

Arun

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7744 OF 2022
WITH
INTERIM APPLICATION NO. 30717 OF 2022
IN
WRIT PETITION NO. 7744 OF 2022

Jagannath Kareba Kamthe & Ors ...Petitioners
Versus
State of Maharashtra & Ors ...Respondents

Mr Gaurav Potnis, with Amrita Kharkar, i/b PH Potnis, for the
Petitioners.
Mrs Rupali Shinde, AGP, for Respondents Nos 1, 2, 5 & 6-State.
Mr GS Godbole, Senior Advocate, i/b Rajdeep Khadapkar, for
Respondents Nos 3 & 4.

CORAM G.S. Patel &
Kamal Khata, JJ.
DATED: 10th January 2024

PC:-

ARUN
RAMCHANDRA
SANKPAL

Digitally signed by
ARUN
RAMCHANDRA
SANKPAL
Date: 2024.01.12
10:39:35 +0530

1. Heard. Having heard Mr Potnis for the Petitioners at some length, we believe that the entire Petition is misconceived.

2. To put it as bluntly as possible, the Petitioners insist that it is the Petitioners' choice of an applicable statute that must prevail for

the acquisition of the Petitioners' land. Specifically, it is their case that an acquisition under the provisions of Chapter V of the Maharashtra Regional Town Planning Act, 1966 ("**MRTP Act**") relating to the Town Planning Scheme ("**TPS**") will yield them less compensation than an acquisition following the process beginning with Section 126 of the MRTP Act and then with amount of compensation controlled by the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 ("**RTFC Act**").

3. One look at the prayers will tell us just how unstatable the various reliefs both final and interim are:

A) That this Hon'ble Court be pleased to issue a Writ of Mandamus or a Writ, Order or direction in the nature of the Writ of Mandamus or any other appropriate Writ, Order or direction, holding and declaring that the Draft Town Planning Scheme No. 9, Fursungi has lapsed.

B) That this Hon'ble Court be pleased to issue a Writ of certiorari or any other appropriate Writ, Order quashing and setting aside the declaration of intention of the Draft Town Planning Scheme No. 9, Fursungi issued under Section 60 and the notification under section 61(1) of Maharashtra Regional and Town Planning Act, 1966 dated 21/03/2022.

J) That this Hon'ble Court be pleased to issue a Writ of certiorari or a Writ, Order and/or direction in the nature of the Writ of Certiorari or any other appropriate Writ, Order quashing and setting aside the notification dated 30/9/2022 and Gazetted Notification dated 27/10/2022 sanctioning the Draft Town Planning Scheme No. 9, Fursungi.

K) That this Hon'ble Court be pleased to issue a Writ of

certiorari or a Writ, Order and/or direction in the nature of the Writ of Certiorari or any other appropriate Writ, Order quashing and setting aside the notification dated 30/9/2022 and Gazetted Notification dated 27/10/2022 appointing the Arbitrator for the Draft Town Planning Scheme No. 9, Fursungi.

4. There is yet another difficulty in the Petitioner's way. After the Petition was filed, the State Government has sanctioned a draft TPS No. 9, Fursungi. An arbitrator has been appointed following the process in Chapter V. The draft TPS has not yet been finally sanctioned in its present form. It may not be finally sanctioned at all. This is a decision that is entirely within the remit of the State Government. There is no question of us today issuing any kind of injunction or restraint or interdiction against the State Government from deciding whether to finally sanction a draft TPS and whether to do so with or without such modifications as it thinks fit in accordance with law.

5. The facts need not detain us. Paragraph 2, quoted below, provides the context.

"2. The Petitioners states that they are the owners of land in Village Fursungi whose lands have been affected by the Draft Town Planning Scheme No.9 Fursungi. The Petitioner No.1 to 2 are the owners of Gat No. 71/2B/1, Petitioner Nos. 3 to 5 are the owners of Gat No. 71/2B/2, Petitioner Nos. 1 to 6 are the owner of Gat No. 71/2A, Petitioner No. 1 to 6 are the owner of Gat No. 71/5, Petitioner No. 2 to 3 and 5 are the owner of Gat No. 103/1 and Petitioner No. 4 is the owner of Gat No. 109/5, all situated at Fursungi, Tal-Haveli, District Pune."

6. On the question of preparation of TPS, the Pune Municipal Corporation (“PMC”), the planning authority, declared its intention to prepare a draft TPS on 1st March 2019. This was published in the Maharashtra Government Gazette on 9th March 2019.

7. On 8th April 2019, the Petitioners filed their objections. Between 20th April 2020 and 19th July 2020, the State Government extended the time for preparation of the draft scheme. Of course, by then this country and most of the world, as we know, was in a lockdown, and that continued for some time. Further extensions were granted and there was then an amendment to Section 148A, after which there were even further extensions. There was then the second lockdown in 2021. Ultimately, on 3rd July 2021, the draft Development Plan for the Pune Metropolitan Area was submitted and published by the Regional Development Authority. A Notification from the PMC followed on 16th March 2022 under Section 61(1) in regard to the Draft TPS No 9, Fursungi.

8. We are not going to trouble with the question of exclusion of the period during the lockdown and the statutory provisions in that regard, simply because the Petition proceeds on a fundamentally incorrect basis, as we shall immediately see.

9. Section 59 of the MRTP Act sets out the requirement for preparation and the contents of a TPS. A TPS is defined in Section 59 itself and Section 59(1)(b) tells us what its contents are to be.

10. Sections 60 and 61 are important for our purposes and they read as follows.

“60. Power of Planning Authority to resolve on declaration of intention to make Scheme

(1) A Planning Authority may by resolution declare its intention to make a town planning scheme in respect of any part of the area within its jurisdiction.

(2) Not later than thirty days from the date of such declaration of intention to make a scheme (hereafter referred to as the declaration), the Planning Authority shall publish the declaration in the *Official Gazette*, and in such other manner as may be prescribed and despatch a copy thereof (together with a copy of the plan showing the area to be included in the scheme) to the State Government and also to the Director of Town Planning.

(3) A copy of the plan shall be open to the inspection of the public at all reasonable hours at the head office of the Planning Authority.”

“61. Making and publication of draft scheme by means of notice

(1) Not later than nine months from the date of the declaration, subject however, to sub-section (3), the Planning Authority shall, in consultation with the Director of Town Planning make a draft scheme for the area in respect of which the declaration was made, and published a notice in the *Official Gazette*, and in such other manner as may be prescribed stating that the draft scheme in respect of such area has been made. The notice shall state the name of the place where a copy thereof shall be available for inspection by the public and shall also state that copies thereof or any extract therefrom certified to be correct shall be available for sale to the public at a reasonable price.

(2) If the Planning Authority fails to make a draft scheme and publish a notice regarding its making within the period specified in sub-section (1) or within the period extended under sub-section (3), the declaration shall lapse, unless the State Government appoints an Officer to prepare and submit the draft scheme to the State Government on behalf of the Planning Authority not later than nine months from the date of such appointment or the extended period under sub-section (3); but any such lapse of declaration shall not debar the Planning Authority from making a fresh declaration any time in respect of the same area.

(3) The State Government may, on application made by the Planning Authority or, as the case may be, the officer by notification in the *Official Gazette*, extend the period specified in sub-section (1) or (2) by such period not exceeding three months as may be specified in the notification.”

(Emphasis added)

11. Plainly read, these Sections contemplate that the planning authority must first resolve to declare its intention to make a TPS. Within 30 days of that Resolution, i.e., from the date it declares its intention, it must be published in the Official Government Gazette. This has been done.

12. But no declaration can be kept hanging indefinitely and therefore Section 61(1) says that a draft scheme must be prepared no later than nine months from the date of declaration and a notice must be published to that effect in the official Gazette.

13. The reliance by Mr Potnis is on sub-section (2) and this is where there is a critical error. What if the planning authority fails to make a draft scheme within nine months? Does this mean that there is a lapsing of *the scheme* if made later, or does it mean that *no scheme can ever be made thereafter*?

14. Obviously, there is no concept of the ‘lapsing’ of a draft scheme. This is logical because sub-section (2) contemplates a situation where *no* draft scheme has been made within the nine months period at all. Therefore, what lapses is not the scheme but the *declaration of intention*. That is the precise phraseology in sub-section (2). But that sub-section also says that a lapsing of a declaration does not prevent the planning authority from making a fresh declaration at any time (possibly in the very next minute) for the same area.

15. The reason we stress this is that prayer clause (a) of the Petition propounds something unknown to the MRTP Act. It says that the *draft TPS in question has lapsed*. But that is not the contemplation of the law at all. It is only the declaration of intention that would lapse and that too on it being shown in a manner that is not contentious that it is beyond nine months period. We refuse to enter into any argument and counter argument of whether this or that period during lockdown should or should not be excluded. That in itself can give the Petitioners no right.

16. The remaining prayers clearly show (for instance prayers clauses (c), (d), (e), (f), (l), (m) and (n), all for interim relief that the

entire attempt is to ensure that there is no TPS for Fursungi or covering the Petitioners land at all.

17. Mr Godbole points out that because of this Petition and an order of status quo, the process of the TPS including the hearings have been held up only for these Petitioners. This becomes important when one looks at the manner in which this TPS is prepared and finally sanctioned.

18. Section 64 deals with the 'contents of the draft scheme'. Section 68 gives the State Government the power to sanction the draft scheme. Section 68A tells us of the 'effect of the sanction of the draft scheme'. Section 71 deals with 'disputed ownership' and then in sub-part (b) of Part V, we find the provisions for the appointment of an arbitrator, his duties, and a tribunal of appeal. Sections 68 and 68A read thus:

“68. Power of State Government to sanction draft scheme

(1) The Planning Authority or as the case may be, the officer aforesaid shall, not later than six months from the date of the publication of the notice, in the *Official Gazette*, regarding the making of the draft scheme, submit the same with any modifications which it or he may have made therein together with a copy of objections received by it or him to the State Government, and shall at the same time apply for its sanction.

(2) On receiving such application, after making such inquiry as it may think fit and consulting the Director of Town Planning, the State Government may, not later than three months from the date of its submission, by

notification in the *Official Gazette* , either sanction such draft scheme with or without modifications and subject to such conditions as it may think fit to impose or refuse to give sanction.

(3) If the State Government sanctions such scheme, it shall in such notification state at what place and time the draft scheme shall be open to the inspection of the public and the State Government shall also state therein that copies of the scheme or any extract therefrom certified to be correct shall on application be available for sale to the public at a reasonable price.

68A. Effect of sanction of draft scheme

(1) Where a draft scheme has been sanctioned by the State Government under sub-section (2) of section 68 (hereinafter in this section, referred to as “the sanctioned draft scheme”), all lands required by the Appropriate Authority for the purposes specified in sub-clauses (ii-b), (ii-f) and (ii-g) of clause (b) of sub-section (1) of section 59 shall vest absolutely in the Appropriate Authority free from all encumbrances.

(2) Nothing in sub-section (1) shall affect any right of the owner of the land vesting in the Appropriate Authority under that sub-section.

(3) The provisions of sections 89 and 90 shall, *mutatis mutandis* apply, to the sanctioned draft scheme as if, —

(i) sanctioned draft scheme were a preliminary scheme, and

(ii) in sub-section (1) of section 89 and sub-section (1) of section 90, for the words “the day on which a final scheme comes into force” the words, brackets and figures “the date on which the draft scheme is sanctioned under sub-section (2) of section 68” were substituted.”

19. Now what this tells us is that when it comes to the preparation of a TPS, and the acquiring of lands for that scheme, there is a process mandated and recognised by law for that purpose. Nothing is being attempted in an extra-legal manner. But the apprehension voiced by Mr Potnis is that the resultant award under Chapter V of the MRTP Act will generate much less compensation than under the RTFC Act. He says candidly the Petitioners are not opposed to acquisition for any purpose. They cannot be. They cannot oppose acquisition for a public purpose. But he submits that the Petitioners are entitled in law to demand that the acquisition should be following that statute which yields them the maximum possible compensation.

20. It is difficult to understand under what provision of Part III of the Constitution such a submission is positioned. To our mind, it is a submission that is only stated to be rejected.

21. The Petitioners have already filed objections once. They are entitled to a hearing. They are most emphatically not entitled to an argument that their objections must be upheld or accepted or that they can choose a statute that will be made applicable to them in a matter of state acquisition of lands for a much wider public purpose, viz., the creation of a ring road around Pune.

22. Consequently, we are unable to see any merit whatsoever in this Petition. Within the four corners of the MRTP Act, the contentions of the Petitioners at any hearing before the arbitrator for

the TPS No 9, Fursungi are expressly kept open. This is the only observation we are inclined to make.

23. The remaining prayers more or less reject themselves. There can be no question of stopping the planning process by a mandamus of a Writ Court under Article 226 of the Constitution of India. It is not for the Writ Court, let alone a petitioner, to decide when, how and in what form the planning process should proceed.

24. The Petitioners cannot, in short, demonstrate any infraction of any legal let alone constitutional right on account of the preparation of the TPS. The Petitioners also cannot demonstrate that they have any legal or constitutional right to demand that a particular acquisition statute should be applied to them over another equally applicable statute.

25. We note with a great deal of concern the contents of paragraph 3 of the Petition. This is the vaguest possible allegation of mala fides in a statutorily permissible town planning process. We refuse to entertain any such grievances. As the Supreme Court itself has frequently observed allegations of mala fides are more easily made than proved, and the seriousness of such allegations demands proof of the highest order of credibility. Mala fides is the last refuge of the losing litigant.¹

26. The Petition is rejected. There will be no order as to costs.

¹ *Union of India v Ashok Kumar*, (2005) 8 SCC 760; *Government of AP v P Chandra Mouli & Ors*, (2009) 13 SCC 272.

27. All interim and ad-interim orders stand vacated. In view of this, the Interim Application does not survive and disposed of accordingly.

28. The request for a continuance of the status quo order is rejected.

(Kamal Khata, J)

(G. S. Patel, J)