Shabi Construction Company vs City And Industrial Development ... on 19 April, 1995

Equivalent citations: AIRONLINE 1995 SC 713

Author: M.K. Mukherjee

Bench: J.S. Verma, N.P. Singh, M.K. Mukherjee

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           CASE NO.:
Appeal (civil)  4487 of 1990

PETITIONER:
SHABI CONSTRUCTION COMPANY

RESPONDENT:
CITY AND INDUSTRIAL DEVELOPMENT CORPORATION AND ANR.

DATE OF JUDGMENT: 19/04/1995

BENCH:
J.S. VERMA & N.P. SINGH & M.K. MUKHERJEE

JUDGMENT:
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JUDGMENT 1995 (3) SCR 534 The Judgment of the Court was delivered by M.K. MUKHERJEE, J. This appeal by special leave is directed against the judgment and order dated February 22, 1989 rendered by the High Court of Bombay in W.P. No. 3682 of 1987. Facts leading to the appeal and relevant for its disposal are as under.

The appellant is a firm registered under the Partnership Act and carries on business as builders and developers, while the respondent No. 1 is a Government Company within the meaning of section 617 of the Companies Act, 1956. On March 23, 1971, the Government of Maharashtra issued a notification under sub-section (1) of section 113 of the Maharashtra Regional and Town Planning Act, 1966 ('Act' for short) delineating and designating certain area for development as a site for a new town to be known as New Bombay. Concurrently, it declared, in accordance with sub- section (3A) thereof, the respondent No.l to be the New Town Development Authority for that township. Consequent upon such declaration the respondent No. 1 assumed, by virtue of sub-section (8) of the said section, all the powers and duties of a Planning Authority under the Act including those under Chapter [1] and IV thereof. In due course the respondent No. 1 framed, in exercise of powers conferred by section 159 of the Act and with the previous approval of the State Government, a set of Regulations called the General Development control Regulations for New Bombay, 1975 ('Regulations' for short). Regulation 16.3.1 of the said Regulations initially provided that the Floor Spice Index ('FSI' for short) for divers land use should not exceed 1. On August 24, 1981 the Board of Directors of the respondent No. 1 passed a resolution to amend the above regulation by fixing

different FSIs for divers land uses; and for land use for business and commercial purposes the maximum permissible FSI was fixed at 2. By its letter dated October 21, 1981 the respondent No. 1 forwarded the resolution to the State Government for approval in accordance with section 159 of the Act. Instead of approving the proposed amendment the State Government wrote back to the respondent No. 1 on November 30, 1982 to resubmit the same after following the procedure laid down in section 37 of the Act to enable it (the State Government) to effectuate the marginal or minor modification to the final Development plan of New Bombay. Pursuant thereto and in compliance thereof respondent No. 1 issued and published a notice dated August 29, 1983 in the Official Gazette inviting objections and suggestions with regard to the proposed amendment by way of a minor modification to the final Development plan. As no objection was received to the proposed amendment the Board of Directors of the respondent no. 1 considered and approved of the proposed amendment and authorised its Chief Administrative Officer to resubmit it to the State Government. Accordingly, the Chief Administrative Officer wrote a letter to the State Government on March 5, 1984 seeking its approval to the amendment as required under section 37(1) of the Act.

While the matter was awaiting final decision of the State Government, the respondent No. 1 issued a public notice in August, 1985 inviting offers for lease of commercial plot No. 4 of the District Business Centre in Sector 17 of Vashi. New Bombay on terms and conditions set out in a booklet published for the purpose. In the booklet the maximum permissible limit of FSI for the successful lessee was shown as 2. Amongst others, the appellant responded to the notice and ultimately succeeded in getting allotment of the plot for which a formal lease agreement was entered into by and between the appellant and the respondent No. 1 on January 21, 1987 for a consideration of Rs. 64,19,250. Clause 3 (aa) (i) of that agreement provides that the maximum permissible FSI as defined by the Regulations shall be 2.

In the meantime - on October 10, 1986 to be precise - the State Government had issued a notification in the Official Gazette in accordance with section 37(2) of the Act sanctioning increase in FSI in respect of use for business purpose to 1.50 only. On getting information about the same the appellant wrote a letter to the respondent No. 1 pointing out that the notification had no bearing upon its construction plan as the maximum permissible built up area granted under the agreement had been fixed at 3200 sq. metres (on the basis that FSI was 2). Without prejudice to its above contentions, it prayed for provisional permission to construct about 2000 sq. metres, as per the plan submitted by them. In reply thereto the respondent No. 1 communicated to the appellant by its letter dated May 15, 1987 that its plan could not be approved since there was discrepancy in the FSI mentioned in the agreement and the FSI actually approved by the Government. Aggrieved thereby the appellant filed a petition in the High Court for a writ of mandamus compelling the respondent No. 1 and the State of Maharashtra (the respondent No. 2) to forthwith withdraw and/or cancel the impugned notification dated October 10, 1986 and the letter dated May 15, 1987 and to forbear and desist them from in any manner implementing or enforcing or taking any action on the basis thereof. The high Court dismissed the writ petition with an observation that as the appellant had with open eyes and possibly in collusion with the officers of respondent No 1 had entered into an agreement which was contrary to the Regulations and the law, it was not permissible for it to claim writ of mandamus to enforce illegalities.

To appreciate the points involved in this appeal it will be imperative at this stage to take a close look into the relevant provisions of the Act. The Act was brought in the statute book in 1966 to make provisions for planning the development and use of land in notified regions and creating new towns through Planning Authorities and Development Authorities to be constituted and declared for the purpose. Chapter III of the Act comprises a fasciculi of sections which relate to preparation, submission and sanction of Development plan and procedures to be followed therefore. Section 21 thereof requires that within the period prescribed therein every Planning Authority shall prepare draft Development plan for the area to be developed and submit the same to the State Government for sanction. Section 22 provides that a Development plan shall generally indicate the manner in which the use of the land in the area of a Planning Authority shall be regulated and also indicate the manner in which the development of land therein shall be carried out. The section then says that in particular, it shall provide, so far as may be necessary, for all or any matters as enumerated in the clauses therein. Clause (m) thereof, which is material for our purposes, reads as under :

> 22(m) Provisions for permission to be granted for controlling and regulating the use and development of land within the jurisdiction of a local authority including imposition of conditions and restrictions in regard to the open space to be maintained about buildings, the percentage of building area for a plot.....
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> (emphasis supplied) Sections 23 to 30 lay down the procedure to be followed in preparing a draft Development plan and section 31 which relates to the sanction to the draft Development plan reads as under :
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> 31 (1) Subject to the provisions of this section, and not later than one year from the date of receipt of such plan, from the Planning Authority, or as the case may be, from the said Officer, the State Government may, after consulting the Director of Town Planning by notification in the official Gazette sanction the draft Development plan submitted to it for the whole area, or separately for any part thereof, either without modification, or subject to such modifications as it may consider proper, or return the draft Development plan to the Planning Authority, or as the case may be, the said Officer for modifying the plan as it may direct, or refuse to accord sanction and direct the Planning Authority or the said Officer to prepare a fresh Development plan:
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> XXX XXX XXX
>
> (2) xxx xxx xxx
>
> (3) xxx xxx xxx
>
> (4) The State Government shall fix in the notification under subsection (1) a date not earlier than one month from its publication on which the final Development plan shall come into operation.

> (5) xxx xxx xxx (6) A Development plan which has come into operation shall be called the "final Development plan" and shall, subject to the provisions of this Act, be binding on the Planning Authority."

(emphasis supplied) Section 35 provides that if any Planning Authority has prepared a Development plan which has been sanctioned by the State Government before the commencement of the Act then such Development plan shall be deemed to a final Development plan sanctioned under the Act. Section 37 of the Act which relates to the mode and manner of making minor modifications to the final Development plan is extracted below :

> "(1) Where a modification of any part of or any proposal made in, a final Development plan is of such a nature that it will not change the character of such Development plan, the Planning Authority may, or when so directed by the State Government shall, within sixty days from the date of such direction, publish a notice in the Official Gazette and in such other manner as may be determined by it inviting objections and suggestions from any person with respect to the proposed modification not later than one month from the date of such notice: and shall also serve notice on all persons affected by the proposed modification and after giving a hearing to any such persons, submit the proposed modification with amendments, if any, to the State Government for sanction.
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> (IA) xxx xxx xxx (2) The State Government may, after making such inquiry as it may consider necessary after hearing the persons served with the notice and after consulting the Director of Town Planning by notification in the Official Gazette, sanction the modification with or without such changes, and subject to such conditions as it may deem fit, or refuse to accord sanction. If a modification is sanctioned, the final Development plan shall be deemed to have been modified accordingly."

(emphasis supplied) Section 159 empowers the Regional Board, Planning Authority and Development Authority to make, with the prior approval of the State Government, Regulations consistent with the Act and the Rules made thereunder to carry out the purpose of the Act and without prejudice to the generality of the power, lays down the specific fields in which it can make Regulations.

That brings us to the relevant provisions of the Regulations. Regulation 3.11 defines FSI to mean the ratio of the gross floor area of all the storeys of a building on a plot to the total area of the plot. Regulation 16 enumerates the various terms and conditions which are to govern development of buildings for the various land use and regulation 163.1 (a) thereof prescribes the maximum permissible FSI.

From the facts of the instant case as recorded earlier it is evident that when the respondent No. 1 issued the public notice in August, 1985 inviting offers for lease of the plot in question the maximum permissible FSI for divers land uses according to the final Development plan was in and the minor

modification proposed by it in respect thereof was awaiting sanction of the State Government. It is also evident, that before execution of the agreement by the appellant and the respondent No. 1, the State Government had issued the impugned notification in accordance with section 37(2) of the Act sanctioning increase in the FSI to 1.50 and not to 2 as proposed by the respondent No. 1. The prior sanction of the State Government being the sine qua nor for a final Development plan as also for minor modifications thereof under section 31 and 37 respectively, the agreement so far as it related to FSI did not, and could not, bestow and legal right upon the appellant. To put it conversely, only on such sanction could the inchoate right under the agreement crystallize into a legally enforceable right in favour of the appellant.

Building his argument on the doctrine of estoppel, the learned counsel for the appellant submitted that the prescription of FSI was not a statutory prescription but an administrative decision required to be taken by the respondent No. 1 from plan to plan under the provisions of section 22 (m) of the Act. He argued that since in the instant case the respondent No. 1, as the Planning Authority, took a decision to increase the FSI to 2 for business use of land and entered into a contract with the appellant on the basis thereof with open eyes it was estopped from repudiating the contract under section 115 of the Evidence Act as also the general equitable doctrine of estoppel. He next contended that regulation 16 of the Regulations made under section 159 of the Act providing for FSI was ultra vires because the matters which could be brought within the ambit of the Regulations were serialised in the enabling section. According to the learned counsel when FSI has been specifically mentioned to be made a part of each Development plan under section 22(m) the fixation of FSI cannot be brought within the ambit of regulation making power of the Development Authority and it had to be provided for by their executive orders to be determined in their discretion. The learned counsel contended that respondent No. 1 could not resile from their contractual obligations by taking shelter behind a regulation which was ultra vires. He lastly contended that, assuming but without admitting, that FSI could fall within the ambit of regulation made under section 159 of the Act, the fixation thereof was not a statutory prescription but the expression of an in-house policy declaration, which if deviated from by the holder of the Authority could not be used as a shield to retract from their contractual obligations. It was at best, according to the learned counsel, a violation of a rule and the proposition that there cannot be any estoppel against statute did not extend thereto.

Having regard to the schemes of the Act as reflected in the various provisions of the Act and the Regulations referred to earlier we are unable to accept the above contentions. Amongst various matters required to be included in a Development plan under section 22 of the Act, a provision for permission to be granted for controlling and regulating the use and development of land including imposition of conditions and restrictions in regard to the open space to be maintained about buildings and percentage of building area for a plot is required to be made under clause (m) thereof. To conform to the words "percentage of building area for a plot" appearing in that clause the FSI has been defined in the Regulations and maximum permissible limit fixed. Undoubtedly, to start with, fixation of FSI is an in-house exercise of respondent No. 1, but it gets its legal sanctity only when the State Government grants its approval thereto under section 159 of the Act. After the FSI is so fixed to comply with the requirements of sections 22 (m), it becomes a part and parcel of the Development plan which is to be submitted by the Planning Authority to the State Government

under section 21. Once the State Government grants approval to the Development plan it becomes the final Development plan and binds the Planning Authority under section 31(6) of the Act. Therefore, any person or violation of any of the terms or contents of the final Development plan or modification in respect thereof without prior sanction of the State Government would amount to a breach of sections 31 and 37, as the case may be, of the Act. That necessarily means, that in the instant case the increase in the FSI to 2 without obtaining approval of the State Government, is not only a breach of regulation 159 but also of sections 31(6) and 37(2) of the Act. In that view of the matter and in view of the well settled law that the doctrine of promissory estoppel cannot be invoked to compel the public bodies or the Government to carry out the representation or promise which is contrary to law or which is outside their authority or power, none of the contentions raised on behalf of the appellant can be entertained.

On the conclusions as above, we hold that the reliefs sought for in the writ petition are not available to the appellant for it is trite that before one can seek a writ of mandamus he has to prove that he has a legally protected and judicially enforceable right. The appeal is accordingly dismissed but without any order as to costs.

Appeal dismissed.