MUNICIPAL CORPORATION FOR GREATER BOMBAY AND ANR.

v.

ADVANCE BUILDERS (INDIA) PVT. LTD. & OTHERS

August 25, 1971

[S. M. SIKRI, C.J., A. N. RAY AND D. G. PALEKAR, JJ.]

Town Planning Act, 1954, *ss.* 51, 53, 54 *and* 55—*Duty of Corporation to remove unauthorised huts on allotted private plots.*

Practice and Procedure—Writ of mandamus issued by High Court—Interference by Supreme Court.

In August 1958, the State Government sanctioned a final town planning scheme—The Bombay Town Planning Scheme, Santa Cruz, No. VI—and directed that the scheme should come into force from 1st January, 1959. As part of the scheme there was a Redistribution and Valuation Statement and to the Statement some Notes were appended. Note 11 provided that 'all huts, sheds, stables and such other temporary structures including those which do not conform to the regulations of the scheme are required to be removed within one year from the date the final scheme comes into force.' In pursuance of the scheme plots were allotted, and the respondents became the owners of certain plots. Huts, sheds and stables had been built on those plots by slum dwellers. Since the appellant-Corporation took no action for implementing the scheme, the respondents, from whom betterment charges were being recovered by the appellant, called upon the appellant to implement it by removing the slums, etc., and to provide roads and drains as directed in the scheme. The appellant however, remained inactive, and the respondents filed a petition for the issue of a *mandamus* to the appellant and the High Court allowed the petition.

In appeal to this Court, on the questions : (1) Whether the appellant was bound in law to remove the structures out the *private plots* of the respondents in so far as they contravened the Town Planning Scheme, and (2) whether a writ of *mandamus* could issue at the instance of the respondents when they had collected rents from the occupants of the huts, etc.

HELD : (1) Under s. 51(3) of the Town Planning Act, 1954, the final scheme as sanctioned by the Government has the same effect as if it were enacted in the Act. The scheme and its regulations must, therefore, be read as supplemental to the Act. Under s. 53, all rights in the original plots of the private owners would determine, and if, in the scheme, reconstituted or final plots are allotted to them, they shall become subject to the rights settled by the Town Planning Officer in the final scheme. The fact that the final plots coincided with the original plots of the private owners would not make any difference. Under s. 54 the local authority has to see whether any person is occupying any land in disregard of the rights determined under the scheme, and if he does so, he is to be summarily evicted by the local authority. Under s. 55(1)(a) every building or *work which is in contravention of the town planning scheme*, wherever it may be in the area under the scheme, could be removed, pulled down or altered by the local authority *which alone is named as the authority for that purpose*. [414 D—E; 415 A—B, C—D, H; 416 E—F; 417 G]

A In the present case, note 11 refers not merely to huts, sheds, stables which do not conform to the regulations of the scheme, but also to *all* huts, sheds, stables and such other temporary structures; and whosoever the owner or occupant may be, he is required to remove it within one year from the date the final scheme came into force. Hence, if the owner or occupant did not so remove he would be *contravening the provisions of the scheme* and thereupon the local authority will have the power under s.55 B (1)(a) to remove or pull them down. The note takes note of the fact that the occupants of the hutments will be dishoused and makes provision for allotment of land to such dishoused persons. [416 F; 417 B—C]

Therefore, it is the primary duty of the Corporation as the local authority to remove all offending huts, etc., in the whole area under the scheme and not merely from those areas which are allotted to the Corporation. That the respondent could, by having recourse to law, eject the slum C dwellers and remove their huts would not be a relevant consideration since the duty is imposed by the Act on the appellant. Further, there is no provision in the Act which requires owners of the plots to take action against the hutment dwellers. [419 D—E; 421 F—G]

The Maharashtra Regional and Town Planning Act, 1966, which came into force during the pendency of the petition in the High Court has provisions corresponding to the 1954-Act which are practically of the same D content. Hence the position is the same under the 1966-Act also. [419 E—F, G—H; 420 C—D]

(2) Since development and planning is primarily for the benefit of public, the Corporation is under an obligation to perform its duty in accordance with the provisions of the Act. A *mandamus* may hence be issued to the appellant ordering that to be done which the statute requires to be done. [420 E—F]

E In the present case, the High Court exercised its discretion in directing the issue of the writ and this Court, in appeal by special leave, will not ordinarily question that discretion. The mere fact that the owners of the plots received some amounts from the hutment dwellers by way of compensation or rent would not import any disqualification for issuing a *mandamus* at their instance. [421 A, F]

F *Queen* v. *The Church Wardens of All Saints, Wigan,* (1875-76) 1 A.C. 611 and *Queen* v. *Garland,* (1869-70) 5 Q.B. 269, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1121 of 1970.

Appeal by special leave from the judgment and order dated G April 24, 1969 of the Bombay High Court in Appeal No. 2 of 1967.

Niren Den, Attorney-General, M. C. Bhandara, P. C. Bhartari, J. B. Dadachanji, O. C. Mathur and *Ravinder Narain,* for the appellants.

H *S. V. Gupte, S. J. Sorabjee, B. R. Agarwala* and *A. J. Rana,* for respondent no. 1.

Sharad Monohar and Urmila Sirur, for the interveners.

A

The Judgment of the Court was delivered by

Palekar, J. This is an appeal by special leave from an Order of the High Court of Bombay dated 24th April, 1969 in Appeal No. 2 of 1967, substantially confirming the order passed by a single Judge of that Court in Writ Petition No. 474 of 1965. The appellants before this Court are the Bombay Municipal Corporation and the Municipal Commissioner of Bombay, and the respondents are the owners of 41 final plots Nos. 106 to 116 and 118 to 147 under the Bombay Town Planning Scheme, Santacruz VI. B

The area under the Town Planning Scheme, with which we are now concerned, originally fell within the municipal limits of the Bandra Municipal Committee. That Committee, by a resolution dated 15th June, 1948, declared its intention to frame a Town Planning Scheme under section 9(1) of the Town Planning Act, 1915. Thereafter, the Municipal Committee was abolished and the area of that municipality was absorbed within the limits of the Bombay Municipal Corporation. The Corporation, which, for the purpose of the Act, now became the local authority, applied to the Government, and on 7th May, 1951, the Government of Bombay sanctioned the making of the Scheme. On 30th April, 1963, a draft scheme was prepared and published as required by the Act and it was duly sanctioned by the Government on 6th May, 1954. On 17th August, 1954, an Arbitrator was appointed to finalize the scheme and the Arbitrator formulated the final Scheme and published the same in the Official Gazette, forwarding, at the same time, the Scheme to the President of the Tribunal appointed under section 32 of the Act. In the meantime, the Town Planning Act, 1915 was replaced by the Town Planning Act, 1954 which came into force on 1st April, 1957. Under section 90 the new Act, the final Scheme already formulated was adopted for continuance and implementation. Finally, on 21st August, 1958, the final Scheme was sanctioned by the Government which directed that the Scheme should come into force from 1st January, 1959. C D E F

The Scheme, as already stated, was known as the Bombay Town Planning Scheme, Santacruz No. VI and covered an area of about 160 acres divided into two parts by the Chodbunder Road which ran from south to north. We are not concerned here with the western part. We are concerned with the eastern part, the total area of which was about 54 acres. A part of this area belonged to the N. J. Wadia Trust. In a Trust Petition made to the High Court, a Receiver was appointed on 8th February, 1948 of this trust property. It appears that unauthorised huts, sheds and stables had been built in this area and the whole of it G H

A was full of slums, the removal of which was one of the objects of introducing the Town Planning Scheme. As the Arbitrator has stated in his Final Scheme, :

> "The Final Scheme as now drawn up provides for the construction of new roads with necessary storm-
B water drains on the sides of the roads, certain public sites within the area such as School, Playground, Market, Maternity Home etc. The construction of new roads, the provision of public sites and the removal of slums will provide for the development of this part of the Suburb on proper lines."

C In pursuance of the Scheme, the part of land, which belonged to N. J. Wadia Trust and which was now in the possession of the Receiver, became a part of the Scheme and, under the Scheme, a number of final plots were allotted to the Receiver. On 31st July, 1962, the Receiver transferred a total area of 69,625 sq. yards comprised in 41 final plots being Nos. 106 to 116 and 118 to 147
D to respondents 1 to 3 and one Cardi. Cardi sold his plots in due course to respondents 4 and 5. So, between the five respondents, they became the owners of the above 41 final plots.

As already noted, the Scheme came into force on 1st January, 1959 and, though, under the Scheme, a period of 2 to 3 years had
E been allowed for the purpose of implementing the Scheme, no action was taken by the Corporation, perhaps due to the resistance offered by the slum-dwellers. The respondents, from whom the betterment charges, etc. were being recovered by the Corporation, called upon the Corporation to implement the Scheme by removing slums, sheds and temporary structures and also to provide
F roads and drains as directed in the Scheme. The Corporation, however, remained inactive and, hence, respondents 1 to 3 filed Writ Petition No. 474 of 1965 on the Original Side of the High Court on 13th October, 1965. By this petition, respondents 1-3 prayed to the Court :

G (1) to issue a writ of *mandamus* or a writ in the nature of *mandamus* against the appellants directing them to construct the roads and drains as indicated in the Town Planning Scheme and to complete the same for use within such time as may be fixed by the Court, and

H (2) to issue a writ of *mandamus* or any other appropriate writ directing the appellants to remove all the huts, sheds, stables and temporary structures from the 41 plots referred to above.

The learned Judge held that, under the Town Planning Act and the Scheme, it was the primary responsibility of the Corporation, which was the local authority, to implement the Scheme and, accordingly, the writs as prayed were substantially granted. In appeal, the Appellate Bench of the High Court confirmed the order of the learned Judge with only minor variations. Hence, the present appeal.

The controversy between the parties has been narrowed down in this Court. The learned Attorney-General, who appeared on behalf of the appellants, did not dispute that, so far as the roads and drains are concerned, it was the primary obligation of the Municipal Corporation to provide the same in accordance with the Scheme. He also agreed that, if there were any unauthorised structures, huts, sheds and the like on any part of the plots which vested in the Corporation for a public purpose, the same were liable to be removed by the Corporation. His chief contention, however, is that the Corporation owed no duty to remove the unauthorised structures situated in the private plots of the owners who, in his submission, were solely responsible to remove them. In any event, he further submitted, since the petitioners and their predecessors had authorised these structures and collected rent from the owners or occupants of these structures, a writ of *mandamus* at their instance should not, in the discretion of the Court, be granted.

The point of substance in this appeal is whether the Municipal Corporation, as the local authority under the Act, owed a duty to remove the unauthorised structure, even though those structures were on private final plots of the respondents. That the respondents could, by having recourse to law, eject the slum-dwellers and remove the huts and structures would not be a relevant consideration if, under the Act and the Scheme, the duty was imposed on the local authority. The Scheme had been framed with a view to clear the area of slums. In fact, Note 11 attached to the Redistribution Statement under the Scheme directs that "all huts, sheds, stables and such other temporary structures including those which do not conform to the regulations of the Scheme, shall be removed within one year from the date the Final Scheme comes into force. Persons thus dishoused will be given a preference in the allotment of land or accommodation in Final Plot No. 16." We will have occasion to consider this Note No. 11 at a later stage; but what is to be noted now is that the slums were to be cleared and the dishoused persons were to be accommodated in final plot No. 16 which was specifically allotted to the Corporation.

Before turning to the provisions of the Act and the Scheme for the determination of the issue before us, it may be necessary

A to note here that the writ issued by the learned single Judge with regard to these huts, sheds and structures was clarified in appeal by limiting the writ as follows :—

> "that the respondents 1 and 2 (the present appellants) do remove within one year from today all unB authorised huts, sheds, stables and other temporary structures standing and lying on the petitioners' (the present respondents) said forty-one final plots."

We asked Mr. Gupte, learned counsel for the respondents, as to what exactly was meant by the term "unauthorised"—whether it meant not authorised by the owners of the plots or not authorised C by the Municipal Corporation or something else. He informed us that the relief that he really wanted was in terms of section 55 of the Act which gives the power to the local authority to remove, pull down or alter any building or other work which contravenes the Town Planning Scheme. If any of the structures or huts and sheds, etc. which were situated in these 41 plots did not contraD vene the Town Planning Scheme, he did not and could not ask for a writ of *mandamus* for the removal of the same. In view of this submission, the controversy is further narrowed down and the only question, with which we are now concerned, is whether the Corporation is bound under the law to remove such of the structures, sheds and huts situated in the respondents' plots in so far as they contravene the Town Planning Scheme. In our E opinion, the Corporation is so bound.

It is not necessary to go through the several provisions of the Town Planning Act. There can be no doubt that the Corporation, as the local authority, is wholly responsible for the preparation and implementation of every development plan. The preamble shows that the Town Planning Act, 1954, which was intended to F be a consolidating and amending Act relating to town planning, was enacted with a view to ensure that Town Planning Schemes are made in a proper manner and their execution is made effective. It was, therefore, necessary to provide that the local authority shall prepare a development plan for the entire area within its jurisdiction. By section 3 of the Act, the local authority is G required to carry out a survey of the area within its jurisdiction within a certain time and publish a development plan. In due course, such a development plan is sanctioned by the Government; but, in the meantime, by section 12 of the Act, stringent restrictions are placed on the property owners in the matter of development of or construction on their private properties as soon as the H local authority declares its intention to prepare a development plan. After the development plan is finally sanctioned by the Government, the next step is for the local authority to make one or more Town Planning Schemes as provided in section 18. The

rest of the Act is mostly concerned with the preparation of the Town Planning Schemes and s. 29(1)(a) provides that, after the local authority has declared its intention to make a scheme under section 22, no person shall, within the area included in the scheme, erect or proceed with any building or work or remove, pull down, alter, make additions to, or make any substantial repair to any building, part of a building, a compound wall or any drainage work or remove any earth, stone or material, or sub-divide any land, or change the user of any land or building unless such person has applied for and obtained the necessary permission of the local authority. These restrictions, though very stringent, are obviously in the interest of the preparation of the Town Planning Scheme, because, if structures come up when the scheme is being prepared, the whole object of town planning will be frustrated. The Arbitrator appointed under the Scheme has to lay out the roads, the drains and make provision for public places such as gardens, hospitals and the like and, if private owners start erecting structures of more or less permanent nature, the cost of the Scheme might become prohibitive and the Scheme itself will flounder. Such is the importance of the Final Scheme as sanctioned by the Government that, under s. 51(3), the Town Planning Scheme has the same effect as if it were enacted in the Act. The Scheme naturally deals with the disposition of the land in the whole area. Titles are displaced and regulations are made with directions as to how the whole of the Scheme is to be implemented. The Arbitrator appointed under the Scheme has to lay out enacted in the Act.

Against this background, we have to determine the question in issue before us. The important provisions, bearing upon the controversy, are sections 53, 54 and 55 of the Act. Section 53 provides :—

> "On the day on which the final scheme comes into force,—
>
> (a) all lands required by the local authority shall, unless it is otherwise determined in such scheme, vest absolutely in the local authority free from all encumbrances;
>
> (b) all rights in the original plots which have been re-constituted shall determine and the re-constituted plots shall become subject to the rights settled by the Town Planning Officer."

It will be seen that all lands in the area which is subject to the Scheme, to whomsoever they might have originally belonged,

A would absolutely vest in the local authority if, under the Scheme, the same are allotted to the local authority. As a necessary corollary to this, all rights in the original plots of the private owners would determine and if, in the Scheme, re-constituted or final plots are allotted to them, the same shall become subject to the rights settled by the Town Planning Officer in the Final B Scheme. The original plots of one owner might completely disappear, being allotted to the local authority for a public purpose. Such a private owner may be paid compensation or a reconstituted plot in some other place may be allotted to him. This reconstituted plot may be also made subject to certain other rights in favour of others as determined by the Town Planning Officer. In other C cases, the original plot of the owner may be substantially cut down and he may be compensated elsewhere by being allotted a smaller or a bigger piece of land in a reconstituted plot. The learned Attorney-General pointed out that, so far as the present case is concerned, the final plots coincide with the original plots of the private owners. That may be so; but that consideration is irrelevant for a proper construction of the statute. It is inherent in D every town planning scheme that titles are liable to be displaced and an owner may get a reconstituted plot which belonged, prior to the Final Scheme, to some other owner. In such a case, if the original plot belonging to 'A' was not encumbered by any unauthorised huts and 'A' is allotted in the Scheme a reconstituted plot of another, encumbered or littered over with unauthorised E sheds and huts, would it be just to say that 'A', who is to be put into possession under the Scheme, of the reconstituted plot, should take legal action for the ejectment of the hutment-dwellers ? For aught we know he may be non-suited on the ground of limitation or adverse possession. In any case, the Scheme will on the one hand, put an innocent owner to undeserved trouble and, on the F other, not achieve the object of removing the hutment-dwellers as speedily as possible, thus frustrating the very object of town planning. It is not as if such a situation was not visualised by the Legislature, because the very next section, viz., section 54 gives ample powers to the local authority to do the needful. That section says :—

G

> "On and after the day on which the final scheme comes into force any person continuing to occupy any land which he is not entitled to occupy under the final scheme may, in accordance with the prescribed procedure, be summarily evicted by the local authority."

H

All that the local authority has to see for the purpose of section 54 is whether any person is occupying any land in disregard of the rights determined under the final scheme and, if he does so, he

is to be summarily evicted by the local authority. Section 55 is more explicit on the question. Sub-section (1) is as follows :—

> "(1) On and after the day on which the final scheme comes into force the local authority may after giving the prescribed notice and in accordance with the provisions of the scheme—
>
> (a) remove, pull down, or alter any building or other work in the area included in the scheme which is such as to contravene the scheme or in the erection or carrying out of which any provision of the scheme has not been complied with;
>
> (b) execute any work which it is the duty of any person to execute under the scheme in any case where it appears to the local authority that delay in the execution of the work would prejudice the efficient operation of the scheme."

Sub-clause (a) of the sub-section gives the local authority power to remove, pull down or alter any building or other work in the whole of the area included in the scheme if such building or work contravenes the scheme, or if, in the erection or carrying out of the building or work, the provision of the scheme has not been complied with. In short, every building or work, which is in contravention of the Town Planning Scheme, wherever it may be in the whole of the area under the Scheme, could be removed pulled down or altered by the local authority which alone is named as the authority for that purpose. For example, the Scheme in this case, by its Note 11, requires that all huts, sheds, stables and such other temporary structures, which do not conform with the Scheme, are liable to be removed within one year of the Scheme which is regarded under s. 51(3) as part of the Act. If the owner or occupant of the tempotary structure does not remove the structure within one year, the local authority is empowered to do that. Sub-clause (b) takes care of any work which, under the Scheme, any private person is liable to execute in a certain time. If there is delay in the execution of the work, the local authority is given the power to execute the work. The question then would arise : at whose cost this work is to be executed ? For that, provision is made in sub-s. (2) which is as follows :—

> "(2) Any expenses incurred by the local authority under this section may be recovered from the persons in default or from the owner of the plot in the manner provided for the recovery of sums due to the local authority under the provisions of this Act."

A The expenses incurred by the local authority in this connection are recoverable from the person in default, *viz.*, the person indicated in the Scheme and who has defaulted in executing the work. To make sure that the expenses are recovered, sub-s. (2) makes them recoverable not merely from the person in default, but also from the owner of the plot. Disputes are likely to arise whether B any building or work contravenes a Town Planning Scheme and, so, provision is made for the same in sub-section (3) which is as follows :—

> "(3) If any question arises as to whether any building or work contravenes a town planning scheme, or whether any provision of a town-planning scheme is not C complied with in the erection or carrying out of any such building or work, it shall be referred to the State Government or any officer authorised by the State Government in this behalf and the decision of the State Government or of the officer, as the case may be, shall be final and conclusive and binding on all persons."

D It will, thus, be seen that section 55 provides a self-contained code by which buildings and works situated in the whole of the area under the Scheme are liable to be removed or pulled down by the local authority if those buildings or works contravene the Town Planning Scheme. A proper implementation of the Scheme would undoubtedly entail considerable cost, but provision for the E same is made in Chapter VIII of the Act, section 66 of which provides for the recovery of what are commonly known as betterment charges. The costs of the scheme are to be met wholly or in part by a contribution to be levied by the local authority for each plot included in the Final Scheme calculated in proportion to the increment which is estimated to accrue in respect of such F plot by the Town Planning Officer. The whole scheme or the Act, therefore, and especially sections 53 to 55 leave no doubt that it is the primary duty of the local authority to remove all such buildings and works in the whole of the area which contravene the Town Planning Scheme.

The Scheme and the regulations made thereunder must be G read as supplemental to the Act and, when that is done, there is no room for any doubt whatsoever that the local authority is entirely responsible for removing the huts, sheds, stables and other temporary structures which contravene the Town Planning Scheme. The Scheme gives a statement of works to be constructed under the Scheme which comprises a number of roads and H the drainage system. The Scheme then specifies which final plots under the Scheme are reserved for public or municipal purposes. In the section dealing with the regulations controlling the development of the area under the Scheme, the various final plots are

mentioned and directions have been given as to how they are to be utilised. Regulation 6 is as follows :—

> "No hut or shed whether for residential user or otherwise, or temporary moveable shops on wheels or such other temporary structures shall be allowed within the area of the Scheme."

It is possible to construe this regulation as prospective in operation, because regulation 9 provides that any person contravening any of the aforesaid regulations or any of the provisions of the Scheme is liable to be prosecuted and fined. As a part of the Scheme, there is a Redistribution and Valuation Statement which shows which are the original plots, who were the owners thereof, whether those plots were encumbered or leased out, who the mortgagees and lessees were, what is the number of the reconstituted or the final plot allotted to such owners, what contributions have to be made by the owners and what additions or deductions are to be taken into account while deciding the contributions. In the case of some of the final plots, certain rights are given and liabilities imposed and, in suitable cases, compensation also is directed to be paid. And, then, to this Redistribution and Valuation Statement, eleven Notes are appended which are important. Note 1 says that all rights of mortgagors or mortgagees if any, existing in the original plots are transferred to their corresponding final plots. Note 2 deals with the rights of lessors and lessees in the original plots. By Note 3, all rights of passage hitherto existing are extinguished. By Note 4, agreements in respect of original plots are transferred to the final plots. By Note 5, the tenures of all original plots are transferred to the corresponding final plots. Note 6 permits the original plot-owners to remove their detachable material on the plot if they are deprived of the same. They are required to remove their wire-fencing, compound wall, sheds, huts or other structures. They can do so within three months from the date on which the final Scheme comes into force, the idea being that the final plots must be clean plots for being allotted to another under the Scheme. This permission under Note 6 has been given not because the local authority has no power to remove wire-fencing, huts, sheds, etc.; that power is there as already shown under section 55. But this is a concession made in favour of the owner. Since the owner is required to remove himself from this plot, he is permitted to take away whatever material he could easily remove. And, then, Note 11, to which reference has already been made, provides that all huts, sheds, stables and such other temporary structures including those which do not conform to the regulations of the Scheme, are required to be removed within one year from the date the final Scheme comes into force. The Note refers not merely to huts,

A sheds, stables which do not conform to the regulations of the Scheme, but also to all huts, sheds, stables and such other temporary structures. Whosoever the owner or the occupant of the same might be, he is required to remove the same within one year from the date the Final Scheme comes into force. This is an important regulatory provision which has the effect as if enacted B in the Act. If the owner or the occupant of these huts, sheds and stables does not remove the same within one year from the date this final Scheme comes into force, he would be contravening the provisions of the Scheme and, thereupon, the local authority will have the power under section 55(1)(a) to remove or pull down these huts, sheds, stables, etc. Note 11 has taken due note C of the fact that, if the huts, sheds, stables, etc. are demolished, the owners or occupants thereof will become dishoused. Hence, further provision is made that persons thus dishoused will be given preference in the allotment of land or accommodation in Final Plot No. 16 allotted to the Corporation. In other words, it is implicit in this Note that the Corporation may not hesitate to pull down or remove these huts and sheds, etc., because provision is D already made for allotment of land in the Corporation's Plot. The Note, therefore, indirectly establishes that it is the primary duty of the Corporation as the local authority to remove all offending huts, sheds, stables and temporary structures in the whole area under the Scheme and not merely from those areas which are allotted to the Corporation under the Scheme.

E

Our attention was invited by the learned Attorney-General to the Maharashtra Regional and Town Planning Act, 1966 which came into force on 11th January, 1967. The Act came into force when the present litigation was pending in the High Court; but it does not appear that any reference was made to the provisions of F that Act. It is a more comprehensive legislation with regard to development and planning than the Bombay Town Planning Act, 1954 to the provisions of which we have already made a reference. By section 165(1) of the Maharashtra Regional and Town Planning Act, 1966, the Bombay Town Planning Act, 1954 is repealed; but, by virtue of sub-s. (2) of section 165, all Schemes finalised under the Bombay Town Planning Act, 1954 are deem- G ed to have been framed under the corresponding provisions of this Act and the provisions of this Act shall have effect in relation thereto. The more important provisions of the Bombay Town Planning Act, 1954, to which a reference has been made by us above, were sections 53, 54 and 55. The corresponding provisions in the new Act are sections 88, 89 and 90. Section 53 H consisted of two clauses (a) and (b). They are the same as the first two clauses (a) and (b) of the corresponding s. 88. One more clause (c) is added which provides that the Planning Authority shall hand over possession of the final plots to the owners to

whom they are allotted in the final Scheme. The Planning Authority is the same as the local authority under the Bombay Town Planning Act, 1954—in the present case, the Bombay Municipal Corporation. There was no specific provision in section 53 directing the local authority to hand over possession of the final plots; but, in our opinion, that was implicit in the Scheme when the original plots were reconstituted and the reconstituted plots were allotted to the owners of the original plots. Clause (c) of section 88, therefore, merely clarifies what was implicit in section 53 of the old Act. Section 54 of the old Act corresponds to sub-s. (1) of section 89 of the new Act. Sub-s. (2) of section 89 is a new provision which makes it obligatory upon the Commissioner of Police and the District Magistrate to assist the Planning Authority in evicting persons from the final plots when there is unlawful opposition to the same. Section 55 of the old Act corresponds to section 90 of the new Act and is practically the same in content. In our opinion, therefore, there is nothing in the new Act which requires us to reconsider the above finding.

It is clear, therefore, on a consideration of the provisions of the Bombay Town Planning Act, 1954 and especially the sections of that Act referred to above, that the Corporation is exclusively entrusted with the duty of framing and implementation of the Planning Scheme and, to that end, has been invested with almost plenary powers. Since development and planning is primarily for the benefit of the public, the Corporation is under an obligation to perform its duty in accordance with the provisions of the Act. It has been long held that, where a statute imposes a duty the performance or non-performance of which is not a matter of discretion, a *mandamus* may be granted ordering that to be done which the statute requires to be done (See Halsbury's Laws of England, Third Edition, Vol. 11, p. 90).

It was, however, contended by the learned Attorney-General that, after all, a writ of *mandamus* is not a writ of course or a writ of right but is, as a rule, a matter for the discretion of the court. That is undoubtedly the case. It is pointed out by Lord Hatherley in *The Queen* v. *The Church Wardens of All Saints, Wigan and Others*(1), that upon a prerogative writ there may arise many matters of discretion which may induce the Judges to withhold the grant of it—matters connected with delay, or possibly with the conduct of the parties; but, as further pointed out by his Lordship, when the Judges have exercised their discretion in directing that which is in itself lawful to be done, no other Court can question that discretion in so directing. In the present case, the High

(1) [1857-76] 1 A.C. 611.

A Court has exercised its discretion in directing the issue of the writ and this Court, in an appeal by special leave, will not ordinarily question that discretion.

In *The Queen* v. *Garland and Another*(1) which was cited by the learned Attorney-General before us, *mandamus* was refused B practically on the ground that the petitioners therein had not come before the Court with clean hands. In that case, the trustees proved the will of the testator, but not claim themselves to be admitted to the copyholds, though they were bound to do so, and called upon the lord of the manor to admit the infant heir by his guardians. The lord refused. If the trustees had done their duty C by admitting to the copyholds, the lord would have been entitled to a double fine instead of a single fine on the admittance of the heir. In these circumstances, the Court refused a *mandamus* to compel the lord to admit the heir as, in the opinion of the Court, the effect of granting it would be to enable the trustees to evade payment of a double fine, and to commit a breach of trust by not acquiring themselves the legal estate in the copyholds. Nothing D of that nature to disqualify the respondents in this case for a writ in their favour has been pointed out to us. The only submission of the learned Attorney-General is that so far as the huts, sheds, etc., which are within the final plots of the respondents are concerned, they must be presumed to be there with the permission of the respondents or their predecessors-in-title, especially when it is E known that some fee, compensation or rent was recovered by them from the owners or occupants of these huts and sheds. It is not the case that the petitioners, while, on the one hand, asking for a *mandamus* against the Corporation, are resisting the enforcement of the Scheme through the owners and occupants of the slums on the other. If the owners of these final plots merely recovered F some amounts from the hutment-dwellers by way of compensation or rent, that act cannot be regarded as importing any disqualification for the purposes of *mandamus*. After all, their land was being used by others and, perhaps, the respondents are also liable to pay local taxes. We have not been shown one provision in the whole of the Act which requires the owners of the plots to take any action against the hutment-dwellers. The Scheme came into G force in 1959 and it is an admitted fact that, till 1964, nothing at all was done by the Corporation to implement the Scheme. The respondents served notices on the Corporation to enforce the Scheme, but, for one reason or the other, the Corporation merely stalled effective action. We do not, therefore, think any adequate reasons have been given for refusing the writ.

H In the result, the appeal is liable to be dismissed with only the following modification in the Appellate Court's Order :—

(1) [1869-70] 5 Q.B. 269.

For the following words :

> "that the respondents 1 and 2 do remove within one year from today all unauthorised huts, sheds, stables and other temporary structures standing and lying on the petitioners' said forty-one final plots"

the following should be substituted :—

> "that the respondents 1 and 2 do remove within one year from today all such huts, sheds, stables and other temporary structures standing or lying on the petitioners' said forty-one final plots as contravene the Scheme or in the erection or carrying out of which any provision of the Scheme has not been complied with."

Subject to this modification in the Order, the appeal is dismissed with costs. Since a stay had been granted by this Court, it would be necessary to allow reasonable time for compliance by the appellants. The periods already given by the trial Court, as modified by the Appellate Court, shall be counted from the date of this judgment.

V.P.S. *Appeal dismissed.*