

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO. 5744 of 2019

Vijay Shankarrao Ambhore,
Aged 61 years, Occ. Business,
R/o Pandey Layout, Khamla,
Nagpur, Tq. and District Nagpur.

..... **PETITIONER**

...VERSUS...

1. The State of Maharashtra,
Through its Secretary,
Urban Development Department,
Mantralaya, Mumbai-32.
2. The Nagpur Municipal Corporation,
Through its Commissioner,
Civil Lines, Nagpur.
3. Assistant Director of Town Planning,
Nagpur Municipal Corporation, Nagpur.
4. Nagpur Improvement Trust,
Through its Chairman, Railway Station Road,
Sadar, Nagpur.

..... **RESPONDENTS**

Shri N.D.Khamborkar, Advocate for petitioner.

Shri A.S.Fulzele, Additional Government Pleader for respondent no. 1.

Shri S.M.Puranik, Advocate for respondent nos. 2 and 3.

CORAM :- A.S.CHANDURKAR AND URMILA JOSHI-PHALKE, JJ.

ARGUMENTS WERE HEARD ON : 21.09.2022

JUDGMENT IS PRONOUNCED ON : 21.10.2022

JUDGMENT (Per A.S.CHANDURKAR, J.)

Rule. Rule made returnable forthwith and heard the learned counsel for the parties.

2. The challenge raised in this writ petition is to the communication dated 26.12.2018 issued by the Assistant Director, Town Planning Department, Nagpur Municipal Corporation, Nagpur by which it has been directed that in accordance with the Development Control Rules of the City of Nagpur, the petitioner should submit the building plans after leaving 15% open space equivalent to 189.42 square meters.

3. The facts giving rise to the present proceedings are that Survey Nos.2041 and 2043 admeasuring 9048.075 square meters was owned by Pande family. In a family arrangement Survey Nos. 2041/2 and 2043/1 admeasuring 579.337 square meters and 683.46 square meters respectively totalling 1262.83 square meters came to the share of Shri Maheshkumar Pande. Insofar as the other share of land admeasuring 1779.13 square meters is concerned, the building plan was sanctioned by the Nagpur Improvement Trust on 14.01.1997 without requiring 15% area to be left open. Another map pertaining to 1754.50 square meters was sanctioned by the Nagpur Improvement Trust on 10.11.2002 in which 15% area was kept open. A building plan for development of the area admeasuring 1262.83 square meters which is the subject land came to be submitted on 05.10.2001. The Superintending Engineer of the Nagpur Improvement Trust examined the same and

approved it on 22.06.2002. A demand note came to be issued to the owner on 28.06.2002 and pursuant thereto the owner paid amount of Rs.2,71,997/- on 03.07.2002 with the Nagpur Improvement Trust. In the meanwhile, Notification dated 27.02.2002 came to be issued by the State Government as a result of which the Nagpur Improvement Trust ceased to be the Planning Authority from 28.06.2002 and Nagpur Municipal Corporation (for short, the Corporation) became the Planning Authority. While considering the aforesaid building plan, it was noted that the amalgamated plot area was more than 1000 square meters and hence it was proposed to consider a building plan with Floor Space Index (FSI) of 1.25. It was also noted in the note sheet prepared by the Nagpur Improvement Trust dated 21.02.2005 that as the land was sub-divided by the City Survey Office, 15% open space could be relaxed in favour of the owner since the land was less than 0.40 Hectare. The Superior Authority however opined that for grant of sanction, 15% open space was required to be left since there was an unauthorised sub-division of the entire plot. The Executive Engineer of the Nagpur Improvement Trust on 22.03.2005 informed the petitioner who is the power of attorney holder of the owner of the land that for the purposes of sanctioning building plan, the FSI be shown as one and 15% open space be left as per Rules. Being aggrieved by the said communication, the petitioner approached this Court by filing Writ Petition No.30 of 2005. On 19.04.2005 this Court observed that the Nagpur Improvement Trust was expected to consider the case of the petitioner by treating two survey numbers as one plot for the purposes of grant of sanction, calculation of FSI and

application of Development Control Rules. It was noted that the initial plan was submitted by the petitioner on 05.10.2001 which was sanctioned by the Nagpur Improvement Trust and the amount as per the demand note had been paid. Pursuant thereto, on 25.04.2005 the Executive Engineer, Nagpur Improvement Trust again called upon the petitioner to submit the building plans with FSI of 1.25 and after leaving 15% open space for sanction. Hence while admitting the said writ petition on 27.04.2005 the Court directed the Nagpur Improvement Trust to consider the plan of the petitioner in accordance with the Building Bye-laws and the Rules after treating two survey numbers as one plot for grant of sanction. On 04.01.2006 the petitioner had again informed to submit the building plans with FSI of 1.25 and 15% open space as per the Development Control Rules. In the meanwhile, when the writ petition was pending the petitioner approached the State Government in the matter. On 30.06.2008 the State Government issued a communication to the Commissioner, Nagpur Municipal Corporation stating therein that as per the case of the petitioner since the plot area was below 4000 square meters, it was not necessary to leave 15% open space for sanctioning the building plan. The Corporation was therefore directed to take necessary decision and if found necessary to obtain any clarification from the High Court. Writ Petition No.30 of 2005 was decided on 09.06.2016. This Court noted developments that took place during the pendency of the proceedings and also referred to the communication dated 30.06.2008 issued by the State Government. It observed that despite liberty being granted to the Corporation to seek any clarification in

case of any difficulty or confusion, no steps were taken either by the Corporation or by the Nagpur Improvement Trust. It was therefore obligatory for the Corporation to have considered the request of the petitioner as contained in the communication dated 30.06.2008. It was thus directed that the said communication should be complied with by the Corporation within a period of three months from the date of the judgment.

4. On 02.06.2017 the Town Planning Department of the Nagpur Municipal Corporation informed the Building Engineer, Nagpur Improvement Trust to transfer the amount of Rs.2,71,997/- that had been paid on behalf of the petitioner pursuant to the demand dated 22.06.2006. Similarly copy of the building plan was also directed to be submitted for taking necessary steps to sanction the same. This was followed by reminder dated 20.09.2017. Since there was no compliance in the matter, the petitioner filed Contempt Petition No. 278 of 2017. On behalf of the Corporation it was stated that the plan stated to be sanctioned by the Nagpur Improvement Trust in the year 2002 was not available with the Corporation. Hence, it was stated that if the petitioner submitted such plan that was sanctioned by the Nagpur Improvement Trust with its endorsements, necessary decision could be taken by the Corporation. The petitioner informed the Corporation that the building plan had already been submitted on 05.10.2001 to the Nagpur Improvement Trust and a demand had been raised which was already paid. Thereafter on 01.10.2018 the Corporation informed the petitioner that after considering the fact that the demand of Rs.2,71,997/- had been paid on

03.07.2022 and perusing the building plan with tentative corrections therein it would be necessary for the petitioner to leave 15% open space on the eastern side of the plot. The petitioner was therefore directed to suitably correct the development plan and re-submit the same. The petitioner reiterated that it was not necessary to leave 15% open space since the total area of the plot was less than 4000 square meters. There was further exchange of communications between the parties on the same aspect. On 29.11.2018 Contempt Petition No.278 of 2017 was disposed of and the Corporation was directed to consider the building plan as endorsed by the Nagpur Improvement Trust and decide the issue with regard to FSI of 1.25 and of leaving 15% open space at the plot. It is thereafter that on 26.12.2018 that the Corporation through its Assistant Director, Town Planning Department issued a communication to the petitioner in which it was stated that as per Clause 13.3.1(b) of the Development Control Rules, 2000 it would be necessary to leave 15% open space. The petitioner was directed to submit the building plan in accordance therewith. Being aggrieved by the aforesaid communication, the same has been challenged by the petitioner in this writ petition.

5. Shri N. D. Khamborkar, learned counsel for the petitioner referred to aforesaid factual developments that took place since submission of the building plan on 05.10.2001. According to him, since the area of the land after its subdivision was 1262.83 square meters which was less than 4000 square meter, it was not necessary for the petitioner to leave 15% area as open space under Clause

13.3.1(b) of the Development Control Rules, 2000. As per the said provision, in case of sub-division of land admeasuring 0.40 Hectare or more, 15% of the land was required to be reserved as playground which area has to be provided as far as possible at one place. It was submitted that the Nagpur Improvement Trust had been directed to consider the case of the petitioner as per the Building Bye-laws and the Rules that were in force as on 05.10.2001 when the building plan was submitted by treating both the survey numbers as one plot for the purpose of granting sanction. Since the total area of the plot was less than 4000 square meters there was no justification on the part of the Corporation to insist upon 15% of the plot area to be left open. He also referred to the opinion expressed by the Town Planning Department, Nagpur Division, Nagpur on 21.06.2007 as made to the Director of Town Planning Department, Pune. By referring Clause 13.3.1.1 of the Development Control Rules, 2000 it has been opined that the open area ought to be 200 square meters at the minimum. Since the area of the entire plot was 1262.83 square meters and 15% thereof was 189.42 square meters which was less than 200 square meters, it would not be justifiable to require 15% of open space to be left. It was thus submitted that the Corporation was not justified in issuing the impugned communication dated 26.12.2018 and requiring the petitioner to leave 15% of open space.

6. Shri S.M.Puranik, learned counsel for the respondent nos. 2 and 3 supported the impugned communication. Reference was also made to the affidavit in reply filed by the Nagpur Improvement Trust. It was urged that on account of

unauthorised sub-division of survey numbers Plot bearing Nos.2041/2 and 2043/1 which were adjoining, the problems had arisen. There was no permission obtained for the sub-division undertaken. The area of the said plots was 1262.83 square meters and 15% of the open space being 189.42 square meters was required to be left open. Rule 13.3.1.1 of the Development Control Rules was not applicable as urged by the petitioner. It was further stated that even if the building plan of other shareholders of Survey Nos.2041 and 2043 came to be sanctioned the same was on account of mistaken notion. The petitioner despite being directed to leave 15% open space to enable the building plan to be sanctioned had failed to do so. The writ petition was therefore liable to be dismissed.

7. We have heard the learned counsel for the parties at length and we have perused the documents placed on record. At the outset, it would be necessary to refer to the orders passed in Writ Petition No. 30 of 2005 which arose at the initial stage of the present litigation. While considering the grievance of the petitioner in the matter of grant of sanction to the building plan that was submitted on 05.10.2001, it was directed by this Court on 19.04.2005 that the Nagpur Improvement Trust was expected to consider the case of the petitioner by treating two survey numbers as one plot for the purpose of granting sanction, for calculating the FSI and application of the Development Control Rules. Thereafter on 27.04.2005 a direction was issued to the Nagpur Improvement Trust to consider the case of the petitioner in accordance with the building Bye-laws by treating two survey numbers as one plot for the purpose of granting sanction on the basis of the

Rules that were prevailing on the date when the petitioner submitted the building plan for sanction. Reference can be made to the relevant portion of the orders dated 19.04.2005 as well as dated 27.04.2005 which read as under :

Order dated 19.04.2005 :

“... We expect the N.I.T. to consider the case of the petitioner by treating the two survey numbers as one plot for the purpose of granting sanction and for calculating FSI and application of DCR Rules and the decision in the matter be taken within a week’s time.

Further as it has come on record tht the first plan which submitted by the petitioner on 05.10.2001 and was duly sanctioned by NIT for which even the deposit and charge were accepted can be considered with necessary modification if required under the DCR Rules.”

Order dated 27.04.2005 :

“We direct the respondent-NIT to consider the case of the petitioner in accordance with the Building Bye-laws and Rules, treating two Survey Numbers as one plot for the purpose of granting sanction as per the Building Bye-laws and Rules, which were enforced on the date on which the petitioner submitted the building plan for sanction.”

8. From the aforesaid two orders it is clear that Survey Nos.2041/2 and 2043/1 admeasuring 1262.83 square meters with which the petitioner was concerned were to be treated as a single plot for the purpose of granting sanction and for calculating the FSI. It is not in dispute that the Development Control Rules were in force on 05.10.2001 and Rule 13.3 thereof which is relevant for the present purpose reads as under:

“13.3 Open Spaces :

13.3.1. (a) *For every land irrespective of in town planning scheme or otherwise admeasuring 0.2 Ha. or more layouts or sub-division or amalgamation proposals shall be submitted for approval.*

***(b)** *In any layout or sub-division of land admeasuring 0.40 Ha. or more, 15% of the entire holding area shall be reserved as playground which shall be as far as possible be provided in one place. Notwithstanding anything contained in this rule, the shape and location of such open space shall be such that it can be properly utilised as playground.*

***NOTE:** (a) *However, for plots below 0.40 Ha. where 15% open spaces are physically shown on the approved layout, the FSI of said open space can be utilised on the upper floor provided completion/occupation certificate are not issued as yet (the project is incomplete).*

No permission will be granted to delete/reduce the existing sanctioned open space of layout/sub-division or amalgamation, where layout/sub-division permission is granted prior to issue of these regulations.

(b) *The open spaces shall be exclusive of areas of accesses/internal roads/designations or reservations development plan roads and areas for road widening and shall as far as possible be provided in one place. Where, however, the area of the layout or sub-division is more than 5,000 Sq.Mt. open spaces may be provided in more than one place, but at least one of such places shall be not less than 50% at one place and further not less than 300 Sq.Mt. at one place. Such recreational spaces will not be necessary in the case of land used for educational institutions with attached independent playgrounds.*

13.3.1.1. *No such recreational spaces shall admeasures less than 200 Sq.Mt.”*

A perusal of aforesaid Rules indicate that under Clause (b) of Rule 13.3.1 in any layout or sub-division the land admeasures 0.40 hectares or more, 15% of the entire holding area has to be reserved as playground which shall be as far as possible be provided in one place. As per Note (a) for plots below 0.40 hectares

where 15% open space are physically shown on the approved layout the FSI of the said open space can be utilised on the upper floor. Under Rule 13.3.1.1 recreation space shall not admeasure less than 200 square meters.

9. As stated above, when both the survey numbers are treated as one plot as directed the same admeasures 1262.83 square meters. This area is less than 0.40 hectares. In the impugned order, Survey Nos. 2041 and 2043 have been taken into consideration to indicate the total area to be 9048.05 square meters. It is on that premise that the respondent no.3 has directed that since the total area exceeds 0.40 hectares and is 9048.075 square meters, it expected that 15% open space was required to be left. That open space was not left initially and there was sub-division of the aforesaid two survey numbers. Hence while granting sanction it was necessary to leave 15% open space which was admeasuring 1262.83 square meters. Though 15% open space was 189.42 square meters which was less than 200 square meters, Rule 13.3.1.1 was not applicable to the case of the petitioner. Correctness of this aspect is required to be considered.

10. As noted above, the two survey numbers wherein the petitioner owns land are Survey Nos. 2041/3 and 2043/1. When their area is taken together and treated as one plot, the same admeasures 1262.83 square meters. Since it was already directed by this Court that both the survey numbers should be treated as one plot while granting sanction to the building plan, it is obvious that the area in question is less than 0.40 hectares as referred to in Rule 13.3.1. Under Sub-Clause

(b) it is only if the land admeasures 0.40 hectares or more that 15% of the entire holding area has to be reserved as playground/open space. We therefore find that the insistence on the part of the respondents to require the petitioner to leave 15% area as open space with reference to Rule 13.3.1(b) is contrary to the earlier orders passed by this Court. By requiring the petitioner to leave 15% area as open space the directions issued earlier are being violated. The impugned communication dated 26.12.2018 ignores this position and therefore requires the petitioner to leave 15% area as open space. In fact, the State Government by its communication dated 30.06.2008 has referred to these aspects and had directed the Corporation to take necessary action in that regard with a further observation that if necessary, clarification can be sought from the High Court. This aspect has also been noted in the judgment dated 09.06.2016 passed in Writ Petition No.30 of 2005 and in paragraph 11 it has been observed that neither the Corporation nor the Nagpur Improvement Trust had approached this Court for seeking any clarification. It was therefore obligatory on the part of the Corporation to consider the request as contained in the communication dated 30.06.2008. It is thus found that the impugned communication has been issued ignoring the earlier orders dated 19.04.2005 and 27.04.2005. It is also an admitted fact that while granting sanction to the other shareholders with regard to land admeasuring 1779.31 square meters on 14.01.1997 the same was without requiring the said shareholders to leave 15% area as open space. On this ground therefore the impugned communication dated 26.12.2018 is found to be unsustainable.

11. Hence for aforesaid reasons the following order is passed:

(i) The communication dated 26.12.2018 issued by the Nagpur Municipal Corporation through its Assistant Director of Town Planning is quashed and set aside.

(ii) In compliance with the directions issued by this Court in the orders dated 19.04.2005 and 27.04.2005 in Writ Petition No. 30 of 2005, the Nagpur Municipal Corporation shall re-consider the petitioner's application for grant of sanction to the building plan by treating Survey Nos.2041/2 and 2043/1 as one plot admeasuring 1262.83 square meters. The building plan shall be considered in accordance with the relevant Development Control Rules as prevailing on 05.10.2001. It is clarified that the total plot area with which the petitioner is concerned is 1262.83 square meters which is less than 0.40 hectares. Necessary decision in accordance with law be taken within a period of six weeks from today.

(iii) Rule is made absolute in aforesaid terms with no order as to costs.

(URMILA JOSHI-PHALKE, J.)

(A.S.CHANDURKAR, J.)

Andurkar..