

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**WRIT PETITION NO.2384 OF 2002
WITH
CIVIL APPLICATION No.4617 OF 2003**

1. Shri Achyut Vamanrao Atre, .. Petitioners
Age-62 years, R/o. Plot No. 29,
Pratap Nagar, Jalgaon.
2. Shri Arvind Ramchandra Chaudhari,
Age-52 years, Occu-Architect,
R/o. 38, Chandrama,
Pratap Road, Jalgaon.
3. Mrs. Champaben Popatlal Shah,
Age-61 years, Occu- Business,
R/o. 43, Pratap Nagar,
Jilha Peth, Jalgaon.
4. Shri Jayant S. Jogalekar,
Age-56 years, Occu-Service,
R/o. Plot No. 30, Pratap Nagar,
Jilha Peth, Jalgaon.
5. Shri Pitambar Pandurang Rane,
Age-73 years, Occu- Retired Govt.
Servant, R/o. 41, Pratap Nagar,
Jilha Peth, Jalgaon.
6. Dr. Aruna S. Patil,
Age-56 years, Occu-Doctor,
R/o. 39 Pratap Nagar,
Jilha Peth, Jalgaon.

Versus

1. The State of Maharashtra
Through Ministry of Urban,
Development, Mantralaya, Mumbai. .. Respondents
2. The Director,
Town Planning & Valuation Dept.
Maharashtra State, Pune.
3. The Collector,
Jalgaon.
4. Jalgaon Municipal Council,
Jalgaon.
(Through the Chief Officer)
5. Shri Swami Samarth Seva Kendra,
Pratap Nagar, Jalgaon.
(Through its President
Shri Bharatsing Mohansing Patil,
Age-45 years, Occu-Service,
R/o.3, Dinanathwadi, Jalgaon)
6. Dinanath S/o. Ramkrishna Saraf,
Age-65 years, Occu-Business,
R/o. Plot No. 37/B, Pratap Nagar,
Jalgaon.
7. Sau. Chhaya W/o. Suresh Chaudhari,
Age-35 years, Occu-Household,
R/. Plot No. 37/A, Pratap Nagar,
Jalgaon.
8. Sunil S/o. Vithal Kolhe,
Age-39 yeeears, Occu-Business,
R/. Plot No. 37/A, Pratap Nagar,
Jalgaon.

9. Sau. Pratibha W/o. Prakash Raje,
Age-35 years, Occu-Household,
R/o.Plot No. 40/1, Pratap Nagar,
Jalgaon, Tq. & Dist. Jalgaon.

Mr.A.N. Subnis h/f Mr. D.P. Palodkar, Advocate for the petitioners.

Mr. U.S.Mote, A.G.P. for respondent-State.

Mr. V.D.Gunale, Advocate for respondent No.4.

Mr. P.R. Patil, Advocate for respondent No.5

Mr. A.G.Talhar, A.G.P. for respondent No.6to9.

**CORAM : A.V. NIRGUDE &
V.K. JADHAV, JJ.**

DATED : 09.01.2015

ORAL JUDGMENT [PER : A.V. NIRGUDE, J.] :-

1. Heard. The facts of the petition in short can be stated as under.

2. The petitioners are residents of Jalgaon. They own plot in Survey No.247-A3, where they constructed their houses. The area is known as Pratap Nagar. This area was developed sometime in 1958 or so, when layout was sanctioned for construction of houses. An open space was kept reserved for recreation admeasuring 200 ft x 170 ft. The petitioners contended that they are owners of the plots which are surrounding this open space. In 1980 or so, small temple admeasuring 10 ft x 10 ft. of Hanuman

was constructed by plot holders in the eastern $\frac{1}{2}$ portion of the open space. Rest of open space was used by the school as play ground. In 1982-83 a structure admeasuring 15 x 20 ft. was constructed having roof of asbestos cement sheets near Hanuman temple. This structure then came to be known as Swami Samarth Seva Kendra. Morning and evening prayers were offered in this structure. After, 1988 the activities of Kendra were increased. In 2001 old small Hanuman temple was demolished and respondent No.5 started several constructions over eastern $\frac{1}{2}$ portion of the open space. They constructed new temple of Hanuman. The petitioners then requested respondent No.5 not to carry on further construction on the open space but in-vain. Respondent No.5 continued construction work of guest house, Yadnya Mandap etc. They also constructed compound wall around $\frac{1}{2}$ portion of open space. In 2002 they started construction of a large structure admeasuring 60 ft. x 150 ft. having 48 pillars. The petitioners objected to this, but in vain. On 03.06.2002, the petitioners sent a letter to the Chief Officer, Jalgaon Municipal Council-respondent No.4 seeking certain information regarding open space. Respondent No.4 did not give positive reply to the queries. The petitioners then moved their complaint to the Collector of Jalgaon and requested him to initiate action of demolition etc. against respondent No.5.

Since, no action was taken, this petition is filed mainly for relief in terms of payer clause (C), which seeks to restore original position of open space.

3. Respondent No.4- The Municipal Council submitted an affidavit-in-reply, in which they stated that the open space referred to above is open space of Survey No.247 left out as per sanctioned lay-out. They, however, stated that this open space was allotted to respondent No.5 in 1983. On 03.11.2000, respondent No.5 submitted an application seeking building permission but the same was refused vide letter dated 21.11.2000. The Council then started action under section 53 and 54 of the Maharashtra Regional Town Planning Act, 1956, directing respondent No.5 to remove construction within 30 days etc. The Council also admitted that they received representation of the petitioners on 04.06.2002, thereupon inspection of the site was undertaken. The Municipal Council directed site inspection. The officer of the Municipal Council inspected the site on 29.06.2002 and report is filed on the same day. Notice under section 53 and 54 of the MRTP Act was given to respondent No.5.

4. Respondent No.5 brought on record affidavit of one Bharatsingh Mohansingh Patil, who has mentioned his occupation as Lecturer. He has not mentioned as to what

position he held in the trust by name – Swami Samarth Seva Kendra, which is admittedly a registered public trust since 1988. The deponent stated that respondent No.5 has carried out construction as per building rules framed under the Maharashtra Municipal Council Nagarpanchayats and Industrial Townships Act, 1965. It is his case that respondent No.5 was allotted about 400 sq. mtr. open space out of which construction is permissible on 10% of the land. According to him, construction is made on 319.95 sq.mtr. area, which is permissible. He further mentioned that respondent No.5 has filed a suit in Civil Court against the Municipal Council and obtained order of status-quo.

5. At interim stage of this petition, some significant orders were passed and we would like to quote entire order of 7th July, 2003.

“Heard Shri Shah, the Learned Council for the petitioner with Shri D.P.Palodkar, Adv. Rule.

The Learned A.G.P. waves service for respondent Nos.1 to 3.

Shri Gunale, Adv. waves service for respondent No.4.

Shri P.R.Patil, Adv. Waves service for respondent No.5.

We have perused the affidavit in reply filed by the Municipal Counsel, Jalgaon i.e. respondent No.4 and noted that the allegations made in this petition regarding the illegal

construction in the open space left over in Survey No.247-A3 within the Jalgaon Municipal limits is duly supported.

The affidavit of the Municipal Counsel further reveals that the respondent No.5 had applied for permission on 03.11.2000 and the same was rejected on 21.11.2000. A site inspection was carried out and it was noticed that the respondent No.5 inspite of rejection of the permission, had proceeded to construct and by notice dated 29.06.2002 the respondent No.5 was called upon to remove the illegal construction. The respondent No. 5 appears to have challenged said notice for removal of illegal construction by filing RCS No. 308/2002 against the Municipal Counsel and the defendant has also filed reply opposing the application for injunction. It is stated across the bar that the said application has not yet been decided. The said civil suit is pending in the Court of Second Joint Civil Judge (J.D.), Jalgaon.

We hereby direct that the application for injunction, if pending, as at present in RCS No. 308/2002 be decided as expeditiously as possible and in any case within period of four weeks.

In the mean while the respondent No. 4 is directed to place before us the expenses required to demolish the subject illegal construction by engaging outside agencies or the Agencies of the Municipal Counsel, as the case may be.

Rule on interim relief returnable on 04th August, 2003. Copy of this order be forwarded to the Learned District Judge, Jalgaon."

6. Unfortunately, above order was not taken to its

logical end. There is nothing on record to show as to what had happened in R.C.S. No.308/2002, which was pending then. Whether the application for injunction was allowed or otherwise. There is nothing on record also in respect of expenses required to demolish the subject illegal construction. The questions that arose for our consideration now are as under :-

- (i) Whether the respondent No.5 has any legal right to the suit open space?
- (ii) Whether the construction raised on the site is lawful?
- (iii) Whether the said construction deserves to be demolished?

7. There is nothing on record to show that this open space was allotted lawfully to respondent No.5 by Municipal Council. The Municipal Council's affidavit vaguely stated that in 1983 the then Administrator of the Council allotted this plot to respondent No.5, but in 1982, it was not in existence. It got registered in 1988. Respondent No.5 also stated the same thing in his affidavit. This plot admeasuring 400 sq.mtr was allotted to them but except such oral assertion, no document came on record. The affidavit of respondent No.5 further stated that they were entitled to use 10% of the plot for raising construction. Even for this purpose, he did not

place reliance on any document. Lastly, he did not deal with the assertions of the Council where it is stated that the application for building permission dated 03.11.2000, stood rejected vide letter dated 21.11.2000.

8. Learned counsel for respondent No. 5 brought to our notice the 'A Class Municipal Council Rules', which were then applicable to Jalgaon. Said Rule 14.2 reads as under.

"14.2. Open Spaces. - In any layout or sub-division of land admeasuring 0.4Ha. or more for residential purpose and 08.Ha. Or more for industrial purpose 10 per cent. Of the total area of land shall be reserved for open space, which shall as far as practicable be located in one central place. Out of such open spaces, an area to the extent of 10 per cent may be allowed to be constructed by a ground floor structure for the purpose of allied public use, such as kinder garnet, library, club hall, pavilion etc. location of such structure shall be in one corner of the open space."

9. It is clear from this Rule that 10% of total area of open space could be allowed to be constructed by a ground floor structure for the purpose of public use such at kindergarten, library, club hall, pavilion etc. It is further mentioned that location of such structure should be in one corner or the open space. In this case, as said above, the open space in question was never

alloted to respondent No.5. They did not obtain any building permission for development. They did not follow this 10% rule for construction of religious center and above all, the religious center which they developed is neither kindergarten, library, club hall or pavilion etc.

10. From the photographs which are taken on record, we found that the establishment of respondent No. 5 is bound by a high compound wall. They have complete control of the land and the structure inside the compound wall. The plot bound by compound wall is about 20,000 sq. feet. By any standard, this is a huge establishment compared to the open space in question. The development of such establishment is nothing but a stark example of lawlessness. This could be possible only with active connivance of the local authority.

11. Learned counsel for respondent No.5 also tried to suggest that by certain resolution, the then Municipal Council had resolved to allot this land to respondent No.5. Pursuant to such resolution, the land was occupied. This submission is not sufficient to justify their stand. Before they could occupy this land they ought to have secured a lawful document of conveyance of the land in their favour. They did not even brought on

record a copy of such resolution. Assuming that the Corporation simply allowed them to occupy the land, it would only amount to illegality.

12. Learned counsel for respondent No.5 placed reliance on the following paragraph of judgment of the Division Bench of this Court in the case of The **Rashtriya Sahakari Grihnirman Sanstha Ltd. Chalisgaon vs. The State of Maharashtra and others**, bearing **Writ Petition No. 396 of 1999**:-

"5. Mr. Dhorde, the learned counsel for respondent No. 2/Municipal Council submits that, now the fresh revised draft development plan is already published. The petitioner has already filed it's objection. Even hearing is given with regard to open space B which is sought to be reserved for crematorium. According to the learned counsel said area was already used for cremation since time immemorial. The municipal council has erected shed in Sy. No. 326 and the open space B of the Sy. No. 325 is used for benefit of persons attending the obsequies. According to the learned counsel no construction is being made on the open space B, though it is reserved for crematorium. According to the learned counsel, even otherwise as objection has already been filed to the revised development plan or the objections raised by the petitioner in this petition can be raised before the authorities, which would be considered and the same has already been raised."

13. By placing reliance on this judgment, learned counsel for respondent No.5 is trying to justify his client's action of not only occupying the land without proper allotment but also its development. No doubt, in this case the owner of the land has not come before us but the petitioners are more concerned to the land than the real owner. If some one is encroaching upon their area of recreation, they have every right to come before the Court and take objection. Unfortunately, in this case, the petition remained pending for quite some time and as noted above, even the petitioners had, for some time, lost interest in the petition.

14. Learned counsel for respondent No.5 then placed reliance on the judgment of the Division Bench of this Court at Nagpur, in the case of **Friends Co-operative Housing Society Ltd. Vs. The Nagpur Improvement Trust & Ors. 2008(5)ALL MR 815.** Paragraph 39 of this judgment reads as under:

39. In the case of **Prem Singh and others Vs. Birbal and others, (2006) 5 SCC 353**, the Supreme Court has held that with respect to both void, as well as voidable transactions, the action has to be brought within the period of limitation. We cannot overlook the fact that in the present case, the petitioner has invoked Article 226 & 227 of the Constitution of India and raised

these challenges after more than 11 years. Therefore, the facet of the period of limitation though not strictly applicable to writ jurisdiction, still in cases like this the principle of filing of suit for cancellation of such transaction as governed by Article 59 even if any just cannot be overlooked. The relevant Articles of Limitation Act are Article 58 (any declaration) or Article 59 (for cancellation or setting aside of instrument) or Article 113 (residuary clause). Therefore, in all these cases, limitation would not be more than 3 years. The petitions, therefore, suffer from grave delay which is not explained at all. **State of Madhya Pradesh and another Vs. Bhailal Bhai and others, AIR 1964 SC 1006.**

15. In this case, there is no delay at all. In 1983 or so, respondent No.5 started occupying small portion of the open space and to that the petitioners and persons in their position did not object. But they raised serious objection the moment they found that respondent No.5 would raise construction on the entire plot thereby depriving them of open space. Admittedly, the construction started in the year 2002 and immediately thereafter this petition is filed. As noted above, at the interim stage, a very strong order was passed by this Court. This Court even, at one time, suggested that they would dispose of the petition by expediting hearing etc. But unfortunately, this did not happen. So the reliance on this judgment is completely misplaced.

16. The Municipal Council has filed an affidavit in which they have taken a feigned stand that they were taking some penal action against respondent No.5. But still illegal development has taken place. No action after filing of this petition was taken. Even higher officers such as Deputy Director of Town Planning, the Collector etc. simply ignored this illegality. The State of Maharashtra has not paid any attention to such violation of law. Their callousness is exhibited through their failure to even file reply to this petition.

17. In view of this, we have no hesitation to hold that respondent No.5 has no right of whatsoever nature in respect of the plot. Their presence on the plot is nothing but encroachment. The construction work which they carried out is also illegal because admittedly there is no permission of planning authority for such construction.

18. The petition deserves to be allowed. The respondent Nos.1 to 4 are directed to demolish the construction work on the plot and restore the plot to its original position within three months from the date of this order.

19. The writ petition is allowed in above terms.
Rule made absolute accordingly. No costs.

20. In view of disposal of the writ petition,
connected civil application does not survive and stands
disposed of.

[V.K. JADHAV, J.]

[A.V. NIRGUDE, J.]