

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 5052 OF 2017

Thane Municipal Corporation

...Petitioner

Versus

Om Ganesh CHS Ltd & Ors.

...Respondents

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Mr.R.S.Apte, Senior Advocate i/b. Mr.N.R.Bubna for the Petitioner.
Mr. Pramod Bhosle i/b. Mr.Sachin T. Tigde for Respondent Nos. 1 and 2.
Mr.S.G.Karandikar for Respondent Nos. 3 and 4.

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CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: JUNE 21, 2017

P.C. :

AT 3.00 P.M.

1. Rule. Rule made returnable forthwith. By consent, petition is heard finally and disposed of at the stage of admission.
2. This petition is directed against the order dated 12.04.2017 passed by the learned I/c. District Judge-5, Thane in Misc. Civil Appeal No. 91 of 2017 thereby allowing the application below Exhibit 5. The said Misc. Civil Appeal is pending before the District Court, Thane.
3. The plaintiffs /respondent societies have filed Special Civil Suit No. 1 of 2017 in the Court of Civil Judge, Senior Division, Thane for a declaration, injunction and specific performance etc.

Gist of the matter

4. The plaintiffs /respondent societies i.e. Kashish Park Complex includes approximately 23 societies, which were developed by respondent nos. 3 and 4. Respondent nos. 3 and 4 had purchased the land from one industrial user. The said land was only in the industrial zone and got it converted into NA for the residential purpose. At the relevant time, as per the provisions of Development Control Regulation and Rules of Thane Municipal Corporation, some percentage of the land was transferred to the Municipal Corporation and some portions of the lands in the complex of Kashish Park were reserved by the Municipal Corporation either for a recreation ground or for amenity space. In the year 2016, the Municipal Corporation had constructed a gymnasium for the public and at that time, respondent nos. 1 and 2, who are the original plaintiffs had filed the Suit as well as the application at Exhibit 5 praying for interim injunction that access of 12 meters road which starts from the main gate of Kashish Park reaching to the gymnasium is not to be used by the public, as the residents of Kashish Park have exclusively owned the said road and it is not a public road. They have opposed inauguration and use of the said gymnasium. The application at Exhibit 5 was rejected by the learned trial Judge, vide order dated 20.02.2017. Hence, the appeal was filed and it was partly allowed by the learned District Judge, vide order dated 12.04.2017.

5. The learned senior advocate of the petitioner has argued that 2.5% of total area as recreation ground and 5% of total area as amenity plot was transferred to the Municipal Corporation by the builder/ developer in the year 2004-2005. In support of his submission, he relied on the letter dated 17.05.2005 issued by the Executive Engineer, Thane Municipal Corporation, Thane. In the said letter, it was mentioned that 12 meters wide internal road shall be used as access to the amenity space without any objection from the developer/ owner. He has further submitted that the gymnasium is ready, which is constructed by the Municipal Corporation, as the said portion of the land was reserved by the Municipal Corporation and it is to be used by the public. During the construction of the gymnasium, no injunction was granted by the trial Court. Now, the construction is complete. He has further submitted that there is also one Meditation Centre, temple and the children park in the Kashish Park and the same are used by not only the residents of Kashish Park but also public at large.

6. Per contra, the learned counsel for respondent nos. 1 and 2, who are main contesting parties/original plaintiffs, opposed this petition. He has submitted that only the residents of Kashish Park are allowed to use the internal road of the society and the outside public cannot enter in the private road. He has further submitted that there is no proof the Municipal Corporation can produce that the said road was also handed

over to the Municipal Corporation at the time of transferring some open space as per the Development Control Rules of Thane Municipal Corporation. He challenged the affidavit dated 21.06.2017 filed by the Executive Engineer Mr.Shailendra Bendale stating that the garden, Meditation Centre and the children park were developed by the Municipal Corporation and the same was opened for the public. He has further submitted that the Meditation Centre is in small shed. He has argued that another proposed road from outside the wall of the society reaching to the gymnasium is available to the public and the Municipal Corporation should keep that road open for the public to go to gymnasium. He has further submitted that the area of gymnasium is to be carved out and bounded from the land of Kashish Park and it can be made open to the public at large from outside by using the said access road. He has further submitted that the gymnasium is constructed on RG place and only 12 meters internal road is available for the amenity space. As per the plan, the gymnasium is on the left side immediately adjacent to the main gate. The plaintiffs have no objection if the gymnasium is constructed on the amenity space, then strip of 500 feet of the road would not be put in use. He has further submitted that the Corporation has constructed one Ganesh temple on the recreational ground and the said temple is maintained by the present corporator.

7. The learned counsel for respondent nos. 3 and 4, who are the developers/ builders have supported the case of the petitioner and has submitted that there is no conveyance and the Suit is filed for specific performance which is pending before the Court. He has further submitted that while handing over some portion of the land as per Development Control Rules and while seeking NA permission for converting the land under yellow zone from the residential zone, it was agreed by the developer/builder that without any objection from the developer/builder, 12 meters wide internal road shall be used as access to the amenity space.

8. Heard submissions. Perused both the orders. Photographs produced disclose that in the complex of Kashish Park, there is a garden and one Ganesh temple. The plaintiffs/ respondent societies have not challenged the fact of handing over some percentage of the land to the Municipal Corporation by the developer/builder. The challenge is only in respect of using the internal road by the public, which is exclusively a private road of the societies. It will be decided on appreciating the evidence of the parties. At this stage, *prima-facie*, it shows that the developer/builder has agreed that the internal road should be used as access to the amenity space without any objection from the developer/ owner. Whether recreation place can be included in the amenity space will be decided at the time of trial of the Suit.

Though approach road running through the land of societies is their private road, at present no other access is provided to the gymnasium, garden and temple. As rightly argued by the counsel for the societies, there is a proposed road running outside the society and is appropriate approach road to the gymnasium. As on today, there is a *prima-facie* evidence to show that the Ganesh temple and the park are not the private properties of the society, but it appears that Thane Municipal Corporation has constructed/created the said properties and the Municipal Corporation is having control over these properties. If the temple is open for the public, then it is very logical to keep gymnasium which stand on reserved space, open for the public. The balance of convenience lies in favour of the Municipal Corporation. Thus, the original plaintiffs/ respondent nos. 1 and 2 as mentioned by the trial Court has failed to make out any *prima-facie* case on these parameters while praying for interim relief and hence the order dated 12.04.2017 passed by the learned District Judge is required to be set aside. However, if the proposed access road which runs outside the society is constructed by the Municipal Corporation, then plaintiffs/respondent nos. 1 and 2 have liberty to seek similar relief for closing the present road in the society by moving a fresh application.

9. The learned counsel for respondent nos.1 and 2 seeks stay of this order. Considering the facts of the case, I am not inclined to grant stay.

10. In view of the above, Writ Petition is allowed in terms of prayer clause (a) and (b). The order dated 20.2.2017 passed by the learned trial Judge is hereby restored.

11. Writ Petition is disposed of accordingly.

(MRIDULA BHATKAR, J.)