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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.122 OF 2008

Ramchandra Ganpatrao Ghorpade,
Adult, Occu: Business, R/o. House No.2974,
C-Ward, Opp. Jain Boarding, Kolhapur

..Petitioner.

V/s.

1. State of Maharashtra,
through the Secretary,
Urban Development,
Mantralaya, Mumbai.
2. Kolhapur Municipal Corporation,
Kolhapur, through its Commissioner.
3. Director, Town Planning,
Maharashtra State, Pune.
4. Assistant Director, Town Planning,
Kolhapur, Branch, Kolhapur.

..Respondents.

Mr.G.S.Godbole with Mr.Drupad Sopan Patil for the petitioner.
Mr.V.S.Gokhale, AGP for the respondent Nos.1, 3 and 4.
Mr.S.S.Patwardhan for respondent No.2.

**CORAM : A.S.OKA AND
V.L.ACHLIYA, JJ.**

DATED : 6TH OCTOBER, 2015

ORAL JUDGMENT (PER A.S.OKA, J.)

1. Perused the order dated 24th June, 2015. Clause 9 of the
said order reads thus :-

“9. (a) We direct the State Government to reconsider the question of confirmation of notice under sub-section (1) of section 49 of the MRTP Act after giving an opportunity of being heard to the petitioner;

(b) It will be open for the petitioner to urge that there is already a deemed confirmation under sub section (5) of section 49;

(c) The State Government shall submit its decision on the issue of confirmation of the said notice under sub-section (1) of section 49 to this Court within a period of 2 months from today;

(d) The petition shall be listed before this Court on 28th August, 2015 under the caption of “directions” for considering a report of the State Government.

(f) All concerned to act upon an authenticated copy of this order.”

2. This writ petition under Article 226 of the Constitution of India is based on the notice dated 14th November, 2006 issued under sub-section (1) of section 49 of the Maharashtra Regional and Town Planning Act, 1966 (for short 'the MRTP Act'). The petition relates to the lands described in paragraph 3.1 of the petition which are situated within the limits of the second respondent-the Municipal Corporation of City of Kolhapur. In

sanctioned Development Plan (second revised) which was sanctioned in the year 2001, the said lands were shown reserved for public purpose of garden.

3. By a communication dated 22nd May, 2007 the State Government informed the petitioner that the notice under sub-section (1) for section 49 cannot be confirmed in accordance with sub-section (4) of section 49. By judgment and order dated 24th June, 2015 this Court directed the State Government to reconsider the question of confirmation of the notice under sub-section (1) of section 49 of the MRTTP Act after giving an opportunity of being heard to the petitioner. On the basis of the said direction, the State Government has issued a communication / order dated 31st August 2015 by which the State Government has declined to confirm the notice dated 14th November, 2006. By amending the petition, a challenge has been incorporated even to the said order / communication.

4. The learned counsel appearing for the petitioner invited our attention to the communication dated 22nd May, 2007 issued by the State Government under sub-section (4) of section 49 of the MRTTP Act by which the State Government declined to confirm the notice. He also invited our attention to the reasons recorded in the impugned communication dated 31st August 2015. He pointed out

that apart from the fact that the reasons recorded therein are the same which were recorded earlier in the communication dated 22nd May, 2007, even assuming the reasons are correct, the confirmation of notice cannot be denied under sub-section (4) of section 49 on the basis of the said reasons. He pointed out that even the contention regarding deemed confirmation was canvassed before the State Government. He would, therefore, urge that the impugned order / communication be set aside and and it be declared that the reservation on the said land stands lapsed.

5. The learned AGP support the impugned communication / order dated 31st August 2015 and submitted that for the cogent reasons recorded therein, the State Government has rightly declined to confirm the notice under sub-section (1) of section 49 of MRTP Act. The learned counsel appearing for the Municipal Corporation supported the contentions raised by the learned AGP.

6. We have given careful consideration to the submissions. Section 49 of the MRTP Act reads thus :-

*" 49 Obligation to acquire land on refusal of permission
or on grant of permission in certain cases*

(1) where-

(a) any land is designated by a plan as subject to

compulsory acquisition, or

(b) any land is allotted by a plan for the purpose of any functions of a Government or local authority or statutory body, or is land designated. in such plan as a site proposed to cases. be developed for the purposes of any functions of any such such Government, authority or body or

(c) any land is indicated in any plan as land on which a highway is proposed to be constructed or included, or

[(d) any land for the development of which permission is refused or is granted subject to conditions, and any owner of land referred to in clauses (a), (b), (c) or (d), claims-

(i) that the land has become incapable of reasonably beneficial use in its existing state, or

(ii) (where planning permission is given subject to conditions) that the land cannot be rendered capable of reasonably beneficial use by the carrying out of the permitted development in accordance with the conditions; or

(e) the owner of the land because of its designation or allocation in any plan claims that he is unable to sell it except at a lower price than that at which he might reasonably have been excepted to sell if it were not so designated or allocated,

the owner or person affected may serve on the State Government within such time and in such manner, as is prescribed by regulations, a notice (hereinafter referred

to as " the purchase notice "1 requiring the Appropriate Authority to purchase the interest in the land in accordance with the provisions of this Act.

(2) The purchase notice shall be accompanied by a copy of any application made by the applicant to the Planning Authority, and of any order or decision of that Authority and of the State Government, if any, in respect of which the notice is given.

(3) On receipt of a purchase notice, the State Government shall forthwith call from the Planning Authority and the Appropriate Authority such report or records or both, as may be necessary, which those authorities shall forward to the State Government as soon as possible but not later than thirty days from the date of their requisition.

(4) On receiving such records or reports, if the State Government is satisfied that the conditions specified in sub-section (1) are fulfilled, and that the order or decision for permission was not duly made on the ground that the applicant did not comply with any of the provisions of this Act or rules or regulations, it may confirm the purchase notice, or direct that planning permission be granted without condition or subject to such conditions as will make the land capable of reasonably beneficial use. In other case, it may refuse to confirm the purchase notice, but in that case, it shall give the applicant a reasonable opportunity of being heard.

(5) If within a period of six months from the date on which a purchase notice is served the State Government does not pass any final order thereon, the notice shall be

deemed to have been confirmed at the expiration of that period.

(6) deleted

[(7) If within one year from the date of confirmation of the notice, the Appropriate Authority fails to make an application to acquire the land in respect of which the purchase notice has been confirmed as required under section 126, the reservation, designation, allotment, indication or restriction on development of the land shall be deemed to have lapsed; and thereupon, the land shall be deemed to be released from the reservation, designation, or, as the case may be, allotment, indication or restriction and shall become available to the owner for the purpose of development otherwise permissible in the case of adjacent land, under the relevant plan.]

7. We have perused the communication dated 22nd May, 2007 which records that only on one side of the said land there was a development and on the three other sides, there is no development. It further records that the said lands are situated 3 Meters below the level of the adjoining road and in monsoon, when there are floods, the back-water of the river enters on the said lands. It is stated the said lands are covered by high flood line fixed by the irrigation department. It was, therefore, stated that it cannot be said that the petitioners are prevented from the beneficial use of the said lands. After reconsideration, in the impugned communication dated 31st August 2015, the State Government has

recorded the following reasons for declining to confirm the said notice :-

- (1) The said lands were situated 3 meters below the level of of the adjoining road and in monsoon, there is flooding on the said lands caused by the backwater of the river;
- (2) The said lands are covered by high flood line;
- (3) It is not established that on the date on which the notice under sub-section (1) of section 49 was served, the petitioner was prevented from the beneficial use of the said lands;
- (4) As the prayer for confirmation of the notice has been already rejected, the only remedy for the petitioner is to give a fresh notice and also to take recourse to section 127 of the MRTP Act and once prayer for confirmation of notice has be rejected, the same cannot be reconsidered.

8. We must note here that one of the contentions raised by the petitioner was that the impugned communication dated 22nd May, 2007 has been issued after the expiry of the period of six months from the date on which purchase notice dated 14th November, 2006 was served on the State Government. The stand

taken by the State Government is consistent. The stand is that the said notice was served on 28th November, 2006. On a query made by this Court to the learned counsel appearing for the petitioner, he fairly stated that in this petition there is no material placed on record to show that the notice dated 14th November, 2006 was served on or before 21st November 2006. Therefore, the plea of deemed confirmation of the notice in accordance with sub-section (5) of section 49 is not available to the petitioner and the same has been rightly rejected by the State Government.

9. It is not the stand of the State Government that the notice under sub-section (1) of section 49 is not legal. The area of the said lands is 2 H 62 R. Therefore, it is fairly a large plot. The first reason recorded in the communication dated 31st August 2015 is that the said lands are at a level 3 meters below the adjoining road. The second reason is that there is a flooding on the said land during monsoon and third is that the land comes within the limits of high flood line. Apart from the fact that these factual assertion have been disputed by the petitioner, there is no provision of any law or statutory rule or any regulation having force of law is pointed out which prohibits making any constructions on the said lands.

10. The confirmation of the notice under sub-section (1) of section 49 could have been declined only if the State Government

was satisfied that conditions specified in sub-section (1) of section 49 were not fulfilled. In the present case, even if the stand taken by the State Government is taken as correct, It cannot be said that the conditions provided in sub-section (1) of section 49 were not satisfied. In fact, that is not the stand taken in the impugned communication.

11. After finding that the communication dated 22nd May, 2007 was erroneous, one more opportunity was granted to the State Government by this Court to reconsider the issue of the confirmation of the said notice in accordance with the sub-section (4) of Section 49. In substance, the reasons recorded in the impugned communication are the same as the reasons recorded in the communication dated 22nd May, 2007 which were not approved by this Court under order dated 24th June 2015.

12. Therefore, the impugned communication dated 31st August 2015 will have to be set aside and it will have to be held that the notice under sub-section (1) of section 49 ought to have been confirmed.

13. As the notice is being confirmed by this judgment and order, the period provided under sub-section (7) of section 49 will commence from today.

14. The learned counsel appearing for the Municipal Corporation stated that he has received no instructions on the question whether the Municipal Corporation intends to apply for acquisition. The learned counsel for the petitioner submitted that in the event, the Planning Authority makes an application to acquire the said lands within the stipulated period of one year, the reservation would not lapse. He pointed out that the proceedings of acquisition initiated under the MRTP Act are invariably delayed. He, therefore, submitted that in the event an application is made for acquisition of the said lands, acquisition be ordered to be completed within a time bound period. The said request deserves to be accepted.

15. Hence the petition must succeed and we pass the following order :-

- (i) The impugned communications dated 22nd May, 2007 and 31st August 2015 are hereby set aside and it is hereby declared that the notice issued by the petitioner on 14th November, 2006 under sub-section (1) of section 49 of the MRTP Act stands confirmed in accordance with sub-section (4) of section 49 of the MRTP Act;
- (ii) We clarify that the period of one year provided by the sub-

section 7 of section 49 shall commence from today;

- (iii) It is obvious that on the failure of the Appropriate Authority to make an application to acquire the said lands set out in paragraph 3.1 of the petition within a period of one year from today, the reservation on the said land shall be deemed to have lapsed and the same shall be available to the owner thereof for development as otherwise permissible in the case of adjacent lands under the relevant Development Plan;
- (iv) If an application as contemplated by sub-section (7) of section 49 is lawfully made by the Appropriate Authority within the stipulated period of one year from today, the State Government shall take all possible steps to commence acquisition proceedings and to complete the same as expeditiously as possible. The acquisition proceedings shall be completed within a period of 24 months from the date on which the application is made by the Appropriate Authority in terms of sub-section (7) of section 49 of the MRTP Act;
- (v) Rule is made absolute in the above terms.
- (vi) All concerned to act upon an authenticated copy of this order.

(V.L.ACHLIYA,, J.)

(A.S.OKA, J.)