

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO. 6961 OF 2012**

Vivek Vishnupant Kulkarni
Age : 58 years, Occ. Advocate,
Residing at Agasti Bunglow
Sane Guruji Society, Vishrambag,
Sangli 416 415.

...Petitioner.

versus

1. The State of Maharashtra, through
Chief Secretary, Mantralaya, Mumbai.
2. The State Information Commission,
Through State Information Commissioner,
Having bench at Pune, New Administrative
Building, 4th Floor, Opp. Council Hall,
Pune - 1.
3. Deputy Secretary and Appellate Authority
Urban Development Department,
Mantralaya, Mumbai 400 032.
4. The Section Officer and Information Officer,
Urban Development Department,
Mantralaya, Mumbai 400 032. ..Respondents.

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Mr. Uday P. Warunjikar for the Petitioner.

Mr. V.S. Gokhale, AGP for Respondent Nos.1, 3 and 4.

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CORAM : A.S. OKA &
A.S. GADKARI, JJ.

Judgment reserved on : 19th December 2014.
Judgment pronounced on : 27th February 2015.

ORAL JUDGMENT (PER A.S. GADKARI, J.) :

Notice for final disposal was issued under the order dated 21st August, 2013.

2. Heard the learned counsel for the Petitioner and the learned AGP for the Respondent Nos.1, 3 and 4. The Respondent No.2 is a formal party as the Petitioner by this present Petition has prayed for the implementation of the order dated 18th August, 2011 passed by the Respondent No.2. Hence, notice to the said Respondent is dispensed with.

3. The case in hand is a classic example, as to how the Government officers for protecting their fellow officers tend to frustrate the basic intention of the legislature behind the enactment of the Right to Information Act, 2005.

4. The brief facts which are necessary for the decision of the present case can be stated thus :

(i) The Petitioner is associated with a public trust by the name Swatantraya Veer Sawarkar Pratishthan, Vishrambaug, Sangli

dedicated to the social, educational, and charitable activities. The said trust is running two schools and both the said schools are having about 1600 students on its roll.

(ii) The Petitioner filed an application dated 5th September, 2008 with the Respondent No.4 for seeking information under the Right to Information Act, 2005 in respect of the Government Resolution dated 21st August, 1996. The said resolution was pertaining to the release of various lands in and around the vicinity of Sangli city which were acquired by the Government under the Urban Land (Ceiling and Regulation) Act, 1976. He sought information about the Government notings and other documents on the basis of which the said Government Resolution was issued. The details of the lands released on the basis of the said Government Resolution were also sought. By a communication dated 22nd September, 2008 the Respondent No.4 informed the Petitioner that the required information sought for by the Petitioner is pertaining to file No. ULC/1089/2123//ULC-2 which is not available on the record of the Urban Development Department and therefore, the said information cannot be furnished to the Petitioner. By the said communication dated

22nd September, 2008 it was informed to the Petitioner that the other information which was sought for by the Petitioner vide his point No.4 in his application dated 5th September, 2008 is in connection with the office of the Deputy Collector and competent authority, Sangli and the said application to that extent has been transferred / transmitted to the said authority for further action in the matter.

(iii) The Petitioner feeling aggrieved by the said non-action by the Respondent No.4 preferred an appeal bearing No.4 of 2008 under Section 19(1) of the Right to Information Act, 2005 before the Respondent No.3 on 27th November, 2008. The Respondent No.3 i.e. the Appellate Authority and the Deputy Secretary, Urban Development Department by its order dated Nil January 2009 partly allowed the said appeal thereby directing the Information Officer along with the Section Officer ULCA-2 to take search of the concerned file bearing No. ULC/1089/2123//ULC-2 and to submit the file or information in connection with the file to the Petitioner immediately. It was further directed to the Deputy Collector and Competent Authority, Sangli Urban Agglomeration to provide the information in respect of the lands returned to the

owners as per the Government Resolution dated 21st August, 1996. The said information was directed to be furnished to the Petitioner within a period of fifteen days. The First Appellate Authority i.e. the Respondent No.3 in his order dated Nil January 2009 has observed that as the Government Resolution dated 21st August, 1996 is a policy decision taken by the Government, the file pertaining to the said decision must be available. It was observed that there is a scope to make efforts for tracing the said file. It was also observed that the information which was sought for by the Petitioner was not available with the Public Information Officer and therefore, the said information was not made available to the Petitioner. The First Appellate Authority further proceeded to observe that the Public Information Officer did not have any intention to deny the said information sought for by the Petitioner.

(iv) The Petitioner feeling dissatisfied by the order dated Nil January 2009 passed in Appeal No.4 of 2008 preferred a Second Appeal dated 15th June, 2009 as contemplated under Section 19(3) of the Right to Information Act, 2005 before the State Information Commission bearing No.262/2011/Sangli before its

Pune Bench. In the said appeal, the Petitioner had raised certain issues and contended that if the information sought for from the Government authorities is not available with the concerned department itself, then there is no use of the Right to Information Act, 2005. The Petitioner also pleaded that as the information sought for by the Petitioner from the concerned authority is having serious repercussions, the said information was of utmost importance from the point of view of public interest and requested the Second Appellate Authority to allow the appeal.

(v) As the Second Appellate Authority did not hear the appeal immediately / expeditiously, the Petitioner sent reminder letters dated 2nd December, 2009, 1st July, 2010, 14th July, 2010, 28th July, 2010 and 13th May, 2011 to the Appellate Authority. The Second Appellate Authority i.e. the Respondent No.2 herein thereafter on 6th April 2011 heard all the concerned in the matter and passed the judgment and order dated 18th August, 2011 in said Second Appeal No.266/2011/Sangli. During the course of hearing of the said Second Appeal, the Second Appellate Authority had orally directed the Public Information Officer and the First Appellate Authority to take all the steps for tracing out

the necessary and required files with respect to the Government Resolution dated 21st August, 1996 and the file bearing No. ULC/1089/2123//ULC- 2 and submit a report on or before 6th May, 2011. It was further directed by the Second Appellate Authority i.e. the Respondent No.2 to the First Appellate Authority i.e. the Respondent No.3 herein that in case the said files are not traced out then to register offence / criminal complaint against all the concerned as contemplated under the provisions of the Maharashtra Public Records Act, 2005 and to submit a report to the said authority on or before 6th May, 2011. The said judgment and order also discloses that by a letter dated 7th July, 2011 the Respondent No.3 submitted an elaborate explanation thereby giving various reasons and expressing its inability to comply with the direction issued by the Respondent No.2 and submitted to the said Second Appellate Authority that the oral directions given in Appeal No.266/2011/Sangli may be reviewed and appropriate order may be passed in the matter. The report / communication dated 7th July, 2011 issued by the Respondent No.3 (Mr.Suresh Kakani, Joint Secretary, Government of Maharashtra) is at page No.44 of the present Petition. The Respondent No.2 in its judgment and order dated 18th August,

2011 has also come to the conclusion that the documents in respect of which the information was sought by the Petitioner were required to be preserved as the same were public documents within the meaning of the Maharashtra Public Records Act, 2005. It was observed that the fact that the said public record is not available was serious. It amounts to denying information to the citizens in respect of important decisions of the State. The Respondent No.2 in its operative part of the order while allowing the appeal of the Petitioner directed the Respondent No.3 to form a special team and trace out the said file on or before 13th September, 2011 and submit a report to the State Information Commission. It was also directed by the Respondent No.2 that in case the aforesaid file is not traced out or made available, in that event, as the record was not maintained as contemplated under the Maharashtra Public Records Act, 2005, it amounts to denial of the information to the Petitioner and therefore, it was directed to initiate action against all the concerned by registering an offence under the Maharashtra Public Records Act, 2005. The said direction was issued to Mr. Suresh Kakani by specifically mentioning his name. It was further directed that the First Appellate Authority shall submit a report to the State Information Commission on or before 5th October, 2011.

(vi) As the order of the Respondent No.2 was not complied with within the stipulated period, the Petitioner sent reminders dated 10th October, 2011 and 2nd December, 2011 to the Respondent No.2 i.e. the State Information Commission and a letter dated 27th April, 2012 to the Respondent No.3 i.e. Mr.Suresh Kakani, the First Appellate Authority and Deputy Secretary, Urban Development Department, Mantralaya, Mumbai requesting the said authorities to inform the Petitioner about the steps taken by the concerned authority in pursuance of the order passed by the Respondent No.2. i.e. the State Information Commission.

(vii) As the Respondent No.3 i.e. the First Appellate Authority did not comply with the order dated 18th August, 2008 passed by the Respondent No.2 i.e. the State Information Commission, the Petitioner has approached this Court under Article 226 of the Constitution of India for a writ of mandamus or a direction that the Respondents be directed to implement the order passed by the State Information Commission, Pune i.e. the Respondent No.2 herein dated 11th August, 2011 in Appeal No.262/2011/Sangli within a stipulated period as this Court may direct.

5. This Court by its order dated 10th August, 2012 issued notice to the Respondent Nos.1, 3 and 4 and after service of the notice, the

Respondent No.3 i.e. Mr.Suresh Kakani, the Joint Secretary Urban Development Department, Mantralaya, Mumbai filed a detailed affidavit dated 29th October, 2012 thereby placing on record the various steps allegedly taken for tracing out the file bearing No.ULC/1089/2123//ULC- 2. On a plain reading of the said affidavit dated 29th October, 2012 it is revealed that, instead of submitting the compliance report of the order passed by the State Information Commissioner, the Respondent No.3 has only given several excuses and the difficulties which he has allegedly faced while attempting to comply with the order passed by the State Election Commission. In paragraph No.8 of the order dated 18th August, 2011, the Respondent No.3 has stated that "It was expected of the First Appellate Authority to submit its report before 5th October, 2011 to the Commission itself." It appears to us that the direction which was issued by the State Information Commission in the order dated 18th August, 2011 in its paragraph No.2 of the operative part has been casually treated by the Respondent No.3 as the "expectation" of the State Information Commission. It was in fact nothing short of a direction. As stated earlier, the Respondent No.3 has given several reasons for non-compliance of the order dated 18th August, 2011 passed by the Respondent No.2 State Information Commission. It further appears to us that the said affidavit dated 29th October, 2012 is conspicuously silent about the registration of the First Information Report and/or the

criminal complaint against the concerned persons. He himself has tried to give a clean chit to all the concerned including himself. This approach of the Respondent No.3 Mr.Suresh Kakani is reprehensible and cannot be countenanced. The said affidavit dated 29th October, 2012 was considered by the Division Bench of this Court on 8th February, 2013 and it was observed that, this Court was not satisfied about the fact that the State has made genuine efforts to comply with the order dated 18th August, 2011 passed by the State Information Commission. It was further directed that if the documents could not be found, an offence could have been registered as directed by the State Information Commission. It was further observed in the said order dated 8th February, 2013 that only by way of indulgence that this Court was granting further time to the learned AGP to enable the State to take appropriate action in the matter as the State had accepted the said order dated 18th August, 2011 passed by the State Information Commission.

6. The Petitioner has filed an affidavit in rejoinder dated 17th January, 2013 to the affidavit in reply of the Respondent No.3, Mr.Suresh Kakani. In the affidavit in rejoinder, the Petitioner has stated that till date, the liability and accountability with reference to the said file in question has not yet been fixed by the Respondents and therefore, the various contentions raised by the Respondent No.3 were

incorrect. The Petitioner has also denied the various contentions raised by the Respondent No.3 in his affidavit. The Petitioner lastly submitted in his affidavit in rejoinder that the Respondent Nos. 3 and 4 cannot come with a case that the file is not traceable. It is further contended that the Government Resolution dated 21st August, 1996 and the file No. ULC/1089/2123//ULC- 2 are pertaining to the release of excess land under the provisions of the Urban Land Ceiling Act and there is every possibility that, the interested persons therein might have taken undue interest in misplacing the said files. The Petitioner has further contended that apart from the consequential action, investigation at the hands of police is necessary, not only for tracing out the file, but also for identifying the persons responsible for its disappearance. The Petitioner has also raised concern about the seriousness of the matter involved in the present case.

7. It is further surprising to note that though Mr.Suresh Kakani had filed an affidavit dated 29th October, 2012 on behalf of the Respondent Nos.1 and 3 i.e. for the State of Maharashtra and he himself being the First Appellate Authority under the Right to Information Act, an additional affidavit in reply on behalf of the Respondent Nos.1, 3 and 4 has been filed by Mr. S.K. Salimath, Deputy Secretary, Urban Development Department, Mantralaya, Mumbai dated 17th April, 2013. It is pertinent to note here that the said Mr.S.K. Salimath while

reiterating what has been already stated by Mr.Suresh Kakani in his earlier affidavit has further tried to absolve all the concerned involved in the present matter and has stated in paragraph Nos.6, 7, 8 and 9 as under:-

“6. I humbly submit that even though the efforts made so far have failed to trace the aforesaid file, the Department is still making every endeavour to locate the file.

7. I further respectfully submit that the search operations regarding the aforesaid file and the process of fixing responsibility for the failure in the safe-keeping of the concerned documents have been complicated by the following factors:-

(i) Initially the General Administration Department of the State Government was handling all the matter pertaining to ULC Act, 1976. Thereafter, the said subject was transferred to the Housing and Special Assistance Department and subsequently vide Government Resolution dated 14.9.2000, all the matters under ULC Act were transferred to the Urban Development Department. Since the said subject was transferred along with the staff and the office record, it is difficult to pinpoint at what exact point of time, the documents sought by the petitioner were misplaced.

(ii) The Government Resolution No.ULC1089/2123/NA.JA.KA.DHA.2, dated 21.8.1996 was issued when the subject of ULC was

with the Housing and Special Assistance Department and it appears to have been issued on a file bearing case No.2123, created in the year 1989 by the Housing and Special Assistance Department. As per the office procedure, the Housing and Special Assistance Department had maintained Common Case Register for the year 1989-1990 and Case Register numbers given therein were in continuation of the earlier numbers. I further say that from the said Government Resolution dated 21.8.1996, it is noticed that the subject matter of the said Government Resolution was started in the year 1989 and the Reference Register Number mentioned by the Housing and Special Assistance Department was 2123 and the concerned Branch was ULC-2. A perusal of the said Register, containing entries from 1095/89 to 2291/90, shows that the Case No.2123 pertains to the year 1990 and actually refers to a different subject viz. "Exemption granted under Sec.20 of ULC Act in respect of Smt. Chandbi Noor Mohd. Saudagar, Sangli (Taj C.H.S. Sangli)". I further submit that in the said Case Register there is no entry bearing no.2123 of 1989.

8. It is humbly submit in the light of circumstances explained above, it has been very difficult for this Department to fix responsibility on any member of the staff for the misplacing of the documents in question.

9. It is humbly submitted that as per Section 8 of the Maharashtra Public Records Act, 2005, no public record shall be destroyed or disposed of in a manner other than prescribed under the said Act. Any person contravening the provisions of section 8 is liable for punishment as per the provisions of section 9. I humbly say that since no deliberate attempt by any officer or employee of this Department to purposely misplace or destroy the record in question has been noticed, so the Department has not lodged any criminal complaint against any member of the staff under the aforesaid section."

8. After reading the affidavit of Mr.Suresh Kakani dated 29th October, 2012 and the affidavit of Mr.S.K. Salimath dated 17th April, 2013, it appears that the said officers have given a clean chit to all the concerned without fixing the liability on anybody. Mr.S.K. Salimath instead of implementing the order passed by the State Information Commission in its true letter and spirit has proceeded to give a go-bye to the order of the Second Appellate Authority. Mr.S.K. Salimath on his own has come to a conclusion that it is very difficult for his department to fix the responsibility on any member of the staff for misplacing the documents in question. It clearly appears to us that while exhibiting over enthusiasm, Mr. Salimath has taken to himself the task of the investigator and the fact finding authority. He has made a bold

statement in paragraph 9 that since no deliberate attempt by any officer or employee of his department to purposely misplace or destroy the record in question has been noticed, the department has not lodged any criminal complaint against any member of the staff under the relevant section of Maharashtra Public Records Act, 2005. We must observe that Mr. Salimath has exceeded his jurisdiction and has tried to overreach the order passed by the State Information Commission dated 18th August, 2011. Mr. Salimath has no authority to decide nor to register an offence. Mr. Salimath was expected to follow the order passed by the State Information Commission in its true letter and spirit.

9. Mr. Suresh Kakani and Mr. S.K. Salimath cannot be allowed to raise or take a spacious plea that the order passed by the State Information Commissioner dated 18th August, 2011 cannot be complied with. The State Information Commissioner has passed the said order which binds the Respondent No.3.

10. It is pertinent to note the preamble to the Right to Information Act, 2005 which reads as under :

“An Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote

transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto.

WHEREAS the Constitution of India has established democratic Republic;

AND WHEREAS democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;

AND WHEREAS revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;

AND WHEREAS it is necessary to harmonise these conflicting interests while preserving the paramountcy of the democratic ideal;

NOW, THEREFORE, it is expedient to provide for furnishing certain information to citizens who desire to have it."

Thus, it is clear that the Right to Information Act, 2005 has been enacted by the Parliament of India for setting up the practical

regime of right to information for citizens to secure access to information under the control of public authorities, and in order to promote transparency and accountability in the working of every public authority.

11. At this stage, we may also refer to relevant provisions of the Maharashtra Public Records Act 2005 which read as under :

“4. No person shall take or cause to be taken out of the State of Maharashtra any public records without the prior approval of the State Government :

Provided that no such prior approval shall be required if any public records are taken or sent, out of the State of Maharashtra for any official purpose.”

“7. (1) The records officer shall in the event of any unauthorised removal, destruction, defacement or alteration of any public records under his charge, forthwith take appropriate action for the recovery or restoration of such public records.

(2) The records officer shall submit a report in writing to the Director without any delay on any information about any unauthorised removal, destruction, defacement or alteration of any public records under his charge and about the action initiated by him and shall take action as he may deem necessary subject to the directions, if any, given by the Director.

(3) The records officer may seek assistance from any Government officer or any other person for the purpose of recovery or restoration of the public records and such officer or person shall render all assistance to the records officer.

8. (1) Save as otherwise provided in any law for the time being in force, no public record shall be destroyed or otherwise disposed of except in such manner and subject to such conditions as may be prescribed.

(2) No record, which is more than hundred years old on the date of commencement of the Maharashtra Public Records Act, 2005, shall be destroyed except where in the opinion of the Director, it is so defaced or is in such condition that it cannot be put to any archival use.

9. Whoever contravenes any of the provisions of section 4 or section 8 shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to ten thousand rupees or with both."

12. Thus, Section 9 of the Maharashtra Public Records Act clearly mandates that whoever contravenes the provisions of Section 4 or Section 8 of the said Act shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to

ten thousand rupees or with both. Thus, according to us the said file bearing No. ULC/1089/2123/ULC-2 which pertains to the resolution dated 21st August, 1996 is a 'public record' as contemplated under Section 2(g) of the Maharashtra Public Records Act, 2005 and it was mandatory for all the concerned authorities to preserve it under the provisions of the Maharashtra Public Records Act, 2005. Hence, in the facts of the case, Section 9 of the Maharashtra Public Records Act, 2005 is certainly attracted. Taking into consideration the directions given by the State Information Commission, it was mandatory firstly for Mr. Suresh Kakani and secondly for Mr. S.K. Salimath to set criminal law in motion and leave it to the investigating agency to find out the culprits. In view of the clear direction issued by the Second Appellate Authority, they were bound to set criminal law in motion as the documents could not be traced within the stipulated time.

13. In the circumstances, we pass the following order :-

- i) We direct the Respondent No.3 to set the criminal law in motion as directed under the judgment and order passed by the Second Appellate Authority dated 18th August, 2011;
- ii) We further direct that after the First Information Report is registered by the State of Maharashtra, the

investigation shall be completed as expeditiously as possible and preferably within the period of six months from the date of registration of the First Information Report. The concerned Commissioner of Police shall consider of entrusting the investigation to an officer of a higher rank and not below the rank of a Deputy Commissioner of Police;

iii) We direct the State to pay cost of Rs.15,000/- to the Petitioner.

We allow the present Petition in terms of the aforesaid directions.

(A.S. Oka, J.)

(A.S. Gadkari, J.)