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IN THE HIGH COURT OF JUDICATURE AT MUMBAI  
ORDINARY ORIGINAL CIVIL JURISDICTION  
**PUBLIC INTEREST LITIGATION NO. 6 OF 2009**

Mr.Arun Ganesh Deo

.. Petitioner

Vs.

The State of Maharashtra and others

.. Respondents

Shri Bipin Joshi, for the Petitioner.

Mrs.M.Kajale a/w Ms.Uma Palsule-Desai, AGP for Respondent No.1.

Shri A.Y.Sakhare, Senior Advocate a/w Ms.Trupti Puranik, for Respondents No.2 and 3 - B.M.C.

Shri Aditya Shiralkar i/b Shiralkar and Co., for Respondent No.4 (a).

**CORAM : A.S. OKA & VL. ACHLIYA, JJ**

**DATED : 01<sup>st</sup> OCTOBER 2015**

**ORAL JUDGMENT (Per A.S.Oka, J.) :**

. We have heard the learned counsel appearing for the petitioner, the learned counsel appearing for the respondent no.4(a), the learned senior counsel representing the second and third respondents as well as the learned AGP for the State.

2. The main challenge which is pressed into service in this Public Interest Litigation relates to the circular/communication dated 14<sup>th</sup> November 1995 issued by the Urban Development Department of the State Government as well as the circular dated 05<sup>th</sup> January 1983 issued by the Municipal Corporation of Greater Mumbai. The issue raised relates to a nalla known as 'Mogra nalla' situated in 'K' East and 'K' West Wards of the Mumbai Municipal Corporation,

Andheri (West), Mumbai. The case made out in the Petition is that the Mumbai Municipal Corporation invited tenders for construction of retaining wall of the said nalla as well as desilting of the said nalla. The contention is that without acquiring the area of the said nalla, a huge amount from the public exchequer cannot be spent by the Mumbai Municipal Corporation and therefore, in fact, the Mumbai Municipal Corporation must acquire the land covered by the nalla. The contention raised in the alternative is that the persons who are claiming to be the owners of the land/bed below the nalla should be compelled to maintain the nalla and the work of desilting of the nalla cannot be carried out at the cost of the Mumbai Municipal Corporation.

3. Inviting our attention to the circular dated 14<sup>th</sup> November 1995, the learned Counsel for the petitioner submitted that the TDR or the FSI cannot be granted in respect of the land below the nalla or the bed of nalla inasmuch as in view of section 20 of the Maharashtra Land Revenue Code, 1966 (for short "the said Code"), the presumption is that the State is the owner of the land below a nalla. The submission is that only on the basis of the entries in revenue/city survey record, the persons claiming to be the owners of the land below nalla cannot be granted FSI/TDR in respect of the said land.

4. The second submission is that in a case where the nalla is on a privately owned land, the work of desilting and maintenance cannot be carried out by the Mumbai Municipal Corporation and the Corporation must compel the owners to do so. It is submitted that even the work of maintaining and widening of such nalla cannot be made at the cost of public exchequer.

5. The learned senior counsel appearing for the Mumbai Municipal Corporation invited our attention to the affidavits on record and in particular the affidavit dated 29<sup>th</sup> April 2009 of Shri Anil C.Doshi. He urged that as far as maintenance and desilting of nallas on a private land is concerned, apart from the statutory obligation of the Mumbai Municipal Corporation under section 61 of the the Mumbai Municipal Corporation Act, 1888 (for short 'MMC Act'), the occasion for removing silt from the nalla arises as silt gets accumulated in the nalla from upstream side and is not attributable to any actions of the owner. His submission is that the work of desilting is required to be carried out in the larger public interest. He also invited our attention to the statements made in clause (c) of paragraph 5 of the said affidavit. He also pointed out the affidavit dated 05<sup>th</sup> August 2015 of Shri Vijaykumar Wagh, Assistant Engineer, R/Central & K/East Ward in the Development Plan Department of the Mumbai Municipal Corporation. He pointed out clause (i) of the Development Control Regulation No. 34 incorporated by the

government notification dated 09<sup>th</sup> March 2010 issued in exercise of the powers under sub-section 2 of section 37 of the Maharashtra Regional and Town Planning Act, 1966 (for short "M.R.T.P Act"). His submission is that the question of grant of FSI/TDR which is the subject matter of challenge will be governed by the said modified Regulation.

6. The learned counsel appearing for the respondent No. 4 (a) urged that nalla with which respondent No.4(a) is concerned is not a natural flowing nalla, but it is a trained nalla or a storm water drain which is passing through the land which is privately owned by various owners. He, therefore, urged that no interference can be made with the benefits granted to respondent No. 4(a). The stand taken in the affidavit of the respondent no. 5 is also similar. It is contended that the nalla is not a natural nalla, but is a trained nalla or a storm water drain.

7. We have carefully considered the submissions of the learned counsel appearing for the parties. It is necessary to consider section 20 of the said Code. Sub-section (1) of section 20 of the said Code reads thus :

**20. Title of State in all lands, public roads etc., which are not property of others-** (1) All public roads, lanes and paths, the bridges, ditches, dikes and fences, on or beside, the same, the bed of the sea and of harbours and creeks below the high water mark, and rivers, streams, nallas, lakes and tanks and all canals and watercourses, and all standing and flowing water and all lands wherever situated, which are not the property of persons

legally capable of holding property, and except in so far as any rights of such persons may be established, in or over the same, and except as may be otherwise provided in any law for the time being in force are and are hereby declared to be, with all rights in or over the same, or appertaining thereto the property of the State Government and it shall be lawful for the Collector, subject to the orders of the Commissioner, to dispose of them in such manner as may be prescribed by the State Government in this behalf, subject always to the rights of way, and all other rights of the public or of individuals legally subsisting.

Explanation :- In this section "high water-mark" means the highest point reached by ordinary spring tides at any seasons of the year."

8. Sub-section (1) of Section 20 of the Code implies that the bed of rivers, streams, nallas, lakes and tanks and all canals and watercourses, and all standing and flowing water and all lands wherever situated, which are not the property of persons legally capable of holding property and except in so far as any rights of such persons may be established, in or over the same, are declared to be the property of the State Government. Thus, sub-section (1) of section 20 of the said Code creates a presumption. It provides that unless the persons claiming any rights in respect of the bed of a nalla establish their rights, the land forming the part of the bed of the nalla is presumed to be the property of the State Government. In the context of this legal position, the submissions canvassed across the bar are required to be appreciated. The communication / circular dated 14<sup>th</sup> November 1995 was issued by the State Government on the basis of guidance sought by the Mumbai Municipal Corporation.

What is stated in the said communication issued by the State Government can be summarised as under :

(a) The land below the nalla is not a statutory proposal in the development plan and therefore, TDR will not be admissible in respect of the said land;

(b) if a land is reserved in the development plan and if the land below the nalla passing through the said reserved land is privately owned, TDR can be granted in respect of the said land;

(c) if the land below the nalla is privately owned, the FSI in respect of the land below nalla can be used on the adjoining land subject to imposing various conditions such as training of nalla etc.

9. In view of what is stated in the communication/circular dated 14<sup>th</sup> November 1995, from that date, the consideration of prayer for grant of FSI/TDR in respect of the land below a nalla will be governed by the clarification issued by the State Government.

10. The clarification issued by the State is crystal clear. If there is a nalla passing through a reserved land and if the bed of nalla is of private ownership, only in such cases, TDR will be admissible in respect of the bed of nalla. In the case of a land which is not reserved in the development plan, if the bed of nalla is privately owned, FSI in relation thereto can be used on the adjoining

land subject to the Mumbai Municipal Corporation imposing various conditions including the condition of training of nalla, maintaining the nalla, etc.

11. Therefore, if an application was made to the Mumbai Municipal Corporation for grant of TDR/FSI in terms of the circular dated 14<sup>th</sup> November 1995, the same could have been granted only on establishing ownership right in respect of the land constituting the bed of nalla. Whether the person claiming to be the owner has established the ownership will have to be considered in the context of the principles laid down in sub-section (1) of section 20 of the said Code.

12. As far as the stand of respondents No. 4(a) and 5 is concerned, their contention appears to be that the so called nalla is not a natural nalla. The issue whether the nalla is a natural nalla or not is a disputed question of fact.

13. In the light of the interpretation put by this Court to the circular/communication dated 14<sup>th</sup> November 1995, it is for the Mumbai Municipal Corporation to examine the cases of respondents No.4(a) and 5 and to ascertain whether TDR/FSI has been lawfully granted in terms of the circular dated 14<sup>th</sup> November 1995. The adjudication of this issue cannot be made in this Petition.

14. We must make a reference to the affidavit dated 5<sup>th</sup> August 2015 of Shri Vijaykumar Wagh, Assistant Engineer, R/Central

& K/East Ward. Clause (i) of Regulation 34 of the D.C.Regulations which was incorporated by the notification dated 9<sup>th</sup> March 2010 reads thus :-

*MODIFICATION*

Following new Regulation No. (i) is added to Regulation No. 34 as follows :

Provision for Proposed nalla/Nalla widening/training and appurtenant service roads thereto shall be considered to be "reservation" in the Development Plan and if the FSI of such land is not possible to be consumed on the remaining land as envisaged under Regulation 35, with prior approval of the Government, the owner shall be eligible for grant of TDR on handing over the land free of cost for such purpose as in Appendix -VII. However, as per the provision of Regulation 15 of Appendix VII, the owner shall be insisted to pay pro-rata charges for cost of construction of compound wall instead of retaining wall :

Provided that when Proposed Nall/Nalla Widening/Training and appurtenant service road thereto is passing through the lands affected by any other reservation of the Development Plan, then TDR of the land can be granted only once either for D.P. reservation or deemed reservation mentioned above for nalla etc. Efforts shall be made to cover/to train the nalla suitably so that the said land can be used for its intended purpose as proposed in the Development Plan. However, if such covering of nalla is not feasible/viable then the nalla and appurtenant service road shall be developed as per requirement and the said other reservation of the Development Plan affecting the said land shall be deemed to be deleted/modified to that extent."

(B) Fixes the date Publication of this notification in the Government Gazette as the date of coming into force of this modification.

(C) Directs the said Corporation that in the schedule of modification sanctioning the said modifications after the last entry, the schedule referred to as (A) shall be added.

15. The modified Regulation was published in the Government Gazette dated 18<sup>th</sup> March 2010. The modified Regulation makes it very clear that if a provision is made for widening of existing nalla



and training of nalla or any appurtenant service roads thereto, the same shall be considered to be a “reservation” in the sanctioned development plan. It provides that if the FSI in relation to the such land cannot be consumed on the remaining land as envisaged by Regulation 35, with the prior approval of the Government, the owner shall be eligible for grant of TDR on handing over the land free of cost for such purpose as provided in Appendix -VII. It also provides that the owner shall be insisted to pay pro-rata charges for cost of construction of compound wall instead of retaining wall. The proviso makes it clear that when a proposed nalla/nalla widening/training and appurtenant service road thereto is passing through the lands affected by any other reservation in the development plan, then the TDR of such land can be granted only once either for development plan reservation or deemed reservation mentioned as aforesaid. In view of clause (B) of the modified Regulation, the same came into force from 18<sup>th</sup> March 2010 i.e. the date of publication of the notification in the government gazette. It is obvious that now the issue of grant of FSI/TDR in respect of the bed of nalla will be governed by clause (i) of Regulation 34 under the notification dated 09<sup>th</sup> March 2010 and after the said Regulation came into force, no action can be taken on the basis of the circular dated 14<sup>th</sup> November 1995.

16. Now we come to the second issue regarding the work undertaken by the Mumbai Municipal Corporation of desilting of nalla or training of nalla. Wherever the bed of nalla vests in the State, it goes without saying that the owner of the land to which the nalla passes has no liability of maintaining the nalla or desilting of the nalla. As regards the nalla passing through a private property in the sense that the bed of nalla is privately owned, it will be necessary to consider what is stated by Shri Anil Joshi, Assistant Engineer of the Mumbai Municipal Corporation in clauses (b) and (c) of paragraph 5 of his affidavit which read thus :

(b) I say that the work of desilting of major and minor nallas is done by M.C.G.M and the cost of desilting the nalla is not recovered from the private land owner, from whose land the nalla is passing. The liability of removing silt from the nalla portion falling within private property cannot be put on any particular owner as this silt is accumulated in the nalla from upstream side and is not attributable to any actions of the owner. The desilting is necessary in the public interest. Hence, the desilting of nalla is carried out through M.C.G.M in the larger public interest. The allegation of the Petitioner at (a) above is baseless and misconceived and is liable to be rejected "ab-initio".

(c) I say that the construction of retaining walls of nalla is insisted from the private owners for the nalla portion falling within their property whenever they came forward for developing the property or by recovering pro-rata charges from the property developer. However, in cases where the private land is not developed by the owner, then in such case, depending upon the urgency and necessity of the work, the nalla training to channelize the flow is done by M.C.G.M. in the larger public interest.

(underline added)

17. Apart from statutory obligation of the Mumbai Municipal Corporation under section 61 of MMC Act, we find

nothing wrong in the stand taken by the Mumbai Municipal Corporation that the responsibility of removing silt from the nalla portion falling within private property cannot be put on the private land owner as this silt is accumulated in the nalla from upstream side. As regards the construction of the retaining walls of nalla, there is a specific statement made that the cost of construction thereof is insisted from the private owners for the nalla portion falling within their property whenever they come forward for developing the property or by recovering pro-rata charges from the property developer. It is contended that when the property is not developed by the owner, then in such case, depending upon the urgency and necessity of the work, the nalla training to channelize the flow is done by the Mumbai Municipal Corporation in a larger public interest. This approach cannot be faulted. There are incidents of flooding of nallas during the monsoon resulting in causing flooding of a large area and that is how in public interest, the Mumbai Municipal Corporation has to step in.

18. In the circumstances, we find no difficulty in rejecting the grievance made as regards the work of desilting of a nalla, work of constructing retaining wall of a nalla and training of a nalla undertaken by the Mumbai Municipal Corporation on private properties. It is in the public interest that the Mumbai Municipal Corporation is doing the said work.

19. Therefore, to conclude, even as per circular dated 14<sup>th</sup> November 1995, it was not permissible for the Mumbai Municipal Corporation to grant the benefit of TDR/FSI in terms of the said circular in respect of the bed of nallas which are not privately owned. The burden was always on the persons claiming to be the owners to establish that they are the owners of the bed of nallas. This aspect has to be considered in view of statutory provision of sub-section (1) of section 20 of the said Code. Now, even under the modified clause (i) of Regulation 34, sanctioned under notification dated 09<sup>th</sup> March 2010, there is no provision made for grant of FSI/TDR in respect of the land covered by the bed of nalla which is not privately owned and the FSI/TDR is available only in respect of the area required for widening/training and for construction of appurtenant service road. After clause (i) of Regulation 34 came into force, the circular dated 14<sup>th</sup> November 1995 has become inoperative.

20. As far as benefits which are already granted to respondents No. 4(a) and 5 are concerned, it is for the Mumbai Municipal Corporation to consider whether the benefits have been granted in accordance with the circular dated 14<sup>th</sup> November 1995. In the event, the Mumbai Municipal Corporation finds that benefits have been erroneously granted, it is for the Mumbai Municipal Corporation to adopt appropriate proceedings in accordance with

law.

21. With the above clarifications and directions, the Petition is disposed of. Rule is accordingly disposed of in the above terms.

No costs.

(V.L. ACHLIYA, J)

(A.S.OKA, J)

Bombay High Court