

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 2231 OF 2019

Shree Vinayak Builders &
Developers, a proprietary firm
having its registered office at
O.G. House Opp. to Wazalwar
Lawns, Bhagwaghar Layout,
Dharampeth, Nagpur, through
its partner Shri Deepak S/o.
Sureshrao Gadge.

.... **PETITIONER.**

// VERSUS //

1. The State of Maharashtra,
through the Principal Secretary,
Urban Development Department,
Mantralaya, Mumbai – 32.
2. The Nagpur Municipal Corporation,
Nagpur, through its Commissioner.
3. Assistant Director, Urban Town
Planning Department, Nagpur
Municipal Corporation, Nagpur.

.... **RESPONDENTS.**

Shri V.G.Palshikar, Advocate for petitioner.
Ms N.P.Mehta, A.G.P. for Respondent No.1.
Shri S.M.Puranik, Advocate for Respondent Nos.2 & 3.

CORAM : **SUNIL B.SHUKRE AND**
ANIL S. KILOR, JJ.

DATE OF RESERVING THE JUDGMENT : **23/09/2021.**
DATE OF PRONOUNCING THE JUDGMENT:**27/01/2022**

JUDGMENT : (Per : Anil S. Kilor, J.)

1. Upon failure of the respondent authorities to acquire petitioner's land reserved for 24 meters wide D.P. Road in the Final Development Plan of the City of Nagpur, within statutory period of two years from the date of service of purchase notice under Section 127 of the Maharashtra Regional and Town Planning Act, 1966 (hereinafter referred to as "the Act of 1966"), the petitioner has filed the present petition, seeking declaration that the reservation of the land in question, is deemed to have lapsed.

2. The brief facts of the present case, are as follows:

3. The land admeasuring 6377.12 Sq.Mts. comprised in land bearing Khasra Nos. 282/2 and 270/1 out of total land admeasuring 21100 Sq.Mts., owned and possessed by the petitioner, shown to be reserved for building a 24 meters wide DP Road in the Final Development Plan for the City of Nagpur, which came into force on 01/03/2000

4. Upon failure of the respondent No. 3 to acquire the land in question for more than ten years from the date of coming into force the Development Plan for Nagpur City, the petitioner served a purchase notice under Section 127(1) of the Act of 1966, on the respondent No.3, a Planning Authority, on 27/07/2016.

5. In response to aforesaid purchase notice, the respondent No.3 vide its communication dated 16/09/2016 informed the petitioner that, the petitioner would be compensated with Commensurate Transferable Development Right(TDR). The petitioner for that purpose, was asked to submit an application for grant of TDR in the prescribed format.

6. Followingly, the petitioner submitted an application on 16/09/2016, for grant of TDR. Whereupon, the respondent No.3 vide its communication dated 22/12/2017, informed the petitioner that its application for TDR against the land in question, has been approved by the Commissioner of Nagpur Municipal Corporation.

7. It is the case of the petitioner that, the petitioner thereafter visited the office of the respondent Nos.2 and 3 on

authorities did not take concrete steps towards acquisition and the respondent authorities made the petitioner to run from pillar to post.

8. Resultantly, the petitioner issued a communication to the respondent No.3 on 31/07/2018, *inter-alia* informing that the petitioner has decided to withdraw its application for grant of TDR. The petitioner further requested the respondent No.3, for grant of monetary compensation.

9. However, thereafter the respondent No. 3 failed to acquire or to commence steps which will culminate in acquisition of the land in question within statutory period of two years from the date of purchase notice under section 127 of the Act of 1966.

10. Hence, this petition for declaration that the reservation of land in question has lapsed by operation of Section 127 of the Act of 1966 and the petitioner is free to develop the land in question in accordance with law.

11. Heard the learned counsel for the respective parties.

12. Shri Palshikar, learned counsel for the petitioner submits that, a sanction granted by the Commissioner for grant of TDR in this case, cannot be termed as a step towards acquisition of land. Thus, he submits that a failure to acquire the land in question by the respondent authorities, before lapse of statutory period of two years from the date of service of purchase notice under Section 127 of the Act of 1966, is sufficient to declare that the reservation has lapsed and the petitioner is entitled to develop the land in question in accordance with law.

13. Shri Palshikar, learned counsel for the petitioner further argues that once the request for grant of TDR was withdrawn by the petitioner, the only mode which was available to the respondent No. 3, was by paying an amount agreed by the petitioner or by making an application to the State Government for acquiring the land in question under the provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereafter referred to as “the Act of 2013”)

and in absence of any such step taken in this matter, within statutory period after the service of purchase notice, the reservation in respect of the land in question is deemed to have lapsed. In support of his contention, he has placed reliance on the judgment of Coordinate Bench of this Court dated 1st August 2017, in **Writ Petition No. 1343 of 2017** (*Keshaorao Narayan Chichghare ..vs.. State of Maharashtra & Others*) and the judgment dated 4th April 2019 passed in Writ Petition **No. 728 of 2017** (*The Nirmal Ujwal Credit Co-operative Society Limited, Nagpur ..vs.. State of Maharashtra*).

14. *Per contra*, Shri Sudhir Puranik, learned counsel appearing for the respondent No.3-Municipal Corporation submits that as the request made by the petitioner for grant of TDR, vide application dated 18/11/2016, was approved and accepted by the Commissioner, subsequent withdrawal of such request by the petitioner would not give effect to the provisions of Section 127 of the Act of 1966 for declaring the reservation as “lapsed” in relation to the land in question.

15. Shri Puranik, learned counsel for the respondent No.3 further argues that, approval accorded for grant of TDR by the Commissioner, amounts to step taken to commence the acquisition of the reserved land. Thus, according to him, in this case, the petitioner has no right to refuse the compensation by way of TDR by withdrawing his request for the same. For this purpose, he has placed reliance upon the recent judgment of the Coordinate Bench of this Court dated 16th September 2021 in **Writ Petition No. 5938 of 2020** (*Asha Sunil Zawar ..vs.. State of Maharashtra & Oth.*).

16. Shri Palshikar, learned counsel for the petitioner, in reply to the above referred contention of the planning authority, has pointed out that in the above referred case of *Asha Sunil Zawar* (supra) this Court has not considered the judgment dated 24th September 2020 in **Writ Petition No.10162 of 2019** (*Madhukar Haribhau Muley ..vs.. State of Maharashtra & oth.*), wherein it has been held that mere passing of resolution to offer TDR in lieu of monetary compensation cannot be treated as commencement of proceedings for the acquisition of the writ lands. He further argues that in view of the above referred judgment, the view taken in the

case of *Asha Sunil Zawar* (supra), cannot be said to be a good law.

17. To consider the rival contentions of the parties, we have carefully perused the record and judgments cited by both the parties.

18. At this juncture before considering the case in hand on merit, it is necessary to refer to Section 126(1) of the Act of 1966, which reads thus:

“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 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 maybe, 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 Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. Floor Space Index (FSI) or Transferable

Development Rights (TDR) against the area of land 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 an 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 land (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 provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, 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.” (Emphasis supplied)

19. After referring to the above referred provision namely Section 126(1) of the Act of 1966, it is clear that, the first mode provided for acquisition is by way of mutual agreement by payment of amount agreed to. The second mode is by way of TDR/FSI in lieu of such amount. Whereas, the third mode is by taking recourse to the provisions of the Act of 2013.

20. This Court in *Asha Sunil Zawar* (supra) has held that the land owner has no voice to deny or decline the compensation of TDR.

21. In the case of case *Madhukar Haribhau Muley* (supra) Division Bench of this Court has held that mere passing of resolution to offer DRC/TDR in lieu of monetary compensation cannot be treated as commencement of proceedings for the acquisition of private lands.

22. The Division Bench of this Court in the case of *Vasant Mahadev Patil and others* (supra), has held that under sub-section (1) of Section 126 of the Act of 1966 there are three modes available for acquisition. The first is by mutual agreement by payment of monetary compensation agreed between the parties, second is of grant of TDR/FSI in lieu of compensation and third is by taking recourse to the provisions of the Act of 2013. This Court has further held that as far as first two modes are concerned, the same can be exercised only with the consent of the owners or persons interested in the land under reservation or designation.

23. A coordinate Bench of this Court in the case of *Keshaorao Narayan Chichghare*(supra) has taken a view that just because the stage of negotiations for acquiring a land reserved for public purpose, as envisaged under Section 126(1) of the Act of 1966, has not been crossed over, it cannot be said that the stage of compulsory acquisition as the third mode of acquisition has not arisen.

24. In the case of *The Nirmal Ujwal Credit Co-operative Society* (supra)while interpreting the option of acquisition of land for public purpose by giving compensation in the nature of grant of TDR under Section 126(1)(b) of the Act of 1966, another Division Bench of this Court has held that the grant of TDR under this Section accrues or flows from the surrender of the area covered by the development plan rights termed as the reservation for public purpose, free of cost and free from all encumbrances. It is further held that in the absence of such surrender, TDR is not available under the said provision thereby indicating that the right to receive the grant of TDR would arise only upon the surrender of the land free of cost and free from all encumbrances and if there is no

surrender of land or there is surrender, subject to condition of cost and/or with an encumbrance, no entitlement for receiving the grant of TDR would arise in favour of the land owner. This proposition of law throws open a question as to what exactly is the step for acquisition of land as elucidated in the case of *Girnar Traders..Vs..State of Maharashtra* reported in **(2007) 7 SCC 555** when the mode of acquisition is by granting compensation in the nature of Floor Space Index(FSI) or Transferable Development Rights (TDR) against the area of land surrendered free of cost and free from all encumbrances.

25. The views expressed in the cases of *Madhukar Haribhau Muley* (supra), *Vasant Mahadev Patil* (supra), *Keshaorao Narayan Chichghare* (supra) and *The Nirmal Ujwal Credit Co-operative Society* (supra) have not been considered or discussed in the case of *Asha Sunil Zawar* (supra), without any dispute.

26. The Hon'ble Supreme Court of India in the first case of *Girnar Traders vs. State of Maharashtra*, reported in **(2007)7 SCC 555**, has held that, no step can be considered as a step for acquisition of land unless such step is towards the acquisition of

land. Paragraph 58 of the said judgment, reads thus:

“58. The MRTP Act does not contain any reference to Section 4 or Section 5-A of the LA Act. The MRTP Act contains the provisions relating to preparation of regional plan, the development plan, plans for comprehensive developments, town planning schemes and in such plans and in the schemes, the land is reserved for public purpose. The reservation of land for a particular purpose under the MRTP Act is done through a complex exercise which begins with land use map, survey, population studies and several other complex factors. This process replaces the provisions of Section 4 of the LA Act and the inquiry contemplated under Section 5-A of the LA Act. These provisions are purposely excluded for the purposes of acquisition under the MRTP Act. The acquisition commences with the publication of declaration under Section 6 of the LA Act. The publication of the declaration under sub-sections (2) and (4) of Section 126 read with Section 6 of the LA Act is a sine qua non for the commencement of any proceedings for acquisition under the MRTP Act. It is Section 6 declaration which would commence the acquisition proceedings under the MRTP Act and would culminate into passing of an award as provided in sub-section (3) of Section 126 of the MRTP Act. Thus, unless and until Section 6 declaration is issued, it cannot be said that the steps for acquisition are commenced.”

27. In the case of *Asha Sunil Zawar* (supra), it is held that the land owner has no voice to say ‘no’ or ‘decline’ the offer of compensation in the nature of TDR and that mere offering of

compensation of TDR within the requisite period is a step commencing the acquisition of the reserved land as the option of TDR does not rest with the land owner. After a careful consideration of the scheme of the provisions made under Section 126(1) of the Act of 1966 and the judgments in the cases of *Madhukar Haribhau Muley* (supra), *Vasant Mahadev Patil*(supra) and *Nirmal Ujwal Credit Co-operative Society*(supra), however, we express our respectful disagreement with the said view taken in the case of *Asha Sunil Zawar*(supra), for the reasons indicated herein below.

28. In Section 126(1)(a) word “agreement” is used which sufficiently denotes that the land owner has discretion to agree or disagree to accept amount in lieu of acquisition of the land. Similarly, the opening words of sub-section 1(b) of Section 126, “*in lieu of any such amount*” clearly indicate that the discretion which the land owner can exercise under sub-section 1(a), is equally available to him/her under sub-section 1(b) while accepting or declining to accept FSI/TDR. Thus, under sub-section 1(a) or 1(b) of Section 126, agreement to accept monetary compensation or TDR/FSI, by the land owner is pre-condition and in absence of same the land cannot be acquired under the said provisions.

29. Admittedly, in the matter in hand, though the sanction was granted by the Municipal Commissioner for grant of TDR, no such TDR was granted to the petitioner till the date he withdrew his request for grant of TDR. It is, therefore, clear that on withdrawal of application for grant of TDR, the petitioner declined to accept the TDR and as such the pre-requisite for acquisition of land under sub-section 1(b) of Section 126, of having agreement to accept TDR, is absent in this matter.

30. In the light of the above observation, if the view taken in the case of *Asha Sunil Zawar* (supra) that the land owner has no voice to refuse or decline the compensation of TDR is accepted, it will amount to taking away the discretion or the choice of the land owner to exercise his statutory right either to accept or decline to accept monetary compensation or TDR/FSI in lieu of acquisition of the land under sub-section 1(a) and (b) of Section 126 of the Act of 1966.

31. We are of the considered view that the discretion to be exercised by the land owner in sub-section(1)(a) and (b) of Section 126 of the Act of 1966 is unconditional and in the nature of choice

given to him, just as the acquiring authority. After all, the law relating to acquisition of land whether under the Land Acquisition Act, 1894 or under Chapter VII of the Act of 1966, has beneficial object, an object to compensate a person deprived of his property reasonably. The provisions made for grant of compensation for acquisition of private lands for public purposes are intended to provide reasonable compensation to a land owner who is deprived of his land by state action. In a case where the statute provides for multiple modes of acquisition and the authority does not wish to determine compensation as per the provisions of applicable land acquisition law in first go the expression “reasonable compensation” would have to be understood not only by applying the settled principles of law but also by considering the nature of modes of acquisition. Section 126 (1) is one such instance. It prescribes not just one mode but three modes of acquisition, two of which depend on the agreement between the parties where consent of the land-owner is equally important. This shows that it is the intention of the legislature to allow parties to choose in it’s discretion one out of two modes of acquisition so that the compensation agreed upon is thought to be reasonable not by one side but by both.

32. There is another aspect also. Take a case where the land-owner gives his consent to go by one of these two modes and then backtracks on his consent before the consent has assumed the form of contract. If this is to happen, there would be no option but to give up that mode of compensation and adopt the mode of compulsory acquisition under clause (c) as there is nothing in law which can compel the land-owner to stick to his consent. There is no provision in the Act of 1966 which compels a land-owner to go by his consent and accept the amount of compensation or TDR offered. It would, however, be a different matter if the land-owner accepts the amount offered under clause (a) or surrenders the land under clause (b) of the sub-section (1) of Section 126 of the Act of 1966. It is therefore, difficult to accept the view that the option regarding the manner in which reserved land should be acquired, can be exercised only at the discretion of acquiring authority and not at the discretion of land owner. If such a view is accepted, it would render the modes of acquisition under clause (a) and clause (b) nugatory and one-sided, thereby frustrating the object of such provisions to pay reasonable compensation to the land-owner.

33. We may make it clear here that what we have said herein above would hold good only when the acquiring authority does not decide to acquire the land as per third mode in clause (c) in the first instance itself and decides to go by the modes given in clause (a) or clause (b) where the agreement is the determining factor.

34. About what is it which makes something a step for acquisition of land, a useful reference can be made to the law laid-down in the case of *Girnar Traders-I* (supra) and appropriate conclusion can be drawn to determine what action would constitute a step for acquisition of land, when the mode of acquisition is by grant of TDR under clause (b). *Girnar Traders-I* (supra), lays down a test for determining what constitutes a step for acquisition of land. It is this – it is a step from which movement in reverse direction is not possible; it is something which must lead to acquisition without any other possibility. It is held that any step which may or may not culminate in the step of acquisition cannot be said to be a step towards acquisition of the land. When this test is applied to acquisition mode under clause (b) of Section 126 (1), a clear picture emerges as regards the step which actually constitutes the step for

granted “against the area of land surrendered” and not the moment consent is given and, therefore, it is the surrender of area of land, physically or symbolically, which would be a step for acquisition of land inasmuch from this stage, reverse movement from either of the sides is not possible and grant of TDR is a forgone conclusion. This would lead us to opine, with due respect, that it may not be a correct proposition of law that offering of compensation of TDR within 24 months from the date of receipt of purchase notice is the step to commence the acquisition of of land, as observed in para 83 of the judgment in *Asha Sunil Zawar* (supra). As found by us, it is not the mere approval of application made for grant of TDR but, it is the surrender of area of land on approval of application for grant of TDR is what constitutes the step for acquisition of land. If this step is reached, TDR grant would follow and there can be no withdrawal of consent for giving compensation by way of TDR. But, if this step has not arrived at, in our respectful submission, it is possible to withdraw the consent or the application, especially when the intention of the legislature is to give opportunity to the land-owner also to decide by which mode from out of two modes he would get the compensation he thinks to be most reasonable.

35. Thus, we are of the opinion that mere acceptance by the authority of the application for grant of TDR, as in the present case, cannot be termed as a step towards acquisition in the absence of any concrete and irreversible step towards acquisition, like the surrender of the land physically or symbolically, or taking over of the possession of the land by the acquisition authority/Planning Authority within the statutory period of two years. The view expressed in *Asha Sunil Zavar* (supra) is however, opposite, and it being prior in point of time, the law of precedents would require that this matter is referred to a larger Bench on the following questions:

- I) Whether the modes of acquisition provided under Section 126(1)(a) and (b) of the Maharashtra Regional and Town Planning Act, 1966 are at the choice of either of the parties or only of the acquiring authority?
- II) If the planning authority has approved the request of the land owner for grant of monetary compensation or grant of TDR/FSI in lieu of compensation, can the land-owner withdraw his request and thereby refuse or decline to surrender the land?

III) Can the grant of approval or passing of resolution by the authorities concerned for grant of TDR in lieu of monetary compensation be treated as a step for acquisition of land and thereby commencing the proceedings for the acquisition of land?

36. In view of the conflict between the views, one taken in the case of *Asha Sunil Zawar* (supra), and the other represented by the cases of *Madhukar Haribhau Muley* (supra), *Vasant Mahadev Patil* (supra), *The Nirmal Ujwal Credit Co-operative Society* (supra) and this very order, the controversy is required to be put to rest by an authoritative pronouncement by a larger Bench of this Court on the above referred questions.

37. The Registry is, therefore, directed to place the papers before the Hon'ble the Chief Justice for considering constitution of a larger Bench of this Court to answer the above referred questions.

Order accordingly.

(ANIL S. KILOR, J)

(SUNIL B. SHUKRE, J)