



Shephali

REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION (L) NO. 22568 OF 2023

RAHUL JAIN,
Age: 48 years, Occ: Ophthalmologist
An Adult Indian Inhabitant, having his
address at A-1205, Satra Park, Shimpoli
Road, Kastur Park, Borivali (West)
Mumbai 400 092.
Mobile No.:9223333541
Email: drrahulj@gmail.com

... PETITIONER

~ VERSUS ~

SHEPHALI
SANJAY
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SHEPHALI
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Date: 2024.01.29
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- 1. MUNICIPAL CORPORATION OF
GREATER MUMBAI,**
A Statutory Corporation duly
constituted under the Mumbai
Municipal Corporation Act, 1888,
4th Floor, Annexure Building,
Municipal Head Office,
Mahapalika Marg, Fort,
Mumbai 400 001.
- 2. THE DEPUTY CHIEF ENGINEER,**
Building and Proposal Department
Western Suburb, R/C Ward, 90 Feet
Road, Asha Nagar, Kandivali (East),
Mumbai 400 101.

3. **THE CHIEF FIRE OFFICER,**
(Region-2) Mumbai Fire Brigade,
Wadala Command Centre Building,
1st Floor, Wadala Fire Station,
Shaikh Mistri Dargah Road,
Antop Hill, Wadala, Mumbai 400 037.
4. **TRIVENI DEVELOPERS,**
a Partnership Firm registered under the
Indian Partnership Act, 1932 having
their Address at, A-102, Vedant Raj
Maitri Apartments, Eksar Cross Road,
Yogi Nagar, Borivali (West),
Mumbai 400 092.
Having their alternate address at:-
807, 8th Floor, Gold Crest Business
Centre, LT Road, Borivali (West),
Mumbai 400 092.
5. **H RISHABRAJ REALTY,**
A Partnership Firm registered under
the Indian Partnership Act, 1932 having
their Address at 2nd Floor, 63 Gold
Medal Avenue, Next to Patel Petrol
Pump, SV Road, Goregaon (West),
Mumbai 400 104.
6. **RESERVE BANK OF INDIA
EMPLOYEES' ASHISH
COOPERATIVE HOUSING
SOCIETY LTD,**
A society registered under the
Maharashtra Cooperative Society Act
1960, Having registration No.
BOM/HSG/4808 OF 1976,
Having address at 3/624, Kastur Park,
Borivali (West), Mumbai 400 092.

... RESPONDENTS

APPEARANCES

FOR THE PETITIONER	Dr Abhinav Chandrachud, with Janay Jain, Diksha Shirodkar & Sachin Mhatre, i/b Mhatre Law Associates.
FOR RESPONDENTS- MCGM	Ms Racheeta Dhura, with Rupali Adhate.
PRESENT	Mr Sandesh Rane, Dy Chief Fire Officer, Mumbai Fire Brigade. Mr Swapnil Patil, Assistant Engineer, Building Proposals Dept (R/C Ward).

**CORAM : G.S.Patel &
Kamal Khata, JJ.**

DATED : 18th January 2024

ORAL JUDGMENT (Per GS Patel J):-

- 1. Rule.** Returnable forthwith.
- 2.** The service report is on file. The Affidavit of Service shows service by hand delivery to the Chairman of the 6th Respondent Society. The name of the 6th Respondent is called out. None appears. Our order of 12th January 2024 was precisely to give the Society an opportunity to appear. We said in that order that if despite notice and especially notice through Court, the Society chose to stay away, it would not be heard to complain at a later stage. The Society has been served more than once. It must now accept the consequences for its non-appearance. We will proceed on the

footing that its failure to appear means that the Society is not opposing the relief sought by the individual Petitioner.

3. Our order of 12th January 2024 summarised the issues involved. This relates to stack parking in the premises of the Society. This stack parking was a later addition. It was required because the developer submitted amended plans to put up two additional floors. Normal building regulations required that these two floors be provided parking. There was not enough physical space in the Society premises to provision additional parking for these two floors, and therefore came this proposal for stack parking. Our previous order notes some of this. It says:

1. The Petition is by an individual. He is a medical practitioner. His specific complaint is that there is now a provision for what is called cantilevered stack parking that is not only dangerous but almost completely blocks access to his premises. ...

2. But the Society has never appeared before us. For some reason that we cannot understand, this Petition has been vigorously opposed by the Municipal Corporation of Greater Mumbai (“MCGM”). **We will have quite a lot to say about the Affidavits filed by the MCGM and by the Deputy Chief Fire Officer. This is because, from the material that is now available, including photographs annexed to the MCGM’s own Affidavit, it is abundantly clear that stack parking as provided completely obstructs the entrance driveway of the Society building and obstructs significantly even foot access to the Petitioner’s premises. It is pointless to get into a dispute about whether an “ambulance” can enter this and pass under the cantilever. The controversy is needless because in answer the MCGM annexes photographs**

that prima facie purport to show an undersized ambulance. It is common ground, however, and the Chief Fire Safety Officer is present in Court, that no fire tender can possibly enter this driveway. We reject out of hand here and now the argument that access by fire engines is unnecessary because the building is less than 13 floors. We know of no principle in law by which the fire safety of those living in buildings of less than 13 floors can be said to be less important than those living in highrises. Such a submission, if made, would be thoroughly irresponsible in a city like Mumbai. We are also rejecting the argument that merely because the MCGM has collected a premium therefore all norms of safety, public safety, fire safety and health etc can be abandoned. The suggestion that every violation, transgression or deviation from well established safety norms can be condoned in exercise of discretionary powers simply by taking money is so utterly reprehensible that we dare say that no Court would ever countenance it. Yet we find it on Affidavit.

3. The removal of the cantilevered parking will affect the Society. We propose to give it one more opportunity to remain present. There is before us no doubt that the Petitioner purchased his premises in 2019. There was an amended plan submitted by the developer in 2021. This involved the construction of two additional floors. That meant providing additional parking. Hence, the provision in this manner for stack parking. The Petition points that this cantilevered stack parking is a danger even to residents, older people and children of the Society itself. But we would need the presence of the Society or at least we would need to give the Society one final opportunity of remaining present. If despite this further notice it does not, then it will not be heard to complain that it was denied an opportunity of a hearing. It will most certainly not be allowed to contend

that any order than we then pass is “ex parte”, i.e., without notice.

(Emphasis added)

4. We also had before us a compilation of documents with photographs. There is now an additional Affidavit of the Petitioner from page 425 that references this compilation. That compilation was earlier tendered to us and we have taken it on record. It is to be maintained as part of the Court record and is not to be sent for destruction.

5. To avoid all ambiguity, we reproduce as attachments to this order some of the photographs from pages 1 to 8 of this compilation to give a visual image of the problem encountered by the Petitioner.

6. What is of immediate consequence as a matter of public law for us is Regulation 6 of the Development Control And Promotion Regulations 2034 (“DCPR 2034”). An extract is helpfully provided at Exhibit “1” at pages 441 and 442 and we reproduce this portion.

“6. Discretionary powers

(a) In conformity with the intent and spirit of these Regulations, the Municipal Commissioner may:—

(i) modify the limit of a zone where the boundary line of the zone divides a plot, village boundary, CS/CTS No. as per records of revenue by a special permission; and

(ii) authorize the erection of a building or the use of premises for a public service undertaking, Government, Semi-Government, Local Bodies for public utility purposes only, where he finds such an

authorization to be reasonably necessary for public convenience and welfare, even if it is not permitted in any land use classification/zone by a special permission.

(iii) decide on matters where it is alleged that there is an error in any order, requirement, decision, determination made by any municipal officer under delegation of powers in application of the Regulations or in interpretation of these Regulations:

(iv) interpret the provisions of these Regulations where a street layout actually on the ground varies from the street layout shown on the development plan;

(b) In specific cases where a clearly demonstrable hardship is caused, the Commissioner may for reasons to be recorded in writing, by special permission permit any of the dimensions prescribed by these Regulations to be modified, except those relating to floor space indices unless otherwise permitted under these Regulations, provided that the relaxation will not affect the health, safety, fire safety, structural safety and public safety of the inhabitants of the building and the neighbourhood.

(c) Any discrepancy/error in regard to location/size/use of designations and any relocation of reservation approved by the competent authority along with its development at its relocated position if not reflected in this Development Plan and that are brought to the notice of MCGM may, after due enquiry, be corrected with the special permission of the Commissioner.

Provided that the Municipal Commissioner shall issue a well-reasoned order of such correction, along with the authenticated part plan showing the location under his seal and signature, with a copy to the Govt., Director of

Town Planning Maharashtra State, Deputy Director of Town Planning, Greater Mumbai for information and record purpose. The proposal of Development Plan shall stand modified to that effect.”

(Emphasis added)

7. The provision for the exercise of discretion by the Municipal Commissioner is not new. It existed in DCR 1991 although its exact form today may be somewhat different. What is important is that DCPR 6(b) speaks of the exercise of a special discretion “where a clearly demonstrable hardship is caused”. There are two dimensions to this. The first is an interpretation of this clause itself. The second is a consideration of the conditions in which this discretion can be exercised because it is by no means unfettered or uncanalised discretion.
8. Taking the second point first, the discretion can be exercised on a clear demonstration of hardships with reasons to be recorded in writing, will take the form of a special permission, and cannot extend to Floor Space Index (“FSI”) unless otherwise permitted.
9. But this is all subject to the proviso that this relaxation, i.e., the exercise of this discretion “will not affect” the health, safety, fire safety, structural safety, and public safety of the inhabitants of the building and the neighbourhood.
10. Obviously, therefore, if it is demonstrated that the relaxation adversely affects safety, fire safety, and public safety that no such

permission can be granted or if granted is liable to be immediately revoked.

11. But the first point is perhaps a little more contentious. Clearly, 'demonstrable hardship' must be read in the context of the ambit and purpose of the Development Control and Promotion Regulations and for whom these are intended. They cannot possibly lend themselves to an interpretation that the "hardship" can be equated to lesser profit by a developer. Reduced profit is not hardship. It is simply less money. Without doing very considerable and irretrievable damage to the language, it is not possible to interpret the words hardship in DCPR 6(b) as being an inconvenience, loss of profit, or any other economic or financial disadvantage to a builder or a developer.

12. It is another matter if this hardship is one that is claimed by the Society itself for its own purposes. Equally, such a hardship may be claimed by the owner or the occupant of the structure. After all, it is for the citizens (and despite all appearances and indications to the contrary) not developers in Mumbai for whom the DCPR is at least supposedly intended.

13. What has happened here is that the stack parking has completely undermined the safety, fire safety, and public safety not only of members of the Society but children, older people, and perhaps even passers by. As we noted on 12th January 2024, it is utterly useless for the MCGM or its Chief Fire Officer ("CFO") to show us a photograph of some undersized ambulance passing under

the stack parking. A regular ambulance will not fit. The CFO himself admits that no fire tender can go past the stack parking. When faced with the question from the Bench what then is to be done if there is a fire in the building, the answer we received was indeed shocking. It was solemnly suggested that since the building is less than 13 floors no fire engine access is necessary.

14. There are many buildings in Mumbai especially in smaller and more crowded areas that are no more than ground and four floors. We dare say that this statement of the fire officer if communicated to anybody in Government, especially those who are who are about to seek votes in the next elections, would result in very considerable perturbation. We can hardly countenance a government officer going into a congested area in Girgaum, Dongri, or Gamdevi and saying that no fire engine will ever come to the rescue and still hope to escape from those areas unscathed. There is no principle in statute let alone in equity by those who live in expensive high rises have greater safety priority than those who do not. The sooner the MCGM's CFO understands it the better.

15. The question of relaxation of fire safety norms is one that is continuously debated. There may be many things to be said about the form that the present DCPR has taken because we find in other cases that there are indeed relaxations that are inexplicable. The number of stairwells have been reduced in taller buildings. The minimum width of those stairwells have been reduced. Instead of two fire lanes on either side of a building, there is a provision that only one is necessary. We will let that pass.

16. The question of safety is one of several that occupied the Supreme Court's attention in its decision in *Municipal Corporation of Greater Mumbai & Ors v Kohinoor CTNL Infrastructure Company Pvt Ltd & Anr.*¹ Speaking for the Bench, Justice Gokhale (as he then was) held:

Adequate access for the fire engines as an essential requirement

43. Having noted the submissions of all the counsel in this behalf, what we find is that whereas the provisions for the mid-rise buildings up to 13 floors are somewhat adequate, those beyond are required to be strictly implemented from within as well. The provisions for the refuge floor and various requirements from within have to be strictly scrutinised and insisted upon. **That apart the second proviso to DCR 43(1)(A) cannot stand scrutiny of minimum safety requirement.** If the access of 6 m is required from at least one side within the property for the fire engine to enter and move inside, we fail to see as to how in redevelopment proposals under DCR 33(7) where the plot size is up to 600 sq m, open space of 1.5 m can be said to be adequate. As fairly pointed out by Mr Bhatt, the buildings on such plots can also go up to 20 floors, depending upon the number of flats for the occupants to be provided for. If that is so, it is necessary to have an open space of the width of 6 m within the property for the fire engine to enter the property at least from one side which is so provided for every other building.

44. It is true that in *Jayant Achyut Sathe [Jayant Achyut Sathe v. Joseph Bain D'Souza, (2008) 13 SCC 547]* the challenge to the five feet open space in the schemes under DCR 33(7), came to be rejected. However, as can be seen

1 (2014) 4 SCC 538.

from para 49 of the judgment, it was principally rejected on the ground that the challenge was hopelessly delayed since this provision restricting the open spaces in these schemes had been in existence since 1984. **The question of fire engines not being able to go inside such plots, was raised in the Bombay High Court, but this Court has not gone into that aspect in the said judgment. We are looking into the issue of the side space on the backdrop of the failure of the Fire Brigade to quickly extinguish the fire even in the six-storeyed Secretariat Building in Mumbai, which has sufficient side spaces on all sides. Not providing a minimum space of 6 m which makes room for the fire engine to access the building amounts to violation of the right to life and equality of the residents of these buildings, by not providing the same standard of safety to them which is available to residents of all other buildings.** It is true that some of these plots under the DCR 33(7) schemes are small plots and are in congested areas. But if that is so, nothing prevents the State Government from taking over such schemes for which it can finance from the overall cess collection. In such cases, it may have to accommodate only the existing occupants. This can also be achieved by calling upon such occupants to partly contribute towards the construction cost. **But human life cannot be made to suffer only on the ground that in the redevelopment scheme sufficient access cannot be provided for the fire engine to enter within the plot even from one side.**

45. We are, therefore, of the view that the second proviso to DCR 43(1)(A) is discriminatory as against the occupants of the plots up to the size of 600 sq m and therefore violative of Article 14 of the Constitution of India. The provision is likely to lead to a hazardous situation, affecting the life of the occupants, and therefore violative of Article 21 of the Constitution. We,

therefore, hold the provision to be bad in law. If the fire is to be extinguished at the earliest the fire engine must be able to reach the spot of fire, without any delay. Manoeuvrability of the fire engine is, therefore, of utmost importance. As such, most of the city roads are very narrow. On top of that if there is no adequate space for the fire engine to enter the property, the situation will become worse. We are clearly of the view that even for redevelopment proposals of plots up to the size of 600 sq m under DCR 33(7), an open space of the width of 6 m within the property which is accessible from the road on one side, will have to be maintained unless the building abuts roads of 6 m or more on two sides, or another appropriate access of 6 m to the building is available apart from the abutting road. This will be subject to the decision of the Chief Fire Officer in writing. Besides, we also feel that it is necessary to direct that the Fire Department must insist from the developer/society of all the buildings, to certify at least once in six months that the access to the building, the internal exits and the internal fire-fighting arrangements are maintained as per the expectations under the DCR, the norms of the Fire Department, and must check them periodically, on its own.

(Emphasis added)

17. The findings of the Supreme Court thus clearly state that planning norms established for safety cannot be compromised. This ties in with both parts of DCPR 6(b): the question to whom hardship can validly be said to be caused and the overriding effect of the proviso. Consequently, viewed in reverse, not only must there be a demonstration of hardship to somebody who is entitled to claim such hardship, but it must also be demonstrated that there is no

compromise to the health, safety, fire safety, structural safety, and public safety.

18. One final dimension remains. These considerations in the proviso are not generalised. These concerns of health, safety, fire safety, etc are specifically meant for the benefit of two classes: the inhabitants of the building and the neighbourhood.

19. Viewed from this perspective it is impossible to see how the health safety and fire safety of the inhabitants of the Society building are not compromised by this stack parking. It is impossible to see how this relaxation does not adversely affect the neighbourhood.

20. The prayers in this Petition read as follows:

“(b) That the Hon’ble Court be pleased to issue a Writ of Mandamus or any other appropriate Writ, to declare the approved amended layout plan bearing No. CHE/A-5271/BP (WS)/AR dated 29/07/2021 passed by the Respondent No 1 and 2 and Amended Fire NOC dated 24/01/2019 bearing No. CHE/A-5271/BP (WS)/AR-CFO passed by Respondent No 3 as being illegal, to the extent permission and or authorization is given to the Respondent No 4 and Respondent No 5, for installing/erecting seven (7) Mechanized Cantilever Car parking’s in Open Space in the premises of the said Building viz., “RBI Employees Ashish Co-operative Housing Society” situated at plot bearing F.P. No. 620A T.P.S III Borivali, Kastur Park, Road No 17, Borivali (West), Mumbai 400 092.

(c) That the Hon’ble Court be pleased to issue a Writ of Mandamus or any other appropriate Writ, directing the Respondent No. 1 and 2 to either relocate and or to remove

the illegally installed seven (7) Mechanized Cantilever Car parking's from the open space of the Building known as "RBI Employees Ashish Co-operative Housing Society" situated at plot bearing F.P. No. 620A T.P.S III Borivali, Kastur Park, Road No. 17, Borivali (West), Mumbai 400 092, as the seven (7) Mechanized Cantilever Car parking's installed by Respondent No. 4 and 5 are against the rules and regulations established by law and possess grave threat and risk to the life and limb of the Petitioner, his incoming/outgoing patients, Society Members, as well as public in general.

(d) That the Hon'ble Court be pleased to issue a Writ of Mandamus or any other writ, order or direction in the nature thereof directing Respondent No 1 and No 2 to comply with the conditions pertaining to 'Deficiency in Open Space' stipulated/highlighted by Respondent No 3 in the form of 'Note' while issuance of Amended Fire NOC dated 24/01/2019 and further direct Respondent No 1 to Respondent No 3 to strictly comply with the provisions of DCPR 2034 Regulation 41 sub-regulation 2 table A, Regulation 41 sub-regulation 9, Regulation 44(6)(d), Model Building Bye-Law 2016 regulation 4.25, NBC 2016, MCGM Circular No. CHE/DP/110/Gen dated 2019-20 Regulation No. 6 and the Maharashtra Fire Protection and Life Safety Measures Act, 2006.

21. Accordingly, we have no hesitation in making Rule absolute in terms of prayer clauses (b), (c) and (d). The MCGM will send a notice to the owner of the Society to remove the illegally installed seven mechanised cantilevered car parking spaces.

22. We understand that the absence of these cantilevered car parking spaces may affect the legitimacy or the continuance of the

additional floors constructed by the developer. It is open to the occupants/members occupying the additional floors of the building and the Society to make an appropriate application to the MCGM (if necessary, on payment of penalty) to dispense with the condition of providing additional car parking within the Society premises or to propose some other viable alternative within the precincts of the Society property.

23. We clarify that we are not ourselves dispensing with the municipal requirement that additional floors must have in-house car parking spaces. There may be various engineering solutions to this, and it is not for us to specify what those solutions should be. We have only held that the proposal granted by the developer for this kind of stack parking is not one that is acceptable even according to the DCRs.

24. Finally, we note that one other facet highlighted by the Petitioners is that the stack parking has obstructed access to his consulting rooms. Indeed, it has. That is clear from the photographs. But we have not taken this to be the central or even the dispositive reason for the order that we have made on the Petition. Our concern is and has been much larger. To put it another way, this Petitioner could have come to Court for the very same relief even if his access had *not* been obstructed and we would have made the same order.

25. There is another prayer in regard to the conversion of the Petitioner's premises from use as a bank for an eye hospital day care

centre. That has nothing to do with our principal concern. We can only direct the MCGM to take up that application for change of permitted user and to dispose it of on merits and in accordance with law at the earliest and in any event, within three weeks from today.

26. We expect the MCGM to act with all possible dispatch. We specifically grant liberty to the Petitioner to apply, should the need arise.

27. The Petition is disposed of in these terms. In the facts and circumstances of the case, there will be no order as to costs.

(Kamal Khata, J)

(G. S. Patel, J)















