

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.867 OF 2013

Dr. Arun R. Chitale & Another .. Petitioners.
V/s.
State of Maharashtra
& Others. .. Respondents.

WITH
WRIT PETITION NO.1564 OF 2013

Maharashtra Chamber of Housing Industry .. Petitioner.
V/s.
State of Maharashtra
& Others .. Respondents.

WITH
WRIT PETITION NO.2373 OF 2013

Sugee Developers Pvt. Ltd.
& Another .. Petitioners.
V/s.
State of Maharashtra
& Others .. Respondents.

WITH
WRIT PETITION NO.339 OF 2014

Chembur Citizen's Forum
& Others. .. Petitioners.
V/s.
State of Maharashtra
& Others. .. Respondents.

WITH
WRIT PETITION (L) NO.102 OF 2014

Dadar Matunga Residents
Association & Others

.. Petitioners.

V/s.
State of Maharashtra
& Others.

.. Respondents.

**WITH
WRIT PETITION (L) NO.2990 OF 2013**

Ajit Anant Barve
& Others

.. Petitioners.

V/s.
State of Maharashtra
& Others.

.. Respondents.

Dr. Veerendra Tulzapurkar, Sr. Advocate with Mr. Virag Tulzapurkar, Sr. Advocate, Mr. Phiroz Palkhiwala, Mr. Sanjay Kadam, Ms. Apeksha Sharma, Mr. Mohanish Chaudhari with Mr. Sanjeel Kadam i/b. Kadam & Co., for the Petitioner in W. P. Nos.867 of 2013 and W.P.(L) No.2990 of 2013 and 2373 of 2013.

Mr. Ravi Kadam, Sr. Advocate with Mr. Sanjay Kadam, Ms. Apeksha Sharma, Mr. Mohanish Chaudhari and Mr. Sanjeel Kadam i/b. Kadam & Co., for the Petitioner in W.P. (L) No.102 of 2014.

Mr. Venkatesh Dhond, Sr. Advocate with Mr. Rohan Kadam, Mr. Sanjay V. Kadam, Ms. Apeksha Sharma, Mr. Mohanish Chaudhari and Mr. Sanjeel Kadam i/b. Kadam & Co., for the Petitioner in W. P. No.339 of 2014.

Dr. Milind Sathe, Sr. Advocate with Mr. D. V. Deokar, Mr. Vismay Shroff, Mr. Sachin Pandey, Ms. Debashree Mandle and Mr. Parimal Shroff i/b. M/s. P. K. Shroff & Co., for the Petitioner in W. P. No.1564 of 2013.

Mr. F. Devitre, Sr. Advocate and Mr. J. P. Sen, Sr. Advocate i/b. Dastur Dadich & Kalambi, for Respondent No.4.

Mr. S. U. Kamdar, Sr. Advocate with Ms. S. M. Modle and Mr. S. S. Pakale, for Respondent-BMC.

Mr. D. J. Khambatta, Advocate General with Mr. S. S. Joshi, AGP, for Respondent-State in W. P. Nos. 867 of 2013 and 1564 of 2013.

Mr. D. J. Khambatta, Advocate General with Smt. Geeta Shastri, Addl. G. P. with Mr. G.W. Mattos, AGP, for Respondent-State in W. P. (L) No.2990 of 2013.

Mr. Milind More, AGP for Respondent-State and Mr. P. G. Lad, for Respondent No.6 in W.P. (L) Nos.102 of 2014 and 339 of 2014.

Mr. P. G. Lad, for the Respondent-State in W. P. No.2373 of 2013.

**CORAM: MOHIT S. SHAH, C.J. &
M.S.SANKLECHA,J.**

DATE : 3 FEBRUARY 2014.

P.C:-

Rule.

All these petitions besides challenging the Constitutional validity of clause (3) of Regulation 67 of Development Control Regulation for Greater Mumbai, 1991 (DCR) also challenge the circular dated 14 August 2013 of the Municipal Corporation for Greater Mumbai (MMC or Municipal Corporation) in so far as it directs its Officers to refer all development proposals including (repairs, demolition etc) for sites, structures, precincts indicated in the 'Published new heritage list' for the grant/NOC to the Mumbai Heritage Conservation Committee (HCC). This challenge is on the basis that in the context of proper interpretation of Regulation 67 of DCR, no NOC is required in case of re-development under Regulations 33(6), 33(7), 33(8), 33(9) and 33(10) of DCR of heritage building/ sites for proposals in Grade III and Precincts.

2 Prior to 31 July 2012, the Municipal Corporation had declared 14 areas as heritage precincts. The Municipal Corporation further proposes to declare 41 more areas as heritage precincts and has invited objections to the proposals contained in the notice. The impugned circular dated 14 August 2013 of the Corporation directed its Officers to refer all development proposals to Mumbai HCC for its NOC as stated above.

3 The petitioners have submitted to the Mumbai Municipal Corporation proposals in different areas of the City which are proposed to be declared as heritage precincts for construction of

buildings. Some of them are from Shivaji Park area where 187 buildings are proposed to be declared as falling within the heritage precinct. Similarly, there are other areas like are Hindu Colony and Parsi Colony which in the aggregate have 941 buildings. Similarly, one petition is filed by the owner of building in Chembur area which is proposed to be declared as Heritage Precinct with 500 buildings.

4 The petitioners in W. P. Nos.867 of 2013,2373 of 2013, 339 of 2013 and 2990 of 2013 are either owners of buildings or Association of owners of Buildings while the petitioner in W. P. (L) No.102 of 2014 are occupants of repaircess or cessed Building. W. P. No. 1564 of 2013 is filed by Maharashtra Chamber of Housing Industry on behalf of developers of buildings in the City, which are proposed to be declared as Heritage Precincts. Although learned Counsel for the petitioners have raised various legal contentions, on facts it is also pointed out that in Shivaji Park area 17 building out of the 187 buildings have already been re-constructed. Similarly, in Hindu Colony and Parsi Colony, out of 911 buildings, 200 buildings have already been re-constructed and so also in Chembur area, out of 500 buildings, 200 buildings have already been re-constructed.

5 At this stage, the petitioners press their challenge to the directions contained in the impugned Circular dated 14 August 2013. The impugned Circular dated 14 August 2013 directs the Officers of the Municipal Corporation to refer all proposals for development, repairs, demolition etc. to Mumbai HCC in respect of the sites, structures, precincts included in the new published proposed heritage lists dated 31 July 2012. It is the petitioner's case that no permission is required of

Mumbai HCC in case of re-construction and re-development of old buildings in heritage Grade III and precincts. In support, our attention is invited to the relevant part of Regulation 67 of DCR 1991 which reads as under:-

“67 - Heritage buildings etc.

Conservation of listed buildings, areas, artefacts, structures and precincts of historical and/or aesthetical and/or architectural and/or cultural value (heritage buildings and heritage precincts).

1 *Applicability -This regulation will apply to those buildings, artefacts, structures and/or precincts of historical and/or aesthetical and/or architectural and/or cultural value (hereinafter referred to as Listed Buildings/ Heritage Buildings and Listed precincts/ Heritage precincts) which will be listed in notification(s) to be issued by the Government.*

2 *Restrictions on Development/ Redevelopment/Repairs, etc.-*

(i) *No development or redevelopment or engineering operation or additions, alterations, repairs, renovation including the painting of buildings, replacement of special features or demolition of the whole or any part thereof or plastering of said listed/heritage buildings or listed/ Heritage precincts shall be allowed except with the prior written permission of the Commissioner. The Commissioner shall act on the advice of/in consultation with the Heritage Conservation Committee to be appointed by Government (hereinafter called “the said Heritage Conservation Committee.”);*

Provided that in exceptional cases for reasons to be recorded in writing the Commissioner may overrule the recommendation of the Heritage Conservation Committee.

Provided that the power to overrule the recommendations of the Heritage Conservation Committee shall not be delegated by the Commissioner to any other officer.

(ii) *In relation to religious buildings in the said list the*

(iii) (a) *Provisions of Regulation 67 would be applicable only in Grade I and Grade II category of heritage Buildings for*

reconstruction and redevelopment of old buildings undertaken under regulations 33(6), 33(7), 33(8), 33(9) and 33(10) of these Regulations.

(b) In case of redevelopment under DCR 33(6), 33(7), 33(8), 33(9) and 33(10) of heritage buildings/ sites from Grade III and precincts – special permission from the Municipal Commissioner, Municipal Corporation of Gr. Mumbai may be obtained if the height of the building exceeds 24 mts. (excluding height of stilt on ground floor).

3 Preparation of list of Heritage Building and Heritage Precincts – The said list of buildings, artefacts, structures and precincts of historical and/or aesthetical, and/or architectural and/or cultural value to which this regulations applies shall not form part of this Regulation for the purpose of Section 37 of the Maharashtra Regional and Town Planning Act, 1966. This list may be supplemented, altered, deleted or modified from time to time by Government on receipt of proposals from the Commissioner or from the said Heritage Conservation Committee, or by Government suo motu, provided that before the list is supplemented, altered, deleted or modified, objections and suggestions from the public be invited and duly considered by the Commissioner and/or by Government.

4 to 10.....”

6 The learned Counsel for the petitioners state that in these petitions, the redevelopment is being taken up under Regulations 33(6), 33(7), 33(8), 33(9) or 33(10) of DCR 1991. Further none of the buildings involved in the petitions are classified as Grade I and Grade II category of Heritage Buildings. It is submitted that Regulation 67 of the DCR 1991 requiring the Commissioner to act on the advice of Mumbai HCC would be applicable only in case of Grade I and Grade II categories of heritage building and not in case of heritage building from Grade III or heritage precinct. It is submitted that Sub-regulation 2 (iii) (b) of Regulation 67 of

the DCR 1991 specifically provides that in case of re-development of DCR Grade III and precinct under 33(6), 33(7), 33(8), 33(9) and 33(10) of DCR 1991, special permission from the Municipal Commissioner alone is required if the height of the proposed building exceeds 24 mtrs (excluding stilt on the ground floor). It is submitted that the proposed heritage lists published on 31 July 2012 proposed to classify the heritage precincts in Shivaji Park area as grade I heritage precinct and in Hindu Colony and Parsi Colony as Grade II-A but as far as the building in question are concerned, the said heritage lists do not proposes to list any individual building in the said areas as heritage building grade I or heritage building grade II and, therefore, Regulations 67 (2)(i),(ii) or (iii)(a) will not apply. Hence, there is no question of referring the proposal for re-development of the buildings in the above areas to the Mumbai HCC. If at all the height of the proposed building is to exceed 24 mtrs (excluding stilt on the ground floor) then only special permission from the Municipal Commissioner of the Municipal Corporation would be required, but no permission of the Mumbai HCC would be required.

7 It is also submitted that in addition to 14 areas already listed by Mumbai HCC as Heritage Precincts if 41 more areas are listed as heritage precincts as proposed, then the number of buildings requiring the sanction of Mumbai HCC would be over 20000 buildings, making it impossible for the Mumbai HCC to examine the individual proposals within reasonable time and the owner of the buildings/ developers will have to wait for decades to commence re-development process.

8 The learned Counsel for the petitioners highlighted the fact that in view of unreasonable stand taken by the Municipal Corporation, many senior citizens who are occupying buildings which were constructed

more than 50 years ago have to stay in premises without the facility of lifts. Thus making it extremely difficult for them to climb stairs whenever they have to move out of their home. Alternatively, they have to be home bound all the time due to difficulty faced in climbing the stairs.

9 It is further submitted that so far the areas in question which have not been listed as heritage precincts, Regulation 67 of DCR 1991 can have no applicability. It is submitted that merely because the Mumbai HCC has made suggestions to the Municipal Corporation to list certain areas as heritage precinct, they cannot be treated as proposal within the meaning of Section 46 of the MRTP Act. Strong reliance is placed upon the decision of the Supreme Court in **S. N. Rao & Others v/s. State of Maharashtra, 1988(1) SCC 586**. The Apex Court in the above case has held that permission for development cannot be refused merely because there was a proposal of the Municipal Corporation to revise the draft development plan. It is submitted that at the highest only after the Municipal Corporation sends its proposal to the State Government to list any building as heritage building or any area as heritage precinct, then it may be considered to be a proposal within the meaning of Section 46 of the MRTP Act and not prior thereto.

10 An additional submission is made on behalf of the petitioner by Dr. Sathe, learned Senior Counsel appearing in W. P. No.1564 of 2013 i.e in the absence of any building being classified as heritage building, there could be no heritage precincts. In support, attention is invited to the definition of Heritage Building and Heritage Precincts as found in Section 2(13B) and (13C) of the M.R.T.P. Act, 1996 which read as under:-

“(13B):- “Heritage Building” means a building, possessing architectural, aesthetic, historical or cultural values which is

declared as heritage building by the Planing Authority in whose jurisdiction such building is situated;

(13C):- “Heritage Precinct” means an area comprising heritage building or buildings and precincts thereof or related places”.

11 On the other hand, learned Counsel for the Mumbai HCC has submitted that all heritage building/ sites and all heritage precincts are governed by the provisions of Regulation 67 (2)(i) of the DCR 1991. According to him it specifically provides that no development or re-development or demolition of the whole or any part of the said listed/ heritage buildings or listed heritage precincts shall be allowed except with the prior written permission of the Commissioner who shall act on the advice of/ in consultation with the Mumbai HCC to be appointed by Government. The proviso makes it clear that the Municipal Commissioner is generally bound by the advice of the Mumbai HCC because it is only for the reasons to be recorded in writing that the Commissioner of Municipal Corporation can overrule the recommendation of the Mumbai HCC. Moreover, it is submitted that the second proviso to Regulation 67 (2)(i) of the DCR 1991 specifically prohibits the Commissioner from delegating his power to overrule the recommendation of the Mumbai HCC to any other officer of the Municipal Corporation.

12 It is further submitted that Regulation 67(3) of the DCR 1991 lays down that the proposal for the listing of heritage building and heritage precinct shall not form part of DCR 1991 for the purpose of Section 37 of the MRTTP Act. Therefore, flexibility is provided for supplementing, altering, deleting or modifying the list from time to time by the Government either on its own or on receipt of proposal from the

Municipal Commissioner or from the Mumbai HCC provided the proposal is made after inviting objections. It is further submitted that Regulation 67 (10) of DCR 1991 also contemplates that there may be Grade I heritage building or Grade II and its Precincts. It is, therefore, submitted that precincts are not excluded from the operation and Regulation 67 (2)(i) by virtue of Regulation 67 (2)(b)(iii) of DCR 1991. It is submitted that the Mumbai HCC has already submitted its recommendations to the Municipal Corporation and the Municipal Commissioner is considering the objections and suggestions to the said proposals and, therefore, till the Municipal Corporation finalizes the list of heritage buildings/ precincts, no proposal for development permission should be considered by the Municipal Corporation without consulting the Mumbai HCC. Learned Counsel for the Mumbai HCC, therefore, fully supports the circular dated 14 August 2013 of the Municipal Corporation and submits that no interference is called for at this stage.

13 Learned Advocate General, appearing for the State has submitted that Regulation 67 (2) (i) of the DCR 1991 would have no application to the heritage buildings/ sites from Grade III and heritage precincts. This is in view of such buildings/ sites being fully governed by Regulation 67 (2)(iii)(b) of DCR 1991.

14 As far as the Municipal Corporation is concerned, they adopt the stand of the State Government on the interpretation of Regulation 67 (2)(i) and (ii) of the DCR 1991.

15 We have heard learned Counsel for the parties on the question of interim relief at this stage.

16 Section 22 of the MRTP Act provides that development plan

shall be indicate the manner in which the use of land in the area of planning authority (the Municipal Corporation for Greater Mumbai in this case) shall be regulated and also indicate the manner in which the development of land therein shall be carried out. In particular, it shall provide so far as may be necessary for inter alia, the following matters i.e. to say clause (i) preservation of features, structures or places of historical, natural architectural and scientific interest and educational value and of heritage buildings and heritage precincts. Further, provision to be made for grant of permission to be granted for controlling and regulating the use and development of land within the jurisdiction of a local authority including imposition of fees, charges and premium, at such rate as may be fixed by the State Government. For grant of an additional FSI or for the special permission or for the use of discretionary powers under the DCR and also for imposition of conditions and restrictions in regard to the open space to be maintained about buildings, the percentage of building area for a plot, the location, number, size, number of storeys and character of buildings and density of population allowed in a specified area, the use and purposes to which buildings or specified area of land may or may not be appropriated.

17 The DCR 1991 has been sanctioned by the State Government in exercise of its powers under Section 124B (3)(b) of the MRTP Act, 1966. The issue being considered by us is in respect of redevelopment of old buildings falling in proposed heritage precincts undertaken under Regulations 33(7),33(8), 33(9) and 33(10) of the DCR 1991 but not classified as Grade I or Grade II heritage Buildings.

18 We may clarify that the submission of the learned Senior

Counsel Dr. Sathe that to be on heritage precincts, it is necessary that at least one building be declared as heritage building is not acceptable. This is for the reason that under Section 22 of the MRTP Act, 1966, preserving Heritage includes inter alia, places of historical and cultural value. Therefore, a site such as August Kranti Maidan or Shivaji Park may not have a building and yet is a site of great historical importance and the area around such a site may be declared as a precinct.

19 Having heard learned Counsel for the parties, we find ourselves bound by the decision of Division Bench of this Court rendered on 5 May 2006 in Indian National Trust for Art & Cultural Heritage & Others v/s. The State of Maharashtra (Notice of Motion Nos.64 of 2006, 200 of 2006 and 226 of 2006 in W.P. No.1650 of 2005). In the above case, the Division Bench was dealing with the similar situation where the Mumbai HCC had forwarded the proposal for listing of 85 structures of NTC as heritage structures. On the basis of the proposal, the Municipal Corporation had issued notification inviting suggestions/objections regarding the proposals to list the concerned structures as heritage structures. Learned Counsel for the developers had raised similar contentions which have been raised by learned Counsel for the petitioners at the time of hearing the petitions for interim relief today. The Division Bench held that when the heritage committee has proposed listing a heritage building/ precinct and objections are invited with respect thereto, that will be a factor to be considered by the Commissioner when any application for development (which includes application for demolition) is made by any of the mill companies. The Division Bench accordingly took the view that the proposal under consideration of Planning Authority (i.e. Municipal Corporation) will be a proposal within the meaning of

Section 46 of the MRTP Act.

20 Even after following the aforesaid decision of the Division Bench, we find substance in the submission of learned Counsel for the petitioner that when the proposal under consideration of Municipal Corporation is not for declaring heritage building as Grade I or Grade II, the Regulation 67 (2)(i) of the DCR 1991 will have no application in view of the clear exclusion provided in Regulation 67(2)(iii)(b) of the DCR 1991. Hence, there will be no requirement for sending the proposal for re-development of building not proposed to be declared as Grade I or Grade II heritage building to Mumbai HCC. However, in view of Regulation 67 (2)(iii)(b) of DCR 1991, special permission of the Municipal Commissioner will be required only if the height of the proposed building is in excess of 24 mtrs. (excluding stilt on the ground floor).

21 In view of the above, we are clearly of the view that the Circular dated 14 August 2013 of the Mumbai Municipal Corporation requiring proposals for redevelopment under Regulations 33(6), 33(7), 33(8), 33(9) and 33(10) of the DCR 1991 of every building to be sent to Mumbai HCC even if they are not proposed to be declared as Grade I or Grade II heritage buildings in the Notice dated 31 July 2012 published by the Municipal Corporation is not sustainable. Therefore, the Circular dated 14 August 2013 is stayed to the above extent.

CHIEF JUSTICE

(M.S.SANKLECHA,J.)