

Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL (ST) NO.12011 OF 2017
WITH
CIVIL APPLICATION (ST) NO.12016 OF 2017

- 1. RITA MAHESH DADARKAR,**
Aged about 53 years, occupation: Service
Indian inhabitant of Mumbai, residing at
B/303, Mugaha Apartments, Satya Nagar,
Borivali (W), Mumbai 400 092
- 2. APURVA MAHESH DADARKAR ALIAS**
APURVA ISWALKAR,
aged about 30 years, Student, Indian
inhabitant of Mumbai, residing at B/303,
Mugaha Apartments, Satya Nagar, Borivali
(W), Mumbai 400 092
- 3. PURNIMA MAHESH DADARKAR**
ageda bout 15 years, Student, Indian
inhabitant of Mumbai, residing at B/303,
Mugaha Apartments, Satya Nagar, Borivali
(W), Mumbai 400 092

...Appellants

~ VERSUS ~

- 1. THE COMMISSIONER**
Brihanmumbai Mahanagar Palika, Greater
Bombay, Palika Marg, CST, Mumbai 400 001

2. **THE EXECUTIVE ENGINEER (TOWN PLANNING)**
Chhatrapati Shivaji Market Building, 2nd
Floor, Palton Road, Fort, Mumbai 400 001
3. **THE ASSISTANT MUNICIPAL COMMISSIONER (R CENTRAL WARD)**
Municipal Market Building, Swami
Vivekanand Road, Borivali (West), Mumbai
400 092
4. **THE CHIEF ENGINEER (DEVELOPMENT PLAN)**
4th Floor, Annex Building, Municipal Head
Office, Mahapalika Marg, Fort, Mumbai 400
001
5. **YASHUBAI GOPINATH DADARKAR**
(since Deceased)
Aged about 86 years, of Mumbai, Indian,
Inhabitant, residing at Dadarkar Wadi, behind
Gulmohor Housing Society, Chikoowadi,
Village Shimpoli, Borivali (W), Mumbai 400
092
6. **SHRI SUDHIR GOPINATH DADARKAR**
Aged about 58 years, of Mumbai, Indian,
Inhabitant, residing at Dadarkar Wadi,
Behind Gulmohor Housing Society,
Chikoowadi, Village Shimpoli, Borivali (W),
Mumbai 400 092
7. **MRS SUBHANGI ALIAS SUJATA
RAMESH RAUT**

Aged about 55 years, of Mumbai, Indian,
Inhabitant, residing at 601, Harishchandra
Apartment, Mogul Lane, Mahim, Mumbai
400 016

8. ADITYA MAHESH DADARKAR

Aged about 21 years, Occupation : Student
Indian, Inhabitant, of Mumbai, B/303,
Mugdha Apartments, Satya Nagar, Borivali
(W), Mumbai 400 092

...Respondents

APPEARANCES

FOR THE APPELLANTS	Mr Rakesh Kumar, <i>with Mr Vishal Agrawal, i/b M/s Legal Vision.</i>
FOR RESPONDENTS NOS 1 TO 4	Mr F Reis, Senior Advocate, <i>with Mr Abhijeet Joshi, i/b Mrs M Bhoir with Mrs Madhuri More.</i>

CORAM: G.S. PATEL, J

DATED: 15th June 2017

ORAL JUDGMENT:

1. By its order dated 23rd March 2017, after framing a preliminary issue under Section 9A of the Code of Civil Procedure 1908 and allowing parties to lead evidence, the City Civil Court dismissed the Plaintiffs' Suit as being barred under Section 149 of

the Maharashtra Regional Town Planning Act 1996 (“**MRTPA Act**”).

2. In order to appreciate the controversy, we must first look at Section 149:

“149. Finality of orders: Save as otherwise expressly provided in this Act, every order passed or direction issued by the State government or order passed or notice issued by any Regional Board, Planning Authority or Development Authority under this Act shall be final and shall not be questioned in any suit or other legal proceedings.”

3. The final reliefs that the Plaintiffs sought were these:

“35(a) That this Hon’ble Court be pleased to declare that the land reserved for public purposes by Defendant Nos.1 to 4, in excess of 30% of the total area of Original Plot No.333 under the Town Planning Scheme Borivli III, is illegal, invalid and this Hon’ble court be further pleased to cancel the reservation in excess of 30% of total area of O.P.333.

(b) That this Hon’ble Court be pleased to direct the Defendant Nos.1 to 4, to allot to the Plaintiffs/owners final plots admeasuring 7900 sq. mtrs. As mentioned in letter dated 19th May 1971, issued by Municipal Corporation of Greater Bombay or as this Hon’ble Court may deem fit and proper;

(c) That in the alternative this Hon’ble Court be pleased to direct the Defendant Nos.1 to 4 to allow the Plaintiffs/owners to develop an area admeasuring about 3000 sq. mtrs. Out of Final Plot No.563

reserved for recreation ground and to develop an area admeasuring about 1020 sq. mtrs. out of Final Plot No.571 reserved for housing the dishoused as delineated in the map at Exhibit "E" to the plaint as per the rules and regulations for development of Recreation Ground and Housing the dishoused;

- (d) That this Hon'ble Court be pleased to direct the Defendant Nos.1 to 4 to grant F.S.I./T.D.R. to the Plaintiffs/owners admeasuring about 3,197.9 sq. mtrs. In lieu of the land admeasuring 5,023.1 sq. mtrs. Utilized for construction of Ist and IInd T.P./D.P. Road;
- (e) That this Hon'ble Court be pleased to direct the Defendant Nos.1 to 4 to hand over the peaceful and vacant possession of an area admeasuring about 1020 sq. mtrs. Out of final plot No.571 reserved for housing the dishoused as delineated in the map at Exhibit "E" to the plaint to the Plaintiffs/owners for development of housing the dishoused as per the rules and regulations."

4. The scheme in question is the Town Planning Scheme-III for Borivali, one that received State Government sanction on 20th July 1995.

5. The remaining prayers are for interim relief, of which the only one that needs to be examined is prayer (i):

"(i) That pending the hearing and final disposal of this suit, this Hon'ble Court be pleased to direct the Defendant Nos.1 to 4 to enter the name of the Plaintiffs' Predecessor Late Mr Mahesh G Dadarkar as co-owner in the Final

Scheme, Form I and all other records pertaining to O.P.333
T.P.S. Borivli III."

6. The submission by Mr Kumar on behalf of the Appellants is two-fold. First, that the remit of Section 149 is limited to notices issued, orders passed or directions given; the prohibition does not extend to Town Planning Schemes framed under Chapter 5 of the MRTP Act. Second, that even if prayer clause (a) is hit by the prohibition in Section 149, the remaining prayers can be severed and the suit ought not to have been dismissed in its entirety.

7. It is not possible to accept the first submission. There is a decision of a learned Single Judge of this Court, JH Bhatia J in *Kalyan Dombivli Municipal Corporation vs Prakash Mutha*¹ that settles the very issue. It arose before Bhatia J in the context of a Town Planning Scheme within the command area of the Kalyan Dombivli Municipal Corporation, a designated planning authority under the MRTP Act. The question there was in relation to a development plan. Town Planning Schemes stand on the same footing and there is, in fairness, no submission made before me that there is any material distinction between a development plan, a regional plan and a town planning scheme for the purposes of Section 149. After setting out in elaborate detail the planning process contemplated by the MRTP Act, Bhatia J held that a suit challenging portions of the development plan was barred under Section 149 of the MRTP Act.

1 2008 (3) ALL MR 269; 2008 (3) Bom CR 720; 2008 (3) Mh LJ 686.

8. There is another perspective on this too. As Bhatia J noted, and as the MRTP Act itself indicates, the process of town planning is very complex. It takes much time to prepare a development plan, regional plan or a town planning scheme. Each has its own special considerations. A multitude of factors must be correctly balanced. The process requires public participation at various stages. In fact, public participation is the *sine qua non* of the planning process. Public hearings are held. Both individual and general notices are issued. The plans may themselves change either at the instance of the planning authority or at the instance of the sanctioning authority, the State Government in its Urban Development Department. Sometimes, within the command area of a planning authority, there are special planning authorities and their concerns also addressed. The result is usually a plan or master plan that envisions urbanization over a long period of time and attempts to take into consideration and properly balance the needs of the region as they evolve, or are anticipated to evolve, over that time period. Importantly, provisions are made in such plans for reservations of land for public purposes such as recreation grounds, affordable housing, schools, medical facilities, transportation and so on. These are all factors that must be balanced. These plans also provide for restrictions on development by individual plot owners and, where lands are reserved for public purposes, make allowance by providing additional or special benefits. These benefits may come in various forms such as TDR, additional *in situ* FSI or some other mechanism. The entire process of town planning would be rendered entirely futile if individual land owners or stake holders were allowed to file suits and obtain injunctions, whether prohibitory or mandatory, permanent or temporary, affecting the overall plan. To

illustrate: if a land-holder claims, for instance, to be entitled to be put in possession of an additional area of land, or to have a reservation cancelled, or to gain additional benefit, then the law requires, as does the constitutional mandate of Article 14 which always guides the hand of the Planning Authority and the Sanctioning Authority, to make the same allowances and provisions for other persons similarly situated within the area of that development plan, regional plan or town planning scheme. Civil Courts, as a general rule, will not enter into this area. It requires significant expertise. It melds policy with entitlement and rights. A Civil Court will not decide whether an individual land owner or holder should, even on the invocation of some principle of equity, be entitled to additional benefits attached to land or a release from restrictions or reservations, but his neighbour be denied that very benefit. If courts started doing this, they would usurp the planning process, reducing it to irrelevance if not making a mockery of it.

9. Within the context of Section 149, one would then have to look at the provisions of Chapter V of the MRTP Act from Sections 59 to 112. In particular this chapter provides for the appointment of an Arbitrator, a Tribunal, an Appellate Tribunal, powers of the Tribunal, the requirement of sanction of the State Government to a Town Planning Scheme, the preparation of a preliminary scheme, the hearing of suggestions and objections and most importantly under Sections 88 to 90, the vesting of lands in a Planning Authority free from all encumbrances (Section 88), the power of the Planning Authority to evict summarily (Section 89) and to enforce the scheme (Section 90). These are all steps taken in the form of directions or orders, and perhaps based on notices required to

implement a Town Planning Scheme. Section 86 of the MRTTP Act, also part of Chapter V, clearly states in sub-section (3) that a preliminary or a final scheme has the effect of law.

10. Section 71 is a statutory provision that is engrafted to deal with questions of disputed ownership. I can understand Mr Kumar's anxiety on behalf of the Appellants to invoke this Section, but in fact it has a very limited application to these facts because the Plaintiffs' ownership of the land is not disputed as against the another individual. What Mr Kumar seems to suggest is that there is an error in the Town Planning Scheme No. III for Borivali and that this is the subject matter of the suit. According to him, Section 71(2) specifically says that such a dispute is not a bar to a regular Suit. But that is not the purport of prayer (a) of the suit at all. That prayer seeks an order to release a portion of the Plaintiffs' plot from a public reservation. This has nothing at all to do with any mistake. If it has any application at all, Section 71 will only apply in the context of prayer (i) and none of the other prayers. I will return to this aspect momentarily.

11. Following the decision in *Prakash Mutha*, it will have to be held that a change to a Town Planning Scheme or a development plan is barred by Section 149. If a notice cannot be challenged because of Section 149, then clearly the town planning scheme itself cannot be challenged either. To hold otherwise would be to introduce an irreconcilable contradiction into the statute: a person cannot bring a civil suit to impeach a notice issued to implement a town planning scheme, but the scheme itself enjoys no such immunity. That is the purport and trajectory of Mr Kumar's

argument. The decision in *Prakash Mutha* binds me, and I cannot depart from the view it takes. In any case, I am in most respectful agreement with Bhatia J on his interpretation of the law. At best, I may be taken to have supplied a few additional reasons of my own today.

12. Then there is the question of severability and of Section 71 and for this we must look at the prayers once again. The question of severability is addressed thus. According to the Appellants at best prayer clause (a) mounts a challenge to the validity and legality of the Town Planning Scheme can be severed. But the entire suit cannot, could not and ought not have been dismissed. According to Mr Kumar, prayer clauses (b), (c), (d) and (e) are nonetheless maintainable and are not hit by Section 149. They do not impeach or impugn any part of the scheme. They seek instead to enforce the scheme so that the Appellants, who are entitled to benefits, obtain those benefits under the sanctioned town planning scheme in the manner provided in the scheme. The submission falls into two parts. The first is covered by Section 71 and I will take this to mean that where there is a rectifiable error in the scheme, such as a missing name in a record of rights or an unresolved dispute, there is a process to be followed. This aspect is quickly dispatched. In its response, the MCGM accepted (page 96 of the paper-book) that the claim of the one of the co-owners, since deceased, Mahesh Dadarkar, was perhaps inadvertently deleted from the record of ownership rights during the formulation of the scheme at some point between 23rd June 1990 and 8th October 1991. The MCGM, the Planning Authority, readily accepts that a direction to it to put into motion a process of correcting this error may be issued. This

will have to be under Sections 91 or 92 of the Act. This does not require the enquiry contemplated under Section 71 simply because the error is accepted and there is no dispute between rival ownership claimants. The only additional observation that may be required is that the existing co-owners will have to agree on the names of legal heirs or the legal representatives of Shri Mahesh Dadarkar. To this end, the MCGM may require the furnishing of an Affidavit, an indemnity, an undertaking or the production of some suitable order of a competent Court to establish heirship. Other than this, there is no more complex process under the MRTP Act that would be required. In fairness, Mr Reis on behalf of the MCGM has instructions to state that on an appropriate application being made with the necessary particulars, now that Mahesh Dadarkar has passed away, the MCGM will place the appropriate proposal for modification to this extent under Sections 91 and 92 of the MRTP Act before the State Government in Urban Development Department within 90 days of the application being received.

13. The process under Section 72 and subsequent Sections being followed is not one that appeals to me as a ground to escape the ambit of Section 149 of the MRTP Act. The submission seems to suggest that the Plaintiffs were not given individual notices of proposed reservations. The Plaintiffs were not heard. The sanction was obtained without hearing their suggestions and objections. The scheme is therefore illegal and invalid and reliefs ought to be granted. It is not possible to accept this submission. The making of the scheme was no great secret. It was widely publicised. It had to have been. The statute requires this. The Plaintiffs could not have been unaware of the planning process or of the hearings being

conducted by the Arbitrator. They had ample opportunity to demand a hearing at an appropriate time. They can hardly be heard to say that it is within their right to wait until all hearings are complete, all modifications made and sanction obtained in 1995 and then to bring a suit 13 years later in 2008 challenging the validity of the scheme itself.

14. This brings me to prayer clauses (b) to (e) of the plaint. Mr Kumar suggests that there should be an order directing the Defendants to allot certain plots of a given area on the basis of a letter dated 19th May 1971 issued by the MCGM. How that letter can survive a town planning scheme properly formulated a quarter of a century later is unexplained. Prayer clause (c) seeks rights to develop additional areas on the basis that some portion of the Plaintiffs' land is under a reservation for housing the dishoused. Prayer clause (d) then asks for additional FSI and TDR, and prayer clause (e) asks for possession of a particular plot.

15. Prayer clauses (b) to (e) do not seem to me to contain a challenge to the Town Planning Scheme itself. There is no doubt that the Plaintiffs are part of the Town Planning Scheme-III, Borivali. They have certain entitlements under that scheme. Whether they are entitled to a decree of a Civil Court and whether those reliefs can be sought from the Civil Court are questions that must be left open, but returning to the preliminary issue, I do not believe that prayers (b) to (e) are hit by the prohibition of Section 149. Mr Kumar may be correct to this extent when he says that in seeking to enforce an individual citizen's entitlements and rights under a planning scheme, there may be disputed questions of fact

which would put him out of a Writ Court. At the same time, it cannot be that a citizen is deprived of every other judicial remedy and that there is no other court to which he can go to enforce his rights. Indeed, Mr Kumar suggests that the argument made by Mr Reis that a Town Planning Scheme has the force of law is one that can be turned against the MCGM itself. For if that be so, then the individual plot owner has rights under that law and must be allowed to seek enforcement of those rights in some court. They cannot be thrown out of courts or left entirely to the mercy of administrative or executive authorities. I see no difficulty in segregating prayer clause (a), which mounts a substantive challenge to Town Planning Scheme-III, Borivali, from prayer clauses (b) to (e), which seek individual reliefs. Of course the question will remain open for decision before the Trial Court whether the Plaintiffs are indeed entitled to total reliefs or whether they are seeking additional benefits beyond what is permissible to them under the Town Planning Scheme. That is a matter of burden of proof, and this lies on the Plaintiffs. They must discharge that burden to get any relief under prayer clauses (b) to (e). All contentions in that behalf must necessarily be left open. It will, for illustration, be open to the MCGM to show that the Plaintiffs' claims have been overtaken by subsequent events, and the benefits they seek are unavailable under the sanctioned town planning scheme; that the Plaintiffs seek a relief beyond what is available to them or others like them under that Scheme; or that a civil suit for those reliefs is beyond limitation. All defences must also necessarily be kept open. Mr Reis accepts that the plea of limitation will not be further raised as a preliminary issue under Section 9A of the Code of Civil Procedure 1908.

16. In my view, the First Appeal can be disposed of with these observations.

17. The Appeal is allowed, but only in part. To the extent the judgment under appeal holds that prayer (a) is barred by Section 149, the judgment is affirmed. The judgment is reversed as regards the remaining prayers. The suit is restored to file for a consideration of the prayers other than prayer clause (a).

18. As regards prayer clause (i), the statement made on behalf of MCGM is noted and accepted. Mr Kumar states that the Plaintiffs will make necessary application to the MCGM on or before 10th July 2017 along with the necessary documents. The MCGM will by 30th June 2017 inform the Plaintiffs of the documents required in support of such an application for the inclusion of the name of Mahesh Dadarkar on the records. The MCGM will then prepare and submit the necessary rectification proposal under Sections 91 and 92 of the MRTP Act to the State Government in the Urban Development Department by 3rd October 2017.

19. All contentions as between the Plaintiffs and the State Government which is not a party to these proceedings are left open.

20. At this stage, no other protective or ad-interim orders passed. It is open to both sides to make respective applications before the Trial Court. Those applications will be decided on their merits uninfluenced by the order under Appeal or the present order.

21. As regards the plots under reservation, it goes without saying that the Planning Authority will take the necessary actions only in accordance with law and not otherwise. Mr Reis makes a statement that the necessary notice under Section 89 of the Act has been served. This is disputed by Mr Kumar. All contentions are left open.

22. The First Appeal is disposed of in these terms. The Civil Application does not survive and is disposed of as well. No costs.

(G. S. PATEL, J.)