

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

rpa

CIVIL WRIT PETITION NO.12039 OF 2012

Kalpataru Builders & Anr.

.. Petitioners

Vs.

The Union of India & Ors.

.. Respondents

....
Mr.Milind Sathe, Senior Counsel with Ms.Devika Deshmukh,
Ms.Sneha Jaisingh i/b. M/s.Bharucha & Partners, Advocate for the
Petitioners.

Mr.Anil C. Singh, ASG a/w. Mr.S.R. Rajguru, Mr. A.R. Varma, Mr.D.P.
Singh & Mr.Ketan Gala, Advocate for the Respondent - UOI.

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**CORAM : A.S. OKA &
C.V. BHADANG, JJ.**

DATED : APRIL 23, 2015.

P.C. :

Heard the learned senior counsel appearing for the petitioners and the learned ASG for the respondents. The challenge in this petition under Article 226 of the Constitution of India is to the letters dated 15th December, 2012 and 18th December, 2012 issued by the respondents. With the view to appreciate the submissions made by the learned counsel, it is necessary to make a reference to the facts of the case.

2 The land subject matter of this petition is vesting in the Union of India. It is situated in the cantonment in Pune. There were two leases executed on 6th November, 1964 on behalf of the

Governor General in Counsel in favour of one Mr. Rustom Master and another. According to the petitioners, the leases were renewed. On 9th February, 1988, the original lessees assigned the lease to the first petitioner.

3 After assignment of lease, the first petitioner sought permission to develop the plot in question by making an application to the Cantonment Board. The Cantonment Board rejected the said application. An Appeal was preferred by the petitioners against the order passed by the Cantonment Board. The said Appeal was heard by the Defence Appellate Authority. It was the contention of the petitioners that the Appellate Authority permitted development for residential and commercial purposes in the ratio of 44% and 56% respectively. The case is that notwithstanding the directions of the Appellate Authority, the development permission was denied to the first petitioner by the Cantonment Board. Therefore, a Writ Petition was filed by the first petitioner being Writ Petition No.5069 of 1997. By the judgment and order dated 30th September, 2005, the said Writ Petition filed by the first petitioner was dismissed by this Court. The order of this Court attained finality inasmuch as the Special Leave Petition filed by the first petitioner was dismissed. In the meanwhile, permission was granted by the Cantonment Board at Pune for development of the plot in question. There was some dispute regarding the issue of the completion certificate. An order

was passed on 16th May, 2008 by and on behalf of the fourth respondent (Station Commander) directing the measurements and taking over the possession of 44% of the constructed area for residential use. The case of the petitioner is that the said petitioner made an offer without prejudice to provide residential premises on leave and licence basis subject to the terms and conditions suggested by the first petitioner. Subsequently, a revised proposal was submitted by the petitioners to the fourth respondent. In the meanwhile, the dispute regarding non grant of completion certificate was resolved subject to condition of the first petitioner withdrawing the subsequent Writ Petition filed by the petitioner. The case made out in the petition is that the petitioners placed the fourth respondent in possession of three flats. As the proposal of the petitioners was not accepted, the petitioners by communication dated 15th November, 2012, informed the respondents that as they were not willing to use the said three flats, the same will be disposed of.

4 Now it is necessary to make a reference to the impugned order. By the first impugned order dated 15 December 2012, a demand was made by the Station Commander calling upon the first petitioner to hand over 44% of the total constructed area on the said plot. By the second impugned order dated 18th December 2012, the first petitioner was informed by the Station Commander that the possession of the area will be taken over on

20th December 2012.

5 On 19th December, 2012, this Court passed an order directing that the parties to maintain status-quo subject to condition of the petitioners keeping five residential flats on the said plot vacant. A statement of the learned senior counsel appearing for the petitioners was recorded in the said order that the said five residential flats constitute 44% of the total area of the construction.

5 The learned senior counsel appearing for the petitioners has invited our attention to the judgment and order passed by this Court dated 30th September, 2005 in Writ Petition No.5069 of 1997 filed by the petitioners. He invited our attention to the relevant findings in the said judgment and order. He invited our attention to the communication dated 17th January, 2004 issued by the Cantonment Executive Officer, Pune and in particular clause 2 thereof. He pointed out that clause 2 merely records that the petitioners will have to offer the 44% construction for residential purposes for the married officers' accommodation by submitting their willingness for the same. The submission of the learned counsel appearing for the petitioners is that all that the said condition requires is that the petitioners should offer 44% of the construction which was for residential use for the married officers' accommodation. He would, however, urged that there is no

condition imposed that 44% area should be handed over free of cost. He urged that the petitioners are willing to offer 44% area on the terms and conditions which may be mutually agreed upon but the respondents cannot claim the allotment of 44% area free of cost. He submitted that even that is not the purport of the Judgment and order dated 30th September, 2005 passed by this Court. He pointed out that in fact, the petitioners had offered flats on leave and license basis to the respondents which offer was accepted by the respondents. He invited our attention to the meaning of the word “offer”. He urged that sufficient compliance was made by the petitioners by making an offer and there is no requirement that 44% of the constructed area should be given free of cost to the Respondent. Learned Additional Solicitor General of India invited our attention to the aforesaid judgment and order of this Court. He urged that the petitioners acting upon the conditions imposed by the Cantonment Board proceeded with the construction. He urged that the condition imposed does not permit the petitioners to demand any consideration for the allotment of 44% area and hence, no interference is called for.

6 We have given careful consideration to the submissions. It will be necessary to make a reference to the judgment and order dated 30th September, 2005 in Writ Petition No.5069 of 1997. The occasion for filing the said petition arose as the application for

grant of development permission made by the Petitioners was rejected by the Cantonment Board, Pune. One of the contentions raised in the petition was that on the basis of the deeming provision in the law, the permission shall be deemed to have been granted. Perusal of the Judgment shows that the stand taken by the Defence department was that the area was already crowded and any permission for new shopping complex will amount to creating further congestion for the already restricted movement of Army traffic. After hearing the Counsel for the Union of India as well as the Counsel representing the Pune Cantonment Board, ultimately the Division Bench proceeded to dismiss the petition. It will be necessary to make consider what is observed in paragraph 26 of the said judgment and order which reads thus:

“26. The petition is therefore dismissed with no order as to costs. Although the petition is dismissed, it will be open to the Petitioners to apply to the GOC-in-C for construction according to the norms set up by him, namely that there can be only 56% construction for commercial purpose and 44% construction for residential purpose. Inasmuch as the area is to be retained for married officers' accommodation, the Petitioner will have to offer this 44% accommodation for that purpose. If there is any such willingness on their part, they may apply, and it will be open for the Respondents to consider such application when made.”

7 On plain reading of paragraph 26 of the Judgment of the Division Bench it appears to us that after rejecting the petition by confirming the order rejecting the application made by the petitioners for grant of development permission, the petitioners were permitted to apply to the GOC-in-C for construction according to the norms set up by him. The norms, as recorded by the Division Bench, were that only 56% of the construction will be permissible for commercial purposes. The Division Bench held that as per the norms, 44% construction which is for the residential use is to be retained for the married officers' accommodation. Thus, the Division Bench very specifically observed that the petitioners can apply for permission to GOC-in-C for making construction. However, the construction only to the extent of 56% was permissible for commercial purpose and balance 44% for residential use will be retained for the married officers' accommodation. The Division Bench specifically observed that 44% construction for residential use will have to be retained for married officers' accommodation. After observing that 44% construction for residential purposes is to be retained for married officers' accommodation, the Division Bench observed that the petitioners will have to offer this 44% accommodation for that purpose. The further part of the order is that only if such willingness is shown, the petitioners can apply for permission. Thus, the willingness which was required to be shown was to utilize only 56% of the

construction for commercial purposes and allow remaining 44% construction to be retained for the married officers' accommodation. The willingness to be shown by the Petitioners as contemplated by the Division Bench was to allow the defence department to retain 44% of the construction for the married officers' accommodation. It is in this context that the condition no.2 in the letter dated 17th January, 2004 imposed by the Cantonment Board will have to be considered. Condition no.2 reads thus:

“2) The sanctioned plan should strictly adhere to the orders dtd.30-9-2005 of the Hon'ble Mumbai High Court. You will have to offer the 44% construction of residential purpose to the GOC-in-C/ Govt.for the married officer's accommodation by submitting your willingness for the same.”

The learned senior counsel appearing for the petitioners is banking upon the second part of the clause 2 which provides that the petitioners will have to offer 44% of construction for residential purposes to GOC-in-C for married officers' accommodation by submitting willingness. First part of Clause 2 specifically refers to the order dated 30th September, 2005 passed by the Division Bench which has been confirmed by the Apex Court. Thus, the willingness in terms of Clause 2 which was required to be submitted was to allow the respondents to retain 44% of construction for residential use for the married officers' accommodation. Therefore, the

contention of the learned senior counsel appearing for the petitioners that 44% residential accommodation could have been offered by the petitioners subject to certain terms and conditions as may be fixed by the petitioners cannot be accepted. On conjoint reading of the Judgment and order dated 30th September, 2005 and in particular paragraph 26 thereof with the aforesaid condition no.2, the petitioners were under an obligation to offer the defence department to retain 44% construction meant for residential use for the married officers' accommodation. Thus, it follows that the petitioners were not entitled to claim any consideration or cost for 44% area. In fact, in consideration of acceptance of the said condition that the petitioners were permitted to use 56% of the construction for commercial use. Therefore, the petitioners after taking an advantage of the Clause 2 of the order as well as paragraph 26 of the said judgment and order of this Court and after acting upon the same cannot impose any condition for allowing the Respondents to retain 44% of the construction. The grant of permission to the petitioners to use 56% of the construction for commercial purposes was subject to the petitioners allowing the defence department to retain the remaining 44% for the married officers' accommodation.

8 The subsequent acceptance of premises elsewhere on leave and licence by the respondents is of no relevance at all. It is

pertinent to note that acting upon the letter dated 17th January, 2004 the petitioners commenced and carried out construction. At no stage, the petitioners challenged the condition no.2 of the said letter.

9 Therefore, in our view, this is not a fit case where the petitioners can be allowed to invoke extraordinary jurisdiction of this Court under Article 226 of the Constitution of India.

10 The petition must fail and the same is rejected.

11 At this stage, the learned senior counsel appearing for the petitioners seeks continuation of the ad-interim relief granted on 19th December, 2012. The ad-interim relief granted earlier will continue for a period of eight weeks from today.

(C.V. BHADANG, J.)

(A.S. OKA, J.)