

Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO. 195 OF 2017
IN
FIRST APPEAL NO. 899 OF 2004

Mahindra Gardens Orchid Co-op Hsg Soc ...Applicant
Versus
Mahindra Gesco Developers Ltd & Ors ...Respondents

Mr Atul Damle, Senior Advocate, a/w Naushad Engineer, Abbas Zaidy, i/b M/s Zohar & Co, for the Applicant- Appellant.

Mr Aditya Singh, i/b Little & Co, for the Respondent No. 1.

Ms Anima B Kapadia, i/b Daphtary Ferraira & Divan, for Respondent No. 2.

Mr R Reis, Senior Advocate, a/w MR Bhoir, for the Respondent No. 3, MCGM.

CORAM: G.S. PATEL, J

DATED: 31st July 2017

PC:-

1. The Applicants have filed this civil application for the following reliefs against Respondent No. 3, the Municipal Corporation of Greater Mumbai (“MCGM”).

“(a) that Respondent No. 3 and its officers subordinates and all person claiming through or under it be restrained by an order and direction of the is Hon'ble Court from interfering with or disturbing in any manner to the

Petitioners' and/or their members' right to ingress or egress from the "Private garden from within the Mahindra Garden Complex to D.P. Road and to the use enjoyment and benefit of the said private garden and joggers track therein being plot of land bearing CTS No. 900A and new CTS No. 90A/2 at village Pahadi, Goregaon (West), Mumbai and the open space comprising tennis court and basket ball court.

(b) that Respondent No. 3 and its officers subordinates and all person claiming through or under it be restrained by an order and direction of this Hon'ble Court from interfering with or disturbing in any manner to the Petitioners' and/or their members' right to use the "Amenity space/garden".

2. It is necessary to describe the areas in question. The plot is in Goregaon (West). It is a substantial plot and seems to have been now segregated into different areas. The CTS No. is 900A. The Appellant, represented by Mr Damle, argues that there is no further sub-division into plots 900A/2, 900A/3 and so on. What Mr Reis for the MCGM says is that abutting the Appellant society's complex there is to the east a reservation plot which is known as 10% additional RG or Recreation Ground plot. This has been described, perhaps for convenience only, by the MCGM as 900A/2. There is another plot to the north-west which is shown as 7.5% amenity plot. This is also under a public reservation, for a hostel and a solid waste disposal facility (as currently advised). The MCGM's case is that this combined 17.5% reservation was surrendered by the 1st Respondent-builder as part of the proposal and sanction which resulted in the Appellant-society's complex, including additional FSI, if any. Mr Damle on the other hand argues that the society was

promised these two areas by the 1st Respondent-builder and these were meant to be used by the society and for the society's benefit; and the so-called FSI benefits were never given to the Appellant-society.

3. There is no doubt that 1st Respondent-builder has in fact, formally surrendered these two plots marked "CTS No.900/A2" and "CTS No.900/A3" to the MCGM and that this was done pursuant to an order dated 7th August 2003 of this Court in Appeal from Order No. 283 of 2003. There is a possession receipt in both plots in favour of the MCGM. The land records are also mutated in the name of the MCGM.

4. Consequently, therefore, it is difficult to see how the relief sought by the Appellants can be granted at this stage when the possession of both plots is with the MCGM.

5. Mr Reis on behalf of the MCGM is categorical in saying on the basis of instructions received that the 10% additional RG plot is meant to be kept as recreational garden to the public, and that there is no proposal to remove or alter this reservation. In fact, the MCGM has awarded a tender to a contractor for the purpose of revamping this RG. The society on the other hand argues that it has kept this space as a garden, and it has kept it open to the public, only closing the gates at night for security purposes. It has itself spent, over the years, a quite considerable sum of nearly Rs. 50 lakhs in plantations, providing a jogging track, planting shrubs, laying a walk-way, providing a children's recreational area with swings and a slide,

installing a hard surface tennis court, basketball court, and area that can be used as a cricket pitch. The Appellant says this area is widely used for sports by neighbourhood children, not just those who reside in the Appellant-society, but others as well.

6. None of this means that the society has or can be said to have acquired any legally enforceable rights over land that is under a public reservation. Granting the kind of relief the Appellant seek is not possible because, first, it must be in aid of some final relief that can be granted; and if no such final relief is possible, then it is difficult to see how any interim relief would be maintainable. Undoubtedly, the Appellant would have its remedy, if it succeeds, against the 1st Respondent perhaps in damages or otherwise. It cannot, however, gain to itself based on a promise made by the 1st Respondent, even if that turns out to be false or not kept, a public space. Mr Damle has been at some pains to point out in fact while the society has paid for the maintenance and upkeep of the 10% additional RG, it has not sought exclusivity but left it open to the public. This presents the second difficulty, for what the Appellant really seeks would amount to a change in the development plan reservation. If Courts start interfering with public reservations in this fashion, and turning to private ownership or use lands under public reservations, the entire planning process would be thrown to the winds.

7. Viewed from the point of balance of convenience or prejudice, it is, therefore, difficult to find for the Appellant.

8. To this extent, however, Mr Damle may be correct that the facility of the 10% additional RG in the plot described as CTS No. 900A/2 should be one that should be left open to all as an additional recreational ground. About this, there is absolutely no controversy between the Appellants and the 3rd Respondent-MCGM and I note this as well for the record.

9. Whether or not the Appellants can contribute to the upkeep is a matter for them to negotiate with the MCGM. I note that there is already a jogging track, several trees, some plantation and the existing of some sports facilities. Mr Damle's argument that these sports facilities are being used by the neighbourhood children also has some merit and I am confident that the MCGM will also consider this, and will consider this order as a request to evaluate or re-evaluate their existing proposal for the garden so that children in the neighbourhood, in a city that is already chronically starved for playing spaces, may have the necessary facilities. There is also no doubt that the MCGM will spend whatever is necessary to maintain the space, provide the necessary upkeep, cleaning, maintenance and security. Mr Reis assures me that there will be security guards paid for by the MCGM. It is proposed to close the park at about 8.30 p.m. and to reopen it in the early morning hours at about 5.30 or 6.00 a.m. There will be access to the park from the two public roads to the south and to the east. There may be a need to install a storage shed for equipment but the MCGM will do this in the most unobtrusive fashion. There will also be a requirement for an underground or overground water tank for the garden and for gardening purposes.

10. With these statements noted and assurances accepted, no further orders are required so far as the 10% additional RG area is concerned.

11. I come now to the 7.5% amenity plot, and here only short directions are necessary. Mr Damle's statement that there are several standing trees on this plot is not disputed. It only remains to direct the MCGM not to undertake any tree cutting until such time as the public purpose project is initiated, and even then such tree cutting must be with proper permission from the tree authority and only to the minimum extent necessary. Any existing fallen trees or branches may be removed by the Garden Superintendent of the MCGM. On any proposal for tree cutting on the 7.5% amenity plot, the Appellants will be entitled to be heard since their plots directly abut it. The MCGM will, therefore, be required to give them notice being immediate residents in the neighbourhood of any such proposal.

12. No further orders are presently necessary or even possible on the civil application.

13. Finally, the only request that can be made to the society is that it should also, this order notwithstanding, make all endeavours to ensure that the garden that is adjacent to and abutting its own private garden is properly maintained and that there is no garbage from the society thrown into the 10% additional RG plot or the 7.5% amenity plot. The 10% additional RG is, after all, for the benefit of

all persons in the neighbourhood and especially children and must be kept clean and neat.

14. The civil application is disposed in these terms. There will be no order as to costs.

15. I must express my gratitude to both Mr Damle and Mr Reis for their cooperation and their untiring efforts in trying to find alternative solutions to this situation.

16. Mr Damle requests that the previous order of *status quo* be continued. I regret I am unable to accept the request.

(G. S. PATEL, J)