

PETITIONER:
DADAR AVANTI CO.OP HOUSING SOCIETY LTD, BOMBAY

Vs.

RESPONDENT:
MUNICIPAL CORPN. OF GREATER BOMBAY & ORS.

DATE OF JUDGMENT: 09/02/1996

BENCH:
AGRAWAL, S.C. (J)
BENCH:
AGRAWAL, S.C. (J)
G.B. PATTANAIK (J)

CITATION:
JT 1996 (2) 256 1996 SCALE (2)137

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

PATTANAIK, J

Leave granted.

This appeal is directed against the judgment of the Bombay High Court dated September 14, 1994 dismissing the Writ Petition No. 826 of 1988. The dispute centers round the question as to whether the Municipal Authorities respondents 1 and 2 in this appeal could have permitted respondents 3 and 4 to convert their flats on the second floor of the building (Flat Nos. 3 & 4) from residential purpose to that of a commercial one for opening of a Surgical Nursing Home. The Cooperative Society is the appellant whose members have purchased different flats in the building in question. M/s. Amar Builders submitted a plan to Municipal Corporation of Greater Bombay on July 25, 1979 for construction of the building consisting of the ground floor and other 13 floors at Kasturchand Mills Compound, Opposite Kabutar Khana Dadar, Bombay. The plan which was approved by the Corporation indicated that the ground floor was to be used for clinics and garages while upper floors were to be used for residential premises. The said Builder after construction of the building sold different flats in all the 13 floors to various persons who are members of the society and respondents 3 and 4 who happen to be the Medical practitioner had purchased flat nos. 3 and 4 on the second floor. The grievance of the Society and its members is that the respondents 3 and 4 have converted their flat nos. 3 and 4 on the second floor to a Surgical Nursing Home and thereby they have not only violated the terms and conditions of the sanctioned plan but also by having a Surgical Nursing Home within a residential building is unhygienic and hazardous to the common living. The members of the Society objected to such user by respondents 3 and 4 before the Additional Municipal Commissioner. In view of such objection, the Architect of the building applied for occupation certificate on September 2, 1986 in respect of the entire building

except flat nos. 3 and 4 on the second floor. The Municipal Corporation granted provisional occupation certificate on January 14, 1987 for entire building except flat nos. 3 and 4 on the second floor. The respondents 3 and 4, therefore, made an application to the Municipal Corporation seeking change of user of flats 3 and 4 on the second floor of the building from residential to commercial. The appellant society and its members as well as the builder objected to grant of such permission. The Executive Engineer Building Proposals (City) by its order dated 20th April, 1987, rejected the application of the respondents 3 and 4 on the ground that the proposed user was not in conformity with the existing Rules and Regulations. The said Executive Engineer had also indicated in his order that the members of the Society have complained about serious inconvenience to be caused to them on account of such user by respondents 3 and 4 by opening a Surgical Nursing Home. Against the aforesaid order of the Executive Engineer, respondents 3 & 4 the Commissioner who by order dated 31st July, 1987 reversed the order of the Executive Engineer and granted 'No objection' certificate for change of user of flats nos. 3 and 4 on the second floor on certain terms and conditions. One of the conditions was that separate water supply and drainage shall be provided by licensed plumber and the ability of the structure shall not be disturbed. The appellant society then moved the Bombay High Court by filing a Writ Petition challenging the order of the Municipal Commissioner which was registered as Writ Petition No. 9740 of 1987. The learned Single Judge dispose of the matter by order dated August 20, 1987 and allowed the Writ Petition on the ground that there has been violation of principles of natural justice and the society had not been given the opportunity of hearing. The learned Judge directed the Municipal Commissioner to re-consider the matter. After the matter was remanded, the parties filed their representation in writing before the Commissioner. The Additional Commissioner finally by his order dated December 18, 1987, disposed of the matter and came to the conclusion that the user of the two flats as Surgical Clinic is in conformity with the existing Development Control Rules and the Building Bye-laws applicable to Greater Bombay and further the occupants of the building were aware of the fact that the two flats were intended to be used for running a Surgical Clinic. With this conclusion he permitted change of user as sought for by respondents 3 and 4. The appellant society, therefore, challenged the said order by filing a Writ Petition which was registered as Writ Petition No. 896 of 1988. The High Court having dismissed the same by an order dated September 14, 1994 the appellants have approached this Court by way of Special Leave Petition.

Mr. Dave the learned counsel appearing for the appellant contended that in view of the provisions of The Maharashtra Regional and Town Planning Act, 1966 (Maharashtra Act No. XXXVII of 1966) (hereinafter referred to as 'The Act') the permission for the building in question having been granted with the specific condition that only ground floor can be used for commercial and clinical purpose and the permission for change of user having been applied for only in the year 1987 at which point of time under the Building Regulations it was not permissible for change of user, the Commissioner as well as the High Court wholly erred in law in granting such permission for change of user merely on the ground that such permission could have been granted when originally the plan for the building was sanctioned. According to the learned counsel for the

appellant an allottee cannot claim to have substantive right of change of user and, therefore, when such an application for change of user is made the relevant Regulations in force must be adhered to by the authority considering such application. Consequently, it is contended that the Commissioner wholly erred in law in relying upon the Regulations of 1966 and then granting the permission to change over and the High Court also erred in law in granting such permission for change of user. Learned counsel for the Development Authority and Mr. Sorabjee, learned Senior counsel appearing for the allottees in whose favour the permission to change over has been accorded, on the other hand contended, that the authorities were fully justified in allowing the application of the allottees for change of user from residential to commercial since they could have got this permission when the plan itself was originally sanctioned and the authorities rightly accorded such permission. The correctness of the rival submissions would require an in depth examination of the provisions of the Act and the Regulations framed thereunder.

The Act is intended to make provisions for planning the development and use of land and to ensure that Town Planning Schemes are made in a proper manner and their execution is made effective. In a city like Bombay where there is acute dearth of vacant sites and where there is rapid increase of population, unless developmental authorities are conferred with power to regulate constructions of building and unless development take place in a planned manner it will be hazardous for a healthy living. With this end in view the Act has been enacted constituting Regional Planning Boards and providing for development plans by a Development Authority. The Act also provides the procedure to be followed in preparing and sanctioning development plans and it also provides for control of development and use of land included in the development plans. The Act confers power on the Planning Authority to take such remedial measure if it comes to its notice that there has been unauthorised development. The Planning Authority has also the power to require removal of authorised development or use if the authority thinks it expedient in the interest of proper planning and its area. Such drastic power has been conferred on the authority with the obvious object that the said authority would act in a manner which is not detrimental to the human health and the unauthorised development or user of the land should be prohibited from such user so that there would be development of the city in a planned manner. If such unauthorised user of the land is not checked by such Planning Authority then in cities like Bombay where the growth rate of inhabitant is fast it would be difficult to have a comfortable living.

Before we focus our attention to the different provisions of the Act it would be appropriate to notice the admitted facts, namely, the builder submitted the plan of the building in July 1979 which was approved by the Corporation. The approved plan indicated that only the ground floor would be used for clinics and garages and rest of the floors would be used for residential purposes. The Architect of the building even when applied for 'Occupation Certificate' in September 1986 he did not make an application for Flat Nos. 3 and 4 on the second floor as the allottees were insisting for using the same as clinic which was contrary to the sanctioned plan. The respondents nos. 3 and 4 made an application in April 1987 seeking change of user of the plots.

Section 2(5) defines building

operation thus;
"building operations"
includes erection or re-erection of a building, or any part thereof, roofing or reroofing of any part of a building or of any open space, any material alteration or enlargement of a building, any such alteration of a building as is likely to affect an alteration of its drainage or sanitary arrangement or materially affect its security-, or the construction of a door opening on any streets, or land not belonging to the owner'

Section 2(7) defines building operation thus;

"development" with its grammatical variations means the carrying out of buildings, engineering, or other operations in, or over, or under, land or the making of any material change, in any building or land or in the use of any building or land and includes reclamation, redevelopment and lay out and sub-division of any land; and 'to develop ' shall be construed accordingly"

Section 2(14) defines 'land' thus;

"'land' includes benefits to arise out of land, and things, attached to the earth or permanently fastened to anything attached to the earth"

Section 2(27) defines 'Regulations' thus;

"'regulation' means a regulation made under section 159 of this Act and includes zoning and other regulation made as a part of a Regional Plan, Development, plan, or town planning scheme"

Section 21 in Chapter III provides for preparation, submission and sanction to Development Plan and under Section 22 the said Development Plan shall indicate the manner in which the use of land in the area of a Planning Authority shall be regulated as well as the manner in which the development of land therein shall be carried out.

Section 23 is the procedure prescribed to be followed in preparing and sanctioning Development Plans.

Section 26 provides for preparation and publication of notice of Draft Development Plan.

Section 28 provides for filing objections to the Draft Development Plan.

Section 43 puts restriction on development of land which is quoted hereinbelow in extenso:-

"43. After the date on which the declaration of intention to prepare a Development plan for any area is published in the Official Gazette or after the date on which a notification specifying any undeveloped area as a notified

area, or any area designated as a site for a new town, is published in the Official Gazette, no person shall institute or change the use of any land or carry out and development of land without the permission in writing of the Planning Authority:

Provided that, no such permission shall be necessary--

(i) for carrying out works for the maintenance, improvement or other alteration of any building, being works which affect only the interior of the building or which do not materially affect the external appearance thereof;

(ii) the carrying out of works in compliance with any order or direction made by any authority under any law for the time being in force;

(iii) the carrying out of works by any authority in exercise of its powers under any law for the time being in force;

(iv) for the carrying by the Central or the State Government or any local authority of any works--

(a) required for the maintenance or improvement of a highway, road or public street, being works carried out on land within the boundaries of such highway, road or public street;

(b) for the purpose of inspecting, repairing or renewing any drains, sewers, mains, pipes, cable, telephone or other apparatus including the breaking open of any street or other land for that purpose;

(v) for the excavation (including wells) made in the ordinary course of agricultural operation;

(vi) for the construction of a road intended to give access to land solely for agricultural purposes;

(vii) for normal use of land which has been used temporarily for other purposes;

(viii) in case of land, normally used for one purpose and occasionally used for any other purpose, for the use of land for that other purpose on occasions;

(ix) for use, for any purpose incidental to the use of a building for human habitation of any other building or land attached to such building"

Section 44 provides for application for permission for development.

Section 45 is the power of the Planning Authority to grant or refuse permission.

Section 46 provides that the Planning Authority in considering application for permission shall have due regard to the provisions of any draft or final plan submitted or sanctioned under the Act.

Section 52 provides penalty on unauthorised development or for use otherwise than in conformity with Development Plan. Said Section is extracted hereinbelow in extenso:-

"52. (1) Any person who, whether at his own instance or at the instance of any other person commences, undertakes or carries out development or institutes, or changes the use of any land,--

(a) without permission required under this Act; or

(b) which is not in accordance with any permission granted or in contravention of any condition subject to which such permission has been granted;

(c) after the permission for development has been duly revoked ; or

(d) in contravention of any permission which has been duly modified, shall, on conviction, (be punished with imprisonment for a term which may extend to three years, or with fine which may extend to five thousand rupees or with both) and in the case of a continuing offence with a further fine which may extend to one hundred rupees for every day during which the offence continues after conviction for the first commission of the offence.

(2) Any person who continues to use or allows the use of any land or building in contravention of the provision of a Development plan without being allowed to do so under that section 45 or 47, or where the continuance of such use has been allowed under that section continues such use after the period for which the use has been allowed or without complying with the terms and conditions under which the continuance of such use is allowed, shall, on conviction be punished (with fine which may extend to five thousand rupees); and in the case of a continuing offence, with a further fine which may extend to one hundred rupees for every day during which such offence continues after conviction for the first commission of the offence".

Section 54 confers power on the Planning Authority to stop unauthorized development and Section 55 confers power on the Planning Authority for removal or discontinuance of unauthorized development.

Section 56 confers power on the Planning Authority even to require removal of authorized development or use if the Authority feels that it is expedient in the interest of proper planning of its areas.

Section 56 is extracted hereinbelow in extenso:-

"56. (1) If it appears to a Planning Authority that it is expedient in the interest of proper planning of its areas including the interest of amenities) having regard to the Development plan prepared, -

(a) that any use of land should be discontinued, or

(b) that any conditions should be imposed on the continuance thereof, or

(c) that any buildings or works should be altered or removed, the Planning Authority may, by notice served on the owner,

(i) require the discontinuance of that use; or

(ii) impose such conditions as may be specified in the notice on the continuance thereof; or

(iii) require such steps, as may be specified in the notice to be taken for the alteration or removal of any buildings or works, as the case may be, within such period, being not less than one month, as may be specified therein, after the service of the notice.

(2) Any person aggrieved by such notice may, within the said period and in the manner prescribed, appeal to the State Government.

(3) On receipt of an appeal under sub-section (2), the State Government or any other person appointed by it in this behalf may, after giving a reasonable opportunity of being heard to the appellant and the Planning Authority, dismiss the appeal or allow the appeal by quashing or varying the notice as it may think fit.

(4) If any person, -

(i) who has suffered damage in consequence of the compliance with notice by the depreciation of any interest in the land to which he is entitled or by being disturbed in his enjoyment of the land or otherwise; or

(ii) who has carried out any works in compliance with the notice, claims, from the Planning Authority, within the time and in the manner, prescribed compensation in respect of that damage, or of

any expenses reasonably incurred by him for complying with the notice, then the provisions of sub-sections (2) and (3) of Section 51 shall apply in relation to such claim as those provisions apply to claims for compensation under those provisions.

(5) If any person having interest in land in respect, of which a notice is issued under this section claims that by the reason of the compliance with the notice, the land will become incapable of reasonable beneficial use, he may within the period specified in the notice or within such period after the disposal of the appeal, if any, filed under subsection (2) and in the manner prescribed, serve on the State Government a purchase notice requiring his interest in the land to be acquired; and thereupon, the provisions of section 49 for dealing with a purchase notice shall, so far as can be made applicable, apply as they apply to a purchase notice under that section."

A combined reading of the aforesaid provisions and the definitions of 'building operation' in Section 2(5), 'development' in Section 2(7) and 'land' in Section 2(14) make it explicitly clear that a building or a part of a building if it has been sanctioned for a specific purpose, user of the same for any other purpose unless permitted by the competent Authority, would be in contravention of the provisions of the Act. It is indeed on this score the Architect of the building did not apply for completion certificate in respect of flats nos. 3 and 4 allotted to respondents as they wanted to use the same for commercial purposes though under the sanctioned plan only the ground floor has been permitted to be used as commercial purpose and it is then in 1987 the respondents nos. 3 and 4 made application for change of user. We are unable to accept the submissions made by the counsel appearing for the Development Authority as well as Mr. Sorabjee, learned senior counsel appearing for respondents 3 and 4 that since such change of user could have been allowed when the plan was originally sanctioned there. is no bar in allowing the same in the year 1987. It is conceded that when application for change of user was made under the regulation in force it was not permissible for allowing change of user from residential to commercial though at later point of time the regulation has been changed and such permission can be accorded subject to certain terms and conditions which includes the requirement of making an independent excess to the building. Keeping in view the very object of the Act and regulations made therein and keeping in view the fact that regulations are changed from time to time in keeping with the need of the time it is difficult for us to accept the contentions of the counsel appearing for the Development Authority that since a change of user could have been granted when the original plan was sanctioned, such a change can be allowed even after a lapse of two decades. Such a view will make the regulations from time to time fully

redundant and will frustrate the very purpose for which Such regulations are made. It would be only reasonable to hold that at the point of time when a change of user is intended whether the regulation in force permits such change and if the regulations do not permit such change the concerned Authority will have no power to allow such change of user. This being the position we have no hesitation to come to the conclusion that the Commissioner as well as the High Court totally erred in law in holding that the Commissioner had the power to allow such change of user even though when the application for change was made the regulations did not authorise such change of user the order on the Commissioner as well as the High court, therefore, is not sustainable.

In course of hearing it was also pointed out to us by the counsel appearing for the Development Authority that in the subsequent Regulation of 1991 (Development Control Regulation for Greater Bombay 1991) which has come into force with effect from 25th March 1991 clinics are permissible in residential area upto second floor with the condition that there should be a separate access. The High Court while dismissing the Writ Application has taken that into consideration and has found that there has been no error in granting permission in the order of the Commissioner. It is to be noted that the order of Additional Commissioner is dated December 15, 1987, allowing such change of user of the flats from residential to surgical clinic and the regulation of 1991 came into force with effect from 25th March 1991 and, therefore, the said Regulation should not have been pressed into service for deciding the legality of the order of the Additional Commissioner. In the aforesaid premises we hold that the Additional Commissioner had no power to allow the change of user sought for by respondents 3 and 4 and the High Court also committed error in upholding the said order. We accordingly set aside the order of the Additional Commissioner as well as the High Court and allow this appeal. Needless to mention that since the Regulation of 1991 empowers the concerned Authority to allow change of user it would be open for the respondents to move the authority afresh and the said authority may pass appropriate orders in accordance with the Regulations of 1991 which is said to be in force. This appeal is allowed.

There will be no order as to costs.