Kohinoor CTNL Infrastructure Company Private Limited and Another Vs The Municipal Corporation of Greater Mumbai and Others

Writ Petition No. 143 of 2012

Court: Bombay High Court

Date of Decision: July 9, 2012

Acts Referred:
Constitution of India, 1950 â€" Article 226#Maharashtra Regional and Town Planning Act, 1966 â€" Section 51

Citation: (2012) 6 ALLMR 49 : (2013) 3 BomCR 410 : (2012) 114 BOMLR 2627 : (2013) 1 MhLj 88

Hon'ble Judges: R.D. Dhanuka, J; D.Y. Chandrachud, J

Bench: Division Bench

Advocate: V.V. Tulzapurkar, assisted with Mr. Nikhil Sakhardande instructed by M/s. A.R. Vaidya and Co, for the Appellant; E.P. Bharucha a/w. Mrs. Geeta Joglekar, for Respondent-BMC., for the Respondent

Judgement

Dr. D.Y. Chandrachud, J.
Rule; with the consent of the Counsel for the parties returnable forthwith. With the consent of the Counsel and

at their request, the Petition is taken up for hearing and final disposal. The First Petitioner is the owner of a plot of land bearing Final Plot No. 46 of

Town Planning Scheme-III situated at N. Kelkar Road, Shivaji Park, Mumbai. The First Petitioner is developing a high rise Information

Technology Park and Residential and Public Parking Building. The development comprises of three level basements for captive parking and three

wings. Wing-A consists of a ground floor and seven upper floors for shops and a restaurant; Wing-B consists of a ground floor and 48 upper

floors for office units; and Wing-C consists of a ground floor and 32 upper floors. The dispute in the present case relates to Wing-C. Wing-C

envisages municipal public parking on the ground floor and 14 upper floors and residential premises on eighteen floors above the parking facility.

2. The Municipal Corporation of Greater Mumbai sanctioned plans for Wings-A, B and C and issued an IOD on 15 February 2006. The Union

Ministry of Environment and Forests issued an Environmental Clearance for the development of a commercial building on 22 August 2006. A

Commencement Certificate was issued by the Municipal Corporation on 13 September 2006. In so far as is material to the present controversy, a

commencement certificate has been issued up to the fourteenth floor for Wing-C. Subsequently, the IOD was amended on 23 April 2008 and 2

September 2009. The Joint Commissioner of Police(Traffic) issued an NOC on 11 December 2009 for the development of a multi-storeyed

public parking lot. The State Government gave its in-principle approval on 2 June 2010 for the construction of a multi-storeyed public parking lot

on the land under Regulation 33(24) of the Development Control Regulations for Greater Mumbai, 1991. The Municipal Corporation issued a

Letter of Intent on 27 July 2010.

3. On 4 March 2011 the State Government directed the Municipal Commissioner to send a proposal for amending Development Control

Regulation 33(24) so as to limit the height of parking towers to four floors and to revoke all sanctioned proposals where commencement

certificates had not been issued. The Municipal Corporation thereafter sought to incorporate new conditions in Sub-Rule (iv) of Regulation 33(24)

of the Development Control Regulations inter alia to limit the height of a public parking amenity to the ground floor and four upper floors and two

basements. The Corporation also sought to provide a cap on the built up area for every parking space. On 22 June 2011, a circular was issued by

the Municipal Corporation for prescribing conditions under Clause (iv) of DCR 33(24) and to stipulate that all proposals for public parking lots

shall be considered subject to those conditions. The new conditions sought to limit the height of public parking to a ground and four upper floors

and two basements and laid down conditions in regard to the payment of premium and a cap on the built up area per parking space.

4. On 29 November 2011, a notice to show cause was issued to the Petitioners u/s 51 of the Maharashtra Regional and Town Planning Act, 1966

calling upon them to explain as to why the commencement certificate which was issued on 30 October 2010 should not be revoked. The notice to

show cause inter alia relied upon the Circular dated 22 June 2011. The Petitioners submitted their reply to the notice on 14 December 2011. On

22 December 2011, a stop work notice was issued to the Petitioners by which they were directed to restrict the work of the public parking lot to

the fourth floor instead of the thirteenth floor.

5. On 27 April 2012 an order has been passed by the Additional Municipal Commissioner. The order considered the status of the construction

work as on 30 November 2011 namely, immediately upon the issuance of a notice u/s 51 of the Act. The Additional Municipal Commissioner

addressed himself to a determination of whether ""work is substantially completed on site or otherwise for the purpose of Section 51"". On that

issue, the Additional Municipal Commissioner held that in about fifty percent of the area, construction has progressed as on 27 December 2011

beyond the stage which can be termed substantial"". The Additional Municipal Commissioner found that it is possible to construct a public parking

lot consisting of a ground floor and four upper floors on the portion where no substantial construction is done without substantial changes in the

structure already constructed. The final order which is passed was in the following terms :

As there is a substantial construction on core part of the plot, PPL done in this part shall be allowed to the extent of already executed construction

as per report dated 27/12/2011. In the remaining portion of the plot, where there is no substantial construction, PPL shall be limited to G + 4,

Developer is to be asked to modify his plans in consonance with modified DCR.

6. Counsel appearing on behalf of the Petitioners submits that :

(i) The impugned order of the Additional Municipal Commissioner proceeds on an erroneous construction of the provisions of Section 51 to the

effect that work which has been ""substantially completed"" would fall within the purview of the provision. Section 51, it was submitted, inter alia

protects operations that have ""substantially progressed"" on the date of an order revoking or modifying permission to develop. However, no such

order shall affect such of the operations as have been previously carried out; or shall be passed after these operations have ""substantially

progressed"" or have been completed.

(ii) As a matter of fact, the Additional Municipal Commissioner found that a substantial part of the construction has been completed on the core

portion. Having regard to the finding of fact which has been arrived by the Additional Municipal Commissioner, it is impermissible to direct the

Petitioners to restrict the work to the construction of a public parking lot comprising of only a ground floor and four upper floors;

(iii) The Municipal Corporation has, in its affidavit in reply, not disputed the factual position that the total cost incurred by the Petitioners for the

construction of the basement and a ground floor and four upper floors upto the relevant date was Rs. 59.51 Crores. The civil cost of construction

of a public parking lot of a ground floor and thirteen floors including the cost of construction of the basement was estimated to be Rs. 167 Crores.

The expenses which have already been incurred cannot be regarded as being insignificant and would establish that the work had, in fact,

substantially progressed.

(iv) The construction of a foundation has proceeded on the basis of the permission that was granted by the Municipal Corporation for construction

of a public parking lot of a ground floor and thirteen floors together with the basement. In these circumstances, the Petitioners were entitled to the

protection that is accorded by Section 51 and the impugned order would have to be set aside.

7. Counsel appearing on behalf of the Municipal Corporation submits that in 2008, the Development Control Regulations were amended to

provide for public parking lots to be constructed by developers. In consideration of the investments to be undertaken by developers, a provision

was made for an incentive FSI. On 22 June 2011 a circular was issued by the Municipal Corporation adding certain conditions for the grant of

permission to construct public parking lots. The Municipal Corporation inter alia sought to restrict the permissible area and height to three

basements, a ground floor and four upper floors. In Petitions which were filed before this Court under Article 226 of the Constitution, the

Municipal Corporation made a statement before the Court to the effect that the circular would not be applied to the Petitioners in those petitions

and the Corporation would move the State Government for an appropriate modification of the Development Control Regulations. In pursuance

thereof, a draft notification was published on 19 March 2012. Counsel submitted that the object of the proposed modification is to ensure that

public parking lots would have a height that would ensure that the amenity is actually used by the members of public. Allowing construction of

parking facilities beyond a certain height would be self-defeating. In the present case, it was urged that the Additional Municipal Commissioner

had, upon due consideration of the facts, come to the conclusion that only a part of the work of the project had been carried out by the Petitioners

and he was, therefore, justified in taking into consideration the proposed change sought to be made in the Development Control Regulations by the

draft as contained in the notification dated 19 March 2012.

8. Section 51 of the Maharashtra Regional Town Planning Act, 1966 confers power on the planning authority to revoke or modify a permission for

development where the authority considers that it is expedient to do so, having regard to the development plan prepared or under preparation. The

proviso to Sub-Section 1 of Section 51 is as follows :

51. (1) If it appears to a Planning Authority that it is expedient, having regard to the Development plan prepared or under preparation that any

permission to develop land granted [for deemed to be granted] under this Act or any other law, should be revoked or modified, the Planning

Authority may, after giving the person concerned an opportunity of being heard against such revocation or modification, by order, revoke or

modify the permission to such extent as appears to it to be necessary :

Provided that

(a) where the development relates to the carrying out of any building or other operation, no such order shall affect such of the operations as have

been previously carried out; or shall be passed after these operations have substantially progressed or have been completed;

(b) where the development relates to a change of use of land, no such order shall be passed at any time after the change has taken place.

This is a provision made in the interest of preserving the sanctity of a development plan. The Act refers specifically not only to a Development Plan

which has been prepared but also to that which is under preparation. The intent is to ensure that a development which would impede or be

detrimental to the realisation of the purposes of a development plan that is already prepared, or even one that is under preparation should be

regulated. This is how sub-section 1 empowers the planning authority to modify or revoke a planning permission already granted to develop land.

But the legislature was cognizant of the fact even before a permission is revoked or modified, planning permissions may have been acted upon and

work may have commenced. To deal with such cases, the legislature has drawn a balance through the proviso.

9. Clause (a) of the proviso makes it clear that in a case where a building is being constructed or other operation is being carried on, an order of

revocation or modification of a development permission shall not affect operations which have been previously carried out nor shall an order of

revocation or modification be passed after these operations have substantially progressed or have been completed. Clause (b) deals with a

situation where the development permission was for a change in the use of land and, acting on the permission, the change has taken place already.

10. Clause (a) of the proviso is in two parts. The first part of the provision protects those operations which have been previously carried out. The

second part has the effect of imposing a restraint upon the passing of an order of revocation or modification where operations have either

substantially progressed or have been completed. Since the second part refers to a situation where operations (i) have substantially progressed; or

(ii) have been completed, the expression ""substantially progressed"" cannot be read to mean the same thing as the completion of operations. If the

legislature intended both the phrases to mean the same thing, there was no reason to introduce a surplusage.

11. The Additional Municipal Commissioner, has in the present case, proceeded on the basis of a patently wrong appreciation of the underlying

legal principles. The test which the Additional Municipal Commissioner applied is : whether the work is substantially complete on site or otherwise

on the relevant date for the purpose of applying the provisions of Section 51. The Additional Municipal Commissioner was required to determine

as to whether the operations have substantially progressed, since there is no dispute about the fact that the project has not been completed.

12. The impugned order of the Additional Municipal Commissioner takes note of the fact that on 27 December 2011 the work of the parking lot

wing upto the fourth floor had been partially completed. The order takes note of the fact that in about 50% of the area construction has progressed

as on 27 December 2011, ""beyond a stage which can be termed substantial"". As a matter of fact, even the operative part of the order takes due

note of the position that there is a substantial construction on the core part of the plot. In view of this finding, it is quite evident that the condition

which has been laid down in Clause (a) of the proviso to Section 51 is met because the order itself contains an acknowledgement of the fact that

operations had substantially progressed.

13. In the Petition as amended, a valuation has been made of the estimated cost of Rs. 167 Crores of constructing a public parking lot consisting of

a ground floor and 13 upper floors. The Petitioners have stated that they have incurred a total cost of Rs. 59.51 Crores towards construction of a

ground floor and four floors including the basement. This aspect has not been dealt with in the affidavit in reply.

14. Looked at from either perspective, it is clear that on the basis of the material which weighed with the Additional Municipal Commissioner a

substantial progress of work has been achieved and that the operation had substantially progressed on the date on which a notice was issued to the

Petitioners to show cause u/s 51 of the Act.

15 Development Control Regulation 33(24) provided for the governing conditions for the grant of permissions for the development of public

parking lots. The Municipal Corporation decided to modify DCR 33(24) along the lines of an administrative circular dated 22 June 2011. The

Corporation may be justified in the reasons for which it proposed the modification. The Corporation has submitted that in the absence of height

restrictions, it would be open to a developer to construct a building for housing a parking lot in the form of a tower which when constructed may

not be fully utilised by the public. Since incentive FSI is to be conferred by the Municipal Corporation upon the developer, the proposed

modification seeks to put in place a cap on the height of the parking lot and on the maximum area that would be used for the purpose of parking

motor vehicles. A draft notification was issued by the Government of Maharashtra in the Urban Development Department on 19 March 2012. The

draft envisaged inter alia that the height of the public parking amenity would be limited to a ground floor plus four floors and three basements.

Among the other restrictions, the draft notification imposes a cap, an outer limit on the maximum built up area per parking space. Significantly, the

concluding part of the notification states that all the developments which have been given permission in accordance with the D.C. Regulations of 20

October 2008, ""except those which have progressed substantially"", will have to follow the regime of the amended D.C. Regulation 33(24) and

would be governed by the payment of premium to the extent stipulated in the notification. Hence, consistent with the provisions of Section 51, the

draft notification also recognises that there may be projects which have progressed substantially before the new norms have been published, after

requisite sanctions were granted and substantial progress was made in the work of development. The project in the present case would on the

basis of the material on record meet that description.

16. For the purposes of the present case, it is not necessary for the Court to render an exhaustive description of when a work of development can

be regarded as having substantially progressed. Ultimately whether a work of development has substantially progressed must be dealt with on the

basis of the facts of each individual case and no general principle can be laid down in that regard. Perhaps some guidance can be derived from the

judgment of a Division Bench of the Calcutta High Court in Corporation of Calcutta Vs. Raj Kumar Narsing Pratap Singh Deo, :

Substantial"" refers to the fact that the alteration and improvement had neither been illusory nor inconsiderable; it was not merely nominal or flimsy

but it was an alteration and improvement which in comparison with the structures already standing can be deemed to materially alter the previous

dispositions of the property, or the conveniences which were available. It is not possible to lay down any clear and specific definition of the word

substantial"". It must be a relative one. Sometimes, the comparison of the floor area, sometimes the value of the structures, and on other occasions

other considerations may weigh with the authority for determining whether in the particular facts of a case, the alterations and improvements can or

should be deemed to be substantial ones.

In the facts of this case, the admitted position as accepted in the order of the Additional Municipal Commissioner indicates that the work of

development had substantially progressed by the time a notice to show cause was issued u/s 51 of the M.R. & T.P. Act, 1966. The impugned

order passed by the Additional Municipal Commissioner restricting the Petitioners to a height of a ground floor and four upper floors in deviation of

the permission granted earlier is therefore contrary to law. Hence, the impugned order would have to be quashed and set aside and is accordingly

set aside. The stop work notice which has been issued to the Petitioners on the basis of the notice to show cause dated 29 November 2011 is to

that extent quashed and set aside. Rule is made absolute in these terms. There shall be no order as to costs.