

VPH

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION No. 1583 OF 2004

Prasad Mhatre ... Petitioner
Vs.
Municipal Corporation of Gr. Mumbai & Ors... Respondents

WITH
WRIT PETITION No. 2991 OF 2015

Gorai Vivek Co-Op. Housing Society Ltd. ... Petitioner
Vs.
Municipal Corporation of Gr. Mumbai & Ors... Respondents

Ms. Sumedha Rao, for the Petitioner.
Ms. Shital Mane, for the Respondent – BMC.
Mr. Milind More, Additional Govt. Pleader for the Respondent – State
in WP. 1583/2004.
Mr. G. B. Walawalkar i/b S. P. Thorat, for the Respondent No. 3 in
WP. 2991/2015

CORAM : A. S. OKA, &
P. N. DESHMUKH, JJ.
DATE : FEBRUARY 1, 2018

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

1. Writ Petition No. 1583 of 2004 is filed by the Petitioner, who is allottee of the flat in Gorai Vivek Co-op. Housing Society Ltd. (for short “the said Society”). He claims to represent several other

members of the said Society. Prayer clauses (a) and (b) are the only substantive prayers in the said writ petition, which read thus:

“(a) This Hon'ble Court be pleased to issue a Writ of mandamus and / or any other writ, order or direction in the nature of mandamus to Respondent No. 2 directing him to quash and set aside any plans sanctioned for construction in the stilt area of Petitioner's Building and / or directing Respondent No. 2 to 4 to direct Respondent Nos. 4 to 6 to restore the stilts to their original position.

(b) This Hon'ble Court be pleased to issue a writ of mandamus or any other order, direction or writ in the nature of mandamus directing Respondent No. 3 to suspend the Managing Committee of Gorai Vivek Co-op. Hsg. Society.”

2. The plot of the land on which subject building has been constructed was allotted to the said Society under the Indenture of Lease dated 20th February, 1996. It appears that plan for the construction of a building comprising stilt + 7 upper floors was approved on 1st November, 2002 by the Mumbai Municipal Corporation and commencement certificate was issued on 27th June, 2002. The Architect of the said Society submitted the amended plan proposing the use of the stilt for professional offices in view of balance the additional FSI. The modified plan was sanctioned by the

Municipal Corporation on 17th October, 2003. The challenge is to the said modification made by the Municipal Corporation and thus, there is a challenge to the sanctioned plan in prayer clause (a).

3. Writ Petition No. 2991 of 2015 is filed by the said Society seeking a writ of mandamus against the Municipal Corporation enjoining the Municipal Corporation to grant occupation certificate.

4. The submission of the learned counsel for the Petitioner in Writ Petition No. 1583 of 2004 is that as per the lease agreement executed by the Maharashtra Housing & Development Authority (for short “the MHADA”), the subject plot was allotted for construction of a building for the bona fide residential use and occupation of members of the said Society. The submission of the learned counsel for the Petitioner is that the development is carried out under the World Bank Project, and therefore, no part of the building can be permitted for the non-residential use. Inviting our attention to the affidavit-in-reply filed by Mr. Rajesh J. Narvekar, it was submitted that admittedly NOC for non-residential purposes is not given to the Society. Therefore, she submitted that sanction of the plan is completely

illegal. Relying upon the rejoinder, her submission is that as a result of conversion of stilt parking for non-residential use, the members of the Society are forced to park their vehicles in the open compound, and therefore, it is not possible for the fire engine to turn inside the compound.

5. In support of the second petition, the submission is that building is constructed as per the sanctioned plan and there is no FSI violation and therefore, occupation certificate ought to have been issued.

6. We have heard the learned counsel appearing for the Municipal Corporation, who has opposed the petitions. We have also heard the Additional Government Pleader for the State.

Conclusions in Writ Petition No. 1583 of 2004

7. It is true that in the agreement executed by and between MHADA and the said Society, it is stated that plot has been allotted for the construction of the residential building. There is an affidavit-in-reply filed by the 4th Respondent to which sanctioned plan dated 17th October, 2003 has been annexed. The same plan is also annexed to the affidavit of Mr. Navnath S. Ghadge, Assistant Engineer (Building

Proposal) of Mumbai Municipal Corporation. It shows that the modified plan was submitted by the Society through its Architect. The substantive challenge in the first petition is to the modified plan. However, we find that the Society which applied and obtained modification of the plan is not impleaded as a party in the first petition. In the affidavit of Rajesh N. Narvekar, it is specifically contended that the Petitioner in the first petition Prasad Mhatre is not a member of the Society as approved by the MHADA. Secondly, it will be necessary to make a reference to the affidavit-in-reply filed on behalf of the Mumbai Municipal Corporation by Ravindra Rajkishore Tripathi, more particularly, to clauses (b) and (c) of paragraph 5, which read thus:

“5. Briefly stated facts of the case are as follows:-

a) ...

(b) I say that the architect has thereafter submitted the amended plan on 27.6.2003 by proposing the user of professional offices in the approved stilt in lieu of balance additional FSI. I say that the architect has proposed professional offices in the approved part stilt portion having clear height of 2.45 mt. I say that as per Clause No. 51 (iv) of DCR 1991, the user of the professional offices upto 30 sq. mt. areas are permitted in residential zone. I say that as the height of the approved stilt is 2.45 mt., the architect has

proposed part ground floor with permanent A. C. system. I say hat as per Sr. No. 1(c) of table No. 19 of DCR 1991 the room having minimum height of 2.45 mt. is permissible permanent A. C. system. I say that moreover area of stilt portion has been computed towards the FSI consumption in the present case, hence user of the part ground floor having height of 2.45 mt. with permanent A. C. system has been sanctioned by these Respondents in accordance with the abovestated rules on 17.10.2003.

c) I say that upon inspection, it was observed that the society has constructed two out of three professional offices as per the sanction accorded by these Respondents. I say that while sanctioning the amended plans of the society, the necessary requirement of parking is retained. I say that the architect had proposed 7 parking spaces as against the required 5 parking spaces to the building under reference.”

(underline supplied)

8. We have perused clause 51 (iv) of Development Control the Regulations for Greater Mumbai, 1991 (for short “DCR 1991”). Regulation 51 sets out ancillary permissible users in residential zone. One of the ancillary users permissible in clause (iv) is of the professional offices.

9. Thus, as per the DCR 1991, certain ancillary users are permissible in residential zone. Therefore, the Municipal Corporation is right in contending that user as office premises in residential building could have been permitted in view of clause (iv) of

Regulation 51. In this petition, the issue is whether modified plan could have been approved on 17th October, 2003 without specific NOC of the MHADA for non-residential uses. Going by clause (iv) of Regulation 51, specific NOC for non-residential user was not at all required. Moreover, the Society which is the allottee of the plot which was granted / permission on 17th October, 2003 by sanctioning the amended plans is not a party to the first petition. The learned counsel for the Petitioner submitted that the 4th and 5th Respondents have been impleaded in their personal capacity as parties. Therefore, the relief of quashing or cancelling the amended plans dated 17th October, 2003 cannot be granted.

10. The other substantive prayer is for directing the third Respondent to suspend the Managing Committee of the said Society. The learned counsel for the Petitioner states that he will not press for the said relief.

Conclusions in Writ Petition No. 2991 OF 2015

11. Now, turning to Writ Petition No. 2991 of 2015, the reason for non grant of occupation certificate has been set out by the Mumbai Municipal Corporation in the affidavit of Mr. Navnath S.

Ghadge. Even in the said affidavit, it is stated that as per the amended plan dated 17th October, 2003 commencement certificate was granted which was extended on 13th April, 2014. In clause 8, it is stated that building completion certificate as required under Section 353A of the Mumbai Municipal Corporation Act, 1888 is not submitted and therefore, the prayer for grant of occupation certificate can be considered only if such a certificate is submitted alongwith the NOC of the MHADA for non-residential user. In fact, in clause (i) of the said affidavit it is stated that built up area permitted in the last approved plan dated 17th October, 2003 is 1143.32 sq. mt. and NOC granted by the MHADA is in respect of 1143.855 sq. mt. It is specifically contended that there is no violation of the FSI and permissible FSI is granted as per the NOC granted by the MHADA. It is not the case made out in the affidavit of Mr. Ghadge that the construction carried out is either not in terms of the sanctioned plan or in violation of the sanctioned plan. On the contrary, the specific case is that there is no violation of FSI. In fact, the only ground for opposing the petition is that building completion certificate alongwith NOC of the MHADA for non-residential user has not been submitted.

12. We have already made a reference to the stand taken by the Municipal Corporation in Writ Petition No. 1583 of 2004 in the affidavit of Ravindra Rajkishore Tripathi, Sub-Engineer working in the Building & Proposal department. The stand is that user of the professional office is permissible in the residential building in view of Clause 51(iv) of DCR 1991. Now, a contrary stand cannot be taken in the affidavit filed by Mr. Navnath Ghadge in the second petition on 29th August, 2016. In fact, as stated above, we have accepted the stand taken by the Municipal Corporation in the first petition.

13. Therefore, even going by the statements made by Mr. Ghadge in clause 4 (h), (i), and (j) of the affidavit dated 29th August, 2016, we are of the view that the occupation / completion certificate will have to be granted by the Municipal Corporation on the Petitioner Society submitting completion certificate in accordance with Section 353A of the said Act of 1888 and the same cannot be withheld on the ground of the failure of the Petitioner to produce NOC of the MHADA for non-residential use.

14. We must hasten to add that when an application for the building completion / occupation certificate is made, the Municipal

Corporation is bound to verify whether the construction is carried out in terms of the sanctioned plan. Needless to add that minor procedural requirements will have to be complied by the Petitioner and if any charges are payable for grant of the completion / occupation certificate, the Petitioner will have to pay the same.

15. We therefore, dispose of both the petitions by passing the following order:

- (i) Prayer clause (a) of Writ Petition No. 1583 of 2004 is rejected;
- (ii) Prayer clause (b) of Writ Petition No. 1583 of 2004 is not pressed;
- (iii) Accordingly Rule issued in Writ Petition No. 1583 of 2004 is discharged;
- (iv) The chamber summons / notice of motion, if any pending, does not survive and is accordingly disposed of;
- (v) In Writ Petition No. 2991 of 2015, we direct the Petitioner through its architect submit an application for the building completion certificate as per Section 353A of the Mumbai Municipal Corporation Act, 1888 within a period of one month from the date on which this order is uploaded;

- (vi) The application for grant of occupation certificate shall be considered and disposed of within a period of one month from the date on which the application for the building completion certificate is submitted by the Petitioner's Architect;
- (vii) We make it clear that building completion certificate or occupation certificate shall not be denied on the ground of the failure by the Petitioner Society to produce NOC of the MHADA for non-residential use;
- (viii) We also make it clear that occupation / completion certificate shall not be denied on the ground of violation of the FSI. We also make it clear that the Petitioner will have to complete all procedural formalities, including payment of charges as per the relevant regulation.
- (ix) Rule is accordingly made absolute in terms of clauses (v) to (viii) above in Writ Petition No. 2991 of 2015.

Sd/-

[P. N. DESHMUKH, J.]

Sd/-

[A. S. OKA, J.]

Vinayak Halemath