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

CHAMBER SUMMONS (L)NO.28 OF 2018 IN
WRIT PETITION (L)NO.3463 OF 2017

Kala Ghoda Association ...Applicant
vs.
State of Maharashtra & Others ...Respondents

ALONG WITH
NOTICE OF MOTION (L)NO.102 OF 2018 IN
WRIT PETITION (L)NO.3463 OF 2017

State of Maharashtra through
Revenue and Forest Department
and another ...Applicants

In the matter between
Organization for Verdant Ambience
and Land (Oval) and another ...Petitioners
vs.
State of Maharashtra through
Revenue and Forest Department
and others ...Respondents.

Mr.Saket Mone a/w Ms Shreya Parekh, Mr.Vishesh
Kalra, Mr.Subit Chakraborti, Ms Neha Joshi i/b Vidhi
Partners for the petitioners

Mr.S.U.Kamdar, Senior Counsel a/w Ms Jyoti Chavan,
AGP for State and applicants in NMWL/102/2018

Dr.Birendra Saraf a/w Ms Pooja Tated i/b ALMT Legal
for the applicant in CHSWL/28/2018

Ms K.H.Mastakar for the respondent-MMC

**CORAM : A.S.OKA, &
P.N.DESHMUKH, JJ.**

DATE : FEBRUARY 7, 2018

P.C.:

1. In the main Writ Petition Rule has been already issued. The main writ petition concerns the Government Resolution (for short 'GR') by which the ground known as Cross Maidan has been ordered to be transferred to the Mumbai Municipal Corporation for its management and protection.

2. According to the material on record, the area of Cross Maidan is 23000 square yards (for short "the said ground") which is the subject matter of the GR dated 6th January 2017. It is shown as reserved for recreational ground in the sanctioned development plan. A Notice of Motion is taken out by the State Government for permitting the State Government and the Collector to grant permission to Kala Ghoda Association, the Applicants in Chamber Summons No.28 of 2018 (the third party Applicant) to hold certain events at Cross Maidan from 3rd February 2018 to 11th February 2018. In the Chamber Summons taken out by the said Kala Ghoda Association, there is a similar prayer. There is an ad-interim order passed by this Court on 13th December 2017 restraining the State Government and the Mumbai Municipal Corporation from allotting the said ground to any third party without prior permission of this Court.

3. The object of the grant of ad-interim order is firstly to ensure that the said ground should be used for the purpose for which it is shown reserved in the development plan and the members of the public should be benefited by the reservation. The second reason is based on a fact about which a judicial notice will have to be taken. Considering very large population of the city, there are very few grounds available for the members of the public where they can breath fresh air. Even assuming that the State Government has a power to allow private organizations to use the said ground for activities which are consistent with the permissible user, the State Government cannot do so without following a fair and transparent process and without application of mind. This is the third reason. In fact, the order which we are passing today will show that the third reason for granting ad-interim relief is substantiated from the manner in which the State Government has dealt with the application of the third party applicant in the Chamber Summons and has granted permission to the third party applicant without application of mind and without following a fair and transparent process.

4. Firstly, the Collector granted permission dated 30th January 2018 to the third party applicant for the use of the said ground from 3rd February 2018 to 11th February 2018. The said order indicates that the permission was granted to use this valuable property in South Mumbai free of cost. There is no

condition imposed that the ground should not be used for commercial purposes. There is no security deposit taken by the State Government for ensuring that the third party applicant abides by the terms and conditions of the State Government and restores the ground to its original condition. When this was pointed out on the last date, now the State Government has come out with one more order passed by the Collector on 6th February 2018 by which the third party applicant is now called upon to pay charges at the rate of Rs.56,023/- on the basis of the GR dated 3rd March 2007. The amount has been charged at the commercial rate of Rs.270/- per 100 sq meters.

5. The learned senior counsel for the State Government in support of the Notice of Motion submits that the State Government is consistently permitting this activity of Kala Ghoda festival from the year 2012. He submits that the musical concerts organized by the third party applicant are open to the members of the public without payment of any amount. He submitted that there is no grievance received from any one during the last few years regarding misuse of the ground by the third party applicant or about commercial exploitation by the third party applicant. He submitted that the present writ petitioner was earlier entrusted with the responsibility of maintenance of the said ground and the present petitioner was charging certain amount to the third party applicant for allowing them to use the said ground for the same function for the

last few years. He submitted that there is no prohibition imposed by law on the State Government permitting such activities. He submitted that the State Government is going to revise the GR dated 3rd March 2007.

6. Our attention was also invited by the learned senior counsel to the provisions of the Rules for Allotment of Plot at Cross Maidan (excluding Home Guard Side) in Bombay, 1988 (for short "the Rules of 1988") which are still in force. He, would, therefore submit that there is no illegality committed by the State Government. He submitted that the decision of this Court in the case of **C.R.Dalvi and others Vs. Municipal Corporation of Greater Bombay and others**¹ will not apply as it is applicable to play grounds as distinct from the recreation grounds.

7. The learned counsel for the third party applicant submits that even the Tourism Department is supporting the activity of the third applicant and therefore, the State Government is aware of the activities of the applicant. He submitted that the applicant has paid donation of Rs.6,00,000/- to the petitioner last year. He states that the applicant is willing to give an undertaking that no food stalls will be set up if permission is granted by this Court and the applicant will not commercially exploit the Cross Maidan in any manner. He states that the functions will be open to the members of

1 1987 Mh.L.J. 373

the public and no entry fee will be charged. He placed reliance on the GR dated 16th August 2011. He submitted that this resolution shows that even the Collector and many Government Officers are involved in this activity.

8. We have given careful consideration to the submissions. It cannot be disputed that the said ground is a very valuable property vesting in the State Government which is proposed to be handed over to the Mumbai Municipal Corporation for its maintenance and security. As far as the law regarding disposal of the public property is concerned, there are series of decisions of the Apex Court. We are referring only to one such decision in the case of **Akhil Bhartiya Upbhokta Congress vs. State of Madhya Pradesh and others**². Whether the property vesting in the State Government is being parted with for few days or on permanent basis, the law laid down by the Apex Court will squarely apply. Paragraphs 65 to 68 of the said decision read thus:

"65 What needs to be emphasised 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 recognised 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 favouritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State.

66 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 dehors 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.

67 This, however, does not mean that the State can never allot land to the institutions/organizations 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 a piece of land is earmarked or identified for allotment to institutions/organizations 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 similarly 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."

(underlines supplied)

9. Much water has flown under the bridge after Rules of 1988 which are relied upon by the learned counsel were made. Obviously, in the light of the law laid down by the Apex Court, the Rules which are inconsistent with the said law cannot apply. Only in view of the fact that (i) the Kala Ghoda festival has already commenced; (ii) that from 2011 onwards, the State Government has been granting permissions and (iii) in view of the undertakings offered to be given by the third party applicant, we are permitting the event to go on. However, as stated across the bar by the learned counsel for the parties, this will not be a precedent.

10. Nevertheless, in the light of the law laid down by the Apex Court in the case of Akhil Bhartiya Upbhokta Congress (supra), we will have to consider the decision making process adopted by the State Government. Reliance is placed on the policy in the form of GR dated 3rd March 2007. We may note here that though the learned counsel for the third party applicant may have stated that there will be no commercial activities undertaken, as per GR dated 3rd

March 2007, the State Government has charged an amount to the applicant at the rate which is prescribed for commercial activities. The third party applicant has not disputed the correctness of the second order passed by the State Government on 6th February 2018 which calls upon the applicant to pay certain amount at the rate prescribed for the commercial activities. Therefore, today it is not open for the the third party applicant to contend that the applicant never planned any commercial activities.

11. We have perused GR dated 3rd March 2007. It deals with all open lands/grounds vesting in the State Government. It provides for allowing the said open lands to be used by private parties by the Collector. On plain reading of the said GR, it is completely contrary to the law laid down by the Apex Court in the case of **Akhil Bhartiya Upbhokta Congress** (supra) and, in particular what is held in paragraphs 65 to 68 thereof. It does not provide for the Collector adopting a fair and transparent process. It only prescribes the terms and conditions on which permission can be granted and the rates at which amounts will be payable.

12. There is one more important aspect. We have perused the application dated 4th December 2017 submitted by the third party applicant to the State Government. The application contains no details. It is not the case of the third party applicant that they are conducting some charitable activities. It

is not the case of the third party applicant that they do not want to derive any profit from the said activities. It is not the case of the third party applicant that they are not going to indulge in commercial activities. They simply sought NOC from the Collector for using the Cross Maidan as a venue for the musical concerts, food stalls, street performances and the visual arts events. On the earlier hearing in the last week, we were informed by the learned counsel for the third party applicant that even the schedule of programmes to be held on said ground from 2nd February 2018 was already announced. Thus, the third party applicant proceeded on the assumption that the State Government as well as this Court will grant permission to hold the function. Before granting permission, the Collector has not even bothered to verify whether the said ground will be used for commercial purposes. Only on the basis of the short and cryptic application made by the third party applicant, the Government machinery swiftly moved into action. Such swift action is rarely seen. Reliance placed on the decision dated 16th August 2011 is completely misplaced. It only constitutes a Committee for coordinating the activities of the Tourism Department and the Maharashtra State Tourism Development Corporation in respect of Banganga Mahostav, Kala Ghoda Festival, Ganeshostav, Navratri etc. The argument is that the District Collector was fully aware of the nature of the proposed activities on said ground and even he is involved in these activities. This argument is very strange.

We fail to understand how the Collector can have knowledge about activities of private parties. If the case made out by the third party applicant that even the Collector is involved in their activities is correct, then the non-application of mind by the Collector becomes more serious. If the Collector was himself involved in the activities, he should have refrained himself from passing any order granting permission to the applicant. As stated earlier, the first order dated 30th January 2018 passed by the Collector is completely silent on the amount payable by the applicant. It shows that use of the ground was allowed free of cost. Within few days i.e on 6th February 2018, the Collector issued second order very promptly. Though at the time of earlier hearing, a statement was made by the learned counsel for the third party applicant that no food stalls will be set up and there will not be any commercial activity, while passing the second order dated 6th February 2018, the Collector failed to impose such condition. On the contrary, the Collector proceeded to fix a sum of Rs.3,36,138/- payable by the applicant at a rate which is applicable to commercial activities under the aforesaid GR. This itself shows non-application of mind by the Collector. It is very difficult for us to understand why the District Collector went out of the way in permitting one private organization to use the said ground.

13. Therefore, we make it clear that prima facie, it appears to us that the entire decision

making process adopted by the Collector is flawed and is completely contrary to the law laid down by the Apex Court.

14. As stated earlier, in the light of the assurance given by the third party applicant and the undertakings, that we are permitting the Collector to act upon the order dated 6th February 2018. While we do so, we make it clear that in the light of law laid down by the Apex Court in the case of **Akhil Bhartiya Upbhokta Congress** (supra) and the series of decisions of the Apex Court, for allowing the third parties to use the said ground, till further orders are passed, the State Government cannot rely upon the Rules at Exhibit-F as well as GR dated 3rd March 2007.

15. Accordingly, we dispose of the Chamber Summons and the Notice of Motion by passing the following order:

(I) We permit the Collector to act upon the order dated 6th February 2018 subject to following conditions:

(a) The applicant in the Chamber Summons shall give unconditional undertaking to this Court that the food stalls shall not be set up on the Cross Maidan;

(b) The undertaking to state that no part of the Cross Maindan shall be used for any commercial activity or for earning any income and that musical events organised on Cross Maidan during the

relevant period shall be open to the members of the public and no entry fee shall be levied by the applicant;

(c) Such undertaking shall be furnished within a period of two days from today.

(II) We make it clear that the aforesaid order is passed subject to observations and findings which we have recorded in this order. It is obvious that hereafter the State Government cannot entertain the applications made by the third party applicants in a casual manner and cannot grant permission contrary to the law laid down by the Apex Court;

(III) As this order is dictated in the open Court, we permit the Collector and the applicants to act upon this order though a copy thereof may not be available;

(IV) Notice of Motion and the Chamber Summons are disposed of on above terms.

(P.N.DESHMUKH,J.)

(A.S.OKA,J.)