

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.871 OF 1996

Bhagwat Janakilal Pandit and Others. .. Petitioners
Vs
The Municipal Corporation of Greater Bombay
and Others. .. Respondents
—
Shri P.P. Chavan i/b Ms. Sheila Kanuga for the Petitioners.
Shri Vinod Mahadik for the Respondents.
--

CORAM : A.S. OKA & V.L. ACHLIYA, JJ

DATE ON WHICH SUBMISSIONS WERE HEARD : 29TH OCTOBER 2015

DATE ON WHICH JUDGMENT IS PRONOUNCED: 22ND DECEMBER 2015

JUDGMENT (PER A.S. OKA, J)

1. One of the main questions involved in this Petition is whether Gajanan Colony Road (for short “the said Street”) situated at Goregaon, Mumbai – 400 062 is a public street within the meaning of Mumbai Municipal Corporation Act, 1888 (for short “the said Act”). The challenge in this Petition is to the notice dated 22nd October 1988 issued under Section 306 of the said Act as well as the order dated 12th March 1996 passed by the Deputy Municipal Commissioner of the Mumbai Municipal Corporation on the basis of the said notice.

2. Reference to few facts will be necessary. According to the case of the Petitioners, the said street is a 30 feet wide private road. To the east of the said street, there are railway tracks of the Western Railways. There are 22 plots on the west side of the said street. The Petitioners claim that out of the said 22 plots, 16 plots are owned by them and their respective predecessors. It is claimed that the total length of the said street is 1448'-7" out of which, the length of 1068'-6" is owned by the Petitioners. The remaining portion of the said street in front of the said 22 plots is owned by other six plot owners who are not before the Court.

3. On 10th February 1969, the first Respondent Mumbai Municipal Corporation (for short "the said Corporation") issued a notice purporting to be a notice under Sub-section (1) of Section 306 of the said Act in which it is stated that it was the intention of the said Corporation to improve the said street subject matter of the said notice which has been unrestrictedly used by the members of the public for more than 10 years. It is stated that accordingly, it was intended to level, metal or pave, drain and light the said street. It is stated that after it was leveled, metalled or paved, drained and lighted, the same shall be treated as a public street, if no objection is received within one month from the date of the publication of the said notice.

4. The Petitioners have referred to the notice dated 5th November 1973 issued in the purported exercise of powers under Section 305 of the said Act by which they were called upon to level, metal or sewer, drain and light the said street in the manner provided in the said notice. The father of the first and second Petitioners by his letter dated 27th January 1974 informed the said Corporation by relying upon the notice dated 10th February 1969 and the letter dated 29th March 1969 that as the said street was declared as a public street, the Petitioners were not liable to pay the amount demanded by the said Corporation.

5. The Petitioners are relying upon the letter dated 13th October 1972 addressed by the then Municipal Commissioner of the said Corporation to one Shri Baburao Shete, who was an elected Municipal Councillor. In the said letter, it was stated that the said street forms a part of the original private layout. It is stated that the said street cannot be asphalted at the municipal cost. It was further stated that though the notice under Section 306 of the said Act was issued by the said Corporation, the matter was not pursued further. By a letter dated 3rd October 1977, the Ward Officer of the concerned Ward informed the Petitioners that they have failed to comply with the requisitions set out in the notice dated 5th November 1973. The said

letter was replied by the Advocate for the father of the first and second Petitioners on 8th October 1977 by contending that the said street was declared as a public street and was taken over by the said Corporation and, therefore, the requisition set out in the notice dated 5th November 1973 has not been complied with. Again a further notice (Exhibit-I to the Petition) was issued by the said Corporation to the owners of the Gajanan Colony informing them that they have not complied with the requisitions set out in the notice dated 5th November 1973.

6. A letter dated 13th April 1983 was addressed by the Ward Officer, "P" South Ward of the said Corporation calling upon the first Petitioner to pay the proportionate cost of construction of the said street. It was stated that the said street has been constructed by the said Corporation. The Petitioners were called upon to deposit the necessary amount with the said Corporation. The said letter was replied by the Advocate for the first Petitioner on 24th June 1983 pointing out inconsistencies in the stand taken by the said Corporation. A notice dated 22nd October 1988 was published by the Deputy Municipal Corporation (Zone-IV) of the said Corporation declaring the said street to be a public street on expiry of the period of one month in exercise of the powers under Sub-section (1) of Section 306 of the said Act. The objections were raised to the said notice by the Petitioners by a letter dated 28th November 1988 sent through their Advocate.

7. On 19th December 1988, the Petitioners' Advocate addressed a letter to the Municipal Commissioner of the said Corporation claiming that the Petitioners are entitled to Floor Space Index (FSI)/Transferable Development Rights (TDR) in lieu of the land covered by the said street which is proposed to be declared as a public street. Thereafter, a communication was issued on 10th February 1989 by the said Corporation stating that as the objections were not raised within one month from the date on which the notice dated 22nd October 1988 was put up, the said street has been declared as a public street. Against the said communication, the Petitioners made a representation dated 20th February 1989 which was replied by the letter dated 9th June 1989 by the Deputy Municipal Commissioner of the said Corporation in which it was contended that in the year 1969 itself, the said street was taken over by the Municipal Corporation. It was stated in the said communication that the question of considering objections does not arise.

8. Being aggrieved by the action of the said Corporation, the Petitioners filed Writ Petition No.2644 of 1989 in this Court for quashing the notice dated 22nd October 1988 and for other reliefs. The Writ Petition was admitted on 17th January 1990 by the learned Single Judge of this Court. Interim relief in terms of prayer clause (c) was granted restraining the said Corporation from treating the said street as

a public street. The Writ Petition was contested by the said Corporation by filing two affidavits. The Writ Petition was disposed of by the judgment and order dated 11th January 1994 thereby recording a statement of the learned counsel representing the said Corporation that the Petitioners' objections filed on 28th November 1988 to the notice dated 26th October 1988 shall be heard on merits without taking any objection on the ground of delay. On 9th October 1995, an order was passed by the Deputy Municipal Commissioner after considering the objections of the Petitioners. The Deputy Municipal Commissioner observed that the benefit of FSI/TDR cannot be granted in respect of a street which was declared as a public street. It was held that the said street was declared as a public street. The said order dated 9th October 1995 was subjected to a challenge by filing Writ Petition No.2182 of 1995 by the present Petitioners. The said Writ Petition was disposed of by the judgment and order dated 17th January 1996. The order dated 9th October 1995 was quashed and set aside by the said order passed by this Court and the matter was remanded to the Deputy Municipal Commissioner of the said Corporation who was directed to consider all the issues which arose in the matter falling under Section 306 of the said Act. After the order of remand was passed, an order was passed on 12th March 1996 by the Deputy Municipal Commissioner of the said Corporation. The objections raised by the Petitioners were overruled and it was held that the said street has become a public street after

expiry of one month from the date of notice dated 22nd October 1988. The main challenge in this Petition apart from the notice dated 22nd October 1998 is to the order dated 12th March 1986.

9. There is an affidavit in reply filed by Shri P.M. Pashte, the Sub Engineer on behalf of the Mumbai Municipal Corporation.

10. The learned counsel appearing for the Petitioners invited our attention to the notice dated 22nd October 1988. He pointed out that by a letter dated 28th November 1988, the Petitioners raised objections to the said notice which was issued under Sub-section (1) of Section 306 of the said Act. He pointed out that in the said objections submitted on 28th November 1988, it was pointed out that two days before the date on which the objections were filed, the Petitioners became aware of the pasting of the notice dated 22nd October 1988. He invited our attention to the order dated 11th January 1994 in Writ Petition No.2644 of 1989. He urged that in view of the concession recorded in Paragraph 3 of the said order, even assuming that the objections to the notice dated 22nd October 1988 were not filed within the time provided by the law, the said Corporation was bound to consider the objections filed by the Petitioners on 28th November 1988. He submitted that even in the impugned order dated 12th March 1996, the specific contention of the Petitioners that the notice was pasted on

26th November 1988 has been noted. He submitted that in view of the order dated 11th January 1994, the Deputy Municipal Commissioner of the said Corporation could not have held that the objections were not filed within the stipulated period of one month from 22nd October 1988. He submitted that the said issue i.e. whether the objections were submitted within one month from the date of the said notice, is no longer open in view of the concession recorded in the said order of this Court. Moreover, there is no evidence on record to show that the notice dated 22nd October 1988 was pasted on the very date at the prominent places on the said street. He pointed out that the Deputy Municipal Commissioner of the said Corporation accepted the contention of the Petitioners that on the basis of the notice dated 29th March 1969, the said street has not been declared as a public street. He pointed out that the letters written by the Petitioners have been misread as the Petitioners have never accepted the status of the street as a public street. He submitted that a finding could not have been recorded that the objections have not been filed by the Petitioners within the stipulated time. Inviting our attention to the language used in the Section 306 of the said Act and in particular Sub-section (2) thereof, he urged that once the objections are raised within one month from the date of notice issued under Sub-section (1) of Section 306 of the said Act, no such street can be declared as a public street. He urged that the Municipal Commissioner was powerless to exercise the power to declare

the said street to be a public street under Sub-section (1) of Section 306 of the said Act and there was no occasion to hear the objections and decide about the merits of the same.

11. The learned senior counsel appearing for the Mumbai Municipal Corporation submitted that once there is a failure to file objections to the notice under Sub-section (1) of Section 306 of the said Act, the declaration as a public street must follow. He pointed out the contents of the affidavit-in-reply filed in Writ Petition No.2644 of 1989. He pointed out the amounts spent by the Municipal Corporation on the maintenance of the said street for providing drainage, sewer etc. It is pointed out in the said affidavit that the Municipal Corporation has provided the services such as scavenging work, cleaning the street, providing electricity supply etc. to the said street. He invited our attention to the correspondence made by the father of the first and second Petitioners. He invited our attention to the letter dated 27th January 1974 in which the Advocate representing the said Jankilal Shaligram Pandit has clearly stated that the said street was declared as a public street, and therefore, the Municipal Commissioner was estopped from recovering any money from the Petitioners by way of contribution for the work carried out by the said Corporation in respect of the said street. He pointed out that the Advocate for the said Janakilal Shaligram Pandit in the letter dated 8th October 1977

addressed to the Ward Officer, “P” Ward, has reiterated that the said street was declared as a public street and that the same was taken over by the said Corporation. The learned senior counsel appearing for the said Corporation, therefore, urged that apart from the admission of the legal status of the street, it is admitted that the said street is being maintained by the said Corporation. He pointed out that the legal consequences provided in Sub-section (1) of Section 306 of the said Act will follow if the objections are not filed within one month from the date of the notice. He submitted that the concession of the said Corporation recorded in the order dated 11th January 1994 is against the express provisions of Sub-section (1) of Section 306 of the said Act and, therefore, it is not binding on the said Corporation. He urged that if by operation of law, the said street is declared as a public street, the so called concession will not change the character of the public street. He invited our attention to Clause (x) of Section 3 of the said Act which defines “public street” and urged that as the said street has been levelled, sewerage and repaired by the said Corporation, it automatically becomes a public street. He urged that in the impugned order, the Deputy Commissioner of the said Corporation has rightly found that Sub-section (1) of Section 306 of the said Act is applicable. Reliance was placed on a decision of the Apex Court in the case of *M/s. Gobind Pershad Jagdish Pershad v. New Delhi Municipal Committee*¹. He, therefore, submitted that no interference is called for.

1 (1993)4 SCC 69

12. The learned counsel appearing for the Petitioners urged that the order dated 11th January 1994 has attained finality and hence, now it cannot be reopened. He urged that the issue whether the objections were submitted within a period of one month from the date of the service of the said notice is no longer open as the order dated 11th January 1994 continues to bind the said Corporation. His submission is that no inquiry is called for to consider the issue whether the objections were filed to the notice dated 22nd October 1988 within the time stipulated in Sub-section (1) of Section 306 of the said Act.

13. We have given careful consideration to the submissions. The first issue will be as regards the scope of Section 306 of the said Act. Section 306 of the said Act reads thus:-

“306 Power to declare private streets when sewered, etc. public streets.

- (1) When any private street has been levelled, metalled or paved, sewered, channelled and made good to the satisfaction of the Commissioner, he may and, upon the request of the owner or of any of the owners of such street, shall, if lamps, lamp-posts and other apparatus necessary for lighting such street have been provided to his satisfaction [and if all land-revenue payable to [the [state] Government] in respect of the land comprised in such street has been paid] by notice in writing put up in any part of such street, declare the same to be a public street, declare thereupon the same become a public street:

- (2) Provided that no such street shall become a public street if, within one month after such notice has been put up, the owner of such street or of the greater part thereof shall by notice in writing to the Commissioner, object thereto.
- (3) Nothing in this section shall be deemed to affect the provisions of sections 37 and 38 of the Bombay Port Trust Act. 1879”.

14. Sub-section (1) of Section 306 of the said Act is applicable provided the conditions incorporated therein are satisfied. Sub-section (1) provides that on satisfaction of the conditions incorporated therein, if a notice is put up for declaring a street as a public street, the same shall become a public street. Sub-section (2) is very clear. It provides that within one month from the date on which the notice under Sub-section (1) of Section 306 of the said Act is put up, the owner of the street or of the greater part thereof is entitled to raise an objection within a period of one month. If such objection is raised within a period of one month, no such street shall become a public street. Therefore, if the owner of the street or the owner of the greater part thereof files objections in writing within one month after the notice under Sub-section (1) of Section 306 of the said Act is put up, the street which is the subject matter of the notice will not become a public street under Sub-section (1) of Section 306. That is very clear from the express language of the sub-section (2) of Section 306. Thus, the consequence of filing objections within a period of one month from the

date of putting up of a notice is that the street in respect of which the said notice is put up cannot be treated as a public street under Sub-section (1). Section 306 of the said Act does not provide for an inquiry into the objections by any authority when the same are filed within the stipulated period of one month. Therefore, it follows that in the present case, if it is established that the objections were raised by the Petitioners to the notice dated 22nd October 1988 within a period of one month from the date on which the same was put up, the said street cannot become a public street within the meaning of Sub-section (1) of Section 306 of the said Act. The Petitioners are claiming to be the owners of a greater part of the said street.

15. Now it will be necessary to make a reference to the order dated 11th January 1994 passed in Writ Petition No.2644 of 1989. Paragraphs 1, 3 and 4 of the said order reads thus:

- “1. The Deputy Municipal Commissioner, Zone IV, of the Bombay Municipal Corporation issued a Public Notice under Section 306(1) of the Bombay Municipal Corporation Act, 1988 (the Act), to the owners of the properties fronting Gajanan Colony, Jawahar Nagar, Goregaon (West), Bombay, intimating them that it was proposed to declare the said road a Public Road and calling for objections, if any, against such declaration. The Petitioners, who are owners of some of the properties fronting the above street, filed objections against the above proposal on 28th November, 1988. It was stated by the Petitioners that they had come to know of the

said public notice only two days before filing of the above objections i.e. on 26th November, 1988. The objections filed by the petitioners were rejected by the Corporation by its order dated 10th February 1989 on the ground that it had been received by it one month after the expiry of the notice under Section 306(1) of the Act.”

3. The Learned Counsel for the Corporation Mr. Murthy fairly stated before me that he has instructions from the Corporation that the Petitioners' objections filed on 28th November, 1988 shall be heard on merits without taking any objection on the ground of delay and disposed of in accordance with law.
4. In that view of the matter, nothing survives in this Petition. The Respondent Corporation shall give a notice to the Petitioners fixing a date of hearing, on which date the Petitioners shall be heard and pass necessary orders on the objections filed by them.”

(Underline added)

In the said Writ Petition, the challenge was to the said notice dated 22nd October 1988.

16. We have already adverted to the provisions of Section 306 of the said Act. A private street to which Sub-section (1) of Section 306 of the said Act is applicable becomes a public street if within a period of one month after the notice under Sub-section (1) of Section 306 of the said Act is put up, the owner of such street or of the greater part thereof fails to raise an objection thereto. If after the notice as contemplated under Sub-section (1) of Section 306 of the said Act is put up, the

owner of such a private street or of the greater part thereof submits an objection in writing to the Municipal Commissioner within one month from the date on which the notice is put up, the private street cannot become a public street under Sub-section (1) thereof. Section 306 of the said Act does not provide that if objections in writing are filed within one month from the date on which the notice is put up, the same can be considered by the Municipal Corporation or the Commissioner and after overruling the objections, the private street in respect of which the notice under Sub-section (1) of Section 306 of the said Act is put up can be declared as a public street. On conjoint reading of Sub-sections (1) and (2) of Section 306 of the said Act, it appears that the private street in respect of which a notice under Sub-section (1) of Section 306 of the said Act is put up automatically becomes a public street on the failure of the owner of such street or of the greater part thereof to submit objections in writing within one month from the date on which such notice is put up. Then, the only question which can arise in such cases is whether the conditions prescribed in Sub-section (1) were satisfied. If such owner raises an objection in writing within the stipulated period of one month provided under Sub-section (2) of Section 306 of the said Act, such a private street cannot become a public street in view of the express language of Sub-section (2). If the owner of such street or of the greater part thereof in respect of which a notice is issued under Sub-section (1) of Section 306 of the said Act

files objections within a period of one month from the date on which the notice under Sub-section (1) of Section 306 of the said Act is put up, there is no question of hearing of the said objections as on filing of the objections by such owner within the stipulated period of one month, the notice under Sub-section (1) of Section 306 ceases to be of any significance. If in such a case, the Municipal Corporation wants such a street to be declared as a public street, the appropriate proceedings in accordance with law are required to be taken.

17. We have already quoted the order dated 11th January 1994 passed by the learned Single Judge. The said order is based on the concession made by the learned counsel appearing for the Municipal Corporation that the objections filed by the Petitioners on 28th November 1988 shall be heard on merits without taking any objection on the ground of delay. The said order of the learned Single Judge in Paragraph 1 records that the objections filed by the Petitioners were rejected by the said Corporation on the ground that the same were not filed within the stipulated period of one month as provided in Section 306 of the said Act. The direction to hear objections was issued by the learned Single Judge only on the basis of the concession made by the learned counsel appearing for the said Corporation and not on the basis of any finding of this Court. The order passed by the Deputy Municipal Commissioner on 9th October 1995, on the basis of the order of the

learned Single Judge was set aside by the Division Bench of this Court by its judgment and order dated 17th January 1996 in Writ Petition No.2182 of 1995. The Paragraphs 4 and 5 of the said order read thus:

- “4. Perused the entire record that is placed before us. There is some controversy as to whether there was a declaration of a public street as contemplated by sec. 306 of the Bombay Municipal Corporation Act, 1888. Our attention has been invited to some of the annexures to the petition raising a doubt as to whether the declaration was made before 1977 as stated in the letter at Exh. H dated 8th October 1977 (on page 56) or whether notice in that behalf was issued for the first time on 22nd October 1988 as per notice at Exh.M (at page 64). In our view, pursuant to the order passed by this Court on 11th January, 1994 in writ petition No.2644 of 1989, the Deputy Municipal Commissioner ought to have decided the issues which arise under sec. 306 of the B.M.C. Act. For instance in such an order, there has to be finding as to whether there was a private street and whether the requirement of putting a written notice as per sub-Sec.(1) of Sec. 306 of the said Act has been fulfilled and whether it has to be declared as a public street in accordance with the said provisions. Similarly sub-sec.(2) of sec.306 of the said Act contemplates that no such street can become a public street if, within one month after such notice has been put, the owner of such street or of the greater part thereof shall, by notice in writing to the commissioner object thereto. In our view, the impugned order dated 9th October 1995 does not record the requisite finding under sec. 306 of the Act.
5. Hence the impugned order dated 9th October 1995 is quashed and set aside. The matter is relegated back to the Deputy Municipal Commissioner with a direction that the Deputy Municipal Commissioner with a direction that

the Deputy Municipal Commissioner shall give the petitioners a reasonable opportunity of being heard and shall dispose of the matter by a reasoned order, after considering all the issues which arise in the matter falling under sec. 306 of the said Act. Shri Rao for the Corporation makes a statement that the Deputy Municipal Commissioner will decide the matter within a period of 8 weeks from today. Statement accepted.”

(Underlines supplied)

The last part of the Paragraph 4 of the said order specifically refers to the provisions of Sub-section (2) of Section 306 of the said Act by observing that it contemplates that no such street can become a public street if within one month after such notice has been put up, the owner of such street or of the greater part thereof by notice in writing to the Municipal Commissioner objects thereto. After noting the effect of Sub-section (2) of Section 306 of the said Act, a specific finding had been recorded by the Division Bench that the order dated 9th October 1995 does not record the requisite findings under Section 306 of the said Act and, therefore, in terms of Paragraph 5 of the said order, a direction was issued that the Deputy Municipal Corporation shall dispose of the matter by a reasoned order after considering “all the issues which arise in the matter falling under Section 306 of the said Act”. Thus, while passing the second order of remand, the Division Bench kept all the issues open including the issue of objections in writing being filed within a period of one month from the date on which the notice dated 22nd October 1988 was put up. This order of the Division Bench was

not challenged by the Petitioners. Therefore, now it is not open for the Petitioners to contend that the plea of delay in filing the objections was given up or waived by the said Corporation. As pointed out earlier, the failure to raise objections to the notice under Sub-section (1) of Section 306 of the said Act has a legal consequence of the street becoming a public street. Hence, the objection of delay could not have been waived as the consequence of the failure to raise objections is automatic.

18. Therefore, we do not agree with the submission of the learned counsel appearing for the Petitioners that the issue of delay was concluded under the order dated 11th January 1994. As stated earlier, the said order was passed only on the basis of the concession made by the learned counsel appearing for the said Corporation. The said concession is completely contrary to the scheme of Section 306 of the said Act and, therefore, the same will not bind the said Corporation. In any case, the subsequent order of the Division Bench on the basis of which the impugned order was passed requires the Deputy Municipal Commissioner to consider all the issues arising under Section 306 of the said Act which will include the issue whether the objections were raised within a period of one month from the date on which the notice is put up.

19. We have carefully perused the impugned order dated 12th March 1996. As stated earlier, the notice under Sub-section (1) of Section 306 is of 22nd October 1988. Sub-section (1) of Section 306 of the said Act provides that the notice in writing has to be put up in any part of the private street. The letter of objection to the notice dated 22nd October 1988 was addressed by the Advocate for the Petitioners on 28th November 1988. In Paragraph 1 of the notice, it is stated that it was pasted only two days prior to 28th November 1988. As stated earlier, in the order of the Division Bench, it is specifically noted that if the objections are not raised within one month after the date on which the notice is put up, the private street will become a public street. In the impugned order, the contention of the learned counsel appearing for the Petitioners has been noted that the notice dated 22nd October 1988 was pasted on 26th November 1988. The Deputy Municipal Commissioner of the said Corporation in the impugned order relied upon the order passed in Writ Petition No.2644 of 1994 and has stated that in view of the said order, the aspect of delay cannot be taken into consideration. The said approach is completely erroneous in view of the subsequent order of the Division Bench which we have discussed above. The specific direction was to consider all the issues which arise in the matter falling under Section 306 of the said Act which include the issue whether the objections were raised within the stipulated

period of one month from the date on which the notice was put up. As stated earlier, if the objections were filed within the stipulated period of one month, there was no question of considering the objections as the street cannot be declared as a public street. If the objections were filed after the period of one month, by operation of Section 306 of the said Act, the private street in respect of which the notice was issued automatically becomes a public street. In the impugned order, the Deputy Municipal Commissioner has gone into the merits of the objections raised and he has purported to reject the objections.

20. At this stage, we must consider the conduct of the Petitioners and/or their predecessor. The first notice under Sub-section (1) of Section 306 of the said Act dated 10th February 1969 was issued in respect of the said street. There were no objections received to the said notice within a period of one month and in fact by the operation of law, the said street was declared as a public street. However, now the stand of the said Corporation appears to be that the notice dated 10th February 1969 was not pursued further.

21. On 5th November 1973, the Municipal Corporation issued a notice to the father of the first and second Petitioners under Section 305 of the said Act. Section 305 of the said Act reads thus:

“305. Levelling and draining of private streets.

If any private street be not levelled, metalled or paved, sewerred, drained, channelled and lighted to the satisfaction of the Commissioner, he may, with the sanction of the standing committee, by written notice require the owners of the several premises fronting or adjoining the said street or abutting thereon to level, metal or pave, drain and light the same in such manner as he shall direct”.

22. Hence, the said notice proceeded on the footing that the said street was a private street and, therefore, the said Corporation demanded the contribution from the predecessor of the first and the second Petitioners. What is material is the reply dated 27th January 1974 sent by the father of the first and second Petitioners through his Advocate. The material part of the said reply reads thus:

“My clients states that the said road in question was declared a public street by the Municipal Corporation of Greater Bombay by it's notice dated 10th February, 1969 and the same was confirmed by the ward officer, 'P' ward by his letter No.MP/2691 dated 29th March 1969 enclosed hereto are the copies of the said notice and letter referred to hereinabove the Corporation has granted R.C.C. to several building whose frontage are on the said road. Therefore, the Corporation is estopped from calling upon my client to carry on the said work referred to in the said notice. The said street was declared as public street by the Corporation looking to the greater need of the public at large and as the same was used by public since very long.”

(Underlines supplied)

23. Thus, the specific contention raised by the predecessor of the Petitioners on 27th January 1974 was that the said street was declared as a public street on the basis of the notice dated 10th February 1969. There was another reply dated 8th October 1977 issued by the father of the first and second Petitioners. In the said reply, it is stated thus:

“Your similar allegation is and the similar requisitions have been dealt with by my letters dated 27th January, 1974 7th August, 1975 and 22nd July, 1977. My abovenamed client repeats and confirm whatever is stated in my above said 3 letters. My abovenamed client once again states that as the said Road is declared as a public street and taken over by the Municipal Corporation of Greater Bombay, construction and/or repairs and/or maintenance will be at its own cost and my abovenamed client has not liability of any nature whatsoever in connection therewith.”

(Underline added)

24. The communication dated 13th April 1983 issued by the Ward Officer, P/South Ward to the father of the first Petitioner records that as per the notice dated 5th November 1973 issued under Section 305 of the said Act, the said street has been constructed by the said Corporation and therefore, the proportionate cost of Rs.12,225.48 was demanded from the father of the first and second Petitioners. In the reply dated 24th June 1983 sent by the father of the first and second Petitioners through his Advocate, in Paragraph 2, it was reiterated that the said road has been declared as a public street. There is a letter

dated 13th October 1972 on record (Exhibit-F to the Petition) addressed by the then Municipal Commissioner to Shri Baburao Shete, an elected Councillor, in which it is stated that the earlier notice issued under Sub-section (1) of Section 306 of the said Act was not pursued.

25. In the letter of objections dated 28th November 1988 submitted by the Advocate for the present Petitioners, the Clauses (c) and (d) of Paragraph 2 stated thus:

“(c) Thereafter, deposits having stated that the said road was being taken over by you by a notice under Section 306 dated 5.11.1973 bearing called upon my clients and the others to carry out certain works as stated in the said notice.

(d) The said notice was replied by my clients by letters dated 27.1.1974, wherein it was clearly stated that the Corporation had taken over the said road as a public road and therefore, my clients were not liable to comply with the said notice dated 5.11.1973”.

26. Therefore, even while raising the objections to the notice dated 22nd October 1988, the Petitioners have reiterated that in their earlier letter, they have stated that the Municipal Corporation had taken over the possession of the said street as “a public road”. As this was the stand taken by the Petitioners even in the objection letter dated 28th November 1988, the question is how the Petitioners can deny that the street is a public street. What is interesting is the letter dated 19th

December 1988 addressed on behalf of the Petitioners by their Architect Atul Desai & Associates. The subject of the said letter reads thus:

“Sub: Taking over of Gajanan Colony Road, CTS No.19 to 34 at Goregaon (West).”

In the first Paragraph of the said letter, a notice dated 22nd October 1988 has been referred. The second Paragraph refers to the objections submitted on 28th November 1988. Last paragraph reads thus:

“According to us they are the owners of the above road and they are entitled for F.S.I./T.D.R. in lieu of the road which they are surrendering to B.M.C. Which is being the policy at present.

Under the circumstances, we request you to kindly use your good offices and settle the matter amicably.”

27. Thus, admittedly a stand was taken by the predecessor of the first and second Petitioners and the Petitioners themselves that the said street is already taken over by the said Corporation and it is a public street. There is another important aspect of the matter. Going back to the notice dated 22nd October 1988, it is material to note what is stated in the notice.

“Being satisfied that the private street known as Gajanan Colony Road, Jawahar Nagar, Goregaon (West), which has been formed and has been duly levelled paved, metalled, cement concreted, drained and sewered and made good to my satisfaction and such lamps, lamp-posts and other apparatus, as are in my opinion necessary for the lighting thereof, have

been provided, I do hereby, pursuant to the provision of Sub-section (1) of Section 306 of the said Act, declare the said street to the public street, on the expiry of the period on one month.”

Careful perusal of the objections dated 28th November 1988 submitted by the Petitioners through their Advocate shows that the case made out in the notice that the said road has been duly levelled, paved, metalled and sewered by the Municipal Corporation has not been disputed. In the affidavit of Shri P.N. Bhat, the Assistant Commissioner of the said Corporation filed in Writ Petition No.2644 of 1989 which is dated 3rd January 1994, he has stated thus:

“I say that these respondents have provided 17 street lights during the period of 1988 to 1993 at the capital cost of Rs.5,000/- per street light. The electricity bills of the said street lights are being paid by the Corporation. I say that these respondents Corporation, in the year 1989-90, has spent sum of Rs.1,90,000/- and the sum of Rs.3,70,000/- in the year 1990-91 towards the capital expenditure and maintenance of the said road and for providing B.C.C. drainage abutting the said road. I further submit that even now similar lines are being laid and estimated cost of the same is about Rs.8,00,000/-. 60% of the work is over before monsoon and now in the fair season, the balance work is likely to be completed. Apart from the above, Corporation is providing services such as drain clean, scavenging work, road clean, providing electric supply etc on the said road. I further say and submit that none of the Societies abutting the said road had even objected to the abovesaid work, being carried out by the Corporation, nor have they ever protested. On the contrary, the societies have availed the above facilities without demur and are still availing the facilities. I humbly submit that the respondents were and are aware of the interim orders

passed by this Honourable Court in the above petition. Nevertheless, it was at the request and behest of the Societies, abutting the said road, the aforesaid work has been carried out and is being carried out. In any event, I say and submit that the said drainage work is of essential nature in order to give proper and effective drainage and these respondents have carried out the work without any intention or purpose of flouting the orders of this Honourable Court.”

(Underlines supplied)

Though there may be some illegality associated with the impugned order, what we have pointed out earlier shows that right from 27th January 1974 onwards, the stand taken by the predecessor of the Petitioners was that the said street has been already declared as a public street and the same has been taken over by the said Corporation. The documents on record show that even the public transport buses of the Brihanmumbai Electric Supply and Transport (BEST) Undertaking are being regularly plied on the said street. After having taken a consistent stand that the said street was declared as a public street and was already taken over by the said Corporation, in writ jurisdiction under Article 226 of the Constitution of India, the Petitioners are not entitled to have the order dated 12th March 1996 set aside. Writ jurisdiction under Article 226 of the Constitution of India is discretionary and equitable. If the order dated 12th March 1996 is set aside, the Petitioners will start treating the said street as a private street which for all purposes is being treated as a public street at least from the year 1974. All the basic amenities on the said street have been provided by

the said Corporation. Hence, in Writ jurisdiction, no interference can be made with the impugned order. It will be interesting to note that in the prayer Clause (b), a writ of mandamus is sought directing the said Corporation to grant appropriate FSI/TDR in lieu of the land which is forming part of the said street by declaring the same as a public street.

28. The learned senior Counsel appearing for the Mumbai Municipal Corporation has relied upon a decision of the Apex Court in the case of *M/s. Gobind Pershad Jagdish Pershad v. New Delhi Municipal Committee*. The Apex Court was dealing with the definition of a street under Clause (a) of Sub-section (13) of Section 3 of the Punjab Municipal Corporation Act, 1911 which is different from the definition appearing in the said Act of 1888. The Apex Court also dealt with Sub-section (4) of Section 171 of the Punjab Municipal Corporation Act, 1911 which provides for declaration of a street as a public street. In Paragraph 8, the Apex Court has quoted with the approval a passage in the *Halsbury's Laws of England, 3rd Edition, Vol.19*. The Paragraph 8 of the said decision reads thus:-

“8. It would be useful to refer to the following paragraph from Halsbury's Laws of England, 3rd Edn., Vol.19 at page 49:

“The fact that a way has been used by the public so long and in such a manner that the owner of the land, whoever he was, must have been aware that the public believed that the way had been

dedicated, and has taken no steps to disabuse them of that belief, is evidence (but not conclusive evidence) from which a court or jury may infer a dedication by the owner.”

(emphasis added)

29. After considering the findings recorded by the High Court, the Apex Court in Paragraph 10 observed thus:

“10. We see no ground to differ with the concurrent findings of the courts below and hold that the appellant as dedicated the verandah in dispute to the public use. It is being used for passing and repassing by the public at large and as such is a “street” in terms of Section 3(13)(a) of the Act. The appellant has, thus, surrendered his rights in the property for the benefit of the public. The user of the property is and always shall be with the public. Any space, passage, verandah, alley, road or footway dedicated to public by the owner for passing and repassing, partakes the character of a “street” and no longer remains under the control of the owner. The owner has no right at all times to prevent the public from using the same. When the owner of the property has, by his own volition permitted his property to be converted into a “street”, then he has no right to claim any compensation when the same property is made a “public street” under Section 171(4) of the Act.”

(emphasis added)

30. Coming back to the facts of the present case, the Petitioners and their predecessors have repeatedly asserted that the said street is a public street which has been taken over by the said Corporation. It is an admitted position that even the Public Transport Buses of the BEST Undertaking are being plied on the said street. The stand that the said

street has been taken over by the said Corporation is taken by the predecessors of the Petitioners from the year 1974 onwards. It shows that the said street is being used by the members of the public for more than 40 years. Therefore, what is observed in the *Halsbury's Laws of England* can be invoked by the members of the public. This is one more reason why we are not inclined to exercise our extra-ordinary jurisdiction.

31. The writ jurisdiction is always discretionary. The discretion cannot be exercised in favour of the parties who have repeatedly accepted that the said street is a public street and that the same has been taken over by the said Corporation. Therefore, interference with the order dated 12th March 1996 is not warranted.

32. However, the said street was admittedly owned by the Petitioners and others. If in accordance with law, the Petitioners are entitled to the FSI/TDR in respect of the portion of the said road falling to their share, they may apply to the said Corporation for grant of FSI/TDR. The Petitioners and their predecessor have accepted atleast from the year 1974 that the said street is a public street. In view of what is held by the Apex Court in the *M/s. Gobind Pershad Jagdish Pershad v. New Delhi Municipal Committee*, the Petitioners will not be entitled to claim any compensation. The Petitioners will be entitled to

claim FSI/TDR as aforesaid provided it is permissible in law to grant such FSI/TDR.

33. Hence, we pass the following order:

ORDER :

- (a) The Writ Petition is rejected;
- (b) The impugned order dated 12th March 1996 passed by the Deputy Municipal Commissioner of the Mumbai Municipal Corporation declaring the status of the said street as a public street is not interfered with;
- (c) Subject to what is observed in Paragraph 32, if the Petitioners are entitled to the FSI/TDR in respect of the portion of the said street held by them in accordance with law, it will open for them to apply for grant of FSI/TDR to the Mumbai Municipal Corporation. However, the issue of entitlement to receive FSI/TDR is kept open;

- (d) If such Application is made, the same shall be decided within a period of three months from the date of filing of the Application;
- (e) Subject to the above directions, the Writ Petition is rejected;
- (f) The Rule is discharged with no order as to costs;

(V.L.ACHLIYA, J)

(A.S. OKA, J)