Bombay High Court
Sarvajanik Shri Ganeshotsav ... vs Municipal Corporation Of Greater ... on 23 February, 2006
Equivalent citations: 2006 (2) BomCR 757, 2006 (4) MhLj 207
Author: R Lodha
Bench: R Lodha, A V Mohta
JUDGMENT R.M. Lodha, J.

1. The appellants were unsuccessful in challenging the entrustment of the subject land on caretaker basis or construction, management and maintenance of 'playground' to Chhatrapati Shivaji Maharaj Smarak Samiti (Respondent No. 3) before the learned Single Judge as their writ came to be dismissed by order dated 9th October 1996. Hence this Appeal.

2. The subject piece of land admeasuring 2 acres (8261.90 sq.mts.) comprises of the land bearing C.T.S.Nos.256 (part), 257, 258, 260 (part), 261, 262, (part), 269 (part), 270, 271(part) and 272 (part) and is situate at Vile Parle (East), Mumbai. In the revised final development plan sanctioned by the Government of Maharashtra of the K(East) Ward, Mumbai which came into effect from 29th December, 1992, the subject plot was reserved for 'playground'. However, in the notification dated 12th November, 1992, the subject land was shown as reserved for 'park' but by the Corrigendum notified on 1st January, 1993, the error was corrected by showing the subject land reserved for 'playground'.

3. The Municipal Corporation of Greater Mumbai (for short, 'the Corporation') decided to develop this plot which belonged to them for combined use of park and swimming pool/sports complex vide their resolution No. 1203 dated 25th February 1988. At that time in the existing development plan of 'K' East ward, the subject land was reserved for 'park'. Dr.Ramesh Prabhoo who is President of Chhatrapati Shivaji Maharaj Smarak Samiti (respondent No. 3) was Mayor of Bombay during that time. That he was keen to develop the subject plot into swimming pool and sports complex is not in dispute. After he ceased to be Mayor, he was elected to the Maharashtra Legislative Assembly and continued to pursue the Corporation and its authorities for the construction of swimming pool and the sports complex at the subject site and the allotment of the said land to him for development on behalf of the Corporation. In the year 1992, he founded the Association/Society by name 'Chhatrapati Shivaji Maharaj Smarak Samiti' (Respondent No. 3) and was finally successful in having the subject land entrusted to him in the name of the Society on caretaker basis for the construction, management and maintenance vide agreement dated 15th March, 1996. The possession of the said plot was given to the respondent No. 3 for the aforesaid purpose on 22nd June 1996.

4. The first petitioner claims to have been founded about 25 years ago and is involved in organising and celebrating religious functions, holding sport competitions etc. The petitioners who are the appellants before us challenged the entrustment of the said plot to the respondent No. 3 on diverse grounds interalia-(one) that the subject plot was reserved in the revised final development plan sanctioned by the State Government on 12th November 1992 which came into effect on 29th December 1992 as 'park' and changing the reservation from 'park' to 'playground' without following the procedure provided in Section 37 of the Maharashtra Regional & Town Planning Act, 1966

(MRTP Act) by issuing Corrigendum under Section 31(1) of the said Act, is illegal; (two) that the Corporation has permitted combined user of park-cum-swimming pool, sports complex at the subject site without obtaining prior sanction of the State Government as required by Regulation 11(3) of Development Control Regulations for Greater Bombay, 1991 is illegal; (three) that the entrustment of the subject plot to the respondent No. 3 on caretaker basis for the purposes of construction of swimming pool and sports complex is illegal, arbitrary, and unlawful; (four) that construction of the swimming pool and sports complex in the open space reserved for 'playground' is impermissible and in any case such construction is not in conformity with the Regulation of the D.C.Regulations, 1991 and that the agreement entered into with the respondent No. 3 is illegal and not in conformity with the provisions of the Mumbai Municipal Corporation Act, 1888 and is not in the public interest.

5. In opposition to the writ petition, the Corporation filed two affidavits through its Executive Engineer Shri A.G.Nabar. The first affidavit was filed on 10th September, 1996 and the other on 27th September, 1996.

6. Shri N.S.Sirnaik, Town Planner in the office of the Deputy Director of Town Planning also filed his affidavit on 26th September 1996.

7. The respondent No. 3 filed reply affidavit through Dr.Ramesh Prabhoo. He stated that the respondent No. 3 is a registered charitable Trust. The allotment of the subject plot in favour of the respondent No. 3 is purely on caretaker basis for construction, management and maintenance of playground as public welfare scheme. The respondent No. 3 does not claim any right, title and interest or any lien on the subject land or the structures constructed thereon. That out of 2 acres, one acre is to be used by the members on payment of membership fees and the remaining one acre to be used by the general public. He stated that total estimated cost of the project was calculated by the Architect of the respondent No. 3 and given to the Corporation and all the Corporators gave no objection for allotment of the subject land in favour of the respondent No. 3 and, therefore, the allegations of political considerations and favouritism are false.

8. The learned Single Judge heard the learned counsel for the parties and vide his order dated 9th October 1996 dismissed the writ petition.

9. We heard Mr.M.M.Vashi, the learned counsel for the petitioner, Mr.A.Y.Sakhare, the learned Senior Counsel for the Corporation, Mr.C.J.Sawant, the learned senior counsel for the respondent No. 3 and Ms.Geeta Shastri, the learned Assistant Government Pleader.

10. Ms.Geeta Shastri, the learned Assistant Government Pleader placed before us the relevant record concerning the sanction of revised final development plan of 'K' East ward notified on 12th November, 1992 by the State Government. From perusal of the said record, it becomes apparent that under Section 26 of the Maharashtra Regional Town Planning Act, 1966, the proposal for reservation of the subject plot for 'park' was published by the Corporation. Under Section 30 of the MRTP Act, the Planning Authority submitted to the State Government for sanction of the subject plot having reservation for 'park' with some modification. However, the Committee appointed by the

State Government for scrutiny of the draft plan suggested deletion of northern strip and triangular piece of land on east side of the reservation bearing CTS No. 263(part) and the rest piece of land was reserved for 'playground'. In the notification published under Section 31(1) the subject plot was shown as reserved for 'park'. This mistake having come to the notice of the State Government, corrigendum was issued on 1st January 1993 and subject plot was shown as reserved for 'playground'. Thus, the contention of the learned counsel for the petitioner that without compliance of Section 37, the subject plot that was reserved for 'park' could not have been changed to 'playground' does not have any merit.

11. That the subject plot is reserved for 'playground' in the revised sanctioned development plan of 'K' East ward, Mumbai with effect from 29th December, 1992 is not disputed by the State Government or by the Corporation or the respondent No. 3.

12. Development Control Regulations for Greater Mumbai, framed under MRTP Act, 1966 came into effect from 20th February 1991. Regulation 9 provides for land uses and the manner of development. Table (4) appended thereto with regard to the 'playground' where the Corporation is the owner empowers the Commissioner to entrust the development and maintenance of the facility to a suitable agency on terms to be decided by him.

13. The question that emerges for consideration is whether the open space that is reserved for 'playground' in the development plan can be permitted to be used for any other purpose.

14. In the reply affidavits filed by the Corporation the case has been set up that sanction of the State Government to change the user of reservation of 'park' under Regulation No. 11(3) of the D.C. Regulations was forwarded to the State Government for the modification of the development plan but during the course of arguments Mr.A.Y.Sakhare, the learned senior counsel submitted that the proposal for change of the user under Regulation No. 11(3) of D.C.Regulations was dropped. It ought to have been because when the proposal for change of user of reservation was forwarded, the subject land was proposed for reservation of 'park' but ultimately the State Government while sanctioning the revised development plan under Section 31, reserved the subject plot for 'playground' and, therefore, the proposal under Section 11(3) was dropped.

15. The ordinary meaning of "playground" is an outdoor area for children to play on. A 'playground' is a piece of land set apart for open air recreation, specially for children; one connected with school.

16. The Single Judge of this Court in C.R. Dalvi and Ors. v. Municipal Corporation of Greater Bombay and Ors. (1986) Mh.L.J.373, ruled that plot reserved as a 'playground' under the development plan cannot be utilised for any purpose other than the play of children and similar recreational activities.

17. That playgrounds must at all times be reserved exclusively for the play of children and similar individual recreational activities and that no part of these playgrounds can be permitted to be used for any other purpose needs no emphasis save and except its temporary user for religious/Natural functions as provided under Section 37A of MRTP Act, 1966.

18. It has to be emphasised that land use in the city must strictly be in conformity with the development plan and the area reserved for 'playground' under the development plan sanctioned by the State Government has to be used as such and cannot be truncated by permitting other public purpose.

19. In Bangalore Medical Trust v. B.S.Muddappa and Ors. , the Supreme Court held hat open space reserved for 'public park' in development scheme cannot be converted into a civic amenity site for the purpose of hospital/Nursing home. Such action would be invalid and ultra vires being contrary to the object and purpose of the Act.

20. When the reservation of the open space is for the purpose specific in the development plan, it can be put to that use alone and no other use. 'Play ground', 'swimming pool', 'gymnasium', 'park' even though covered under the head 'Recreational grounds and facilities' is a separate and distinct 'use' category and cannot be put to interchangeable use wholly or partly. Seen thus, swimming pool can never be covered by expression 'playground' or vice versa.

21. We have no hesitation in holding that the subject plot reserved for 'playground' in the revised final development plan duly sanctioned and published by the State Government could not have been permitted for the purposes of the swimming pool and sports complex at all as has been done by the Corporation. The decision to construct 'swimming pool' and 'sports complex' in the area reserved for 'playground' is wholly illegal and in derogation to the revised development. What shocks us is that has been done by the Corporation.

22. Under Regulation 9(5), Explanation (iv) as was existing at the relevant time, it is provided that in the case of development of lands for Swimming pools, Recreation Grounds, Playground etc., the construction for ancillary uses may be permitted in a suitable location so as to keep as much of the remaining space open upto 15% on 10% of the area of the land for the said amenities. On the basis of the said regulation the construction for ancillary uses cannot exceed that limit. By ancillary uses for the purposes of 'playground' in Regulation 9(5), explanation (iv), 'swimming pool' or 'club house' or 'sports complex' cannot be included. For the purposes of 'playground', the ancillary uses may be facility area, change rooms, small pavilion or sitting area etc. but, by no stretch of imagination 'swimming pool' and 'sports complex' can be considered as ancillary use for the playground.

23. Our attention was invited to D.C. Regulation 23(1)(g)(ii) by the learned senior counsel for the respondent No. 3, which provides that in the case of playground of 100 sq.meter or above, structures for pavilion, gymnasium, club house and other structures for the purpose of sports and other structures for sports and recreation activities may be permitted with built up area not exceeding 15% of the total recreational open space and plinth area is restricted to 10% of the total recreational open space. We considered the said provision very carefully and we find that the said provision has no application as it is applicable to the recreational/amenity open spaces in residential and commercial layout. Open space whole of which is reserved for 'playground' in the development plan is not covered by the expression, "open spaces in residential and commercial layouts". We, thus, hold that D.C. Regulation 23 cannot be applied to the open space reserved for a 'playground' in the development plan which is not part of residential and commercial layouts.

24. The whole exercise of the Corporation in allowing development of the subject plot reserved for 'playground' into some other purpose like 'swimming pool/sports complex' was misdirected and illegal being in contravention of the development plan sanctioned for 'K' East ward. It may be that the objective to construct Olympic size swimming pool was laudable but it did not mean that land reserved for 'playground' could be used for that purpose without change of use being accorded by the State Government. Development plan must be adhered to strictly if the city has to have planned development. It is all the more deplorable if the wrongdoer is the Corporation itself.

25. Upon perusal of the entire file concerning the subject matter that was placed by the learned senior counsel for the Bombay Municipal Corporation for our perusal, we find that Dr.Ramesh Prabhoo had an eye for that plot for many years and he has been pursuing the matter for allotment of this plot to him with the authorities of the Corporation, but nothing favourable seems to have been done until he became Mayor of Bombay in the year 1987-1988. It was during his tenure as Mayor of Bombay Municipal Corporation that a resolution No. 1203 was passed on 25th February 1988 deciding to develop the subject plot for combined use of park and swimming pool/sports complex. Pertinently that time the subject plot was reserved for 'park' but since 29th December, 1992, the plot is reserved in the revised development plan for 'playground'. The Corporation must have raised its hands then and there but since Dr.Ramesh Prabhoo by that time had become Member of Legislative Assembly, the Corporation continued to scrutinise and process the proposal forwarded by him for the entrustment of the subject plot to the respondent No. 3 which he formed in the year 1992 for construction of the swimming pool and sports complex and ultimately the Commissioner accepted the proposal on 3/8.1.1996 and the Joint Municipal Commissioner entered into an agreement with the respondent No. 3 on 15th March, 1996, which apparently is arbitrary and smacks of nepotism and favouritism. In the name of the welfare scheme, private benefit was extended to the respondent No. 3. The allegations made by the petitioners in the writ petition that the respondent No. 3 is formed by members of a political party and its Chairman is Dr.Ramesh Prabhoo and on political considerations, the plot has been handed over to the respondent No. 3 for construction of the swimming pool/sports complex is not unfounded. Can the Bombay Municipal Corporation as a local-self Government and public body choose any person at its sweet will for entering into the contractual relationship. The answer is simply 'no'. If the Corporation or for that matter, the Commissioner decided to develop the subject plot for construction of the swimming pool/sports complex, assuming that it was permissible in law and that the Corporation was not in the financial position to do so, the said contract could only be entered into by ffollowing the norms that meet the test of relevance and reason.

26. In Ramana Dayaram Shetty v. The International Airport Authority of India and Ors. , the Apex Court highlighted that the democratic form of Government demands equality and absence of arbitrariness and discrimination in the matter of contracts or licences or leases or such other matter. The Government cannot grant largess arbitrarily like a private individual. Its action must be in conformity with the standard norm which is not arbitrary, irrational or irrelevant.

27. The aforesaid legal position admits of no legal ambiguity and has been re-iterated by the Courts from time to time. We need not multiply the authorities.

28. Mr.C.J.Sawant, the learned senior counsel for the respondent No. 3 invited our attention to the judgement of the Apex Court in the case of Netai Bag and Ors. v. State of West Bengal and Ors. in support of his submission that though in the matter of distribution of State largess, tender or public auction is desirable, but even where such procedure is not followed, arbitrariness cannot be presumed in all cases.

29. In paragraphs 17 and 18 of the report, the Supreme Court noted thus:

17. It has been consistently held by this Court that in a democracy governed by the rule of law, the executive Government or any of its officers cannot be allowed to possess arbitrary powers over the interests of the individual. Every action of the executive Government must be in conformity with reason and should be free from arbitrariness. The Government cannot be equated with an individual in the matter of selection of the recipient for its largesse. Dealing with the limits on the exercise of executive authority in relation to rule of administrative justice, Mr Justice Frankfurter in Vitarelli v. Seaton said:

An executive agency must be rigorously held to the standards by which it professes it action to be judged .... Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed....

This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword.

18. This rule of administrative law was accepted as valid and applicable in India by this Court in Amarjit Singh Ahluwalia (Dr) v. State of Punjab, Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi and Ramanna Dayaram Shetty v. International Airport Authority of India.

30. In paragraph 22, the Supreme Court held that principle of reasonableness and non-arbitrariness in governmental action is the core of our entire constitutional scheme and structure. However, in the facts and circumstances obtaining in that case, it was held that they were not persuaded to hold that the action of the respondent-State in executing lease deed with the respondent No. 5 was unreasonable, illegal, arbitrary or actuated by extraneous consideration.

31. The circumstances many a time are louder and eloquent than words. In the present case, the fact is that the exercise of the development of the subject plot into swimming pool and sports complex was initiated at the instance of Dr.Ramesh Prabhoo. He happened to be Mayor of Bombay Municipal Corporation from 1st April. 1987 to 31st March 1988. It was during that time that on 25th February 1988 the resolution was passed by the Bombay Municipal Corporation to develop the subject plot for combined use of park and swimming pool/sports complex. Though later on the revised development plan was sanctioned and notified on 12th November, 1992 and therein the subject plot was reserved for 'playground', yet the Corporation decided to develop the subject plot, into 'swimming pool' and 'sports complex'. It cannot be believed that the Corporation did not know that the subject plot was reserved for 'playground' and the playground has to be used as playground

and for no other purpose. Moreover, no other application was invited from the public of the area for entrustment of this plot for development even if it be assumed that the subject plot could be developed into swimming pool and sports complex and the Corporation did not have the finance to develop the plot. Before entrustment of the plot to the respondent No. 3, no guidelines were framed for entering into such contract. There was no policy in place. Even the agreement that was entered into with the respondent No. 3 is not in conformity with Section 70 of the Mumbai Municipal Corporation Act, 1888 that provides for mode of executing contract. As a matter of law, the change of user of the subject plot reserved for 'playground' into swimming pool/sports complex is against the public interest and grossly illegal. The entrustment to the respondent No. 3 for its development is also illegal and in blatant misuse of the powers vested in the Corporation and its Commissioner and intended to benefit an individual who was ex-Mayor and sitting M.L.A. at the relevant time.

32. In the reply affidavit filed by Dr.Ramesh Prabhoo on 9th September, 1996, he stated that the respondent No. 3 has started construction work of the swimming pool and that 2000 members have been enrolled who are required to pay Rs. 5000/-towards life membership and Rs. 20,000/-each towards building fund. During the pendency of litigation, we are informed that in the year 1998, the Olympic size swimming pool of 50x21 meters and the building for sports complex were completed at the cost of Rs. 4.5 crores. The respondent No. 3 is said to have collected Rs. 5 crores by enrolling 2000 members as noted above. It may be true that in the development of the swimming pool and sports complex, huge amount has been spent but as already held by us, the action of the respondent No. 1 in deciding to construct the swimming pool and sports complex at the subject plot reserved for playground and also the agreement with the respondent No. 3 is absolutely illegal, arbitrary, ultra vires, unconstitutional and does not meet the test of reasonableness and public interest. The children have been deprived of their right to use the place as playground. Construction of Olympic size swimming pool and the sports complex by the respondent No. 3 for its elite members from whom it has collected Rupees five crores and also charges monthly fee is grave injustice to the children for whom the subject plot is reserved in the revised development plan for playground.

33. Having held that the development of the subject plot reserved 'playground' iinto the swimming pool/sports complex is illegal, the restoration of the open space for a playground must ordinarily follow as a matter of course. Mr.M.M.Vashi, the learned counsel for the petitioner submitted and, in our view, rightly that it would not be in the interest of anyone if the swimming pool and the sports complex is ordered to be demolished. He submitted that now it would be reasonable if the facility of swimming pool and sports complex is made available for the use of the public in the same manner the Corporation provides such facility in respect of its other swimming pools and the subject land alongwith structures is immediately taken possession by the Corporation.

34. We were informed by Mr.A.Y.Sakhare, the learned senior counsel for the Corporation that the respondent No. 3 is guilty of many breaches of the agreement dated 15th March, 1996. He invited our attention to the notice dated 26th October, 2005 issued by the Corporation whereby the respondent No. 3 was informed of the following breaches:

(1) The permanent exhaust arrangement is found installed and the stage is erected in the basement and the basement is being used for functions/wedding ceremonies etc. (2) The stage found erected

at the terrace and is also being used for functions.

(3) A tarpaulin shed with bamboo is found erected in South C.O.S.resting on M.S.angle truss with washing place.

(4) A toilet is found constructed at terrace at North East corner.

(5) Three rooms are found constructed in the basement at South end. Out of which, one appears to be used as pump room and other two as changing rooms.

(6) A ground floor structure with A.C. sheet roof is found constructed at West side C.O.S. at North West corner and is being used as Office and a toilet block is found constructed adjacent to it.

(7) A G.I. sheet sides barricading is erected at the terrace at South East corner for stacking of catering materials, chairs etc. and a washing place is also constructed adjacent to it.

(8) An additional M.S. stair-case flight is erected to reach terrace from mid-landing at North side stair-case.

(9) Gents toilet block is constructed in North C.O.S.

(10) A structure at South West corner in R.G.portion is found constructed with P.V.C. tank resting at its terrace.

35. By the said letter dated 26th October, 2005, a demand of Rs. 1,07,96,422/-was also raised against the respondent No. 3 towards licence fee (compensation) for unauthorised use, occupation and operation of the Sports Complex on the plot for the period from 10.12.1998 to 09.12.2005 at the rate of Rs. 15,42,346/- per annum.

36. Mr.C.J.Sawant, the learned senior counsel for the respondent No. 3 submitted that inquiry pursuant to the said notice is pending before the Inquiry Officer.

37. The respondent No. 3 in its reply affidavit has admitted that allotment of the subject plot in its favour is purely on caretaker basis and that as per the agreement the respondent No. 3 shall not claim any right, title or interest or any lien on the land or the structures constructed by it. As a matter of fact under clause 7 of the agreement, the respondent No. 3 was to hand over vacant and peaceful possession of the structures (including swimming pool) as soon as the work was completed but that was not done for whatever reason. It would be, thus, seen that the respondent No. 3 has been entrusted the subject plot for development, management and maintenance on behalf of the Corporation as caretaker and has no right, title or interest of any nature whatsoever in the subject land and the development carried on by it thereat. Besides that the respondent No. 3 is allegedly guilty of gross breaches of the agreement and a demand of exceeding Rs. one crore is outstanding against it for illegal and unauthorised use and occupation as noticed above. In the circumstances, illegality cannot be allowed to be perpetuated by permitting the respondent No. 3 to continue to

remain in use and occupation of the subject plot with the swimming pool and sports complex and commercially exploit for its benefits.

38. We are sad that the playground (admeasuring acres) has been truncated by permitting swimming pool and sports complex by none other than Municipal Corporation itself and thereby depriving the children from the playing space. It is unfortunate that all this was done in utter disregard of the development plan. What is shocking is that Municipal Corporation is privy to this gross illegality. The Municipal Corporation knows that the deviation from the development plan is illegal. They are responsible in taking action against such illegal development. Curiously in the present case, they themselves are guilty of deviating from development plan.

39. As suggested by Mr.M.M.Vashi, it may not be in the interest of anyone in directing the demolition of swimming pool and sports complex. But one thing is clear that the respondent No. 3 cannot be permitted to remain in use and occupation of the subject plot with the facilities even as caretaker any longer.

40. We, accordingly, dispose of the appeal by the following order:

(i) The judgment of the learned Single Judge dated 9th October 1996 is set aside.

(ii) The entrustment of the subject plot admeasuring 8261.90 sq.meters situate at Vile Parle (East), Mumbai to the respondent No. 3-Chhatrapati Shivaji Maharaj Smarak Samiti by the Bombay Municipal Corporation vide agreement dated 15th March, 1996 is declared illegal and ultra vires.

(iii) The Municipal Mumbai is directed the subject plot Corporation of Greater to take possession ofalong with the swimming pool and all other structures from the respondent No. 3 immediately without any delay.

(iv) If the respondent No. 3 deposits a sum of Rs. one crore within one week from today, with the Municipal Corporation of Greater Mumbai pursuant to demand raised vide letter dated 26th October, 2005 and any further amount that may be due to the Corporation, the respondent No. 3 is granted six weeks time for handing over possession of the entire subject plot along with swimming pool and all other structures as it is to the respondent No. 1.

(v) The Municipal Corporation of Greater Mumbai, upon taking possession of the subject plot along with swimming pool and sports complex, shall maintain and manage as it does in respect of its other swimming pools and sports complex and also maintain and manage the remaining open space as playground. The swimming pool and the sports complex shall be made available to the public at large without any discrimination and in the same manner as such facility is provided by the Corporation for its other swimming pools and sports complexes. The remaining open space shall be used as 'playground'.

41. The learned senior counsel for the respondent No. 3 orally prays for stay of the Order. However, for the reasons that we have indicated above, we find no justifiable ground to stay the order. As it is,

we have provided that in case the respondent No. 3 deposits a sum of Rs. one crore with the Municipal Corporation of Greater Mumbai, the respondent No. 3 shall have six weeks time for handing over possession of the subject plot with swimming pool and other structures to the Corporation.

Certified copy expedited.