

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WAIT PETITION NO. 379 OF 2003

Mr. Rajendra Thacker)
)
Residing at Flat No. 27 D-1)
Dwarkesh Park Co-op. Housing)
Society, Saibaba Nagar,)
Borivali (W), Mumbai – 400 092.) . . Petitioned

Versus

1. Municipal Corporation of Gr.)
Mumbai.)
)
Road office: Mahapalika)
Bhavan C.S.T. Mumbai – 400 001) . . Respondents

ALONG WITH

WAIT PETITION NO. 2822 OF 2003

1) Bhrashtachar Nirmoolan)
Sanqhatana Mumbai, Public)
Trust duly registered with)
Charity Commission, vide its)
Registration No. 1111/96 BBBHD)
Having office at Shakti Niwas)
Station Road, Goregaon (West))
Mumbai – 400 062)

2) Manav Shankar Joshi)
President of the petitioner)
No. 1, having his office at)
Shakti Niwas, Station Road,)
Goregaon (West))
Mumbai – 400 062) . . Petitioners

Versus

1 State of Maharashtra)
Mantralaya Mumbai)
)
2 Brihanmumbai Municipal)
Corporation, & statutory)
Corporation constituted under)
The Bombay Municipal Corporation)
Act, 1888, having its principal)
Office at Mahapalika Marg,)
Mumbai – 400 001)

3 Mr. K.C. Shrivastava)
Municipal Commissioner for)
Greater Mumbai, having his)
Office at Mahapalika Marg,)
Mumbai – 400 001.) . . Respondents

Ms. Sumedha Rao for the petitioner in W.P. 379/2003.

Ms. Shankutala Joshi i/by Anand Poojary for
Intervenon in w.p. No. 373/2003 in support of the
Petition.

Ms. Shakuntala Joshi i/by A. Poojari for the
Petitioners in W.P. No. 2822 / 2003.

Mr. K.K. Singhvi alongwith D.H. Mehta for B.M.C.

Coram : H.L. Gokhale &
R.L. Mohite J.J.

Date of Reserving: 05.04.2004
The Judgement:

Date of Pronouncement
Of Judgement: 05.05.2004.

JUDGEMENT :- (PER : MOHITE, J)

1. These two Writ petitions seek to prevent the proposed regularization of several unauthorized construction in Mumbai City. Since both the Petitions are filled in public interest, arise out of a common background of facts and involve the same questions of law, they are being heard and Disposed of together.

h. With the assistance of counsel of both the parties as well as some of the intervenes, we have perused the record before us. It cannot be disputed that in the case of 128 structures, flagrant violations of the Municipal permissions taken / required to be taken and the Development Control regulations are sought to be regularized. The nature of some of the concessions / regularization granted / sought to be Granted can be stated as under :-

- a. That additional floors (over and above the original approved floors) constructed are sought to be regularized and relying interlay on the Certificate given by the builder on the aspect of structural stability.
- b. That construction work commenced in the absence of a commencement certificate is sought to be regularized.
- c. That deficiencies in open spaces are permitted to be reduced by granting concession way of modification / relaxation under Regulation 64(b) of the D.C. Regulation.
- d. That concession for using staircase, lift, lobby area, free from FSI are sought by way of concession under regulation 35 (2) (c) by charging premium.
- e. That requirement under the DC Rules such as number of lifts for a building are sought to be relaxed by grant of a concession.
- f. That the minimum size of shop is allowed to be reduced by way of concession Granted under Regulation 64 (b).
- g. That commercial premises such as a restaurant are sought to be permitted on the Higher floor by way of a concession under Regulation 64 (b).
- h. That excess balconies are sought to be permitted by way of a concession under Regulation 64 (b).

9 On perusing these orders, we noticed a consistent and uniform procedure and method being used by the Builders / Developers / Architects for obtaining regularization. The modulus operand can be better understood if a sample tentative order of Regulation said to be passed by the Municipal Commissioner is reproduced. In respect of one of the building at serial no. 31 to Exh . 1 in the affidavit of Mr. Sane the reasons for permitting proposed regularization are detailed in the note prepared by the Engineer of the Ward as under :-

“In this case, owner Mrs. Nilam A. Vazir through her Architects M/s. Pushkar consultants applied for building permission for stilt + 3 upper floors on 4 . 1 . 90 under sec. 337 of M.M.C. Act at plot bearing CTS No. 284 / 21 of village Marol, Andheri (East). The said plot is part of layout approved vide permission was granted initially and I.O.D. was issued to Mrs. Nilam A. Vazir on 17. 12. 91 for stilt + 3 upper floors by restricting F.S.I. to 0.75 for want of P.R.C. in words. C.C. upto top of stilt was granted on 29. 6. 93. Full C.C. granted as per approved plan on 17. 12. 96. Architect submitted amended plan claiming staircase / lift area free of F.S.I. and T.D.R. admeasuring 530.00 sq.mt. Accordingly plans for stilt (Pt) Gr. (Pt) 7 upper floor were approved on 6. 4. 2002 and full C.C. was granted as per approved plan on 23. 5. 2002.

Again Architect submitted plans in lieu of T.D.R. adm. 100.00 sq.mt. proposing part 8th floor over earlier approved floors.

Thereafter, some concessions were involved for approving the plans as mentioned below.

1. Deficiency in open space by charging premium upto 23.16 %
2. Staircase, lift, lift lobby area free of FSI by charging premium.
3. To condone deficiency of second lift by charging premium.

These concessions were approved on 5. 8. 02 by Dir. (E.S. & P) as per the power vesting in M.C. under Sec. 64 (b) of D.C. Reg. 1991 which are subsequently delegated to Dir. (E.S. & P.) under section 63 of D.C. Reg. 1991. After approval of concessions, owner purchased T.D.R. The report to allow utilization of T.D.R. as per Reg. 34 of D.C. Reg. 1991 was sent to Ch. Eng. (D.P.) / Dir. (E.S. & P.) 's approval on 24. 9. 2002. Approval to utilization of T.D.R. was granted on 26. 11. 2002.

On routine inspection, it was observed that, the work was completed upto part 8th floor beyond approval given upto stilt (Pl) + Gr. (Pl) + 7 floors. Thus part 8th floor construction was beyond approval. Hence, this office had issued stop work notice under Sec. 354 A of M.M.C. Act on 27. 9. 2002.

In response to the above action, owner through his architect applied to this office for regularization of the work carried out beyond C.C. requested to (i) regularize the work carried out beyond C.C. / beyond approval at 15% of the land rate as per regularization policy circulated vide AMC / R / 3258 dated 30. 7. 85 amended upto date and in view of circular Under No. CHE / 1077 / DPC / Gen as work of beyond

approval was carried out after sanctioning of necessary concessions and while utilization of T.D.R. was in process.

- To withdraw the stop work notice issued under Sec. 354 – A of M.M.C. Act.

The plans will be issued, penalty will be recovered and stop work notice will be recovered and stop work notice will be withdrawn after receipt of the order from the Hon'ble High Court in the matter, Penalty will be recovered at double the rates.

Submitted Please.

It is this note, which is ultimately signed by his superiors and ultimately by the Municipal Commissioner. We find that similar notes have been put up in almost all of the 120 cases in which regularization are sought to be made. From the above sample order as also upon reading other orders, we find that the modus operandi which is used for effecting the regularization consists of the following steps :-

- (a) Initially the developers / builders / architect submits particular building plan for sanction. They obtain the sanction as also the commencement certificate.
- (b) That the building is erected in violation of approved plan and / or the commencement certificate and even additional floors are added.
- (c) That even before purchase of TDR, concessions / modification / relaxation are got approved from the office of the Director. (Engineering services and projects).
- (d) Thereafter the builders / developers / architects go about shopping for TDR in the market.
- (e) An application for regularization of the unauthorized structure is then made either on the basis of acquired TDR's on the basis of an agreement to purchase TDR or on the ground of having acquired lands / development rights in lands in the adjoining areas.
- (f) On these regularization applications, noting are made by the engineers at the Ward level and signatures then put therein below upto the level of Municipal Commissioner and that such notes with the further signature of such officers are produced as being the tentative decisions for regularization.

16. In conclusion, we find that all the concession which are granted under orders passed by the Director (Engineering services and project) or any officer subordinate to the Municipal Commissioner prior to the stage of regularization are without jurisdiction or authority and the question of grant of such concession as well as the question of allowing the retention of unauthorized construction will have to be reconsidered by The Municipal Commissioner under section 44, 46, & 53 read with Regulation 64(b) of the MRTP Act. Similarly, any concession given by the Director (Engineering services and projects) or any officer subordinate to the Municipal Commissioner under

any other provision of the MRTP Act which require the special permission of the Municipal Commissioner, such as regulation 35(2) (c) ' will also have to be bad in law and the question of granting of such concession will also have to be considered a fresh by the Municipal Commissioner.

17. We have gone through the files containing these 128 cases as produced by the Petitioners. They are containing photocopies of the municipal decisions. We have heard the intervenes appearing for various builders. These defects are on procedure as pointed out above as well as on the merits of these cases. We have mentioned one case only as a representative one but the defects subsist all throughout. The cases where TDR is utilized is defended on the ground that amenities are improve on the island city. That, however, cannot be at the expense of specific rights of the resident /buyers of flats under the D.C. Regulation. The builder are obliging anybody by buying the T.D.R. The municipal corporation cannot permit their use to reduce the amenities under the D.C. Regulation without compensating the affected persons. Besides Regulation 64 (b) speaks of health safeguard and neighborhood. In all such applications whenever regulation is involved, the affected resident / buyers of the flats and residents / buyers of the flats and residents at least in the immediate vicinity will have a right of hearing if they so desire.
18. It is thus directed that the tentative orders for regularization in the 128 cases where Regularization is proposed and 19 cases where regularization was effected prior to the Grant interim relief, excluding the 2 cases mentioned in paragraphs –4 (e) and 4 (d) of This judgement are not approved and these cases will be reconsidered for regularization / retention by the Municipal Commissioner in accordance with the following directions :-
 - (a) That the power and duty to decide the question of retention / regularization of any Unauthorized development or grant of any modification / relaxation and which is required to be decided by this grant of a special permission will not be delegated

by the Municipal Commissioner to any other officer. The commissioner may take the opinion of the concerned Engineers but the final decision must be his for reason to be recorded in writing (however the reasons may be brief, but they will be adequate).

- (b) That while deciding such a question, the Municipal Commissioner will consider All representation made by affected parties on the questions in issue including any Hardship or loss caused to them, which will include the affected residents / proposed Buyers and affected residents at least in the immediate neighborhood.
- (c) That if any unauthorized development is in violation of any dimensions pertaining to FSI (unless where permitted by the Development Control Regulation), as on the date of decision, the same will not be regularized
- (d) If on the date of decision, the authorized development is found to be in violation of any rule, regulation or law, which violation cannot be waived / relaxed, then the said development should not be regularized. TDR will not be permitted to reduce the amenities under the D.C. Regulations without adequately and fully compensating the resident / purchasers of the regular part of the structure for good reasons to be recorded in writing by the commissioner.
- (e) That the final order allowing retention must reflect application of mind as regards the “Demonstrable hardship” for which the retention of an unauthorized development has been permitted;
- (f) That similarly the final order allowing retention must indicate that the relaxation / concessions grants will not affect the health, safety, fire safety, structural safety and public safety of the inhabitants of the building and the neighborhood;
- (g) Where of question structural modification involving a further burdening of structure Is involved, the structural safety will be certified by a structural engineer of B.M.C.,

who will grant such a Certificate after inspecting the premises.

- (h) If there is any loss of a facility, requirement or amenity suffered by any person / Persons having interest in the authorized part of any further unauthorized development of which is sought to be retained / regularized, then such loss should be assessed at the market value of the concession granted and must form an ingredient computing premium. Whenever possible this ingredients may be directed to be distributed to the persons who suffer such a loss. In addition the BMC may also add to the premium any amount which may be reasonably required to be invested by it to put up additional infrastructure, if any, in on around the regularized structure. An amount of fine or violation of law should be the third ingredients of the premium. The overall premium to be levied should be sufficiently deterrent so as to discourage a tendency to violate rules and building regulations. In the future, it will be desirable that the consent of such person who would suffer any loss of facility, requirement or amenity should be filled along with application for retention.

20. Before we part would like to impress upon the Commissioner that Regulation 64 contains the Discretionary powers and by their very nature these powers to be sparingly exercised in specific cases where a demonstrable hardship is caused. Thus this provision is to be utilized as an exception and not by way of a rule. In Normal cases D.C. regulation must be applied as they are. What we find here is an Unfortunate phenomenon of a planned subversion of these regulation of these regulation by persons who are beneficiaries thereof. 128 cases is not small number and it clearly shows modus operandi. Besides demonstrable hardship will normally mean a situation arising inspite attempting to follow the regulation. If a plan of a builder is sanctioned on a certain layout for certain number of floors normally no additional floors can be permitted. This undermines the strength of the building affecting the health and safety. The commissioner will appreciate that he represents the interest of the citizens and must function as a watchdog. He must appreciate that

these departures from rules for the benefit of a few is severally undermining the quality of life in urban areas. We record our appreciation for the petitioners for raising these issue. It is only such action and response there to which restores the faith of the citizen in the democratic systems.

21. Rule is thus made absolute in the aforesaid terms with no order as to costs. All the pending Notice of Motions and the Chamber summons also stand disposed off in view of this Judgement. The Municipal Commissioner to decide the applications for regularization expeditiously.

22. Although the petition is disposed of Ms. Joshi in writ petition No. 2822 / 2003 points out that in her petition there are some additional prayers which are for taking action against the Municipal officers and the Architects. We are not deal with those prayers in the present petition. It will be for the petitioner to take appropriate proceedings.

- Certified copy expedited.
- Parties to act on an ordinary copy of this order duly authenticated by the personal Secretary of this court as a true copy

Personal Secretary to
The Hon'ble Judge
High Court, Bombay

(H.L. Gokhale)

(R.S. Mohite)

