

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 9934 OF 2016

Syyed Haji Hammid Takiya Trust,
Through its President :-
Syyed Sabir Ali S/o Syyed Mansoor Ali,
Age : 48 years,
Occupation : Agriculture and Business,
R/o Sattar Haji Hamid Takiya,
Hamid Nagar, Civil HUDCO,
Savedi, Ahmednagar,
Taluka and District Ahmednagar

.. Petitioner

VERSUS

- 1] The State of Maharashtra
(Through its Principal Secretary),
Urban Development Department,
Mantralaya, Mumbai-32.
- 2] The Director of Town Planning,
Maharashtra State,
Pune
- 3] The Ahmednagar Municipal Corporation,
Ahmednagar
(Through its Commissioner)
- 4] The Assistant Director of Town Planning,
Opposite to TV Centre,
Savedi, Ahmednagar
- 5] The Town Planner,
Ahmednagar Municipal Corporation,
Ahmednagar
- 6] The Collector, Ahmednagar

.. Respondents

**WITH
WRIT PETITION NO. 7986 OF 2017**

Sayyed Haji Hammid Takiya Trust,
(Through it's President)
Sayyed Sabirali S/o Sayyed Mansoorali,
Age : 49 years,
Occupation : Agriculture and Business,
R/o Satta Haji Hammid Takiya,
Hammid Nagar, HUDCO, Savedi,
Ahmednagar

.. Petitioner

VERSUS

- 1] The State of Maharashtra
(Through its Principal Secretary),
Urban Development Department,
Mantralaya, Mumbai-32.
- 2] The Director of Town Planning,
Maharashtra State, Pune
- 3] The Ahmednagar Municipal Corporation,
Ahmednagar Through its Commissioner
- 4] The Assistant Director of Town Planning,
Savadi, Ahmednagar
- 5] The Collector,
Ahmednagar

.. Respondents

...
Ms. Pradnya Talekar, Advocate for the petitioner in both writ petitions
Mr. A.S. Shinde, AGP for the respondent – State
Mr. V.S. Bedre, Advocate for the respondent no. 3 (WP/7986/2017) and
for respondent no. 5 (WP/9934/2016)
...

**CORAM : MANGESH S. PATIL &
S.G. CHAPALGAONKAR, JJ.**

**RESERVED ON : 06 JANUARY 2023
PRONOUNCED ON : 03 FEBRUARY 2023**

JUDGMENT (MANGESH S. PATIL, J.) :

Heard both sides. Rule in both the petitions, made returnable forthwith. Learned AGP waives service for the respondent – State and learned Advocate Mr. Bedre waives service for the respondent - Corporation. At the joint request of the parties, the petitions are heard finally.

2. These petitions have been filed by the same trust for different reliefs on the same set of facts.

3. In writ petition no. 9934 of 2016, the petitioner trust claiming to be the owner of the final plot nos. 193 and 195 in the development plan of the respondent - municipal corporation is seeking variation and modification of the town planning scheme sanctioned on 04-01-1985 in respect of those two plots by following procedure under section 39 read with section 92 of the Maharashtra Regional and Town Planning Act, 1966 ("**MRTP Act**"), pursuant to the order passed by the learned Minister of the State Urban Development Department dated 27-09-1988 in writ petition no. 9934 of 2016.

4. In writ petition no. 7986 of 2017, the petitioner trust is seeking a declaration regarding lapsing of the reservation on the same two final plot nos. 193 and 195 under the provisions of section 127 of the MRTP Act and also seeking a declaration that it is entitled to develop the plots for the purpose for which those are reserved.

5. Learned advocate Ms. Talekar for the petitioner trust would submit that a town planning scheme no. 4 for Ahmednagar city was sanctioned on 04-01-1985 *inter alia* declaring that full amount of compensation shall be payable under section 72(3)(vi) of the MRTP Act. The petitioner - trust's plots were reserved for different public purposes. An area of 11471.60 Square Meter from plot no. 195 and 39402.10 Square Meter from plot no. 193 were reserved for school and playground and playground, respectively.

She would submit that by issuing government resolution under section 154 of the MRTP Act, the land owners themselves were permitted to develop such reservations for the purpose for which those were put under the town planning scheme.

6. Ms. Talekar would submit that since the petitioner trust was in need of both these plots under reservation for upkeep of the *masjid*, it applied to the Minister. By the order dated 17-09-1998, the learned Minister rejected its request to remove the reservation, however, permitted it to develop the property for the purpose under reservation and issued direction to the respondent - municipal council, as it then was, for taking steps under section 91 of the MRTP Act.

7. Pursuant to such an order, the petitioner trust moved the respondent - corporation on 11-03-1999 but it did not take any decision, and, therefore, a direction was required to be solicited from this Court. It thereafter rejected the petitioner's representation on the ground that by virtue of section 88 of the MRTP Act, the plots reserved under the scheme vested in the respondent corporation absolutely. This was the order passed on 09-05-2007 but it was never communicated to the petitioner trust. She would submit that first time the fact was revealed to the petitioner trust when the respondent corporation filed its affidavit in reply in writ petition no. 7986 of 2017.

8. Ms. Talekar would then submit that the respondent corporation also made an attempt to mutate its name in the property card of the plot nos. 193 and 195 but the District Superintendent of Land Records by the order dated 02-12-2011 rejected the respondent corporation's appeal and the name of the petitioner trust continued to appear in the property card.

9. Ms. Talekhar would then submit that the respondent municipal corporation is illegally refusing to acquire the plots by not paying any compensation or even a request for grant of Transfer of Development Rights (TDR) was turned down under a spacious plea that already some portion of the plots are affected while sanctioning lay-out. She would submit that a similarly placed property owner - Mr. Shivajirao Miskin under the same scheme has been granted the TDR.

10. Ms. Talekar submitted that the respondent municipal corporation in its affidavit in reply has specifically admitted that the petitioner trust was never paid any compensation in lieu of the reservation but has come out with an unsustainable plea of allotment of plot nos. 42 and 192B to the petitioner trust in exchange of such reserved plots. She would submit that both these plots nos. 42 and 192B stood in the name of the erstwhile trustees of the petitioner trust whose names also appear in the property card of plot nos. 193

and 195. She would rely upon the communication received from the respondent corporation dated 03-02-2021 and would submit that the respondent corporation has informed the petitioner trust about exchange of the land but has been unable to substantiate it by producing relevant record.

11. In response to the stand of the corporation that the petitioner trust having already filed a suit before the Wakf Tribunal under the Wakfs Act, 1995 and the fact has been suppressed, Ms. Talekar would submit that the suit was filed for declaration and injunction since the respondent corporation was obstructing its possession, development and enjoyment. Since the corporation started putting up a claim that the reserved plots vested in it under section 88 of the MRTTP Act, in view of such peculiar circumstances that the petitions were required to be filed. The petitioner trust would withdraw the suit if this Court directs.

12. Lastly, Ms. Talekar would submit that though the right to property is no longer a fundamental right, it still continues to be a constitutional right under Article 300A. The respondent corporation cannot deprive the petitioner trust of its right to the plots without following due process of law and the matter is clearly covered by the decision of the Supreme Court in the matter of ***Hari Krishna Mandir Trust Vs. The State of Maharashtra and others; (2020) 9 SCC 356.***

13. Learned advocate Mr. Bedre for the respondent corporation would submit that the intention to prepare a town planning scheme was declared in the year 1985. An arbitrator was appointed as is contemplated under the provisions of the MRTP Act who prepared an award indicating contribution or compensation and re-distribution of the final plots. Even an appeal no. 11 of 1978 was preferred to the District Judge against that award and some corrections were made which was finally sanctioned by the Government as a town planning scheme, Ahmendagar.

He submitted that pursuant to such scheme, plots nos. 193 and 195 vested in the respondent corporation. He would further submit that in lieu of the plots, the petitioner trust was allotted the final plot nos. 42 and 192B which was accepted by the petitioner trust. It even subsequently sold both these plots. Consequently, the stand of the petitioner trust and offer to develop the final plots nos. 193 and 195 in the light of the Government resolutions issuing direction under section 154 of the MRTP Act is not sustainable as it no longer continues to be the owner. Such a request was also rightfully turned down by the respondent corporation.

14. However, Mr. Bedre submits that though it was an initial stand of the respondent corporation regarding the petitioner trust being allotted final plot no. 42, as mentioned in the additional affidavit in reply,

of one Rajesh Madhukar Patil, who is the incharge Assistant Director of Town Planning in the respondent municipal corporation dated 17-12-2018 filed in writ petition no. 7986 of 2017, the plot no. 42 was allotted to the trust in lieu of the original plot no. 39 and has no relevance to the writ plot nos. 193 and 195.

15. Mr. Bedre would submit that in view of the scheme of the MRTP Act when the properties under the town planning schemes vest in the planning authority as contemplated under section 88 of the MRTP Act, the petitioner trust is neither entitled to any declaration regarding lapsing of reservation under section 127 which is not at all applicable nor would it be entitled to develop on its own under section 154 of the MRTP Act.

16. As regards the factual aspects are concerned, the respondent corporation in its initial stand did not dispute the fact that the petitioner's writ plots were affected by the town planning scheme finalized in chapter V. It had come with a specific stand about the petitioner trust having been allotted two other properties in exchange of the writ plots. However, the respondent corporation has not been able to substantiate this stand by producing some concrete record. On the contrary, at least to the extent of plot no. 42, the respondent's officer in his affidavit in reply, has admitted that it was allotted to the petitioner trust in lieu of original plot no. 39 and not in exchange of the writ plots.

Consequently, one will have to proceed on the premise that the writ plots of the petitioners bearing final plot nos. 193 and 195 were affected by the town planning scheme of the municipal corporation.

17. Admittedly, the respondent corporation has not paid any compensation to the petitioner trust or has taken any steps to put this property under reservation for any purpose for which those were reserved. Since section 127 of the MRTP Act is only applicable to the lands reserved / designated in any original plan or final development plan and is not applicable to the land reserved under the town planning schemes finalized under Chapter V and consequently, there would be no question of any lapsing of reservation under that provision.

18. The law in respect of the provisions of section 88 is no more *res integra*, in view of the decision in the case of ***Hari Krishna Mandir Trust*** (supra). It has been specifically laid down that even in respect of the town planning schemes, reserved properties would vest in the planning authority only by way of acquisition to be resorted to under Chapter VII (Section 126 to section 129 of the MRTP Act). After considering the scheme of the MRTP Act, and particularly, Chapters no. V and VII and the various provisions contained therein, dispelling inter alia the argument on behalf of the municipal corporation and the planning authority in respect of scope of section 88, the following observations have been made in paragraphs nos. 108 to 115.

“108. Section 88 of the Regional and Town Planning Act, 1966 provides:

“88. Effect of preliminary scheme. - On and after the day on which a preliminary scheme comes into force -

(a) all lands required by the Planning Authority shall, unless it is otherwise determined in such scheme, vest absolutely in the Planning Authority free from all encumbrances;

(b) all rights in the original plots which have been reconstituted shall determine, and the reconstituted plots shall become subject to the rights settled by arbitrator;”

109. Section 88 of the Regional and Town Planning Act cannot be read in isolation. It has to be read with Sections 125 to 129 relating to compulsory acquisition as also Sections 59, 69 and 65.

110. Section 125 provides as follows:

“125. Compulsory acquisition of land needed for purposes of Regional Plan, development plan, or Town Planning Schemes, etc. -- Any land required, reserved or designated in a Regional Plan, development plan or Town Planning Scheme for a public purpose or purposes including plans for any area of comprehensive development or for any new town shall be deemed to be land needed for a public purpose within the meaning of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (30 of 2013):

Provided that, the procedure specified in Sections 4 to 15 (both inclusive) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (30 of 2013) shall not be applicable in respect of such lands.”

111. Section 126 stipulates the mode and manner of acquisition of land acquired to a designate in regional, development and town scheme for a public purpose and the mode of payment of compensation.

112. Section 127 provides that any land reserved, allotted or designated for any purpose specified in any plan under the Regional and Town Planning Act, which is not acquired by agreement within ten years from the date on which a final regional plan or final development plan comes into force, is to be deemed to have lapsed and the land shall be deemed to be released from such reservation. Of course by virtue of sub-section (2) of Section 126 inserted by amendment by Maharashtra Act 16 of 2009 on lapsing of reservation or a designation of any land under sub-section (1), the Government shall notify the same by an order published in the Official Gazette. Section 128 enables the

Government to acquire lands for a purpose other than the one for which it is designated in any plan or scheme.

113. *In our considered opinion, the High Court erred in dismissing the writ petition, misconstruing Section 88 of the Regional and Town Planning Act, by reading the same in isolation from the other provisions of the Regional and Town Planning Act, particularly Sections 65, 66, 125 and 126 thereof.*

114. *Section 125 read with Section 126 enables the State/ Planning Authority to acquire land. On a proper construction of Section 88, when land is acquired for the purposes of a development scheme, the same vests in the State free from encumbrances. No third party can claim any right of easement to the land, or claim any right as an occupier, licensee, tenant, lessee, mortgagee or under any sale agreement. On the other hand, Section 65 referred to above read with Section 66 protects the interests of the owners.*

115. *In the absence of any proceedings for acquisition or for purchase, no land belonging to the appellant Trust could have vested in the State."*

In view of such startling similarity in the matter before the Supreme Court and the ones in hand, it can be safely conclude that the stand of the respondent municipal corporation about vesting of the writ plots in it pursuant to section 88 is liable to be discarded.

19. This brings us to the relief to be granted to the petitioner trust in the light of such peculiar facts and circumstances.

20. Since the writ plots are under reservation in a town planning scheme under Chapter V of the MRTP Act, there is no question of any lapsing of the reservation under section 127. The respondent municipal corporation has not taken any steps for acquiring these writ plots under Chapter VII as is observed hereinabove. The petitioner trust in both these petitions are coming with different prayers.

In writ petition no. 9934 of 2016, it is seeking variation or modification of the town planning scheme by following procedure under section 39 read with section 92 or to allow it to use the writ plots for the purpose for which they are reserved in the town planning scheme. In writ petition no. 7986 of 2017, it is seeking a declaration that reservation of the writ plots in the town planning scheme is rendered null and void, to quash and set aside the town planning scheme to the extent of the writ plots, to quash the work order issued by the respondent municipal corporation for construction of 10 M wide road through the writ plots and also seeking lapsing of the reservation under section 127.

21. As is observed herein-above , since the writ plots were reserved under a town planning scheme under Chapter V, the question of lapsing of reservation under section 127 which falls under Chapter VII does not arise. Simultaneously, for want of steps under Chapter VII for payment of compensation, the writ plots would not vest in the respondent corporation under section 88. However, when in the town planning scheme a road passes through the writ plots, directing the respondents to take steps for modification or variation as contemplated under section 39 read with section 92 would be practically difficult and would affect the public at large.

22. In view of such state-of-affairs, it would be just and proper and in the interest of the petitioner trust as well as the public at large that instead of declaring the town planning scheme to the extent of writ

plots to be null and void and instead of directing any variation, when the petitioner trust is also praying for putting the writ plots to the same use as is earmarked in the town planning scheme by undertaking a development, it would be appropriate that it is allowed to develop the writ plots by putting them to the same reservation as is earmarked in the town planning scheme excluding the portion of the road which the respondent municipal corporation may develop and in lieu thereof distribute the TDR to the petitioner trust according to law.

23. Both the writ petitions are allowed partly.

24. It is declared that the writ plots do not vest in the respondent municipal corporation except the portion reserved for public road.

25. The petitioner trust is permitted to use the writ plots except the portion of the road for the purpose for which those have been reserved under the town planning scheme.

26. The respondent municipal corporation shall grant appropriate TDR to the petitioner to the extent of the road passing through the writ plots, according to law.

27. Rule is made absolute in the above terms.

[S. G. CHAPALGAONKAR]
JUDGE

[MANGESH S. PATIL]
JUDGE

arp/