

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

WRIT PETITION NO. 10622 OF 2019

1. Mahendra Ajayraj Kothari
Age: 63 years, Occu. Business & Agriculture,
R/o: Saurabh Jewellers, Sarafa Bajar, Jalgaon
2. Sau. Nathidevi Pravinchandra Jain
Age: 53 years, Occu. Household,
R/o: Jilha Peth, Jalgaon, District Jalgaon
3. Sau. Kamladevi Prasannachand Jain
Age: 52 years, Occu. Household,
R/o: Jilha Peth, Jalgaon,
Dist. Jalgaon
4. Sau. Pushpadevi Gyanchand Ostwal
Age: 75 years, Occu. Household,
R/o: Jilha Peth, Jalgaon,
Dist. Jalgaon
5. Sau. Vinoddevi Padamchand Nahar
Age: 60 years, Occu. Household,
R/o: 99, Sarafa Bajar, Jalgaon
Petitioner Nos. 2 to 5
through their General Power of
Attorney Holder i.e. Petitioner No.1 ... PETITIONERS

Versus

1. The State of Maharashtra
Through the Secretary
Ministry of Urban Development
Mantralaya, Mumbai-32
2. The Director of Town Planning Department
Pune
3. The Deputy Director,
Town Planning, Nashik Division,
Nashik

4. Assistant Director,
Town Planning Department,
Jalgaon
5. Municipal Corporation, Jalgaon
Through its Commissioner
6. Assistant Director, Town Planning,
Municipal Corporation, Jalgaon
Jalgaon

... RESPONDENTS

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Shri A. P. Bhandari, Advocate for petitioners
Smt. Geeta L. Deshpande, AGP for respondents No.1 to 4
Shri S. H. Tripathi, Advocate for respondent No.5
Respondent No.6 served

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**CORAM : SUNIL P. DESHMUKH AND
R. G. AVACHAT, JJ.**

DATED : 08th DECEMBER, 2020

JUDGMENT (Per: R. G. AVACHAT, J.) :-

1. Rule. Rule made returnable forthwith and heard finally with consent of learned counsel for the parties.

2. The petitioners claim to be owners of land, being Survey No.327/2/6 admeasuring 93 R, situated at Shivar Jalgaon city, taluka and district Jalgaon. 1700 square meters of land in Survey No.327/2/6 has been reserved for a playground in development plan of Municipal Corporation, Jalgaon (for short 'Corporation'), that came into force on 01-10-2004. The

petitioners therefore could not develop the land under reservation. Respondent No.5 - Corporation, Jalgaon, neither acquired the land under reservation nor has taken any steps for its acquisition. The petitioners, therefore issued the Corporation, a notice under Section 127 of the Maharashtra Regional and Town Planning Act, 1966 (for short 'the Act of 1966) on 28-02-2017. The Corporation offered the petitioners Transfer of Development Rights (TDR) as a consideration for proposed acquisition of the land under reservation. The petitioners did not accept the offer. Since the Corporation did not comply with the mandate of Section 127 of the Act of 1966, the petitioners have filed the present petition for a relief of declaration that the land under reservation did stand released and has become available for the petitioners for the development as otherwise permissible in the case of adjacent land under the relevant plan.

3. Shri A. P. Bhandari, learned Advocate for the petitioners made submissions reiterating the averments in the petition.

4. Shri S. S. Tripathi, learned Advocate for the Corporation would on the other hand submit that the land has been reserved for playground. He meant to say that the land

under reservation would remain an open land for all the time to come. He has relied on a judgment of the Hon'ble Apex Court in the case of *Municipal Corporation of Greater Mumbai Vs. Hiranman Sitaram Deorukhkar and ors.*, reported in *2017 SCC OnLine 1739*. The learned Advocate, ultimately, urged for rejection of the writ petition.

5. Admittedly, the land Survey No.327/2/6 belonged to the petitioners. 1700 Square meters of land forming part of Survey No.327/2/6 has been reserved for a playground in a development plan of Jalgaon city, that came into force on 01-10-2004. It has been 16 years since the land has been reserved in the development plan. The Corporation did not acquire the land nor has taken any steps towards acquisition of the land under the reservation. The petitioners therefore issued the Corporation, notice under Section 127 of the Act of 1966. The Corporation in turn offered the petitioners TDR in lieu of monetary compensation. The petitioners did not accept the offer.

6. Section 127 of the Act of 1966 reads thus:

“127. Lapsing of reservations

[(1)] If any land reserved, allotted or designated for any purpose specified in any plan under this Act is not acquired by

agreement with ten years from the date on which a final Regional plan, or final Development plan comes into force [or, if a declaration under sub section (2) or (4) of section 126 is not published in the Official Gazette within such period, the owner or any person interested in the land may serve notice, alongwith the documents showing his title or interest in the said land, on the Planning Authority, the Development Authority or, as the case may be, the Appropriate Authority to that effect; and if within [twenty-four months] from the date of the service of such notice, the land is not acquired or no steps as aforesaid are commenced for its acquisition, the reservation, allotment or designation shall be deemed to have lapsed, and thereupon the land shall be deemed to be released from such reservation, allotment or designation and shall become available to the owner for the purpose of development as otherwise, permissible in the case of adjacent land under the relevant plan.

[(2)] On lapsing of reservation, allocation or designation of any land under sub-section (1), the Government shall notify the same, by an order published in the Official Gazette.]”

7. Since the Corporation has not complied with the provisions of Section 127 of the Act of 1966, in spite of having been in receipt of the notice issued thereunder by the petitioners, the land under reservation shall be deemed to have been released from such reservation and has become available to the petitioners for the purpose of development as otherwise permissible in the case of adjacent land under the relevant plan. The State Government shall notify the same, by an order published in the official gazette.

8. The Apex Court, in the case of *Municipal Corporation of Greater Mumbai* (supra) has observed thus :

“ This court has laid down that public interest requires some areas to be preserved by means of open spaces of parks and play grounds, and that there cannot be any change or action contrary to legislative intent, as that would be an abuse of statutory powers vested in the authorities. Once the area had been reserved, authorities are bound to take steps to preserve it in that method and manner only. These spaces are meant for the common man, and there is a duty cast upon the authorities to preserve such spaces. Such matters are of great public concern and vital interest to be taken care of in the development scheme. The public interest requires not only reservation but also preservation of such parks and open spaces. In our opinion, such spaces cannot be permitted, by an action or inaction or otherwise, to be converted for some other purpose, and no development contrary to plan can be permitted.

The importance of open spaces for parks and play grounds is of universal recognition, and reservation for such places in development scheme is a legitimate exercise of statutory power, with the rationale of protection of the environment and of reducing ill effects of urbanisation. It is in the public interest to avoid unnecessary conversion of ‘open spaces land’ to strictly urban uses, for gardens provide fresh air, thereby protecting against the resultant impacts of urbanization, such as pollution etc. Once such a scheme had been prepared in accordance with the provisions of the MRTP Act, by inaction legislative intent could not be permitted to become a statutory mockery. Government authorities and officers were bound to preserve it and to take all steps envisaged for protection.

It could be legitimately expected of the authority to take timely steps in which they have failed. Their inaction tantamount to wrongful deprivation of open spaces/garden to public.”

9. The Apex Court has further observed as under :-

“ As a matter of fact, Authorities ought to have issued forthwith a requisite declaration and ought to have completed the proceedings. Be that as it may, since there is lapse of reservation, and the land is still required for public park, and since now the provisions of Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (in short ‘the 2013 Act’) have come into force, obviously the compensation has to be paid in accordance with the provisions contained in the said Act. In the circumstances, we direct that the land shall continue to be reserved and to be used for the public garden. However, the compensation shall be determined and paid in accordance with the principles laid down in the 2013 Act.”

10. The Division Bench of this Court in the case of **Satish Prakash Rohra and ors. Vs. Municipal Corporation of Greater Mumbai and ors.**, MANU/MH/2520/2018, considered the aforesaid judgment of the Apex Court and observed as under:-

23. We have carefully perused the decision of the Apex Court. On page 10 of the said decision, the Apex Court has held thus:-

“It cannot be disputed that reservation made under section 127 of the MRTTP Act stands lapsed. At the same time area had been reserved for garden.”

(emphasis supplied)

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25. careful perusal of the decision of the Apex Court shows that the finding of this Court that the reservation had lapsed has been affirmed and in fact, the Apex Court has held that it cannot be disputed that the reservation has lapsed. However, after finding that the reservation of the subject land was necessary for a public park, a direction has been issued by the Apex Court to acquire the said land by paying compensation in accordance with new Land Acquisition Land. After holding that the reservation has lapsed, the aforesaid direction has been issued by the Apex Court in exercise of its plenary powers under Article 142 of the Constitution of India. The decision of the Apex Court in the case of Girnar Traders(2) (supra) and Shrirampur Municipal Corporation (supra) are of larger Benches. Therefore, we are unable to issue the same directions which are issued by the Apex Court. As observed earlier, the directions have been issued in exercise of power under Article 142 of the Constitution of India. There is no more reason why we have held that the said direction was in exercise of the power under Article 142. The day on which the judgment in the case of Deorukhkar was delivered, Special Leave Petitions arising out of the judgments of this Court in these two petitions were disposed of by the same Bench by passing an order of remand. Though the facts of these two cases were similar, the Apex Court has not chosen to issue similar directions in these two cases.

26. Notwithstanding the lapsing of reservation, the respondents can always acquire the land subject matter of these two petitions by taking recourse to the new Land Acquisition Act, though the provisions of sections 125 and 126 of the M.R.T.P. Act will not be available for such acquisition in view of lapsing of the reservations. Therefore, while acceding to the prayer made by the petitioners, we propose to grant time of one year to the State Government to acquire the subject lands by directing that for the said period, the petitioner shall not carry on any development. In fact, in both the Writ Petitions, there is a statement made on oath by the petitioner without prejudice to the other contentions by the petitioners that if compensation as stated in the affidavit is paid within the reasonable period of six months, they have no objection for acquisition of the subject lands.”

11. In view of the above, the writ petition is allowed in terms of the following order:

- (a) Reservation of the land to the extent of 1700 square meter forming part of the land in Survey No.327/2/6 situated in Jalgaon city stands lapsed.
- (b) The petitioners, however, shall not perform any development activity on the said land for a period of one year.
- (c) The Corporation is entitled to acquire the said land in accordance with law.
- (d) In case of failure on the part of the Municipal Corporation to acquire the said land within a period of one year from 01-01-2021, the land will be available to the petitioners for purpose of development as otherwise permissible in the case of adjacent land under the relevant plan.

(e) Respondent No.1 shall notify the lapsing of reservation by an order published in the official gazette.

(f) Rule is made absolute accordingly.

[R. G. AVACHAT, J.]

[SUNIL P. DESHMUKH, J.]

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