

FORWARD CONSTRUCTION CO. & ORS. ETC. ETC.

v.

PRABHAT MANDAL (REGD.) ANDHERI & ORS. ETC. ETC.

NOVEMBER 26, 1985

[R.S.PATHAK, O. CHINNAPPA REDDY AND R.B. MISRA, JJ.]

Maharashtra Regional Town Planning Act & Building Regulations - Regulation 3, Proviso - "Change of user" - Meaning of.

Code of Civil Procedure, 1908, s.11, Explanations IV, VI and s.91 - Principle of res-judicata - Applicability to public interest litigation - "Public right" - Meaning of.

Public Interest Litigation - Res-judicata - Principle of - Applicability to such litigation.

Words & Phrases - "Change" and "Public right" - Meaning of - S.11, Civil Procedure Code, 1908.

Under the development plan for Bombay a plot of land was reserved for a bus depot of the Bombay Electricity Supply & Transport Undertaking. The BEST Committee passed a Resolution on 18th January, 1982 approving a proposal under which a part of the plot was to be used for construction of two buildings that will augment the income of the Corporation which could be used for the purpose of construction of staff quarters. Under the proposal the BEST would, on the one hand get a cash amount of Rs.99.0 lacs in the forms of non-refundable premium from the builder in addition to the regular income from the tenants of the two buildings and on the other hand it would not be required to make any capital expenditure for the construction of the project. Thereafter, an advertisement came to be published in newspapers inviting offers from the interested parties to develop the property. In addition to the said advertisement, notices were also forwarded to 22 well-known builders out of whom 12 builders purchased the tender forms. Pursuant to the advertisement and the notices, two tenders were received out of which one was sent by respondent 7, Forward Construction Company and another by Deep Construction. The tender of respondent 7 being higher than that of Deep Construction, was accepted by the BEST Committee on 31st March 1982.

One Mr. Thakkar filed writ petition before the Bombay High Court challenging the right of the BEST to use the land for a purpose different from the one for which it had been reserved and

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designated under the development plan as well as the town planning scheme on the ground that it had no right to use it for commercial purpose. The right of the BEST to enter into a contract with the builder was also challenged. A single Judge dismissed the petition holding: (1) that the substantial portion of the acquired plot was being utilised for a purpose for which it was acquired and the commercial use to which the small portion was being put would substantially augment the coffers of the Corporation for the benefit of the public at large; (2) that the value charged by the BEST for allowing use of its property was not grossly inadequate and that sufficient publicity was given before inviting offers; and after having rejected the various pleas taken by the petitioner in the case, he observed that the petitioner was not an independent-minded citizen solely inspired by the laudable motive of protecting public interest and that the allegations in the petition indicated that he had been set up by a disgruntled builder who purchased the tender document but did not give an offer. The matter was taken up in appeal but the Division Bench dismissed the same after hearing all the parties.

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After the dismissal of the aforesaid appeal, respondents Nos. 1 to 6 in civil appeal no. 2311, filed a similar petition under Article 226 of the Constitution. The writ petition was summarily dismissed by a Single Judge. However, the appeal filed by the respondents was allowed by a Division Bench which issued a writ of mandamus directing appellants 1 to 4 in civil appeal No. 2311, not to use the plot reserved for BEST bus depot for commercial purpose or for any purpose other than the purpose for which the said plot of land was reserved. The plea of res-judicata was rejected for two reasons, namely; (1) that in the earlier writ petition the validity of the permission granted under Rule 4(a)(1) of the Development Control Rules was not in issue; and (2) that the earlier writ petition filed by Thakkar was not a bona fide one inasmuch as he was put up by some disgruntled builder. The appellant's review petition also failed.

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Allowing the appeals and dismissing the special leave petition,

HELD: 1(1) The High Court was not justified in allowing the writ petition only on the basis of the proviso to Building Regulation No.3. The proviso to Building Regulation No.3 requires that the change of user of the sanctioned plan can be made only after the modification of the development plan. The key word in this regulation is 'change'. The general meaning of the word

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A 'change' is to make or become different, to transform or cover. If the user was to be completely or substantially changed only then the prior modification of the development plan was necessary.

B In the instant case, the user of the plot has not been changed. It has been used for a bus depot combined with a commercial use to augment the income of the Corporation for public purpose. In this view of the connotation of the word 'change' the proviso has no application to the present case. [784 D; 785 A-C]

C 1(ii) It cannot be said that the plot has been used for a different purpose from the one for which it had been acquired. All that can be said is that a part of the plot is being used for constructing two buildings which would augment the income of Bombay Municipal Corporation that could be utilised for the public purpose. The plot is being substantially used for the purpose for which it had been acquired. The additional use of the property will not make the use of the property for altogether a different purpose. The purpose for which the plot was earmarked remains intact, that is, for the construction of a bus depot. The other public interest sought to be achieved by the construction of the two buildings in addition to the bus depot is equally important. [781 D-E; G]

E 2(1) Explanation IV to s.11 C.P.C. provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue, it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided. The High Court was therefore not right in holding that the earlier judgment would not operate as res-judicata as one of the grounds taken in the present petition was conspicuous by its absence in the earlier petition. [779 E-G]

2(ii) It is only when the conditions of Explanation VI to s.11 are satisfied that a decision in the litigation will bind all persons interested in the right litigated and the onus of proving the want of bona fides in respect of the previous litigation is on the party seeking to avoid the decision. The words "public right" have been added in Explanation VI in view of the new s.91 C.P.C. and to prevent multiplicity of litigation in respect of public right. [780 C]

2(iii) It cannot be disputed that s.11 applies to public interest litigation as well in view of Explanation VI but it must be proved that the previous litigation was the public interest litigation not by way of a private grievance. It has to be a bona fide litigation in respect of a right which is common and is agitated in common with others. [780 C-D]

In the instant case, the High Court in the earlier writ petition had recorded a finding that it was not a bona fide litigation and that the petitioner in that case had been put up by a disgruntled builder. Therefore, this finding, excludes the application of s.11 C.P.C. [780 E]

3. Public interest law activities at times champion one public interest which clashes with another public interest thus benefiting one segment of public at another's expense.

In the instant case, the avowed function of the Corporation is the improvement of Greater Bombay. The plot in question admittedly lies in a commercial zone and if any facilities are given to the people of that locality providing for commercial offices those facilities would go towards the improvement of Bombay. It cannot, therefore, be said that the transaction was outside the Bombay Corporation Act. [781 F; 782 C-D]

4. If commercial activities are to be pin-pointed in a commercial zone and for that purpose the Municipal Corporation takes a step to provide accommodation for commercial purposes it cannot be said that the property of the Corporation was being acquired or held for purposes other than the purposes of the Act. [783 B]

Collins English Dictionary and Oxford Dictionary referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2310-2311 of 1984 etc.

From the Judgment and Order dated 14.11.1983 of the Bombay High Court in A. No. 644 of 1982 and O.S.W.P. No. 2412 of 1982.

A Parimal Shroff, Arun K. Sinha, K.K. Singhvi, P.H. Parekh,
M.K. Nesari and Miss Indu Malhotra for the Appellants.

V.N. Ganpule, S. Naphade and Mrs. Urmila Sirur for the
Respondents.

B The Judgment of the Court was delivered* by

MISRA, J. The present connected appeals and the special
leave petition to appeal are sequel to a public interest
litigation and are directed against the judgment of the High
Court of Bombay dated 14th November 1983 allowing a petition
under Article 226 of the Constitution.

C Public interest litigation is a comparatively recent
concept of litigation but it occupies an important status in the
new regime of public law in different legal systems. By its very
nature the concept of public interest litigation is radically
different from that of traditional private litigation. Ordinary
D traditional litigation is essentially of an adversary character
where there is a dispute between the two litigating parties, one
making the claim of seeking relief against the other and the
other opposing such claim or resisting such relief. While public
interest litigation is brought before the Court not for the
purpose of enforcing the right of one individual against another,
as happens in the case of ordinary litigation, it is intended to
E prosecute and vindicate public interest which demands that
violation of constitutional or legal rights of a large number of
people, who are poor, ignorant or socially and economically in
disadvantaged position, should not go unnoticed, unredressed for
that would be destructive of the rule of law. Rule of law does
not mean protection to a fortunate few or that it should be
F allowed to be prosecuted by vested interest for protecting and
upholding the status-quo. The poor too have a civil and political
right. Rule of standing evolved by Anglo Saxon jurisprudence that
only a person wronged can sue for judicial redress may not hold
good in the present setting. Therefore, new strategy has to be
evolved so that justice become easily available to the lowly and
G the lost. Law is not a closed shop. Even under the old system it
was permissible for the next friend to move the court on behalf
of a minor or a person under disability or a person under
detention or in restraint. Public interest litigation seeks to
further relax the rule on locus standi. This Court in **S.P. Gupta**
v. Union of India, [1982] 2 S.C.R. 365, dealing with the question
H of public interest litigation observed :

"It may therefore now be taken as well established that where a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of breach of any fundamental right of such person or determinate class of persons, in this Court under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons."

The present is a typical case of public interest litigation and arises in the following circumstances.

The development plan for Bombay was sanctioned by the State Government on 8th August 1966 and the verified Andheri Town Planning Scheme framed under the Maharashtra Regional Town Planning Act, came into force, after the repeal of the Bombay Town Planning Act, this effect from 7th January 1967 and the Scheme was finally sanctioned on 11th June 1970. Under the development plan final plot No. 14 was reserved for a bus depot of the Bombay Electricity Supply and Transport Undertaking (hereinafter referred to as the 'BEST'), owned and run by the Bombay Municipal Corporation (hereinafter referred to as 'BMC').

The said plot originally belonged to one Amarsi and after a prolonged litigation the said land admeasuring 4657.10 sq. mtrs. was acquired under the provisions of the Land Acquisition Act, 1894 and the BMC through the BEST had to pay a sum of Rs. 35,00,000 as compensation pursuant to the award given by an arbitrator appointed by consent of the parties and the BEST took possession of the same on 18th February, 1978.

It appears that the General Manager of the BEST Undertaking laid before the BEST Committee a proposal in his letter dated 4th August, 1981. In his opinion of the BEST provided only a bus depot on the said plot the total investment would be Rs.45,00,000 inclusive of the cost of the land and the return from the

A investment would be nothing except the rent from the canteen
vender. The General Manager, therefore, proposed to the said
committee that if an additional investment of Rs.50,00,000 on the
construction of two buildings was made, the BEST would get a
return to the tune of Rs.8,50,000 per annum. He referred to the
B two buildings as 'A' and 'B' on the plan which was annexed with
his letter. The 'A' building was to have five floors with the
ground floor on stilts and building 'B' was to have a ground and
two upper floors with a mezzanine floor and the first floor.
Building 'B' was also partly to be on stilts to provide for car
parking. The calculation made by the General Manager was on the
footing that a carpet area of 22,500 sq.ft. could be spared after
meeting the needs of the BEST bus depot and that space could be
C let out for offices and show rooms etc. from which the BEST could
expect an overall minimum rent of Rs.3 per Sq. ft. exclusive of
taxes resulting in a net profit of Rs.8.50 lacs per annum.

It, however, appears that the Best Committee referred back
the proposal of the 4th August, 1981 to the General Manager and
he, in the light of discussions with the members of the BEST
D Committee, put up two alternative proposals vide his letter dated
17th September, 1981. The salient features of the first proposal
were that offers from builders were to be invited by public
advertisements for construction of the entire complex as per BEST
plans and specifications by the builder at his own cost which was
estimated at Rs.60.0 lacs. Under the said proposal the builder
E was to make his own arrangements for finance and materials inclu-
ding steel, cement etc. The proposal further indicated that as
the builder's maximum investment would amount to Rs.159.0 lacs he
may in lieu thereof be given a right to dispose of the property
to the users of his own choice. Under that proposal the builder
was to make an annual payment to the BEST to cover repairs, main-
F tenance and other costs. The builder making the highest payment
was to be selected and the premium was put at the rate of Rs.200
to Rs.250 per sq. ft. of the available F.S.I. On that basis it
was estimated that the floor space available being 39,592 sq.ft.,
at the rate of Rs.200 to Rs.250 per sq.ft. a sum between Rs.79.0
lacs to Rs.99.0 lacs could be received by BEST, in addition to
G making a full-fledged bus depot free of cost. The General Manager
in the said letter, however, also pointed out the draw-backs of
his proposal and therefore an alternative suggestion was also
made by him whereunder the BEST may invite offers directly from
the prospective tenants for a period of 30 years at a time and
after the expiry of 30 years the tenants were to have an
H option of renewal for a further period of 30 years but at

a revised rate to be fixed by the BEST taking into consideration the prevailing market price. Under the alternative proposal a premium of Rs.99.0 lacs was to be received directly from the tenants and after deducting the cost of the whole complex, which was expected to be Rs.60.0 lacs the BEST would get a net amount of Rs. 39.0 lacs in addition to the revenue of Rs.8.46 lacs per annum by way of rent or compensation from the tenants.

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The final proposal which, however, emerged as a result of discussion with the BEST Committee was the one contained in the letter of the General Manager to the BEST Committee dated 14th January, 1982. Under this proposal the builder was to pay to the BEST non-refundable premium at the rate of Rs.250 per sq.ft. of 'FSI' allowed to be used. The builder was to construct at his cost two buildings including the bus depot, yard concreting, lighting etc. and hand them over free of cost to the BEST within two years after entering into the contract and the plans and specifications were to be given by the BEST. The builder was to recommend tenants for 23500 sq.ft. carpet area and the BEST was to grant lease to the tenants nominated by the builder subject to approval by the General Manager at the rate of Rs.1 per sq.ft. of the carpet area. The lease was renewable for a further period of 30 years and that the rent was to be at the rate of Rs.2 per sq.ft. The user was to be such as was allowed under the development control rules. The builder was to pay the premium in two instalments, the first instalment of 50 per cent before signing the agreement and the remaining 50 per cent within 18 months after the first payment but before the completion of the project.

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The effect of this proposal was that the BEST would on the one hand get a cash amount of Rs.99.0 lacs in the form of non-refundable premium and on the other hand would not be required to make any capital expenditure for the construction of the project. A net income of Rs.2.82 lacs per year for 30 years amounting to Rs.84.60 lacs, and for the next 30 years at the rate of Rs.5.64 lacs per year amounting to Rs.169.20 lacs would be earned by the BEST. Under the said project the BMC or the BEST would gain in the first 60 years period about Rs.412.0 lacs as against Rs.159 lacs and would not be required to supply any cement for the project. This proposal was approved by the BEST Committee by its resolution dated 18th January, 1982.

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The follow up proceedings started thereafter and an advertisement came to be published in the Times of India and

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- A various other newspapers on 10th February 1982 inviting offers from the interested parties to develop the BEST property on certain terms and conditions contained in a document which could be obtained from the Engineer-in-Charge (Civil) of the BEST. In addition to the said advertisement in the newspapers, notices were also forwarded to 22 well-known builders out of whom 12
- B builders purchased the tender forms on payment of Rs.1000 each.

The parties hereinafter are referred to in accordance with their position in C.A. No. 2311 of 1984.

- C Pursuant to the advertisement and the said notices two tenders were received, one was sent by M/s. Forward Construction Co., respondent No.7, a partnership firm, and the other by M/s. Deep Construction. As the tender of Forward Construction Co. was higher than that of M/s. Deep Construction it was accepted by the BEST Committee on 31st March 1982. The BEST Committee also recorded its approval to General Manager entering into the contract with the highest bidder for development of the BEST's property at Andheri. The approval further stated that the amount
- D so earned would be used for constructing staff quarters. The possession of the plot was handed over to Forward Construction Company for the purpose of putting up the construction for and on behalf of the BEST on 18th April 1982.

- E It appears that soon after one Subhash Vasant Thakkar on 20th April, 1982 filed a petition in his capacity as a rate-payer in the High Court of Judicature at Bombay under Article 226 of the Constitution, being writ petition No.921 of 1982. He challenged the right of the BEST to use the land for a purpose different from one one for which it had been reserved and designated under the development plan as well as the town planning
- F scheme and that it had no right to use it for commercial purpose. He also challenged the right of the BEST to enter into a contract with the builder. The petition was dismissed by a learned Single Judge on 28th May, 1982 after having heard all parties concerned and after giving opportunity to file replies. The learned Judge found that the substantial portion of the
- G acquired plot was being utilised for a purpose for which it was acquired and the commercial use to which the small portion was being put would substantially argument the coffers of the Corporation for the benefit of the public at large. The learned Judge also rejected the contention that the value charged by the BEST for allowing use of its property was grossly inadequate and
- H that no sufficient publicity was given before inviting offers.

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The court after having rejected the various pleas taken by the petitioner in the case also observed that the petitioner was not an independent-minded citizen solely inspired by the laudable motive of protecting public interest but the allegations in the petition indicated that he had been set up by a disgruntled builder who purchased the tender document but did not give an offer. The matter was taken up in appeal but the Division Bench dismissed the same after hearing all the parties. B

After the dismissal of the appeal the present respondents 1 to 6 in civil appeal no. 2311 filed a similar petition under Article 226 of the Constitution in the Bombay High Court which gives rise to the present appeals and the special leave petition seeking almost the same relief as was claimed in the earlier petition filed by Thakkar. The learned Single Judge summarily dismissed the writ petition by his order dated 23rd November, 1982. C

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The respondents Nos. 1 to 6 took up the matter in appeal. The Division Bench admitted the appeal and disposed of the same finally on the same day setting aside the order of the learned Single Judge. It admitted the writ petition and transferred the same to be finally disposed of by a Division Bench. The Division Bench eventually allowed the petition and issued a writ of mandamus directing appellants 1 to 4 in civil appeal no. 2311, their officers, subordinates, servants and agents not to use plot no. 14 in the Town Planning Scheme, Andheri No.1 (2nd Variation) reserved for BEST bus depot for commercial purpose or for any purpose other than the purpose for which the said plot of land was reserved. The court, however, clarified that its decision did not prevent the planning authority, that is, the BMC, from taking such steps as it may be advised to have the plan modified in accordance with s. 37 of the said Act. E F

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The appellants feeling aggrieved by the judgment of the High Court filed a detailed review petition mainly on the ground that the respondents 1 to 6 had not taken any plea based on regulation 3 of the Building Regulations and it was only during the course of arguments that this plea was advanced before the court and certain papers were filed before the court. The appellants had no opportunity to produce documents in rebuttal and it was only when the decision was given by the court that the appellants have been able to trace and collect a number of documents, which according to them have great bearing on the interpretation of the said building regulations contained in the Town Planning Scheme H

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Andheri I (2nd Variation) finally sanctioned by the State Government on 17th July, 1976. They filed the following documents along with the review petition :

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1. Town Planning Scheme Andheri No. I (Final) which came into force on 15th November, 1919 vide Government notification No. GP-8388-A dated 7th October 1919 in the Bombay Government Gazette Part I No. 2404 dated 9th October, 1919.

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2. Notification No. TPS-2963-30714-R dated 29th October, 1963 issued by the State Government sanctioning the T.P. Scheme Andheri I (1st Variation) (Final) with effect from 1st January, 1964.

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3. The T.P. Scheme Andheri I (1st Variation) containing Building Regulations which inter alia state that no plot within the area of the Scheme shall be permitted to be used for any purpose other than residential.

4. Resolution of the Bombay Municipal Corporation No. 539 dated 24th August 1967 declaring their intention under Section 92 read with Section 59(a) of the MRTP Act 1966 to make second variation Town Planning Scheme Andheri No. I with a view :

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(a) to rectify the discrepancies in the areas of the plots, if any, to regularise the boundaries wherever necessary, and to make other consequential changes in the re-distribution of Valuation Statement ;

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(b) to change some of the residential and/or shopping plots into commercial plots as per final Development Plan;

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(c) to make such other variation as deemed necessary, supplementary to and consequential to the Variations stated above.

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5. Notification dated 6th September 1968 issued by the Municipal Commissioner for Greater Bombay informing the public that the Draft Variation Scheme for Andheri Town prepared and approved by the Corporation for publication under Resolution No.399 of 19th August, 1968 was upon for inspection and any person who had been affected by the draft variation scheme should communicate in writing to the Executive Engineer, Town Planning, any objection or suggestion within 30 days from the publication of the said notification. .

6. Government notification in Urban Development, Public Health & Housing Department TPS 2969/11752 dated 30th May 1970 sanctioning the draft scheme (2nd variation).

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7. Notification dated 15th May 1973 issued by Shri K.S. Keswani, Arbitrator, announcing that he had done all that was required of him regarding Town Planning Scheme, Andheri I (2nd Variation) (Final) under Section 72(3) of the MRTP Act 1966 and the rules framed under the Bombay Town Planning Act 1954 and had drawn up the Final Scheme as required under section 72(3) (xviii) of the said Act.

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8. Decision given by the Tribunal of Appeals presided by Shri G.H. Guttal dated 7.4.1975 regarding Town Planning Scheme, Andheri I, (2nd Variation)(Final) wherein paragraph No.16 deals with Appeal No.3 relating to Final Plot No.14.

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9. Notice dated 16th January 1976 issued by Shri K.S. Keswani, Arbitrator, announcing that he had drawn up the Final Scheme, Andheri No.I (2nd Variation) as required under section 72(3) (xviii) read with section 82(2) of the MRTP Act, 1966.

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10. Final Scheme drawn by Shri K.S. Keswani, Arbitrator on 16th January 1976 showing that the Scheme involved 27 plots which had fallen in Commercial Zone under the Final Development Plan and the Original Plot Nos.1 to 27 remained as Final Plot Nos.1 to 27.

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11. Notification dated 17th July 1976 issued by the Government of Maharashtra sanctioning Town Planning Scheme, Andheri No.I (2nd Variation)(Final) published in the Maharashtra Government Gazette Extraordinary dated 17th July 1976.

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These documents according to the appellants proved that:

(a) The Town Planning Scheme Andheri No.I (Final) known as the principal scheme, came into force on 15th November 1919.

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(b) The Bombay Municipal Corporation declared its intention to vary that scheme on 18th November 1957 to enable the plot holders in the scheme area to effect development on par with the area outside the scheme wherein the built up area upto 1/3rd of the plot and the structures for ground and two upper floors were permissible and also to provide underground sewers and storm water drains.

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A (c) The Town Planning Scheme, Andheri No.1 (1st Variation)
(Final) was sanctioned by the Government on 29th October, 1963
with effect from 1st January, 1964. Under the Building Regula-
tions made under the said scheme, Regulation No.6 stated that no
plot within the area of the scheme shall be permitted to be used
B for any purpose other than residential, provided that profession-
al offices of doctors, lawyers, engineers and the like as also
buildings required for educational, recreational, religious or
cultural purposes, community centres, dispensaries, hospitals and
any other buildings the use of which is, in the opinion of the
Local Authority, not likely to affect detrimentally the residen-
tial character of the locality, may be permitted. In short, all
the plots in the area of the scheme were permitted to be used for
C residential purposes.

(d) Final Development Plan of 'K' Ward which includes
Andheri came into force with effect from 8.8.1966 and the
Development Control Rules for the entire Greater Bombay came into
force from 9th February 1967. Under the Final Development Plan
the plots which had been included in Town Planning Scheme Andheri
D No.1 (1st Variation) (Final) were included in 'Commercial Zone'.

In short, the entire purpose of varying the Town Planning Scheme
Andheri No.1 was to bring the scheme in conformity with the
Development Plan.

E The High Court, however, dismissed the review petition on
22nd December, 1983 by the following order:

"Heard Mr. Singhvi. We have interpreted Regulation 3
and the proviso in its plain terms. The number of
F documents now produced do not effect the construction
which we have placed on Regulation 3 and the proviso.
Review Petition rejected."

All the contesting parties have now come up in appeal
against the judgment of the High Court dated 14th November 1983
to the extent it went against them. The result is that all the
G questions which were before the High Court are again up for
consideration by this Court.

To start with, the respondents 1 to 6 had taken a plea that
the Municipal Commissioner had not obtained the approval of the
Bombay Municipal Corporation under r.4(a)(i) of the Development
H Control Rules for change of user. The counsel for the BMC,
however, informed the court that he had already sought the

sanction of the Bombay Municipal Corporation and the proposal would soon come up before the Corporation for discussion and on that ground he sought an adjournment of the case to enable the Corporation to approve the said proposal. On 6th January 1983 the BMC by its resolution accorded sanction under r.4(a)(i) of the Development Control Rules for the change of present user of BEST bus depot to a combined user of BEST bus depot with commercial offices proposed by the Municipal Commissioner. The court thereafter allowed respondents 1 to 6 to amend their writ petition as the plea taken by them had lost its force after the sanction.

The second question for consideration is whether the present writ petition is barred by res judicata. This plea has been negatived by the High Court for two reasons: (1) that in the earlier writ petition the validity of the permission granted under r.4(a)(i) of the Development Control Rules was not in issue; and (2) that the earlier writ petition filed by Shri Thakkar was not a bona fide one in as much as he was put up by some disgruntled builder, namely, of M/s. Western Builders.

So far as the first reason is concerned, the High Court in our opinion was not right in holding that the earlier judgment would not operate as res judicata as one of the grounds taken in the present petition was conspicuous by its absence in the earlier petition. Explanation IV to s.11 C.P.C. provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided. The first reason, therefore, has absolutely no force.

The second reason given by the High Court however, holds good. Explanation VI to s.11 provides :

- A "Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section be deemed to claim under the prsons so litigating."
- B But it is only when the conditions of Explanation VI are satisfied that a decision in the litigation will bind all persons interested in the right litigated and the onus of proving the want of bona fides in respect of the previous litigation is on the party seeking to avoid the decision. The words "public right" have been added in Explanation VI in view of the new s.91 C.P.C. and to prevent multiplicity of litigation in respect of public right. In view of Explanation VI it cannot be disputed that s. 11 applies to public interest litigation as well but it must be proved that the previous litigation was the public interest litigation not by way of a private grievance. It has to be a bonafide litigation in respect of a right which is common and is agitated in common with others.
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- D The High Court in the earlier writ petition had recorded a finding that it was not a bona fide litigation and that Shri Thakkar, the petitioner in that case, had been put up by M/s. Western Builders. This finding excludes the application of s.11 C.P.C. in the present case. The possibility of litigation to foreclose any further enquiry into a matter in which an enquiry is necessary in the interest of public cannot be overruled. In view of the finding of the High Court that the previous writ petition was not a bona fide one, the present writ petition would not be barred by s.11 of the C.P.C. and the High Court was justified in so holding but not because of the first reason but because of the second reason.
- E
- F This leads us to the third point that a valuable public property was being disposed of at a gross undervalue in a highly secretive manner only to oblige respondent No. 7. This plea in our opinion was rightly negatived by the High Court. Consequent upon the resolution of 18th January 1982 approving the proposal of the General Manager, an advertisement came to be published in the Times of India and various other newspapers on 10th February 1982 inviting offers from the interested parties to develop BEST's property on certain terms and conditions contained in a document which could be obtained from the Engineer-in-Chief (Civil) in the BEST. In addition to the said advertisement in the newspapers notices were also forwarded to 22 well-known builders
- G
- H

out of whom 12 builders purchased the tender forms on payment of Rs.1000 each. In view of these circumstances it cannot be said that the whole thing was done in a secretive manner.

Pursuant to the advertisement and the said notices two tenders were received out of which one was sent by respondent 7 which is a partnership firm and another by Deep Construction. The tender of respondent 7 being higher than that of Deep Construction, was accepted by the BEST Committee on 31st March 1982. In the facts and circumstances of this case as established, it cannot be said that the property of the Corporation has been disposed of for a wholly inadequate consideration.

The fourth point raised is that the plot No. 14 acquired for a public purpose of constructing a bus station was being used for a commercial purpose which was not permissible. This plea had been rejected by the High Court holding that a very substantial portion of the acquired plot was being utilised for the purpose for which it was acquired and the commercial use to which a small portion was being put would substantially augment the coffers of the Corporation for the benefit of the public at large without spending any further amount on the development. It cannot be said that the plot has been used for a different purpose from the one for which it had been acquired. All that can be said is that a part of the plot is being used for constructing two buildings which would augment the income of B.M.C. that could be utilised for the public purpose. The plot is being substantially used for the purpose for which it had been acquired. The additional use of the property will not make the use of the property for altogether a different purpose.

Public interest law activities at times champion one public interest which clashes with another public interest thus benefiting one segment of public at another's expense. As disclosed in the earlier part of the judgment, the General Manager had sent up a proposal whereunder a part of plot No. 14 was to be used for construction of two buildings that will augment the income of the Corporation which could be used for the purpose of construction of staff quarters. The purpose for which the plot was earmarked remains intact, that is, for the construction of bus depot. In our opinion the other public interest sought to be achieved by the construction of the two buildings in addition to the bus depot is equally important.

This leads us to the question of mala fides of the officers of the Corporation in accepting the tender of M/s. Forward Construction. This plea was based on various circumstances which

A had been taken into consideration by the High Court and repelled. Indeed, no specific plea had been taken against any officer of the Corporation to show that the officers were acting with any ulterior or improper motive. All the same, the High Court did consider this plea and rejected the same for cogent reasons with which we agree and it is not necessary to repeat them here.

B
C As a second limb to the plea of mala fides it was contended that even assuming that no mental guilt on the part of the officer of the Corporation is proved, the transaction suffered from legal mala fides or mala fides in law in as much as the transaction was outside the Bombay Corporation Act as it was intended to make financial gain.

D The avowed function of the Corporation is the improvement of Greater Bombay. Section 61 of the Municipal Corporation Act enumerates the obligatory and discretionary duties of the Corporation. Section 61(t) refers to the improvement of Greater Bombay. Section 63(k) authorises the Corporation to take any measures to promote public safety, health, convenience. The plot in question admittedly lies in a commercial zone and if any facilities are given to the people of that locality providing for commercial offices those facilities would go towards the improvement of Bombay. It cannot, therefore, be said that the transaction was outside the Bombay Corporation Act.

E The resolution of the BEST Committee dated 18th January 1982 approving the proposal of the General Manager dated 14th January 1982 clearly provided that the amount of nonrefundable premium payable by the builder at the rate of Rs.250 per sq.ft. of F.S.I. would be utilised for the construction of the Undertaking's quarters and tenements under hire-purchase scheme. The BEST had, therefore, clearly earmarked the nonrefundable premium for the purpose of construction of quarters and tenements under the hire-purchase scheme.

G Section 87 of the Bombay Municipal Corporation Act provides that the Corporation shall be for the purposes of this Act have powers to acquire and hold movable and immovable property whether within or without the limits of Greater Bombay. As the property is being utilised for augmentation of the revenues of the Corporation it is sought to be contended that it is not for the purpose of the Act.

H The mere fact that the Corporation was to make a gain of the nonrefundable premium did not mean that that was the only purpose which was in view. The purpose obviously was the best utilisation

of the available space. If in a commercial zone the Corporation was able to make available accommodation for commercial purposes we do not see why such a venture cannot be one either for the purpose of promoting public safety, convenience or in the nature of facilities being made available as a part of the improvement of the city, If commercial activities are to be pin-pointed in a commercial zone and for that purposes the Municipal Corporation takes a step to provide accommodation for commercial purposes it cannot be said that the property of the Corporation was being acquired or held for purposes other than the purposes of the Act.

This leads us to the last but not the least in importance the plea based on Building Regulation No. 3. In order to appreciate the contention it will be proper to read the regulation:

"The user of the following final plots will be as under, as per the sanctioned development plan :

| <u>Final Plot No.</u> | <u>User</u> |
|-----------------------|----------------|
| 10 | Public Wall |
| 12 Part | Parking lot |
| 14 | Best Bus Depot |

Provided that the above users may be changed by the Local Authority after modification of the Development Plan."

It was this plea which prevailed with the High Court and the writ petition was allowed only on this score. The precise contention of the counsel for the respondents was that Building Regulation No.3 will override the Development Control Rules for Greater Bombay. Rule 3 of the Development Control Rules for Greater Bombay reads :

"3.(a)(i) All development work shall conform to the respective provisions made under these Rules. If there is a conflict between the requirement of these rules and the requirements of bye-laws in force the requirements of these rules shall prevail;

Provided however that in respect of areas included in a finally sanctioned Town Planning Scheme, the scheme regulations shall prevail if there is a conflict between the requirements of these rules and of the Scheme regulations.

A (ii) The development work when completed shall not be used for any purpose except for the sanctioned use or such use as can be permitted under these rules.

B (b) Change of use; No building or premises shall be changed or converted to a use not in conformity with the provisions of these rules."

C If the contention of the respondents that proviso to Building Regulation No. 3 overrides the Development Control Rules in accepted then the user of the plot as per sanctioned development plan can be changed by the local authority after modification of the development plan and as in the instant case there has been no modification of the development plan the change of user cannot be permitted. This is the crucial point on which the writ petition has been allowed. The other pleas taken by the respondents, as stated above, had been negatived by the High Court. What the proviso to Building Regulation No.3 requires is that the change of user of the sanctioned plan can be made only after the modification of the development plan. The key word in this regulation is 'change'. What does the word 'change' mean? Collins English Dictionary gives the following meaning to the word 'change' :

E "1. to make or become different, alter, 2. to replace with or exchange for another, 3. to transform or convert, 4. to give or receive something in return, interchange, 5. to give or receive money in exchange for the equivalent sum in small denomination or different currency, 6. to remove or replace the coverings of, 7. to put on other clothes, 8. to pass from one phase to the following one, 9. to alight from and board another, 10. a variation, deviation or modification, 11. the substitution of one thing for another, exchange, 12. anything that is or may be substituted for something else, 13. a different or fresh set."

F
G The meaning of the word 'change' in the Oxford Dictionary reads :

H "1. take another instead of, 2. resign, get rid of, 3. give or get money change for, 4. put on different clothes, 5. go from one to another, 6. pass to different owner, 7. make or become different, 8. take new position in argument, 9. adopt new plan or opinion."

So, the general meaning of the word 'change' in the two dictionaries is "to make or become different, to transform or convert." If the user was to be completely or substantially changed only then the prior modification of the development plan was necessary. But in the instant case the user of the plot has not been changed. It has been used for a bus depot combined with a commercial use to augment the income of the Corporation for public purpose. In this view of the connotation of the word 'change' the proviso has no application to the present case and the High Court in our opinion was not quite justified in allowing the writ petition only on the basis of the proviso to Building Regulation No.3.

It may further be pointed out even at the cost of repetition that this plea had not been taken in the original writ petition nor in the amended writ petition, and had been taken for the first time in the course of argument. The appellants had no opportunity to produce documents in rebuttal and it was only when the judgment was pronounced that the appellants could lay their hands on certain notifications and certain other documents to show that that was a minor adjustment and could be rectified. Therefore, the appellants filed a review petition along with those documents which has been enumerated in the earlier part of the judgment. The court described those papers as irrelevant for the purpose of construction of the proviso to Building Regulation No. 3. But in our opinion those documents would go a long way to solve the problem.

For the foregoing discussion, the appeals must succeed. They are accordingly allowed, the judgment and order dated 14th November, 1983 of the Division Bench of the High Court are set aside, and the judgment and order dated 23rd November 1982 of the learned Single Judge of the High Court dismissing the writ petition are restored. The special leave petition filed by Prabhat Mandal and others is dismissed. In the circumstances of the case, however, the parties shall bear their own costs.

M.L.A.

Appeals allowed.