

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

WRIT PETITION NO.2273 OF 2014

Vinoba Bhave Nagar Sunrise Co-operative
Housing Society Ltd., Kurla (W), Mumbai. Petitioner
V/s.

The State of Maharashtra,
Through the Ministry of Housing,
Mantralaya, Mumbai & Ors. Respondents

Mr. A.S. Daver, a/w. Mr. Ashok Dhanuka, for the Petitioner.

Mr. Milind V. More, A.G.P., for Respondent Nos.1 and 2.

Ms. Sharmila U. Deshmukh for Respondent No.10.

Mr. P.J. Ramchandani, i/by Mr. Ishrat Khan, for Respondent No.12.

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

DATE : 8TH JULY, 2016.

P.C. :

1. This Writ Petition, under Article 226 of the Constitution of India, prays for a writ of mandamus or any other appropriate writ, order or direction for restoration of an open space. Prayer clauses (a) and (b) of the Writ Petition read as under :-

(a) That this Honorable Court be pleased to issue Writ of Certiorari and/or in the nature of Certiorari or any other appropriate writ, order and/or direction, thereby

quashing and/or setting aside the revised Layout Plan of Vinoba Bhave Nagar, Kurla (West) bearing Survey No.260 to 263 & 171 to 174 and corresponding Chain Triangulation Survey (C.T.S.) No.938, also being revised layout annexed at Exhibit 'W1' hereto, and restoring the said open space to the original approved Layout Plan for which permission and approval was granted by the appropriate Planning Authority being Respondent No.13, the same being in contravention of the provisions contained in Section 22(c) and 37(1) and/or such other provisions as contained in the Maharashtra Regional Town Planning Act 1966 and Rules made thereunder and also in contravention of fundamental right of the members of the Petitioner-Society for open space.

(b) That this Honorable Court be pleased to issue Writ in the nature of Writ of Mandamus or any other writ, order and/or direction, thereby directing the Respondents Nos.13 to 15 & 18 to take action under section 351 and/or 354A of the Mumbai Municipal Corporation Act, 1966 and/or under the provisions of the Maharashtra Regional Town Planning Act, 1966, thereby removing and/or demolishing the unauthorized construction undertaken by the Respondent No.12 on the said open space admeasuring 1165.7 sq.mtrs. reserved for garden and forming part of the L shaped plot of the Petitioner-Society and meant for residents of the Petitioner-Society, in contravention of the provisions contained therein.”

2. The Writ Petitioners seek to base their claim on a legal right. They are stating that a Co-operative Housing Society was registered and of those persons, who were allotted a piece and parcel of land by the Maharashtra Housing and Area Development Authority, namely, Respondent Nos.3 to 9.

3. It is stated that there was a Layout and the Layout comprises of about 52 buildings. The buildings were constructed long time back, but, within the Layout, a small portion admeasuring 1165.7 square meters, and appurtenant to Building Nos.1 to 10, is available for sole use, occupation and possession of the residents of Building Nos.1 to 10 as garden. Similarly, for other buildings in the complex, namely, Building Nos.11 to 46, garden area was provided. It is the claim of the Petitioner-Society further that, when the allotment of residential tenements were made in the completed construction, what expected was, such an open space reserved for garden was exclusively for the residents of the building. It is in these circumstances, when an open space surrounding the same was used as garden and play-ground for a period of almost 18 years, that suddenly the Petitioner-Society found that there is a school and which is proclaimed to be functional. Now Respondent No.12, through some persons, claims this open area, which was being consistently used as garden/play-ground by the occupants of the Petitioner-Society. They fenced this area and stated that it would be a play-ground for the children taking education in the school. Thus, this is an encroachment. The act of such encroachment was brought to the notice of the authorities, but far from attending to the complaints they were overlooked and with a deliberate intent. It is in these circumstances that the Petitioner-Society

claims that without any permissions, Respondent No.12 has been using the said area. There is no arrangement, much less, any consent by the Petitioner-Society to such user. It is not clear as to whether there is a proper or authorized functional school. It is in these circumstances that this Writ Petition was filed.

4. The Respondents were served and on the earlier occasion what we noted is that, if the Petitioner-Society is provided with a facility of a garden around the building and for the use by its occupants and residents, then, the matter could be worked out. Even if the portion which was earlier used as a garden by the Petitioner-Society is now in the possession of Respondent No.12-Trust, there is some area available. That piece of land or area is an open land and in exclusive possession and under the control of the Maharashtra Housing and Area Development Authority. Therefore, without disturbing the primary school, a facility, as desired by the Petitioner-Society and claimed in the Petition, can be made available or otherwise, was our query on the earlier occasion.

5. We granted time to Ms. Deshmukh, appearing for Respondent No.10-MHADA to take instructions.

6. After taking instructions, she states that, at page 531, Exhibit-B to the affidavit filed by the MHADA in this Writ Petition, on the left hand side there is a delineation or demarcation, visible even to the naked eye, that portion below the proposed 44 ft. wide D.P. Road, as shown on the Plan, *Legendum* "A7" is one Nursery School and 1,200 sq.yards of MHADA land is adjacent to land of this Nursery School. Then, there is a recreation ground. It is vacant piece of land with no construction and no encroachment. That is styled as 'Recreation Ground No.6' and delineated as such on the Plan.

7. We keep the Plan, as produced by Ms. Deshmukh, on record of this Petition. It shall be marked as "X" for identification.

8. If the Petitioner-Society makes an application in the prescribed format to the Maharashtra Housing and Area Development Authority (MHADA) for allotment of this land on a long term lease basis to the Petitioner-Society and with an agreement to abide by such terms and conditions, as would be imposed by the MHADA in accordance with law, then, the MHADA will process that application and grant the request made therein in accordance with law as expeditiously as possible.

9. If these are the statements made on instructions by Ms. Deshmukh and they are accepted as undertakings given to this Court, then, that would ensure provision of a recreation ground for the Petitioner-Society. Now that MHADA has agreed as above, let the Petitioner-Society make the requisite application and invoking the Maharashtra Housing and Area Development Act, 1976 and the necessary Rules and Regulations framed thereunder. If such an application is made by the Petitioner-Society, the Maharashtra Housing and Area Development Authority shall take a decision thereon within a period of three months from its receipt by the appropriate / competent authority. We accept the statements made, on instructions, by Ms. Deshmukh that the Recreation Ground No.6 is an open piece of land, not allotted to anybody and without any construction or encroachment thereon.

10. Since these are the statements made, we dispose of the Petition with the above directions and without examining any other grievance of the Petitioner-Society. Once we have ensured that the members of the Petitioner-Society and such other Societies, as are adjacent or in the surrounding area, have a recreation ground, then, we need not examine the issue or dispute as between the Petitioner-Society and Respondent

No.12-Trust. It is for the Petitioner-Society to raise it before an appropriate forum and in appropriate proceedings.

11. We dispose of the Writ Petition with the above directions.

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