application that the Court on 4th October, 2012 may have taken that area to be the area directed by the Court. It is seen that that was mischief. It is, therefore, seen that the statement that the Court "had directed" when the Court had not directed is incorrect and cannot be relied upon by the applicants to again claim that 1060 flats of 40 Sq.mtrs. and 1060 flats of 80 Sq.mtrs. only have to be constructed as per the calculation submitted earlier.

18. The application is, therefore, seen to be an effort as a ploy to pass off 1060 plus 1060 flats instead of 1511 and 1593 flats of 40 / 80 Sq.mtrs. as specifically directed.

19. The judgment needs no modification and none is made.

20. In view of the fact that the applicants have been heard on the merits of their application, the technical plea that the application is in the nature of review petition taken up by the petitioner need not be considered.

21. The applicants have applied for an order by this Court upon another Court being the learned Single Judge of this Court hearing Arbitration Petitions under Section 34 of the Arbitration &

Conciliation Act, 1996 being Arbitration Petition No.982 of 2011 to hear the same on its merits without being influenced by observations in the orders passed in that behalf in the above petitions including the judgment described as the interim order dated 22nd February, 2012.

22. Such prayer cannot be granted. It would impinge upon the independence of the Courts. Each judge is entitled and free to see for himself / herself the facts of the case as made out by any of the parties before him or her and consider any document or any order in that behalf. The orders passed by the Court are in public domain. They are meant to be seen by all. They may be considered if relevant. No judge can be directed not to look into any order. Each judge would decide independently upon all the material placed before him or her. It may be mentioned that in the argument of the above petitions at the time of passing the judgment dated 22nd February, 2012, the applicants themselves placed much reliance upon the arbitral award. This Court considered the case on merits independent of the arbitral award. Similarly any other judge would consider the case independently and cannot be fettered by an order of another Court. The very prayer is misconceived and deserves to be rejected.

23. The Civil Application is, therefore, dismissed.

(MRS. MRIDULA BHATKAR, J.)

(ROSHAN DALVI, J.)