

(2011) 02 BOM CK 0142

Bombay High Court

Case No: Writ Petition No. 792 of 2010

Ikram Suleman Qureshi

APPELLANT

Vs

Mumbai Building Repairs and
Reconstruction Board and
Others

RESPONDENT

Date of Decision: Feb. 23, 2011

Acts Referred:

- Development Control Regulations for Greater Bombay, 1991 - Regulation 64(b)

Citation: (2011) 3 ALLMR 61 : (2011) 5 BomCR 617 : (2011) 3 MhLj 936

Hon'ble Judges: D.Y. Chandrachud, J; Anoop V. Mohta, J

Bench: Division Bench

Advocate: Ramesh Dube-Patil and Ashish Giri, instructed by Ajay Misar and Co, for the Appellant; V.M. Parashurami, Kevit Setelwad, instructed by Mulla and Mulla for Respondent Nos. 7 and 8 and D.A. Nalawade, GP for State, for the Respondent

Judgement

D.Y. Chandrachud, J.

Rule; by consent returnable forthwith. With the consent of Counsel and at their request the Petition is taken up for hearing and final disposal.

2. The challenge in these proceedings is to a No Objection Certificate dated 13 June 2009 issued by the Mumbai Building Repairs and Reconstruction Board and to an IOD dated 28 January 2010 issued by the Municipal Corporation. The authorities whose action is challenged are impleaded as the First and Second Respondents. The subject matter of the petition is a proposed redevelopment to be carried out by the Seventh and Eights Respondents in respect of land and immovable property situated at Survey No. 200 of Tardeo Division. The redevelopment is proposed under DCR 33(7) of the Development Control Regulations for Greater Mumbai.

3. The Petitioner is an occupant of a residential flat in an adjoining building, which is known as Suleman Tower. The building where the Petitioner resides was also

redeveloped under DCR 33(7) and the construction is complete. At the time when the building belonging to the Petitioner was redeveloped, the structure situated on C.S.200 comprised of a ground floor and first floor. The building in which a flat is in the occupation of the Petitioner consists of 19 storeys. Under DCR 29, it has been provided that the open space for separation between any building and a single storeyed accessory building need not exceed 1.5 meters. The developer of Suleman Tower sought a condonation of the deficiency in the open space under DCR 64(b) which was granted by the Municipal Commissioner. The Petitioner now seeks to challenge the condonation in the deficiency of open space in relation to the redevelopment which is taking place on the adjoining plot, C.S.200. The deficiency has been condoned by the Municipal Commissioner on 12 January 2010.

4. Under a notification issued by the Urban Development Department on 15 October 2003, the marginal open space required for a building having a height of more than 24 meters, is six meters. A proposal was put up by the Architect of the Seventh and Eighth Respondents for condoning the deficiency in the open space.

It is common ground between Counsel appearing on behalf of the Petitioner and the Seventh and Eighth Respondents that the building in which the Petitioner resides (Suleman Tower) is on the eastern side of the plot in which a redevelopment under DCR 33(7) is to be carried out by the Seventh and Eighth Respondents. The Assistant Engineer (Building Proposals), City III submitted a report in which he noted that the proposal for redevelopment of the Seventh and Eighth Respondents envisaged condoning a deficiency in open space ranging between 6.67% to 100%. The relevant observation of the report is as follows:

Thus, it can be seen that Architect is unable to provide required open space. The open space deficiency is ranging from 6.67% to 100%.

The Architect contended that open space required cannot be proposed due to planning constraints and the F.S.I. permissible is 3.810. In order to consume such F.S.I. open space deficiency is inevitable.

The report also notes that in view of the fact that another proposal under DCR 33(7) was allowed by his office (that proposal is the one which pertains to Suleman Tower), the open space between the two buildings will be 2.10 meters, including 1.5 meters open space in respect of the development on the East side.

5. The Municipal Commissioner allowed the proposal and condoned the deficiency in open space on the ground that out of 285.12 sq.mtrs. being the area of the plot, the setback is 135.79 sq.mtrs. and 25 rehabilitation tenements were required to be provided.

6. The grievance of the Petitioner is that as a result of the order which has been passed by the Municipal Commissioner, the deficiency in the open space, which is extremely drastic, would be condoned and there would be virtually no distance at all

between the two sets of buildings. Learned Counsel submitted that the Commissioner has not applied his mind to the requirements of Regulation 64(b) under which a deficiency can be condoned only provided that the relaxation will not affect health, safety, fire safety, structural safety and public safety of the inhabitants of the building and the neighborhood. On the other hand, it has been urged on behalf of the Seventh and Eighth Respondents that when the building of the Petitioner was constructed, the deficiency in the open space came to be condoned under Regulation 64(b). Hence, it is urged that the Petitioner cannot be heard to argue against the condonation which has been granted in respect of the adjoining plot. Moreover, it was submitted that the deficiency has been occasioned by the fact that an area of 135.79 sq.mtrs. out of the total area of plot of 285.12 sq.mtrs. has to be surrendered as setback to the Municipal Corporation.

7. Regulation 64(b) contemplates that the Municipal Commissioner in specific cases of demonstrable hardship may permit the dimensions prescribed by the Regulations (except those relating to FSI) to be relaxed. However, the power can be exercised only when the relaxation does not affect the health, safety, fire safety, structural safety and public safety of the inhabitants of the building and the neighbourhood. DCR 64(b) provides as follows:

In specific cases where a clearly demonstrable hardship is caused, the Commissioner may for reason to be recorded in writing, by special permission permit any of the dimension prescribed by these regulations to be modified, except those relating to floor space indices unless otherwise permitted under these regulation, provided that the relaxation will not affect the health, safety, fire safety, structural safety, and public safety of the inhabitant of the building and the neighbourhood.

In the present case, it is evident from the proposal of the Architect which is noted in the report of the Assistant Engineer that on the eastern side, as opposed to the required open space of six meters, the average open space is 0.61 meters; 0.32 meters, 0.81 meters and 0.65 meters at points BC, DE, FG and HI. The Municipal Commissioner has condoned the deficiency only on the ground that: (i) There is a setback of 135.79 sq.mtrs. out of the total plot area of 285.12 sq.mtrs.; and (ii) That there are 25 rehabilitation tenements. Ex facie, the Municipal Commissioner has not applied his mind to the requirements of Regulation 64(b). The report of the Assistant Engineer did advert to issues pertaining to hardship, health, safety, fire safety, structural safety and the neighbourhood. The Municipal Commissioner must, however, independently apply his mind to all the facets required under Regulation 64(b). The power to grant a relaxation under Regulation 64(b) is coupled with a duty that the Municipal Commissioner must apply his mind to all the circumstances which are considered to be relevant and germane by the subordinate legislation. Evidently, the Municipal Commissioner has not done so. The requirements of health, safety, fire safety, structural safety and public safety of the inhabitants of a building

and the neighbourhood cannot be lightly brushed aside and must be taken into account by the Municipal Commissioner before he grants a relaxation. In the affidavit filed by the Municipal Corporation, the only attempt at justification is in the following terms:

I say that the proposal under reference has been submitted under modified D.C. Rule 33(7) and as per notification from U.D. Department, margin open space required for building having height more than 24 mtr. are 6.00 or as prescribed by C.F.O. However, the architect has provided open space with deficiency ranging from 6.67% to 100%. The open space deficiency is mainly created due to smaller plot area and 135.79 sq.mtrs. area in set back to be handed over to MCGM for road widening out of the plot area to 285.12 sq.mtrs. I say that the Hon"ble Municipal Commissioner by his approval dated 7.1.2010 accorded specific sanction in accordance with law under C.D.R. 64(b) to condone the open space deficiency by charging premium mentioning that "since out of 285.12 sq.mtrs. plot area, set back is 135.79 mtrs. and 25 rehab tenements the proposal is approved .

It is surprising as to how the Corporation considered that the Architect has provided open space with a deficiency ranging from 6.67% to 100%. The Municipal Corporation seems to proceed on the basis that the mere charging of premium is sufficient to condone a deficiency of open space. This is completely contrary to the underlying basis and purpose of Regulation 64(b).

8. In these circumstances, we are of the view that the order passed by the Municipal Commissioner is unsustainable and should be quashed and a direction should be issued to the Municipal Commissioner to apply his mind afresh to the proposal submitted by the Seventh and Eighth Respondents. It would be open to the Seventh and Eighth Respondents to submit a modified proposal for the approval of the Municipal Corporation, in the event that they are advised to do so. In order to facilitate a fresh determination, we quash the impugned order of the Municipal Commissioner dated 12 January 2010. The Municipal Commissioner shall pass a fresh order preferably within a period of six weeks. Rule is made absolute in these terms. There shall be no order as to costs.