

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

WRIT PETITION NO. 9851 OF 2013

1. Keystone Constructions Co. Pvt. Ltd.,
Having Registered Office at 122,
Navi Peth, Jalgaon, Through its
Director Omprakash s/o Sitaram Agarwal,
Age:64 Years, Occ.: Business,
R/o 122, Navi Peth, Jalgaon,
Dist. Jalgaon.

...PETITIONER

VERSES

1. The State of Maharashtra,
Through its Secretary,
Urban Development Department,
Mantralaya, Mumbai-32.
2. The Director of Town Planning,
Maharashtra State, Pune.
3. The Commissioner,
Jalgaon Municipal Corporation,
Dist. Jalgaon.

...RESPONDENTS

...
Mr. A.B. Kale, Advocate for the Petitioner.
Mr. D.R. Kale, AGP for Respondents No. 1 and 2.
Mr. Pradip R. Patil, Advocate for Respondent No.3.

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**CORAM : S.C.DHARMADHIKARI &
MANGESH S. PATIL, JJ.
RESERVED ON: 17.07.2017.
PRONOUNCED ON: 01.08.2017.**

JUDGMENT:- *(Per Mangesh S. Patil, J.)*

Rule. Rule is made returnable forthwith and with the

consent of the parties the matter is heard finally.

2. In this petition under Article 226 of the Constitution of India, the petitioner is claiming a writ of Mandamus as also a certiorari on following facts:

According to the petitioner, it is a company registered under the Companies Act, 1956. It owns and possess the land bearing Survey No. 26/1A/1 ad-measuring 4580 Sq. mtr at village Mehrun within the corporation limits of the Jalgaon City of which respondent No.3 the Commissioner. The Municipal Corporation owns and possesses the land Survey No. 29/B adjacent to the petitioner's land. The land bearing City Survey No. 1965 was also owned by the Municipal Corporation in the heart of the city and in the Development Plan it was reserved for setting up a Municipal Market. However, there was encroachment on this land and the Municipal Corporation was intending to construct a Shopping Complex thereon. This could not have been possible except by rehabilitating the encroachers. The petitioner has averred that the Municipal Corporation then made a proposal to it to hand over a portion ad-measuring 595 sq.mtrs from its land Survey No. 29/1A/1 and in exchange thereof offered to hand over land Survey No. 496/3 ad-measuring 140.35 Sq. meter and ad-measuring 472 sq.mtrs described as plots 'J' and 'K' in the plan. As per the Development

Plan these plots were earmarked as residential area. Accordingly, the proposal was moved in the General Body Meeting of the Municipal Corporation on 30.01.1992 and it was duly approved. Since both sides had agreed for such exchange of the lands, a registered Exchange-Deed was duly executed on 27.03.1992 and since then the lands were actually given in possession by way of exchange. It is the petitioner's version that pursuant to such exchange and the terms and conditions agreed upon between the parties, the Municipal Corporation constructed a Shopping Complex in the land Survey No. 1965 after rehabilitating the encroachers over the land which it had got exchanged from the petitioner from Survey No.29/A1/1 (part). Simultaneously, the petitioner company also applied for building permission over the plots 'J' and 'K' which it had got exchanged from the Municipal Corporation. By the order nos. 2398 and 2927, the building permission was also granted on 06.08.1992.

3. The petitioner company then sold the plot no. 'J' to third parties on 21.11.1997 and the purchasers developed the plot by carrying out construction as per the plan sanctioned by the Municipal Corporation. Due to business problems, however, the petitioner-company could not carry out any construction over plot no. 'K' except laying foundation, constructing a store room and digging a bore well.

4. The petitioner company has then averred that though, both the plots 'J' and 'K' which were received in exchange were shown in the Town Planning Scheme as reserved as open plots, the respondent no.3 had agreed to change the reservation / plan, since it was only the draft. Subsequently, the State Government approved the draft Town Planning Scheme on 29.05.1993 and it was made applicable with effect from 22.07.1993 and both the plots 'J' and 'K' continued to be shown as open plots. This fact was brought to the notice of the Municipal Corporation, however, it did not take any steps for correction/modification of the Town Planning Scheme.

5. As regards the plot no. J that was sold by the petitioner-company, the purchasers were allowed to carry out construction without any objection though it was shown in the Town Planning Scheme as an open plot. Since the petitioner-company wanted to develop the other plot no. K, it moved an application for building permission on 22.02.2012. However, the Municipal Corporation refused building permission by the letter dated 16.03.2012 on the ground that the plot was shown as open land in the Town Planning Scheme. On inquiry, it was informed that the Municipal Corporation has submitted a proposal to the State Government requesting modification in the Town Planning Scheme in accordance with Section 91 of the Maharashtra

Regional and Town Planning Act, 1966 (herein after referred to as 'MRTP Act'), by the letter dated 13.04.2007. It was also given to understand that its request for building permission would be reconsidered, once, the proposal was accepted by the State Government. The petitioner, therefore, requested the Secretary, Urban Development Department of the State Government by letter dated 25.05.2012 to take action and to correct Town Planning Scheme as per the proposal. However, neither the respondent no. 1-State has taken any decision on the proposal, nor has the respondent no.3 looked into the matter of grant of building permission. The action of the Municipal Corporation in not granting building permission, for no fault on the part of the petitioner is clearly in violation of the provisions of Section 45 of the M.R.T.P. Act. However, since the Town Planning Scheme itself is not being corrected, the remedy of preferring any appeal under Section 47 of the M.R.T.P. Act could not be said to be appropriate.

6. The petitioner has, then, averred that it had changed its position relying on the promise given by the Municipal Corporation while exchanging the lands and now it is estopped from withdrawing the promises and inaction is violative of the provisions of Article 14 of the Constitution of India. Hence, this writ petition claiming following reliefs:

"C) To quash and set aside the letter/order dated 16.03.2012 passed by the Municipal Corporation i.e. respondent no.3 thereby refusing to grant permission to the petitioner, which is annexed at Exhibit "K" to this petition and for that purpose issue necessary orders;

D) To direct the respondents to grant permission as sought by the petitioner in view of their application dated 22.02.2012, which is at Exhibit "J" to this petition and for that purpose issue necessary orders;

E) To direct the respondent No.1 to grant approval to the proposal submitted by the Municipal Corporation, Jalgaon within period of one month from today and for that purpose issue necessary orders;"

7. The respondent no. 3, Commissioner of Municipal Corporation has filed an affidavit in reply (page No.63) so also one Manohar Yashwant Bhargawe who is working as Assistant Director of Town Planning, Jalgaon has filed an affidavit in reply (Page No.72) on behalf of the respondent nos. 1 and 2. They have admitted about exchange of the lands between the Municipal Corporation and the petitioner company. They have also admitted that the plot nos. 'J' and 'K' have been shown as open plots in the Development Plan approved by the State Government. They have admitted about the building permission having been refused to the petitioner-company for carrying out constitution over plot No. 'K' vide the impugned order dated

16.03.2012.

8. They have contended that in view of the peculiar facts wherein the lands were exchanged but in the approved Town Planning Scheme the plot nos. 'J' and 'K' have been shown to be open plots, guidance was sought from the respondent no.1 State Government. However, they have denied that any proposal was made by the Municipal Corporation for variation in the scheme as contemplated under Section 91 of the M.R.T.P. Act. According to them, the plots 'J' and 'K' were already shown as open space in the draft development plan, which was submitted to the State Government even before the lands were exchanged. The Draft Development Plan was sent to the Government in the month of June 1992, though, it was approved by the State Government on 29.05.1993. There is no record with the Municipal Corporation to support petitioner's version about the then, Municipal Council which was its predecessor had assured the petitioner about making any proposal for variation in the Town Planning Scheme. Lastly, they have contended that since the plot no. 'K' is shown to be the open plot in the approved Development Plan, no building permission can be granted to change its user.

9. Since the statement was made in the affidavits in reply by the respondent to the effect that no proposal under Section 91 of the M.R.T.P. Act for modification of the Town

Planning Scheme was ever made, by our order dated 17.06.2017 we permitted the petitioner company to file a rejoinder to that limited extent. Accordingly, the petitioner has filed affidavit of one Omprakash Sitaram Agarwal (Page 85) and has reiterated that the respondents' denial of having sent the proposal under Section 91 of the M.R.T.P. Act was factually incorrect. Along with the rejoinder the petitioner has also enclosed a copy of the letter dated 03.08.2007, apparently addressed to the Additional Chief Secretary, Urban Development Department of the State Government by the Director of Town Planning, Pune, which corroborates its version about the respondent no. 3 having forwarded the proposal under Section 91 of the M.R.T.P. Act.

10. At the outset, it would suffice to observe that going by the fact admitted by both the sides as mentioned above, the reliefs claim by the petitioner in clause 'B' and 'C', on the one hand and clause 'D' on the other are rather incongruous. For that matter even in paragraph 18 of the petition, the petitioner has apparently conceded that it could not have invoked the alternate remedy of preferring an appeal under Section 47 of the M.R.T.P. Act, since the Town Planning Scheme has not been modified. It is suggested that since plot no. 'K' is shown to be open plot in the approved Town Planning Scheme, so long as it is not modified, no building permission could have been legally

granted and consequently, the appeal even if it would have been preferred under Section 47 of the M.R.T.P. Act would not have been maintainable. If this is the State of affairs, when the law prevents from carrying out any construction over open plot, and when the Municipal Corporation could not have granted building permission, we strongly feel that the discretionary powers vested in this Court under Article 226 can not be legally invoked. In other words, discretionary powers vested in this Court can not be invoked to do what the law does not permit to be done. It is for this reason that we have no hesitation in concluding that the petitioner-company is not entitled to the reliefs 'C' and 'D' and which are clearly inconsistent with the relief sought in the prayer clause 'E' (supra).

11. As regards the relief claimed in clause 'E' is concerned, as is observed above the respondents have for flatly denied about the Municipal Corporation having put in any proposal in modification of the Town Planning Scheme as contemplated under Section 91 of the MRTP Act. For this reason alone, no direction can be issued to respondent no.1-State to grant any approval to the proposal which is non est.

12. A perusal of the letter Exhibit R-1 dated 03.08.2007 and the information obtained by the petitioner under Exhibit R-2 regarding proceedings of the legislative council of the respondent

no. 1-State would clearly reveal that only a guidance was solicited from the State Government as to if the proposal under Section 91 of the M.R.T.P. Act could be made and an opinion was expressed by the Director of the Town Planning that it could have been made. Meaning thereby that in fact no concrete proposal as contemplated under Section 91 of the M.R.T.P. Act was ever moved by the Municipal Corporation. Therefore we have no slightest of hesitation in concluding that no proposal was ever submitted by the Municipal Corporation as contemplated under Section 91 of the M.R.T.P. Act and consequently there is no obligation on the part of the respondent no.1-State to consider any such proposal. As a result the petitioner-company is not even entitled to relief 'E' (supra).

13. In the result, the petition fails and is disposed of.

14. The Rule is discharged.

(MANGESH S. PATIL,J.)

(S.C.DHARMADHIKARI,J.)