2018 INSC 1202

Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.10192 OF 2010

JANHIT MANCH THROUGH ITS PRESIDENT
BHAGVANJI RAIYANI & ANR. ……APPELLANTS

Versus

THE STATE OF MAHARASHTRA & ORS. ….RESPONDENTS

J U D G M E N T

SANJAY KISHAN KAUL, J.

1. The expanding population of rural and urban areas has created its own problems, insofar as civic amenities are concerned. The problem is aggravated in metropolitan cities, where there is movement of population with the prospect of better livelihood. Lack of opportunities for employment has compelled people to leave their home and hearth. We are concerned in the present matter with the consequences of such mobility of population.

2. Mumbai is perceived to be a city that fulfills the dreams of many. The movement of population has thus been manifold, putting a strain on civil services and open areas, including to play grounds and streets. There has

been vast encroachment on public lands by people who have migrated, or otherwise, and who could not find reasonable accommodation for their residence. There has been growth of slum areas, thereby blocking access to public land. The density of construction was therefore required to be upscaled to meet the pressing needs of the population. One methodology to address the issue, devised by the State, was that of awarding development rights, as defined in Section 2(9A) of the Maharashtra Regional and Town Planning Act, 1966 (hereinafter referred to as the said Act), which provides as follows:

> “(9A) "development right" means right to carry out development or to develop the land or building or both and shall include the transferable development right in the form of right to utilise the Floor Space Index of land utilisable either on the remainder of the land partially reserved for a public purpose or elsewhere, as the final Development Control Regulations in this behalf provide”

A Transferable Development Right (hereinafter referred to as ‘TDR’) is therefore a voluntary, incentive-based programme allowing land owners to sell development rights from their land to a developer, or to other interested *parties,* who can then use these rights to increase the density of development at another designated location.

3. In order to understand this concept, we would like to further elucidate that the object is to give compensation in a different way, to private landowners who have transferred a portion of their land to the Government as and when the Government has required such private land to build or expand public utilities like grounds, gardens, bus stands, roads, etc. The

alternate mode of compensation, instead of payment of money is TDR, which is nothing but a development potential, in terms of increased Floor Space Index (hereinafter referred to as 'FSI') awarded in lieu of the area of land given, conferred in the form of a Development Rights Certificate (hereinafter referred to as 'DRC'), by the Government. Such TDR or DRC is negotiable and can be transferred for consideration, leaving it open for the owner of the acquired land to either use the TDR for himself or to sell it in the open market.

4. The other concept which would have to be dealt with in the context of the present dispute is that of Floor Area Ratio (hereinafter referred to as 'FAR'), which is the ratio of a building's total floor area (gross floor area) to the total area of the plot. The concept of FAR can be utilized in the zoning process, to limit urban density. It may be noted that often FAR and FSI are used as interchangeable terminologies and what is taken into account is the carrying capacity/infrastructure and amenities of an area, which would, in turn, have a direct impact on public health, safety and the right to life of the occupants of the area. Illustratively, if a plot of land measures 1000 sq. mts and the permissible FSI is 1, then about 1000 sq. mts. is permissible to be built on that plot of land.

5. Now, turning to the problem referred to aforesaid, of the expanding slums; the Government of Maharashtra has launched a comprehensive slum rehabilitation scheme by introducing an innovative concept of using land as a

resource and allowing FSI as an incentive, in the form of tenements for sale in the open market, for cross-subsidization of the slum rehabilitation tenements, which are to be provided free of cost to the slum-dwellers. The petition arises out of a prayer of the petitioner to effectively review the existing Development Control Regulations for Greater Bombay, 1991 (hereinafter referred to as 'DCR'). Appellant No.1 claims to be an NGO espousing legal issues concerning the State and the Nation, in larger public interest, while the second appellant is the President of the first appellant. A perusal of the pleadings and the impugned judgment shows that the primary question which occasioned the Division Bench of the Bombay High Court to examine the matter was whether the State, on account of financial inability to provide housing to encroachers on public and private lands, residing in structures which came up before 1.1.1995, could grant TDR to builders to be used in the suburbs of Mumbai, by permitting increase of FSI from 1 to 2. This was occasioned on account of the protection granted from eviction and the inability of the State to free parks, gardens, footpaths and roads from encroachment for which, in the wisdom of the Government, they chose a cut-off date of 1.1.1995. The original prayers show that the concern of the petitioner was to stop the grant of TDR in certain specified areas as under:

> "(i) Between the tracks of the Western Railway and the Swami Vivekanand Road;
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> (ii) Between the tracks of the Western Railway and the Western Express Highway;
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> (iii) Between the tracks of the Central Railway (Main Line) and the Lal Bahadur Shastri Road."

The inter-linked prayers were for constituting an expert body of social activists, architects, lawyers, bureaucrats etc. to review the TDR policy and to lay down parameters to restrict the discretionary powers given to the Municipal Commissioner, of the Brihanmumbai Municipal Corporation (hereinafter referred to as 'BMC'), under DCR Regulation No.64, specifically in matters of concessions in open spaces and parking, in consultation with the Committee.

6. The appellant, through amendments, thereafter expanded the scope of the petition to lay a challenge to the aforesaid regulation, on the ground that it was *ultra vires* the Constitution of India, and to quash Appendix VII A & Appendix VII B of DCR insofar as they deal with the use of heritage and slum TDR in the three prohibited zones. There were many impediments in the way of the appellants, for their petition to be entertained. Firstly, the challenge to the DCR had already been rejected by the judgment of the Division Bench of the Bombay High Court in *Nivara Hakk Suraksha Samiti and Ors* v. *State of Maharashtra and Ors.,*[1] dated 16th April, 1991. However, it may be stated that a window was provided by the Division Bench of the High Court which observed, in the impugned order, that it was permissible to permit a challenge in case of violation of Part III of the Constitution of India.

1 Writ Petition (Civil) No. 963 of 1991

7. The second aspect was that the appellants were not new in Mumbai, and yet they had not objected when the TDR concept was implemented in 1991 and, even when it was implemented in the corridors in question, in 1997. The petition was filed only in 2003. In this interim period of time, there was large scale implementation of the TDR concept and various slums were cleared by spending vast monies.

8. Thirdly and most importantly, the second appellant himself is a builder who was residing in a building constructed by the use of TDR in Deepak Villa, Vallabh Nagar Society, J.V.P.D. Scheme, Mumbai, at the time of filing of the petition. Apparently, appellant No.2 had failed to get advantage of the Slum Regulation Scheme, and thus a defence was raised by the respondents, to the petition that it was a *mala fide* attempt, couched in the form of a public interest litigation. In fact, the petitions were attributed with the motive of attempting to manipulate the prices of properties. The use of TDR in corridor areas had resulted in prices in the western suburbs to have fallen substantially since there was a boost in the housing sector, which in turn had hurt the commercial interest of builders, including that of the appellants. The issue was further aggravated by the fact that the second appellant is a partner of a firm by the name La Builde Associates, which had executed several projects in the suburbs of Mumbai. A Writ Petition No.1080 of 2003 was filed in the name of the said firm, assailing grant of TDR towards a competing party in a tender. This petition was dismissed on 28.4.2003. The present petition is stated to be a sequitur r to that insofar as it was moved

only after the earlier petition, that is Writ Petition No.1080 of 2003, was dismissed, and thus having failed in the earlier proceedings and tender, an endeavor was made in the second proceedings, in the form of this present petition.

9. The High Court, however, despite these various impediments, considered the issue important enough to examine, and even appointed an amicus curiae to assist the court. Respondents, however, pleaded that there was appropriate application of mind before an FSI of 2 was permitted, in any suburb, by utilization of the concept of TDR. The open spaces, water supply, sewerage and other infrastructure in such area were also taken note of. The necessity of using such methodology and employing TDRs, on account of the vast increase in population density was emphasized. The TDR policy was also stated to have a statutory flavor, in view of it being contained in Section 9(a) and Section 126 of the said Act. No challenge had been laid to these provisions. The TDR was stated to have worked as an effective tool for acquiring lands for utilities, amenities, playgrounds, recreation grounds etc. TDR had its conception in the Draft Regulation Bill of 1984, which Bill was followed by the recommendation of the Dsouza Committee in 1987. The said recommendations finally found reflection in the Development Control Regulations, which came into force in March 1991. All these envisaged a public consultation process. The impugned judgment deals with it extremely elaborately, to say the least. In terms of the impugned judgment dated 20.11.2006, the Court not sitting in appeal to review legislative actions was

rightly emphasized. The Court held that only when a legislation fails to keep within its legislative limits, would an occasion arise for the court to strike down the law. This was not found to be so in the present case. The DCR, forming part of the Development Plans, are liable to be revised every 20 years, which is a circumstance that mitigates any plea of arbitrariness. The result of the exercise of the test of unreasonableness of a legislation must fall within the category of 'manifest arbitrariness'. A number of judicial precedents on the scope of judicial review have been cited in the impugned order, and no useful purpose would be served by referring to them again.

10. The provisions of the said Act and the DCR have been scrutinized in great detail. In the larger public interest, certain directions have been issued to the following effect:

> "(1). We have noted that the existing infrastructure in terms of Parks, Play grounds, open spaces, water supply, sanitation and sewerage disposal, ambient quality of air and public transport is inadequate. There is serious congestion on roads and railways. Yet considering the cut off date as 1.1.1995 which shall not be extended further and bearing in mind the object behind the Slum Rehabilitation Scheme for those residing in slums or protected structures before 1.1.1995, we have rejected the challenge under Articles 14 and 21.
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> (2) The fees/compensation received by Respondent No. 2 from the exercise of discretionary powers under Regulation 64(b) by Respondent No. 2 or by Respondent No. 1, are directed to be kept under a separate revenue head for providing and maintaining parks, Play grounds, open spaces and such other amenities in the city of Mumbai. The wards from where the revenue is collected, however will have the first right on that Revenue for making provisions for parks, Play grounds and such other amenities, as the

> revenue is generated from those wards by relaxing the dimensions of space.
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> (3) Considering the complaints by the petitioners that the Respondent No. 2 is not acting on the complaints, Respondent No. 2 to set up a mechanism in the form of a Scheme in each ward, within eight weeks from today by designating officers by posts, to whom the citizens can file their complaints. The outer time limit be also fixed for deciding those complaints. The mechanism be put up on the website of Respondent No. 2. This mechanism to be also published in two leading Newspapers in the English language and one newspaper each, in Marathi, Hindi and Gujarati languages.
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> (4) We have recorded the statement made by the learned Advocate General that the process of new development plan will commence in 2008. We have however, noted that in respect of the development plan published in the year 1991, the process had taken a long time. Considering that, Respondent No. 1 to consider initiating steps at the earliest for putting into place the mechanism for starting the process of the new development plan for 2011."

11. We have heard the petitioner-in-person and wondered what grievance of his still survives! We specifically put this question to him also in the context of the fact that the High Court had examined the matter in such great detail. It is also appropriate to emphasise that local problems must be attended to locally. The High Court is a Constitutional Court. The State Court is best equipped to look into local matters, especially where the area development and zoning regulations of the state or the city are in question. The problems and solutions may vary from state to state. It is really not for this Court to sit as an appellate court over these matters, unless some patent illegality is shown, or it is shown that there is any contravention of the constitutional mandate. We find no such case made out, here.

12. Appellant No.2, appearing in-person on behalf of the appellants, really sought to put forth what he thinks would be best for the city. Thus, for example, pleas were raised, *inter alia,* for post approval impact assessment on environment and not only a prior environment impact assessment of the DCR; that there was no genuine endeavor to provide alternative accommodation to slum dwellers, but it was only vote bank politics, as evidenced by repeated extensions of deadlines for providing alternative accommodations; that the new development plan continued to offer FSI incentive to land owners; that the Commissioner exercises powers, in respect of FSI, almost as a mandatory requirement rather than a discretionary exercise; that there has been an increase in vehicular traffic in the city of Mumbai; that the increase in FSI has led to an influx of population in various regions in Mumbai; that the Pradhan Mantri Avas Yojana Scheme providing '*pucca ghar'* to the population would result in further influx into Mumbai, etc.

13. We have to keep in mind the principles of separation of powers. The elected government of the day, which has the mandate of the people, is to take care of policy matters. There is a democratic structure at different levels, starting from the level of Village Panchayats, Nagar Palikas, Municipal Authorities, Legislative Assemblies and the elected Parliament; each of them has a role to perform. In aspects, as presented in the instant case, a consultative process is always helpful, and is one which has already been undertaken. The philosophy of appellant no.2 cannot be transmitted as a

mandatory policy of the government, which is what would happen were a mandamus to be issued on the prayers made. Perspective of individuals may vary, but if the elected bodies which have policy formulation powers, is to be superceded by the ideals of each individual, the situation would be chaotic. The policies formulated and the legislations made, unless they fall foul of the Constitution of India, cannot be interfered with, at the behest of the appellants. The appellants have completely missed this point.

14. We are unequivocally of the view that the High Court has already examined, in detail, the issues that were raised in the present *lis*, and has issued whatever directions were feasible, keeping in mind the enormity of the problem. Nothing more is required.

15. We, thus, dismiss the appeal leaving it open to the parties to bear their own costs.

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..............................CJI
[RANJAN GOGOI]

....J.
[SANJAY KISHAN KAUL]

....J.
[K. M. JOSEPH]

NEW DELHI.
DECEMBER 14, 2018