Raju S. Jethmalani & Ors vs State Of Maharashtra & Ors on 5 May, 2005

Equivalent citations: AIRONLINE 2005 SC 712

Author: A.K. Mathur

Bench: Ashok Bhan, A.K. Mathur

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           CASE NO.:
Appeal (civil)  8274-8275 of 2003

PETITIONER:
Raju S. Jethmalani & Ors.

RESPONDENT:
State of Maharashtra & Ors.

DATE OF JUDGMENT: 05/05/2005

BENCH:
ASHOK  BHAN & A.K. MATHUR

JUDGMENT:
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J U D G M E N T A.K. MATHUR, J.

These appeals are directed against orders passed by learned Division Bench of the High Court of Bombay dated September 4, 1997 and September 8, 1999.

Initially a writ petition was filed before the High Court of Bombay by way of public interest litigation by the residents of Salisbury park and persons living around that area challenging the notification dated February 12, 1993 whereby an area admeasuring 1.50 acres of land was de-reserved from plot No.438 of Salisbury Park within the Municipal limits of Pune which was reserved as a garden in the development plan. In order to promote ecology and to have congenial environment, a development plan was prepared on August 15, 1986 for Pune city under the erstwhile provisions of the Bombay Town Planning Act, 1954 and that development plan was carried out under the Maharashtra Regional and Town Planning Act, 1966 (hereinafter to be referred to as the "1966 Act") where under on September 18, 1982 a draft development plan was published by the Municipal Corporation of Pune purported to be under Section 26(1) of the1966 Act. In that development plan Plot Nos. 437 & 438 were earmarked for the purposes of park and garden. This draft development plan was ultimately finalized and sanctioned on January 5, 1987. The present controversy centres around Plot No.438 and this plot originally belonged to respondent No.3. She did not object to the reservation of the plot for the garden. In December 1986, this plot was purchased by respondent Nos.4 to 10 in the writ petition (appellants herein) at a throw away price. These respondent Nos. 4 to 10 then initiated

a proposal for de-reserving this plot before the Government. Government of Maharashtra after hearing the Planning authority and on receiving report from the Municipal Corporation of Pune that they are not in a position to acquire this plot of land for garden , de-reserved the plot by the aforesaid impugned notification. This was challenged by a public interest litigation contending that once the land is earmarked for a particular purpose, namely to promote environmental exigencies, the same cannot be de-reserved to defeat the public purpose. Heavy reliance was placed on a decision of this Court in the case of Bangalore Medical Trust vs. B.S.Muddappa & Ors. reported in (1991) 4 SCC 54. As against this, learned counsel appearing for the Municipal Corporation of Pune submitted that the proposal for de-reservation was mooted by the Corporation at the behest and on the dictate of the State Government and it was also pointed out that the Municipal Corporation of Pune had no financial resources to acquire the aforesaid land. It was also submitted that the decision rendered by this Court in the case of Bangalore Medical Trust (supra) cannot be of any assistance to the present controversy as the provisions of the Bangalore Development Authority Act, 1976 are not pari materia with that of the provisions of the Maharashtra Regional and Town Planning Act, 1966. It was further pointed out that Section 38-A of the Bangalore Development Authority Act, 1976 creates a complete prohibition for the authority from selling or otherwise disposing of any area reserved for the public parks and play grounds. In this background the Division Bench of the Bombay High Court after hearing arguments came to the conclusion that an equitable device can be worked out so as to serve the interest of public in general as well as safeguard the interest of the owners of the plot by putting certain conditions. A proposal was also mooted that an alternative plot adjacent and suitable be provided for the same purpose as envisaged in the final development plan i.e. park and garden and possibility may be explored that such a land is available in the vicinity which will serve the purpose. But no such land could be found in the vicinity for the aforesaid purpose. However, finally the High Court thought of settlement that the notification be quashed but it deferred it for a period of two years and within this period the respondent Nos. 4 to 10 (appellants herein) provide necessary area, approximate in size, suitable for the purposes of garden and park as envisaged in the Development Plan to the satisfaction of the Planning authority. In case of failure, the impugned notification shall stand quashed and set aside. After that an application seeking clarification of the earlier order was moved before the High Court. Therein it was contended that in the order dated September 4, 1997 it was not indicated that how the applicants should offer piece of land for the purpose of park and garden in the same vicinity where the plot in question is situated. This application was dismissed by the Division Bench of the High Court and it was observed that the order dated September 4, 1997 is clear and does not call for any clarification as prayed for by the applicants. It was also observed that the order dated September 4, 1997 was not challenged during the last two years by the applicants. Therefore, on the expiry of the period of two years, the order passed by the Court quashing the notification dated February 12, 1993 became operative and Municipal Corporation of Pune was directed to proceed accordingly. Aggrieved against both these orders i.e. order dated September 4, 1997 and order dated September 8, 1999 the present Special Leave Petitions were filed. Leave was granted and these appeals were argued at some length before a Bench on November 9, 2000 and the matters were adjourned at the request of the parties to sit together and consider the terms on which a settlement could be arrived at between the parties, again on August 16, 2001 parties sought time for some agreed solution of the issue. When the matters again came up before this Bench and it was mooted out that some solution could be worked out but it could not be worked out and this is how these appeals have come up for

final disposal before us.

The Plot No.438 measuring 1.50 acres of land has a sub-plot 1 to 9. Construction has already been completed on sub-plot Nos.4,5,6 & 7. The dispute is with regard to sub-plot Nos.1,2,3 and 8 & 9 on the plot. Sub-plot Nos.1,2,& 3 are on one side of the road and sub-plot Nos.8 & 9 are on the other side of the road. It was also pointed out that adjacent plot No.437 measuring 2.00 acres was acquired and a garden was developed. It was not disputed that Plot No.438 was earmarked as garden in the development plan in 1966 but it was not acquired and it remained a private property. It is true that when it was shown as a garden in the draft development plan no objection was raised and final notification declaring this land as earmarked for garden was published. It is true that a Development Plan can be prepared of a land comprising of a private person but that plan cannot be implemented till the land belonging to the private person is acquired by the Planning authority. It is not that the Planning authority was ignorant of this fact. It acquired some land from Plot No.437 for developing garden but the land from plot No.438 was not acquired for garden. Therefore, the question is whether the Government can prepare a development plan and deprive the owner of the land from using that land ? There is no prohibition of including private land in a development plan but no development can be made on that land unless that private land is acquired for development. The Government cannot deprive the persons from using their private property. We quite appreciate the interest of the residents of that area that for the benefit of the ecology, certain areas should be earmarked for garden and park so as to provide fresh air to the residents of that locality. In order to provide such amenities to the residents of the area private land can be acquired in order to effectuate their public purpose but without acquiring the private land the Government cannot deprive the owner of the land from using that land for residential purpose. In the present case, it is clear that Plot No.438 belonged to the private person and it was shown as a garden in the development plan of 1966. But no effort was made by the Municipal Corporation or the Government to acquire this plot for the purpose of developing it as a garden. When it was not acquired for the purpose of garden, the owner of this land i.e. the appellants moved the Government for de-reserving this land and the Government after resorting to necessary formalities de-reserved the land by the impugned notification. All the procedures which were required under the 1966 Act were observed, the notification was issued inviting objections against de-reservation. No objection was filed by the residents of the area and ultimately a proposal was put up before the Municipal Council it also resolved that Municipal Council is not in a position to acquire the land because of the financial crunch and accordingly, the Government was intimated. Government accordingly de-reserved it and consequently, issued the impugned notification dated February 12, 1993. When finally the notification came to be published on February 12, 1993 the residents of the area woke up and brought about this public interest litigation. Section 37 of the 1966 Act empowers the Government for modification of the final development plan. It lays down that 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 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 and if the Planning authority fails to issue the notice as directed by the State Government, the State Government shall issue the notice, and thereafter modification can be issued by the State Government. Therefore, all the formalities required under the law were complied with by the authorities. In fact, the public spirited persons who have filed the public interest litigation did not file any objection to the proposed de-reservation of the area. The High Court after hearing both the parties felt persuaded because of the decision rendered by this Court in the case of Bangalore Medical Trust (supra). But with great respect the Division Bench of the High Court of Bombay did not examine the matter very closely whether the provisions of the Bangalore Development Authority Act, 1976 and that of the Maharashtra Regional and Town Planning Act, 1966 are pari materia or not. In the case of Bangalore Medical Trust, the open space reserved for park under the development scheme was converted in to a Hospital in favour of a private body by the Development authority at the instance of the Chief Minister of the State. Therefore, this Court examined the provisions of the Bangalore Development Authority Act, 1976 and after considering all those provisions, this Court held that this unilateral act of the Bangalore Development Authority at the instance of the Chief Minister of the State cannot be countenanced. In that case, the area was reserved for park and play-ground. Section 38-A of the Bangalore Development Authority Act, 1976 specifically prohibited that the authority shall not sell or otherwise dispose of any area reserved for public parks and playgrounds and civic amenities for any other purpose and any disposition so made shall be null and void. Firstly, there is no such provision under the Maharashtra Regional and Town Planning Act, 1966 and secondly, the area which is earmarked for the purpose of park and playground was not owned by a private person. In the present case, though the development plan has been prepared in the year 1966 and the area has been earmarked for the purpose of garden but no proceeding for acquisition of the present plot was ever initiated by the respondent- Municipal Corporation or by the State Government. There is no prohibition for preparing the development plan comprising of private land but that plan cannot be implemented unless the said private land is acquired by the Government for development purpose. In the present case, the area comprising in the plot No.438 belonged to the appellants and that no steps were taken to acquire the said land by the State Government or by the Municipal Corporation of Pune and the Municipal Corporation had already expressed their inability to acquire that land and therefore, the said land has been de-reserved by the State Government. Therefore, the present case has no semblance with that of the Bangalore Medical Trust case (supra). The question is whether without acquiring the land can the Government deprive a person of his use of the land ? This in our opinion, cannot be done. It would have been possible for the Municipal Corporation and the Government of Maharashtra to acquire the land in order to provide civic amenities. But the land in question has not been acquired. We are quite conscious of the fact that the open park and garden are necessary for the residents of the area. But at the same time we cannot loose sight of the fact that a citizen is deprived of his rights without following proper procedure of law. The period of deferring the quashing of the de-reservation notification for two years by the High Court was perhaps to allow the Government or the Municipal Corporation of Pune to muster up funds so as to acquire the same. But earnest hope was frustrated when no step was taken by the Municipal Corporation. The direction given by the High Court of Bombay that within this period if the respondents (the present appellants) provide necessary area, approximate in size, suitable for the purposes of garden and park as envisaged in the Development plan to the satisfaction of the Planning authority, quashing and setting aside of the impugned notification will not be operative. We fail to understand how can

the burden be placed on the appellants that they should provide suitable area in the present locality for using the same as garden or park. Rather, the burden should have been placed on the Municipal Corporation or the State Government instead of putting it on the appellants that they must provide some space for garden and park. This direction, in our opinion, appears to be wholly misconceived and we set aside the impugned order of the Division Bench. Unfortunately, this direction was reaffirmed by subsequent order passed on the clarification application dated September 8, 1999 by the Division Bench and the Division Bench has observed that since the period of two years has already expired, therefore, the notification stood quashed and the Municipal Corporation can proceed in the matter. Since we felt persuaded to set aside the direction given on September 4, 1997 by the High Court putting the burden on the appellants, therefore, the subsequent order passed by the Division Bench on September 8, 1999 also cannot be sustained. In this connection, our attention was invited to a recent decision of this Court in the case of Balakrishna H.Sawant & Ors. vs. Sangli, Miraj & Kupwad City Municipal Corporation & Ors. reported in 2005 (2) SCALE 420 wherein under the identical situation under the Maharashtra Regional and Town Planning Act, 1966, this Court quashed the reservation in respect of the land owned by private person. In that case final development plan was published reserving land for a High School and play ground owned by the private person. The grievance of the appellant was that the State had not taken any steps to acquire the land within the stipulated statutory period, therefore, the reservation had lapsed. The State Government also admitted that the reservation had lapsed and it had no power to condone the delay. However, the High Court took the view that since the Corporation has taken appropriate steps to acquire the land in question so as to give effect to the reservation, the same cannot be said to have lapsed. The matter came up before this Court by way of Special Leave petition. The respondent-Corporation took the stand that the Corporation has no money for the construction of the High School and play ground and therefore, the Corporation does not need the subject land. In this background, this Court set aside the order of the High Court and quashed the reservation in respect of the land in question owned by the appellant and allowed the appeal. Similar is the position in this case also. Since the Government and the Municipal Corporation expressed their inability to acquire the land because of lack of funds, the appellants cannot be deprived of the use of the land. Therefore, the view taken by the High Court by the orders dated September 4, 1997 & September 8, 1999 cannot be sustained & both are liable to be set aside.

However, before parting with the case we may observe that we tried to explore the possibility if the Municipal Corporation is still prepared to acquire the land then even at this point of time we can permit them to acquire the land keeping in view the larger interest of ecology and for the amenities to the public of that locality. But learned counsel for the Municipal Corporation expressed inability of the Corporation and likewise learned counsel for the State of Maharashtra. We also asked the counsel for the private respondents if they can muster sufficient funds so as to enable the Municipal Corporation to acquire the land in question but learned counsel for the respondents expressed their inability to do so. Be that as it may, still we keep it open. In case within six months if the residents of the locality can raise funds for acquisition of the land by the Government, then it will be open for them to keep this land as garden for the benefit of the locality. But we cannot sustain the present order passed by the High Court of Bombay. In case, the respondents cannot muster sufficient funds to acquire the land within six months from today, in that case, it will be open to the appellants to utilize the land for residential/ other purpose in accordance with law.

In view of our above discussion, we allow these appeals and set aside the impugned orders dated September 4, 1997 in Writ Petition No.2087 of 1993 and September 8, 1999 in Civil Application No. 6171 of 1999 in Writ Petition No.2087 of 1993 passed by the High Court of Bombay. There will be no order as to costs.