

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION**

**WRIT PETITION (L) NO.1977 OF 2011**

Jayesh Tokarshi Shah and Ors.

.....Petitioners

versus

The Sub-Divisional Officer,  
Mumbai Suburban District and Ors.

..... Respondents

Mr.Rajiv Narula i/by M/s.Jhangiani Narula and Associates, for the petitioners.

Mr.D.A.Nalawade, Govt. Pleader with Ms.G.R.Shastrri, AGP, for the respondents.

**CORAM: P.B.MAJMUDAR &  
MRS.MRIDULA BHATKAR, JJ.**

**DATE: 30<sup>th</sup> NOVEMBER, 2011**

**PC.**

1. After having acted in a high handed manner and after flouting the orders of the Supreme Court in the matter of removal of debris, grit, boulders etc. and to put bund in its original position, the petitioner has filed this petition challenging the action on the part of the Collector in recovering certain amount, which the Government is required to incur for removal of debris and other material from the site in question in order to clear the site.

2. The petitioner was a constituted attorney of 9 people i.e. Smt.Krishnadevi Malchand Kamathia and 8 others, it is not necessary to refer the names of each of them. The petitioner is a developer and for the

purpose of developing the land in question, the power of attorney was executed by the said original owners in favour of the present petitioner and the petitioner was put in possession of the entire property for the purpose of development of the land in question. It seems that a Public Interest Litigation was filed in this Court in connection with the damaging the mangroves. The Division Bench of this Court disposed of the said Public Interest Litigation on October 06, 2005 by giving certain directions in connection with the protection of the mangroves. Since the land in question wherein the mangroves were there and which were damaged, the petitioner preferred a Special Leave Petition before the Supreme Court of India challenging the order passed by this Court in the said PIL as well as the Notification dated 18-02-2009 declaring the area as a Forest land. The Special Leave Petition was admitted and thereafter, the matter was numbered as Civil Appeal No.4421 of 2010. Before the Supreme Court, on behalf of the petitioners, an interim applications were preferred bearing I.A.Nos.16 and 17 of 2010 and the Supreme Court passed the following order in the said I.A. Nos.16 and 17 of 2010.

Heard both sides.

Pursuant the order passed by this Court on 15-12-2009, the Collector had inspected the property and permitted the applicants to carry out the repairs of the Bund subject to the following conditions :

The applicants shall not carry out any other construction activities on the said land.

The applicants will not destroy mangroves and/or vegetation on the said land.

The applicants shall not raise the height of the Bund above as in existence at present.

Upon completion of the repairs, the applicants shall file a completion report in the office of the Collector.

The applicants shall carry out the repairs as directed by the Collector and shall strictly comply with the instructions given by the Collector. If there is any violation, the respondent would be at liberty to bring it to the notice of this Court.

I.A.s are disposed of accordingly. List in the month of July, 2010.

3. Thereafter, on behalf of the State Government, a complaint was made before the Supreme Court that the petitioner has flouted the order of the Court and carried out the constructions. Both the sides have filed contempt proceedings before the Supreme Court. Ultimately, the Supreme Court vide judgment dated 31-01-2011 disposed of the proceedings by giving following directions :

(1) The appellants are directed to restore the height and width of the bund as it was existing prior to the order passed by the District Collector dated 27-01-2010 within a period of 60 days from today by removing all debris, grit, boulders, etc., dismantling of platforms and reducing the height and width of the bund.

(2) All culverts, drains which existed prior to 27-01-2010 which could facilitate the natural flow of sea water into the land shall be restored.

(3) In case the appellants fail to carry out the aforesaid directions within the stipulated period, the District Collector, Suburban District, shall carry out the aforesaid directions and recover the cost from the appellants as

arrears of land revenue and shall ensure in future that the appellants would not act in a manner detrimental to the ecology of the area and ensure the preservation of mangroves and other vegetation.

5. In view of the aforesaid directions of the Supreme Court, the District Collector was permitted to remove debris, grit, boulders, in case the petitioners who were the appellants before the Supreme Court, fails to comply with the aforesaid directions within the stipulated period. On behalf of the respondent-State, proceedings were initiated in this behalf, asking the petitioners to remove all debris, grit, boulders etc., in view of the order of the Supreme Court and as per the stand of the Government, since the petitioners had failed to carry out the said obligation, substantial portion of debris, grit etc., were removed through the Office of the Collector by giving an agency to the independent contractor and on that basis, a cost of ₹1,24,00,891/- was recovered from the petitioners by attaching the bank accounts. The aforesaid decision for recovery of the said amount is challenged by way of this petition in the present proceedings.

6. The learned counsel for the petitioners vehemently argued that so far as the present petitioners are concerned, there were the constituted attorney of the original owner and therefore, if any amount is required to be recovered by the Government, it should have recovered the

amount from the original owner, for which constituted attorney is not liable to pay any amount on behalf of the original owner. It is vehemently submitted that the District Collector has acted in a high handed manner for recovery of the amount from the constituted attorney and it is submitted that in view of the same, the respondents may be directed to repay the said amount to the constituted attorney. The learned counsel for the petitioner submitted that before attaching the amount, regarding the actual costs incurred by the Office of the Collector, the amount in question could not have been recovered from the petitioners as the Collector was required to take appropriate proceedings under the Maharashtra Land Revenue Code, before effecting the actual recovery. He submits that since the amount in question is recovered in a high handed manner, it is the fit case in which this Court in its extraordinary jurisdiction under Article 226 of the Constitution of India, may exercise its powers and direct the District Collector to refund the said amount to the petitioners.

7. The petition is resisted on behalf of the respondents. The learned Govt. Pleader has submitted that the proceedings were initiated by the Constituted Attorney before the Supreme Court on behalf of the original owner and the petitioners on the basis of the constituted power of attorney, has entered into possession and has tried to develop the property

in question. The learned Govt. Pleader submits that before even effecting the recovery, a notice was given to the original owner through the present petitioners, which notice is undisputedly served on and received by the petitioners. It is submitted that as a matter of fact, before the recovering the amount, various meetings were held between the District Collector and the petitioner's constituted attorney and since the petitioners were adamant, the Collector was required to give private contract for removing the remaining portion of the debris, grit from the large site and ultimately, by incurring the aforesaid expenditure the debris, grit were removed from the site. In order to substantiate his say that the amount in question, for which recovery was sought for, has been incurred by the Government, he tried to rely on relevant bills for the same. However, since copy of the said bills are not made available to the other side, we have not taken the said documents on record, as otherwise also this Court cannot determine such a disputed question of facts as to what actual costs the Government has incurred for removing the debris, grit etc.

8. We have heard the learned counsel for the parties. In our view, the petition filed by the present petitioners is totally misconceived and is not required to be entertained by this Court in its extra ordinary jurisdiction under Article 226 of the Constitution of India. At the outset, it is required to be noted that in para No.31, the Supreme Court has

observed that 'the appellants are guilty of willful defiance of the orders passed by this Court as well as the District Collector and they have filed the contempt petitions using it as a legal thumb screw to enforce their claims, though totally unwarranted and unfounded on facts. The petitioners have shown least respect to the orders passed by the Supreme Court, as in spite of the directions of the Supreme Court reproduced hereinabove, the petitioners have failed to carry out their obligations by removing the debris, grit etc., from the site. In this behalf, it is required to be noted that in connection with the subject matter, the petitioners were also heard by the District Collector. Not only that, on behalf of the original owners, the petitioner's constituted attorney Jayesh Shah addressed a letter to the Collector on 13-04-2011 asking the Collector the dimension of the Bund i.e. height and width, prior to the order dated 27-01-2010. On the same day, the Office of the Sub-Divisional Officer, Mumbai, addressed a letter to the petitioners pointing out to him that out of total debris, grit, 25 to 30% debris have been removed. The said letter reads as under :

Sir,

Hon'ble Supreme Court vide its order dated 31-01-2011 had granted 60 days period to remove all debris, grit and boulders etc., deposited while repairing the bund existed in land bearing S.No.344 of Village Dahisar and also further directed to restore the position of the culvert, drains, which was existed prior to the order dated

27-01-2010 passed by the District Collector, M.S.D. As the petitioner unable to remove the debris within time period given by the Hon'ble Supreme Court, the petitioner sought extension which has been granted by the Hon'ble Supreme Court by further 4 weeks.

Tahsildar Borivali, visited the site on 31-03-2011 and reported that till the date only 25 to 30% debris has been removed from the site. The extension period granted by the Hon'ble Supreme Court will also be elapsed on 30-04-2011 and the work of removal of debris is still remained to be done at large scale. In this connection, meeting is held in my chamber on 15-04-2011 at 11.30 a.m. to discuss line of action to be taken to expedite the work and complete the same within extension period given by the Hon'ble Supreme Court. You are therefore, requested place remain present in the meeting along with detailed action plan.

Yours faithfully,

sd/-  
Sub-Divisional Officer,  
Mumbai Suburban District.

9. It is also pertinent to be noted that on behalf of the Office of the Sub-Divisional Officer, M.S.D., a communication was addressed to the petitioner on 05-05-2011 pointing out that since the petitioner failed to comply with the order of the Supreme Court, the Department has invited quotations for removing debris, grit etc., and to restore the bund to its original position as on 27-01-2010. The petitioner was initially directed to deposit an amount of ₹3,00,00,000/-, which includes the cost of removal of debris, grit etc. and also the restoration of the bund in its original position.

10. Subsequently, the proceedings were initiated by issuing notice dated 30-08-2011 under the Maharashtra Land Revenue Code for recovering the said amount from the developers, which is addressed to the original owner, a copy of which is given on c/o address of the petitioner. It is not in dispute that the petitioner Jayesh Shah himself has received the said notice. After receiving the said notice and on the basis of some discussion taken place between the petitioner and the Collector, the recovery is actually effected for lesser amount of ₹1,24,00,891/- than ₹3,00,00,000/- demanded vide a letter dated 05-05-2011. The learned Govt. Pleader submits that ₹1,24,00,891/- is the total cost of removal of debris and grit from the site by giving sub-contract of the same to the private contractor, whereas the cost of the restoration of the bund to its original position, has not been recovered from the petitioner.

11. In so far as the argument regarding recovery of the amount by the power of attorney is concerned, it would be opposite to have a reference on the relevant clauses of the power of attorney, which is placed on record. They are :

1. To get the said property surveyed by any Surveyors Architects or T.I.L.R. Authorities and upon such survey being done to execute Deed of Rectification, Supplemental Agreement or any other writing or writings confirming the variation of the area if any of the said property and to do accordingly altered with all authorities including Revenue Department and Municipal Corporation.

2. To apply for and obtain the necessary permission for conversion of the user of the said property from agricultural to non-agricultural use or purpose and to sign to execute and deliver all the papers, writings, deeds, documents, guarantees, undertaking, etc., for the purpose to the authorities concerned.

34. To represent before and to deal with the correspondence with Municipal Corporation, all Revenue Authorities under Maharashtra Land Revenue Code, the Government of Maharashtra, Collector, Competent Authority and any other Officer, Authority or Town Planning Authorities, Municipal Corporation and Regional Development Authority, Maharashtra Electricity Board etc. or any other officer, Authority or authorities.

35. To pay all taxes, rates, charges, expenses and all other outgoing in respect of the said property.

12. The learned Govt. Pleader pointed out that so far as the original owners are concerned, they have already created interest in favour of the constituted attorney by giving possession and the entire work has been carried out by the constituted attorney as the original owner is an illiterate widow. It is also required to be noted that on behalf of the petitioner, an undertaking was also given to the Collector stating that if permission is granted to repair the said bund, no misuse of such permission will be made. Moreover, they will not commit any breach of coastal laws and we will not defy the orders of the Government of Maharashtra in this regards. In the said undertaking, it is also stated that while repairing the said bund, no harm will be caused to the natural vegetation or cause any harm to the wet land. No harm will be caused in

any case to the trees existing in the said land.

13. The learned Govt. Pleader also pointed out that the construction activity was carried out by the petitioner by virtue of the power of attorney given to them by the original owner. It is true that if any action is required to be taken for recovering the amount, the power of attorney holder may not be directly responsible for recovering the amount, as he is only an agent on behalf of the original owner. However, the factual aspect of the case, which is not in dispute that on the basis of the power of attorney, the petitioner carried out the development work and as argued by the learned Govt. Pleader, as per the clauses of the power of attorney, the original owners gave all powers to him to incur all costs and carry out the work in question. Interestingly, it is not the say of the petitioner that the amount is required to be recovered from the original owner and no such averments are made in the petition. Even the original owners are not joined as party respondents in this petition, may be purposefully or perhaps the petitioner may be aware that the original owners may not be responsible to make the loss good. In our view, this is not a case in which the petition of such a nature is required to be entertained at the hands of such a petitioner, who has not carried out the work in spite of the Collector's notice in this behalf and in spite of the orders of the Supreme Court.

14. It is pointed out that meetings were held between the Collector and the petitioner even after issuance of the notice, which the petitioner has received and he has not made any grievance in that regard by saying that the notice may be given to the original owner, as practically he was managing the affairs. A Special Leave Petition was filed by the petitioner as a constituted attorney of the original owner and for all practical purpose, he is the sole responsible person. However, whether the power of attorney holder is personally liable to pay the amount in question or not, is the question which is required to be decided in an appropriate civil suit wherein both the sides can lead evidence in support of their case. In a given case, this Court may exercise its extra ordinary jurisdiction under Article 226 of the Constitution of India by entertaining such petition and direct the Government to refund the amount. But looking to the conduct of the petitioner and the facts and circumstances of the case, this is not one of such cases where this Court would like to exercise its extra ordinary jurisdiction under Article 226 of the Constitution of India by entertaining the claim of the petitioner which is in the nature of money claim. This Court is not required to consider as to what actual costs was incurred by the State Government for removal of the debris, grit etc., and this question is required to be decided in an appropriate suit wherein both the parties can lead evidence, wherein on

the basis of the evidence, the Court can come to a definite conclusion. This Court would not like to exercise its powers by entertaining such a petition. It is not the mandate of the law that in such cases the High Court is bound to exercise its extra ordinary jurisdiction, as every case depends upon facts of each case. Suffice to say that since the amount has already been recovered and the petitioner was also served with a notice under the provisions of the Maharashtra Land Revenue Code and since the petitioner has participated in the proceedings before the Collector, as various meetings were held, the prayer made by the petitioner is not required to be entertained. If the amount is wrongly recovered, it will be open to the petitioner to take out appropriate proceedings as according to the learned counsel for the petitioner, the amount is recovered from the Company wherein the petitioner is one of the Director and even otherwise, such recovery was made in law. All these questions are kept open in case appropriate proceedings are taken out by the petitioner in an appropriate Court. It is clarified that in case the petitioner takes out appropriate proceedings as indicated above, the observations made in this order may not be taken into consideration as it is made only for the purpose of deciding this petition and such proceedings to be decided on its own merits and in accordance with law.

16. In view of what has been stated above, the writ petition is dismissed with no order as to costs.

( MRS.MRIDULA BHATKAR, J.)

( P.B.MAJMUDAR, J.)