

Wadhwa

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 3878 OF 2022

1. **SHAILESH VIJAY MOGAL,**
aged: 36 years.
2. **ROSHAN VIJAY MOGAL,**
aged: 42 years.
3. **VISHAL VIJAY MOGAL,**
aged: 39 years.
4. **VAISHALI VIJAY MOGAL,**
aged: 67 years.
All residing at Gangadhar Niwas,
Ramdas Wadi, Murbad Road,
Kalyan (West) 431 301.

... PETITIONERS

~ VERSUS ~

1. **KALYAN DOMBIVLI MUNICIPAL CORPORATION,**
a Statutory Body Incorporated under
the Maharashtra Provincial Municipal
Corporation Act, 1949 having its office
at Corporation Building, Kalyan.
2. **THE COMMISSIONER,**
Dombivli Municipal Corporation
Having his office at Corporation
Building, Kalyan, Dist. Thane.

Digitally
signed by
SUMEDH
NAMDEO
SONAWANE
Date:
2024.02.21
12:18:42
+0530

3. **THE STATE OF MAHARASHTRA,**
Through Urban Development
Department, Mantralaya,
Mumbai - 400 032.

... **RESPONDENTS**

APPEARANCES

FOR THE PETITIONER **Mr RV Govilkar, Senior Advocate,**
i/b Mihir Govilkar.

FOR THE RESPONDENT **Mr Sandeep D Shinde.**
- KDMC

FOR THE RESPONDENT **Mr MP Thakur, AGP.**
- STATE

CORAM : G.S.Patel &
Kamal Khata, JJ.

RESERVED ON : 12th February 2024

PRONOUNCED ON : 21st February 2024

JUDGMENT (Per Kamal Khata, J.):

1. **Rule.** Rule returnable forthwith and heard finally, with the consent of the parties.

2. This Petition, filed under Article 226 of the Constitution of India, seeks a declaration that reservation No. 191 for an 'Amusement Park' on the Petitioners' land has lapsed and the land is available to the owner for development.

3. The Petitioners are the owners of land bearing CTS No. 3165-A and 3175 admeasuring 12450 sq mtrs, at Kalyan (**‘said lands’**). The said lands of the Petitioners were initially included in the Green Zone as per the development plan of Kalyan Municipal Council. In 1983, the areas covered by old Kalyan Municipal Council were made a part of Kalyan Dombivli Municipal Corporation (**“KDMC”**), which in 1992 became a Planning Authority under the Maharashtra Regional Town Planning Act, 1966 (**“MRTP Act”**).

4. The KDMC published a Draft Development Plan on 5th December 1996. Under the said Draft Development Plan, the Petitioners’ lands, which were prior to 1996 designated as “No Development Zone” (**“NDZ”**) also known as a Green Zone, were now designated and reserved for ‘Play Ground’. In view of the objections raised by the Petitioners to the proposed designation as a Play Ground, the Planning Authority eventually, in 2009, changed the designation to an ‘Amusement Park’.

5. The Petitioners objected to the designation of their lands as an Amusement Park on the ground that the lands in question admeasured only 12,450 sq mtrs, whereas the minimum requirement for an Amusement Park would be 50,000 sq mtrs (5 hectares) as per the policy and guidelines of the Maharashtra Tourism Development Corporation.

6. The Petitioners contend that the designation of the lands as an Amusement Park was without due consideration, as there was no road available for heavy vehicular and/or even for pedestrian traffic.

The Petitioners brought to the attention of the authorities that there was no possibility for an extension of land by adding other neighbouring lands, as the Petitioners' lands were situated between lands owned by the Railways and the Kalyan–Murbad highway.

7. Although the Petitioners were granted permission to retain the lands under the Urban Land Ceiling Act in or around 22nd March 2005, they were unable to utilize the said lands to their full potential and the lands continued to be under reservation.

8. In July 2011, the Petitioners applied to the Respondent No. 1 for permission to utilise 0.2 FSI of the total land holdings. However, the Petitioners were permitted to use only 0.05 FSI. The application for the additional FSI was rejected, on the ground that a Draft Development Plan had been published on 5th December 1996. An appeal under Section 47 of the MRTP Act was filed, and the Government permitted some construction that was not to be included in the FSI, like a swimming pool and other supporting or ancillary facilities. The Petitioners contend that this limited permission for use and construction was not economically beneficial, as it was granted solely to safeguard the land and was in line with the land's designation as an Amusement Park.

9. Mr Govilkar, learned Senior Counsel for the Petitioners, submits that the FSI available in the area for the civil use of the land, according to existing rules, would be 1.00 FSI. He argues that granting permission to use only 0.05 FSI is clearly economically unviable for the Petitioners. He submitted that the Respondents

have reserved the lands since the year 1980. In light of these circumstances, the Petitioners issued a notice under Section 127 of the MRTP Act, 1966. The said purchase notice explicitly mentioned that the Green Zone was created in 1980, and the reservation of “Play Ground” was imposed in 1986. Subsequently, in 2009, the reservation for an ‘Amusement Park’ was imposed. Consequently, the land remained unused for about 40 years.

10. Mr Govilkar pointed out that it was becoming increasingly difficult for the Petitioners to protect the land from trespassers, and they are required to spend huge amounts to secure the lands. He submitted that the reservation for Amusement Park was initiated by KDMC, which had failed to implement the Development Plan. According to him, the KDMC has not fulfilled the reservation within a period of 10 years, and there has been no financial arrangement by the Respondents for acquisition of the land in question, which is allegedly reserved for public purpose. He submitted that the reservation for an Amusement Park was clearly not feasible as it did not meet the requirements of the area.

11. The Petitioners served the purchase notice under Section 127 of the MRTP Act along with the documents on 26th July 2019. The statutory period of 24 months expired on 26th July 2021. He accordingly submitted that the reservation is deemed to have lapsed.

12. Mr Govilkar submitted that on 4th August 2021, the Petitioners made a request to permit them to develop the said lands. The letter stated that if no reply was received from the

Respondents, the Petitioners would proceed with developing the lands. The Respondents, through the Assistant Director of Town Planning, KDMC, rejected the application on the ground that development on the said lands had taken place as per the orders of the Government, and thus, the provisions of Section 127 of the MRTTP Act would not be applicable. Mr Govilkar submits that in view of this stand taken by the Respondents, the present Petition was filed.

13. The learned Senior Counsel refers the decision of this Court in the case of *Subhash Ramrao Jadhav & Ors v State of Maharashtra & Ors*¹ to submit that when the Appropriate Authority fails to make an application as per the provisions of section 126 of the MRTTP Act for acquiring the land within the statutory period, the reservation shall lapse. He also cited the case of *Girnar Traders v State of Maharashtra & Ors*² and other subsequent judgments following the decision in *Girnar Traders* in support of his contention that the reservation has lapsed and the Petitioners would be entitled to develop the said lands. The Division Bench decision in *Arun Motiram Nimkar v Municipal Corporation of City of Amravati*³ was relied on to submit that the notifying of lapsing in the official gazette after an order passed by the Court is merely a ministerial act.

14. Mr Shinde for the Respondents submitted that the Petitioners have suppressed material facts with an intent to obtain favourable orders. He submitted that the said lands were earmarked for

1 2012 SCC OnLine Bom 266 : (2012) 4 Mah LJ 236

2 (2007) 7 SCC 555.

3 2013 SCC OnLine 739 : (2013) 5 BCR 546.

reservation No. 191 of an 'Amusement Park' and a 24 meter wide DP road. He submitted that the fact that the Petitioners had applied for building permission on 8th December 2000, which was rejected, and an appeal preferred therefrom under Section 47 of the MRTTP Act was allowed on 14th October 2004, are facts that have been suppressed by the Petitioners. He contended that pursuant to an order dated 14th October 2004, building permission was granted to the Petitioner under an order dated 4th January 2005. As per the said building permission, the Petitioners constructed a swimming pool and a structure, and thus the Petitioner started commercial use of the said lands.

15. On 3rd April 2005, the Petitioners applied for permission to construct an Amusement Park on the said lands, which was approved on 21st October 2011. Subsequently, the Petitioners applied for building permission for a building to be used for a coffee shop and restaurant within the Amusement Park. Mr Shinde contended that said permission was not only granted, but a part Completion Certificate also came to be issued on 21st October 2011. Furthermore, on 16th July 2015, a further building permission for construction on an area of 530.12 sq mtrs was also granted. It is contended that the Petitioners have developed the said lands as per the reservation and, thus, having been granted permission for construction of the Amusement Park and running the same for profit, the Petitioners cannot now contend that the reservation has 'lapsed'.

16. In view of the foregoing, the learned counsel for the Respondents submitted that Section 127 notice under the MRTTP Act will not be attracted in the present case. He, thus, submitted that the Petition be dismissed.

17. We have heard both counsel at length and perused the papers.

18. We believe Mr Shinde is correct in saying that the Petitioners have suppressed material facts from this Court. In our view, on this ground alone, the Petition deserves to be dismissed with exemplary costs. The Supreme Court in *SP Chengalvaraya Naidu v Jagannath & Ors*⁴ has held that a litigant who approaches the Court is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document or suppresses material information in order to gain advantage over the other side then he would be guilty of playing a fraud on the Court as well as the opposite party. Such a party is not entitled to any relief. Above all, a court must have a complete and candid disclosure of all material particulars. A failure to disclose material particulars is indistinguishable from an attempt to mislead the Court. This is now well settled in our jurisprudence.⁵

4 (1994) 1 SCC 1.

5 See:

- i *Hari Narain v Badri Das*, (1964) 2 SCR 203;
- ii *Rajabhai Abdul Rehman Munshi v Vasudev Dhanjibhai Mody*, (1964) 3 SCR 481;
- iii *Gowrishankar & Anr v Joshi Amba Family Trust & Ors*, (1996) 3 SCC 210;
- iv *Ashok Leyland Ltd v State of Tamil Nadu & Anr*, (2004) 3 SCC 1, paragraph 116;
- v *AV Papayya Sastry & Ors v Government of AP & Ors*, (2007) 4 SCC 221;

19. If the Petitioners had, therefore, received development benefits over the very land in question, and knew about it, the Petitioners were bound to disclose these facts. The Petitioners could not take the benefit and advantage of development permissions relatable to the reservation in question as an amusement park and simultaneously complain that the reservation curtailed development benefits or was unworkable. This is especially so when some of the development permissions sought and obtained were in the context of an amusement park itself.

20. A coordinate bench of this Court had a very similar case before it in *Ravindra D Waikar & Ors v Brihanmumbai Municipal Corporation & Ors*.⁶ The question in that case was about a reservation as a Recreation Ground or RG in the Development Control Regulations 1991 and a later reservation as a garden in the Development Control & Promotion Regulations 2034, and a revocation by the MCGM of a permission granted. That revocation or cancellation was on account of an alleged suppression while seeking development permission. The petitioners argued that the reservation had 'lapsed'. Paragraphs 54 to 58 of the decision in *Waikar*'s case read:

-
- vi *Dalip Singh v State of UP*, (2010) 2 SCC 114;
 - vii *Oswal Fats & Oils Ltd v Additional Commissioner (Administration) & Ors*, (2010) 4 SCC 728;
 - viii *A Shanmugam v Ariya Kshatriya Rajakula Vamsathu, etc*, (2012) 6 SCC 430;
 - ix *Maria Margarida Sequeira Fernandes & Ors v Erasmo Jack De Sequeira*, (2012) 5 SCC 370;
 - x *Sciemed Overseas Inc v BOC India Ltd*, (2016) 3 SCC 70;
 - xi *Dnyandeo Sabaji Naik & Anr v Pradnya Prakash Khadekar & Ors*, (2017) 5 SCC 496.

6 2023 SCC OnLine Bom 1927.

“54. Based on UDD reply, the Corporation sought reasons by issuing a Show Cause Notice dated 8 February 2023 from the Petitioners as to why the earlier agreement of 2004 was suppressed, while applying for new permission. The Petitioners tendered their detailed reply to the Show Cause Notice.

55. Upon consideration of the Remarks of UDD and Architect's non disclosure of agreement and clauses therein in Form 3 (List of Indicative concessions), the development permission dated 20 January 2021 granted by Corporation was revoked due to following reasons:

- a) That the Project Proponent/Architect failed to submit/disclose earlier development permissions under DCR 1991 and agreement dated 09.02.2004 while obtaining development permission dated 20.01.2021 under DCPR-2034.
- b) That the Development Permission dated 20.01.2021 is lapsed.

56. We find that the Architect of the Petitioner had not disclosed of the existence of condition No. 8 in agreement dated 9 February 2004. Hence, while preparing the reports, the said fact was not known to the concerned officer of the Corporation about the earlier development Agreement dated 9 February 2004. According to our view, the Petitioners had suppressed the material clauses from the earlier Development Agreement while submitting the proposal under DCPR 2034. The Petitioner had also given an undertaking to the Corporation that no purchase notice/TDR/FSI/award/compensation whatsoever has been received in the past nor any proposal with regard to claiming any benefits there under. Therefore on the face of it false undertaking was given by Petitioners.

57. In this back drop we are of the view that the Petitioners submitted a proposal for development of the

reservation in the 2034 plan by suppressing the fact that the reservation has already been implemented and that there is a Tripartite Agreement to that effect between the owners, occupiers and Corporation executed way back in 2004 and the same has not been set aside or cancelled or rescinded.

58. **We are also of the view that once the Petitioners had received the benefit under DC Regulations 1991 and had constructed the club house, therefore effectively the whole scheme was implemented and, therefore having received compensation in the form of FSI for a land which is reserved for garden purpose, the Petitioners now cannot, in view of DCPR 2034, again apply for compensation when the reservation on the subject land has not changed.”**

(Emphasis added)

21. We agree with Mr Shinde that the present case is on a similar footing to *Waikar's case*. Considering that the said lands have been already utilized for the purposes of the reservation, and that, too, by the Petitioners themselves, the Petitioners cannot now claim that the reservation has lapsed. The Petitioners have made commercial use of the lands in question. Therefore, it is not possible for the Petitioners to assert that the State has not acted upon the reservation of the lands.

22. No party can approbate and reprobate at the same time. A species of estoppel will undoubtedly operate against the Petitioners: this is the equitable principle of an estoppel *in pais* as a defence. In our country, this will arise inter alia under Section 115 of the Evidence Act, 1872. Thus, having once accepted the Amusement Park reservation, and having acted on it by seeking development

permission, obtaining and exploiting it, the Petitioners cannot be permitted to claim that the reservation had 'lapsed'. It had been acted on, and it had been acted by none other than the Petitioners themselves. The Petitioners' conduct itself constitutes the necessary estoppel.

23. The Petition stands dismissed. Rule is discharged.

24. No orders as to costs.

(Kamal Khata, J)

(G. S. Patel, J)