



Shubhada Kadam

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO. 9118 OF 2024

Our Lady of Immaculate Conception Church)
 A Public Charitable Trust -)
 having P.T.R. No. D-218 (Bom))
 Through its Parish Priest and Sole Trustee)
 Rev. Fr. Gerald Fernandes,)
 I C Colony, Mount Poincur, Borivali West, Mumbai,)
 Maharashtra 400103.) Petitioner

Versus

- 1 Municipal Corporation of Greater Mumbai)
 (Through Its Commissioner))
 Mahapalika Bhavan, Mahapalika Marg, Mumbai 400)
 001.)
- 2 Assistant Commissioner)
 MCGM, R/North Ward,)
 Office Building Rustom Irani Marg,)
 Leo Peter Wadi, Borivali West, Mumbai,)
 Maharashtra 400 068.)
- 3 Chief Engineer (Development Plan))
 5th Floor, Municipal Head Office,)
 Extn. Bldg., Mahapalika Marg, Fort,)
 Mumbai 400001)
- 4 Executive Engineer (Development Plan) P & R)
 5th Floor, Municipal Head Office,)
 Extn. Bldg., Mahapalika Marg, Fort,)
 Mumbai 400001)
- 5 Archaeological Survey of India)
 Through its Director)
 Western Region, Sion Fort, Sion East,)
 Mumbai - 400022)
- 6 State of Maharashtra)
 Through Urban Development Department)
 Government Pleader Office)
 4th Floor, Bhanushankar Yagnik Rd,)
 beside Escalator, Mantralaya, Churchgate, Mumbai,)
 Maharashtra 400020)

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7 Union of India)
Through the Ministry of Culture)
C-wing; Shastri Bhawan; New Delhi 110001) Respondents

Mr. Dhananjay Deshmukh, Advocate for the Petitioner.

Ms. Pooja Patil, AGP for State of Maharashtra.

Ms. Priyanka Sonawane i/b. S. K. Sonawane, Advocate for Respondent Nos. 1 to 4/MCGM.

Mr. Ashutosh Misra, Advocate for Respondent Nos. 5 and 7 – UOI.

CORAM : G. S. KULKARNI &
ARUN R. PEDNEKER, JJ.

RESERVED ON : 11 June, 2024

PRONOUNCED ON : 21 June, 2024

Judgment (Per Arun R. Pedneker, J.) :

1. By the present writ petition under Article 226 of the Constitution of India, the petitioner is seeking direction to the respondent to follow due process of law in taking over the petitioner's land by following the provisions of Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013 (hereinafter referred to as '2013 Act'). The petitioner primarily seeks a relief as prayed for in prayer clause (b) which reads as under:

“(b) To issue a Writ of Mandamus or Writ in the nature of Mandamus or any other appropriate Writ, order and/or direction to the Respondents to follow the due process of law and acquire the said land under the Provision of the Right to Fair Compensation and Land Acquisition Act, 2013 before carrying out any activity in the property land bearing CTS No. 216(pt) of Survey No.26-A/1pt. Admeasuring 4732.0 sq. metres and CTS No.190 of Survey No.20 Hissa No.5 admeasuring 1309.2 sw.metres belonging to the Petitioner, which land is situated adjacent to the Mandapeshwar Caves.”

2. The case of the petitioner is that the petitioner is a Public Charitable Trust duly registered with the Office of the Charity Commissioner and is the owner of the land bearing CTS No.216(pt) of Survey No.26-A/1pt. admeasuring 4732.0 sq.metres and CTS No.190 of Survey No.20, Hissa No.5 admeasuring 1309.2 sq.metres. Respondent No.5-Archaeological Survey of India (ASI) has claimed ownership of the caves and land adjacent to it and has filed an Application No.D.I.N. Inquiry under Section 20(2) Case No.10/78. The petitioner contends that the petitioner's land is adjacent to the land under two caves situated in land bearing Survey No.26 of Village Mandapeshwar of Borivali Taluka , which is declared as vested in the Government of India. The petitioner further contends that by an order dated 20th August 2001 in Civil Suit No.1098 of 1995, the City Civil Court has injuncted the respondent from carrying out any work or disturbing the peaceful possession and enjoyment of the said property of the Church and if the ASI wants to acquire the said land, it can do so, by following due process of law. The petitioner further contends that the Additional Collector has issued certificate to the Trust as the owner and holder of the above properties. It is further contended that the land of the petitioner is reserved in the plan for garden/park, as such, the Office of the Chief Engineer (Development Plan) requested the petitioner to handover the land to the Executive Engineer for development of the said land as a garden/park in public interest in lieu of TDR benefit.

3. The petitioner, by letter dated 9th February 2024 to the Executive

Engineer submitted that the land bearing CTS No.216(pt) of Village Mandapeshwar is reserved for garden/park which could be taken over by the Corporation by lawfully acquiring the same. It is further stated in the letter dated 9th February 2024 that the Church being a charitable organisation registered under the provisions of the Bombay Public Trusts Act cannot utilise the TDR which is proposed to be offered in lieu of handing over the land and utilisation of TDR is outside the scope of trust activity and does not serve any purpose of the trust activity. The petitioner indicated its willingness to handover the land to the Corporation provided that the Municipal Corporation pays “monetary compensation”, for the same in accordance with law. The request of the petitioner was rejected by respondent No.1 – Municipal Corporation by letter dated 21st February 2024. It was further contended in the letter that the Bombay Municipal Corporation is ready to take over the vacant possession of the land bearing CTS No.216(pt) of Village Mandapeshwar reserved for ROS 1.5(garden/park) in lieu of TDR benefit **only** and in view of larger public interest, the petitioner was requested to handover the land bearing CTS No.216(pt) of Village Mandapeshwar, so that it can be developed for the public purpose of garden. Being aggrieved by such response of the Municipal Corporation, the present petition is filed seeking directions to respondents that, in the event, if the respondent seek to acquire the petitioner’s land in CTS No.216(pt) of Village Mandapeshwar for reservation of garden/park, then the same should be only by following the procedure of acquisition as contemplated under the 2013 Act.

4. Per contra, learned counsel appearing for the Municipal Corporation submits that the respondent can grant TDR in lieu of monetary compensation for acquisition of the petitioner's land reserved for garden/park and it is permissible under the Maharashtra Regional and Town Planning Act, 1966 to do so and the petitioner cannot insist upon the payment of compensation under the 2013 Act.

5. We have heard Mr.Deshmukh, learned counsel for the petitioner, Ms. Sonawane, learned counsel for respondent Nos.1 to 4-MCGM, Mr.Misra, learned counsel for respondent Nos.5 and 7 and Ms. Patil, learned AGP for respondent No.6. With their assistance, we have perused the record.

6. Having considered the rival submission, the question that arise for consideration is that whether a land reserved for public purpose under the Maharashtra Regional and Town Planning Act, 1966 can be acquired by granting TDR or FSI as compensation of the acquired land or has to necessarily follow the 2013 Act for acquisition of the reserved land, if the land owner refuses to accept TDR/FSI as compensation.

7. The land reserved under the Maharashtra Regional and Town Planning Act, 1966 for public purposes can be acquired in terms of Sections 125 and 126 of the said Act, which reads thus :

“125. Compulsory acquisition of land needed for purposes of Regional Plan, Development plan or town planning 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] :

[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 shall not be applicable in respect of such lands.]

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] [This portion was substituted for the words 'any Appropriate Authority may acquire the land', by Maharashtra 21 of 1971, Section 11(1).] [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 Land Acquisition Act, 1894, Floor Space Index (FSI) or Transferable Development Rights (TDR) against the area of and surrendered free of cost and free from all encumbrances, and also further additional Floor Space Index or Transferable Development Rights against the development 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 and (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 Land Acquisition Act, 1894, 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.]

2. On receipt of such application, if the State Government is

satisfied that the land specified in the application is needed for the public purpose therein specified, or [if the State Government (except in cases falling under section 49 [and except as provided in section 113A)] [These words were substituted for the words 'if the State Government itself is of opinion' by Maharashtra 14 of 1971, Section 6(1)(a).] itself is of opinion] that any and included in any such plan is needed for any public purpose, it may make a declaration to that effect in the Official Gazette, in the manner provided in section 6 of the Land Acquisition Act, 1894, in respect of the said land. The declaration so published shall, notwithstanding anything contained in the said Act, be deemed to be a declaration duly made under the said section:-

[Provided that, subject to the provisions of sub-section (4), no such declaration shall be made after the expiry of one year from the date of publication of the draft Regional Plan, Development Plan or any other Plan, or Scheme, as the case may be.] [This proviso was substituted by Maharashtra 10 of 1994, Section 13(b).]

3. On publication of a declaration under the said section 6, the Collector shall proceed to take order for the acquisition of the land under the said Act; and the provisions of that Act shall apply to the acquisition of the said land, with the modification that the market value of the land shall be,-

(i) where the land is to be acquired for the purposes of a new town, the market value prevailing on the date of publication of the notification constituting or declaring the Development Authority for such town;

(ii) where the land is acquired for the purposes of a Special Planning Authority, the market value prevailing on the date of publication of the notification of the area as an undeveloped area; and

(iii) in any other case the market value on the date of publication of the interim development plan, the draft development plan or the plan for the area or areas for comprehensive development, whichever is earlier,

or as the case may be, the date of publication of the draft town planning scheme:

Provided that, nothing in this sub-section shall affect the date for the purpose of determining the market value of and in respect of which proceedings for acquisition commenced before the commencement of the Maharashtra Regional and Town Planning (Second Amendment) Act, 1972:

Provided further that, for the purpose of clause (ii) of this sub-section, the market value in respect of land included in any undeveloped area notified under sub-section (1) of section 40 prior to the commencement of the Maharashtra Regional and Town Planning

(Second Amendment) Act, 1972, shall be the market value prevailing on the date of such commencement.] [Sub-section (3) was substituted by Maharashtra 11 of 1973, Section 6.]

[Notwithstanding anything contained in the proviso to sub-section (2) and sub-section (3), if a declaration] [Sub-section (4) was added by Maharashtra 14 of 1971, Section 6(3).] is not made within the period referred to in subsection (2) (or having been made, the aforesaid period expired on the commencement of the Maharashtra Regional and Town Planning [(Amendment) Act, 1993] [These brackets, words and figures were substituted for the brackets, words and figures '(Amendment) Act, 1970', by Maharashtra 10 of 1994, Section 13(c)(ii).], the State Government may make a fresh declaration for acquiring the land under the Land Acquisition Act, 1894, in the manner provided by sub-sections (2) and (3) of this section, subject to the modification that the market value of the land shall be the market value at the date of declaration in the Official Gazette made for acquiring the land afresh.]”

[emphasis supplied]

8. Section 125 of the Act provides that any land required, reserved or designated in the regional plan, development plan or town planning scheme for public purpose shall be deemed to be the land needed for public purpose within the meaning of 2013 Act.

9. Section 126 of the Act inter alia provides for acquisition of the land required for public purposes. Section 126 provides that after publication of the draft regional plan or a development plan 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 the Act, the authority as the case may be, 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 the FSI or TDR on the surrendered land; or

c) by making an application to the State Government for acquiring the land under 2013 Act.

10. A bare reading of Section 126 of the Maharashtra Regional and Town Planning Act, 1966 would indicate that a land reserved for public purpose can either be acquired by an agreement by paying an amount or in lieu of such amount, the TDR or FSI can be granted to the claimant. However, the TDR or FSI can only be granted in lieu of the amount agreed. As such, it is necessary that for TDR or FSI to be granted to the claimant, there has to be basic agreement between the parties. The TDR/FSI can only be granted in lieu of the amount agreed. In the absence of agreement between the parties, the reserved land cannot be acquired under clause (a) or clause (b) of Section 126(1). If there is no agreement, the logical corollary to it is that, the land reserved for public purpose has to be subjected to acquisition as per the applicable law, namely to be acquired under Section 126(1)(c). As such, we have no hesitation to hold that the land of the petitioner, in absence of any agreement between the petitioner and the planning authority/development authority, can be acquired only under the 2013 Act for the purposes of implementation of the regional plan for constructing public garden/park on the land of the petitioner.

11. The respondents cannot contend that the petitioner need to only accept TDR and/or they cannot claim monetary compensation. Such contention of the respondents is patently misconceived considering the provisions of Section 126 of the Maharashtra Regional and Town Planning Act as noted by us above,

which would not permit the respondents to foist TDR/FSI on the petitioner in the absence of an agreement to this effect and avoid to follow the land acquisition process. The legal position is no more res integra considering the decision of the Full Bench of this Court in the case of Shree Vinayak Builders and Developers, Nagpur versus The State of Maharashtra and ors. reported in 2022(4) MH.L.J.

739. In paragraph 17, in such context the Full Bench observed as under :-

17. While concurring with the above proposition, we would like to emphasize that the mode of acquisition of land under Section 126(1)(a) and (b) of the MRTP Act is by an "agreement". The word agreement connotes offer and acceptance and signifies that the agreement is not an unilateral act but a bilateral act which is concluded with communication of acceptance of the offer. Thus, Acquisition of land reserved for public purpose under Section 126(1)(a) and (b) cannot be by any unilateral proposal of the Acquiring Authority to acquire the land with an offer of compensation or FSI/TDR. It is a mutual agreement between the Acquiring Authority and the land owner whereunder the land is acquired by the concerned authority by agreement either by paying an amount agreed to or by granting, in lieu of any agreed amount, FSI or TDR against the area of land surrendered free of cost, and free of all encumbrances. That being so, the modes of acquisition of land under Section 126(1)(a) and (b) of the MRTP Act, can be resorted to only when there is a consensus between the parties;..."

12. In view of the law discussed above, it is hereby directed that, in the event, the Municipal Corporation seeks to acquire the land of the petitioner, the same can be done only under Section 126(1)(c) of the Maharashtra Regional and Town Planning Act, 1966 by resorting to acquire the land by following the

procedure under the 2013 Act, in the absence of agreement in regard to acceptance of TDR/FSI.

13. Needless to observe that till the Municipal Corporation resorts to appropriate procedure in law as discussed above to acquire the petitioner's land, the Municipal Corporation shall not disturb the peaceful possession of the petitioner in any manner whatsoever except if consented by the petitioner.

14. The writ petition is disposed of with the above directions. No costs.

(ARUN R. PEDNEKER, J.)

(G. S. KULKARNI, J.)