Nariman Point Churchgate Citizens Welfare Trust and Others Vs. The State of Maharashtra through the Public Works Department and Others

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Court : Mumbai

Decided On : Mar-02-2016

Judge : A.S. Oka &Amp; C.V. Bhadang

Appeal No. : Public Interest Litigation No. 101 of 2013 with Notice of Motion No. 189 of 2014

Appellant : Nariman Point Churchgate Citizens Welfare Trust and Others

Respondent : The State of Maharashtra through the Public Works Department and Others

Judgement :

Oral Judgment: (A.S. Oka, J.)

FACTS OF THE CASE

1. The submissions were heard on the earlier date. This Petition concerns a plot of land known as Jawaharlal Nehru Garden located to the north of Madame Cama Road, adjoining Mantralaya, Mumbai. The said plot of land is in the prime area of South Mumbai. In the Development Plan sanctioned under the Maharashtra Regional and Town Planning Act, 1966 (for short MRTP Act) in the year 1967, the plot of land subject matter of this Petition (for short the said land) was shown in green zone. In the subsequent sanctioned Development Plan (1981-2001), the same is reserved as a Recreational Ground (for short RG). The issue concerns the structures which are in possession of the Respondent Nos.4 to 9 which are situated on the said land. The first prayer in this Petition under Article 226 of the Constitution of India is for issuing a writ of mandamus directing the demolition and removal of all encroachments and structures constructed on the said land and for restoration of the said land for its use as RG. Consequential prayers are made for directing the Respondent Nos.1 to 3 (State of Maharashtra and the Municipal Corporation of the City of Mumbai) to take adequate steps and measures to protect the said land from encroachments in future. There are prayers for interim relief in addition to the aforesaid prayers for substantive reliefs.

2. The Respondent No.2 is the State of Maharashtra. The Respondent No.3 is the Municipal Corporation of Greater Mumbai (for short the said Corporation) and the Respondent No.3 is its Commissioner. The Respondent No.4 is the Maharashtra Tourism Development Corporation Limited which is a Company owned and controlled by the State Government. The Respondent No.5 is the Employment Exchange which is set up by the State Government. The Respondent Nos.6 and 7 are the political parties (Bharatiya Janata Party and Janata Dal respectively). The Respondent No.8 is a Zunka Bhakar Kendra stall. The Respondent No.9 is the Mahila Arthik Vikas Mahamandal (MAVIM) which is again a Company owned and controlled by the State Government. A part of the said land having structures is occupied by the Respondent Nos.4 to 9.

3. The first Petitioner in this Petition is a Charitable Trust registered under the Bombay Public Trusts Act, 1950. Various activities carried out by the first Petitioner are set out in paragraph 2 of the Petition. The Petitioner

No.7 is an Association of residents of Oval Cooperage area. The Petitioner No.9 is a Federation of Churchgate Residents. The credentials of the said two Associations are also set out in the Petition. The other Petitioners are citizens who are the residents of the area.

4. As stated earlier, the contention raised by the Petitioners is that the said land which is known as Nehru Garden is designated as RG in the sanctioned Development Plan (1981-2001) of Mumbai under the MRTP Act. It is also pointed out that under the earlier sanctioned Development Plan of the year 1967, the said land was a part of the Green Zone. It is pointed out that opposite the said land, there is a plot of land on which there is a garden known as Mahatma Gandhi Garden which is also shown as RG in the sanctioned Development Plan. It is stated that said garden is well developed and is free of any encroachments. There is a statue of Jawaharlal Nehru installed on the said land. Reliance is placed on information obtained under the Right to Information Act of 2005 (for short the said Act of 2005) from the said Corporation and other authorities as regards the area allotted to the various Respondents in the Petition. As per the information furnished by the letter dated 23rd November 2007 issued by the Public Information Officer of the Public works Department, the Respondent Nos. 4,6 and 7 were allotted areas of 4546 square feet, 2682 square feet and 1384 square feet respectively.

5. By amending the Petition, it is brought to the notice of the Court that on 25th April, 2013 the third Respondent Mumbai Municipal Corporation (for short the said Corporation) issued a notice under Section 354A of the Mumbai Municipal Corporation Act, 1888 (for short the said Act) to the Respondent No.6 (Bharatiya Janata Party)pointing out that an unauthorised construction is being carried out. The Respondent No.6 was called upon to stop the construction. It is contended that after service of the said notice, no steps were taken by the said Corporation and the work of construction proceeded. The Prayers in the Petition are for removal of all the structures on the said land and for restoration of the said land as RG.

THE SUBMISSIONS OF THE PETITIONERS

6. The learned Senior Counsel appearing for the Petitioners relied upon the provisions of the Development Control Regulations for Greater Mumbai, 1991 (for short the DCR). He invited our attention to Exhibit' K' to the Petition. Exhibit-K is the information supplied to one of the Petitioners under the Right to Information Act, 2005 by the Public Works Department of the State Government. He pointed out that the information records that as the said land was in Green Zone, permanent construction thereon cannot be carried out. He pointed out that the said information records that before the Garden was made on a part of the said land, there were temporary sheds erected which were given for use of the Government offices and Political Parties. He also pointed out the stand taken by the State Government in one of its affidavits in which it is contended that the prime responsibility of removal of encroachments as well as illegal constructions on the said land was of the Municipal Corporation. His submission is that none of the structures which are in existence in the present form were in existence when the sanctioned Development Plan (1981-2001) came into force. He relied upon clause 1(a) of Regulation 13 of the DCR and submitted that unless the buildings are lawfully constructed before coming into force of the DCR, the same cannot be retained as the reservation of the said land is admittedly for RG. Therefore, the basic submission of the Petitioners is that none of the structures can be tolerated after the DCR came into force in the year 1991.

7. He also invited our attention to the provisions of the Development Control Rules, 1967 which were in operation till the DCR came into force. He invited our attention to Rule 3 and other relevant Rules. He also invited our attention to Rule 4B and Rule 31. He submitted that as the said land was falling in green zone under the Development Plan of the year 1967, in view of Rule 31 of the said Rules of 1967, the structures/ buildings for limited usages as specified under Rule 31 could have been constructed. He submitted that the structures on the said lands are used for the purposes which are not covered by Rule 31. His submission is that in any case, after the said Rules of 1967 came into force, there could not have been any construction on the said land. His submission is that even assuming that the said structures were in existence, the same cannot be tolerated in view of clause 1(a) of Regulation 13. He also pointed out various affidavits on record.

He pointed out that there is a newspaper report which indicates that the Respondent No.4 has agreed to vacate the portion of the said land in its possession. His submission is that none of the Respondents should have taken this Petition as an adversarial litigation inasmuch as the requirement of maintaining the said land as a Recreation Ground ought to have been accepted by everyone in the light of the well settled legal principles laid down by the Apex Court.

8. He pointed out that none of the Respondents including the State Government and the said Corporation have placed on record any documents showing that the existing structures were lawfully constructed. He pointed out that as far as the Respondent No.6 is concerned, premises having an area of 1,200 square feet was allotted under the Government Resolution dated 31st May, 1989 for temporary period of two years. He urged that the said period was never extended. He pointed out that as far as the other Respondents are concerned, there is no document placed on record showing the allotment. He invited our attention to the affidavit in reply filed by the Respondent No.8 Mr. Ramchandra Dagadu Sawant and the documents annexed thereto. He submitted that the Leave and Licence agreement dated 18th March, 1996 executed by the State Government in respect of the land on which the stall of the Respondent No 8 is constructed has expired long back on 18th February, 1997. Relying upon further affidavit filed by the Petitioners he pointed out that in the year 2000, Zunkha Bhakar Scheme has been discontinued. He pointed out that the Leave and License was executed only for the purpose of running the Zunkha Bhakar Centre as per the scheme of the State Government which is a part of the Government Resolutions dated 27th December, 1995 and 25th August, 1995. He also invited our attention the affidavit filed by the Respondent No.4. He pointed out that as far as Respondent No.6 is concerned, even according to the stand of the State Government, by a subsequent order dated 31st October, 1995 an additional area of 1482 square feet has been allotted. His submission is that from the letter dated 5th September, 1996 which is placed on record and marked as 'A2' it will have to be inferred that an additional area was allotted to the Respondent No.6 which makes the total area allotted to it as 1482 square feet. In any event, he submits that the total area allotted to the Respondent No.6 will be 2682 square feet. He invited our attention to the affidavit filed by Shri Keshav Y. Dhotre, the Designated Officer of the said Corporation. He pointed out that earlier, the officers of the Municipal Corporation were not allowed entry in the premises of the Respondent No.6 for the purposes of carrying out inspection. Inviting our attention to the inspection report dated 30th March, 2015 annexed to the affidavit of Shri Keshav Y. Dhotre dated 9th April, 2015, he urged that now the structure in possession of the Respondent No.6 consists of two full fledged floors (Ground and first floor). The area of the ground floor is 476 square meters and the area of the alleged mezzanine floor is 430 square meters. He pointed out that on so called mezzanine floor, there is a Conference Hall, 1 Common Hall and 14 cabins/ rooms. He pointed out that even going by the stand taken by the State Government, at highest, the area allotted to the Respondent No.6 is 2682 square feet and unchallenged inspection report submitted by Shri Dhotre shows that the area of the ground floor is nearly double the said area. He also pointed out that only after the said inspection was carried out on 31st March, 2015, on 8th June, 2015 the Respondent No.6 made an application to the State Government for rectification of the area allotted to it by contending that the Respondent No.6, after the initial allotment, have not made any additions or alterations and have also not carried out extension. He submitted that after the service of the stop work notice dated 25th April, 2013 the Respondent No.6 made an application for regularisation through an Architect which was not granted. The submission is that the Respondent No.6 indulged in illegal construction.

9. Lastly, the submission of the learned counsel appearing for the Petitioners is that it is the duty of the State to ensure that the reservation for RG in the sanctioned Development Plan is scrupulously implemented.

THE SUBMISSIONS OF THE LEARNED ADVOCATE GENERAL FOR THE STATE

10. The learned Advocate General representing the State invited our attention to the several documents on record which are annexed to the affidavit of Shri Padmakar Isanji Sukhadeve, Sub Divisional Engineer, South Public Works Division which show that at least in the year 1978, number of structures were in existence on the

said land which are described as CDO Barrack Nos.1, 2 and 10. He pointed out that the premises in possession of a political party Janata Dal (Respondent No.7) were in possession of the Janata Party in the year 1978. He pointed out that the premises allotted to the Respondent No.6 were in possession of Hindustan Samachar. His submission is that the structures in the form of barracks were in existence for several years. As far as allotment to the Respondent No.6 is concerned, he candidly stated that initially, constructed area of 1200 square feet was allotted to the Respondent No.6 and subsequently on 31st October, 1995 an additional area of 1482 square feet allotted to the Respondent No.6. He did not dispute that the agreement executed in favour of Respondent No.6 was only in respect of an area of 1200 square feet and on 6th June, 1998 the term of the agreement has expired. However, he stated that rent is being paid by the Respondent No.6 which is being accepted by the State Government. On a query being made by the Court, he candidly accepted that what is constructed in excess of the area allotted to the Respondent No.6 will have to be pulled down.

THE SUBMISSIONS OF THE MUMBAI MUNICIPAL CORPORATION

11. The learned Senior Counsel representing the Mumbai Municipal Corporation relied upon the affidavits filed on record. He also invited our attention to the affidavit of Shri Dhotre which specifies the area of the structure presently in possession of the Respondent No.6. He pointed out that though after the service of the stop work notice dated 25th April, 2013 issued by the said Corporation, the Respondent No.6 through his Architect applied for regularisation, the said proposal was not granted. He pointed out the communication dated 18th June, 2013.

THE SUBMISSIONS OF THE RESPONDENT NO.4 ,7 AND 8

12. The learned counsel appearing for the Respondent No.4 invited attention of the Court to the affidavit in reply filed by the said Respondent. He submitted that there is no illegality associated with the possession of the said Respondent. He denied that the fourth Respondent has decided to vacate the premises in its possession. He pointed out that as set out in the affidavit in reply, the possession of the said Respondent is lawful and there is nothing illegal about the activity carried out by the said Respondent. He pointed out that even before 1981-2001 Development Plan came into force, the structure which is in possession of the Respondent No.4 was in possession of the Tourism Department of the State Government. The learned counsel appearing for the Respondent No.7 pointed out that it is not even the case that any illegal construction has been made by the Respondent No.7. His submission is that the Respondent No.7 's predecessor Janata Party was in possession of the premises for several years prior to coming into force of the sanctioned Development Plan. The learned counsel appearing for the Respondent No.8 submitted that the Zunkha Bhakar Kendra has been lawfully constructed in accordance with the agreement entered into which is annexed to the affidavit in reply. None appeared for the Respondent No.9.

THE SUBMISSIONS OF THE RESPONDENT NO.6

13. The learned Senior Counsel appearing for the Respondent No.6 initially contended that no additional construction has been carried out by the Respondent No.6 and the area of the premises in possession of the Respondent No.6 continues to be the same which existed on the dates of respective allotments. He submitted that clause 1(a) of Regulation 13 of the DCR protects all the structures which were lawfully used. He submitted that it is not necessary that the structure should have been constructed after obtaining permission for attracting the provisions of the clause 1(a) of the Regulation 13. He has produced for perusal of the Court a photocopy of the receipt showing that the State Government has accepted rent in the sum of Rs.24,083/- on 30th January, 2016 from the Respondent No.6. He would, therefore, urge that possession of the Respondent No.6 is lawful and though Lease Agreement may not have been extended, the State Government is regularly accepting the rent from the Respondent No.6. He submitted that the lawful user which existed on the date on which Development Plan came into force has been expressly protected. He submitted that there is no merit in the allegation that any illegality is committed by the Respondent. He submitted that the structures in the form of barracks were in existence on the said land much prior to coming into force of the Development Plan (1981

to 2001) and now it is too late in the day to urge that the structures were in contravention of the Development Plan sanctioned in the year 1967.

14. We must note here that the submissions of the learned counsel appearing for the parties concluded on 11th February, 2016. Yesterday, when the Petition was listed for Judgment, the learned Senior Counsel appearing for the Respondent No.6 stated that the said Respondent is willing to alter the existing structure in its possession for bringing the same down to the area of 1,200 square feet as it existed on the date of allotment (31st May 1989). On a query being made by the Court, he clarified that the alteration will be made in such a manner that only the ground floor structure will continue to exist and that mezzanine floor will be removed. Yesterday, he sought time of six months to carry out aforesaid alterations so as to bring down the area of the structure to 1,200 square feet. Today, the learned Senior Counsel submits that time of eight months may be granted.

CONSIDERATION OF SUBMISSIONS

15. We have given careful consideration to the submissions. There is no dispute between the contesting parties that in the sanctioned Development Plan (1981 to 2001), the said land is shown reserved as a Recreation Ground (RG). There does not seem to be any dispute that in the sanctioned Development Plan of the year 1967, the said land was shown as falling in Green Zone. The Development Control Regulations (DCR) are of the year 1991. In the DCR, the RG is included in the definition of amenity in clause 7 of Regulation 3. Regulation 23 deals with the structures/uses permitted in RG/Amenity open spaces. The DCR is a piece of a subordinate legislation. We are making a reference to clause (g) of the Regulation 23 only to indicate the object of reserving a particular land as a RG. The relevant part of clause (g) reads thus:

(g) Structures/uses permitted in recreational open spaces :

(i) In a recreational open space exceeding 400 sq.m in area (in one piece), elevated/ underground water reservoirs, electric substations, pump house may be built and shall not utilise more than 10 per cent of the open space in which they are located.

(ii) In a recreational open space or playground of 1000 sq. m or more in area (in one piece and in one place), structures for pavilions, gymnasia, club houses and other structures for the purpose of sports and recreation activities may be permitted with built-up area not exceeding 15 per cent of the total recreational open spaces in one place. The area of the plinth of such a structure shall be restricted to 10 per cent of the areas of the total recreational open space. The height of any such structure which may be single storey shall not exceed 8 m. A swimming pool may also be permitted in such a recreational open space and shall be free of FSI.

Structures for such sports and recreation activities shall conform to the following requirements:

(a) The ownership of such structures and other appurtenant users shall vest by provision in a deed of conveyance, in all the owners on account of whose cumulative houldings, the recreational open space is required to be kept as recreational open space or ground viz. 'R.G.' in the layout or sub-division of the land.

(b) The proposal for construction of such structure should come as a proposal from the owner/owners/ society/societies or federation of societies without any profit motive and shall be meant for the beneficial use of the owner/owners/members of such society/societies /federation of societies.

(c) Such structures shall not be used for any other purpose, except for recreational activities for which a security deposit as decided by the Commissioner will have to be paid to the Corporation.

(d) The remaining area of the recreational open space or playground shall be kept open to sky and properly accessible to all members as a place of recreation, garden or a playground.

(e) The owner/owners/ or society or societies or federation of the societies shall submit to the Commissioner a

registered undertaking agreeing to the conditions in (a) to (d) above.

16. Thus, the intention seems to be that a land which is reserved for RG should be used for the purposes of sports and recreation subject to the compliance with various terms and conditions listed in clause (g). The question before the Court is whether the user of the structures which are in existence on the said land can be said to be in conformity with the reservation for RG. Fortunately, none of the Respondents who are before the Court have come out with the case that their present user is in conformity with the user permissible for RG in the sanctioned Development Plan or in the DCR.

17. Clause 1(a) of Regulation 13 reads thus:

13. Exemptions -

(1) **Existing nonconforming uses to continue in certain circumstances:**

(a) **Any lawful use of land/buildings/premises existing before the coming into force of these Regulations may continue** even if it does not conform to the use provisions of these Regulations provided such non-conforming use is not extended or enlarged except as provided in these Regulations.

(emphasis added)

18. The argument of the learned Senior Counsel appearing for the Respondent No.6 was that to attract clause 1(a), the use of the buildings or premises existing before coming into force of the DCR has to be lawful and it is not necessary that the buildings or premises should have been lawfully constructed. We have already quoted clause 1(a) of Regulation 13. It contemplates lawful use of land/buildings/premises. Buildings or premises can be lawfully used provided the buildings or premises are lawfully constructed. In other words, if a building or premises is not lawfully constructed, it cannot be said that it is being lawfully used. Therefore, on plain reading of clause 1(a), the interpretation sought to be put by the learned Senior Counsel appearing for the Respondent No.6 will have to be rejected.

19. The argument of the Petitioners is that the structures are contravening structures inasmuch as the said land was in Green Zone in the sanctioned Development Plan of the year 1967 and in terms of Rule 31 of the said Rules of 1967, a very limited user of the premises in Green Zone was permissible which did not include the present user. Therefore, the argument is that the structures on the said land are contravening structures even as far as the 1967 Development Plan is concerned. For dealing with this argument, it will be necessary to make a reference to the affidavit of Shri Padmakar Isanji Sukhadeve, Sub Divisional Engineer of the Public Works Department of the State Government and in particular the annexures thereto which are Exhibits 1 and 2 to the said affidavit. Exhibit 2 is a copy of the Government of Maharashtra Circular dated 31st August 1978 which shows that three rooms in CDO Barrak No.2 were in possession of the Superintendent, Parks and Gardens and the Director of Tourism was in possession of Room Nos.4 to 6 in the same barrack having total area of about 519 square feet. The Janaty Party was in possession of Room Nos.1 and 2 of CDO Barrack No.10 having total area of 820.90 square feet. As far as the Hindustan Samachar is concerned, it is mentioned that it was in possession of CDO Barrack No.1. It is stated that Hindustan Samachar was allotted additional area of 430 square feet in addition to the accommodation already allotted. In the circular dated 6th October, 1978 issued by the General Administration Department of the State Government a copy of which is annexed to the said affidavit it is stated that Room No.3 in CDO Barrack No.10 was in possession of the Maharashtra Purogami Vidhimandal Congress. In chart at Exhibit-1 to the said affidavit, it is claimed that the aforesaid structures were in existence prior to the year 1978 as most of the allotments are of the year 1978. Chart at Exhibit-1 records that the Directorate of Tourism was in possession of premises having area of 519 square feet and 704 square feet which were allotted in the year 1978. It records that premises allotted to the Employment Exchange was having an area of 4028 square feet which was allotted on 15th June, 1993 but was in existence on or before 1978. It is stated that MAVIM (the Respondent No.9) was allotted an area of 2,200 square feet. The allotment of an area of 1,200 square feet in Barrack No.1 was made to the Respondent No.6

on 31st May, 1989. Thus, the record of the year 1978 in the form of Circulars dated 31st August, 1978 and 6th October, 1978 show that the structures in the form of CDO Barrack Nos.1, 2 and 10 were in existence on the said land. The said documents shows that Barrack No.10 consisted of Room Nos.1 and 2 and Barrack No.2 consisted of Room Nos.1 to 6. The number of rooms in Barrack No.1 are not specified but it appears that Barrack No.1 was in possession of Hindustan Samachar. Now, it is too late in the day to contend in this Petition filed in the year 2013 that the structures which were in existence in the year 1978 were contravening structures insofar as 1967 sanctioned Development Plan is concerned. For such a long time, no one has raised any objection that the structures which were in existence atleast in the year 1978 were contravening structures. It is not the case made out in the Petition that between 1978 till the date on which the Development Plan of 1981 - 2001 was sanctioned, on the said land, any further constructions were made. However, after coming into force of the Development Plan (1981-2001), on the said land which was shown as RG, there could not have been any construction of contravening structures save and except the structures erected for permissible user as per Regulation 23. Therefore, the contravening structures which came into existence after sanctioned Development Plan (1981-2001) came into force reserving the said land as RG, cannot be tolerated.

20. Now, we may make a reference to the case made out as regards the structure of the Respondent No.6. Under the letter of allotment dated 16th June, 1989 issued on the basis of the Government Resolution dated 31st May 1989, the Public Works Department of the State Government allotted to the Respondent No.6 an area of 1,200 square feet in Barrack No.1 which was earlier in possession of M/s. Hindustan Samachar. The letter records that allotment was only for a period of two years subject to payment of rent of Rs.6,000/- pm. It is stated in the said letter that rent at the rates revised from time to time by the State Government will have to be paid. It is specifically stated that allotment was for a temporary period of two years. Thus, the allotment made under the letter dated 16th June, 1989 was of the constructed area of 1,200 square feet in Barrack No.1. An agreement dated 31st May, 1989 was executed by and between the State Government and the Respondent No.6 incorporating various terms and conditions in terms of the letter of allotment. The said agreement was to remain in force until 31st May, 1991. The second allotment is by the Government Circular dated 31st October, 1995. It records that an additional area of 1482 square feet was allotted in the compound of Barrack No.1. The Circular records that the said area is in the compound of the Barrack no.1 and around the office of the Respondent No.6 set up in the said Barrack No.1. Clause 3 of circular dated 31st October, 1995 incorporates a specific condition that before carrying out any construction on the additional area of 1482 square feet, a permission of the Competent Authority including the said Corporation shall be obtained. Thus, it is crystal clear that additional area allotted under the Circular dated 31st October, 1995 was an open area and no construction could be carried out thereon without seeking prior permission of the Competent Authorities. We must note here that it is not the case of the Respondent No.6 or even the said Corporation that in relation to the said added area of 1482 square feet, at any point of time, the Respondent No.6 even applied for grant of permission to construct a building or structure. Thus, it becomes an admitted position that the construction on the additional area was illegally carried out by Respondent No.6. The matter does not rest here.

21. We must make a reference to the affidavit filed by Shri Keshav Y. Dhotre, the Designated Officer of the Mumbai Municipal Corporation. The said affidavit was filed after visiting the premises in possession of the Respondent No.6 as per the order dated 27th March, 2015. Inspection report dated 30th March, 2015 has been annexed to the said affidavit which records that Shri Dhotre in presence of Shri Mukund Kulkarni of the Respondent No.6 and other office bearers inspected the premises on 30th March, 2015 at 11.00 am. The description of the premises of the Respondent No.6 has been incorporated in the said report apart from annexing number of photographs and a sketch. The description of the structure recorded by Shri Dhotre reads thus:

1. The premises consist of Ground and Mezzanine floor with BM side walls and GI sheet roofing and mezzanine floor consist of ladi-coba-ladi-flooring supported with RSJ adm. about 476 sq.m at gr. floor and

adm. about 430 sq.m. at mezzanine floor.

2. There are 11 Nos. of cabins/ rooms, 1 No. of Conference Hall, 1 No. of Waiting Hall, 4 Nos. of Toilet Blocks, 2 Nos.Kitchen Room, Meter and Server Room consisting of BM partition walls/ glass partition/ gypsum partition at gr. Floor and 14 Nos. of cabins/ rooms, 1 No. of Conference Hall, 1 No. of Common Hall, and 4 Nos. of Toilet Blocks consisting of BM partition walls/ glass partition/ gypsum partition at mezzanine floor as shown in the sketch.

(emphasis added)

22. We must note here that though the said report is produced on record along with the affidavit dated 9th April, 2015, the contents of the affidavit of Shri Dhotre and the report have not been disputed by Respondent No.6. Thus, it becomes an undisputed position that the area of the ground floor premises constructed by the Respondent No.6 was found to be 476 square meters which is about 5123 square feet and the area of the alleged mezzanine floor thereon was found to be 430 square meters which is approximately equivalent to 4628 square feet. As stated earlier, the constructed area allotted to the Respondent No.6 was 1,200 square feet inside existing barrack. Additional open area of 1482 square feet was allotted in the year 1995. Thus, what was found on 30th March, 2015 was a ground floor having an area which is nearly double the allotted area of 2682 square feet. In addition, the mezzanine floor 4628.48 square feet was found. The mezzanine floor really appears to be a regular floor which has a conference hall and cabins. As stated earlier, it is not the case made out by the Respondent No.6 that for making construction on the additional area of 1482 square feet, even an application for grant of building permission was made. At this stage, we must note another fact which is very relevant. The said fact is that the stop work notice was issued by the Mumbai Municipal Corporation to the Respondent No.6. The said stop work notice is dated 25th April, 2013 which records that the Respondent No.6 started unauthorized repairs of the existing sloping roof structure by increasing the height with BM wall and construction of mezzanine floor with R.S.J. ladi coba. The additions and alterations were shown in the sketch annexed to the notice. There is an affidavit filed by Shri Dharmendra D. Kantharia, Assistant Engineer (BandF) of the Corporation. A copy of the letter dated 18th June, 2013 addressed by the Assistant Engineer (BP) City-I to M/s. Deshmukh and Associates, Architects of the Respondent is annexed thereto. The subject of the said letter is regularisation of the existing office of the Respondent No.6 in CDO Barrack No.1. The opening portion of the said letter records that sanction is refused and the proposal is rejected in exercise of powers under the MMC Act as well as MRTP Act. However, it records that on compliance with 22 conditions incorporated therein, regularisation proposal could be processed. It is not the case of the Respondent No.6 that thereafter the regularization proposal was processed and it was allowed. Hence, the application made by the Respondent No.6 for regularization was rejected. Thus, everything over and above the area of 1,200 square feet in Barrack No.1 was constructed illegally by the Respondent No.6. Moreover, material alterations were made to the main structure of 1200 square feet by constructing a mezzanine floor thereon. The admitted area of the present structure is already quoted above. Hence, not only that illegal structure was made by the Respondent No. 6, but the structure was extended by making an encroachment on a very valuable Government land reserved as RG. Shockingly, after the report was submitted by the Municipal Officer, the Respondent No. 6 made an application on 8th June 2015 to the State Government seeking the rectification of the area mentioned in the allotment orders of the year 1989 and 1995. As the area mentioned in the allotment documents of 1989 and 1995 was never disputed by the Respondent No.6, the said Application ought to have been rejected by the State Government. Now, this controversy is put to rest by the statement made across the Bar by the Respondent No.6 that the said Respondent will restore the structure as it existed on 31st May, 1989. It follows that as what was in existence was a single storied structure having an area of 1200 square feet, the restoration will have to be made accordingly. It is only because of the statement made across the Bar that we are not issuing a direction for demolition of the entire structure which deserves to be demolished. Today, a request is made for grant of time of eight months to remove the additions and alterations. According to us, considering what we have recorded above, time of six months sought yesterday was more than enough which can be granted only by

way of indulgence.

23. There is another feature of the controversy. It is not brought on record either by the State Government or by the Respondent No.6 that by following due process of law and by following a process which is fair and transparent, the lease period of a very valuable property was extended beyond the period of two years which expired on 1991. Even for allotting additional area, such a procedure was not followed. However, we need not go any further on this aspect as in this Petition, there is no challenge to continuation of the possession of the Respondent No.6 on this ground. However, this is an aspect which will have to be taken into consideration by the State Government.

24. Now, we turn to the Respondent No.4 which is a Government of Maharashtra Undertaking. There is an affidavit in reply filed by the Respondent No.4 of Ms. Kavita N. Solunke. It is stated that the premises in CDO Barrack which are now in possession of the Respondent No.4 was allotted to the Directorate of Tourism in the year 1972 and on establishment of the Respondent No.4 on 20th January, 1975, the said Respondent has been occupying the same. It is stated in sub paragraph (A) of paragraph 3 which reads thus:

(A) The subject property viz. C.S. No.240 and 240A admeasuring ___ sq. mtrs. situate on Madame Cama Road and adjoining Mantralaya, Mumbai belonging to Public Works Department of Government of Maharashtra. As per the records, the C.D.O. hutments which are now in possession of Respondent No.4 was allotted to the Directorate of Tourism from 1972. Later, on and from the establishment of Respondent No.4 M.T.D.C. 20/1/1975, the Respondent No.4 has been occupying the said tenements. Initially, the Respondent No.4 was in possession of about 6761 sq. ft. constructed area and 3239 sq.ft. open space. The Respondent No.4 had been paying monthly rent to the Public Works Department.

25. We must note here that the area claimed to be in possession by the Respondent No.4 appears to be much in excess of the area which is reflected from the Government Circulars dated 31st August, 1978 and 6th October, 1978. Both the Circulars record that the area in possession of the Directorate of Tourism was admeasuring 518.90 square feet comprising of Room Nos.4 to 6 of CDO Barrack No.2. As held earlier, what can be tolerated is the structure in existence on the date on which reservation of RG was imposed on the said land. The claim made by the Respondent No.4 is not supported by any authentic documents annexed to affidavit of Shri Sukhadeve. Further part of the affidavit Ms. Solunke records that on 27th August, 1992, the land admeasuring 1,000 square meters was allotted to the Respondent No.4 out of the area of 4795 square meters which was allotted by the State Government to the said Corporation. It is stated that the area of 1,000 square meters is used for parking of tourist vehicles. The letter dated 15th June, 2013 addressed to the Superintending Engineer of the Public Works Department by its Executive Engineer records that a portion of the said land on which garden is developed which is having a statute of Pandit Jawaharlal Nehru has been placed in possession of the Respondent No.4 for the purposes of its maintenance and beautification. The conditions on which the said portion of the said land has been handed over have been incorporated in the said letter. Even in case of the Respondent No.4, what can be allowed to be occupied by the Respondent No.4 is the constructed area which existed on the date on which the reservation for RG was imposed by the sanctioned Development Plan. Obviously, use of large area of 1,000 square meters for parking of tourist vehicles cannot be permitted on RG. 26 As far as the Respondent No.8 is concerned, Shri. Ramchandra Dagadu Sawant has filed an affidavit. To the said affidavit, a copy of the agreement dated 18th March, 1996 executed by and between the State Government and him has been annexed which records that in terms of the Government Resolution dated 27th April, 1995 allotment of a portion of the said land was made to the said Respondent free of cost for running a Zunkha Bhakar Centre as a Licensee. The letter dated 20th July, 1996 issued by the District Collector has been relied upon. The agreement provides that the License will be only upto 18th February, 1997. We fail to understand as to what is the authority of the Respondent No.8 to continue thereafter. The Government Resolution dated 27th June, 2000 (Exhibit H to the additional affidavit of the Petitioners) records that Zunkha Bhakar Scheme has been cancelled and the lands allotted for setting up Zunkha Bhakar Centers should be returned to the owners or the concerned Authorities. By no stretch of

imagination, the Respondent No.8 has any right to continue to occupy any portion of the said land.

27. As far as the Respondent No.7 Janata Dal is concerned, though there is a reply filed, the document of allotment is not annexed to the said reply. It is merely contended that there is nothing wrong in the allotment and no additions and/or alterations have been made by the said political party. Not a single document is annexed to the said affidavit. We may note here that Government Circular dated 31st August, 1978 records that the Janata Party (Predecessor of Respondent No.7) was in possession of two rooms in CDO Barrack No.10 totally admeasuring 830 square feet. The circular dated 6th October, 1978 shows that the area in possession of the Janata Party of the two rooms in Barrack No.2 is 901.90 square feet. Even the State Government has not placed on record any document to show in what manner the premises were allotted earlier to the Janata Party and thereafter, to the Respondent No.7. As far as the Respondent No.9 is concerned, there is no return filed. The terms and conditions on which the respondent No.9 is in possession have not been placed on record. The Respondent No.5 is the Employment Exchange of the State of Maharashtra.

28. To summarize, valuable property in the prime area of south Mumbai has been allotted to the two political parties without following a fair and transparent procedure. But there is no challenge to the allotment of the portions of the said land on that ground. However, considering the reservation of RG, only those structures which were in existence on the date on which the reservation came into force will have to be protected. Therefore, a determination will have to be made with reference to the date on which the reservation of RG was imposed. Needless to state that user as it existed on that date can be tolerated under clause 1(a) of Regulation 13. The exercise of determining the existence of the structures and user thereof on the relevant date will have to be undertaken by the Mumbai Municipal Corporation.

29. Before we part with the Judgment, we must note here that a larger issue is involved in this Petition. In the PIL, the Petitioners have specifically relied upon the well known decision of the Apex Court in the case of **M.C. Mehta Vs. Kamal Nath and Ors. (1997) 1 SCC 388).**It is the famous decision of the Apex Court which invokes the public trust doctrine.

What is relevant for our purposes is paragraphs 34 and 35 which read thus:

34. Our legal system-based on English common law includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the seashore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership.

35. We are fully aware that the issues presented in this case illustrate the classic struggle between those members of the public who would preserve our rivers, forests, parks and open lands in their pristine purity and those charged with administrative responsibilities who, under the pressures of the changing needs of an increasingly complex society, find it necessary to encroach to some extent upon open lands heretofore considered inviolate to change. The resolution of this conflict in any given case is for the legislature and not the courts. If there is a law made by Parliament or the State Legislatures the courts can serve as an instrument of determining legislative intent in the exercise of its powers of judicial review under the Constitution. But in the absence of any legislation, the executive acting under the doctrine of public trust cannot abdicate the natural resources and convert them into private ownership, or for commercial use. The aesthetic use and the pristine glory of the natural resources, the environment and the ecosystems of our country cannot be permitted to be eroded for private, commercial or any other use unless the courts find it necessary, in good faith, for the public good and in public interest to encroach upon the said resources.

(emphasis added)

The doctrine of public trust is very much applicable in the present case as the said land is vesting in the State which can be used only as RG. Since the said land is vesting in the State, the public at large is the beneficiary

of the said land reserved as RG. The State as a trustee must protect the interests of public at large and cannot allow the user thereof contrary to the reservation.

30. The preparation, finalisation and sanction of a Development Plan under the MRTP Act contains an elaborate procedure and, therefore, the view taken by this Court is that it partakes a character of a legislative function. The object of imposing the reservation for RG is to ensure that there are open spaces available for recreation. Regulation 23 is a pointer which shows that a land reserved for RG has to be used for recreational purposes as provided therein. There are very few open spaces in the city. The City of Mumbai is becoming a concrete jungle. Therefore, necessity of having open spaces and Recreation Grounds in the City need not be specifically emphasized. The citizens have right to live in a pollution free environment which is guaranteed by Article 21 of the Constitution of India. Right to lead a meaningful life is guaranteed under the same article. The citizens of this city need open spaces and recreational grounds where they can breath freely and can participate in the recreational activities. The Garden on the said land is named after Late Pandit Jawaharlal Nehru. There is a statue of Jawaharlal Nehru in the developed garden. Opposite the Nehru Garden, there is another garden known as Mahatma Gandhi Garden in which there is a statue of the father of the Nation. On the said land which is reserved as RG, there are no structures/ encroachments.

31. As far as the structure of the Respondent No.8 is concerned, the same will have to go. The Respondent Nos.4 and 9 are undertakings of the Government of Maharashtra. The Respondent No.5 is a set up by the Government itself. Two other structures are in possession of a recognized political parties at National level. Substantial part of the structure of the Respondent No.6 will be demolished. We fail to understand the reasons which prevent the State Government from fully implementing the RG reservation in the most prime locality in the City of Mumbai in its true letter and spirit. We are conscious of the fact that Regulation 13 clause 1(a) protects certain categories of users of the existing structures. Nevertheless, in this Petition, we are not dealing with the private property. We are dealing with a land vesting in the State on which there is a statue of Jawaharlal Nehru. The majority of structures are occupied by public sector undertakings of the State and two structures are occupied by the leading political parties. Though we cannot issue any directions which will run contrary to clause 1(a) of Regulation 13, we are sure that this is a fit case where the State Government should seriously consider of shifting the existing offices elsewhere so that substantial part of the said land can be used as RG. We are sure that if a proper appeal is made to the two leading political parties, even the possession of retainable premises in their possession can be secured so that the said land can be given its true status of a garden or a recreational ground named after late Jawaharlal Nehru. The question is whether the State and the two national parties can allow the present user of the said land named after one of the greatest personalities of the last century especially when it is vesting in the State and is reserved as RG. The only direction which we can issue on this aspect is of directing the State Government to consider this issue and take a proper decision. If there is a proper appeal made by the State Government in the larger public interest, we are sure that even the two political parties which are in possession of the office premises will rise to the occasion and will co-operate with the State Government by vacating the respective premises in their possession.

32. We, therefore, dispose of the Petition by passing the following order:

ORDER

(i) We accept the statement made across the Bar by the learned Senior Counsel appearing for the Respondent No.6 that the said Respondent shall reduce the size of the structure in its possession to 1,200 square feet. In short, the statement of the Respondent No.6 is to restore the statue-quo ante as existed on 31st May, 1989. The statement made by the learned Senior Counsel appearing for the Respondent No.6 on instructions is accepted as the undertaking of the Respondent No.6. In view of this undertaking, we grant time of six months from today to the Respondent No.6 to restore status-quo ante as it existed on 31st May, 1989. We make it clear that the mezzanine floor will have to be removed in compliance with the undertaking;

(ii) We clarify that as the case made out in the Petition is that in fact there are substantial changes made in the structure in possession of the Respondent No.6, the issue of the legality and validity of the restored structure admeasuring 1,200 square feet is expressly kept open;

(iii) We direct that on the failure of the Respondent No.6 to abide by the aforesaid undertaking, the said Municipal Corporation shall take action of demolition in respect of the entire structure of the Respondent No.6. Needless to state that the action of demolition will have to be taken without any further notice to the Respondent No.6;

(iv) We direct the State Government to take action in accordance with law for the removal of the structure of the Respondent No.8. This action shall be completed within the time limit of three months;

(v) We direct the said Corporation to issue notice to all concerned parties for ascertaining the extent of structures which were in existence on the date on which reservation of RG was imposed on the said land and for ascertaining the nature of the user as of that date. The said Municipal Corporation after hearing all the concerned parties shall determine what can be protected and tolerated in accordance with clause 1(a) of Regulation 13 of the DCR. Appropriate decision shall be taken by the said Municipal Corporation on this aspect after hearing all the concerned parties within a period of three months from the date on which an authenticated copy of this Judgment and Order is produced in the office of the said Municipal Corporation;

(vi) Needless to add that the said Municipal Corporation shall take action of demolition in accordance with law in respect of structures found to be contravening structures;

(vii) The action in respect of the contravening structures, if any, shall be completed by the said Municipal Corporation within a period of six months from the date on which an authenticated copy of this judgment and order is produced in the office of the said Corporation;

(viii) As observed in the last paragraph, the State Government shall consider of implementing the reservation of RG in its true letter and spirit on the said land by removing all the existing structures on the said land. Appropriate decision will be taken by the State Government in the light of the observations made in this Judgment and Order within a period of six months from the date on which an authenticated copy of this order is produced before the Chief Secretary of the State Government;

(ix) Rule is partly made absolute with the above directions.

There will be no order as to costs. Notice of Motion does not survive and the same is disposed of;

(x) At this stage, the learned counsel appearing for the Respondent No.8, on instructions of the Respondent no.8, seeks time of six months to remove the structure made by the said Respondent. The said request is reasonable which deserves to be accepted. We, therefore, direct that the direction given to the State Government to demolish the structure of the Respondent No.8 shall not be implemented for a period of six months from today subject to condition of the said Respondent filing an undertaking in this Court within a period of four weeks from today stating therein that he will remove the structure within a period of six months from today and that he will not create any third party rights and will not part with possession of the said structure;

(xi) On failure of the Respondent No.8 to file undertaking within a period of four weeks from today, the protection granted to the said Respondent shall cease to apply.