

VPH

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 5735 OF 2006
WITH
CIVIL APPLICATION NO. 991 OF 2011

Kesari H. Mali	...	Petitioner
Vs.		
Mumbai Municipal Corporation of Greater Mumbai & Ors.	...	Respondents
And		
Smita Shankar Nalekar & 2 Ors.	...	Applicants (in the Civil Application)

Mr. G. S. Salunke, for the Petitioner.
Mr. Pradeep M. Patil, for the Respondent No. 1 to 3.
Mrs. R. A. Salunkhe, AGP for the Respondent No. 4.
Mr. G. S. Godbole a/w Vishal Thakar & Ms. Kaushalya Prajapati i/b
Vinod Thaker, for the Respondent Nos. 5, 6 and 7 / the Applicants in
CAW. 9911/2011.

CORAM : A. S. OKA, &
P. N. DESHMUKH, JJ.

DATE : FEBRUARY 15, 2018

ORAL JUDGMENT [PER : A. S. OKA, J.]

1. Called out for final hearing. Heard the learned counsel
for Petitioner, the learned counsel for the 1st to 3rd Respondents, the

learned AGP for the 4th Respondent and the learned counsel for the 5th, 6th and 7th Respondents. The Town Planning Scheme-III, Borivali (for short “the said scheme”) under the provisions of the Maharashtra Regional and Town Planning Act, 1966 (for short “the MRTP Act”) was sanctioned by the State Government by a notification dated 17th July, 1995 by exercising the power under Section 86 of the MRTP Act. The State Government fixed 3rd October, 1995 as the date on which the said scheme shall come into force.

2. Under the said scheme, in lieu of original plot No. 358, allotment of Final Plot No. 633 was made. A notice was issued by the 1st Respondent Municipal Corporation in exercise of powers under Section 89 to the Petitioner stating that the re-constituted Final Plot No. 633 is subject to the rights settled by the Arbitrator. The notice stated that the Petitioner has no right in respect of the said final plot and therefore, he was called upon to vacate the structure / land is in his possession forming a part of Final Plot No. 633. The Petitioner replied to the said notice on 3rd March, 2004. In the said reply, he contended that he is the owner of Original Plot No. 359 and Final Plot No. 634 in the said scheme. He claimed that he has authorised structures on

Final Plot No. 634 and a portion of his structures is shown on Final Plot No. 633. He stated that he was in possession of the said structure for about 50 years. In paragraph 3, the Petitioner has stated that he will surrender the portion of the structure on Final Plot No. 633 but he is entitled to damages. A notice invoking Section 90 of the MRTP Act was issued by the said Municipal Corporation on 29th April, 2004 calling upon the Petitioner to remove the subject structure on Final Plot No. 633 within a period of 15 days.

3. Being aggrieved by the notices issued under Sections 89 and 90 of the MRTP Act, the Petitioner invoked jurisdiction of the State Government under sub-section (3) of Section 90 of the MRTP Act by making necessary application on 28th June, 2004.

4. In the meanwhile, the 5th to 7th Respondents filed Writ Petition No. 42 of 2006 in this Court. The grievance made in the said writ petition was that the said Respondents have not been placed in possession of Final Plot No. 633 which has been allotted to them under the said scheme. The said writ petition has been disposed of by the order dated 7th June, 2006 by a Division Bench of this Court. The Division Bench noted that the 5th Respondent in the said Petition

(Petitioner in the present petition) has been allotted Final Plot No. 634. The contention of the present Petitioner was noted that he had applied under sub-section (3) of Section 90 for compensation in lieu of the structures which are now in Final Plot No.633. Therefore, the Division Bench directed disposal of the application made under sub-section (3) of Section 90 of the MRTP Act within a period of three months. By order dated 27th June, 2006, the said application made by the present Petitioner was disposed of by the Hon'ble Minister of State for Urban Development Department. A direction was issued by the Hon'ble Minister that by taking action under Section 91 of the MRTP Act, the name of the Petitioner shall be shown as an allottee of Final Plot No. 634, and a direction was issued to the Petitioner to remove the structures on Final Plot No. 633 on or before 31st August, 2006, failing which the Municipal Corporation was directed to take action of removal. It is this order which is the subject matter of challenge in the present writ petition. The only substantive prayer in the petition is in prayer clause (a) wherein the Petitioner has prayed for setting aside of said order and for remanding the matter to the State Government for re-consideration.

5. The learned counsel for the Petitioner invited our attention to the impugned order. He submitted that a specific grievance was made before the Hon'ble Minister that the Arbitrator has not considered the aspect of grant of compensation to the Petitioner in respect of the structure on Final Plot No. 633. He pointed out that other contention raised was that the Petitioner was entitled to an alternate accommodation and this aspect has not been considered by the Municipal Commissioner while issuing notice under Section 89 / 90 of the MRTP Act. He pointed out that it was specifically contended that an appeal under sub-section (3) of Section 90 was filed to ensure that a direction is issued by the State Government for necessary modification of the scheme by altering the boundary of Final Plot Nos. 633 and 634 so that entire structures of the Petitioner shall form a part of Final Plot No. 634. He urged that these contentions have not been taken into consideration by the Hon'ble Minister. His submission is that Sections 89 and 90 are operating in different fields. Section 89 confers powers to evict a person summarily from any land and Section 90 confers powers on the Planning Authority to remove or pull down a building or a structure. Inviting our attention to the provisions of the

Maharashtra Regional Town Planning Scheme Rules, 1974 (for short “the said Rules”) and provisions of Section 89 and 90, he submitted that while issuing notice under Section 90 of the MRTP Act, instead of granting 30 days time to remove the structure, only 15 days time was granted. He submitted that the Petitioner was not even made aware about the decision of the Arbitrator taken under Section 72 of the MRTP Act, and therefore, the Petitioner could not prefer an appeal under Section 74. He submitted that perhaps notice was not given as the Petitioner was not shown as the owner. He would, therefore, submit that the impugned order is completely erroneous. The learned counsel for the Mumbai Municipal Corporation supported the impugned order. The learned counsel for the 5th , 6th and 7th Respondents also supported the impugned order.

6. We have given careful consideration to the submissions made on behalf of the parties. It is not in dispute that the said scheme was brought into force with effect from 3rd October, 1995 by virtue of revised notification dated 17th July, 1995 issued in exercise of powers under Section 86 of the MRTP Act. Under clause (b) of Section 88 of the MRTP Act, all rights in the original plots which have been

reconstituted determine, and the reconstituted plots become subject to the rights settled by the Arbitrator. It is not in dispute that the 5th to 7th Respondents who were the owners of original plot No. 358 were allotted Final Plot No. 633 by the Arbitrator. Therefore, the Final Plot No.633 is now of the ownership of the 5th to 7th Respondent. As of today, the Scheme has become final. It is well settled that it is the obligation of the Planning Authority (in the present case the Mumbai Municipal Corporation) to place the allottee of final plots in vacant possession thereof. That is why notices under Section 89 and 90 were issued on 20th February, 2004 and 29th April, 2004 respectively. In the reply to the first notice dated 20th February, 2004 the Petitioner claimed that he was the owner of original Plot No 359 and Final Plot No. 634. Paragraph 3 of the said reply reads thus:

“3. In the circumstances, in the event you are requiring me to surrender the portion as mentioned above as shown in O. P. No. 358 F. P. No. 633, I shall surrender, however, part of my office premises is required to be demolished and for the said portion I am entitled for damages.”

(emphasis supplied)

7. Thus, the Petitioner showed willingness to demolish the portion of his structure on Final Plot No. 633 and surrender the same.

However, he claimed that he is entitled to damages. In paragraph 4 of the said reply, he reiterated that he should be granted compensation / damages at market rate. Thus, the perusal of the said reply dated 3rd March, 2004 shows that the Petitioner had no objection for removing his structure on the Final Plot No. 633 and handing over possession, but his only demand was for grant of compensation / damages. After service of the second notice dated 29th April, 2004, the Petitioner filed an application under sub-section (3) of Section 90 of the MRTP Act before the Hon'ble Minister of State for Urban Development. The first contention raised therein was that the notice has been served in wrong name. The contention was that the notice has been served in the name Keshrinath Mali but his name is Kesari Mali. The second contention is that notice becomes bad in law as instead of notice of 30 days, only 15 days' time has been granted. Third contention is that principles of natural justice have not been complied with and the last contention was that as per the policy of the Planning Authority, the Petitioner was entitled to an alternate accommodation. We have already referred to Writ Petition No. 42 of 2006 filed by 5th to 7th Respondents seeking a writ of mandamus for handing over vacant possession of Final Plot

No. 633. The present Petitioner filed affidavit-in-reply in the said writ petition, a copy of which is annexed to the petition, in which he pointed out that proceedings under sub-section (3) of Section 90 were pending before the State Government. That is why the Division Bench directed disposal of the said proceedings by order dated 7th March, 2006. Subsequently, by a letter dated 15th October, 2004 addressed to the Hon'ble Minister of State for Urban Development, the Petitioner claimed that his structure on Final Plot No. 633 was in existence prior to 1961-62. He further stated that he was ready to offer an equivalent area out of Final Plot No. 334, which could be added to Final Plot No. 633 so that his structure on Final Plot No. 633 could be saved.

8. Section 90 of the MRTP Act reads thus:

“90. Power to enforce scheme

- (1) On and after the day on which a [preliminary scheme] comes into force, the Planning Authority may, after giving the prescribed notice and in accordance with the provisions of the scheme,—
 - (a) remove, pull down or alter any building or other work in the area included in the scheme which is such as to contravene the scheme or in the erection of which or carrying out of which, any provision of the scheme has not been

complied with.

- (b) execute any work which it is the duty of any person to execute under the scheme, in any case where it appears to the Planning Authority that delay in the execution of the work would prejudice the efficient operation of the scheme.
- (2) Any expenses incurred by the Planning Authority under this section may be recovered from the person in default or from the owner of the original plot in the manner provided for the recovery of sums due to the Planning Authority under the provisions of this Act.
- (3) If any action taken by the Planning Authority is questioned, the matter shall be referred to the State Government or any officer authorised by the State Government in this behalf; and the decision of the State Government or of the officer, as the case may be, shall be final and conclusive and binding on all persons.
- (4) No person shall be entitled to compensation in respect of any damage, loss or injury resulting from any action taken by the Appropriate Authority under the provisions of this section except in respect of the building constructed or work begun before the date referred to in sub-section (1) and only in so far as such building or work has proceeded until that date :
Provided that, any claim to compensation, which is not barred by this sub-section shall be subject to the condition of any agreement entered into between the claimant and the Appropriate Authority.
- (5) The provisions of this section shall not apply to any

operational construction undertaken by the State Government or the Central Government.

9. Sub-section (3) above provides that if any action taken by the Planning Authority is questioned, the matter shall be referred to the State Government or any officer authorised by the State Government in this behalf. Obviously, the reference to “any action taken” is the action contemplated by sub-section (1) of Section 90 of removing, pulling down, altering any building or executing any work under the Town Planning Scheme. Under sub-section (3) of Section 90, the State Government or the officer authorised by the State Government cannot look into the legality and validity of the Town Planning Scheme, which is already brought into force. What can be gone into is the legality of the action taken on the basis of a Town Planning Scheme in terms of sub-section (1) of Section 90. Therefore, while deciding the application / appeal under sub-section (3) of Section 90 the State Government or the officer authorised cannot go into the question of illegality associated with a Town Planning Scheme. While deciding the proceedings under sub-section (3) of Section 90, a direction cannot be issued to take action under Section

91 of variation of the scheme. It is true that while passing the impugned order, there is a direction issued by the Hon'ble Minister of taking steps on modification of scheme for showing name of the Petitioner as allottee of Final Plot No. 634. However, that part of the direction is not questioned by any party, and therefore, it is not necessary to go into the legality of that direction.

10. We have already referred to the contention raised by the Petitioner before the Hon'ble Minister. The first contention was that the Arbitrator has failed to award any compensation / damages to the Petitioner in respect of the structure on Final Plot No. 633. This aspect touches the legality of the actions of the Arbitrator which could not have been gone into in proceedings under sub-section (3) of Section 90. The second contention raised was that, in fact, an application under sub-section (3) of Section 90 was for modification of the scheme. As held earlier, while exercising the powers under sub-section (3) of Section 90, the State Government cannot go into the prayer for modification of a Town Planning Scheme. Therefore, the argument based on proposal for altering the boundaries of Final Plot Nos. 633 and 634 could not have been gone into by the Hon'ble Minister.

Another contention raised was that 15 days' time was granted in the notice for eviction instead of 30 days. It is not the case of the Petitioner that before expiry of 30 days, any action of removal was taken by the Municipal Corporation and therefore, the said contention is really of no relevance. Perhaps only one contention raised specifically, which is noted in the impugned order, ought to have been considered. The said contention is that in terms of the policy of the Municipal Corporation, alternate accommodation ought to have been offered to the Petitioner.

11. As narrated earlier, the Town Planning Scheme came into force on 3rd October, 1995. The application under sub-section (3) of Section 90 was filed in the year 2004. Even assuming that the Petitioner was not aware of the decision of the Arbitrator, at least in 2004, the Petitioner was aware of the same. However, the Petitioner never challenged the decision of the Arbitrator in accordance with law.

12. Therefore, the position which emerges today is that as per the said scheme, the 5th to 7th Respondents are entitled to the vacant possession of the Final Plot No. 633. As held by the Apex Court in *The Municipal Corporation of Greater Bombay and another Vs. The*

*Advance Builder (India) Pvt. Ltd.*¹, it is the obligation of the 1st Respondent Municipal Corporation being the Planning Authority to place the said Respondents in vacant possession of the Final Plot No. 633. Therefore, the Petitioner cannot claim any right, title and interest in respect of the structures on Final Plot No. 633, and hence, it is not possible to find fault in the notices as well as the order passed by the Hon'ble Minister.

13. However, as the contention of the Petitioner regarding grant of alternate accommodation is not considered, we propose to grant a reasonable time to the Petitioner to make an application to the Municipal Corporation to consider the prayer for grant of alternate accommodation as per policy, if any, which is adopted either by the State Government or the Municipal Corporation.

14. As far as the argument alleging the breach of the principles of natural justice is concerned, suffice it to say that in the facts of the case, the only conclusion which is legally possible is that the Petitioner has no right in respect of the structure on Final Plot No. 633.

¹ AIR 1972 SC 793.

15. Therefore, we find absolutely no merit in the petition and accordingly, we pass the following order:

- (i) Writ petition is rejected;
- (ii) We direct to the Petitioner to vacate the portion of Final Plot No. 633 and hand over possession thereof to the 5th to 7th Respondents within four months from the date on which this order is uploaded;
- (iii) In the event of failure to remove the structure on Final Plot No. 633 and handing over possession thereof, the Respondent No. 2 shall take over the vacant possession of Final Plot No. 633 after demolishing the structure of the Petitioner and hand over the same to the 5th to 7th Respondents;
- (iv) It will be open for the Petitioner to make an application to the Municipal Corporation for grant of an alternate accommodation in view of the fact that structure of the Petitioner was on Final Plot No. 633, within two weeks from the date on which this judgment uploaded;

- (v) If such an application is made by the Petitioner within the stipulated period of two weeks, the Municipal Corporation shall decide the same within a maximum period of two months from the date on which said application is made;
- (vi) The decision taken on the application shall be communicated to the Petitioner within a period of one month thereafter;
- (vii) We make it clear that we have not made adjudication on the question whether the Municipal Corporation is under obligation to grant an alternate accommodation to the Petitioner and all issues in that behalf are kept open.
- (viii) Rule is discharged with no orders as to costs.
- (ix) In view of disposal of the petition, Civil Application No. 991 of 2011 does not survive and is accordingly disposed of.

Sd/-
[P. N. DESHMUKH, J.]

Sd/-
[A. S. OKA, J.]