

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.875 OF 2013

Indian Education Society,
Dadar, Mumbai & Ors.

.... Petitioners

V/s.

The State of Maharashtra,
Through the Hon'ble Minister,
Revenue and Forests,
Government of Maharashtra,
Mantralaya, Mumbai & Ors.

.... Respondents

Ms. Nilima Sanglikar, a/w. Ms. Nandini Menon,
for the Petitioners.

Ms. Geeta Shastri, A.G.P., for the
Respondents.

CORAM : S.C. DHARMADHIKARI &
DR. SHALINI PHANSALKAR-JOSHI, J.J.

DATE : 20TH APRIL, 2016.

P.C. :

1. By this Petition, under Article 226 of the Constitution of India, the Petitioners challenge an order at Page No.191 of the paper-book and which is passed by the Minister of Revenue, Government of Maharashtra, dated 30th January 2013.

2. By the amended Memo of the Writ Petition, further orders, and stated to be passed in exercise of review jurisdiction, have been impugned and challenged in this Petition.

3. Very few facts are required to be set out to appreciate the contentions of Mrs. Sanglikar, learned counsel appearing for the Petitioners.

4. Petitioner No.1 before us is, both, a Trust and a Society registered under the Bombay Public Trust Act, 1950 and the Societies Registration Act, 1860. It is registered as a Public Trust and Petitioner Nos.2, 3 and 4 are its Trustees.

5. It is common ground that Petitioner No.1-Trust is carrying on educational activities. It is set up so as to establish, administer and manage quality schools and colleges. Petitioner No.1 claims to have established and currently managing and administering schools in English and Marathi medium across the city and suburban area.

6. Given its exemplary record till date, Petitioner No.1, after coming across an advertisement inserted in the daily Times of India, an English language newspaper, widely circulated in Mumbai and Mumbai Suburban area and daily Loksatta, a vernacular language newspaper, equally widely circulated, applied for allotment of a piece and parcel of Government land. Since the advertisement is claimed to be inserted by the Department of Home, Government of Maharashtra, Petitioner No.1, who was desirous of setting up a school and imparting quality education in the subject area,

applied to the said Department of the Government of Maharashtra. The proposal of Petitioner No.1 dated 9th June 1987 was scrutinized and, thereafter, the Department of Home, Government of Maharashtra, permitted the Commissioner of Police to lease 10,000 square meters of land to Petitioner No.1. An order in that behalf has been passed on 30th May 1989.

7. Thereafter, on 26th July 1989, the Commissioner of Police corresponded with the Department of Revenue, particularly, with the District Inspector of Land Records and requested him to depute an officer for measurement of the land since a lease was required to be executed and Petitioner No.1 was then to be put in possession. On 11th August 1989, the Commissioner of Police addressed a letter to the Collector of Mumbai for sub-division of the land. Upon perusal of all this, the Collector had addressed a letter to the Commissioner of Police, copy of which is at Annexure "F" to the Petition. That letter, according to the Petitioners' counsel, would denote as to how from vast track of land admeasuring 58,232.80 square meters, 10,000 square meters of land has to be carved out by the Home Department for allotment to Petitioner No.1. Thereafter, the Collector granted permission to sub-divide the land and copy of that document is at Page Nos.59 and 60 of the paper-book.

8. Since there was an order of sub-division, on 23rd May 1990, the Commissioner of Police requested the District Inspector of Land Records, City Survey Officer No.7, about that sub-division and thereafter to take consequential steps and those consequential steps be taken so as to fix the boundaries so that from the huge land, a piece and parcel of the land for allotment to Petitioner No.1 can be segregated and separated.

9. It is then stated that the demarcation was done with boundaries and the Lease Agreement was executed with the Government of Maharashtra for lease of a plot of land and which is subject matter of that document; copy of which is at Annexure-H. It is claimed that, pursuant to this Lease Agreement, order of sub-division came to be passed, Petitioner No.1 has been put in possession and a possession letter is relied upon, copy of which is at Annexure-I.

10. It is claimed that the lease rentals have also been paid and the lease was for a period of 999 years.

11. The Petitioners claimed to have completed construction of a school building some time in the year 1994-1995. They have a functional school with teaching and non-teaching staff. The lease period was then proposed to be reduced from 999 years to 99 years and even that modification has been accepted by Petitioner No.1 on 24th August 1995.

12. It is then claimed that the Government has issued a resolution and based on that, it is argued before us that the Department of Home, Government of Maharashtra, was fully empowered and authorized by the Business Rules to deal with that part of the Government land, which is earmarked for the use of the said Department; meaning thereby, it is free to utilize and use the land in a manner deemed fit by it. It could also deal with the land pursuant to such authorization.

13. Petitioner No.1 claims that, after all these steps were taken, it is surprising that the Collector discovers that the land has been allotted to Petitioner No.1-Trust by the Department of Home, Government of Maharashtra, which was not empowered and authorized to deal with the Government lands. The Collector relied upon the Maharashtra Land Revenue Code, 1966 and the Maharashtra Land Revenue (Disposal of Government Lands) Rules, 1971. The Collector's Report came to be forwarded and which indicated, according to him, the large scale illegalities and irregularities committed. If the Home Department was not requiring 10,000 square meters of land, then, it should not have allotted it to the Educational Institution and even if any such allotment was necessary and required for setting up a school for the children of Police personnel, the Department of Home should have obtained all prior clearances and approvals from the Revenue and Forests Department of

the State. It is that Department which was kept in dark and the Police machinery dealt with the lands as if they exclusively vest in it. It is based on this Collector's Report that action of resumption of the land and to the extent it is not under use for a school by the Petitioner No.1 came to be initiated. It is initiation of that action, which resulted in the impugned order being passed.

14. We have noted that, prior to the impugned order being passed, the requisite notice came to be issued to the Petitioners, they were afforded opportunity to show cause and thereafter there was a personal hearing as well. At the conclusion of all this, the impugned order has been passed.

15. In assailing this order, Mrs. Sanglikar would submit that the foundation of this order is a large scale illegality committed at the behest of the Petitioners allegedly. She would submit that the allotment has never been made by any back-door method and that is even not the case of the Government. Once it is a Department to Department problem, then, the Petitioners cannot be visited with the consequence of cancellation of a lease obtained by it way back in the year 1990. She would submit that this was not a case where any Government land has been usurped and, therefore, the Petitioners are not trespassers, as projected. Once the Petitioners are not trespassers, but lawfully occupying a public land, that too for a noble cause, then, a drastic order of resumption, with such

consequences would violate not only the mandate of Article 14 of the Constitution of India, but would render the Right of Children to Free and Compulsory Education Act, 2009 nugatory. Mrs. Sanglikar relied upon Section 19 of this Act to urge that, no school shall be established, or recognized, under Section 18, unless it fulfills the norms and standards specified in the Schedule. By inviting our attention to the Schedule and Serial Number 2 thereof, she would submit that, not only there should be a proper school building, which would withstand natural calamities and weather fluctuations, but such a school must have a play-ground. She would submit that, if open areas and play-grounds are necessary, so that children develop fully and normally, then, this order would mean that the Petitioner-School does not function in accordance with the Right of Children to Free and Compulsory Education Act, 2009. She would submit that the topography and the location of the land is such that it will not be possible for the Government to put it to the proposed use of an Industrial Training Institute or an Urdu Academy or an Urdu School. She would submit that the Petitioners are proposing to expand their activities as a part of the expansion programme. It would definitely put to use the area or the portion of the land sought to be resumed. There is also a reservation on the land and the Municipal Corporation is not likely to sanction the plans unless they are in tune with this reservation. She would, therefore,

submit that the order passed by the State, which was sought to be reviewed, on more than one occasion, at the request of the Petitioners, is patently illegal, arbitrary, unfair, unreasonable and unjust and, therefore, deserves to be quashed and set aside.

16. Ms. Shastri, learned A.G.P. appearing on behalf of the State, would support the impugned order and submits that the State is on oath before this Court to mention that the land, on resumption, will not be used for any other purpose but to set up an Industrial Training Institute and for establishing an Urdu Academy. The promotion of Urdu language is a part and parcel of the schemes of welfare of minorities. Equally, the technical education and to impart skills, so that the youngsters could utilize them to obtain gainful employment, is equally an avowed social object. That would not be achieved, if this Court interferes in its writ jurisdiction with the discretion exercised by the State. Once that is not exercised arbitrarily, unfairly, unjustly but on valid and reasonable grounds, then, the impugned orders should be upheld and the Petition be dismissed.

17. With the assistance of the learned counsel appearing for both the sides, we have perused the impugned order. We have also perused the Petition and all annexures thereto. We have also perused the affidavits placed on record.

18. It is common ground and undisputed that the land was to be utilized by the Home Department for the Police force. If the Police have to be housed and the staff must get all basic amenities and facilities, in addition to decent housing, then, it is undisputed that school would be necessary within its proximity. In such Police Colony, therefore, a school was required to be set up. Concededly, that decision was taken by the authorized officials of the Home Department. As far as that decision is concerned, none is questioning the same. The Revenue Department of the State does not say that the Home Department should not have unilaterally decided to permit setting up of a school within its colony or within the area concerned. Therefore, so far as issuance and insertion of an advertisement for the purpose of setting up of a school is concerned, at best, the Police Department, if acting without prior concurrence of the Revenue Department, has committed an irregularity. No one possibly, therefore, is so inhuman and unreasonable as to bring down or completely stop the functioning of a school. Petitioner No.1 was allotted the piece of land and, indeed, very valuable, in a city like Mumbai, for setting up a school. What the Department of Revenue and Forests objects and rightly is the fact that the Police machinery dealt with the Government lands as if they are free to take every decision in relation thereto. It is that part of the exercise by the Police machinery which is faulted and in our opinion

rightly. That part was not a mere irregularity but an illegality going to the root of the matter. The Maharashtra Land Revenue Code, 1966, has been enacted primarily to provide for dealing with the Government lands and lands which are said to be belonging to the public. It is an Act to unify and amend the law relating to land and land revenue in the State of Maharashtra. It is common ground that the State holds the land as a trustee of the public. It does not, at its free will, get the authority to deal with and dispose of such lands. The Government lands, therefore, vest in the State and for a definite purpose. If any decision of the Hon'ble Supreme Court is required to be referred to, a useful reference can be made to the decision in the case of ***Akhil Bhartiya Upbhokta Congress Vs. State of Madhya Pradesh & Ors., AIR 2011 SC 1834.***

19. As far as above part of the matter is concerned and the authority of the State to deal with and dispose of the land at its pleasure, the Supreme Court enunciated the rule thus :-

“15. The concept of 'State' has changed in recent years. In all democratic dispensations the State has assumed the role of a regulator and provider of different kinds of services and benefits to the people like jobs, contracts, licences, plots of land, mineral rights and social security benefits. In his work “The Modern State” MacIver (1964 Paperback Edition) advocated

that the State should be viewed mainly as a service corporation. He highlighted difference in perception about the theory of State in the following words :

“To some people State is essentially a class-structure, “an organization of one class dominating over the other classes”; others regard it as an organisation that transcends all classes and stands for the whole community. They regard it as a power-system. Some view it entirely as a legal structure, either in the old Austinian sense which made it a relationship of governors and governed, or, in the language of modern jurisprudence, as a community “organised for action under legal rules”. Some regard it as no more than a mutual insurance society, others as the very texture of all our life. Some class the State as a great “corporation” and others consider it as indistinguishable from society itself.”

16. *When the Constitution was adopted, people of India resolved to constitute India into a Sovereign Democratic Republic. The words 'Socialist' and 'Secular' were added by the Constitution (Forty-second Amendment) Act, 1976 and also to secure to all its citizens Justice-social, economic and political, Liberty of thought, expression, belief, faith and worship; Equality of status and/or opportunity and to promote among them all Fraternity assuring the*

dignity of the individual and the unity and integrity of the Nation. The expression 'unity of the Nation' was also added by the Constitution (Forty-second Amendment) Act, 1976. The idea of welfare State is ingrained in the Preamble of the Constitution. Part III of the Constitution enumerates fundamental rights, many of which are akin to the basic rights of every human being. This part also contains various positive and negative mandates which are necessary for ensuring protection of the Fundamental Rights and making them real and meaningful. Part IV contains 'Directive Principles of State Policy' which are fundamental in the governance of the country and it is the duty of the State to apply these principles in making laws. Article 39 specifies certain principles of policy which are required to be followed by the State. Clause (b) thereof provides that the State shall, in particular, direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good. Parliament and Legislatures of the States have enacted several laws and the Governments have, from time to time, framed policies so that the national wealth and natural resources are equitably distributed among all sections of people so that have-nots of the society can aspire to compete with haves.

31. *What needs to be emphasized is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well defined policy, which shall be made known to the public by publication in the Official Gazette and other recognized modes of publicity and such policy must be implemented/executed by adopting a non-discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy. The distribution of largesse like allotment of land, grant of quota, permit, licence etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favoritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State.*
32. *We may add that there cannot be any policy, much less, a rational policy of allotting land on the basis of applications made by individuals, bodies, organizations or institutions de hors an invitation or advertisement by the State or its agency/instrumentality. By entertaining applications made by individuals, organisations or institutions for allotment*

of land or for grant of any other type of largesse the State cannot exclude other eligible persons from lodging competing claim. Any allotment of land or grant of other form of largesse by the State or its agencies/instrumentalities by treating the exercise as a private venture is liable to be treated as arbitrary, discriminatory and an act of favouritism and/or nepotism violating the soul of the equality clause embodied in Article 14 of the Constitution.

33. *This, however, does not mean that the State can never allot land to the institutions/organisations engaged in educational, cultural, social or philanthropic activities or are rendering service to the Society except by way of auction. Nevertheless, it is necessary to observe that once the piece of land is earmarked or identified for allotment to institutions/organisations engaged in any such activity, the actual exercise of allotment must be done in a manner consistent with the doctrine of equality. The competent authority should, as a matter of course, issue an advertisement incorporating therein the conditions of eligibility so as to enable all similar situated eligible persons, institutions/organisations to participate in the process of allotment, whether by way of auction or otherwise. In a given case the government may allot land at a fixed price but in that case also allotment must be preceded by a*

wholesome exercise consistent with Article 14 of the Constitution.

34. The allotment of land by the State or its agencies/instrumentalities to a body/organization/institution which carry the tag of caste, community or religion is not only contrary to the idea of Secular Democratic Republic but is also fraught with grave danger of dividing the society on caste or communal lines. The allotment of land to such bodies/organisations/institutions on political considerations or by way of favoritism and/or nepotism or with a view to nurture the vote bank for future is constitutionally impermissible.”

20. We find that, contrary to the Mandate of the Maharashtra Land Revenue Code and the rules and principles laid above, the Government land in this case and which was handed over to the Police Department has been dealt with.

21. It is undisputed before us that the Maharashtra Land Revenue Code, by several provisions, starting from Chapter 1, sets out as to how title of State in all lands, public roads etc., which are not property of others, meaning thereby, private property, is understood. By law, there is an extension of rights of public in or over any public road, lane, path, not

required for use of public. Section 22 states that the lands will be assigned for special purposes, and when assigned, the same shall not be otherwise used without sanction of Collector. We have several provisions which would indicate as to how everything, including trees and forests, vest in Government. The grant of land is permitted by Chapter 3 of this Code. The occupation of the land, therefore, in pursuant to the grant is within the exclusive domain of such of the authorities, which are established by the Code and function in terms thereof. We are, therefore, mindful of this position that any land, vesting in the State for the use of the public and as their Trustee, cannot be parted with, save and except, with the concurrence and approval of such authorities, as are envisaged by this Code. Precisely that has been done in the instant case. The State has found that all the steps that have been taken, as proposed by the Home Department, end towards an allotment and parting with the land in favour of Petitioner No.1-Trust. A lease was executed, without involving these authorities, by the Home Department. That has not been cancelled and hence the land is required to be resumed. Though the Collector and to our mind, rightly, faults the exercise at the instance of Petitioner No.1, he is careful enough to also record in his Report that there is a functional school. The Indian Education Society has been allotted this land and more particularly described in his report, copy of which is at Page Nos.98 to 100

of the paper-book. The Collector records as to how the land came to be allotted by the Home Department on its own and even possession thereof has been handed over to Petitioner No.1. He, therefore, proposes regularization of that part of the action where the allotment is made in favour of Petitioner No.1 for setting up an educational institution / school and the land under use of such functional school. His Report, therefore, states that 10,000 sq.mtrs. of land, which was handed over to the Police Department and belongs to it, is required to be resumed and brought back so as to be dealt with by the Department of Revenue exclusively. It is based on that Report and which also proposed regularization of the allotment and possession of the land under use by the Petitioners for a school which has been made the foundation of the impugned order. We have carefully perused all these documents and proceedings, including the impugned order, with the assistance of Mrs. Sanglikar so as to appreciate her contention that the entire 10,000 sq.mtrs. of land could have been dealt with by the Department of Home or the Police machinery and its dealing in such manner does not violate the rule of law.

22. We are unable to agree with her. However, that apart, the impugned order relies on the Report and proceeds on the footing that the land, which was forming part of the two Reports, including the one at Page 173 of the paper-book, has been under a conditional allotment to the Police

Department. The Police Department could not have, without any proper authorization and concurrence of the Revenue and Forests Department, allotted and handed over the land to Petitioner No.1. Their doing so unilaterally has been commented and criticized severely. However, there are two references made; one to the Report of the Police Commissioner, Brihanmumbai, and that of Petitioner No.1-Society. The Police Commissioner says that allotment has not been made by him surreptitiously and we agree with Mrs. Sanglikar to that extent, because an advertisement was inserted in two leading newspapers. Apart therefrom, the Report of the Police Commissioner says that there are English and Marathi medium schools, which have been set up and established and which impart education to 1,500 students. The Police Commissioner says that, since in the vicinity, a quality school was lacking, that he did what he thought fit and to be in the best interests of the children of the Police personnel. However, a very large tract of land is allotted virtually free to Petitioner No.1, is equally his conclusion. The Report in that regard, from Page 184 onwards, would denote as to how, when the concerned Minister proposes to cancel the allotment, he does not do so unmindful of the factual position prevailing at site. He records all this and then concludes that about 7,500 sq.mtrs. of Government land should be made available for setting up a Government Industrial Training

Institute and Government Polytechnic, so also Urdu Academy. That is equally the proposal of the Collector. The Minister, while recording the factual position, has not committed any error, nor has he assumed the position contrary to that prevailing at the site. There is record of a hearing held equally by the Collector and by the Minister concerned. In a detailed order, there is a reference made to the stand of the present Petitioners as well. After perusal of the entire record, the concerned Minister and in-charge of the Department of Revenue and Forests concludes that, as far as part of the action is concerned, that could be construed as irregular and not wholly illegal or unauthorized. To the extent that the land is under use of the School and found in site inspection and scrutiny of documents, that part is left out and remains untouched. Thus, 2,500 sq.mtrs of land remains with the Petitioner. As far as balance 7,500 sq.mtrs of land, even humanitarian consideration would not allow or permit the State to continue the usurpation thereof by the Petitioners. It has been found that 1,921 sq.mtrs of land has already been surrendered by the State for road widening. Even if that part is to be excluded, what has been found is that the Home Department could not have permitted a user, nor could have allotted a substantial portion to the Petitioners. That has been done contrary to record. The records also indicated that the school building has consumed about 1,921.85 sq.mtrs. and adjoining or appurtenant area of

578.15 sq.mtrs. Therefore, 2,500 sq.mtrs. is the land, which is allowed to be retained by the Petitioners. Petitioners are not held to be trespassers or usurpers of Government land to that extent. Since that part of the allotment could be regularized, the Minister has permitted and sanctioned such regularization. However, as far as the other area is concerned, though the Petitioners may not be at fault, their claim cannot be accepted. The allotment has been made contrary to the Maharashtra Land Revenue Code, 1966 and by assumption of power contrary thereto by the State Police machinery. The State Police machinery was not vigilant and they should not have allowed the retention of 10,000 sq.mtrs of land or at-least 7,500 sq.mtrs. of land therefrom by the Petitioners before us. That is plainly contrary to the Mandate of the Code and the Rule of law. That is, therefore, the act which has been taken into consideration and termed as illegal and not a mere irregularity. It is a finding of fact based on perusal and scrutiny of all the materials on record. We do not find that to be perverse or vitiated by any error of law apparent on the face of the record, permitting us to interfere therewith in our writ jurisdiction. It is too well settled to require reference to any Judgment that our jurisdiction is extraordinary, equitable and discretionary. It is to be exercised to promote justice and not to defeat it. It only enables us to interfere with an exercise of power or discretion by the State, if it is palpably illegal, arbitrary, high-

handed and malafide. We do not find any malafides in the State action in the present case and for the reasons indicated above, we do not hold that it is arbitrary and high-handed as well. The rule of law has been followed and interest of justice has been sub-served by the exercise of powers in this case. There was nothing that could be reviewed and there was no error of law apparent on the face of the record, nor any new materials which could have been presumably looked into in review jurisdiction by the State. The parameters of review have also been adhered-to and not ignored in the present case. We, therefore, do not think that there was anything to be reviewed in the matter. We do not think that a expansion plan of a Public Charitable Trust can take precedence over the larger interest of the public. When the State is not acting contrary to the above objects and purposes for which the land has been earmarked, then, all the more, we cannot agree with Mrs. Sanglikar on this count.

23. However, we have been repeatedly observing and in the case of Government lands, which are very valuable and scare in the city of Mumbai and Mumbai Suburban areas, that these end up in private hands. How they reach and in what manner is something which we cannot probe in the present case. However, we can surely ensure that the lands which have been resumed and to the extent indicated in the impugned order, are put to use for the purpose and object for which they have been

earmarked. We direct that the 7,500 sq.mtrs. of land shall not be allotted by the State for any user, other than setting up of an Industrial Training Institute or Government Polytechnic, both, of the State, or the Urdu Academy. The State shall strictly abide by the Maharashtra Land Revenue Code, 1966 and the rules promulgated thereunder, namely, the Maharashtra Land Revenue (Disposal of Government Lands) Rules, 1971. We are clearly of the view that such of these rules, circulars, regulations, which are not in tune with the Constitutional Mandate and enshrined in the Supreme Court Judgment above, shall be taken to be modified or brought in tune therewith. Therefore, no Government land can be allotted, nor disposed of, or, distributed by the State contrary to the Mandate of the Constitution and the Rule of Law.

24. For compliance, only to this extent, we place this matter after eight weeks. While placing the matter for this limited purpose and dismissing the Petition as far as the challenge to the impugned order, we also do not find any substance in Mrs. Sanglikar's reliance on the Right of Children to Free and Compulsory Education Act, 2009.

25. Chapter 4 of this Act sets out responsibilities of Schools and Teachers. Section 18 of the Act states that no school be established without obtaining a certificate of recognition by applying then prevailing norms and standards for schools. These norms and standards specified in

the Schedule have to be fulfilled. However, we do not see how they are not fulfilled when the Government has permitted retention of 2,500 sq.mtrs. of land. The calculations brought on record reveal that, approximately, 578 sq.mtrs. of land appurtenant, adjoining and adjacent to the school building is with Petitioner No.1-Trust. Similarly, if any of the facilities or amenities, such as, play-ground, is found wanting, not in totality, but, partially, then, the Petitioners are free to approach the Competent Authority so that a play-ground in the area nearby and utilized by schools in the vicinity can be made available for use by Petitioner No.1-Trust. Such a request can be made before the Competent Authority irrespective of the dismissal of this Writ Petition.

26. At this stage, Mrs. Sanglikar, learned counsel for the Petitioners, would request the Court to continue the ad-interim order passed by this Court upon this Petition on the footing that the same is operational since 17th April 2013 till date.

27. Ms. Shastri, learned A.G.P. appearing for the State, opposes this request.

28. We have heard counsel on this point. After having found no substance in the challenge raised and when the rights and equities have been balanced by permitting the functional school to continue its

functioning, then, the request, as made by Mrs. Sanglikar, cannot be accepted. The request is refused.

[DR. SHALINI PHANSALKAR-JOSHI, J.] [S.C. DHARMADHIKARI, J.]