

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

PUBLIC INTEREST LIGITATION NO.84 OF 2015

Balaji s/o Daulatrao Humbad,
Age-50 years, Occu:Agriculture
and Social Work,
R/o-Plot No.4, Gut No.300,
Radhakrishna Nagri, Nanded.

...PETITIONER

VERSUS

- 1) The State of Maharashtra,
Through its Secretary in the
Department of Municipal Administration,
Mantralaya, Fort, Mumbai-32,
- 2) The Commissioner,
Nanded Waghala City Municipal
Corporation, Nanded,
- 3) The Deputy Commissioner,
(Development),
Nanded Waghala City Municipal
Corporation, Aurangabad,
- 4) Shri. Ratnakar s/o Kantrao Waghmare,
Age-51 years, Occu:Service as
Deputy Commissioner, NMWC,
having his office in the premises of
Nanded Waghala City Municipal
Corporation, Nanded,
- 5) The Town Planner,
Office of Town Planning Department,
Nanded Waghala City Municipal
Corporation, Nanded.

- 6) Sanman Constructions (JV),
Through its Proprietor,
Shri Satish s/o Purshottam Maheshwari,
Age-50 years, Occu:Business,
having its office at Block No.201,
First Floor, Sanman Towers,
Vajirabad, Nanded - 431 601
and Residence at Industrial Estate,
Shivaji Nagar, Nanded,
- 7) Jai Kedarnath Buildcon Pvt. Ltd.,
A Company registered under the
Companies Act 1956,
Through its Director,
Shri. Satish s/o Purshottam Maheshwari,
Age-50 years, Occu:Business,
having its office at 201,
First Floor, Sanman Tower,
Vajirabad, Nanded - 431 601,
- 8) The District Collector,
Nanded,
- 9) The Director of Town Planning,
Maharashtra State,
having its office at Pune.

...RESPONDENTS

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Mr. Amit A. Mukhedkar Advocate for the
Petitioner.

Mr. V.M. Kagne, A.G.P. for Respondent Nos.
1, 8 and 9.

Mr. R.K. Ingole Patil Advocate for Respondent
Nos. 2 to 5.

Mr. P.M. Shah, Senior Counsel i/b. Mr. G.A.
Gadhe Advocate for Respondent Nos.6 & 7.

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**CORAM: R.M. BORDE AND
A.I.S. CHEEMA, JJ.**

DATE : 12TH FEBRUARY, 2016

JUDGMENT [PER A.I.S. CHEEMA, J.] :

1. Heard. Rule. Rule made returnable forthwith. With the consent of learned counsel for the parties, the Petition is taken up for final disposal at admissions stage.

2. The Petitioner claiming to be social worker, has filed this Petition seeking declaration that the construction of commercial complex, namely, Ranjeet Singh Market and Bindu Mangal Karyalaya on Survey No.1803 at Nanded admeasuring 51,312 Sq. Ft. carried out by Respondent Nos. 6 and 7 (hereafter referred as "concessionaires") is illegal and unauthorized. Petitioner wants that the Respondent Authorities should demolish the structure and the 'concession

agreement' dated 30th November 2012 executed by Respondent No.4 with Concessionaires be held to be illegal and *void ab initio*. The Petitioner is questioning the authority of Respondent No.4 who signed the agreement as Deputy Commissioner and wants a departmental inquiry to be held against him. Petitioner has prayed that Concessionaires be black listed and there should be recovery of penalty/ lease amount as they have not completed construction in 48 months from 30th November 2012 as per clause 4.4.1.1 of the tender document.

3. We have heard the learned counsel for the Petitioner. Respondent Nos. 2, 3 and 5 have filed affidavit in reply of the Town Planner, dated 14th January 2016. The Concessionaires have also filed affidavit in reply dated 14th December 2015. We have heard learned counsel for Respondents also.

CASE OF PETITIONER

4(A). It is stated for the Petitioner that

Respondent Corporation is owner and possessor of the land Survey No.1803. On this land there was an old building having commercial market known as "Maharaja Ranjeet Singh Market and Digambarrao Bindu Mangal Karyalaya" (herein after referred as "complex"). It is in the center of the Nanded city. The Corporation decided to demolish the old structure and construct a new commercial complex under "Public Private Partnership Basis" (P.P.P. Basis). On 5th June 2012 bids were invited by publishing public tender. The Concessionaires participated in the bid and were successful. They were required to develop and complete the construction for an amount of Rupees Five Crores Ninety One Lakhs. The construction was to be completed in 48 months. In this period, not only the construction was to be completed but the shops and facilities were required to be leased out and the end user should start paying lease rent to the Corporation, and in default, the Concessionaires shall be treated as occupying the vacant

facilities / shops / offices and shall be liable to pay lease rent.

4(B). It is argued for the Petitioner that the Corporation has issued contract acceptance letter to the Concessionaires on 29th August 2012 and 'concession agreement' dated 30th November 2012 (Exhibit D) has been executed and registered. The period of 48 months commenced on 30th November 2012 and expired on 29th November 2014 but the constructions is still not complete and Concessionaires cannot be permitted to further construct as the construction period has expired. The further construction is thus unauthorized. The learned counsel submitted that the Petitioner collected information (Exhibit E) under Right to Information Act and has learnt that the Concessionaires have not done the construction obtaining permission of construction from the Town Planner, as such the construction activity is without permission and illegal. As per Section 43

of the Maharashtra Regional and Town Planning Act, 1966 ('M.R.T.P. Act" - in short), the construction carried out without permission of planning authority is illegal. It is argued that as per observations of the Hon'ble Supreme Court in the matter of **Mahendra Baburao Mahadik and others vs. Subhash Krishna Kanitkar and others, reported in A.I.R. 2005 Supreme Court 1794**, the Municipal Council does not have power to regularize unauthorized construction and it must be demolished.

4(C). It is stated for the Petitioner that Respondent No.4 executed the agreement in capacity of Deputy Commissioner of the Corporation by virtue of the order dated 19th November 2012 issued by Respondent No.2 regarding delegation of powers. The counsel submitted that this Respondent No.4 Ratnakar has, in his service records, at different times shown either different name of his father or surname and thus, according to the counsel,

identity of Respondent No.4 is doubtful and inquiry needs to be made regarding his locus. It is further submitted that as per Section 68(2) of the Bombay Provincial Municipal Corporation Act, Municipal Commissioner can delegate his powers to any other municipal officer, subject to approval of the Standing Committee. In the present matter, order dated 19th November 2012 was passed by the Commissioner – Respondent No.2 authorizing Deputy Commissioner to execute the agreement, but no prior approval of the Standing Committee has been obtained and thus the agreement is illegal.

4(D). It is stated for the Petitioner that the Corporation has issued Circular dated 10th March 2015 whereby minor discrepancies regarding area and delay in construction can be regularized by imposing "hardship premium and penalty". The Mayor of the Corporation has passed Resolution in General Body Meeting dated 14th August 2014 that benefit of hardship premium cannot be given to the

Concessionaires. It is claimed that the Concessionaires have not deposited development premium also as per the agreement and as directed in Resolution dated 16th August 2012.

4(E). It is stated that Petitioner had earlier filed R.C.S. No.72 of 2015 in the Court of Civil Judge, Senior Division, Nanded for injunction, but as the temporary injunction application was yet not decided, the Petitioner had no option but to withdraw the said Suit and file this Public Interest Litigation. According to the Petitioner, the Suit was allowed to be withdraw on 25th August 2015.

DEFENCE OF RESPONDENT NOS. 2, 3 & 5

5(A). Per contra, Respondent Nos. 2, 3 and 5, in their affidavit in reply have stated and it has been argued for these Respondents that the Petition deserves to be dismissed. It is stated

that at the place of complex, there was earlier an old structure which was decided by the Corporation to be developed on P.P.P. Basis. Regarding this, Resolution No.178 was passed by General Body on 30th January 2009. Reference has been made to the Resolution, copy of which has been filed at Exhibit RA-1. It is pointed out that the Corporation took services of consultant M/s. Fortress and detailed feasibility report for redevelopment of the Market and Mangal Karyalaya was obtained as per Exhibit RA-2. The Corporation took assistance of an expert before going into Public Private Partnership and guidelines were settled. As per the guidelines, public tender was published in newspaper dated 10th February 2012 (Exhibit RA-3). These Respondents state that on receipt of tenders, the rate of the Concessionaires were found to be the highest and scrutiny committee of the Corporation looked into the same. Thereafter Standing Committee of the Corporation caused negotiation and Concessionaires

increased their officer from Rs.5,21,10,000/- to Rs.5,91,00,000/-. The Committee then accepted the offer of Concessionaires passing Resolution No.93 dated 16th February 2012. It has been argued that the Resolution Exhibit RA-4, itself shows that it was the third occasion for calling tenders through newspaper and this time the tenders received were found to be in order. On 22nd August 2012 General Body vide Resolution No.94 (Exhibit RA-5), authorized the Municipal Commissioner to execute an agreement with Concessionaires and consequently the Commissioner issued acceptance letter dated 29th August 2012 (Exhibit RA-6) and the agreement came to be executed on 30th November 2012, which has been filed by the Petitioner.

5(B). It is stated on behalf of these Respondents that under Section 72B of the Maharashtra Municipal Corporations Act, 1949 ("Municipal Corporations Act" in brief), the Municipal Commissioner has authority to delegate

his powers to subordinate officers. Accordingly, on 19th November 2012, the Commissioner delegated his powers conferred upon him by the Standing Committee, to Respondent No.4 Deputy Commissioner (Development) to execute the concession agreement.

5(C). It is argued that as per Section 44 of the M.R.T.P. Act, "local body" is exempted from seeking permission for development from planning authority. The Corporation is "local body" and thus is exempted. There is no need for the Corporation to seek permission from the planning authority. As per the terms and conditions of the tender and the concession agreement, it is not necessary for Concessionaires to obtain construction permission. The Concessionaires were only required to prepare architectural and structural design of the project and seek approval of the Commissioner. Accordingly the plans were submitted by them and they were duly approved by Respondent No.2 Municipal Commissioner.

5(D). It is stated for Respondent Nos.2, 3 and 5 that in view of the concession agreement, the period is of 48 months "from the date of signing of agreement' or "the date of handing over the site to the developer" or "the date of issue of work order", whichever is later. It is argued for these Respondents that in June 2014 Concessionaires started construction as per the mark outs given by the Municipal Engineers. There is supervision of the Municipal Corporation over the construction undertaken by the developer and there is no violation of Development Control Rules of the Corporation. The construction is thus not illegal. The Concessionaires are doing the construction on P.P.P. Basis and the Corporation has not put in any funds and thus it cannot be said that public funds are misused.

5(E). It is stated for Respondent Nos.2,3 and 5 that some tenants of the old market filed

Civil Suits before Civil Judge, Junior Division at Nanded and had obtained status quo orders, which came to be vacated when the temporary injunction applications were rejected on 29th January 2015. The tenants approached the High Court vide Writ Petition No.11402 of 2014, which also came to be disposed on 19th June 2015. The tenants agreed, in the High Court, to shift to alternate accommodation and thus it is stated that only thereafter complete possession of the site could be given to the Concessionaires.

DEFENCE AS PER RESPONDENT NOS. 6 & 7

6(A). Respondent Nos.6 and 7 have also referred to regular civil suit which was filed by the Petitioner to contend that the Petitioner clearly had resorted to the alternative remedy which he had, but withdrew the suit unconditionally and thus he abandoned the claim which he is now making in the Public Interest

Litigation. Reference is made by these Respondents to the withdrawal purshis filed, to submit that the suit was not withdrawn with permission to resort to alternative remedy. Thus, according to Concessionaires the present PIL should not be entertained as these Respondents cannot be vexed twice.

6(B). It is stated for the Concessionaires that the entire project in question is executed by and under the supervision of Municipal Commissioner himself. The project is being executed on behalf of the Corporation itself as an agency or extended arm of the Corporation. Referring to the claims made by the Petitioner, it is argued that these Concessionaires participated in the bid process and Standing Committee accepted their bids and consequently the Commissioner executed the agreement with regard to the development plans. It is argued that even if the period was to be calculated from 30th November

2012, the period of 48 months is still not over and there is no foundation for the argument that period of agreement is over and continuation of the construction is illegal. Reference is made to Clause 4.1.10 of the tender document to point out, how commencement date is to be considered. The same is as under:-

"4.1.10 "Commencement date" shall mean the later date of the following:

. Date on which the concession agreement is signed or

. The date of handing over possession of the project site to the Concessionaire free of encroachments and encumbrances or

. The date of issue of work order."

6(C). At the time of arguments, the learned senior counsel for Respondent Nos.6 and 7 filed copy of the communication of the Corporation dated 19th October 2015 (taken on record and marked "X")

to point out that the work site has been made available to the Concessionaires free from all encroachments and encumbrances on 27th July 2015 and thus the date of work order has been fixed as 27th July 2015. The learned senior counsel submitted that as per Condition No.1.5 of the tender document, it was the responsibility of the Corporation to handover the project site within 60 days of signing of the Concession agreement, but in the present matter, some of the tenants of the Corporation filed four civil suits as mentioned in the affidavit. Earlier the Civil Court passed status quo orders and the Corporation was not able to evict those tenants. Subsequently, the orders came to be vacated and the applications were rejected. Writ Petition No.11402 of 2014 filed by the tenants was disposed after the tenants undertook to vacate the premises within one month. The High Court orders were passed on 19th June 2015 and thereafter the site became available free from all encumbrances and consequently the

communication dated 19th October 2015 was issued fixing the date of work order as 27th July 2015.

6(D). It is stated that the Concessionaires are not liable for hardship premium policy as they are still within the prescribed period. The counsel submitted that the site was being developed as per the agreement and the Corporation continued to retain the right of ownership and other rights in the complex. The learned counsel referred to Clause 4.1.44 to submit that after the development, the structure has to be handed over to the Corporation free of cost. As per Clause 4.4.1.14 the Concessionaires will have no right over the project after the end of concession period. Reference was also made to Clause 4.4.1.16 to submit that the ownership rights of the site of the project facilities are not transferred either to the Concessionaires or to the occupants. According to the learned senior counsel, the whole project is being supervised by the Corporation

which continues to be the owner of the site and the property developed continues to remain as that of the Municipal Corporation. Reference was made to Section 44 of the M.R.T.P. Act to argue that the local body is exempted from applying for permission. In the present matter, the construction is of the Corporation building itself, which is local body. As per the terms and conditions of the agreement, it is not necessary for Respondent Nos. 6 and 7 to obtain construction permission. However, as per the terms and conditions, architectural and structural designs of the project facilities were submitted and they have been approved by the Commissioner. The counsel submitted that as per Section 152 of the M.R.T.P. Act, in the corporation area the Municipal Commissioner himself is the town planning authority and having powers to grant sanction to proposed construction under Section 44 of the M.R.T.P. Act. It is stated that when the Concessionaires will complete the construction,

they will seek provisional completion certificate as per Clause 4.4.4.5 of the concession agreement.

6(E). Learned counsel submitted that there is no record of the Petitioner being social worker. He has been set up to create hurdles in the project. The concession agreement was executed on 30th November 2012 and after about three years the present Petition has been filed, which is liable to be rejected. About 75% of the work is already completed. Because of issuance of notice in the present matter, which was widely made public by the Petitioner, the Concessionaires have not been able to get advance amount for bookings which has heavily caused financial loss and loss of good-will for these Respondents. The learned senior counsel further tendered communication dated 7th January 2016 (taken on record and marked "Y") to submit that out of abundant precaution, the Commissioner has even approved the maps of the construction in response to the request made by

the Concessionaires vide their letters dated 16th September 2013 and 22nd December 2015.

FALLACY OF PETITION

7. The fallacy of the Petition brought and arguments raised for the Petitioner gets exposed when the same is juxtaposed with the defence of the Respondents supported by record as we have just done (supra). Bare reading of the above shows that there is no substance in the Petition and arguments as raised by the learned counsel for the Respondents needs to be accepted.

8. Considering the record, we find that the Municipal Corporation took the necessary precautions for replacing the old structure with a new building. The matter was placed before the General Body on 30th January 2009 and resolution in this regard was passed. Precautions were taken to go in for feasibility report for redevelopment and

taking expert advise, steps to go into such Public Private Partnership were taken. Record shows that efforts were since before being made by the Corporation by issuing tender notices which ultimately bore fruits when notice was published on the third occasion in newspaper Daily Lokmat dated 10th February 2012. All this while the Petitioner did not come forward to question how such project could be gone into. The Corporation there after, on receiving the tenders, finalized the same in favour of Respondent Nos.6 and 7 and Standing Committee in this regard adopted Resolution No.93 dated 16th February 2012. The General Body thereafter on 22nd August 2012, directed the Commissioner to act upon the tender and enter into agreements. Further steps have been taken by Respondent Nos. 2 to 4. Perusal of the concession agreement filed by the Petitioner discloses that the Corporation has taken sufficient precautions with protective clauses while entering into the agreement, in public

interest.

9. It is a matter of record that some tenants created obstacles by going to the Civil Court and the matter got ironed out after the High Court took undertakings from the tenants to shift to alternate accommodation. The objection raised by the learned counsel for the Petitioner that the period is over and thus the further construction is illegal, is, on the face of it, not tenable. Even by mathematical calculations, even accepting the date 30th November 2012 as basis, when the Petition came to be filed, the period of 48 months as mentioned in the agreement, was not over. This is apart from the fact that agreement itself prescribes as to how the commencement date will be calculated as per Clause 4.1.10.

10. The objections raised by the Petitioner regarding building plans and construction permission also are liable to be rejected. Sub-

section (1) of Section 44 of the M.R.T.P. Act reads as under:-

"44. Application for permission for development

(1) Except as otherwise provided by rules made in this behalf, any person not being Central or State Government or local authority intending to carry out any development on any land shall make an application in writing to the Planning Authority for permission in such form and containing such particulars and accompanied by such documents, as may be prescribed."

. We find force in the submission of the learned senior counsel for Respondent Nos.6 and 7 that Section 44 of the Act does not apply to local authority. The concession agreement Para 4 a) reads as under:-

"4. The Concessionaire does hereby agree:

a) To duly execute and complete the Project in

all respect entirely at the cost of the Concessionaire and strictly in accordance with the approved designs, drawings and work specifications under the technical control and supervision of the NWCMC and within the time limits specified therein."

Emphasis supplied.

11. The Concessionaires have filed copy of approved plans, Exhibit R-4, to submit that the Corporation has approved the designs and drawings. The Respondents have submitted that the construction being carried out is, as per the designs settled and no Development Control Rules are being violated.

12. The Petitioner is questioning the locus of Respondent No.4 who has been made Respondent by name. We need not go into the controversy raised regarding the name of father or surname of Respondent NO.4. The Respondent authorities have not raised any such questions. The Commissioner delegated his powers to Respondent NO.4 in his

capacity of Respondent No.3 to execute the agreement. The copy of the order dated 19th November 2012 has been filed on record. The Respondents have relied on Section 72B of the Maharashtra Municipal Corporations Act which gives authority to the Commissioner to delegate his powers to the subordinate officers. We do not find force in the submission of learned counsel for Petitioner referring to Section 68(2) of the Bombay Provincial Municipal Corporations Act, to claim that the Commissioner required approval of the Standing Committee. In the present matter, the tender was approved by the Standing Committee vide Exhibit RA-4 and the General Body had directed the Commissioner to go into the development with the Concessionaires as per Exhibit RA-5 and the Municipal Commissioner himself issued acceptance letter to the Concessionaires vide Exhibit RA-6 and Respondent No.3 getting authority vide letter dated 19th November 2012, entered into the agreement. Looking to all the procedures followed,

we do not find any force in objections raised to the validity of the agreement executed.

13. We have gone through the Judgment in the matter of **Mahendra Baburao Mahadik**, cited supra, relied on by the learned counsel for the Petitioner. That matter related to an individual who sought permission for repairs and went into construction of the premises. The facts are clearly different. In the present matter it is Corporation, a local body, which is itself developing its own property after following necessary procedure.

14. In the matter of **Jal Mahal Resorts Private Limited vs. K.P. Sharma and others**, reported in (2014) 8 Supreme Court Cases 804, disputes were raised regarding public private partnerships entered into by the authorities for ecological restoration of Mansagar Lake and architectural conservation and restoration/

preservation of 18th Century Jal Mahal Monument and for development of tourism/recreational components at the Lake precincts. It was observed in Para 137 as under:-

"137. From this, it is clear that although the courts are expected very often to enter into the technical and administrative aspects of the matter, it has its own limitations and in consonance with the theory and principle of separation of powers, reliance at least to some extent to the decisions of the State authorities, specially if it is based on the opinion of the experts reflected from the project report prepared by the technocrats, accepted by the entire hierarchy of the State administration, acknowledged, accepted and approved by one Government after the other, will have to be given due credence and weightage. In spite of this if the court chooses to overrule the correctness of such administrative decision and merits of the view of the entire body including the administrative, technical and financial experts by taking note of hair splitting submissions at the instance of a PIL petitioner without any evidence in support thereof, the PIL petitioners shall have to be put to strict proof and cannot be allowed to function as an extraordinary and extra-judicial ombudsmen questioning the entire exercise undertaken by an extensive body which include administrators, technocrats and financial experts.

In our considered view, this might lead to a friction if not collision among the three organs of the State and would affect the principle of governance ingrained in the theory of separation of powers....."

. It was further observed in Para 139 as follows:-

139..... Therefore, the courts although would be justified in questioning a particular decision if illegality or arbitrariness is writ large on a particular venture, excessive probe or restraint on the activity of a State is bound to derail execution of an administrative decision even though the same might be in pursuance of a policy decision supported by other cogent materials like survey and search by a reliable expert agency of a State after which the State project or private and public partnership project is sought to be given effect to."

15. Looking to the above observations of the Hon'ble Supreme Court, when the present matter is considered, we do not find that there is any illegality or arbitrariness writ large requiring interference by this Court. Assuming himself to be Social Worker, Petitioner has jumped on to the vehicle of P.I.L. and is clinging to tit - bits to

put spokes in the development taking place. The objections being raised are in the nature of hair splitting and more technical than driven by public object. The same Petitioner, who is asking for cancellation of the agreement and demolition of structure, has relied on same agreement and prayed that the Concessionaires be asked to pay the lease amount, as according to him, the period of 48 months has come to an end.

16. The Petition is liable to be rejected on the count of delay and laches also. The Petitioner never objected to the project when the Corporation was issuing public notices from before 10th February 2012 and when the concession agreement was entered into. When part of the construction work has been done, the objections were raised. The argument of the learned senior counsel for the Concessionaires cannot be ignored that after filing of the Petition and issue of notice, the project was doubted and it affected these

Respondents in getting advance amount for bookings leading to loss of finance and good-will. Looking to the Petition, it does not appear to be in public interest. It appears to be for oblique reasons and thus the caution amount deposited by the Petitioner would require to be forfeited.

17. For the above reasons, there is no substance in the Petition. The Public Interest Litigation is dismissed with costs quantified at Rupees Fifty Thousand, which shall be adjusted from the caution money of Rupees Fifty Thousand already deposited by the Petitioner in view of order dated 29th September 2015. Rule stands discharged, accordingly.

[A.I.S. CHEEMA, J.]

asb/FEB16

[R.M. BORDE, J.]