MIG CRICKET CLUB

v.

ABHINAV SAHAKAR EDUCATION SOCIETY AND ORS.

(Civil appeal No. 2047 of 2007)

SEPTEMBER 5, 2011

[MARKANDEY KATJU AND CHANDRAMAULI KR. PRASAD, JJ.]

Maharashtra Regional and Town Planning Act, 1966: ss.31(1), 37(2) – Sanction to draft development plan – Held: Development Plan existing prior to the coming into force of the Act shall be deemed to be a sanctioned Development Plan u/s.31(1) of Act – In the instant case, the Development Plan existing prior to the commencement of the Act showed the area in question as reserved for "playground" which was modified to "school and cultural society" by State Government in exercise of its power u/s.37(2) and earmarked for the "school and cultural centre" by notification dated 25th April, 1985 – Such a course was permissible under law – Notification dated 24th April, 1992 provided that State Government in exercise of powers conferred u/s.31(1) had modified the user of land to "playground" – This was not the modification of the Development Plan but sanction of the same in exercise of power u/s.31(1) of the Act – High Court misdirected itself by considering notification dated 10th April, 1985 to be the sanction of the Development plan u/s.37(2) of the Act and the notification dated 24th April, 1992 to be the modification of the final Development plan which rendered its order illegal.

Administrative Law: Judicial review – Change in user of land by State Government – Scope of judicial review – Held: User of the land is to be decided by the authority empowered to take such a decision and the Court in exercise of its power of judicial review would not interfere with the same unless the

change in the user is found to be arbitrary – Town planning requires high degree of expertise and that is best left to the decision of State Government to which the advise of the expert body is available – Town planning.

Interpretation of statutes: Legal fiction – Held: When a legal fiction is created, it shall be given full effect – Generally legal fiction is created to advance public policy and preserve the rights of certain individuals and institutions – Legal fiction tends to treat an imaginary state of affairs as real and entails the natural corollaries of that state of affairs.

The case of respondent no.1 was that it was granted lease of a portion of land for a period of 99 years by Maharashtra Housing and Area Development Authority (MHADA) and Bombay Housing and Area Development Board (BHADB) with the consent of Municipal Corporation of Greater Bombay (Corporation). When respondent no.1 proposed to construct a school building thereon, it noticed that area in question was reserved for a playground in the draft development plan. Respondent no.1 brought this fact to the notice of MHADA and BHADB and in response respondent no.1 was asked to get the user of land changed in accordance with law. Meanwhile, the Maharashtra Regional and Town Planning Act, 1966 came into force on 20.12.1966. In February, 1984, the Corporation passed a resolution sanctioning user of said plot for the purpose of constructing school. By notification dated 25.4.1985, the said land was earmarked for the school and cultural centre in the development plan of the area. During the period 1985-86, the appellant-club approached the State Government for change of user of the said plot for "cricket playground". The attempts were made to convince respondent no.1 to shift the school to another plot as the plot in question was required by the appellant for its playground. Respondent no.1 did not accept the proposal and by letter dated 10.11.1986 sought

permission to erect a compound wall on account of the threats given by the appellant. Respondent no.1 submitted the development plan to the State Government. However, contrary to the expectations of respondent no.1, notification dated 24.4.1992 was published in the Gazette on 7.5.1992 which revealed that the State Government in exercise of powers conferred under Section 31(1) of the Act had modified the user of the land in question and instead of land being shown reserved for "school and cultural centre", it was shown as a "playground". Respondent no.1 filed a writ petition challenging the notification and further for a direction to the respondents to restore the reservation of plot for "school and cultural centre". The High Court quashed the notification dated 24.4.1992 holding that it was issued without consideration of the notification dated 10.4.1985 which rendered the same illegal. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: 1.1. A plain reading of Section 35 of the Maharashtra Regional Town Planning Act shows that the Development plan sanctioned by the State Government before the commencement of the Act, shall be deemed to be a final Development plan sanctioned under the Act. Making of Development plan requires consideration of various inputs and for that, several bodies have to be consulted and various steps as provided in the Act are required to be taken. Naturally it would take some time. A town cannot exist without a Development plan, otherwise it would lead to chaos. No Development plan was made under the Act which came into force on 20th of December, 1966 and hence the legislature created a legal fiction by enacting Section 35 of the Act. It provided for assuming a fact i.e. existence of a Development plan, which was, in fact, not made in accordance with the

A provisions of the Act. When a legal fiction is created, it shall be given full effect. Generally legal fiction is created to advance public policy and preserve the rights of certain individuals and institutions. Legal fiction tends to treat an imaginary state of affairs as real and entails the B natural corollaries of that state of affairs. Hence, the Development plan, existing prior to the coming into force of the Act, shall be deemed to be a sanctioned Development plan under Section 31(1) of the Act. Section 31(1) confers power on the State Government to C sanction the draft Development plan submitted to it for the whole area or separately for any part thereof either without modification or subject to such modifications as it may consider proper. Under the scheme of the Act, a minor modification of the Development plan by the State D government in exercise of powers conferred is provided under Section 37(2) of the Act. [Paras 11, 12] [153-F-H; 154-A-D; 155-C-D]

1.2. Bearing in mind the scheme of the Act, the Development plan sanctioned by the State Government E before commencement of the Act, has become final Development plan under the Act. The Development plan existing prior to the commencement of the Act shows that the area in question was reserved for "playground" which was modified to "school and cultural society" in F exercise of power under Section 37(2) of the Act and earmarked for the "school and cultural centre" by notification dated 25th April, 1985. Such a course was permissible under law. It was the plea of Respondent No.1 that the Corporation informed it that in the proposed G Development plan the area in question has been shown as "cricket club and playground". Had notification dated 25th April, 1985 been a sanction of final Development plan, the area in question ought not to have figured in the draft Development plan submitted to the H State Government. The draft plan submitted to the State

Government was considered by it and the Development plan dated 24th April, 1992 was sanctioned. This was not the modification of the Development plan but sanction of the same in exercise of the power under Section 31(1) of the Act. The High Court misdirected itself by considering the notification dated 10th April, 1985 to be the sanction of the Development plan under Section 37(2) of the Act and the notification dated 24th April, 1992 to be the modification of the final Development plan which has rendered its order illegal. It is trite that the validity of the order does not depend upon the section mentioned in the order. Wrong provision mentioned in the order itself does not invalidate the order, if it is found that order could be validly passed under any other provision. However in a case, like the instant one, contrary to what was mentioned in the notifications the Court cannot say that such powers were not exercised to render the notification illegal if in fact such power exists. [Para 13] [156-C-H; 157-A-B]

2. It is well settled that the user of the land is to be decided by the authority empowered to take such a decision and this Court in exercise of its power of judicial review would not interfere with the same unless the change in the user is found to be arbitrary. The process involves consideration of competing claims and requirements of the inhabitants in present and future so as to make their lives happy, healthy and comfortable. Town planning requires high degree of expertise and that is best left to the decision of State Government to which the advise of the expert body is available. In the facts of the instant case, the power was been exercised in accordance with law and there is no arbitrariness in the same. [Para 14] [157-C-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2047 of 2007.

From the Judgment & Order dated 05.09.2005 of the High Court of Bombay in Writ Petition No. 1561 of 1992.

WITH

Conmt. Pet. (C) No. 43 of 2007.

Shyam Divan, Atul Y. Chitale, R.P. Bhatt, Jay Savla, S. Ghanekar, Rajesh Kothari, Renuka Sahu, Meenakshi Ogra, Vaishali Thorat, Karan Thorat, A.S. Bhasme, Pankaj Mishra, Nishtha Kumar, Suchitra Atul Chitale, Sanjay Kharde (for Asha Gopalan Nair) Mahima C. Shroff, Chirag M. Shroff, Vinay Navare, Keshav Ranjan (for Abha R. Sharma) for the appearing parties.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. Respondent No. 3, MIG Cricket Club has preferred this appeal by special leave, aggrieved by the judgment of the Division Bench of the Bombay High Court dated 5th of September, 2005 passed in Writ Petition No. 1561 of 1992 whereby it had allowed the writ petition and quashed the notification dated 24th of April, 1992, published 7th in the Gazette on of May, 1992 and further directed the respondents of the writ petition to restore the reservation of plot for "school and cultural centre".

2. According to the writ petitioner – Respondent No. 1 Abhinav Sahkar Education Society, a Society registered under the Societies Registration Act, 1860 (hereinafter referred to as the "writ petitioner") it was allotted a portion of plot of land admeasuring 7224 sq. yards, bearing Survey No. 341 situated at MIG Colony, Gandhi Nagar, Bandra (East) in the city of Mumbai. Respondent No. 4, Maharashtra Housing and Area Development Authority (hereinafter referred to as "MHADA") and Respondent No. 5, Bombay Housing and Area Development Board (hereinafter referred to as "BHADB") with the consent of Respondent No. 3, Municipal Corporation of

Greater Bombay (hereinafter referred to as the "Corporation") under a resolution of February, 1965 granted lease for a period of 99 years to the writ petitioner on a premium equivalent to the price fixed and payable annually by way of installments. According to the writ petitioner, however, on measurement of the plot, the area was found to be 7301.25 sq. yards and when it proposed to construct a school building thereon, it came to its notice that the area in question has been reserved for a playground in the draft development plan. Writ Petitioner brought this fact to the notice of MHADA and BHADB by letter dated 8th of May, 1968 and in answer thereto the writ petitioner Society was asked to get the user of the land changed in accordance with law. Meanwhile, according to the writ petitioner, the Maharashtra Regional and Town Planning Act, 1966 (hereinafter referred to as the "Act") had come into force on 20th of December, 1966.

3. Further case of the writ petitioner is that by letter dated 15th of November, 1978 the Secretary to the Government of Maharashtra in the Department of Housing and the Chief Executive Officer and Vice-President of MHADA in a letter addressed to the Secretary of Urban Development Department requested for modification of the draft development plan showing "school purpose" for the user of the said plot. By letter dated 1st of January, 1979, the Senior Town Planner of the Bombay Metropolitan Regional Development Authority directed the writ petitioner to furnish certain details and plans. According to the writ petitioner he duly complied with the direction. It has been further averred that by letter dated 12th of November, 1979 addressed to the Personal Assistant to the Minister for Education, his intervention was sought for the necessary change in the user of the land for the purpose of school. By letter dated 10th of August, 1983, the Under Secretary to the Urban Development Department of the State Government informed the writ petitioner that instruction has been issued to the Corporation for change of the user of the plot in question for school purposes. In February 1984, according to the writ

A petitioner, the Corporation passed a resolution sanctioning user of the said plot for the purpose of a school. Ultimately in exercise of the powers under Section 37(2) of the Act, a notification dated 10th of April, 1985 came to be issued and published in the Government Gazette on 25th of April, 1985. B By the said notification the land admeasuring 6103.33 sq. meters out of Survey No. 341 (Part) was excluded from the site reserved for the playground and the land so released was earmarked for the "school and cultural centre" in the development plan of the area. The change of the user of the C said plot was also confirmed to the writ petitioner by the Executive Engineer, Town Planning (Division Plan) by the Corporation by letter dated 15th of April, 1985.

4. It is the allegation of the writ petitioner that during the period 1985-1986 it came to its notice that Respondent No. 3 D of the writ petition i.e. MIG Cricket Club (the appellant herein) had also approached the State Government for change of the user of the said plot for "cricket playground". It is the case of the writ petitioner that attempts were made to convince it to shift the school to another plot as the plot in question was required E by the MIG Cricket Club (hereinafter referred to as "the Club") for its playground. Petitioner did not yield to the pressure and by letter dated 10th of November, 1986 sought permission to erect a compound wall on account of the threats given by the Club. The Corporation by its communication dated 24th of F November, 1986 gave the permission sought for and informed the writ petitioner to submit development plan to the State Government. According to the writ petitioner, the Corporation informed it that in the proposed development plan submitted to the Government, by mistake it has shown the plot in question G as "cricket club and playground". In the aforesaid premises petitioner was asked to approach the State Government to get the mistake rectified. As directed, the petitioner 8th by letter dated of November, 1986 approached the State Government for rectification of the mistake and the same was H acknowledged by the Corporation stating that appropriate

action would be taken in this regard. However, to its surprise the petitioner came across the notification dated24th of April, 1992 published in the Gazette on 7th of May, 1992 which revealed that State Government in exercise of the powers conferred under Section 31(1) of the Act, had modified the user of the land in question and instead of land being shown reserved for "school and cultural centre" it was shown as a "playground".

5. Aggrieved by the same, the petitioner preferred the writ petition inter alia challenging the aforesaid notification and further for a direction to the respondents of the writ petition to restore the reservation of plot for "school and cultural centre".

6. Respondents in the writ petition including the Club, the appellant herein, contested the writ petition and according to them the notification dated 10th of April, 1985 was a minor modification in relation to a specific plot of land of a development plan sanctioned by the State Government before the commencement of the Act. It was further pointed out that the draft development plan for the entire area was already prepared on 16th October, 1984 and after hearing the necessary objections and suggestion the revised draft development plan was submitted on 29th of April, 1986 by the Corporation with necessary modification to the State Government. The same was finalized and the impugned notification dated 24th of April, 1992 was issued and published on 7th of May, 1992, whereby the land in question was shown as reserved for the purpose of "playground". It has further been averred by the respondents that the interest of the petitioner was also safeguarded by reserving a plot towards the eastern side of the plot in question for the "school and cultural centre". According to the respondents such finalization of the plan was done after hearing all the interested parties. It is the allegation of the respondents that the school opened by the petitioner was permanently closed since 1990 and on account of the failure on the part of the petitioner to pay the premiums payable to

A MHADA, the allotment in favour of the petitioner is liable to be cancelled. Respondents have further averred that the land in question was delivered to the Corporation which in turn leased the same to the Club since September, 1974.

B 7. In view of the pleadings of the parties the question which fell for consideration before the High Court was whether the notification dated 24th of April, 1992 issued in exercise of the powers under Section 31(1) of the Act was legal, valid and complied with the provisions of the Act.

C 8. The High Court on appraisal of the materials came to the conclusion that the notification dated 10th of April, 1985 purportedly issued in exercise of the powers under Section 37(2) of the Act was in fact issued in exercise of the power under Section 31(2) of the Act. While doing so the High Court D observed as follows:

> "The very fact that the draft development plan was prepared and placed for objections and suggestions from the members of the public on 30th April, 1984 and thereafter, E by the notification dated 10th April, 1985 the respondents had finalized the reservation of the land in question to be for school and cultural centre, even though the notification on the face of it refers to the exercise of powers under Section 37(2) of the said Act, for all the legal purposes, it F will have to be construed as having been issued in exercise of powers under Section 31 of the said Act in relation to the area in question. It is pertinent to note that there is no dispute on the point that subsequent to the draft development plan was prepared on 30th April, 1984, there was no finalization of the said plan in terms of Section 31 G of the said Act otherwise than the notification of 10th April, 1985. Being so, there was no occasion for the respondents on 10th April, 1985 to exercise the powers under Section 37(2) which clearly speaks of modification in the final development plan."

H

As regards notification dated 24th of April, 1992 said to have been issued in exercise of the power under Section 31(1) of the Act, the High Court observed that in fact the State Government exercised the power under Section 37(2) of the Act. In this connection, the High Court observed as follows:

> ".....Once it was known to the respondents that the draft plan was prepared on 30th April, 1984 and was subjected to the objections and suggestions from the members of the public and thereafter, on 10th April, 1985, a part of such area was finalized and notified, mere reference in the notification to Section 37(2) of the said Act could not be construed to mean that the powers had been, in fact, exercised under Section 37(2). It will have to be construed as having been exercised under Section 31(1) of the said Act, and for the same reason, it was necessary for the respondents to explain as to how and why the said notification dated 10th April, 1985 could not be considered or was not necessary to be construed while issuing the notification dated 24th April, 1992."

Ultimately, the High Court held that the impugned notification dated 24th of April, 1992 had been issued without consideration of the notification dated 10th of April, 1985 which renders the same illegal. While holding so the High Court observed as follows:

> ".....The impugned notification is of dated 24th April, 1992. Being so, once it is held that the impugned notification has not been issued in compliance with the provisions of law and the decision making process in that regard does not disclose the opportunity to the petitioner of being heard in the matter and the consideration of the notification dated 10th April, 1985 and application of mind by the concerned authorities before issuing the impugned notification, for the reasons stated above, therefore, the impugned notification is liable to be quashed and set aside

A to the extent it relates to the plot in question. Consequently, the respondents will have to be also directed to restore the reservation of the plot in question in accordance with the notification dated 10th April, 1985."

B Accordingly the High Court allowed the writ petition, quashed the impugned notification and granted the relief sought for by the writ petitioner.

9. Mr. Shyam Divan, Senior Advocate appearing on behalf of the appellant contends that the High Court erred in holding C that the notification dated 10th April, 1985 is, in fact, final development plan in relation to the area in question as contemplated under Section 31(1) of the Act. He points out that under Section 35 of the Act a development plan sanctioned by the State Government before commencement of the Act shall D be deemed to be final development plan sanctioned under the Act. According to him, the notification dated 10th April, 1985 modified the deemed final development plan which was in existence prior to the coming into force of the Act. Under the deemed development plan, according to Mr. Divan, the area E in question was shown as "playground" and hence, the modification in the final development plan can be done in exercise of the power conferred under Section 37(2) of the Act. In fact, while issuing the notification dated 10th April, 1985, such a power was exercised which would be apparent from the F notification and the site reserved for "playground" was earmarked for the "school and cultural centre". Mr. Divan further points out that the draft development plan submitted on 29th April, 1986 was sanctioned as development plan under Section 31(1) of the Act by notification dated 24th April, 1992 and the G notification itself shows that it was sanctioned under Section 31(1) of the Act. According to him, the High Court erroneously held that this notification, in fact, was issued under Section 37(2) of the Act. In sum and substance, according to Mr. Divan, the notifications dated 10th April, 1984 and 24th April, 1992 show that it were issued in exercise of the powers under H

Section 37(2) and Section 31(1) of the Act, but the High Court misdirected itself and held the same to have been issued under Sections 31(1) and 37(2) of the Act respectively. A

10. Ms. Vaishali Thorat, however, appearing on behalf of Respondent No.1 submits that the notification dated 10th April, 1985 was a final development plan sanctioned under Section 31(1) of the Act and without considering the same it has been modified by the impugned notification dated 24th April, 1992 in exercise of the power under Section 37(2) of the Act which renders the same illegal in the eye of law. She further points out that non-consideration of the notification dated 10th April, 1985, while issuing the notification dated 24th April, 1992 vitiates the impugned notification. B C

11. Rival submissions necessitate examination of the scheme of the Act. Section 35 of the Act which is relevant for the purpose, reads as follows: D

> **"35. Development plans sanctioned by State Government before commencement of this Act :**
>
> If any Planning Authority has prepared a Development plan which has been sanctioned by the State Government before the commencement of this Act, then such Development plan shall be deemed to be a final Development plan sanctioned under this Act." E F

From a plain reading of the aforesaid provision, it is evident that the Development plan sanctioned by the State Government before the commencement of the Act, shall be deemed to be a final Development plan sanctioned under the Act. Making of Development plan requires consideration of various inputs and for that several bodies have to be consulted and various steps as provided in the Act are required to be taken. Naturally it would take some time. A town cannot exist without a Development plan, otherwise it would lead to chaos. No Development plan was made under the Act which came into G H

force on 20th of December, 1966 and hence the legislature created a legal fiction by enacting Section 35 of the Act. It provided for assuming a fact i.e. existence of a Development plan, which was, in fact, not made in accordance with the provisions of the Act. It has to be borne in mind that when a legal fiction is created it shall be given full effect. Generally legal fiction is created to advance public policy and preserve the rights of certain individuals and institutions. Legal fiction tends to treat an imaginary state of affairs as real and entails the natural corollaries of that state of affairs. Hence, the Development plan, existing prior to the coming into force of the Act, shall be deemed to be a sanctioned Development plan under Section 31(1) of the Act.

12. Section 31(1) of the Act inter alia provides for sanction of the draft Development plan, the same reads as follows:

"31. Sanction to draft Development plan.

(1) Subject to the provisions of this section, and not later than one year from the date of receipt of such plan from the Planning Authority, or as the case may be, from the said Officer, the State Government may, after consulting the Director of Town Planning by notification in the Official Gazette sanction the draft Development plan submitted to it for the whole area, or separately for any part thereof, either without modification, or subject to such modifications as it may consider proper, or return the draft Development plan to the Planning Authority or as the case may be, the said Officer for modifying the plan as it may direct, or refuse to accord sanction and direct the Planning Authority or the said Officer to prepare a fresh Development plan:

Provided that, the State Government may, if it thinks fit, whether the said period has expired or not, extend from time to time, by a notification in the Official Gazette, the period for sanctioning the draft Development plan or

refusing to accord sanction thereto, by such further period as may be specified in the notification:

Provided further that, where the modifications proposed to be made by the State Government are of a substantial nature, the State Government shall publish a notice in the Official Gazette and also in local newspapers inviting objections and suggestions from any person in respect of the proposed modifications within a period of sixty days from the date of such notice."

The aforesaid provision confers power on the State Government to sanction the draft Development plan submitted to it for the whole area or separately for any part thereof either without modification or subject to such modifications as it may consider proper. Therefore, Section 31 of the Act operates in the field of the power of the State Government to sanction a draft Development plan. Under the scheme of the Act, a minor modification of the Development plan sanctioned under Section 31(1) of the Act is provided under Section 37(2) of the Act. It reads as follows:

"37. Minor modification of final Development plan.

(1) xx xx xx

(2) The State Government may, after making such inquiry as it may consider necessary after hearing the persons served with the notice and after consulting the Director of Town Planning by notification in the Official Gazette, sanction the modification with or without such changes, and subject to such conditions as it may deem fit, or refuse to accord sanction. If a modification is sanctioned, the final Development plan shall be deemed to have been modified accordingly."

From a plain reading of the aforesaid provision it is evident that the State Government has been conferred with the

A power to make minor modification to the final Development plan. Thus, under the scheme of the Act, a Development plan sanctioned by the State Government prior to the commencement of the Act, shall be deemed to be the final Development plan and there can be minor modification in such
B Development plan by the State Government in exercise of power conferred under Section 37(2) of the Act. Sanction of draft Development plan is provided under Section 31(1) of the Act.

13. Bearing in mind the scheme of the Act, as aforesaid,
C we are of the opinion that the Development plan sanctioned by the State Government before commencement of the Act, has become final Development plan under the Act. The Development plan existing prior to the commencement of the Act shows that the area in question was reserved for
D "playground" which was modified to "school and cultural society" in exercise of power under Section 37(2) of the Act and earmarked for the "school and cultural centre" by notification dated 25th April, 1985. Such a course was permissible under law. It is the writ petitioner's plea that the Corporation informed
E it that in the proposed Development plan the area in question has beenshown as "cricket club and playground". Had the notification dated 25th April, 1985 been a sanction of final Development plan, the area in question ought not to have figured in the draft Development plan submitted to the State
F Government. The draft plan submitted to the State Government was considered by it and the Development plan dated 24th April, 1992 was sanctioned. This, in our opinion, is not the modification of the Development plan but sanction of the same in exercise of the power under Section 31(1) of the Act. It
G seems that the High Court misdirected itself by considering the notification dated 10th April, 1985 to be the sanction of the Development plan under Section 37(2) of the Act and the notification dated 24th April, 1992 to be the modification of the final Development plan which has rendered its order illegal. It
H is trite that the validity of the order does not depend upon the

section mentioned in the order. Wrong provision mentioned in the order itself does not invalidate the order, if it is found that order could be validly passed under any other provision. However in a case, like the present one, contrary to what have been mentioned in the notifications the Court cannot say that such powers were not exercised to render the notification illegal if in fact such power exists.

14. It is well settled that the user of the land is to be decided by the authority empowered to take such a decision and this Court in exercise of its power of judicial review would not interfere with the same unless the change in the user is found to be arbitrary. The process involves consideration of competing claims and requirements of the inhabitants in present and future so as to make their lives happy, healthy and comfortable.

We are of the opinion that town planning requires high degree of expertise and that is best left to the decision of State Government to which the advise of the expert body is available. In the facts of the present case, we find that the power has been exercised in accordance with law and there is no arbitrariness in the same.

15. In the result, the appeal is allowed, the impugned judgment of the High Court is set aside. However, there shall be no order as to costs.

CONTEMPT PETITION © NO.43 OF 2007:

16. In view of the order passed in Civil Appeal No.2047 of 2007, we are not inclined to entertain the contempt petition. The Contempt Petition stands dismissed.

D.G. Matters disposed of.