

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 13401 OF 2016

M/s. Shandar Builders

..Petitioner

Vs.

Bhiwandi Nizampur City Municipal

Corporation and Another

..Respondents

Mr. Ram Apte, Senior Advocate i/b Mr. Mandar Limaye, for the Petitioner.

Mr. N. R. Bubna, for Respondent No.1.

Ms. S. D. Vyas, 'B' Panel Counsel.

**CORAM:- S. J. KATHAWALLA &
B. P. COLABAWALLA, JJ.**

DATE :- JANUARY 17, 2020

P. C.:

The present Petition has been filed under Article 226 of the Constitution of India seeking to challenge Condition No.1 in the letter dated 3rd October, 2007 issued by Respondent No.1 as well as for directing Respondent Nos.1 and 2 to take immediate steps to correct the error in the revised development plan of 2001 in respect of Reservation No. 62 (for playground). The Petitioner, by virtue of amendment to the Writ Petition, has also sought a

direction against the Respondent No.2-State to withdraw and cancel the Notification dated 12th February, 2018 and to further direct Respondent No.2 to issue a Notification under Section 37(2) of the Maharashtra Regional & Town Planning Act, 1966 (for short the “**MRTP Act**”) in terms of the proposal dated 15th February, 2017 forwarded by Respondent No.1 to Respondent No.2.

2 The brief facts of the case are that, the Petitioner claims to be the owner of certain properties more particularly described in paragraph 2 of the Petition, and for the purposes of construction thereon, by a letter dated 30th May, 1983, a commencement certificate was granted by the Bhiwandi Nizampur Municipal Council (& which is now taken over by Respondent No.1). According to the Petitioner, as per the sanctioned plans, the Petitioner constructed 17 commercial/residential buildings and the same was completed in the year 1987. They are also assessed to Municipal Tax which has been paid till date. In so far as the 18th building was concerned, it is the case of the Petitioner that a revised permission was granted by Respondent No.1 dated 2nd September, 2003.

3 Out of the land mentioned in paragraph 2 of the Petition, a portion admeasuring 1990 sq.mtrs was reserved under the development plan of 1st Respondent Corporation as a playground bearing site no. 62. According to

the Petitioner, the possession of the said land admeasuring 1990 sq.mtrs was handed over by the Petitioner to 1st Respondent Corporation under an agreement dated 23rd December, 2002. In light of the surrender of the said land of the Petitioner for the playground, Respondent No.1 Corporation also issued a development right certificate (DRC) dated 25th June, 2003.

4 It is the case of the Petitioner that a revised building permission dated 2nd September, 2003 for the construction of the 18th building was renewed from time to time. Thereafter, by their letter dated 24th August, 2007, the Petitioner requested the Corporation for allowing them to complete the further construction of the 18th building. It is at this time that by a letter dated 3rd October, 2007, it was pointed out that the application of the Petitioner can be considered subject to certain terms and conditions as Building No.E and Building No.B (which were already constructed and assessed) were now affected by Reservation No. 62 pertaining to play ground in the revised development plan of Respondent No.1.

5 Being aggrieved by this, the Petitioner immediately preferred a representation dated 30th August, 2008 inter alia contending that the buildings which were sought to be affected under the revised development plan of 2001 (by the reservation of the playground) were constructed as per the sanctioned

permission dated 30th May, 1983. The Petitioner also contended that at the relevant time, taking into consideration the area affected by the reservation, the measurements were done and plans were sanctioned. The Petitioner's further contention was that in the revised development plan of 2001, the said Reservation No.19 (pertaining to garden) was changed to Reservation No. 62 as a playground. The Petitioner submitted that the boundaries of the area under reservation should have been the same as those which were earlier at that point of time.

6 In light of the letter/representation of the Petitioner dated 30th August, 2008, the Assistant Director of Town Planning thereafter conducted a detailed survey and enquiry and prepared the report. This report was thereafter sent to the Deputy Director of Town Planning who furnished his report in this regard. The report issued by the Assistant Director of Town Planning is dated 13th April, 2009 indicating that there was no mistake on the part of the Petitioner as they had constructed the building as per the sanctioned plans and it transpired that while preparing the development plan there was a "draftsman error". The Deputy Director of Town Planning also confirmed this report by its report dated 13th June, 2009. In the aforesaid report it was pointed out that the discrepancies in the area appear to be due to application of a wrong scale. While preparing the development plan for 1976, the scale 1:2000 was used,

whereas whilst preparing the revised development plan of 2001, the scale of 1:5000 was used. It was in these circumstances that the Director of Town Planning opined that the change in area of reservation i.e. Reservation No. 62 (play ground) was due to application of a wrong scale.

7 Having received these reports from the Planning Authority, the Petitioner made several representations to Respondent No.2- State requesting them to correct the error/mistake that had occurred in the development plan using the wrong scale. Additionally, Respondent No.1 Corporation by its letter dated 21st June, 2014 also requested Respondent No.2 to decide the proposal forwarded by them under Section 37 (1) of the MRTP Act to correct the aforesaid mistake. On receiving the aforesaid letter of Respondent No.1, Respondent No.2 directed Respondent No.1 to take appropriate steps to correct the aforesaid mistake by following the due process of law. Since nothing was done, the present Petition came to be filed.

8 Thereafter, this Court by its order dated 27th July, 2017 directed Respondent No.2 to take an appropriate decision on the proposal of Respondent No.1 in light of Section 37 (2) of the MRTP Act. Respondent No.1 has accordingly taken a decision and rejected the proposal forwarded by Respondent No.1 which was duly notified vide a Notification issued by

Respondent No. 2 dated 12th February, 2018. It is in these circumstances that the above Writ Petition was amended and the said notification is also impugned herein.

9 In these facts, Mr. Apte, the learned Senior Advocate appearing on behalf of the Petitioner, submitted before us that the Petitioner has been denied permissions to construct the 18th building for no fault of their own. He submitted that the reservation of the playground is wrongly shown in the revised development plan of 2001 due to a mistake committed by the Planning Authority, namely Respondent No.1. This mistake has occurred by virtue of the fact that the Planning Authority while preparing the revised development plan of 2001 has used a wrong scale and which is why there was a discrepancy in the area of reservation. Mr. Apte then submitted that to correct this mistake, Respondent No.1 had forwarded a proposal to Respondent No.2 under Section 37(1) of the MRTP Act which proposal was wrongly rejected by Respondent No.2 by issuing the impugned Notification dated 12th February, 2018. It is in this light that Mr. Apte submitted that this Court may direct Respondent No.2 to withdraw and cancel the impugned Notification dated 12th February, 2018 and direct Respondent No.2 to forthwith issue a Notification under Section 37 (2) of the MRTP Act in terms of the proposal forwarded by Respondent No.1 dated 15th February, 2017.

10 On the other hand, Ms. Vyas, the learned counsel appearing on behalf of Respondent No.2 – State, submitted that the action taken by the Government cannot be faulted. She submitted that the Urban Development Department of Respondent No.2 had given instructions to Respondent No.1 to submit a modification of the revised development plan of 2001 by following the procedure under Section 37 (1) of the MRTP Act. In response thereto, the Commissioner of the said Corporation submitted the modification proposal but without following the procedure as laid down under Section 37(1) of the MRTP Act. This, in fact was communicated by the Urban Development Department of Respondent No.2 vide its letter dated 27th July, 2017. Since the Urban Development Department was directed by this Court to take an appropriate decision on the proposal forwarded by the Municipal Corporation (Respondent No.1), the Government has taken its decision vide its Notification dated 12th February, 2018 and has refused to accord sanction to the proposal submitted by the Corporation in light of the non-compliance of the procedure laid down under Section 37(1) of the MRTP Act. She submitted that in light of the fact that Respondent No.1 has not followed the procedure as laid down under Section 37(1) of the MRTP Act, the Government's action to reject the proposal forwarded by the Municipal Corporation for modification of the revised development plan of 2001, cannot be faulted. She therefore submitted that

there was no merit in this Petition and the same ought to be dismissed.

11 We have heard the learned counsel for the parties at length and have perused the papers and proceedings in the Writ Petition, the reply filed by the State as well as the statutory provisions. The main controversy in the present Petition revolves around Section 37 of the MRTTP Act. Section 37 pertains to modification of a final development plan and reads as under:-

37.[Modification] of final Development of Plan

(1) Where a modification of any part of or any proposal made in a final Development Plan, the Planning Authority may, or when so directed by the State Government shall, within ninety days from the date of such direction, publish a notice in the Official Gazette and in such other manner as may be determined by it inviting objections and suggestions from any person with respect to the proposed modification not later than one month from the date of such notice; and shall also serve notice on all persons affected by the proposed modification and after giving a hearing to any such persons, submit the proposed modification (with amendments, if any), to the State Government for sanction within one year from the date of publication of notice in the Official Gazette. If such modification proposal is not submitted within the period stipulated above, the proposal of modification shall be deemed to have lapsed:

Provided that, such lapsing shall not bar the Planning Authority from making a fresh proposal.

(1A) If the Planning Authority fails to issue the notice as directed by the State Government, the State Government shall issue the notice, and thereupon, the provisions of sub-section (1) shall apply as they apply in relation to a notice to be published by a Planning Authority.

(1AA)(a) Notwithstanding anything contained in sub-sections (1), (1A) and (2), where the State Government is satisfied that in the public interest it is necessary to carry out urgently a modification of any part of, or any proposal made in, a final Development plan of such a nature that it will not change the character of such Development plan, the State Government may, on its own, publish a

notice in the Official Gazette, and in such other manner as may be determined by it, inviting objections and suggestions from any person with respect to the proposed modification not later than one month from the date of such notice, and shall also serve notice on all persons affected by the proposed modification and the Planning Authority.

(b) The State Government shall, after the specified period, forward a copy of all such objections and suggestions to the Planning Authority for its consideration. The Planning Authority shall, thereupon, submit its say to the Government within a period of one month from the receipt of the copies of such objections and suggestions from the Government.

(c) The State Government shall, after giving hearing to the affected persons and the Planning Authority and after making such inquiry as it may consider necessary and consulting the Director of Town Planning, by notification in the Official Gazette, publish the approved modifications with or without changes, and subject to such conditions as it may deem fit, or may decide not to carry out such modification. On the publication of the modification in the Official Gazette, the final Development plan shall be deemed to have been modified accordingly.

(1B) Notwithstanding anything contained in sub-section (1), if the Slum Rehabilitation Authority appointed under section 3A of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 is satisfied that a modification of any part of, or any proposal made in, a final Development plan is required to be made for implementation of the Slum Rehabilitation Scheme declared under the said Act, then, it may publish a notice in the Official Gazette, and in such other manner as may be determined by it, inviting objections and suggestions from any person with respect to the proposed modification not later than one month from the date of such notice; and shall also serve notice on all persons affected by the proposed modification, and after giving a hearing to any such persons, submit the proposed modification (with amendments, if any) to the State Government for sanction.

(2) The State Government may, make such inquiry as it may consider necessary and after consulting the Director of Town Planning by notification in the Official Gazette, sanction the modification with or without such changes, and subject to such conditions as it may deem fit, or refuse to accord sanction. If a modification is sanctioned, the final Development plan shall be deemed to have been modified accordingly.

12 As can be seen from Section 37 (1), where a modification of any part of a final development plan is sought, the Planning Authority shall publish a notice in the Official Gazette inviting objections and suggestions from any person with respect to the proposed modification not later than one month from the date of such notice and shall also serve the notice on all persons affected by the proposed modification. After hearing any of such persons, the Planning Authority can submit the proposed modification (with amendments, if any) to the State Government for sanction within one year from the date of publication of the notice in the Official Gazette.

13 In the facts of the present case, it is undisputed that the Planning Authority (Respondent No.1) has not followed the procedure as laid down under Section 37 (1) of the MRTP Act. The Planning Authority ought to have published a notice in the Official Gazette pointing out the modification sought and inviting objections thereto, by any persons interested. Once those objections were invited and considered, the Planning Authority could have then forwarded the proposal for modification to the State Government, which the State Government [under section 37(2) of the MRTP Act] could have accepted, with or without changes, and/or rejected the same. In the facts of the present case, since the procedure as laid down under Section 37(1) was admittedly not

followed by Respondent No.1 (namely inviting objections by publishing notice in the Official Gazette), we do not find that the State Government was in any way unjustified in rejecting the proposal forwarded by Respondent No.1 to Respondent No.2 seeking a modification of the revised development plan of 2001.

14 Though we quite see that inconvenience is caused to the Petitioner because of the aforesaid mistake of Respondent No.1, we also cannot ignore the provisions of Section 37 of the MRTP Act and direct the State Government to accord sanction to the modification sought by Respondent No.1 without following the process/procedure as contemplated under Section 37 (1) of the MRTP Act.

15 In these circumstances, even though we find that we cannot grant any relief to the Petitioner, to meet the ends of justice, we direct that Respondent No.1 shall within a period of four weeks from today follow the procedure as contemplated under Section 37(1) of the MRTP Act and invite the objections (by publishing a notice in the Official Gazette) to the modification sought. After inviting the objections and considering the same, within a period of 45 days thereafter, Respondent No.1 shall forward its proposal for modification to the Urban Development Department of Respondent No.2.

After receiving the proposal of Respondent No.1, Respondent No.2 shall take its decision either to accord sanction to the aforesaid modification (with or without changes) and/or reject the said proposal as contemplated under Section 37(2) within a period of eight weeks from the receipt of the proposal from Respondent No.1. The Writ Petition is disposed of in the aforesaid terms. However, there shall be no order as to costs.

(B. P. COLABAWALLA, J.)

(S. J. KATHAWALLA, J.)