

Sharayu Khot.

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

PUBLIC INTEREST LITIGATION NO. 6 OF 2013

Mr. Pankaj Babulal Kotecha

...Petitioner

Versus

**Municipal Corporation of Greater ...Respondents
Mumbai & Ors.**

Mr. P.M. Havnur, for the Petitioner.

Mr. Anand Wadgaonkar a/w Ms. Shital Mane, for the
Respondent Nos. 1 to 8-BMC.

Mr. Milind More, Addl. G.P., for Respondent Nos. 9, 9A to 9F –
State.

**CORAM : ABHAY S. OKA AND
RIYAZ I. CHAGLA, JJ.**

Reserved on : 28 June 2018

Pronounced on : 3 August 2018

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JUDGMENT : (Per Riyaz I. Chagla, J.)

1. This Petition has been filed in public interest. The

Petitioner is an Indian citizen, resident of Mumbai City. The Petitioner has sought directions against the Respondents to demolish the illegal construction that has been done on the subject plot i.e. CTS No. 417, at Khajuria Tank Road, Kandivali by filling in the 100 years old Khajuria Lake (referred to incorrectly as “Khajuria Pond” in this Petition) and for restoration of the Khajuria Lake. The Petitioner has also sought a necessary direction to the Chief Secretary, the State of Maharashtra for conducting an enquiry into the unauthorised and illegal expenditure for the illegal construction on the subject plot and to take action in accordance with law against the erring officers, public representatives and recover the amount from them as well as initiate prosecution against all concerned.

2. The Petitioner had on 6th September 2012 come across a report in the Times of India that the Khajuria Lake situated at Kandivali (West) which is more than 100 years old was illegally filled in by the Respondent No. 1-Corporation. The Petitioner claims to have made enquiries from which the

Petitioner claims to have learnt that the illegal construction was done at the behest of one Shri. Yogesh Sagar, a member of a political party when he was a local Councilor and who is now a Member of the Legislature Assembly from the constituency where the said Khajuria Lake is situated. The Petitioner claims that the illegal construction was done in collusion with the Respondent No. 1-Corporation and another Corporator Shri. Baldev Singh Manku. The Petitioner has stated that when he visited the Khajuria Lake, it was completely filled and a garden has been constructed on the subject plot. The Petitioner states that illegal construction on the subject plot was done without taking permission of the Collector. The Bhoomi Pujan of the garden was done in the year 2010 and thereafter, a musical water fountain was constructed there. The municipal garden was opened on the subject plot in December 2011.

3. The Petitioner has stated that the said Khajuria Lake originally belonged to Vithaldas Mathurdas and other heirs of Khimji Vallabdas Trust Estate and was given to them by the

Government in return for their land near old Kandivali Station.

4. The Petitioner has stated that the said Lake now belongs to the Collector and this is reflected in the 7/12 extract and 6/12 extract. The Petitioner further states that the news of filling of the said Lake has appeared in other newspapers and the Petitioner has relied upon the same. The Petitioner states that the Khajuria Lake was used for immersing Ganesh idols during Ganesh Festivals. The said Lake also contained various types of rare fish, tortoise and different types of birds used to come to the mangroves existing therein. It is the Petitioner's case that the Talathi has visited the said Lake and a panchanama was done. The Talathi appears to have also been surprised at the filling of the said Lake as this has been done without any permission taken.

5. It is the Petitioner's case in the Petition that there are no documents reflecting the handing over of the subject plot to the Respondent No. 1-Corporation. The Petitioner states that the

subject plot to his knowledge was not handed over to the Respondent No. 1-Corporation and despite which the illegal construction has been carried out with public funds. The Petitioner has also addressed a representation to the concerned authorities, but no action was taken against the unauthorized construction. It appears from the Petition that it came to the Petitioner's knowledge under the Right To Information Act, 2005 that the original owners of the subject plot had addressed correspondence to the Tahasildar, Borivali, Mumbai and Shri. Yogesh Sagar, the then Councilor bringing it to their notice that the original owners had objected to filling up of the said Lake which is a natural Lake. The Petitioner has also obtained documents which revealed that the Superintendent of Garden of the Respondent No. 1-Corporation had appointed vide letter dated 10th April 2008, M/s. Techno Trede Impex India Pvt.Ltd. as the municipal contractors with respect to a tender issued on 8th February 2008 allotting the said Lake for being converted into a garden. It appears from a noting dated 16th February 2009 issued by the Assistant Commissioner, R/South Ward that

the provision of allocation of Rs. 5 Crores and more in the year 2008-09 had been made by the Municipal Corporation with respect to conversion of the said Lake into garden and Amphi Theatre. It appears from these documents that no objection was obtained by the Respondent No. 1-Corporation from the Collector for the purpose of converting the said Lake to that of a municipal garden and Amphi Theatre. The Chief Engineer, Development Plan and the Chief Accountant (Finance) has been joined as the Respondents No. 5 and 6 since their office was responsible for converting the said Lake into garden. Since no action had been taken against the illegal construction on the subject plot, the Petitioner has filed this Petition in public interest. Rule has been issued by this Court on 25th November 2015. This Petition has thereafter, come up for final hearing.

6. Shri. Havnur, the learned Counsel appearing for the Petitioner has submitted that the illegal construction viz. the conversion of the said Lake to a municipal garden had been done by the Respondent No. 1-Corporation in connivance with

the MLA Shri. Yogesh Sagar and to the detriment of the public at large. He has submitted that the said Lake belongs to the Collector and that such construction could have been carried out provided the Collector gave permission for the same. He has submitted that although in the Development Plan, the subject plot was shown as Recreation Ground (R.G.), conversion of the said Lake into a garden could not have been done by the Respondent No. 1-Corporation in connivance with the local Corporator by taking advantage of this reservation. He has submitted that public funds have been used for the conversion of the said Lake and this has been done by the Respondent No. 1-Corporation contrary to public interest. The said Lake was used for immersing Ganesh idols during the Ganesh Festivals. He has submitted that the said Lake was in existence for over 100 years and various types of rare fish, tortoise lived inside the Lake and different types of birds visited the said Lake, as there were mangroves in existence. He has submitted that from the documents on record, it appears that an application had been made to the Collector by the Respondent No. 1-Corporation for

handing over of the subject plot, but this was only for beautification of the said Lake and not for conversion of the said Lake into a municipal garden. He has relied upon the judgment of the Supreme Court in *Jagpal Singh Vs. State of Punjab*¹, wherein the Supreme Court has observed that the use of Ponds which are for the common benefit of villagers of the village cannot be auctioned for private use by the Authorities/Grampanchayat officials and that the lands should be restored for the common use of villagers of the village. He has also relied upon the judgment of this Court in *Avinash Laxman Kandalgaonkar Vs. the Municipal Corporation of Greater Mumbai & Ors*², wherein this Court came down heavily on the Municipal Corporation and the Corporator for failing in their duty of constructing a municipal primary school on the plot for which it had been reserved and held them to be answerable to the public as to why they had used public money for construction of a jogging park which was impermissible keeping

¹ (2011) !! SCC pg 396

² PIL (L) No. 16 of 2008 Jt. dt. 31st July 2008

in view the reservation. He has also relied upon the judgment of this Court in *Edwin Britto and another Vs. The State of Maharashtra and others*³, wherein this Court has held that it is an obligation of the State to ensure that the lakes must continue to exist and the Apex Court has held that the forests, tanks, ponds, hillock, mountain are the material resources of community and nature's bounty which maintain delicate ecological balance. He has thus, submitted that such illegal construction by filling the said Lake can in no circumstance have been permitted by the Collector to whom the subject plot belonged.

7. Shri. Wadgaonkar, the learned Counsel appearing for the Respondent No. 1-Corporation and the Respondents No. 2 to 8/Authorities of the Respondent No. 1-Corporation has made his submissions in support of the impugned action of the Respondent No. 1-Corporation. Shri. Milind More, the learned AGP appearing for the Respondents Nos. 9, 9A to 9F –State and

³ 2016 SCC OnLine Bom 3975

its Authorities has also supported the impugned action of the Respondent No. 1-Corporation. The learned Counsel appearing for the Respondent No. 1-Corporation has submitted that the Collector had given *post facto* sanction dated 10th February 2014 on the terms and conditions mentioned therein for beautification of the subject plot and its development as a theme park by the Respondent No. 1-Corporation. He has submitted that the subject plot has been reserved for R.G. He has submitted that it was necessary to develop the said Lake as the public used to throw garbage in the said Lake and the said Lake had lost its beauty. He has submitted that the Respondent No. 1-Corporation had not filled up the entire Lake, but had only beautified the subject plot by keeping the said Lake at the center with aquarium. He has submitted that the *post facto* sanction granted by the Collector was only pursuant to the several attempts made by the Respondent No. 1-Corporation to transfer the said Lake for its development and beautification. He has relied upon the Affidavits which have been filed by Shri. H.A. Khairmode, the Assistant Engineer (Maintenance) on behalf of

the Respondents No. 1 to 8 dated 3rd July 2013 and the additional Affidavit filed by Shri. Jagdish Rajabhai Rathod, the Deputy Superintendent of Gardens of the Respondent No. 1-Corporation dated 28th June 2018 in support of his submissions. He has denied the Petitioner's contention that the said Lake was a heritage property. He has submitted that there is no change of user as the subject plot had been reserved for R.G. and the same has been put to use as per the designated user. He has submitted that by developing the subject plot, the need of the larger section of the public had been catered to. He has therefore, submitted that in the light of *post facto* sanction for development of the subject plot granted by the Collector, there is no merit in the Petition.

8. The learned Additional Government Pleader for the State has relied upon the Affidavit of Shri. Rajendra Kshirsagar, Joint Secretary, Revenue and Forests Department, the Respondent No. 9-State in support of his submission that the State had given *post facto* sanction for development of the

subject plot by the Respondent No. 1-Corporation, as the subject plot was reserved as “R.G.” in the Development Plan. He has submitted that the subject plot was transferred to the Respondent No. 1-Corporation, pursuant to the *post facto* sanction being granted for beautification of the said Lake at the subject plot on the terms and conditions mentioned in the *post facto* sanction dated 10th February 2014. He has submitted that the subject plot bearing C.T.S. No. 417 is the same as Survey No. 124 mentioned in the *post facto* sanction dated 10th February 2014 issued by the State Government. He has submitted that as the State Government has given *post facto* sanction for beautification already done by the Respondent No. 1-Corporation, the construction of the subject plot cannot be considered to be illegal as alleged of the Petitioner.

9. We have considered the submissions. It has been a consistent stand of the Respondents that there existed a Talao (Lake) on the subject plot. The documents which are on record including the Punchnama prepared before the Talathi and

executed by the resident of Khajuria Tank Road as well as noting issued by the Assistant Commissioner, R/South Ward dated 27th November 2008 refer to Lake on the subject plot. The letter dated 30th June 2009 addressed by the Respondent No. 1-Corporation to the Collector calls upon the Collector to issue no objection for the purpose of converting the Khajuria Talao to that of a municipal garden and Amphi Theatre. Further, in the 7/12 extract which has been annexed to the Affidavit of Shri. Kshirsagar for the Respondent No. 9-State, the word “Talao” is mentioned as existing on the subject plot. In the post facto sanction of the Respondent No. 9-State dated 20th February 2014 which is also annexed to the said Affidavit, the word “Talao” is mentioned and that post facto sanction was being granted in respect of the beautification of the Talao on the subject plot which had already taken place. It is thus, clear from the documents that there existed a Lake on the subject plot. The Lake has been destroyed by the Respondent No. 1-Corporation filling up the said Lake and converting it into a municipal garden.

10. We do not accept the submissions of the learned Counsel appearing for the Respondent No. 1-Corporation that there was no change in the user of the subject plot and/or that the subject plot was only beautified by keeping the Lake at the center with the aquarium. We have perused the photographs tendered during the course of the hearing and we find that what is described by the Respondent No. 1-Corporation as a Lake appears to be only a fountain and the rest of the said Lake has been filled up and converted into a municipal garden. We find that the *post facto* sanction granted by the State Government on 10th February 2014 was specifically for the beautification of the said Lake subject to the terms and conditions mentioned therein. One of the terms and conditions being that there shall be no change in the use of the land or otherwise the land shall be transferred to the State Government. The Respondent No. 1-Corporation by converting the said Lake to a municipal garden has breached the condition of the *post facto* sanction granted by the State Government. We further find from the contentions in the Petition and documents on record

that one Shri. Yogesh Sagar, MLA was responsible for the conversion of the said Lake into a municipal garden in collusion with the Respondent No. 1-Corporation and that an amount of over Rs. 5 Crores of public money was used for the construction of the municipal garden.

11. We find that in the revenue records which includes the property card annexed to the Affidavit of Shri. Kshirsagar, for the State, the subject plot is shown as belonging to the State Government and this would include the Lake which is mentioned to have existed on the subject plot. The said entries have presumptive value.

12. Under Section 22 of the Maharashtra Regional and Town Planning Act, 1966 the contents of a Development Plan is provided and amongst the contents what is to be noted is Sub-Clause (i) of Section 22 which reads thus:-

“preservation of features, structures or places of

historical, natural, architectural and scientific interest and educational value [and of heritage buildings and heritage precincts]”

In the present case the subject plot is shown in the Development Plan as “R.G.”. However, the State Government is enjoined with a duty to preserve features of natural interest and of historical value viz. the said Khajuria Lake. Merely because there is a reservation of R.G. provided, it does not authorise the State to destroy the Lake.

13. This duty of the State can be inferred from the Chapter of Directive Principles of the State Policy viz. Article 48A of the Constitution of India, which provides thus:-

“The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.”

14. Further, under the same Chapter Article 51-A

Sub-Clause (g) provides that it shall be the duty of every citizen of India “to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures”. It is thus, equally the duty of every citizen of India to protect forests, lakes, rivers and wild life, which are essential for a natural environment.

15. The Supreme Court in ***Jagpal Singh Vs. State of Punjab*** (supra) in paragraphs 20 and 23 held thus:-

“20. Over the last few decades, however, most of these ponds in our country have been filled with earth and built upon by greedy people, thus destroying their original character. This has contributed to the water shortages in the country. Also, many ponds are auctioned off at throw away prices to businessmen for fisheries in collusion with authorities/Gram Panchayat officials, and even this money collected from these so-called auctions is not used for the common benefit of the villagers but misappropriated by certain individuals. The

time has come when these malpractices must stop.

23. *Before parting with this case we give directions to all the State Governments in the country that they should prepare schemes for eviction of illegal/unauthorized occupants of Gram Sabha/Gram Panchayat/Poramboke/Shamlat land and these must be restored to the Gram Sabha/Gram Panchayat for the common use of villagers of the village. For this purpose the Chief Secretaries of all State Governments/Union Territories in India are directed to do the needful, taking the help of other senior officers of the Governments. The said scheme should provide for the speedy eviction of such illegal occupant, after giving him a show-cause notice and a brief hearing. Long duration of such illegal occupation or huge expenditure in making constructions thereon or political connections must not be treated as a justification for condoning this illegal act or for regularizing the illegal possession. Regularization should only be permitted in exceptional cases e.g. where lease has been granted under some Government notification to*

landless labourers or members of Scheduled Castes/Scheduled Tribes, or where there is already a school, dispensary or other public utility on the land.”

16. The Supreme Court has thus observed that there is illegal auctioning of many Ponds at throw away prices to businessman in collusion with the public authorities/Gram Panchayat and the money collected from such auctions is not used for the common benefit of villagers, but misappropriated by certain individuals. The Supreme Court has therefore, directed restoration of the said land for common use of the villagers.

17. This Court has in ***Avinash Laxman Kandalgaonkar*** (supra) in the context of illegal acts done by the Corporators at paragraph 10 held thus :-

“The Corporation or any of its officers or public representative were bound by the reservation which

had the force of the law. It was expected of the Corporation to construct the school which has not been done over such a long period of 17 years. In our opinion, both the Corporation and its officers have admittedly failed in discharging their duty towards the public at large. Furthermore, the Corporator concerned exceeded his jurisdiction in spending public funds over construction of beautification of a park or jogging park, which admittedly was impermissible keeping in view the reservation. The Corporation and the Corporator both are answerable to public as to why the public funds were spent for such a purpose and why these funds could not be utilized for construction of the school. May be the construction of the school would require much more expenditure, but surely this could be beginning of a cause of a greater legal significance and larger public interest. We have no hesitation in observing that this was not expected of either of the Corporation nor the Corporator that they would ignore their legal and public duty and act contrary to law just to appease certain people. We are hopeful that the Corporation would ensure that in future public funds are not wasted in this

absolutely discretionary manner. Every Corporator is expected to spend the public money for a public cause but in accordance with law.”

This Court has thus held the Corporation and the Corporator to be answerable to the public for public funds being spent for a purpose which was impermissible. The Division Bench of this Court presided over by one of us (A.S. Oka, J) has in ***Edwin Britto and another*** (supra) referred to the Directive Principles of the State Policy and the fundamental duty under clause (g) of Article 51-A as well as the law laid down by the Apex Court in ***Hinch Lal Tiwari Vs. Kamala Devi & Ors.***⁴ which has held that forests, tanks, ponds, hillocks, mountains are nature's bounty which maintain the delicate ecological balance and thus, needed to be protected as these are essential for a healthy environment and for enabling people to enjoy a quality life which is the essence of the right guaranteed under Article 21 of the Constitution. Accordingly, it was held therein that the obligation is of the State to ensure that the lakes must continue

⁴ (2001)6 SCC 496

to exist and cannot be filled up for carrying out so called beautification work which leads to their disappearance.

18. The Supreme Court has time and again enunciated the public trust doctrine. A few of these decisions are worth referring to in the present context.

19. The Supreme Court in *Intellectuals Forum Vs. State of A.P.*⁵ whilst invoking the public trust doctrine in a matter involving the challenge to the systematic destruction of percolation, irrigation and drinking water tanks in Tirupati town and by referring to some judicial precedents including *M.C. Mehta Vs. Kamal Nath*⁶, *M.I. Builders Pvt. Ltd. Vs. Radhey Shyam Sahu*⁷, *National Audubon Society Vs. Superior Court of Alpine County*⁸, observed at paragraph 76 thus:-

⁵ (2006) 3 SCC 549

⁶ (1997) 1 SCC 388

⁷ (1999) 6 SCC 464

⁸ 658 P 2d 709 : 33 Cal 3d 419 (1983)

“...This is an articulation of the doctrine from the angle of the affirmative duties of the State with regard to public trust. Formulated from a negatory angle, the doctrine does not exactly prohibit the alienation of the property held as a public trust. However, when the State holds a resource that is freely available for the use of the public, it provides for a high degree of judicial scrutiny on any action of the Government, no matter how consistent with the existing legislations, that attempts to restrict such free use. To properly scrutinise such actions of the Government, the courts must make a distinction between the Government’s general obligation to act for the public benefit, and the special, more demanding obligation which it may have as a trustee of certain public resources.....”

20. The Supreme Court has enunciated the public trust doctrine in the case of ***Fomento Resorts and Hotels Ltd. Vs. Minguel Martins***⁹ and at paragraph 55 held thus:-

“55. The public trust doctrine is a tool for exerting

⁹ (2009) 3 SCC 571

long-established public rights over short-term public rights and private gain. Today every person exercising his or her right to use the air, water, or land and associated natural ecosystems has the obligation to secure for the rest of us the right to live or otherwise use that same resource or property for the long-term and enjoyment by future generations. To say it another way, a landowner or lessee and a water right holder has an obligation to use such resources in a manner as not to impair or diminish the people's rights and the people's long-term interest in that property or resource, including down slope lands, waters and resources.

65. *We reiterate that natural resources including forests, water bodies, rivers, seashores, etc. are held by the State as a trustee on behalf of the people and especially the future generations. These constitute common properties and people are entitled to uninterrupted use thereof. The State cannot transfer public trust properties to a private party, if such a transfer interferes with the right of the public and the court can invoke the public*

trust doctrine and take affirmative action for protecting the right of people to have access to light, air and water and also for protecting rivers, sea, tanks, trees, forests and associated natural ecosystems.”

21. The Supreme Court has considered the above two decisions in the case of ***Association For Environment Protection Vs State Of Kerala & Ors.***¹⁰ and at paragraphs 9 and 10 held thus:-

“9. We have prefaced disposal of this appeal by discussing the public trust doctrine and its applicability in different situations because the Division Bench of the Kerala High Court, which dealt with the writ petition filed by the appellant for restraining the respondents from constructing a building (hotel/restaurant) on the banks of River Periyar within the area of Aluva Municipality skirted the real issue and casually dismissed the writ petition only on the ground that while the appellant had questioned the

¹⁰ (2013) 7 SCC 226

construction of a hotel, the respondents were actually constructing a restaurant as part of the project for renovation and beautification of Manalpuram Park.

10. *The people of the State of Kerala, which is also known world over as the ‘God’s Own Country’ are very much conscious of the imperative of protecting environment and ecology in general and the water bodies, i.e., the rivers and the lakes in particular, which are integral part of their culture, heritage and an important source of livelihood. This appeal is illustrative of the continuing endeavour of the people of the State to ensure that their rivers are protected from all kinds of man made pollutions and/or other devastations.”*

The Supreme Court has in so observing allowed the Writ Petition filed by the Appellant and directed the Respondents to demolish the structure raised for establishing a restaurant as part of the renovation and beautification of Manalpuram Park at Aluva.

22. From the above decisions, it is clear that the State being a trustee on behalf of the people is enjoined to protect and preserve the natural resources which would include water bodies such as Lakes and allow the public interrupted use thereof. We find that in the present case the Respondents have failed in their duty as trustee to protect and preserve the said Lake for the benefit of the public who were entitled to uninterrupted use thereof. We find that the Respondent No. 1-Corporation has illegally constructed on the said Lake by having it filled up. We are of the view that the Respondent No. 9 State could not have granted *post facto* sanction to such illegal construction carried out by the Respondent No. 1-Corporation. There has in fact been a breach of the *post facto* sanction granted by the State Government which was for beautification of the said Lake and not for the change of user of the subject plot. We find that the State Government has failed to take action against those concerned for the illegal construction including to have the subject plot transferred back to the State. It is thus, necessary in the circumstances of the case to invoke the public

trust doctrine and protect the right of the people to the said Lake by ordering its restoration. This Public Interest Litigation must accordingly, succeed. Hence, we pass the following order:-

- (i) We order and direct the State Government and collector of Mumbai Suburban District to take over possession of the subject plot within a period of three months from today.
- (ii) We order and direct the State Government and Collector of Mumbai Suburban District to demolish the illegal construction done on the subject plot and restore the Khajuria Lake, as it existed prior to being filled up, within a period of six months from taking over of the subject plot.
- (iii) Rule is made partly absolute in the above terms with no order as to costs.

(iv) Place the Public Interest Litigation on 19th November 2018 for Directions. The State shall file Affidavit of Compliance before the next date.

[RIYAZ I. CHAGLA J.]

[ABHAY S. OKA, J.]