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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION (L)NO.375 OF 2015

Dinesh Shetty & Anr. ...Petitioners
vs.
The State of Maharashtra
and others ...Respondents

Ms Mamta Sadh a/w Mr.Ravindra A. Lokhande for the
Petitioners
Mr.M.D.Naik, AGP for the respondent No.1-State
Mr.S.U.Kamdar, Senior Counsel a/w Ms K.R.Punjabi for
the Mumbai Municipal Corporation

CORAM : A.S.OKA, &
A.K.MENON, JJ.
DATE : FEBRUARY 12, 2015

ORAL JUDGMENT : (PER A.S.OKA,J.)

1 Yesterday the papers of this petition were produced before this Court by pointing out that essentially the petitioners are seeking a relief in terms of section 37A of the Maharashtra Regional and Town Planning Act,1966 (for short "the MRTP Act"). The issue concerns the famous ground of Shivaji Park at Dadar, Mumbai which is very well known for various sports activities conducted thereon. It is not in dispute that Shivaji Park ground is in a thickly populated locality in the heart of the city of Mumbai.

2 PIL No.116 of 2009 has been filed by the Welcome Trust and another for raising various issues. The PIL is pending for final disposal. The order dated 10th March 2010 passed in the said PIL by

a Division Bench records the issues which arise in the said pending petition. The first issue is regarding the declaration of Shivaji Park as a silent zone and the second issue is regarding the misuse of the said ground for the purpose other than for which it is meant to be used. The learned senior counsel for the Mumbai Municipal Corporation pointed out that one of basic issues raised in the PIL which is waiting for final determination is whether Shivaji Park ground is reserved as a recreation ground or as a play ground in the sanctioned Development Plan under the MRTP Act. The petitioners want to use Shivaji Park ground for the function "Jagannath Rath Yatra" on 21st February 2015. An application was made by the petitioners to the Mumbai Municipal Corporation for grant of necessary permission. By a communication dated 12th January 2015 (Exhibit A to the petition), the said application has been rejected. The said order is a subject matter of challenge in this Writ Petition. The first prayer in this Petition is for directing the Commissioner of Police to issue a licence to use Loudspeaker for the Rath Yatra proposed to be held on 21st February 2015. The second prayer is for directing the Mumbai Municipal Corporation to permit the petitioners to erect a temporary stage on a portion of Shivaji Park ground for the purpose of Jagannath Rath Yatra.

3 The learned counsel for the petitioners invited our attention to various orders passed by this Court from time to time in PIL 116 of 2009. She relied

upon section 37A of the MRTP Act and in particular after its amendment by the Maharashtra Act No.43 of 2014. She urged that assuming that Shivaji Park is a playground, now there is a specific power conferred on the Municipal Corporation being the Planning Authority to permit the use of the said ground for religious functions and public meetings on application being made by any organization, body of persons or association. She pointed out that in the past, similar Ratha Yatra functions were permitted to be held under the orders of this Court passed in PIL 116 of 2009. She pointed out various orders and in particular the order dated 31st January 2010 passed by this Court which permits the use of Shivaji Park ground for non-sporting activities. She the urged that the activity proposed to be organized on 21st February 2015 is not merely a religious activity but it is essentially an activity where food in the form of *Prasadam* will be distributed to about 1.50 lac people. She submitted that the petitioners are willing to give an undertaking to abide by provisions of the Noise Pollution (Regulation and Control) Rules, 2000 and in particular, the requirement of maintaining Air Quality Standards of Noise in silence zone incorporated in the said Rules. She submitted that every year volunteers of the second petitioner ensure that after the function is over, the ground is properly cleaned and restored to its original condition. She submitted that the activity is organized in such a way that it does not cause nuisance to local residents and in fact, the

petitioners have received written feed back from some citizens complementing them. She would, therefore, submit that in view of Section 37A, this Court should exercise jurisdiction under Article 226 by permitting Shivaji Park ground to be used for Jagannath Rath Yatra festival proposed to be held on 21st February 2015. She pointed out that permissions have been granted in the past by this Court for various non sports activities to be held on Shivaji Park including a political rally on Dussehra day to Shiv Sena which is a political party.

4 The learned senior counsel for the Mumbai Municipal Corporation invited our attention to various orders of this Court. He urged that after the order dated 31st January 2013, in the year 2014, this Court has not granted any permission to hold any such non-sports activity. He submitted that permissions were denied by this Court to Indian National Congress Party and Shiv Sena party to hold rallies. He would, therefore, urge that considering the interim order in PIL No.116 of 2009 which continues to operate till today, no relief should be granted to the petitioners. The learned Government Pleader states that he has not received any specific instructions from the State Government.

5 We have given our careful consideration to the submissions. It will be necessary to make a reference to the interim order passed by this Court in PIL 116 of 2009 on 5th May 2010 which admittedly

continues to operate. The paragraphs 4 to 6 of the said order read thus:

"4...Considering this affidavit by the State Government, we are clearly of the opinion that Shivaji Park would fall within the silence zone and considering that the Police Authorities cannot issue any license for loudspeakers for being used in that area during the time when they cannot be used.

5 We, however, find in the affidavit of Shri Narayan V. Pai in para 4(f) it is set out that the State Government has reserved Shivaji Park every year for the Republic Day and Maharashtra Day function and similarly on 6th December every year the Corporation grants permission on account of Mahaparinirvan Din of Dr.Babasaheb Ambedkar for a period of two days. Considering the importance of those three functions, in our opinion there can be to some extent relaxation the use of the park in so far as those events are concerned and on those days the restriction would be exempt.

6 However, we make it clear that it is for the State Government if at all it decides to amend the notification to apply its mind. At any rate neither the Corporation nor the Municipal Commissioner can read down the said Notification. **We further make it clear that**

this is subject to other contentions raised by the petitioner that the use of Shivaji Park cannot be used for any functions other than as a playground."

(emphasis added)

6 Thus, the only exception carved out in the said order is for functions of Republic Day, Maharashtra Day and Mahaparinirvan Din of Dr.Babasaheb Ambedkar. We have perused the several subsequent orders passed by this Court in the said PIL. We find that the directions issued by this Court on 5th May 2010 stand as it is subject to what is provided in the order dated 4th January 2013 and 31st January 2013. This Court permitted non sports activities to be conducted only by way of exception.

7 It will be necessary to make a reference to the order dated 4th January 2013 passed on a Notice of Motion taken out by the present petitioners in PIL No.116 of 2009 and in particular paragraphs 9, 10 and 13 thereof which read thus:

"9 We, therefore, direct the State Government in Urban Development Department to specify the functions for which the Shivaji Park may be permitted to be used for non-sporting activities. The number of days shall not exceed 30 days in the aggregate in the calendar year and if entry to the Shivaji Park is prohibited for the purposes of sports and other activities on a day prior to the date of the function, such days shall also be

included in the aggregate period of 30 days in a calendar year.

10 We make it clear that, while we are allowing the notice of motion and **we are directing the respondent authorities to grant permission to the applicants for organizing the Jagannath Rath Yatra this year, no such application will be entertained next year unless the date/event for which permission is sought from this Court is already included in the list of 30 days to be specified by the State Government in the order/notification under Section 37A of the MRTP Act,1966.**

13 It is clarified that it will be open to the State Government to specify maximum 30 days for which non-sporting users of Shivaji Park may be permitted under section 37A of the MRTP Act,1966 and the State Government shall take into consideration the applications if any, from other organizations as well. Such applications may accordingly be invited by the State Government latest by 31 January 2013 and the State Government shall take a decision notifying the number of days for which non user of Shivaji Park may be permitted by issuing appropriate notification and public notice by 28 February 2013. These time limits are stipulated for this year only, but for the calender year 2014 onwards, the State Government shall

undertake this exercise well in advance by inviting applications for non-sport user of Shivaji Park at least two months before commencement of next calender year and take appropriate decision by 31 December of the concerned previous year."

(emphasis added)

8 It is an admitted position that the State Government in Urban Development Department has not specified the functions for which Shivaji Park ground can be permitted to be used for non-sporting activities in the years 2014 and 2015. Paragraph 10 of the said order is crystal clear which binds the Petitioners who are the organizers of the Jagannath Rath Yatra as the aforesaid order has been passed on their Notice of Motion. It makes it very clear that no application made by the petitioners for organizing Jagannath Rath Yatra will be entertained next year unless the public event for which the permission is sought is already included in the list of 30 days to be specified by the State Government in the notification under section 37A of the MRTP Act. In fact, in the light of the directions contained in paragraph 10 of the said order, the petitioners could not have applied to the Municipal Corporation for grant of permission. The learned counsel for the petitioners made a grievance that for a period of more than 2 years, the State Government has not acted upon the said order. That is an altogether a different issue. The petitioners have never sought enforcement of the direction in

paragraph 10 above. The fact remains that clause 10 of the said order operates which clearly lays down that the application of the petitioners will not be entertained for subsequent years unless the date or event for which permission is sought is already included in the list of 30 days to be specified by the State Government. In fact only on this ground that this petition deserves to be rejected. The learned counsel for the petitioners relied upon the order dated 31st January 2013. The relevant part of the said order reads thus:

"Learned counsel for the PIL petitioners submits that Shivaji Park has always been used as a playground for the last several decades and opposes the above submission.

The question will be gone into when the Municipal Corporation of Greater Mumbai takes out the Notice of Motion, but in the meantime, without prejudice to the rights and contentions of the parties, it is directed that Shivaji Park shall not be used for non-sports activities without prior orders of this Court except for the functions of Republic Day (26th January), 1st May (Maharashtra Day), 15th August (Independence Day) and 6th December (Mahaparinirvan Din of Dr.Babasaheb Ambedkar)."

9 We must note that the earlier orders which are relied upon by the petitioners made on their

application or on the applications of other organizations are not passed on the footing that they have a right to hold functions on Shivaji Park ground involving activities other than as a playground. The orders have been passed in peculiar facts of the case only by way of exception.

10 Now, the other issue canvassed is based on section 37A of the MRTP Act. Section 37A as it existed till 29th December 2014 reads thus:

"37A. Power of State Government or Planning Authority to permit temporary change of user-

Notwithstanding anything contained in this Act or any other law for the time being in force, or in any judgment, order or direction of any Court, or any draft or final Development Plan, the State Government or the Planning Authority may, in respect of any plot of land reserved, designated or allocated for the purpose of play ground in such draft or final Development plan, which is in the possession of the State Government or the Planning Authority, by an order issued from time to time, permit any organisation, body of persons or association to use such play ground for functions organised on the occasions of independence Day, Republic Day, Maharashtra Day and similar National events, and the Jayanties or Punnyatithies of National Leaders, and religious functions, on terms and conditions specified by the State

Government or the Planning Authority, as the case may be, in such order, for a period not exceeding 12 days at a time and in any case not exceeding 30 days in the aggregate in a calendar year; and such use shall not be deemed to be a change of user."

11 On 29th December 2014, the Maharashtra Act No.43 of 2014 came into force. The words "religious functions" were substituted by the words "religious functions and public meetings". The only other modification made is that the figure 30 is replaced by 45.

12 Section 37A which we have quoted above was on the statute book with effect from 6th August 1997 by virtue of amendment made to the MRTP Act by the Act No.28 of 1997. The orders passed by this Court and in particular order dated 5th May 2010 have been passed when section 37A in its unamended form was in existence. Only amendment made on 29th December 2014 is by adding public meetings in addition to religious functions and the number of permissible days in a year for such non-sporting activities have been enhanced to 45 days. Therefore, the amendment made to section 37 by Maharashtra Act No.43 of 2014 will not affect interim order of the Court in any manner. Apart from the fact that in view of paragraph 10 of the order dated 4th January 2013, the petitioners' application could not have been entertained, the purport of all the orders which have been relied upon by the petitioners is that

till the PIL is disposed of, as a matter of rule, Shivaji Park ground cannot be used for non-sporting activities. The said order dated 5th May 2010 carves out an exception in case of three events which are of national importance. Thereafter, all orders passed by this Court permitting deviation from the said order have been passed in the peculiar facts of each case.

13 Thus, in our view, the observations made by the First Court in the order dated 31st January 2013 make it clear that Shivaji Park ground shall not be used for non-sports activities except for the function of 26th January (Republic Day), 1st May (Maharashtra Day), 15th August (Independence Day) and 6th December (Mahaparinirvan Din of Dr. Babasaheb Ambedkar). It is only in very rare and exceptional cases that this Court can permit Shivaji Park ground to be used for activities other than as a playground. The exceptions are exceptions and they cannot be created in a routine manner. The learned senior counsel for the Mumbai Municipal Corporation has pointed out that this Court has denied permissions for such activities from the year 2014 and no exceptions have been made.

14 The learned counsel for the petitioners submitted that the objects of the second petitioner are very benevolent and their activities are not confined to religious activities. In this petition, the said contentions are irrelevant. The orders passed by this Court in PIL 116 of 2009 repeatedly

take a note of the fact that Shivaji Park ground has been always used as a playground for last several decades. The question is whether in the face of the interim orders passed by this Court, in a routine manner, exceptions can be carved out. Considering the purport of the order dated 5th May 2010, we make it clear that recourse can be taken to the order dated 31st January 2013 only in very rare and exceptional cases. By no stretch of imagination, the case of the petitioners can be said to be a rare and exceptional case. Moreover, in view of the direction in paragraph 10 of the order dated 4th January 2013, the petitioners were not entitled to apply for such permission.

15 At this stage, it will be necessary to make a reference to the order of the learned Single Judge on a Notice of Motion taken out by the petitioners by which a permission was sought to conduct the same festival in the year 2014. The said order dated 31st December 2013 was passed in the Notice of Motion No.648 of 2013 in PIL no.116 of 2009.

16 We are conscious of the fact that the said order is an ad-interim order. Nothing is placed on record to show that either the said order was challenged or subsequently any interim order was made on the said Notice of Motion. We cannot resist the temptation to quote what is observed in paragraph 7 of the said order which reads thus:

"7...The Shivaji Park area is widely used by

local residents, sports persons and children for sports and recreation. Allowing the function would mean rendering it inaccessible to all those people not only for the day in question but also for some days both before and after, for preparation of the ground and for a subsequent clean-up. To my mind, the city's public open spaces such as Shivaji Park should be allowed to be used only for their designated purposes, and the exceptions, if any, should be few. It is to be noted that the other functions such as Republic Day and Maharashtra Day are both secular, State organized functions. Though Section 37A of the Maharashtra Regional and Town Planning Act, 1966 contemplates use of such grounds for religious purposes, as Mr. Nair points out, that does not mean that every single religious or non-secular proposal must be accepted. Were that so, then every single religious group would be entitled to demand such permission as of right. A Court must always test where the greater public interest lies. In the case of the Shivaji Park ground, I find it difficult to accept the proposition that the public interest lies with groups such as the petitioners. The reservations and designation of our open spaces exist for a reason. Applications such as these are against the intent of those reservations. A Court must remember that, after all, these

spaces are our "commons"; to allow their diversion once would mean having to allow such diversions again and again; and therein lies the tragedy of our commons. At some stage, a Court will have to consider whether the doctrine of public trust could possibly lend itself to the grant of such applications at the instance of private parties (their numbers notwithstanding). It is for this reason that a Division Bench of this Court recently declined permission for a political party's rally at the same venue. The reasons for that refusal are equally applicable to this case. It is not, in my view, possible to allow any particular group to claim that it can use a designated playground or a recreation ground for such an activity as a matter of right."

17 Though the observations of the learned Single Judge are prima facie observations, we agree with the same to a great extent. The considerations applied by the learned Single Judge are certainly the most relevant considerations while dealing with the application made by the petitioners.

18 There is another important aspect of the matter. Section 37A does not provide that any organization can hold religious functions on designated play grounds as a matter of right.

19 Even assuming that none of the local

residents have raised any objection to the Ratha Yatra held in the past and that some of them have appreciated the function, it is not at all a relevant consideration for grant of permission by this Court. Therefore, we cannot find any fault with the impugned order dated 12th January 2015 passed by the Mumbai Municipal Corporation by which a permission was denied to the petitioners. No case is made out for grant of any relief in this petition for the reasons which we have recorded above. Accordingly, Writ Petition is summarily rejected.

18 If the PIL 116 of 2009 pertains to the assignment of this Court, we direct the Prothonotary and Senior Master to list the said PIL on 23rd February 2015 under the caption 'Directions' for fixing the date for final hearing.

(A.K.MENON,J.)

(A.S.OKA,J.)