

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

WRIT PETITION NO. 6357 OF 2013

1. Shri Gurudatta Cooperative Housing
Society Wadgaon Gupta, Ta. and
Dist. Ahmednagar, through its
Chairman Sitaram S/o Gouram Dhorajkar
Age: 46 years, Occu. Agri.& Business,
R/o In front of MIDC Police Station
Shivaji Nagar, Ta. Nagar,
Dist. Ahmednagar.

2. Gouram Sakharam Dhorajkar
Guruji Foundation Dangat Mala,
Nagapur, Ta. Nagar, Dist. Ahmednagar
Through its President
Sitaram S/o Gouram Dhorajkar,
Age: 46 years, Occ.: Agri & Business,
R/o : infront of MIDC Police Station
Shivajinagar, Tq. Nagar,
Dist. Ahmednagar

...PETITIONERS

versus

1. State of Maharashtra,
Through its Secretary,
Revenue Department,
Mantralaya, Mumbai- 431 032.

2. The Collector,
Ahmednagar

3. The Sub-Divisional Officer,
Ahmednagar Division
Ahmednagar.

4. The Tahsildar,
Tq. Nagar, Dist. Ahmednagar.

...RESPONDENTS

.....
Mr. N.V. Gaware, Advocate for petitioners
Smt. S.S. Raut, AGP for respondents
.....

**CORAM : S. V. GANGAPURWALA AND
K.K. SONAWANE, JJ.**

DATED : 28th JULY, 2016.

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

1. Rule. Rule made returnable forthwith and heard finally with consent of learned advocates for the parties.

2. Mr. Gaware, learned counsel for petitioners submits that petitioner No. 1 is registered co-operative housing society. The proposal for non agricultural use of the property bearing Survey No. 102/1 admeasuring 3 Hectares, 79 Aar situated at Wadgaon Gupta, Tq. and Dist. Ahmednagar was submitted. After following due procedure of law, on 13-12-1990 non-agricultural permission was granted in favour of the petitioner-society. Layout was prepared and as per rules internal road and open space are kept. The learned counsel for petitioners submit that circular came to be issued by the Government on 25-05-2007 to the effect that open spaces, internal roads in the layout shall be mutated and transferred in favour of local bodies. According to learned counsel for petitioners, respondents do not have any ownership right upon the open spaces and internal roads in the layout, as such said circular is erroneous. Pursuant to the same, name of the Government has been mutated in respect of open spaces owned by petitioners in the said layout.

3. Learned counsel for petitioners rely on the judgment of the Apex Court in a decision of *Pt. Chet Ram Vashist (dead) by L.Rs. Vs. Municipal Corporation of Delhi* reported in *AIR 1995 Supreme Court 430(1)* and a decision of this Court in the case of *Vrajlal Jinabhai Patel Since deceased through his L.Rs. And another Vs. State of Maharashtra and others* reported in *2003(3) Mh.L.J. 215*.

4. Learned Assistant Government Pleader submits that the Government has issued circular with object of maintaining open spaces and that said open spaces and internal roads in the layout would not be misused by original owners. Learned Assistant Government pleader submits that said Government Circular has been validly issued. Pursuant to the same, mutation entry has been rightly effectuated. The petitioners had filed RTS appeal, still has filed present petition. Learned Assistant Government Pleader submits that the petitioners are trying to misuse the open space and inasmuch as petitioners state that a proposal was submitted for running school in the open space, however, no permission is granted to the petitioners to run the school in open space and to avoid such misuse of land, mutation entry has been rightly effected with a view to maintain the open spaces as it is, directions are given to the authority concerned to transfer the land in favour of local authorities when this land come within the limits of local bodies till then be transferred in the name of Government. Learned Assistant Government Pleader to support the contention, relies on

section 20 of the Maharashtra Land Revenue Code, 1966, which is reproduced below:

“20.(1) All public roads, lanes and paths the bridges, ditches, dikes and fences on, or beside, the same, the bed of the sea and of harbours and creeks below the high water mark, and of rivers, streams, nallas, lakes and tanks and all canals and watercourses, and all standing and flowing water, and all lands wherever situated, which are not the property of persons legally capable of holding property, and except in so far as any rights of such persons may be established, in or over the same, and except as may be otherwise provided in any law for the time being in force, are and are hereby declared to be, with all rights in or over the same, or appertaining thereto, the property of the State Government and it shall be lawful for the Collector, subject to the order of the Commissioner, to dispose of them in such manner as may be prescribed by the State Government in this behalf, subject always to the rights of way, and all other rights of the public or of individuals legally subsisting.

Explanation- in this section 'high water-mark' means the highest point reached by ordinary spring tides at any season of the year.

(2) Where any property right in or over any property is claimed by or on behalf of the Government or by any person as against the Government, it shall be lawful for the collector or a survey officer, after formal inquiry of which due notice has been given to pass an order deciding the claim.

(3) An order passed by the collector or survey officer under sub-section (1) or sub-section (2) shall, be subject to one appeal and revision in accordance with provisions of this Code.

(4) Any suit instituted in any civil court after the expiration of one year from the date of any order passed under sub-section (1) or sub-section (2) or, if appeal has been made against such order within the period of limitation, then from the date of any order passed by the appellate authority, shall be dismissed (though limitation has not been set up as a defence) if the suit is brought to set aside such order or if the relief claimed is inconsistent with such order, provided that in the case of an order under sub-section (2) the plaintiff has had due notice of such order.

(5) Any person shall be deemed to have had due notice of an inquiry or order under this section if notice thereof has been given in accordance with rules made in this behalf by the State Government.

5. Perusal of said provision it is manifest that public roads, lanes, and the paths, the bridges, ditches, dikes and fences and all lands wherever situated, which are not the property of persons legally capable of holding property and except insofar as any rights of such person may be established, provided in any law, apart from said properties, all these would vest with State Government and the State would be entitled to dispose of the said property.

6. The roads and open spaces in the lay-out are properties owned by original owner, ownership of the same vests with original owner. The Apex Court in paragraph No. 6 of its judgment in *Pt. Chet Ram Vashist (dead) by L.Rs.* referred to supra has observed as under:

“6. Reserving any site for any street, open space, part, school etc, in a lay-out plan is normally a public purpose as it is inherent in such reservation that it shall be used by the public in general. The effect of such reservation is that owner ceases to be a legal owner of the land in dispute and he holds the land for the benefit of the society or the public in general. It may result in creating an obligation in nature of trust and may preclude the owner from transferring or selling his interest in it. It may be true as held by the High Court that the interest which is left in the owner is a residuary interest which may be nothing more than a right to hold this land in trust for the specific purpose specified by the coloniser in the sanctioned lay-out plan. But the question is, does it entitle the Corporation to claim that the land so specified should be transferred to the authority free of cost. There is not made out from any provision in the Act or on any principle of law. The Corporation by virtue of the land specified as open space may get a right as a custodian of public interest to manage it in the interest of the society in general. But the right to manage as a local body is not the same thing as to claim transfer of the property to itself. The effect of transfer of the property is that the transferor ceases to be owner of it and the ownership stands transferred in the person in whose favour it is transferred. The resolution of the committee to transfer land in the colony for parks and school was an order for transfer without there being any sanction for the same in law.”

7. As such, it would be abundantly clear that though original owner of the lay-out remains owner of the said open space his ownership is residuary in nature and said space is meant for use of the plot holders and general public. Original owner retains said residuary rights as trustee of the other lay-out plot holders. However, as observed by the Apex Court local body or the Government do not have any right to transfer the open space in its name without any consideration or nominal charges. Even section 20 the Maharashtra Land Revenue Code, 1966 would not come to the aid of the respondents' for claiming ownership of the open space. The original owner is never divested of his ownership.

8. As observed above, even original owner would not be in a position to use that open space in any other manner and same has to be kept as open space for the purpose of use and enjoyment general public and lay-out plot holders. Respondents can supervise said open space and has to ensure that it is not used for any other purpose not permissible.

9. In light of the above, impugned mutation entry is quashed and set aside.

10. Writ petition is allowed. Rule is made absolute in above terms. No costs.

Sd/-

[K. K. SONAWANE, J.]

Sd/-

[S. V. GANGAPURWALA, J.]