

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

WRIT PETITION NO.4208 OF 1998

1. Mr. Punjabrao Srihari Wadje,
Age 37 years, Occ. Business &
Social service, R/o Plot No.35,
"Wadje Residency", Manjeetnagar,
Aurangabad, Secretary
Manjeetnagar Residents Association,
(Proposed), Manjeetnagar,
Opp. Akashwani, Jalna Road,
Aurangabad.
2. Anil Sacchinand Walunjkar,
Age 42 years, Occ. Service,
Member Treasurer of the
Manjeetnagar Residents Association,
(Proposed) R/o Flat No.12,
Dhanesh Apartment, Manjeetnagar,
Opp. Akashwani, Jalna Road,
Aurangabad. ... PETITIONERS

VERSUS

1. Municipal Corporation, Aurangabad
through its Municipal Commissioner,
Aurangabad.
2. The State of Maharashtra,
through its Secretary,'
Urban Development Department,
Mantralaya, Mumbai - 32
(Copy of respondent No.2 is
to be served on the Govt. Pleader,
High Court Building at Aurangabad)
3. The Icon National Sports Club,
Aurangabad, through its Secretary
Mr. Sunil Jagannath Magar,
Age 28 years, Occ. Teacher,

Working in Maharashtra Public School
R/o Vishnunagar, Behind Akashwani,
Near Mata Mandir, Aurangabad

4. Shri Trimbak s/o Ganpat Tupe,
Age major, Occ. Municipal Corporator
(From Ward No.37),
Municipal Corporation, Aurangabad,
R/o Bhavaninagar, Aurangabad

5. Prafful s/o Lalchand Malani,
Age 47 years, Occ. Municipal
Corporator (from Ward No.22),
Municipal Corporation, Aurangabad
R/o Rajabazar, Aurangabad.

... RESPONDENTS

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Shri P.G. Godhamgaonkar, Advocate for petitioners
Shri P.S. Patil, A.G.P. for State
Shri Girish Kulkarni, Advocate holding for
Shri IA.M. Karad, Advocate for respondent No.1
Shri S.V. Kurundkar, Advocate for respondent No.3

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CORAM: R.M. BORDE AND
 A.I.S. CHEEMA, JJ.

DATED: 29th February, 2016.

JUDGMENT (PER A.I.S. CHEEMA, J.):

1. This petition is filed to set aside agreement dated 3.3.1998 entered into between respondent No.1 Municipal Corporation, Aurangabad with respondent No.3 Icon National Sports Club, whereby open space left in Manjeet Nagar Layout has been agreed to be made available to respondent No.3 on

lease on rent of Rs.100/- per year for 30 years with right to construct on 10% of the open space or 200 sq.mtrs., with condition to maintain garden in the remaining open area.

2. The petition claims and it is argued for the petitioners that, respondent No.3 Club is under complete control of respondent No.4, who was elected Corporator at the concerned time and attached with the then ruling Party in State. Layout plan of Manjeetnagar was approved on 14.1.1985 and contains 35 plots. There is open space provided for garden, admeasuring 26450 sq. ft. To the east of the layout of Manjeetnagar, there is Ahinsa Nagar, and on the West there is one Sant Eknath Society. In the whole area, there is no other open space left. The open space in dispute was earmarked for garden in the sanctioned final development plan of Aurangabad city. The open space has been unauthorisedly, without consent and ignoring objections of residents of Manjeetnagar assigned by the Corporation in favour of the Club, which is in control of respondent No.4 Corporator. The residents of Manjeetnagar held meeting on 13.9.1998, passing resolution against the move of the Corporation permitting the Club to grab the open space. The residents have formed association for the purpose and the resolution was submitted to the Corporation. The Club purports to have one

Sunil Magar as Secretary and one Jasbirsingh Bhatia as Vice President. All these people have no connection with the Manjeetnagar Society and they do not own property there. The residents came to know about resolution No.588 of 30.3.1998 assigning development rights to the respondent Club in respect of the open space. On the same date of 30.3.1998, the respondent No.1 Corporation entered into agreement with respondent No.3 club. Even the witnesses of the agreement do not own any property in Manjeetnagar locality. The open space has been earmarked for garden and even estimates had been prepared. As per record, just when the Corporation was to develop the garden in the open space, the development rights have been passed of to respondent No.3 Club.

3. It is stated for the petitioners that, construction on the open space in violation of the development plan, could not have been allowed under the rules. The petition refers to installation of a tapari on the spot on 9.9.1998 and when residents objected, the respondent No.4 along with the tapari owner came forward to quarrel and complaints have been lodged in Police Station. It is stated that, the agreement dated 30.3.1998 has been registered on 7.9.1998 when the petitioners raised objections. According to petitioners, in the open space left

for garden in the locality, residents have right of fresh air and use of the area is vested in the residents of the area and right in the land did not vest with the Corporation by way of ownership or for any other purpose and the Corporation could not have diverted the purpose. The open space was not owned by the Corporation and the Corporation had not paid any compensation for the place either to the residents of the locality or to any other person and thus, Corporation cannot change the user. It is stated that, at the time when the Corporation passed resolution in favour of the Club, the respondent No.4 was part of political party which was in power and to show favouritism, the resolution was passed and agreement entered into. For such reasons, the petitioners claimed that the resolution No.588, passed by the Corporation and the agreement entered into with the Club be quashed and set aside.

4. The Corporation has filed affidavit-in-reply and it has been argued that, if the petitioners were aggrieved by resolution passed by the Corporation, representations should have been filed to the State Government in view of Section 451 of the Bombay Provincial Municipal Corporations Act, 1949 and the Writ Petition should not have been filed. Respondent No.3 Club was imparting education and training to youths in various sports and

had approached the Corporation with request to allot piece of land from Manjeetnagar Layout. Property bearing C.T.S. No.12489 belonged to one Sardar Trilochansingh who had applied for sanction of layout, which was sanctioned on 14.1.1985. The owner, by executing agreement dated 23.1.1985, had handed over possession of the land under roads, drainage etc. along with the open space, due to which the Corporation became owner of the open space and all open spaces mentioned in the layout. The open space remained to be developed. When the respondent No.3 Club made request to grant the land to them, the Standing Committee, in the meeting dated 13.3.1998, resolved to allot 10% of open space or 200sq. mtrs. whichever is less on long term lease basis to the Club. Accordingly, the space has been allotted and as per the agreement, the respondent No.3 club has undertaken to develop the garden in remaining area incurring expenditure under supervision of the Garden Department of the Corporation. The open space cannot be considered as reserved area under the development plan. Reserved areas under the Maharashtra Regional and Town Planning Act 1966 ("M.R.T.P. Act" in brief) are different. The present matter relates to development of land and layouts as per the Development Control Rules. It is stated that, as per Rule 13.3.1.3, the Corporation can grant or permit

construction over 10% of the open space for creation of Sports Club, Health Club or any such activity. The Corporation claims that, the resolution was passed as per the Development Control Bye-laws and Building Bye-laws. The open space left in the sanctioned layout vests with the Corporation and under Section 79(C) of the Maharashtra Municipal Corporations Act, the Corporation can deal with its property.

5. The Club has also filed affidavit-in-reply, dated 12.10.1998 and it is argued that the club was duly registered in 1996. The Club has also raised similar defence as that which has been raised by the Corporation. It is claimed by this respondent that the purpose of the use of open space has not been changed. 22 residents of the area have given consent/ No Objection to start sports club in the open space. Lease deed has been executed in favour of the club, whereby the club has agreed to develop garden on the open space. The lease is only for the period of 30 years. it is claimed that the petitioner No.1 is builder by profession and resides in adjoining locality and uses the open space for parking of his trucks/ vehicles and thus, he is opposing the agreement entered into by the Corporation. The Manjeetnagar Layout is having total area of 302261.50 sq.ft., out of which D.P. Road is 10075 sq.ft. and area reserved for plots is

245786.50 sq.ft. and open space is 26450 sq.ft. It is claimed that, 10% area out of total area of open space, which comes to 26450 sq.ft. can be carved out and can be allowed to be constructed for public purpose such as Recreation Hall, Clubs, Gymnasium etc. This respondent accepts that if purpose is changed, then that has to be banned. The Club runs a sports club, which is not prohibited. Out of open space of 26450 sq.ft., 10% comes to 2645 sq.ft., the Corporation has leased only 2000 sq.ft. area to the respondent No.3. It is claimed that, it is as per the rules and bye-laws. According to this respondent, the object of the Development Control Rules is that, the residents of locality should get basic facilities/ amenities such as hygiene, and there must be open space, recreation hall, sports club etc. so that during the leisure time, the residents can visit this place. The Club denies that its office bearers do not have concern with Manjeetnagar locality. The respondent wants the petition to be dismissed.

6. In Building Bye-laws, Chapter 13 has "Rules for Development of Land Into Land Sub-Division and Layout". The respondents have relied on Rule 13.3.1.3 to defend their action. It will be appropriate to reproduce said Rule 13.3.1 to 13.3.1.3 here :

"13.3 Open Spaces -

13.3.1 In any layout of sub-division of land measuring 0.4 hector or more in residential and commercial zones, 10% of the entire holding area shall be reserved, for recreational spaces which shall be as far as possible; be provided in one place.

13.3.1.1 No such recreational spaces shall admeasure less than 400 sq. m.

13.3.1.2 The minimum dimension of such recreational space shall in no case be less than 7.5 m. and if the average width of such recreational space is less than 24 m. the length thereof shall not exceed 2 1/2 times the average width.

13.3.1.3 The structures to be permitted in the open spaces shall be as per the following provisions :

(i) They shall be single storyed structure with the maximum area not exceeding 10% of the open space. This shall be further subject to a maximum of 200 sq.m.

(ii) The structure shall be used for the purpose of pavilion or gymnasia or other activities which are related to open spaces ; and

(iii) No toilet block shall be permitted.

(iv) Whenever called upon by the Planning Authority to do so, under provisions of Section 202, 203 of BPMC Act area as under roads and open space in Byelaw Nos.12.3 to 12.5, 13.3 shall be handed over to the Planning Authority after development of the same for which nominal amount of Re. 1 shall be paid by the Planning Authority. In case of the owners who undertake to develop the open spaces for

bonafide reasons as recreational community open spaces, the Authority may permit the owner to develop the open space unless the Authority is convinced that there is no misuse of open spaces in which case the Authority shall take over the land.

Note : This would be exempted from F.A.R./ Built up area calculations. Every such plot and recreational open space shall have an independent means of access."

7. It is clear from above that, the structure permitted in open spaces can be only single storyed not exceeding 10% of the open space. This is further subject to a maximum of 200 sq.m. The structure can be used only for the purpose of pavilion or gymnasium or other activities "which are related to the open spaces". No toilet block is to be permitted in the structure. This appears to be so as nearly plot residents of lay-out for whose beneficial use the open space is to be left would not need it, their flats/houses being near. If the resolution No.588/15 (Page 35) passed by the Corporation is perused, it merely records that the application of the Icon National Sports Club (respondent No.3) has been received; that it is operational since two years and is doing the work of preparing quality players and wants the open space on long lease. The resolution accepted proposal putting the conditions that :

- (i) Rent will be as per resolution dated 30.11.1996 and
- (ii) As per the Development Control Rules, permission for construction to the extent of 10% or 200 sq.mtrs. whichever is less will have to be taken and that,
- (iii) The period of lease will be 30 years, but after five years lease renewal will have to be done.

No condition was stipulated that the structure will have to be used for particular purpose leave aside what above Rule 13.3.1.3(ii) required, nor condition as per (iii) was directed.

8. It is merely stated that, the rent conditions will be as per usual terms. If the rent agreement (Exhibit C) entered into by the Corporation with the Club is perused, although it provides that garden in the remaining open space will have to be maintained, there are no clear provisions that the structure to be put up will be used for activities which are related to the open space. Agreement permits construction of hall and states in para 7 that in the space given from open space only hall and ancillary to such use will be permissible. The use of the structure put up has to have link with the use of the open space. Looking to the rule referred above, the use of the open space and the structure have to be linked use. Plot holders in the layout for whose

benefit the open space is required to be left open nowhere appear to be targeted beneficiaries in the structure to be put.

9. Apart from above, at the time of arguments, the learned counsel for respondents were pointedly asked to show as to how merely for the asking by respondent No.3 Club the Corporation could, without following any procedure or transparent method allot the space to respondent No.3 Club. The Club was hardly two years old and no material was there of it producing "quality players" and how, in such short period. Section 79 of the Maharashtra Municipal Corporations Act contains provisions governing the disposal of Municipal property. Relevant clause (b) to (d), for present matter, read as under :

"79. Provisions governing the disposal of municipal property :

With respect to the disposal of property belonging to the Corporation, other than property vesting in the Corporation exclusively for the purposes of the Transport Undertaking the following provisions shall have effect, namely :-

(a)

(b) with the sanction of the Standing Committee the Commissioner may dispose of by sale, letting out on hire or otherwise any moveable property belonging to the Corporation, of which the value does not exceed

five thousand rupees; and may with the like sanction grant a lease of any immoveable property belonging to the Corporation, including any such right as aforesaid, for any period exceeding one year or sell or grant a lease in perpetuity of any immovable property belonging to the Corporation the value of premium whereof does not exceed fifty thousand rupees or the annual rental whereof does not exceed three thousand rupees;

(c) with the sanction of the Corporation, the Commissioner may lease, sell, let out on hire or otherwise convey any property, moveable or immoveable, belonging to the Corporation;

(d) the consideration for which any immoveable property or any right belonging to the Corporation may be sold, leased or otherwise transferred shall not be less than the current market value of such premium, rent or other consideration.

10. There is no material available as to on what basis the rent has been calculated at the relevant time at Rs.100/- per year. No transparent procedure was adopted for leasing out the property in favour of the respondent Club. No public information was given that the open space is to be leased out and interested parties who would use the structure to be put up for pavilion or gymnasias or other activities which are related to the open space, may apply. It is not the case of the Corporation that for the open space left open in the layout by the then owner, compensation was paid. No doubt, the Corporation got an agreement Exh. R-3 executed from the then owners, copy of

which has been filed, which mentions that, the ownership of the open space will vest in the Corporation. Clause (1) of the agreement rather mentions that the ownership will vest in the Corporation "without any compensation". Thus, the Corporation did not even pay the ridiculous "Re.1" (which itself is not acceptable) mentioned in Rule 13.3.1.3(iv) referred above. However, the owner left the open space open in view of the building bye-laws and Development Control Rules. The Corporation cannot be seen as acquiring ownership to property in lieu of granting sanction to layout. If the person desirous of developing land is required to leave space open, it has to be left open and not that the Corporation can declare ownership and do whatever it desires with the open space as per its own sweet will.

11. The reasons why we have just mentioned that the provision stating that the Corporation will pay "Re. 1" is not acceptable, can be found in the judgment of **Pt. Chet Ram Vashist (Dead) by L.Rs. Vs. Municipal Corporation of Delhi, [AIR 1995 Supreme Court 430]**. In that judgment the Hon'ble Supreme Court was considering Section 313 of the Delhi Municipal Corporation Act, 1957 regarding lay-out plans. After referring to the provisions, the Hon'ble Supreme Court observed that :-

"None of its provisions entitled the Corporation to claim any right or interest in the property of the owner. Sub-section (3) empowers the Standing Committee to accord sanction to the lay-out plan on such conditions as it may think fit. The expression, 'such conditions' has to be understood so as to advance the objective of the provision and the purpose for which it has been enacted. The Corporation has been given the right to examine that the lay-out plan is not contrary to any provision of the Act or the rules framed by it. For instance a person submitting a lay out plan may be required to leave certain open space or he may be required that the length and width of the rooms shall not be less than a particular measurement or that a coloniser shall have to provide amenities and facilities to those who shall purchase land or building in its colony. But the power cannot be construed to mean that the Corporation in the exercise of placing restrictions or imposing conditions before sanctioning a lay-out plan can also claim that it shall be sanctioned only if the owner surrenders a portion of the land and transfers it in favour of the Corporation free of cost. That would be contrary to the language used in the Section and violative of civil rights which vests in every owner to hold his land and transfer it in accordance with law. The resolution passed by the Corporation directing the appellant to transfer the space reserved for tube wells, school and park in its favour free of cost was depriving the owner of its property and vesting it in the Corporation against law. The finding of the High Court that such condition did not amount to transfer of ownership but it was only a transfer of the right of management cannot be accepted. The two rights, namely, of ownership and of management, are distinct and different rights. Once a vacant site is transferred in favour of another free of cost then the person

transferring it ceases to be owner of it. Whereas in transfer of right of management the ownership continues with the person to whom the property belongs and the local authority only gets rights to manage it. But the conditions imposed by the Standing Committee clearly meant to transfer the ownership in favour of the Corporation. The Corporation as custodian of civil amenities and services may claim and that would be proper as well, to permit the Corporation to regulate, manage, supervise and look after such amenities but whether such a provision can entitle a Corporation to claim that such property should be transferred to it free of cost appears to be fraught with insurmountable difficulties. The law does not appear to be in favour of the Corporation. Public purpose is, no doubt, a very important consideration and private interest has to be sacrificed for the welfare of the society. But when the appellant was willing to reserve the two plots for park and school then he was not acting against public interest. This cannot be stretched to create a right and title in favour of a local body which utmost may be entitled to manage and supervise only."

12. Considering the provisions applicable to the present matter, keeping in view observations of the Hon'ble Supreme Court, we find that the Corporation does not have unfettered rights relating to open space. The Corporation has to use it for the purpose for which the space is left open.

13. In this regard, the petitioners have rightly pointed out the Circular issued by the Government of Maharashtra having

No.TPB4396/114/C.No.89/96/NV.11, dated 10th June 1996. The Circular refers to misuse being done of such 10% open spaces handed over to public institutions. The Circular records that, to such open spaces, the first right is of the plot holders of the layout, because the plot holders have indirectly to the extent of their plots paid price to the owner of the plot even for the open space which was required to be left by the owner. It is stated that, even if from the open space 10% would be constructed for "Balak Mandir, Club Hall" etc., still such use should be made by the Corporation or jointly by the plot holders of the layout. The Circular requires forming of Co-operative Society/ Federation of plot holders of the lay-out. The proposal should be received from the Co-operative Society/ Federation of the plot holders and should be for common use. If Society/ Federation has not been formed, Registered Undertaking can be taken from plot holders to use the open space for the purposes specified. Such structure can be only for purposes of recreation. As per the directions issued by the State Government, the remaining space has to be left open permanently for the common use of the plot holders as a playground or garden or space for recreation. The Circular contains directions that it would be permissible for the Corporation to give such 10% open space to the Co-operative Society/ Federation of the plot holders on rent on such terms and

conditions as mentioned in the Circular.

14. The above circular was issued on 10.6.1996, which was before the respondent Corporation passed resolution dated 30.3.1998 to give away the land to the respondent Club. There is no material to show that the Corporation made any efforts as were directed under the above Circular dated 10.6.1996.

15. This Court has, in the matter of "**R.S. Pool Table & others Vs. The Aurangabad Municipal Corporation & ors.**" (**Writ Petition No.4335 of 2012**), decided on 8th July 2014, held that, even where Corporation has to lease its land, it would be necessary to follow transparent procedure inviting tenders by issuing advertisement. In this matter, the Corporation cannot justify its action of simply receiving an application from a Club hardly two years old, managed by one of its Corporator and leasing out property, in violation of the Circular dated 10.6.1996, which had been recently issued at that time. In fact the Circular issued by State was specifically to curb leasing outs to such public institutions. Neither the Circular was resorted to nor any transparent procedure was followed for leasing out the land. In fact, as per direction Clause 'B' of the Circular, the only course open for the Corporation was to either lease out the open space to the Society/ Federation or develop the same itself.

16. For such reasons, the allocation of the open space made by the Corporation in favour of respondent No.3 and the impugned agreement dated 7.9.1998 is quashed and set aside. Looking to the averments of the respondent No.3 that the petitioner No.1 was misusing the open space to park his vehicles etc., we record that it would be responsibility of the Municipal Corporation to ensure that the open space is kept open and for common use of the plot holders of the lay-out. The Corporation would be at liberty to take necessary steps as per the Circular referred and to ensure that open space is used strictly for the purpose for which it is left open under the bye-laws and shall take action against violation, if any.

17. Rule made absolute accordingly. No costs.

(A.I.S. CHEEMA, J.)

(R.M. BORDE, J.)