

BDPPS

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
PUBLIC INTEREST LITIGATION (L) NO.100 OF 2015**

Mr. Sanjay Krishna Chavan,)
Occ: Service)
Ujala Seva Chawl)
Room No.2, gundavli Gaothan,)
Highways Service Road,)
Andheri (W), Mumbai-400069) Petitioner.

 V/s

1. M.M. Corporation,
having its office at 117, Kamla
Niwas, A/17, 1st floor, Bajaj Road,
Vile Parle (W), Mumbai-400056)
)
2. The Asstt. Engineer,
K/West Ward,
Municipal Corporation of
Gr. Mumbai)
)
3. Municipal Corporation of Gr.
Mumbai, Mahapalika Marg,
Mumbai)
)
4. The State of Maharashtra) Respondents.

.....

Mr. B.D. Joshi a/w. Mrs. Gauri Jadhav for the Petitioner.
Mr. S.U. Kamdar, Senior Counsel a/w. Mr. M.M. Vashi, Senior Counsel
i/b M/s. Thakore Jariwala & Associates for Respondent No.1.
Ms. Trupti Puranik for Respondent Nos. 2 & 3/BMC.

**CORAM: V. M. KANADE &
MRS. SWAPNA S. JOSHI, JJ**

DATE: 25th October, 2016

ORAL JUDGMENT: (*Per V.M. Kanade, J.*)

1. Heard the learned Counsel appearing on behalf of the Petitioner, the learned Senior Counsel appearing on behalf of Respondent No.1 and the learned Counsel appearing on behalf of Respondents - Municipal Corporation.
2. Petitioner claims to be an RTI activist. He has also stated that he is actively involved in philanthropic activity as well as social work.
3. Petitioner is seeking an appropriate writ, order and direction in the nature of writ of mandamus, directing Respondent Nos. 2 and 3 to make inquiry into the alleged illegal sanction and grant of IOD and Commencement Certificate to Respondent No.1. He is also seeking an appropriate writ, order and direction cancelling Occupation Certificate dated 22/10/2014 issued by Respondent No.3. He is also seeking an appropriate writ, order and direction directing demolition of the structure which is erected by Respondent No.1.
4. By consent of parties, PIL is taken up for final disposal at the stage of admission.

5. The grievance of the Petitioner is that Respondent No.1 had illegally constructed residential tower on the land which was reserved for Municipal School. Secondly, it is submitted that the procedure which is required to be followed for the purpose of modification of the plan was not followed and therefore the construction of 19 storeyed building is illegal.

6. The relevant facts which are necessary for the purpose of understanding the controversy which is raised by the Petitioner in this PIL are as under:-

7. It is not in dispute that Respondent No.1 purchased the said property by a deed of conveyance dated 24/10/1994. On the said land, there was one storeyed structure. The ground floor was occupied by Municipal Primary School and there was also a play ground. Secondly, Gujarati Medium Municipal Primary School existed on the ground floor which was having ground plus one storeyed structure. There were four rooms in the said structure. The said structure, however, was in a dilapidated condition. The Corporation was paying rent for the said structure.

8. The land, though owned by Respondent No.1, was reserved for Municipal School, playground and it was also reserved for a public road.

9. Respondent No.1 developed the pre-existing playground and handed over the same to the Corporation alongwith the portion of the said property which was reserved for road widening. Accordingly, name of the Corporation was entered in the property registration card as an owner of the portion comprising of the playground and the road. The remaining property stood in the name of Respondent No.1. Respondent No.1 entered into agreements with the tenants who surrendered their tenancies and handed over possession to the landlord after they obtained monetary compensation from Respondent No.1.

10. Thereafter, Respondent No.1 under the provisions of Rule 11 of Development Control Regulations (for short "DCR") made an application to Respondent No.3 to redevelop the pre-existing Municipal Primary School on the said property. Respondent No.3 gave its in-principle approval for redevelopment of the pre-existing Municipal Primary School on 25/01/2005.

11. The Municipal Corporation granted necessary permission to Respondent No.1 to redevelop the property in a composite manner in accordance with Rule 11 of DCR and this permission was granted on 20/09/2006. Further permission was granted on 09/03/2008 to redevelop the pre-existing Municipal Primary School.

12. Thereafter, Respondent No.1 obtained IOD and Commencement

Certificate for development of the said property and completed redevelopment of the Municipal Primary School to the satisfaction of Respondent No.3. The Occupation Certificate was also granted on redevelopment on 09/03/2010. Respondent No.1 thereafter applied for development of the property for residential purposes in accordance with the plans as permissible under Rule 11 of DCR. The land which was being used by the Corporation was transferred in their name as tenant on 23/07/2014. Respondent No.1 also obtained an Occupation Certificate dated 22/10/2014. The flat purchasers who have purchased the flats from Respondent No.1 started occupying the said flats and they are in occupation since last 10 years.

13 The Petitioner, almost after 10 years after the flats in the said building were occupied by the flat purchasers, has filed this PIL seeking the following reliefs:-

(a) The Hon'ble Court be pleased to grant a writ of mandamus or any other writ in the nature of mandamus to direct the Respondent Nos. 2 and 3 to carry out the necessary enquiry into the illegal sanction and granting of IOD and Commencement Certificate.

(b) The Hon'ble Court be pleased to grant a writ of mandamus or any other writ in the nature of mandamus whereby cancelled the issuance of Occupation Certificate dated 22.10.2014 bearing number CE/8937/WS/AK issued by the Respondent No.3.

(c) The Hon'ble Court be pleased to grant a writ of mandamus or any other writ in the nature of mandamus whereby directing to demolish the structure and/or the structure used for the education purpose.

(d) Pending the hearing and final disposal of the present PIL, the Respondent No.1 be directed not to act upon the Occupation Certificate dated 22.10.2014 bearing number CE/8937/WS/AK issued by the Respondent No.3;

(e) Pending the hearing and final disposal of the present PIL, this Hon'ble Court be pleased to grant stay to the allotment of the premises as per Occupation Certificate dated 22.10.2014 bearing number CE/8937/WS/AK issued by the Respondent No.3.

(f) Interim reliefs in terms of prayer clause (d) and (e);

(g) Any other, further and equitable reliefs as this Hon'ble Court may deem fit.

14. Mr. Joshi, the learned Counsel appearing on behalf of the Petitioner firstly submitted that Respondent No.1 has deceived the tenants and constructed residential complex above a Primary School, though the entire plot i.e. CTS No.12/C was reserved specifically for Municipal School and not for residential complex. He then submitted that permission under Rule 11(2) of the DCR was granted for constructing the Primary School. He submitted that the said order could not have been passed under Rule 11(2) of the DCR since the

entire plot was reserved for the purpose of Municipal Primary School. He submitted that Rule 11(2) of DCR could be applied only in cases where the plot was partly reserved. He then submitted that once the plot was reserved for a specific purpose, the same could not be used for any other purpose without obtaining prior permission of the concerned authorities. He submitted that this was not done in the present case. He further submitted that there was violation of IOD and as such the Occupation Certificate could not have been granted by Respondent Nos. 2 and 3. He then submitted that Respondent No.1 had exceeded the construction which was to be carried out on CTS No.12/C. He submitted that Respondent Nos. 2 and 3 had erred in granting permission for development to Respondent No.1. He further submitted that the permission from Education Department of Respondent No.3 was not obtained. The learned Counsel appearing on behalf of the Petitioner also tendered additional documents in support of his case. He relied on the following judgments:-

1. *Motibagh Co-op. Housing Society Ltd. & Anr. vs. Pune Municipal Corporation & Ors.*¹

2. *Housilal Balchand Shah vs. State of Maharashtra and Others*².

3. *Balak Vihar Vidya Trust vs. Municipal Corporation of Gr. Bombay and Ors*³

1 2005(3) ALL MR 27

2 2006(3) Mh.L.J. 763

3 Division Bench Judgment of Bombay High Court in OSWP No.1259/1997
dt.03/05/2011

4. *Manohar Joshi vs. State of Maharashtra and Others*¹

15. On the other hand, Mr. Kamdar, the learned Senior Counsel appearing on behalf of Respondent No.1 pointed out that Respondent No.1 had constructed the building after obtaining permission from the concerned authorities. He submitted that the present Petition was filed after entire building was constructed and flat purchasers had taken possession of their respective flats. He then submitted that Respondent No.1 had taken permission under Rule 11(2) of DCR. He submitted that Section 22-A of the Maharashtra Regional and Town Planning Act (for short “MRTP Act”) was not applicable to the facts of the present case. He submitted that the contention of the Petitioner that Respondent No.1 ought to have taken permission under Section 22-A of the MRTP Act was not correct. He then submitted that the judgments on which reliance was placed by the learned Counsel appearing on behalf of the Petitioner were not applicable to the facts of the present case.

16. Ms. Puranik, the learned Counsel appearing on behalf of Respondents - Municipal Corporation also invited our attention to the affidavit-in-reply filed by the Corporation. She submitted that the permission was obtained by Respondent No.1 from all authorities and therefore case of the Petitioner was not justified.

17. After having heard all the Counsels at length, following

¹ (2012) 3 SCC 619

questions fall for consideration before this Court.

(i) Whether Respondent No.1 had committed an illegality in constructing 19 storeyed tower on the said land?

(ii) Whether Respondent No.1 was justified in obtaining permission under Rule 11(2) of the DCR?

(iii) Whether submissions made by the learned Counsel for the Petitioner are liable to be accepted or rejected?

18. Before we take into consideration the rival submissions, few undisputed facts need to be stated and which are as under:-

(a) It is not in dispute that the plot was owned by Respondent No.1 and it was reserved for construction of the Municipal School.

(b) It is also not in dispute that the reservations was three-fold viz. (i) for Municipal School; (ii) for playground and

(iii) for public road.

19. Mr. Joshi, the learned Counsel for the Petitioner had strenuously urged that it was not permissible to use the plot which was reserved for Municipal School for any other purpose. He placed reliance on the Judgment of Division Bench of this Court (Coram: D.K. Deshmukh & Anoop V. Mohta, JJ.) dated 03/05/2011 delivered in Writ Petition No.1259 of 1997 (*Balak Vihar Vidyas Trust vs. Municipal Corporation of Gr. Bombay & Ors*). He also relied on the Judgment of the Apex Court in *Manohar Joshi vs. State of Maharashtra and Others*¹. He also invited our attention to the relevant provisions of DCR and submitted that the case of Respondent No.1 would not fall under Rule 11 (2) of DCR. He relied on the judgment of the Division Bench of this Court in *Motibagh Co-op. Housing Society Ltd. & Anr. vs. Pune Municipal Corporation & Ors.*² and submitted that in the said Judgment Division Bench of this Court had held that it was not permissible for the Corporation to grant permission to Respondent No.1 to reconstruct the building since procedure under Section 22-A of the MRTP Act had not been followed. He then submitted that Respondent No.1 had terrorized the tenants and had compelled them to surrender their respective flats. He submitted that Respondent No.1 had gone to the extent of filing false complaints against the tenants and had not even spared their advocates who had appeared on their behalf. He showed us the reports submitted by the Inspector. He submitted that the

1 (2012) 3 SCC 619

2 2005(3) ALL MR 27

reports clearly stated that bogus complaints were filed by Respondent No.1 against the villagers who were living in the said village.

20. Ms. Puranik, the learned Counsel for Respondents – Municipal Corporation had taken us through the affidavit-in-reply filed by the Corporation.

21. After having heard the learned Counsels appearing on behalf of the both sides, we have come to the conclusion that this PIL does not appear to have been filed on bonafide basis. Petitioner as well as the tenants had initially filed complaints against Respondent No.1 and, as a counter-blast, Respondent No.1 had to file complaints against tenants. Mr. Joshi, the learned Counsel for the Petitioner submitted draft agreement. He submitted that representation was made by Respondent No.1 to the tenants that Respondent No.1 proposed to construct the building for the School and by making that representation he had obtained their signatures.

22. In our view, all these submissions made by the learned Counsel for the Petitioner are without any substance. We have perused the affidavit-in-reply filed by the Corporation in which the Corporation has given detailed reasons for granting Commencement Certificate and Occupation Certificate in favour of Respondent No.1. The complaints appear to have been filed by the Petitioner and tenants against Respondent No.1 and, as a counter-blast, Respondent No.1 had filed

complaint against the tenants. As rightly pointed out by Mr. Kamdar, the learned Senior Counsel appearing on behalf of Respondent No.1, the document which was tendered across the bar by Mr. Joshi the learned Counsel appearing on behalf of the Petitioner was only a draft agreement and subsequently final agreement was entered into between the parties in which Respondent No.1 had given all the details regarding the transaction.

23. It would be relevant to take into consideration two provisions viz. Section 22-A of the MRTP Act and Rule 11(2) of the DCR which read as under:-

“22-A. Modification of a substantial nature

In section 31, the expression “of a substantial nature” used in relation to the modifications made by the State Government in the draft development plan means,-

(a) any modification to a reserved site resulting in reduction of its area by more than fifty per cent or reduction of such amenity in that sector by an area of more than ten per cent in the aggregate;

(b) insertions of a new road or a new reservation or modification of a reserved site or a proposed road widening resulting in inclusion

of any additional land not so affected previously;

(c) Change in the proposal of allocating the use of certain lands from one zone to any other zone provided by clause (a) of section 22, which results in increasing the area in that other zone by more than ten per cent in the same planning unit or sector in a draft Development plan;

(d) alteration in the Floor Space Index beyond ten per cent of the Floor Space Index prescribed in the Development Control Regulations.”

DCR

“11. Other Stipulations

(1).....

(2) Development of land partly designated / allocated / designated /reserved.-

Where a building exists on a site shown as an allocation, designation or reservation in the Development Plan, only its appropriate part as used for such allocation, designation or reservation, shall be used for the said purpose and the remaining part of the building or of the

developable land may be put to use in conformity with the purpose of development as otherwise permissible in the case of adjacent land.

(3)

(4)”

24. So far as Rule 11(2) of DCR is concerned, it is clear that if conditions mentioned in Rule 11(2) are satisfied then permission could be granted under the said provision by the competent authority. We find that the case of Respondent No.1 is squarely covered by the said Rule 11(2) of DCR.

25. It has also to be noted that construction of the building was completed in 2014 and the flat purchasers had already started residing in their respective flats in the said building. Respondent No.1 has handed over garden to the Corporation and has also constructed four rooms and handed over the same to the Corporation in which the Corporation has already opened the School. The ratio of the judgment on which reliance was placed by the learned Counsel for the Petitioner would not apply to the facts of the present case. On the other hand, the Apex Court in *Manohar Joshi* (supra) has examined the similar issue and has noted that construction of shops above BEST Bus Depot was permissible. Viewed from any angle therefore we do not find any merit in the submissions made by the learned Counsel appearing on behalf of the Petitioner.

26. We would like to note here that it appears that the Petitioner is trying to agitate cause of the tenants after possession of their respective flats in the said building was obtained by the flat purchasers. The Apex Court in *Forward Construction Co. and Others vs. Prabhat Mandal (Regd.), Andheri and Others*¹ has considered this issue in para 33 of the said judgment, which reads as under:-

“33. This leads us to the last but not the least in importance the plea based on building Regulation No. 3. In order to appreciate the contention it will be proper to read the regulation:

The user of the following final plots will be as under, as per the sanctioned development plan:

<i>Final Plot No.</i>	<i>User</i>
10	Public Wall
12 Pert	Parking lot
14	Best Bus Depot

Provided that the above users may be changed by the Local Authority after modification of the Development Plan.

It was this plea which prevailed with the High Court and the writ petition was allowed only on this score. The precise contention of the counsel for the respondents was that Building Regulation 3 will override the Development Control Rules for Greater Bombay. Rule 3 of the Development Control Rules for Greater Bombay reads:

3(a)(i) All development work shall conform to the

1 (1986) 1 SCC 100

respective provisions made under these Rules, if there is a conflict between the requirement of these rules and the requirements of bye-laws in force the requirements of these rules shall prevail;

Provided however that in respect of areas included in a finally sanctioned Town Planning Scheme, the scheme regulations shall prevail if there is a conflict between the requirements of these rules and of the Scheme regulations.

(ii) The development work when completed shall not be used for any purpose except for the sanctioned use or such use as can be permitted under these rules.

(b) Change of use; No building or premises shall be changed or converted to a use not in conformity with the provisions of these rules.

If the contention of the respondents that proviso to Building Regulation No. 3 overrides the Development Control Rules is accepted then the user of the plot as per sanctioned development plan can be changed by the local authority after modification of the development plan and as in the instant case there has been no modification of the development plan the change of user cannot be permitted. This is the crucial point on which the writ petition has been allowed. The other pleas taken by the respondents, as stated above, had been negatived by the High Court. What the proviso to Building Regulation No. 3 requires is that the change of user of the sanctioned plan can be made only after the modification of the development plan. The key word in this regulation is "change". What does the word 'change' mean? Collins English Dictionary gives the following meaning to the word 'change':

1. to make or become different, alter, 2. to replace with or exchange for another, 3. to transform or convert, 4. to give or receive something in return, interchange, 5. to give or receive money in exchange for the equivalent sum in small denomination or different currency, 6. to remove or replace the coverings of, 7. to put on other clothes, 8. to pass from one phase to the following one, 9. to alight from and board another, 10. a variation,

deviation or modification, 11. the substitution of one thing for another, exchange, 12. anything that is or may be substituted for something else, 13. a different or fresh set.

The meaning of the word 'change' in the Oxford Dictionary reads:

1. take another instead of, 2. resign, get rid of, 3. give or get money change for, 4. put on different clothes, 5. go from one to another, 6. pass to different owner, 7. make or become different, 8. take new position in argument, 9. adopt new plan or opinion.

So, the general meaning of the word 'change' in the two dictionaries is "to make or become different, to transform or convert." If the user was to be completely or substantially changed only then the prior modification of the development plan was necessary. But in the instant case the user of the plot has not been changed. It has been used for a bus depot combined with a commercial use to augment the income of the Corporation for public purpose. In this view of the connotation of the word 'change' the proviso has no application to the present case and the High Court in our opinion was not quite justified in allowing the writ petition only on the basis of the proviso to Building Regulation No. 3."

The ratio of the said judgment in *Forward Construction Co.* (supra) would squarely apply to the facts of the present case. Corporation in its detailed affidavit in reply has also given the steps taken by it while granting sanction to the plans submitted by Respondent No.1.

27. Lastly, it has to be noted that there is gross unexplained delay in approaching this Court and on that ground also, PIL is liable to be

rejected. Division Bench of this Court (Coram: V.M. Kanade and M.S. Sonak, JJ.) in its judgment dated 28/07/2016 delivered in PIL No.43 of 2016 (*Mr. Imran Suleman Qureshi vs. Mumbai Building Repair and Reconstruction Board and Ors.*) has considered all the judgments of the Apex Court and has observed that this Court should be slow in entertaining Petitions as PIL and only after it is satisfied that the tests laid down in the said judgments are followed then only it should entertain the PIL. Keeping this view in mind, we are of the view that though the Petitioner claims to have acted with bonafide intention, in reality, he has agitated rights of the tenants. In our view, it was always open for the tenants to approach this Court challenging the action of Respondent No.1 and there was no impediment in their way either social or financial to challenge the action of the State in granting permission to Respondent No.1 for reconstruction of the said building above the four rooms which were given to the Municipal Corporation. The photographs which have been shown to us by Respondent No.1 shows that four rooms have been given to Municipal Corporation on ownership basis and the garden and the four rooms are well maintained. We are therefore not inclined to grant the reliefs claimed by the Petitioner.

28. The questions framed in para 17 above are therefore answered as under:-

Questions	Findings
(i) Whether Respondent No.1 had committed an illegality in constructing 19 storeyed tower on the said land?	In the negative
(ii) Whether Respondent No.1 was justified in obtaining permission under Rule 11(2) of the DCR?	In the affirmative
(iii) Whether submissions made by the learned Counsel for the Petitioner are liable to be accepted or rejected?	Liable to be rejected

29. PIL is therefore dismissed.

30. At this stage, the learned Senior Counsel appearing on behalf of Respondent No.1 submitted that Petition may be dismissed with costs. He invited our attention to para 6 of the affidavit-in-reply dated 13/10/2015 filed by Respondent No.1. He submitted that Petitioner alongwith Hemant Dalal, Ashok Deshmukh, Ashwin Herani and Ms. Heena Shroff had, by making false, frivolous, vexatious and malicious allegations, filed the present PIL to threaten Respondent No.1. He

submitted that no rejoinder had been filed to the said averments. He submitted that two more Petitions have been filed by said Hemant Dalal and one complaint was filed before Lokayukta against Respondent No.1. He submitted that the complaint filed before Lokayukta was, however, dismissed.

31. We are satisfied that the Petitioner has obviously been put up by some one and it is possible that the Petitioner who is a rickshaw driver has been put up by Hemant Dalal, Ashok Deshmukh, Ashwin Herani and Ms. Heena Shroff. It is also pertinent to note that no particulars have been given by the Petitioner regarding his philanthropic work. Under these circumstances, in our view, this is a fit case where the Petitioner should be asked to pay costs which is quantified at Rs 1 lakh. Petitioner to pay this cost of Rs 1 lakh within four weeks to Tata Cancer Research Society and file a compliance report in this Court within one week after the said costs is paid to Tata Cancer Research Society.

32. PIL is accordingly disposed of.

(MRS. SWAPNA S. JOSHI, J.)

(V.M. KANADE, J.)