IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 6269 OF 2007

Rajjak S/o Gaibilal Inamdar,
Age : 57 Years, Occu. : Agril.,
R/o Kanegaon, Tq. Lohara,
Dist. Osmanabad. .. Petitioner

Versus

1. The State of Maharashtra,
Through Collector, Osmanabad.

2. The Divisional Commissioner,
Aurangabad Division, Aurangabad.

3. The Additional Collector (EQ),
Osmanabad.

4. Tahsildar Lohara, Tq. Lohara,
Dist. Osmanabad.

5. Sarpanch, Kanegaon,
Tq. Lohara, Dist. Osmanabad.

6. Mustafa Gaibilal Inamdar (Mulani),
Age : 64 Years, Occu. : Agril.,
R/o Opp. Govt. Seed Form,
Shivpuri Road, Omerga,
Tq. Omerga, Dist. Osmanabad. .. Respondents

Shri K. K. Kulkarni, Advocate for the Petitioner.
Shri A. P. Basarkar, A.G.P. for Respondent Nos. 1 to 4.
The Respondent No. 5 is served.
Shri V. G. Salgare, Advocate for the Respondent No. 6.

CORAM : S. V. GANGAPURWALA
A. M. BADAR, JJ.

CLOSED FOR JUDGMENT ON : 26.02.2016

JUDGMENT PRONOUNCED ON : 23.03.2016

JUDGMENT (Per S. V. Gangapurwala, J.) :-

. The petitioner assails the order passed by the Divisional Commissioner Aurangabad Division, Aurangabad thereby dismissing the appeal filed by the petitioner and confirming the order dated 10.11.2005 passed by the Additional Collector, Osmanabad whereby the Additional Collector, Osmanabad allowed the application of the present respondent No. 6 thereby sanctioned the house bearing No. 316/B in favour of the respondent No. 6 which was initially allotted to the father of the petitioner and the respondent No. 6 under the scheme of allotment of house to the persons affected by earthquake.

02. In the year 1993 some parts of Osmanabad and Latur districts were affected by earthquake. The persons affected by the earthquake were provided with houses as a part of rehabilitation programme.

03. The petitioner and the respondent No. 6 are real brothers. The father of the petitioner and the respondent No. 6 Gaibilal was allotted house No. 317/B. The petitioner was separately

allotted house No. 257/A in the same village. On 13.01.1999 father of the petitioner died. Thereafter, the respondent No. 6 filed an application with the Collector for allotment of the house to him upon the death of his father contending that the petitioner is already allotted the house under the scheme of rehabilitation of earthquake affected persons and respondent No. 6 is not allotted any house. Pursuant to the said application, the Additional Collector E.Q. (Rehabilitation), Osmanabad ordered that the house property No. 317/B be given to the respondent No. 6. The petitioner had filed civil suit bearing R.C.S. No. 125 of 2005 before the Civil Judge Junior Division, Omerga challenging the said order. The said suit was dismissed on the ground of jurisdiction. Liberty was given to the parties to approach the Divisional Commissioner. Pursuant thereto, petitioner filed an appeal before the Divisional Commissioner. The Divisional Commissioner dismissed the appeal confirming the judgment and order of Additional Collector directing the house property No. 317/B which was allotted to the father of the petitioner and the respondent No. 6 be given to the respondent No. 6. The petitioner has assailed the said order in the present writ petition.

04. Mr. Kulkarni, the learned counsel for the petitioner submits that, the reasoning given by the Additional Collector, so also the Commissioner is based on erroneous appreciation of the scheme itself. The name of the present respondent No. 6 was not included in the list of beneficiaries. The father of the petitioner

and the respondent No. 6 Gaibilal had purchased the open land, constructed house on his own and allotted the same to respondent No. 6. The petitioner was in the list of beneficiaries of the earthquake affected persons and pursuant thereto was allotted the house in his own capacity and the father was allotted separate house. During the life time of the father, the father gave the possession of the house to the petitioner by way of oral hibba (Gift). The same had taken place in presence of Gafoor Jinda and Namdeo Nivrutti. As such, the petitioner is in possession of the house bearing No. 317/B as a owner. According to the learned counsel, if the respondent No. 6 wants to make any claim pursuant to the alleged gift as contended by the respondent No. 6, he has to establish his right in the Civil Court. Unless, the respondent No. 6 establishes gift in his favour, he cannot claim any right. The petitioner may not be entitled to two houses as an earthquake affected beneficiary, however, the petitioner is not getting two houses as an earthquake affected beneficiary. He has got only one house as beneficiary and another house is given to the petitioner by his father by way of oral gift, which is permissible under the Mohammedan Law. The learned counsel submits that, only on the premise that, the petitioner is already having one house, the authorities have passed the order sanctioning the house in favour of the respondent No. 6, which stood in favour of the father of the petitioner and the respondent No. 6. The petitioner is in possession of the said house as owner pursuant to valid oral hibba. The orders be set aside. Mr.

Kulkarni, the learned counsel in alternate submits that, even if there was prohibition for transfer, the transfer would be voidable and not void. The same will have to be challenged in the Court of law. The learned counsel relies on the judgment of the Apex Court in the case of **Sindav Hari Ranchhod Vs. Jadev Lalji Jaymal and others** reported in ***AIR 1997 SC 3479***.

05. Mr. Salgare, the learned counsel for the respondent No. 6 submits that, the petitioner is already allotted one house as a beneficiary of earthquake affected person. So also father was allotted a house. The respondent No. 6 was not allotted any house under the said scheme. The father of the petitioner and the respondent No. 6 has by gift given the said house to the respondent No. 6. The document evidencing gift is also placed on record. According to the learned counsel, the scheme dated 01st November, 1995 specifically states that, no beneficiary should be allotted two houses. The petitioner is not entitled for the house which was owned by the father.

06. The learned Assistant Government Pleader submits that, the Collector and the Commissioner have rightly exercised their powers and have implemented the scheme correctly. The petitioner is already allotted a house as a beneficiary under the scheme. The house allotted to the father was as a beneficiary under the earthquake affected rehabilitation scheme. No error is committed by the authorities.

07. We have gone through the submissions canvassed by the learned counsel for respective parties.

08. The factual matrix about the petitioner being a beneficiary of allotment of a house bearing No. 257/A under the earthquake affected rehabilitation scheme is not disputed. So also the father of the petitioner and the respondent No. 6 being allotted an another house under the said scheme bearing house No. 317/B is also not disputed. Upon the death of the father, the authorities have sanctioned the said house in the name of the respondent No. 6.

09. The petitioner and the respondent No. 6 both stake their claim on the basis of gift from their father. The petitioner claims that the father has gifted writ property to him. The respondent No. 6 also claims the father having gifted writ property to him. The respondent No. 6 is not allotted any house as a beneficiary in the earthquake affected rehabilitation scheme. The scheme dated 01.11.1995 specifically lays down that no beneficiary shall be allotted two houses. The letter of allotment/ownership certificate issued in favour of the father of the petitioner itself states that, the said house shall not be transferred without prior permission. No permission has been obtained. The petitioner as well as the respondent No. 6 stake their claim on the ground that the same is given as gift by their father. The gift amounts to a transfer, which was prohibited in this case. None of the parties

have come with the case that before giving the said property as a gift either to the petitioner or the respondent No. 6, prior permission was obtained.

10. If the transfer is illegal, the Government has power to take steps to forfeit or repossess the property. Be that as it may, we are not concerned with the same in this particular case.

11. When both the parties are claiming on the basis of gift, it will be for the parties to establish their rights before the Civil Court. It is only before the Civil Court the parties can prove their theory of gift, wherein parties will be required to adduce evidence. The authorities have considered that, the petitioner is already a beneficiary of a house under the earthquake affected rehabilitation scheme. The house allotted to the father was also under the said scheme and as such have sanctioned the said house, allotted to the father of the petitioner and respondent No. 6 and to the respondent No. 6 upon the death of the father. The discretion has been exercised in a plausible manner. The earlier suit filed by the petitioner was challenging the judgment of the Collector. The remedy to challenge the said judgment was before the Commissioner. In the light of that, the Civil Court has held that, it has no jurisdiction. If the petitioner feels that, he has got a right by virtue of oral gift in his favour, he may establish the same before the Civil Court and if he succeeds in the Civil Court, then can approach the authorities pursuant to the judgment of

the Civil Court. As plausible view has been taken by the authorities, we are not inclined to interfere with the said orders. However, if the petitioner so chooses, the petitioner may approach the Civil Court for establishing his right on the basis of gift. If the petitioner succeeds in establishing his right, then may approach the authorities in tune with the judgment of the Civil Court, the authorities would consider and take decision accordingly. The writ petition accordingly is dismissed. Rule discharged. No costs.

12. At this stage Mr. Kulkarni, the learned counsel for the petitioner seeks extension of interim relief for a period of eight weeks from today. Mr. Salgare, the learned counsel for the respondent No. 6 opposes the said request. Considering the fact that, interim relief was in force, the same is extended for a period of four (04) weeks from today. Needless to state on lapse of four (04) weeks, the interim protection granted shall come to an end.

Sd/-
[A. M. BADAR, J.]

Sd/-
[S. V. GANGAPURWALA, J.]

bsb/March 16