

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 2486 OF 2018

1. Kishor Sharad Borawake,
Age : 56 years, Occu: Agri. & Business
2. Swati Kishor Borawake,
Age : 54 years, Occu: Agri. & Business
Both R/o : At Shirdi, Tq. Rahata,
Dist. Ahmednagar. ...Petitioners

VERSUS

1. The State of Maharashtra,
Through the Urban Development Department,
Mantralaya, Mumbai 32
2. The Collector, Ahmednagar,
Dist. Ahmednagar.
3. Shirdi Nagar Panchayat,
Through its Chief Executive Officer,
Shirdi, Taluka Rahata,
Dist. Ahmednagar. ...Respondents

Mr. Amol K. Gawali, Advocate for Petitioners
Mrs. V.N. Patil Jadhav, AGP for Respondents/State
Mr. V.D. Hon, Senior Advocate with
Mr. A.V. Hon, Advocate for Respondent No. 3

WITH
WRIT PETITION NO. 3805 OF 2018

1. Vimalbai W/o Dada Bankar,
Age : 56 years, Occu: Nil,
Through its GPA Holder,
Bhaskar S/o Dada Bankar
Age : 36 years, Occu: Business,
R/o : Shirdi, Tal. Rahata,
Dist. Ahmednagar.

2. Meena Gangadhar Wagh,
Age: Major, Occu: Nil,
R/o : Shirdi, Tal: Rahata,
Dist. Ahmednagar
3. Reema Suresh Bodhak,
Age: Major, Occu: Nil,
R/o : Shirdi, Tal: Rahata,
Dist. Ahmednagar
4. Kalpana Prakash Bodhkar
Age: Major, Occu: Nil,
R/o : Shirdi, Tal: Rahata,
Dist. Ahmednagar
5. Saroj Govardhan Husale,
Age : 60 years, Occu: Nil,
R/o : Husale Hospital,
Dharangaon Road, Kopargaon,
Dist. Ahmednagar.
6. Madhura Anil Junnarkar,
Age: 51 years, Occu: Nil,
R/o : Shirdi, Tal: Rahata,
Dist. Ahmednagar
7. Santosh S/o Ramkrushna Digholkar
Age: 56 years, Occu: Nil,
R/o : Digholkar Hospital, Rahata,
Tal: Rahata, Dist. Ahmednagar
8. Kamini Anil Satav
Age: Major, Occu: Nil,
R/o : Indranagar, Sakuri,
Tal: Rahata, Dist. Ahmednagar
9. Sushila Daulat Bedre
Age: Major, Occu: Nil,
R/o : Babhaleshwar,
Tal: Rahata, Dist. Ahmednagar
10. Chhaya Madhukar Deshmukh
Age: 57 years, Occu: Nil,
R/o : Deshmukh Hospital, Chari Road,
Post : Nimgaon, Tal : Rahata,
Dist. Ahmednagar

...Petitioners

VERSUS

1. The State of Maharashtra,
Through its Principal Secretary,
Urban Development Department,
Mantralaya, Mumbai 32
 2. The Collector, Ahmednagar,
Dist. Ahmednagar.
 3. Shirdi Nagar Panchayat,
Through its Chief Executive Officer,
Shirdi, Taluka Rahata,
Dist. Ahmednagar.
 4. Shri. Kishor Sharad Borawake,
Age : 56 years, Occu: Agri. & Business,
 5. Smt. Swati Kishor Borawake,
Age: 54 years, Occu: Agri. & Business,
Both R/o : At Shirdi, Tq. Rahata,
Dist. Ahmednagar
- ...Respondents

Miss. P.S. Talekar, Advocate for Petitioners
Mrs. V.N. Patil Jadhav, AGP for Respondent Nos. 1 and 2
Mr. V.D. Hon, Senior Advocate with
Mr. A.V. Hon, Advocate for Respondent No. 3
Mr. Amol K. Gawali, Advocate for Respondent Nos. 4 and 5

**CORAM : S.V. GANGAPURWALA AND
A.M. DHAVALA, JJ.**

RESERVED ON : 30.04.2019

PRONOUNCED ON : 04.07.2019

JUDGMENT : (PER : A.M. DHAVALA, J.)

1. These petitions raise issue about the maintainability of the orders passed by Municipal Council to transfer open space and space for amenity free of cost to it and consequential taking of possession free of charge as condition for sanctioning the layout. There is delay of around 12 years in challenging the orders.

2. Heard learned Counsel Mr. Amol Gawali for the plot holders, Ms. Talekar for the original owners, Mr. V.D. Hon, Senior Counsel for Shirdi Nagar Panchayat and Mrs. V.N. Patil-Jadhav, Assistant Government Pleader for the State.

3. Rule. Rule is made, returnable forthwith. With the consent of the parties, the matters are finally heard at the admission stage.

4. Writ Petition No. 2486/2018 is filed by the original owners against the State, the Collector and the Shirdi Nagar Panchayat. Writ Petition No. 3805/2018 is filed by 10 petitioners, who have purchased various plots in the layout from the respondent Nos. 4 and 5, who are the petitioners in Writ Petition No. 2486/2018. The State, the Collector and Shirdi Nagar Panchayat are respondent Nos. 1 to 3. For the sake of convenience, the petitioners in Writ Petition No. 2486/2018 are hereinafter referred to as 'the original owners' and petitioners in Writ Petition No.3805/2018 are hereinafter referred to as 'the plot holders').

5. Learned Advocate Miss Talekar for the original owners argued as follows :-

Kishor Borawake and Swati Borawake, the petitioners, are original owners of the property bearing sub-survey No. 2, 4, 5, 7, 8, 9 of Survey No. 103 admeasuring 4 hector and 12R situated at Shirdi.

A Development Plan at Shirdi was sanctioned on 15.12.1992, wherein the above land was shown in green zone. Shirdi Nagar Panchayat on 30.09.2000, proposed a modification to the final development plan so as to convert various lands including the above referred land from green zone to residential zone. Accordingly, the proposal was forwarded to the Government on 10.01.2003. Though, there was no recommendation for delivery of 10 % open space and 10 % amenity space to the Planning Authority, the Government by notification dated 18.02.2004 sanctioned the modification of the development plan and granted permission to convert the plots from development zone to residential zone subject to the condition that 10 % open space and additional 10 % space for amenity would be transferred to the Nagar Panchayat free of cost. On 10.04.2007, the Assistant Director, Town Planning Department granted technical approval to the layout plan of the original owners. Land of 4143.24 sq. mtrs. was earmarked for amenity space. Lands of 888.75 sq. mtrs. and 3244.52 sq. mtrs. were earmarked as open spaces and land of 6035.44 sq. mtrs. was specified for road in the lay out plan. As per the Government directions, the respondent No. 3 on 18.09.2007, communicated to the original owners that the approval would be granted subject to the petitioners executing agreement to provide total land of 14311.95 sq. mtrs. to Shirdi Nagar Panchayat free of cost and execute the possession receipt. Accordingly, on

18.02.2007, the approval of lay out plan was granted on fulfilling the condition. However, the original owners continued to enjoy the possession of these amenity spaces and open spaces where they were having 100 year old trees of chickoo and others. When there was threat to their possession, they filed regular civil suit No. 374/2012 for injunction simplicitor. The application for temporary injunction came to be rejected by the trial court and the Appeal before the First Appellate Court was dismissed. The original owners thereafter amended the suit and challenged the modification dated 18.02.2004 and the agreement and possession receipt dated 18.09.2007. The original owners had filed Writ Petition No. 10777/2015 and they felt that without challenge to the notification, agreement and possession receipts, there was no use in prosecuting the Writ Petition. Hence, it was withdrawn. On 22.02.2018, the original owners received notice of Shirdi Nagar Panchayat to remove encroachment over the amenity space and open space. Hence, they filed Writ Petition No.2486/2018. The petitioners sought quashing of conditions to that effect from notification dated 18th August, 2004 and conditions in the grant of sanctioned layout by Shirdi Nagar Panchayat.

6. Learned Advocate Mr. Gawali for the petitioners in Writ Petition No. 3805/2018 argued that the petitioners have purchased various plots from the lay out from the original owners during the

period 2006 to 2009. They were attracted by the natural beauty of the spot maintained by the lush green chickoo plantation on nearly 2 acres of land left as open space and amenity space. The Government by resolution dated 23.01.2018 decided to use the open space and amenity space for construction of indoor game hall and swimming pool for the benefit of general public and the tourists. In pursuance thereto, on 22.02.2018, the Planning Authority attempted to take illegal possession of open space and amenity space. As per law, these spaces are meant for beneficial enjoyment of the plot holders and those cannot be used by the public at large. If the State Government or the Municipal Council desires to use the open space and amenity space for public purpose, they would be required to acquire the land as per the procedure prescribed and to pay compensation. The open space and amenity space of 10 % each are left as per the statutory provisions and the Planning Authorities are merely custodian of these lands. The activities of Shirdi Nagar Panchayat are contrary to Development Control Regulations. Hence, the plot holders prayed for declaration that Shirdi Nagar Panchayat is only custodian of open space and amenity space, and it was bound to ensure that those are used for the purpose for which those were reserved i.e. the beneficial enjoyment of residents of the lay out. They sought quashing of Government Resolution dated 23.01.2018 of the Shirdi Nagar Panchayat and the notice dated

22.02.2018 and to restrain Shirdi Nagar Panchayat from destroying or cutting down the trees standing on the open space and amenity space. The petitioners claim declaration that Shirdi Nagar Panchayat is only custodian of the open space and amenity space and shouldered with a responsibility to ensure such reservation are strictly adhered to without seeking change of user, which shall be for the beneficial enjoyment of the residents of the survey No. 103 and to quash and set aside the order dated 23.01.2018 of construction of swimming pool for enjoyment of the residents as well as the devotees passed by respondent No. 3 and quashing notice dated 22.02.2018 issued by respondent No. 3.

7. Learned Senior Counsel Mr. Hon relied on affidavit of its Chief Officer of Shirdi Nagar Panchayat argued that -

(i) The petitioners have suppressed material facts, and therefore, they are not entitled for discretionary reliefs under writ jurisdiction.

(ii) The petitions are filed after thirteen and half years from the notification dated 18th August, 2004, whereby the modification of final development plan was sanctioned by the Government in exercise of powers under section 37 of the Maharashtra Regional and Town Planning Act (for short 'MRTP Act'). The Writ Petitions are bad for delay and laches. The petitioners have availed the benefits under the said notification, and they are now estopped from challenging

any part of the said notification. Respondent No. 3 made a proposal as per Section 37 of the MRTP Act and by following the due procedure and after complying with the provisions of the principles of natural justice by giving opportunity of hearing to the concerned parties, the State Government had granted conditional sanction to modification of plan. There is no substance in the contention that no such conditions can be imposed by the Government. The original owner, not only agreed the terms and conditions to handover the amenity space and open space to the Shirdi Nagar Panchayat free of cost, but also entered into agreement and delivered the possession of these spaces to the Municipal Council. The plans were sanctioned on 18.09.2007 and those were not challenged till 2018. The possession of Shirdi Nagar Panchayat was challenged before the Revenue Officers and the Revenue Officer and the Appellant Authorities, upto the Commissioner consistently held that the Municipal Council was in possession. The original owners have availed the remedy of civil suit and the suit is pending and therefore, their writ petition is not tenable. The Civil Court as well as the First Appellate Court have refused to grant temporary injunction in favour of the original owner. It is denied that there were 100 year old trees on the spot. There are agricultural crop trees in the land of which the fruits are taken by the petitioners. The Municipal Council is planting 8700 trees to maintain the environmental standards. The original

owners were encroaching upon the property of Shirdi Nagar Panchayat. They were illegally allowing devotees of Sai Baba to visit the place projected as 'Sai heritage village' by charging entry fees. There are illegal activities. By resolution dated 23.01.2018, the Shirdi Nagar Panchayat decided to develop the spaces by constructing indoor Game Hall, multi-purpose hall and swimming pool for the Sai residents and devotees of Shirdi.

8. Same defence is raised by the Shirdi Nagar Panchayat in Writ Petition filed by the plot holders. Besides, the locus of the plot holders is also challenged.

9. Miss Talekar and Mr. Amol Gawali, the learned Counsel for the petitioners relied on -

- (i) ***Pt. Chet Ram Vashist (dead) by L.Rs. Vs. Municipal Corporation of Delhi AIR 1995 SC 430.***
- (ii) ***Tukaram Kana Joshi Vs. MIDC AIR 2013 AIR (SC) 565.***
- (iii) ***M/s. Delhi Rohtas Lights Railway Company Ltd. Vs. District Board, Bhojpur AIR 1993 SC 802.***
- (iv) ***Godrej and Boyce Manufacturing Company Ltd. Vs. The State of Maharashtra (2009) (5) SCC 24.***
- (v) ***State of Maharashtra Vs. Bhimashankar Sindramappa 2009 (5) Mh.L.J. 76***
- (vi) ***Pune Municipal Corporation Vs. Kausarbag Co-op. Hsg. Society (2014) 15 SCC 753.***
- (vii) ***SIEL Foods and Fertilizers Industries Vs. Union of India (2010) 5 SCC 169***

10. Mr. Hon, learned Counsel for the Nagar Panchayat relied on -

(i) ***Pune Municipal Corporation Vs. Promoters and Builders Association (2004) 10 SCC 796***

(ii) ***P.R. Narhari Rao Vs. State of Kerala 2012 (12) SCC 451***

11. We have carefully considered the submissions made by the parties and gone through the Judgments cited before us.

12. As issues raised before us, will have to be answered on the basis of true and correct purport and effect of the relevant provisions of the MRTP Act and the Development Control Regulations as applicable to Shirdi Nagar Panchayat, the same may be extracted at the first instance.

Section – 22 – Contents of development plan.

A Development plan shall generally indicate the manner in which the use of land in the area of a Planning Authority shall be regulated, and also indicate the manner in which the development of land therein shall be carried out. In particular, it shall provide so far as may be necessary for all or any of the following matters, that is to say, -

(a) Not applicable

(b) Not applicable.

(c) proposals for designation of **areas for open spaces, playgrounds, stadia, zoological garden, green belts, nature reserves, sanctuaries and dairies;**

(d) transport and **communications, such as roads,**

highways, park-ways, railways, waterways, canals and air ports including their extension and development;

(m) provisions for permission to be granted for controlling and regulating the use and development of land within the jurisdiction of a local authority (including imposition of fees, charges and premium, at such rate as may be fixed, by the State Government or the Planning Authority, from time to time, for grant of an additional Floor Space Index or for the special permissions or for the use of discretionary powers under the relevant Development Control Regulations, and also for imposition of) **conditions and restrictions in regard to the open space to be maintained about buildings, the percentage of building area for a plot,** the location, number, size, height, number of storeys and character of buildings and density of population allowed in a specified area, the use and purposes to which buildings or specified areas of land may or may not be appropriated, the sub-division of plots the discontinuance of objectionable users of land in any area in reasonable periods, parking space and loading and unloading space for any building and the sizes of projections and advertisement signs and boardings and other matters as may be considered necessary for carrying out the objects of this Act.

Section 33 – Plans for areas of Comprehensive Development -

(1) Any time after [the publication of notice regarding preparation] of draft Development plan under section 26, a Planning Authority may prepare plan or plans showing proposals for the development of an area or areas which in the opinion of the Planning Authority should be developed

or re-developed as a whole (hereinafter referred to as 'the area or areas of Comprehensive development]; and in particular such plans shall provide for -

(a) Not applicable.

(b) Not applicable.

(c) Not applicable.

(d) **open spaces, gardens, playgrounds and recreation areas.**

Section 37 – It provides for modification for final development plan.

Section 126. Acquisition of land required for public purposes specified in plans.

(1) When after the publication of a draft Regional Plan, a Development or any other plan or town planning scheme, any **land is required or reserved for any of the public purposes specified** in any plan or scheme under this Act at any time the Planning Authority, Development Authority, or as the case may be, (any Appropriate Authority may, except as otherwise provided in section 113A] [acquire the land, -

(a) by agreement by paying an amount agreed to, or

(b) in lieu of any such amount, by granting the land-owner or the lessee, subject, however, to the lessee paying the lessor or depositing with the Planning Authority, Development Authority or Appropriate Authority, as the case may be, for payment to the lessor, an amount

equivalent to the value of the lessor's interest to be determined by any of the said Authorities concerned [on the basis of the principles laid down in the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013], Floor Space Index (FSI) or Transferable Development Rights (TDR) against the area of land surrendered free of cost and free from all encumbrances, and also further additional Floor Space Index or Transferable Development also further additional Floor Space Index or construction of the amenity on the surrendered land at his cost, as the Final Development Control Regulations prepared in this behalf provide, or

(c) by making in application to the State Government for acquiring such land [under the provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013],

and the land (together with the amenity, if any, so developed or constructed) so acquired by agreement or by grant of Floor Space Index or additional Floor Space Index or Transferable Development Rights under this sections (or under the provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013] as the case may be, shall vest absolutely free from all encumbrances in the Planning Authority. Development Authority, or as the case may be, any Appropriate Authority,)

Standard Development Control and Promotions Regulations for Municipal Council Act and Nagar Panchayats in Maharashtra.

2.9 : Amenity Space :- For the purpose of these Regulations, amenity space means a statutory space kept in any layout to be used for playgrounds, sports complex, gardens, convenience shopping, parking lots, primary and secondary schools, clinics, dispensaries, nursery, health club, sub post-office, police station, electric substation. ATM of Banks, electronic cyber library, open market, garbage bin, water supply installation, electricity supply installation, sewage treatment plant and includes other utilities, services and conveniences.

2.78 : Owner :- The person who has legal title for land or building.

2.85 : Road/Street :- Any highway, street, lane, pathway, alley, stairway, passageway, carriageway, footway, square place or bridge, whether a thoroughfare or not, over which the public have a right of passage or access or have passed and had access uninterruptedly for a specified period, whether existing or proposed in any scheme and includes all bunds, channels, ditches, storm-water drains, culverts, sidewalks, traffic islands, roadside trees and hedges, retaining walls, fences, barriers and railings within the street lines.

3.1 : Applicability of Regulations :- These regulations shall apply to all development, redevelopment, erection and/or re-erection of a building, change of user etc. as well as to the design, construction or reconstruction of and additions and alteration to a building. These regulations shall also apply to any revision of the development

permissions/building permissions granted earlier under any Development Control Regulations. Further these Regulations shall apply to development work defined in Regulation No. 3.2 to 3.4.

5.0 : No person shall carry out any Development in contravention of the Development Plan proposals.

13.3. : Recreational open spaces :

13.3.1 : In any layout or subdivision or any development of land for any use/zone admeasuring 0.40 Ha. Or more after deducting D.P. Road and reservation area, if any, **10% of the entire holding area** shall be reserved as **recreational open space** which shall as far as possible be provided in one place. In case of land admeasuring more than 0.8 ha. Recreational open space may be allowed to be left at different locations in the same layout provided that the size and other dimensions conform to the provisions herein below.

In case of development of land for educational purpose, 40% of the gross area (or as decided by the Government from time to time) shall be open space. Notwithstanding anything contained in this rule, the shape and location of such open space shall be such that it can be properly utilized as playground.

Provided that, the above-mentioned area of 0.4 Ha. Or 0.8 Ha. shall be measured with reference to original holding as on 11th January 1967 and not with reference to sub-divided holding in revenue/city survey record thereafter without the permission under the Maharashtra Regional & Town Planning Act, 1966. If such sub-divided holding in

revenue/city survey record admeasures less than 0.4 Ha., then 10% open space shall be left which shall not be in any case less than 250 sq.mt.

Provided further that, in case of lands declared surplus or retainable under Urban Land (C & R) Act, 1976, if the entire retainable holding or entire surplus holding independently admeasures 0.4 Ha. or more, then 10 percent recreational open space shall be necessary in respective holding.

Provided further that, no such open space shall be necessary in case of layout or subdivision of plots from already sanctioned layout by the Planning Authority where the requisite recreational open space has already been left in the sanctioned layout.

Provided further that no such open space shall be necessary for development of the reservations in the development plants designated for the purpose **other than residential.** (N.A.) .

13.3.2 : The **owner** shall have to give an undertaking that the recreational open space shall be for the **common use of all the residents or occupants of the layout/building unit.**

(a) On sanction of the development permission, the recreational open space **shall deem to have vested** in the society/association of the residents/occupants. In case such society or association is to be formed, the possession/custody of recreational open space shall remain with the Chief Officer until such association/society is formed. **The recreational open space shall not be sold**

to any other person and it shall not be put to any other user except for the common use of residents/occupants.

(b) If the authority is convinced that there is misuse of open spaces; in such case the authority shall take over the land of recreational open space.

13.3.3 : No permission shall be granted to delete/reduce open spaces of the existing sanctioned layout/subdivision. However, while revising the layout, such recreational open space may be rearranged without decrease in area subject to minimum prescribed area under these Regulations with the consent of plot/tenement holders/co-owners; but such revision of recreational open space area shall ordinarily not be allowed after a period of 4 years from the first sanction.

13.3.4 : The open spaces shall be exclusive of location of accesses/internal roads/designations or reservations in development plan roads and areas for road widening.

13.3.5 : No such recreational open spaces shall admeasure less than 400 sq. mt.

13.3.6 : Minimum dimensions – The minimum dimensions of such recreational open spacer shall be not less than 10 m. and if the average width of such recreational open space is less than 20 m. the length thereof shall not exceed 2 ½ times the average.

13.3.7 : Such recreational open space shall also be necessary for group housing scheme or campus/cluster planning for any use/zone.

13.3.8 : If required, structure and uses which can be permitted free of FSI in the recreational open spaces shall be as under :-

- (1) There shall be two storeyed structure with maximum 15% built up area of recreational open space, out of which 10% built up area shall be allowed on ground floor and remaining 5% can be permitted on 1st floor. In case of stilt, additional floor may be allowed.
- (2) The structures used for the purpose of pavilion or gymnassia or club house or vipashyana and yoga centre or creche or kindergarten or liberty or water tank, health out post if required by the Planning Authority or other structures for the purpose of sports and recreation activity may be permitted. Convenience Shopping below pavilion facing on road on payment of premium at the rate of 10 % of the land rate in ASR with requisite side margin required for stadium may be allowed.
- (3) No detached toilet block shall be permitted.
- (4) A swimming pool may also be permitted in such a recreational open space. The ownership of such structures and other appurtenant users shall vest in all the owners on account of whose cumulative holdings, the recreational open space is requires to be kept in the layout of subdivision of the land.
- (5) The proposal for the construction of such

structure should come as a a proposal from the owner/s, owners' society/societies or federation of owners' societies and shall be meant for the beneficial use of the owners/members of such society/federation of societies.

- (6) Such structure shall not be used for any other purpose, except for recreational actaivity.
- (7) The remaining area of the recreational open space shall be kept open to sky and properly accessible to all members as a place of recreation, garden or a playground.
- (8) The owners' society/societies, the federation of the owners' a registered undertaking agreeing to the conditions in (5) to (7) above while obtaining permission for the above said construction.

The provisions for amenity space are different.

13. In the light of the above provisions, it is necessary to consider the facts of the present case.

(i) Admittedly, on 15.12.1992, development plan for Shirdi Nagar Panchayat was approved. The disputed property bearing Survey No. 103 Part admeasuring 4 hecters 12 R was shown in no development zone.

(ii) On 30.09.2000, a proposal for minor modifications converting several plots from no development zone to residential zone including the plots at Survey No. 103 was published and

objections were invited. It *inter alia* provided for reservation No. 66 on Survey No. 101, 102 and 103 (part) as 'Shri Sai Baba Sansthan Arakshan'. Similarly, the road of 15 meter width was also provided through several lands including survey No. 103.

(iii) On 4th January, 2001, a notice was issued to one of the original owners Kiran Borawake, disclosing the proposed modification and inviting objections, if any.

(iv) On 10.01.2003, Shirdi Nagar Panchayat sent to the State Government a proposal of draft modification of development plan. The proposal to the Government, however, did not provide for reservation No. 66. It provided reservation of 12 meter wide road through several lands including Survey No. 103 and the remaining land was to be converted into residential zone.

14. The above events disclose that there was no condition that open spaces and amenity spaces will have to be handed over to the Shirdi Nagar Panchayat free of cost for conversion of plan from no residential zone to residential zone.

15. On 18.08.2004, the Government issued notification and several plots from Survey No. 96, 101 to 106, 185 to 187 were converted from no development zone to residential zone, but subject to following conditions :-

(i) There should be roads of 12 meter width north-south and east west as shown in the plan and those should be transferred to Nagar Panchayat free of charge.

(ii) While granting development permission besides 10 % compulsory open space, there should be additional 10 % amenity space provided and should be transferred to Shirdi Nagar Panchayat free of charge. The notification of the Government did not disclose the nature of amenity to be carried out on the 10% amenity spaces to be reserved in addition to compulsory acquisition of 10% for open space.

16. On 18.01.2006, the original owners sought permission for development of the plot and town planning Authority granted permission dated 10.03.2006 on the terms and conditions as shown above and as shown therein

The relevant terms are as follows :-

4) As shown in the proposed layout, no construction should be carried out on the open space and the said space should be **kept open for the benefit of the plot holders**. Such open space shall be transferred to the Shirdi Nagar Panchayat within one year as open space.

5) Layout roads, drainage lines shall be constructed by the owner at

own cost and these with open spaces and amenity plots shall be handed over to the Nagar Panchayat. Public roads should be kept open for all. It is silent regarding the nature of use to be carried on the amenity space.

(ii) The Collector, by order dated 17.06.2006 granted N.A. permission subject to the terms and conditions stated therein.

The relevant terms are as follows :-

Clause 6/ 29 : On the said land, there should be construction of drainage lines, internal roads and connected roads and those should be handed over to the local authority and till then, the plots shall not be sold.

Clause 15 : In the layout map, the space shown as open space should be kept permanently open and it should be developed and handed over to local authority.

17. On 27.03.2006, one of the original owners Kishor Borawake for himself and as power of attorney for others executed agreement with Shirdi Nagar Panchayat. whereby he handed over 5 internal roads occupying area of 7560 sq.mt. open space of 4133.75 sq. mt. and amenity space of 4126.50 sq.mt. to the Shirdi Nagar Panchayat and gave no objection for recording the name of Nagar Panchayat as owner thereof.

18. On 12.01.2007, final sanction was granted to the layout by

Shirdi Nagar Panchayat subject to the terms and conditions stated therein. Again condition No. 13 provided that the open spaces from the layout should be handed over to Nagar Panchayat free of charge.

19. On 10.04.2007, the Town Planning Authority issued letter to the Shirdi Nagar Panchayat recommending sanction to the layout subject to the terms and conditions as referred above. Sanctioned layout shows amenity space and open space separately provided by the side of space provided for parking and garden. The total land area was 41200 sq.mtr. (60.93X68 sq.mtr.). Amenity space is 4143.24 sq.mtr. open space 3244.52 sq. mt. (60.93 X 53.25 mtrs.) and space of 888.75 sq.mtrs. total 4133.27 sq.mtr. On 18.09.2007, the original owners again executed agreement and handed over the above referred open space, amenity space and roads to the Shirdi Nagar Panchayat free of cost and also executed separate possession receipt. Accordingly, mutations were effected in the revenue record. These mutations were challenged, but were not set aside.

20. The plot holders have produced copy of sale deed dated 23.01.2007 in favour of the petitioner No.1 Vimaltai Bankar in Writ Petition No. 3805/2018. The pleadings disclosed that the plots were purchased during the year 2006 to 2009, but no sale deed has been

produced of any date prior to the handing over possession by the original owners to the Municipal Council.

21. Though the possession receipts are issued, it is seen that there are large number of chikoo trees and garden type infrastructure for children. The contention that there are existing trees for the period of 100 years is not much relevant and cannot be believed. It is also seen that the plot holders have carried out constructions and developed 'Sai Heritage Village' and it is alleged that the devotees and tourists are entertained by charging fees.

22. When the Planning Authority made modification in the plan, the plot in question was converted from no development zone to residential zone. Shirdi Nagar Panchayat is notified as Nagar Panchayat. The Standardized Development Control Regulations for Municipal Council and Nagar Panchayats in Maharashtra are applicable to these lay outs and the construction activities therein and those are mandatory for all the parties.

23. The provisions for open spaces are different than the provisions for recreational space the Regulations 13.3.1 deals with recreational open spaces and clause 13.3.11 deals with amenities space. The Rules specifically provide that the land shall be provided for open space and amenity space as provided in Clause 13.3.1 to 13.3.11.

24. Clause 13.3.2 clearly lays down that the open space shall be used for the purpose of common **use of all the residents** or occupants of the layout/building unit. Sub clause (b) of clause 13.3.2 authorizes the authority to take over the land of recreational open space if convinced that there is misuse of the same. The possession/custody shall remain with the Chief Officer until society is formed. The recreational open space shall not be sold to any other person and it shall not be put to any other user except for the common use of residents/occupants. Clause 13.3.8 Sub-Rule (1) (2) and (4) provide for the purpose of construction of pavilion, gymnasium or club house or vipashyana and yoga centre or crèche or kindergarten or library or water tank, health centre and construction of swimming pool thereon, but the same can be done if the owner or owners society of the plots make a proposal to that effect. It is obvious that when the open space is to be used exclusively for the common use of plot holders, Shirdi Nagar Panchayat cannot construct structures or swimming pool on the same for the common use of the general public.

25. In the case of ***Pt. Chet Ram Vasist Vs. Municipal Corporation, Delhi AIR 1995 SC 430***, it is laid down that -

(A) There is no provision in this chapter or any other provision in the Act which provides that any **space**

reserved for any open space or park shall vest in the Corporation. Even a private street can be declared to be a public on the request of owners of the building and then only it vests in the Corporation. In absence of any provision, therefore, in the Act the open space left for school or part in a private colony cannot vest in the Corporation.

(B) Section 313 which empowers the Commissioner to sanction a lay-out plan, does not contemplate vesting of the land earmarked for a public purpose to vest in the Corporation or to be transferred to it. The requirement in law of requiring an owner to reserve any site for any street, open space, park, recreation ground, school, market or any other public purpose is not the same as to claim that the open space or park so earmarked shall vest in the Corporation or stand transferred to it. Even a plain reading of sub-section (5) indicates that the land which is subject-matter of a lay-out plan cannot be dealt with by the owner except in conformity with the order of the Standing Committee. In other words the Section imposes a bar on exercise of power by the owner in respect of land covered by the lay-out plan. But it does not create any right or interest in the Corporation in the land so specified. **The resolution of the Standing Committee, therefore, that the area specified in the lay-out plan for the park and school shall vest in the Corporation free of cost, was not in accordance with law.**

The High Court held that such condition did allow to transfer, but it was only transfer of right of management. The Apex

Court did not accept it. However, considering the facts that no objections were raised by the Appellant for one year and he proceeded to sell and transfer the land and the suit was filed after one year and the Corporation was exercising right over the land for about 25 years, in the circumstances, the Apex Court modified the order and held that the Corporation shall have right to manage the land which was earmarked for school and park. The Corporation shall not have any right to change the user of land, which shall be for beneficial enjoyment of the residents of the colony. It was left open to the Corporation to get the land transferred in its favour after paying the market price as prevalent on the date when the sanction to the layout plan was accorded.

26. In the ***State of Maharashtra Vs. Bhimashankar Sindramappa Chippa 2009 (5) Mh.L.J. 76***, the similar issue was raised. The suit land was reserved for playground and the same was acquired by the Government of Maharashtra at the instance of Solapur Municipal Corporation for establishment of the market. In the acquisition proceeding, the Land Acquisition Officer awarded compensation of Rs.1/- to the claimant. The Civil Judge, Senior Division, Solapur awarded compensation of Rs. 5,80,244/- plus interest. Relying on *Pt. Chet Ram Vasistha's case, (supra)*, it was held that Land Acquisition Officer erred in holding that the land stood vested and transferred to Municipal Corporation without payment of

price and the reference Court erred in wrongly deducting 50% development expenses. Accordingly, the appeal was allowed.

27. In the case of **Vrajlal Jinabhai Patel Vs. State of Maharashtra 2003 (3) Mh.L.J. 215**, again similar claim was made by the Jalgaon Municipal Council. It was observed as under :-

7. Rule 14 appears to have been framed in furtherance of section 183 of the Act which relates to laying out or making of a new streets. It nowhere provides for the open spaces. Therefore, the power, if any, of acquiring the land under the streets is only contemplated under section 183. Acquisition of open spaces is not contemplated under section 183. Rule 14.3 which is a delegated legislation cannot, confer a power of acquisition of the open space under the lay out. Under Article 300-A of the Constitution of India, no person shall be deprived of his property save by authority of law. The authority of law means by or under any law made by a competent legislature. No law made by the legislature was shown to us under which the ownership in the open space could be vested or transferred to the Municipal Council whether by payment of compensation of Re.1/- or otherwise. In the circumstances, we reject their alternative contention of Shri. Joshi that the open space under the layout would be vested in the Municipality on payment of compensation of Re.1/-

28. We thus find that the transfer of open space and amenity space by the original owners to the Shirdi Nagar Panchayat in view

of the condition laid down for grant of sanction for development is illegal and unsustainable.

29. The Development Regulations referred herein clearly lay down that the open spaces are to be provided for the beneficial enjoyment of the plot holders. There is deeming provisions under which the Society or the plot holders become owners of the open spaces. Those can be used for any purpose except those which are required to be kept open.

30. The rules provide for construction of structures of 10% on the ground floor of open space and 5% on the first floor of the structure for yoga centre, pavilion or gymnasium or club or vipashyana or kindergarten or library or water tank. Similarly, swimming pool can be constructed. But these constructions on open spaces are at the discretion of the plot holders and not against their wish. These structures obviously can be meant for the exclusive use of the plot holders and not for the general public.

31. Even the plot holders have no right to use open space and amenity space for any purpose other than as provided in the Regulations referred herein above. If there is misuse of open space, clause 13.3.2(b) authorizes the authority to take over the land or recreational open space. Such taking over shall be always from the management for the purpose of common enjoyment of the plot

holders. It cannot be vesting of title of ownership of the plot in the local authority.

32. It is certain that when the original owners have got the layout sanctioned and sold plots, they will have no claim over the open spaces. The open space shall belong to all the plot holders. We therefore, find that the Writ Petition No. 2486/2018 in respect of open spaces filed by the original owners is not even otherwise maintainable. They have executed agreement and possession receipts and handed over the open space and amenity space and the street to the Shirdi Nagar Panchayat. Thereafter, they did not take any steps for almost 12 years and they filed Writ Petition on 26.02.2018. If the original owners have sold all the plots, they do not have any interest in the open space. Besides, they have filed a Civil Suit and it is still pending.

33. As far as amenity space is concerned, it is governed by Rule 2.9 read with section 13.3.10 and 13.3.11. 13.3.10 is applicable to industrial zone and is not relevant in the present matter.

34. 13.3.11 reads as under :-

13.3.11 : Amenities for layouts of larger areas in Residential Zone :-

For layouts admeasuring more than 2.0 Ha. **Provision of 5%** of the total area shall be made for **amenity space** in the layout for purposes such as defined in Regulation No. 2.9

or as approved by the Chief Officer. The area defined in Regulation No. 2.9 or as approved by the Chief Officer. The area earmarked for such amenities **shall be developed for the same purpose.**

Provided that such amenity space shall not be required in case of permission governed under Regulation No. 22.4.2.1(v).

Provided further that where provision in the Regional Plan or Zone Plan or any other plan has a provision of amenity space more than what is stipulated in this regulation, then amenity space as required under such plan shall prevail and in that case amenity space as per this regulation shall not be required.

35. On carefully reading the provisions of Development Building Bye-Laws and Development Control Rules, the provisions of section 13.3.2 to 13.3.8 are not applicable to the reservations for amenity space under Rule 13.3.11.

36. Clause 2.9 provides that amenity space means statutory space kept in any layout to be used for any of the amenities such as open spaces, parks, recreational grounds, playgrounds, sports complex, gardens, convenience shopping, parking lots, primary and secondary schools, clinics, dispensaries, nursery, health club, sub post-office, police station, electric substations, ATM of Banks, electronic cyber library, open market, garbage bin, water supply installation, sewage treatment plant and includes other utilities,

services and conveniences.

37. The purposes for which the amenity space can be used indicate that the same can be used for plot holders as well as for common public. In the circumstances, the amenity space shall belong to the original owner.

38. However, it is clear that the amenity space cannot be used for any purpose except for the purpose earmarked or for the purposes under Rule 2.9. Neither the original owner nor the plot holders, nor the municipality can change the user of the amenity space. If the amenity space is taken in possession by the Municipal Council under agreement and by way of possession receipt, the possession of Municipal Council will be only as and by way of trust and it shall be for the management of the premises. The Municipal Council cannot become owner of the premises. If the amenity space is going to be used for the purpose of plot holders, then the Municipal Council is not required to acquire it, but if It is to be used for common public, it must be acquired and then only it can be developed for use of common public. The plan of Municipal Council to construct swimming pool, indoor game hall, multi purpose hall for the residents as well as for the Sai devotees cannot be carried further without acquisition of the amenity space. As far as swimming pool or gymnasia or other structures, permissible under clause

13.3(a) are concerned, those can be carried out in open space if the plot holders consent for the same, but those shall be for the exclusive use of the plot holders.

39. On the point of delay, the Counsel have relied on the following Judgments :-

(i) The petitioners relied on ***Tukaram Kana Joshi Vs. MIDC AIR 2013 AIR (SC) 565***. In this case, 9500 sq.mtr. land owned by predecessor in interest of the appellants was taken by the Government on 06.06.1964 for Ulhas Khore Project for industrial development. The possession was also taken in 1964. Similarly situated other persons were granted compensation in 1966. Modification under section 4 of the Land Acquisition Act in respect of the lands of the appellants was published in 1981, but no notice under section 6 was published. Meanwhile, the Development Corporation in 1988 handed over the possession to CIDCO. The appellants reportedly approached the various authorities for compensation and ultimately, in 2009, they filed the Writ Petition. The Apex Court observed as under :-

7. The right to property is now considered to be, not only a constitutional or a statutory right, but also a human right. Though, it is not a basic feature of the Constitution or a fundamental right. Human rights are considered to be in realm of individual rights, such as the right to health, the

right to livelihood, the right to shelter and employment etc. Now however, human rights are gaining an even greater multi faceted dimension. The right to property is considered, very much to be a part of such new dimension.

10. The State, especially a welfare State which is governed by the Rule of Law, cannot arrogate itself to a status beyond one that is provided by the Constitution. Our Constitution is an organic and flexible one. Delay and laches is adopted as a mode of discretion to decline exercise of jurisdiction to grant relief. There is another facet. The Court is required to exercise judicial discretion. The said discretion is dependent on facts and circumstances of the cases. Delay and laches is one of the facets to deny exercise of discretion. It is not an absolute impediment. There can be mitigating factors, continuity of cause action, etc. That apart, if whole thing shocks the judicial conscience, then the Court should exercise the discretion more so, when no third party interest is involved. Thus analyzed, the petition is not hit by the doctrine of delay and laches as the same is not a constitutional limitation, the cause of action is continuous and further the situation certainly shocks judicial conscience.

Ultimately, the Government agreed to issue notification under section 4 and 6 and pass order of compensation and the matter was disposed of on admissions.

40. In ***M/s. Delhi Rohtas Lights Railway Company Ltd. Vs.***

District Board, Bhojpur AIR 1993 SC 802, it is mentioned that by way of unregistered agreement, the Appellant Company agreed in 1953 to pay fix amount on Rs. 10,000/- per annum to the District Board, Bhojpur towards State as a lessee of the land acquired for laying down railway line. In 1967, the Collector made a demand for cess of Rs. 9,86,809/- claiming that State was not bound by the unregistered agreement. The Company filed a suit to enforce the agreement. It was dismissed and the First Appeal before the High Court was also dismissed. Civil Appeal is directed against this judgment of the High Court. It was observed that though it is true that appellant could have even by constituting the suit agitated question of legality of the demand and claimed revenue in respect of the earlier years. But failure to do so, by itself in the circumstances and the case, does not disentitle him from the remedies open under the law. It is observed as follows :-

13. The Rule which says that the Court may not enquire into belated and stale claim is not a rule of law but a rule of practice based on sound and proper exercise of discretion. Each case must depend upon its on facts. It will all depend on what the breach of the fundamental right and the remedy claimed are and how the delay arose. The principle on which the relief to the party on the grounds of laches or delay is denied that the rights which have accrued to others by reason of the delay in filing the petition should not be allowed to be disturbed

unless there is reasonable explanation for the delay. The real test to determine delay in such cases is that the petitioner should come to the writ Court before a parallel right is created and that the lapse of time is not attributable to any laches or negligence. The test is not to physical running of time. Where the circumstances justifying the conduct exists, the illegality which is manifest cannot be sustained on the sole ground of laches. The delay is condoned.

41. In ***P.R. Narhari Rao Vs. State of Kerala (2012) 12 SCC 451***, respondent No. 6 as Managing Director of respondent No. 7 availed the loan of Rs. 5.00 crores from the Tourism Finance Corporation of India for construction of Three Star Hotel on the land belonging to him and claimed exemption under the Kerala Municipal Corporation and Building Rules. The Competent Authority granted the exemption from 1991 to 1996. The appellant is nephew of respondent No. 6. He filed a suit in 1995 claiming damages of Rs. 25,000/- for the loss sustained due to construction of compound wall and for perpetual and mandatory injunction. The Court Commissioner was appointed. His report was not favourable to the appellant. He filed Writ Petition challenging the provisions of Kerala Municipality Act and Municipal Corporation Act under Article 14 as ultra vires and for acquiring the free exemptions. The appellant continued to prosecute the suit. The High Court did not find any significant violation of the statutory provisions in the construction of

building, yet in the concluding portion of the impugned order, it made an observation about some construction having been made in violation of the exemption orders, and hence, fine of Rs. 1,00,000/- was imposed on the respondent Nos. 6 and 7. In this context, it was observed -

8. The parameters for exercise of jurisdiction by the superior courts in public interest matters have been succinctly laid down in the recent judgment in *State of Uttaranchal v. Balwant Singh Chaufal* and, in our considered view, the appellant cannot, by any stretch of imagination, be treated as a person pursuing remedy under Article 226 in public interest. It was plain and simple a province interest. It was plain and simple a private interest litigation camouflaged as public interest litigation.

It was observed that a suit to challenge exemption under 1990 would have been barred by limitation, and therefore, the writ petition could not have been entertained. The reliance was placed on ***State of M.P. Vs. Bhailal Bhai AIR 1964 SC 1006***.

42. In the present case, we find that though possession receipt is issued by original owners and probably before selling the plots as per the conditions in the sanction order, the plot holders were not aware of such transactions and it appears that the Shirdi Nagar Panchayat was not in *de facto* possession of the open space and amenity space. The plot holders were enjoying possession of the

same. The Government and Shirdi Nagar Panchayat had no right to impose the conditions to transfer the open space and amenity space free of cost and the original owner must have done it under duress in order to get permission for development of the property. The plot holders, who are deemed owners of open space were not parties to the agreement. In the light of these facts, we find that the delay or laches should not affect the rights of the plot holders to enjoy the possession of open space as per the statute.

43. In ***Raju S. Jethmalani Vs. State of Maharashtra (2005) 11 SCC 222***, the Government at the instance of the Planning Authority and Municipal Corporation, Pune declared that they were unable to acquire the plot of land reserved for garden. This was challenged with contention that land earmarked for garden to promote environmental exigencies cannot be dereserved to defeat the public purpose. It was held that since the Municipal Corporation expressed inability to acquire the land because of lack of funds, the original owner cannot be deprived of use of the land, but time of six months was given for Municipal Corporation to take decision for acquisition.

44. In ***Sarvajanik Shri Ganeshotsav Mandal Vs. Municipal Corporation of Greater Mumbai 2006 (4) Mh. L.J. 207***, the plot was reserved for play ground. The Municipal Corporation decided to

develop it for combined use of park, swimming pool, sports complex. It was held that the Municipal Corporation was in possession of the land on caretaker basis for construction, management and maintenance vide agreement. It was held that change of user of subject plot reserved for playground into swimming pool/sports complex was against public interest and grossly illegal. Entrustment of the plot land with respondent No. 3 – Chhatrapati Shivaji Maharaj Smarak Samiti was held illegal and *ultra vires* and Municipal Corporation was directed to take possession along with swimming pool and other subjects.

45. The Municipal Corporation and the Government should act like welfare bodies and cannot take away property of individuals illegally. The transfer is illegal and *ultra vires* as referred in above Judgments, and therefore, delay on the part of the original owners in filing the Writ Petition cannot come in way for getting reliefs in respect of the amenity space, which is their individual property and it cannot be taken away by the Government or the Municipal Corporation without following the procedure of acquisition. The objections raised by the petitioners against the Municipal Council with respect to amenity space deserve to be upheld.

46. The petitioners relied on the Judgment in ***SIEL foods and fertilizers Vs. Union of India (2010) 5 SCC 169***. This is in totally

different set of facts. In public interest litigation in *M. C. Mehta Vs. Union*, the Apex Court issued directions to shift the hazardous industries from Delhi to outside Delhi. The Delhi Development Authority was directed to frame suitable schemes for utilization of the land available after relocation of hazardous industries from Delhi. The issue was to how much extent, the industries would be entitled for the vacated land. The Judgment is not interpreting any provisions of law, but explaining the directions issued by the Apex Court, hence, it is not relevant.

47. Miss Talekar relied on ***Pune Municipal Corporation Vs. Kausarbag Co-op. Hsg. Society (2014) 15 SCC 753*** wherein the point involved was about applicability of 126 (1) (c) to the land acquired under the Act, it was held that sub-clause (c) of Section 126 (1) of MRTP Act providing for claiming FSI by giving land free of charge would be applicable even to the acquisition under other Acts. This is not relevant in the present case.

48. In ***Godrej and Boyce Manufacturing Company Ltd. Vs. The State of Maharashtra (2009) (5) SCC 24***, the issue was whether the Transferable Development Rights (TDR) would be available to the land developed in addition to the TDR for the land acquired and it was held that as per the provisions of section 126 (1) (c) of the MRTP Act read with Regulation 34, the owner is entitled

for 100 % TDR for the bare land + additional FSI equal to the land developed even for construction of road. It was held that the said provision gives unfair advantage to the owner, still administrative instructions will not change the legal position and the law will have to be amended. It has also no relevancy to the facts of the present case.

49. In ***Surendra Ramlal Tiwari Vs. State of Maharashtra 2013 (1) Bom. C.R. 744***, it was held that there is no justification to deviate from final development plan to transfer public property to private hands interested in earning monetary profits by running restaurants. Playground reserved in development plan can be used for benefit of all school going children in BVB school as well as children from the said area.

50. In the light of these findings, we proceed to pass following order :-

- (i) Writ Petition No. 2486/2018 is partly allowed.
- (ii) The condition No. 2 in the notification dated 18th August, 2004 and condition No. 14 in the sanctioned order of layout with respect to open space and amenity space are set aside.
- (iii) It is held that possession of the open space shall remain with the Municipal Council on behalf of the plot holders for the purpose of management of the same. The original owner is entitled to get possession of the amenity space unless it is acquired by the Municipal Council.

- (iv) Writ Petition No. 3805/2018 (filed by the plot holders) is allowed in terms of prayer clause A and B.
- (v) It is declared that respondent No. 3 is only a custodian of the open space for the management of the same for the purposes for which those can be used and respondent No. 3 is restrained from changing the user of the land of open space and amenity space except for the beneficial enjoyment of residential plot holders/ petitioners.
- (vi) The resolution dated 23.01.2018 of the Municipal Council is quashed to the extent of the construction of indoor game hall, Multi-purpose meeting hall and swimming pool on open space/amenity space and held that amenity space can be used for public purpose as per DCR Rules subject to acquisition of the same by the respondent. The resolution is not quashed in respect of removal of encroachments.
- (vii) The notice dated 22.02.2018 issued to the original owners is quashed to the extent of claim of the Shirdi Nagar Panchayat as owner of the open space and amenity space. If there is encroachment, the Municipality is at liberty to exercise the power under section 13.3.2 (b).
- (viii) The Rule is partly made absolute in both the Writ Petitions in above terms.
- (ix) No order as to costs.
- (x) Civil Application if any, stands disposed of.

[A. M. DHAVAL]
JUDGE

[S. V. GANGAPURWALA]
JUDGE

At this stage, the learned advocate for the Municipal Council seeks stay of the present Judgment for a period of four (04) weeks.

2. The present Judgment is stayed for a period of Four (04) weeks, however, status quo shall be maintained of the writ property by all parties till then. Needless to state on lapse of Four weeks, present order shall come to an end.

[A. M. DHAVALA]
JUDGE

[S. V. GANGAPURWALA]
JUDGE

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