

Edwin Britto and Another Vs. State of Maharashtra and Others

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Court : Mumbai

Decided On : Apr-22-2016

Judge : A.S. Oka & P.D. Naik

Appeal No. : Public Interest Litigation No. 41 of 2009

Appellant : Edwin Britto and Another

Respondent : State of Maharashtra and Others

Judgement :

Oral Judgment: (A.S. Oka, J.)

1. The question in this PIL is whether two lakes in the suburban district of Mumbai admittedly vesting in the State should be allowed to be used by individuals? The other question is whether the act of respondent No.6 of illegally filling in one of the two lakes is legal? Heard the learned counsel for the petitioners, the learned AGP for the respondent Nos.1 to 3, 8 and 9. We have heard the learned counsel for the respondent Nos.4 and 5. We have also heard the learned senior counsel for the respondent Nos.6 and 7. The issue concerns two lakes in the city on the land bearing CTS No.1550 admeasuring 3381.60 sq meters and the land bearing CTS No.1612 admeasuring 12,929.50 sq meters at Village Eksar, Taluka Borivali, Mumbai Suburban District. What is mentioned here is the area of the two lakes as per the City survey/Revenue records.

2. With a view to appreciate the submissions made across the bar, it will be necessary to make a reference to the factual aspects in some detail. The respondent No.6 is at present a Member of Parliament who was at the relevant time a Member of the Maharashtra Legislative Assembly addressed a letter dated 22nd March 2007 to the District Collector of Mumbai Suburban District. In the said letter, he has referred to the said two lakes vesting in the State of Maharashtra. He pointed out that there is every possibility that the area will be taken over by the anti social elements. He, therefore, requested the Collector to ensure that the area is beautified. On 6th June 2007, another letter was addressed by the respondent No.6 to the District Collector of Mumbai Suburban District in which he has stated that by filling in the lakes, a Welfare Centre can be constructed. It appears that the respondent No.6 offered to utilise the funds at his disposal for beautification of the lakes. On the basis of the said proposal, a note was put up before the Revenue and Forest Department. Exhibit-C to the petition shows that the Principal Secretary of the Revenue Department recorded that in principle there should not be any objection subject to condition that the person beautifying will have no right in respect of the lands on which the lakes are situated and secondly, the work will be carried out with the approval of the concerned Authorities. Thereafter, on 6th September 2007, necessary order was issued by the State Government. The said order specifically records that the small lake is situated on the land bearing CTS No.1550 admeasuring 3381.60 sq meters and the bigger lake is situated on the land bearing CTS No.1612 admeasuring 12,929.5 sq meters. The State Government recorded that the lands below the lakes be granted to the respondent No.6 on licence basis for a period of one year subject to terms and conditions incorporated therein. English translation of the terms and conditions reads thus:

"a) The ownership/possession of the land will be of Government only.

b) This permission will automatically come to an end after one year. No separate order is required to pass for the same. There will be no extension of the licence after the expiry of the said permission.

c) The Hon. MLA has to spend the expenses for the beautification of the Talao over the said land and for other protection through his MLA fund only. No

monetary help will be provided by the Government.

d) The trees and water etc over the said land will owned by the Government only. The board displaying the contents that "This land owned by the Government and beautification of this Talao/land is being carried out". Shall be put over the land before starting above beautification work.

e) The collector/Government is having all rights to cancel the said permission/licence if it appears that any of the above conditions is contravened or the said land/pond is misused in any way. It is not obligatory upon the government to give any reasons for the same.

f) The agency doing beautification work will not have any rights over the said land.

g) The permission from the appropriate authorities for the work will be obligatory for concerned."

3. The said order was forwarded by the respondent No.6 to the District Collector. Exhibit F is the letter dated 26th May 2008 which is addressed by the Collector of Mumbai Suburban District to the Additional Chief Secretary (Revenue), Revenue and Forest Department of the State Government. It records that in view of the provisions of the Bombay Minor Mineral Extraction Rules,1955, no work of excavation can be carried out, and therefore, the construction of a Social Welfare Centre and a temple cannot be permitted. It appears that on the basis of the order of the State Government, the Collector passed an order dated 5th October 2007 granting permission to the respondent No.6 to make beautification of both the lakes by spending funds assigned to him by virtue of being a Member of Legislative Assembly (MLA's Fund). It specifically records that a licence was granted to the respondent NO.6 for a period of one year subject to terms and conditions incorporated in the said order. Thus, the terms and conditions were in terms of the conditions incorporated in the order dated 6th September 2007 passed by the State Government.

4. Thereafter, there was further correspondence between the respondent No.6 and the Collector. A note was put up on 3rd October 2007 before the Revenue and

Forest Department. The note was as regards the request made by the respondent No.6 to fill in the small lake and to make construction thereon. It appears that the Revenue Department decided to await for the remarks of the Urban Development Department. Exhibit-J to the petition shows the remarks of the Urban Development Department. The remark of the Urban Development Department is that the land bearing CTS No.1550 is in 'No Development Zone' and therefore, by filling in the lake, no construction is permissible. Therefore, the Urban Development Department left the matter to the decision to the Revenue and Forest Department. On 9th April 2008, another note was prepared by the Urban Development Department recording that the request of the respondent No.6 to fill in the small lake and to make construction thereon cannot be acceded to. The said note was approved by the Hon'ble Minister for Revenue Department. The said decision is reiterated in the note at Exhibit-9. However, on the said note the Hon'ble Minister of the Revenue Department, on 21st July 2008 made an endorsement that no objection be granted as per the available FSI. The said decision was communicated by the State Government in Revenue Department to the District Collector by a letter dated 2nd August 2008. On the basis of the said letter, the Collector issued a formal order on 22nd October 2008 permitting construction as per the available FSI of 0.04 which was available to 'No Development Zone'.

On 24th November 2008, a letter was addressed by the Collector of Mumbai to the City Survey Officer, Borivali informing him that the period of one year granted to the respondent No.6 has expired on 4th October 2008 and therefore, the possession of the land will have to be taken over and handed over to the Mumbai Municipal Corporation. Exhibit-X is the possession receipt dated 16th December 2008 signed by the Surveyor which records that the Assistant Commissioner of Mumbai Municipal Corporation of R/Central ward took over the possession of the lands bearing CTS Nos.1550 and 1612. It appears that the present petitioners addressed a letter dated 30th December 2008 to the various Officers of the State Government, to the Municipal Commissioner and to the Hon'ble Minister of the Revenue Department pointing out that various illegalities have been committed by the respondent No.6 which are set out in the said letter. The present PIL is filed seeking a writ of mandamus directing the Authorities to restore both the lakes and to demolish the construction carried out by the respondent Nos.6 and 7. The

respondent No.7 is a private Gymkhana by the name M/s.Poisar Gymkhana. A declaration is claimed that various permissions granted to the respondent No.6 are nullity. A direction is sought against the respondent Nos.1 to 5 directing to take over the said land.

5. Various orders were passed by this Court from time to time. On 24th March 2011, Rule was issued by the First Court. The said order records the statement of the learned counsel for the respondent No.7 that since the Mumbai Municipal Corporation is not ready to maintain the garden, the respondent No.7 will maintain the garden at its own costs. Clause 4 of the said order reads thus:

"4 It is directed that even though the bigger lake and the surrounding area of the garden are being maintained by the respondent No.6 at his own cost, all the members of the public shall have access to the said lake, surrounding area and the garden which shall be permitted to be used only as garden and children park area, without charging any fees, from 6.00 a.m to 10.00 p.m."

6. There are various affidavits filed on record. The first affidavit is by Shri Bapurao R. More, the Assistant Engineer of the Mumbai Municipal Corporation. In the said affidavit, the stand taken is that the possession of both the lands has not been handed over to the Mumbai Municipal Corporation and both the lands vest in the Collector. It also records that the Mumbai Municipal Corporation has not granted any permission to develop the said lands and the request for grant of permission was rejected. Reliance is placed on the letter dated 7th may 2009 addressed by the Assistant Commission of R/Central Ward to the Maharashtra Housing and Area Development Authority (for short "MHADA") regarding refusal to grant permission to construct Samaj Mandir. Similarly, by a separate letter issued by the Assistant Engineer on the same date to MHADA, a permission was refused to carry on construction of toilet blocks.

7. There is a reply filed by the respondent No.6. It is contended that the work of beautification is complete and the area was open for public use on 30th May 1990. In paragraph 11 of his affidavit, the respondent No.6 has stated thus:

"11. I say that since the Corporation has refused to accept and take the possession of the said plot of land which is completely beautified in all respect and which is inaugurated for public use on 30.5.90, therefore, the question arise as to who is going to maintain the said beautified Talao which is now known as Children's Park and Jogger Trek. Therefore, the same is for the time being given for administration and maintenance to the respondent No.7 and as it required the daily expenses for its maintenance and for meeting to those maintenance expenses as it is the practice of the Corporation to allot such public garden and joggers park, jogger trek to maintain and for that purpose allow to collect a minimum entry fee from the public and as such the said respondent no.7 is collecting Rs.2/from the general public excluding the Senior citizens and the children."

8. It is contended that the petition has been filed to defame him. In paragraph 3 of the affidavit, he accepted that there were two lakes. It is contended that the smaller lake has practically vanished. The photographs of the beautification work done have been annexed to the said affidavit. There is an affidavit in rejoinder filed by the petitioners. It is stated therein that in fact the small lake did not vanish but it was destroyed by the respondent Nos.6 and 7. The Petitioners contend that even the area of the bigger lake was reduced. Reliance is placed on the Google image and certain photographs showing that the smaller lake was destroyed.

9. There is an affidavit of Shri Vijay Lokhande, the Deputy Engineer of MHADA in which he has stated that the beautification permission was granted by the MHADA in view of administrative approval given by the Collector. He has stated that the decision regarding the restoration of the smaller lake has to be taken by the State Government. There is an affidavit filed by Shri Vijay Kamble, the Assistant Commissioner of R/Central Ward of the Municipal Corporation in which it is reiterated that both the lands are not placed in possession of the Mumbai Municipal Corporation and no objection certificate of the said Corporation was not obtained before carrying out the work of beautification. It is stated that the work has been carried out under the permission of MHADA. Therefore, restoration work has to be carried out by the MHADA. There is further affidavit filed by Shri Vijay Lokhande, the Deputy Engineer of MHADA. In the said affidavit, it is stated that

the MHADA has constructed only one toilet block. It is stated that the construction of the Samaj Mandir Hall and the Library etc is not carried out by the MHADA. He stated that he was not in a position to tell as to who permitted the said construction. There is another affidavit filed by the respondent No.6 which is dated 7th March 2011. In clause (ii) of paragraph 4 of the said affidavit, the respondent No.6 has stated thus:

"(ii) I say that I had produced before this Hon'ble Court a Pamphlet published by College Bachav Committee, having its office at Shimpoli Borivli, of which Smt.Meera Kamat is the Secretary and she is the party worker of the Nationalists Congress Party (NCP) and of which the petitioner's Advocate Mr.Salunkhe is the legal adviser of the said committee and resident of the Borivali area. In this Pamphlet a reference to the litigation of the present petition is mentioned, and in which myself has been described as "Liar Cunning MLA" (Aasa labaad bolanaara Amdaar kiti divas aapalyavar raajya karnaar, i.e. such a liar cunning MLA for how many days will rule over us). This pamphlet has been distributed in my entire constituency inside the morning newspapers. Once of such pamphlet is also delivered at my residence inside the Times of India Newspaper."

10. It is further stated as to what transpired in the meeting held by the petitioners and the Advocate for the petitioners. The contention is that the petition has been filed for taking undue political advantage.

11. The submission of the learned counsel for the petitioners is that at no stage a permission was granted to fill up the lakes and to make any construction thereon. His submission is that licence granted to the respondent No.6 has expired way back on 4th October 2008. He pointed out that the respondent No.7 has no locus and the respondent No.7 has not only taken possession but is also charging entry fee to the members of public notwithstanding clause 4 of the interim order dated 24th March 2011 passed in this PIL. He submitted that both the lands will have to be taken over by the State Government or the Mumbai Municipal Corporation and that the lakes will have to be restored after demolition of the illegal structures, if any. The learned senior counsel for the respondent Nos.6 and 7 invited our attention to the photographs annexed to the affidavit of the respondent No.6 which

are from page 185 onwards. According to him there is a lawn and that garden equipments are in place where the smaller lake was earlier in existence. We have also heard the learned counsel for the Mumbai Municipal Corporation and the learned AGP for the State.

12. We have carefully considered the submissions. Following are the admitted facts:

(a) the land bearing CTS No.1550 admeasuring 3381.60 sq meters and the land bearing CTS 1612 admeasuring 12,929.5 sq meters were having two lakes and the said lands are vesting in the State Government;

(b) On 6th September 2007, the State Government passed an order permitting the respondent No.6 to use the said lands on licence basis only for a period of one year only for the purposes of beautification of the lakes by spending funds from the MLA's fund. The said order records that after expiry of period of one year, permission will not be extended. There is one more condition of displaying a board in the front side that the State Government is the owner. Another condition was imposed was of taking permission of the Competent Authority before carrying out the work of beautification;

(c) It appears that a proposal was submitted by the respondent No.6 seeking permission to fill up the smaller lake and to construct cultural centre, Samaj Mandir etc thereon;

(d) Initially, both the Urban Development Department and the Revenue Department were of the view that no permission can be granted to carry on construction. However, on the basis of the note dated 21st July 2008 of the Hon'ble Minister of Revenue that the construction be permitted as per the permissible FSI, that an order was issued by the State Government on 2nd August 2008 permitting construction to the extent of FSI of 0.04. The said order records that after the period of licence expires, the land together with the structures thereon shall be taken over by the District Collector and thereafter, it should be placed in possession of the Mumbai Municipal Corporation for maintenance. On the basis of the said order, on 22nd October 2008, the District Collector passed an

order permitting utilization of the said FSI subject to various conditions. A specific condition was imposed that a permission should be obtained from the Mumbai Municipal Corporation for construction;

(e) Admittedly, the respondent No.6 did not obtain any such permission either from the Mumbai Municipal Corporation or from the MHADA;

(f) Neither the order of the State Government dated 22nd October 2008 nor the order of MHADA permitted the respondent No.6 to fill in the small lake,

(g) In the letter dated 22nd March 2007 addressed by the respondent No.6 to the District Collector, he has specifically stated that there were two lakes in existence. Thus, as on 22nd March 2007, to the knowledge of the respondent No.6, both the lakes were in existence. In the letter dated 6th June 2007 addressed by him to the District Collector, the respondent No.6 has again accepted that the small lake admeasuring 3381.60 was in existence and by doing the work of filling the said lake, the Welfare Centre can be constructed. The order dated 6th September 2007 passed by the State Government and consequent order dated 5th October 2007 passed by the Collector, specifically record the existence of both the lakes. The respondent No.6 acted upon both the orders. Notwithstanding this factual position, in the affidavit in reply filed in August 2009, the respondent No.6 in paragraph 3 has claimed that due to passage of time and nature change, the smaller lake practically vanished. Thus, the said statement made by the respondent No.6 appears to be completely incorrect;

(h) Moreover, at no stage, the period of licence of one year which expired on 4th October 2008 was extended by any authority. Another admitted position is that though there is no permission granted by the State Government or by any Authority, the respondent No.6 allowed the respondent No.7 which is a club to manage the whole show and the respondent No.7 started maintaining both the lands. Firstly, the respondent No.6 has no right, title or interest in respect of both the lakes and the lands. The licence granted to the respondent No.6 expired long back in 2008. Thirdly, there was no permission granted by any Authority to fill up small lake and lastly, there was no permission granted by the Mumbai Municipal Corporation or MHADA to carry out any construction on the said lands.

13. Now, it will be necessary to make a reference to the directive principles of the State Policy incorporated in part 4 of the Constitution of India and in particular Article 48-A which reads thus:

"48-A. Protection and improvement of environment and safeguarding of forests and wild life-

"The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country."

14. The lakes are essential and important part of our environment. Therefore, it is the duty of the State to protect the lakes. More importantly, part IVA containing fundamental duties of the citizens was incorporated by way of amendment with effect from 3rd January 1977. Clause (g) of Article 51 A reads thus:

"(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures." (emphasis added)

15. Thus, every citizen is duty bound to protect the lakes as it is the fundamental duty of every citizen to protect the lakes. It becomes collective duty of the State Government to protect the lakes.

16. The Apex Court has repeatedly held that a citizen has a right to live in a pollution free environment. This right is an integral part of Article 21. The lakes form an essential part of our environment. On this aspect, the learned counsel for petitioners has relied upon the decision of the Apex Court in the case of Hinch Lal Tiwari vs. Kamla Devi and others, 2001 (6) SCC 496. Paragraph 13 of the said decision reads thus:

"13. It is important to notice that the material resources of the community like forests, tanks, ponds, hillock, mountain etc are nature's bounty. They maintain delicate ecological balance. The need to be protected for a proper and healthy environment which enables people to enjoy a quality life which is the essence of the guaranteed right under Article 21 of the Constitution. The Government, including the Revenue Authorities i.e Respondents 11 to 13 having noticed that a pond is falling in disuse, should have bestowed their attention to develop the same

which would, on one hand, have prevented ecological disaster and on the other provided better environment for the benefit of the public at large. Such vigil is the best protection against knavish attempts to seek allotment in nonabadi sites." (underline supplied)

17. Apart from the Directive Principles of the State Policy and the fundamental duty under clause (g) of Article 51-A, the Apex Court has held that material resources of the Community like forests, tanks, ponds, hillock, mountain are nature's bounty which maintain delicate ecological balance. The Apex Court has laid down that there is a need to protect the forests, tanks, ponds, hillock, mountains which enable the people to enjoy the quality life which is essence of the right guaranteed under Article 21 of the Constitution of India. In a very thickly populated and congested suburbs of Mumbai, lakes play a very crucial role in maintaining ecological balance.

18. Therefore, it is the obligation of the State to ensure that both the lakes must continue to exist. Therefore, there is no option for the State to take immediate action of restoration of the lakes which were admittedly in existence at least in the year 2008. It is obvious that the smaller lake did not vanish automatically as contended by the respondent No.6. When the respondent No.6 was granted a licence for a period of one year on 5th October 2007, even the smaller lake was very much in existence. It is obvious that while carrying out so called work of beautification, filling work was done which led to disappearance of the small lake.

19. It is true that the area around the bigger lake has been beautified by spending the funds out of MLA's Fund. Nevertheless, neither the respondent No.6 nor the respondent No.7 can claim any right over the lands and the lakes. If the respondent No.7 wants to continue to remain in possession, needless to add that the respondent No.7 will have to make an application to the Collector/State Government for grant of necessary permission. Needless to add that the area of both the lakes will have to be restored by the State Government. Therefore, in the event the Collector of the State Government decides to grant permission to the respondent No.7, it will have to be with the condition of restoration to its original condition and of demolition of structures which were constructed without obtaining

permission of the Mumbai Municipal Corporation.

20. It is true that the respondent No.6 has raised a contention regarding the locus of the petitioners. A gross illegality is brought on record. One small lake vesting in the State vanished because of the filling work done by the respondent No.6. The respondent No.7 continues to remain in possession of both the government lands though the same were never allotted to it. Therefore, the possession was illegally parted with by the respondent No.6 without permission of any Authority. The smaller lake has been illegally destroyed. Both the lands are admittedly government lands which are being illegally possessed by the respondent no.7. Therefore, even assuming that the petitioners have no locus, it was the duty of the Court to entertain this PIL as a Suo Motu PIL. The respondent No.6 has utilized the MLA's Fund allotted by the State Government for this illegal work. No illegality can be committed by utilizing the fund of the State Government on the lands and lakes vesting in the State Government in this fashion.

21. As far as the issue regarding placing the Mumbai Municipal Corporation in possession of the lakes is concerned, it is the matter to be sorted out by the State Government and/or the District Collector as the lands are vesting in the State Government.

22. Therefore, the PIL must succeed. Hence, we pass the following order:

(I) We direct the State Government and the Collector of Mumbai Suburban District to take over possession of the lands bearing CTS No.1550 admeasuring 3381.60 sq meters and CTS No.1612 admeasuring 12,929.5 sq meters at village Eksar, Taluka Borivali, Mumbai on expiry of period of four months from today;

(II) We direct the State Government and the Collector to restore the original area of both the lakes by demolishing the construction carried out without obtaining permission of the Mumbai Municipal Corporation and by carrying out digging work, if necessary;

(III) It will be open for the respondent No.7 to make an application to the District Collector for grant of permission to look after and maintain the lands and lakes

thereon;

(IV) If such application is made within a period of eight weeks from today, the Collector and/or State Government shall take appropriate decision thereon within a period of six weeks from the date on which the application is made;

(V) We make it clear that if the State Government and/or the Collector decides to grant permission to the respondent No.7, a condition shall be imposed to restore both the lakes to its original position by demolishing all the structures made without obtaining the permission of the Mumbai Municipal Corporation and by carrying out necessary digging work;

(VI) Needless to add that if such application is not made by the respondent No.7 within a period of eight weeks from today, or if the application made by the respondent No.7 is rejected, on expiry of period of four months from today, the State Government shall take over possession of both the lands as directed above and thereafter shall take steps for restoration of the lakes as directed above;

(VII) We make it clear that the State Government shall ensure that the work of restoration of both the lakes shall be completed within a period of nine months from today;

(VIII) Rule is made absolute on above terms;

(IX) Pending Notice of Motion does not survive and the same is disposed of.

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