

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION 3156 OF 2021

1. Jayant s/o. Hirji Gosar,
aged about 54 years,
Occ. Service,
R/o. 14, Garden New Devidayal
Road, Mulund(P),
Mumbai 400 080

2. Mayur s/o. Hirji Gosar,
Aged about 50 yrs, Occ. Agriculture,
R/o. Hirji Gosar, 38-1-22, F-443,
Punnama Thota, Near American
Hospital, Labbi Pte, Vijayawada
(Urban), Bukinghampet, Vijaywada,
Andhra Pradesh 520 002

.....PETITIONERS

...V E R S U S...

1. State of Maharashtra,
through its Principal Secretary,
Department of Urban Development,
Mantralaya Madam Cama Road,
Mumbai 32

2. The Director of Town Planning,
State of Maharashtra, Also through
the Secretary, Department of Town
Planning, Central Office,
Old Building, Pune 411 001

3. Nagar Parishad,
through its Chief Officer,
Digras, District Yavatmal

4. Bhaurao Fakira Dudhe,
aged Major, Occ. Agriculture,

5. Prakash Fakira Dudhe,

Aged Major, Occ. Nil
Both R-4 & 5 R/o. Baripura,
Taluka Digras, District Yavatmal

..RESPONDENTS

Mr. H.S. Chitaley, counsel for petitioners.
Mr. S.M. Ukey, Addl.GP for respondents 1 and 2.
Mr. F.T. Mirza and Mr. P.P. Deshmukh, counsel for respondent 3.
Mr. Sameer Khan, counsel for respondents 4 & 5.

CORAM:- ROHIT B. DEO & M.W. CHANDWANI, JJ.
DATE : 07.07.2023

JUDGMENT (Per: Rohit B. Deo, J.)

Rule.

2. Rule made returnable forthwith.

3. Challenge in the petition is to the Notification dated 26.10.2021, issued by the Government of Maharashtra, in exercise of power under Section 37(1) of the Maharashtra Regional Town Planning Act, 1966 ("MRTP Act") sanctioning the minor modification in the development plan for Digras town. It is not in dispute that a Kabrasthan or buried ground for the Muslim community is existing at Digras, at Survey 171/1/1. With the increase of population and the inevitable need for additional burial space, land adjoining the existing Kabrasthan bearing Survey 151/2, 127/1/B, 151/3, 127/2

and 127/3 are reserved for Muslim burial ground by deleting existing reservation which partly affected the said land.

4. Petitioners claim to be the owner of land Survey 151/1 which is situated in the vicinity of the Muslim burial ground.

5. Petitioners state that the Municipal Council, Digras – respondent 3 resolved to reserve land Survey 127/3, 127/2 and 151/2 for Muslim burial ground vide resolutions passed in the General Meeting held on 4.8.2018 and 24.12.2018. Petitioners state that the said land is owned by respondents 4 and 5, who accepted the offer of the Municipal Council to purchase the said land subject to Municipal Council quantifying the consideration as per the valuation of the Sub-Registrar. Petitioners then state that third respondent proposed minor modifications in the development plan and resolved to submit the proposal to the State Government.

6. The petitioners state that the notice under Section

37(1) of MRTP Act was published in the official gazette dated 6.8.2018. The owner of the land Mr. Bhaurao Dudhe submitted certain objections. The petitioners state that on 24.12.2018, the General Body of the third respondent resolved to proceed with the minor modification. The third respondent then requested the State Government to sanction the minor modification in the development plan.

7. The petitioners state that the second respondent did not issue notice to the persons affected by the minor modification and it was only in September 2019 that the petitioners became aware of the proposed minor modification and sought the relevant information from the third respondent under the provisions of the Right to Information Act. The petitioners submitted objection dated 7.11.2019 to the third respondent by email and followed up by delivering copy of the objection, by hand. The Chief Officer of the third respondent addressed communication to the petitioners that the objections were raised beyond the time prescribed. The petitioners then refer to the communications addressed to the

authorities concerned. Petitioners then refer to the communication dated 10.3.2021 received from the third respondent that the petitioners and the other objectors were heard on 26.2.2021 and the objections were rejected. Petitioners claim that the hearing which was granted, was by junior engineer Mr. Khan and not by the Chief Officer of third respondent, and was an empty formality. It is on these broad facts that the petitioners have invoked writ jurisdiction.

8. By amending the petition, the petitioners submitted that while the notice issued under Section 37(1) refer to land Survey 127/3, 127/3 and 151/2, the notification sanctioning the minor modification covers additional land.

9. Before we proceed further in the narrative of facts, the submission of the petitioners that the notification sanctioning the minor modification covers land not included in the public notice, needs consideration. The third respondent has filed affidavit in response dated 30.6.2023, stating that notice under Section 37(1) of the MRTP Act was

published on 13.1.2021 in the official gazette and land Survey 151/2, 127/1/B, 151/3, 127/2 and 127/3 are clearly mentioned. We have perused copy of the notice dated 13.1.2021. The stand of the third respondent is consistent with record.

10. We need not therefore, dilate further on the submission that certain land which is not included in the notice published under Section 37(1) of the MRTP Act, is included in the notification sanctioning the minor modification.

11. Petitioners claim to be the owners of land Survey 151/1 which is situated in the vicinity of the existing Muslim burial ground, as is discernible from the map which is placed on record along with the affidavit in response dated 17.4.2023 filed by the third respondent. The third respondent has stated on oath that the owners of the land affected by the proposed reservation were issued notices and heard and none of them objected to the proposed

modification. The third respondent then asserts that the municipal engineer, who heard the petitioners, is a senior technical officer and the insistence of the petitioners that the hearing ought to have been granted by the Chief Officer is without substance.

12. The third respondent then emphasizes that sanctioning of minor modification under Section 37 of the MRTP Act is legislative act and the petitioners have not made out a case of either lack of legislative competence or of violation of fundamental rights. The third respondent refers to the provisions of the Constitution of India and Section 252 of the Maharashtra Municipal Councils Nagar Panchayats and Industrial Township Act, 1965 and asserts that while it is the constitutional and statutory obligation of the Municipal Council to ensure space for burial purpose, it is not the obligation of the Municipal Council to ensure that land in private layouts fetch better prices, which in the perception of the Municipal Council is the driving force behind the opposition of the petitioners to the minor modification of the

development plan.

13. We have heard learned counsel Mr. H.S. Chitaley for petitioners, learned Addl.GP Mr. S.M. Ukey for respondents 1 and 2, learned counsel Mr. F.T. Mirza with Mr. P.P. Deshmukh for respondent 3 and learned counsel Mr. Sameer Khan for respondents 4 and 5.

14. We have already considered the submission that there is variance between the notice issued and the notification sanctioning the minor modification and have found the submission not in conformity with record. Learned counsel Mr. H.S. Chitaley would submit that while the writ Court indeed has limitations and exercise of delegated legislative power is ordinarily not susceptible to judicial scrutiny, the writ Court can nonetheless examine whether due process is followed. Mr. H.S. Chitaley would like us to hold that since the hearing is not granted to the objectors by the Chief Officer of the Municipal Council, the hearing stands vitiated. Similar submission is considered and rejected by

this Court in ***Mihir Yadunath Thatte .vs. State of Maharashtra, 2007(1)ALL MR 537 (“Mihir Thatte”)*** and it would be apposite to extract paragraphs 65 and 68 of the said decision.

“65. Applying the tests laid down by the Supreme Court in the case of Jaswant Sugar Mill, the fact that the Planning Authority, pursuant to the direction given by the State Government under [Section 37\(1\)](#), is required to publish a notice inviting objections/suggestions within 60 days from the said direction and to prepare a report after hearing the objections of the person affected by the proposed modification and forward the same to the State Government for action under [Section 37\(2\)](#), it cannot be said that the acts done by the Planning Authority are judicial/quasi judicial act. Rather, such acts of the Planning Authority are administrative. Once the sanction has been accorded by the General Body of the PMC, after the receipt of the direction from the State Government for including the said land in residential zone deleting it from HTHS Zone and make changes as per [Section 37\(1\)](#), to issue public notice calling objections/suggestions from the public and to prepare a report under [Section 37\(1\)](#) of the Town Planning Act and send the proposal to the State Government for final approval, such decision has to be carried out by the executive functionary i.e., the Municipal Commissioner either by himself or through his subordinate officials. In the matter such as this with which we are concerned, the act of the Municipal Commissioner in issuing public notice calling objections/suggestions from the public, the authorisation to the City Engineer to collect objections and hear objectors and prepare the report and the act of forwarding the report to the State Government alongwith complete record are not the act of agency or delegation but implicit in

the discharge of executive functions and all these acts shall be deemed to have been done by the Planning Authority.

68. We are afraid, the judgment in the case of C.V. Shah has no application in the facts of the present case. As already noticed, in the present case, the Pune Municipal Corporation in its meeting held on 26th December, 2000 accorded sanction for including the subject land in the residential zone deleting it from HTHS Zone and make changes as per [Section 37\(1\)](#), to issue public notice calling for objections/suggestions from the public and to prepare a report and send the proposal to the State Government for final approval. The resolution having been passed by the General Body, obviously, its implementation has to be done by the Municipal Commissioner and his subordinate officials and that is what has been done in the present case. It is not necessary that the resolution passed by the general body has to be implemented by the Municipal Commissioner himself who is the Chief Executive Officer. In the very functioning of the Corporation in executive matters, the Municipal Commissioner can always take assistance of his subordinates and, accordingly, he cannot be said to have committed any illegality in directing that persons affected due to the modification shall be heard by the City Engineer and consequently, the City Engineer heard the objectors who were present for the hearing”.

Following ***Mihir Thatte***, a Coordinate Bench was pleased to reject similar submission in ***Ramdas and Others...vs.... The State of Maharashtra and Others (WP 1501,1448, 1395, 5056 of 2016) (“Ramdas and Others”)***.

15. We are further not persuaded to even consider much less accept the submission that the petitioners shall be affected by the minor modification. In the first instance, there is an existing Muslim burial ground in the vicinity of the land owned by the petitioners and the minor modification only ensures that additional space is available to the Muslim community for burying their dead. The petitioners and the owners of the land reserved are not on the same page. Even de hors the said aspect, individual interest, assuming that any commercial interest of the petitioners is affected must necessarily be subservient and give way to larger public interest.

16. Learned counsel Mr. H.S. Chitaley fairly has not even argued that the exercise of power under Section 37 of the MRTP Act is not legislative in nature. It would not be permissible for the writ Court to test the exercise of delegated legislative power on the touchstone of perceived adverse effect on the commercial interest or the convenience of the residents who own land within the vicinity of the Muslim

burial ground.

17. We may further note that the decision in ***Ramdas and Others*** (supra) was assailed before the Apex Court which refused to interfere.

18. We find no substance in the petition.

19. The petition is dismissed with no order as to cost.

20. Mr. H.S. Chitaley prays for continuation of the interim order. We are not inclined to continue the interim order.

(M.W. Chandwani, J.)

(Rohit B. Deo, J.)

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