

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER (ST). NO.6783 OF 2015
WITH
CIVIL APPLICATION (ST). NO.6786 OF 2015**

Anupama Co-operative Housing Society Limited .. Appellant

Vs.

The Municipal Corporation of Greater Mumbai
and Ors. .. Respondents

Mr.Charles J. D'souza with Ms.Mahima Sinha for the appellant

Mr.A.Y.Sakhare, Sr.Counsel i/b Mr.A.K.Nandanwar for the BMC

**CORAM : K.K.TATED, J.
DATED : 07/04/2015**

PC:

1 Heard the learned counsel for the parties.

2 This Appeal from Order is preferred by plaintiff challenging the order dated 27.02.2015 passed by Bombay City Civil Court at Bombay in Notice of Motion No.4734 of 2015 in L.C.Suit No.3337 of 2014 declining to grant any relief in favour of the appellant plaintiff.

3 In the present proceeding, the defendant issued notice under section 299 of the Mumbai Municipal Corporation Act (hereinafter referred to as "said Act" calling upon the plaintiff to hand over possession of the land (not occupied by a building) forming part of

their premises No.C.S.No.239, Anupam Building, situated at Manav Mandir Road, Malabar Hill, Mumbai 400 006 lies within the regular line of the public street as prescribed by the Commissioner under section 297 of the said Act.

4 Being aggrieved by the said notice under section 299 of the said Act, the plaintiff filed L.C.Suit No.3367 of 2014 under section 34, 37 and 38 of the Specific Relief Act for declaration that the notice under section 299 of the said Act in respect of the suit property is illegal, bad in law, improper and is liable to be withdrawn, revoked and cancelled. Following are the prayers in the plaint:

“a. That it be declared that the said notice u/s.299 of the MMC Act bearing No.OACD/2152/AEM(W) DATED 6.12.2014 in respect of property situated at C.S.No.239, Anupama Building, Manav Mandir Road, Malabar Hill, Mumbai 400 006, is illegal, bad in law, improper and is liable to be withdrawn, revoked and cancelled;

b. That this Hon'ble Court be pleased to pass a permanent injunction restraining the Defendants, their servants, agents, representative and/or person or persons claiming through or under the from taking any action pursuant to the said notice u/s.299 of the MMC Act bearing No.OACD/2152/AEM(W) DATED 6.12.2014 in respect of property situated at C.S.No.239, Anupama Building, Manav Mandir Road, Malabar Hill, Mumbai

400 006;

c. That this Hon'ble Court be pleased to pass a temporary injunction restraining the Defendants, their servants, agents, representative and/or person or persons claiming through or under them from taking any action pursuant to the said notice u/s.299 of the MMC Act bearing No.OACD/2152/AEM(W) DATED 6.12.2014 in respect of property situated at C.S.No.239, Anupama Building, Manav Mandir Road, Malabar Hill, Mumbai 400 006, pending hearing and final disposal of the above suit;

d. That ad-interim and interim reliefs in terms of prayer clause (c) above be granted;

e. That cost of this suit be provided for;

f. That such other and further reliefs as the nature and circumstances of the case may require, be granted.”

5 In that suit, the plaintiff preferred Notice of Motion No.4734 of 2014 for temporary injunction restraining defendants from taking any action pursuant to the said notice dated 6.12.2014 under section 299 of the said Act. The plaintiff made following prayers in the Notice of Motion:

“a. That this Hon'ble Court be pleased to pass a

temporary injunction restraining the Defendants, their servants, agents, representative and/or person or persons claiming through or under him from taking any action pursuant to the said notice u/s.299 of the MMC Act bearing No.OACD/2152/AEM(W) DATED 6.12.2014 in respect of property situated at C.S.No.239, Anupama Building, Manav Mandir Road, Malabar Hill, Mumbai 400 006, pending hearing and final disposal of the above suit;

b. That ad interim reliefs in terms of prayer clause (a) above be granted;

c. That costs of the Notice of Motion be provided for;

d. That such further and other reliefs as this Honourable Court may deem fit and proper, in the nature and circumstances of the case, be granted.”

6 In that Notice of Motion, the defendants filed their affidavit in reply and written statement dated 4.2.2015 and opposed the reliefs to be granted in favour of the plaintiff. Considering the submissions made by both the counsel before the Trial Court and the documents on record, the Trial Court held that the plaintiff failed to make out a case for interim relief and hence, rejected the Notice of Motion No.4734 of 2014 by impugned order dated 27.2.2015. Hence, the present Appeal from Order.

7 The learned counsel for the plaintiff submits that the impugned order dated 27.2.2015 passed by the Trial Court is against justice, equity and good conscious and same is liable to be set aside. He

submits that the Trial Court failed to appreciate that the notice was issued by the defendant Corporation without following due procedure prescribed under the said Act. He submits that the learned Judge failed to appreciate that since the procedure prescribed under the said Act was not complied the notice was vitiated and was invalid, bad in law and unenforceable.

8 The learned counsel for the plaintiff submits that the learned Judge ought to have called upon the defendants to produce necessary documents evidencing that they passed resolution No.371 dated 13.7.1967 after following the procedure established under the Act. He submits that the trial court instead of calling upon the defendant to justify that they followed due process of law, before passing the Resolution No.371 dated 13.7.1967, the Trial Court assumed that the due procedure was followed by the defendant without there being a iota of evidence to support the said assumption.

9 The learned counsel for the plaintiff submits that the learned Trial Court erred in holding that the procedure under section 297 of the said Act was followed by the defendants. He submits that the Trial Court has reached this conclusion on the basis of mere assumptions though the defendants had failed to produce copy of public notice published in local newspapers, public notice in the Official Gazzete, signed notice put up in the street as required by Section 297 of the said Act before the learned Judge. He submits that in the absence of these documents, the learned Trial Court erred in coming to the conclusion that the procedure under section 297 of the said Act was followed by

the defendants.

10 The learned counsel for the plaintiff submits that the trial court ought to have drawn adverse inference against the defendants for non production of the public notice in the local newspapers, public notice in the Official Gazette, signed notice put up in the street as required under section 297 of the said Act. However, the learned Judge failed to do so and mechanically dismissed the Notice of Motion filed by the plaintiff.

11 The learned counsel for the plaintiff submits that though the plaintiff called upon the defendant to give inspection of several documents like action taken by them before issuing notice under section 299 of the said Act as required by law, resolution no.371 dated 13.7.1967, publication of notice in newspaper, Government Gazette etc, they failed and neglected to comply the same. Hence, the plaintiff preferred Notice of Motion No.792 of 2015 for direction to the defendant to give inspection of all the documents under Order 11 Rule 15 of the Code of Civil Procedure. He submits that the Trial Court failed to appreciate that the said Notice of Motion was pending for hearing and disposal on its own merits. Without deciding the Notice of Motion No.792 of 2015 the Trial Court decided the present Notice of Motion No.4734 of 2015 without giving any opportunity to the plaintiff to take inspection of the relevant documents. Hence, the order dated 27.2.2015 passed by the Trial Court is required to be set aside and Notice of Motion No.4734 of 2015 be made absolute in terms of prayer clause (a).

12 On the other hand, the learned Senior Counsel for the defendant Corporation vehemently opposed the present Appeal from Order. He submits that in the present proceeding, the Corporation complied with all the procedure as required by them. He submits that in fact in the present proceeding, the Corporation after following due process of law passed Resolution No.371 of 13.7.1967 prescribing Regular Line of Malbar Hill. He submits that the suit filed by the plaintiff is not maintainable in law. He submits that in L.C.Suit No.3367 of 2014, the plaintiff has challenged the notice issued by the Corporation under section 299 of the said Act dated 6.12.2014 without challenging the resolution No.371 dated 13.7.1967. He submits that the Regular line of 60 feet width was prescribed in the year 1967 and the enforcement road line is in the interest of public at large. He submits that the said road was physically demarcated along with the staff of A.E.Survey and the staff of A.E. (Traffic & Co-ordination) on 17.7.2014. He submits that the affected Road Line goes through open setback land of the plaintiff's property. Accordingly notices under section 299 of the said Act was served on the defendant. He submits that the said notice under section 299 of the said Act was issued for widening of the Manav Mandir Road. He submits that only open portion affected by regular line has to be taken for widening of Manav Mandir Road. He submits that they issued notice to in all 10 societies / persons and out of that three societies / persons handed over possession. He further submits that the road widening work is in progress. He submits that if ad interim and or interim relief is granted in favour of the plaintiffs restraining defendants from executing or taking possession of the 60 feet road line, defendant will suffer irreparable, loss and injury. He

submits that this is in the interest of public at large. He further submits that in any case, plaintiff is entitled to compensation according to law.

13 The learned counsel for the defendant Corporation in support of his contention relies on the judgment of Division Bench of our High Court in the matter of Mumbai Municipal Corporation of Greater Bombay vs. Durgadas Shankarrao Rege dated 27.4.1979 reported in 1979 Bom C.R.432. He particularly relies on paragraph 9 and 11 of the said judgment which reads thus:

“9 In support of his submission that in being paid compensation under Section 301 of the Act the first respondent was being discriminated against when compared with the owners who would be paid compensation under the Land Acquisition Act, Mr. Sakhardande, learned counsel for the first respondent, referred us to several decisions of the Supreme Court. In our opinion, none of these decisions is relevant to the point which arises before us, for in each of these cases the classification sought to be made was held to be unreasonable and not to have a reasonable relation to the object sought to be achieved, and it was either admitted or clearly apparent that the compensation payable under the impugned statute was grossly discriminatory as compared to the compensation payable under the Land Acquisition Act. We will however, briefly refer to these decisions. The first of these cases relied upon was that of [P. Vajravelu Mudaliar v. The Special Deputy Collector](#) for Land Acquisition, West Madras, AIR 1965 SC 1017. In that case the Land Acquisition (Madras Amendment) Act, 1961 (the Madras Amendment Act, 1961), was struck down as infringing Article 14 of the Constitution. The said Amending Act permitted the State to acquire land for housing schemes and laid down principles for fixing compensation different from those provided in the Land Acquisition Act

under which the owner admittedly got a much lesser value than he would have got for the same land or a similar land if it was acquired for another public purpose, like, for example, a hospital. The Supreme Court held that the classification so sought to be made was not reasonable. Now, in the case before us there is no question of the same land or similar land being acquired for different purposes by the Municipal Commissioner. As pointed out by the Supreme Court in that case :

Out of adjacent lands of the same quality and value, one may be acquired for a housing scheme under the Amending Act and the other for a hospital under the Principal Act (that is, the Land Acquisition Act); out of two adjacent plots belonging to the same individual and of the same quality and value, one may be acquired under the Principal Act and the other under the Amending Act. From whatever aspect the matter is looked at the alleged differences have no reasonable relation to the object sought to be achieved. For achieving the object, any land falling in any of the said categories can be acquired under the Amending Act. So too, for a public purpose any such land can be acquired under the Principal Act. We, therefore, hold that discrimination is writ large on the Amending Act and it cannot be sustained on the principle of reasonable classification. We, therefore, hold that the Amending Act clearly infringes Article 14 of the Constitution and is void.”

“11 So far as the questions of personal service of notice and personal hearing are concerned some more facts are required to be set out. Section 267 of the Act requires the giving of a public notice of the proposal to prescribe a fresh regular line of the street. For the Linking Road in the instant case it was given by the Municipal Commissioner by publication in the Maharashtra Govt, Gazette, Part II, dated Oct. 26, 1967. It was also published in ten local newspapers of different

languages on the same day. By this public notice objections were invited to the proposal. Under Section 297 of the Act a special notice is also required to be put up in the street or the part of the street for which a fresh line is proposed to be prescribed. This special notice, signed by the Municipal Commissioner, was put up also on the same day, that is, on Oct. 26, 1967, at nine different points on the Lining Road. As the documents filed by consent at the hearing of the writ petition show, objections were in fact raised to this proposal by several parties. These objections were considered and the matter was referred to the Works Committee (Suburbs) by the Municipal Commissioner by his letter dated June 1, 1968. The said Committee met on June 26, 1958, considered the matter and recommended the said proposal to the Municipal Corporation. At its meeting held on Sept. 12, 1968 the Municipal Corporation accepted this recommendation. These facts clearly show that all the requirements of Section 297 of the Act were complied with, that there was ample and adequate publicity given to this proposal and that such publicity resulted in the objections being raised to this proposal by several owners of properties who would be affected by the fresh regular line intended to be prescribed. What was, however, submitted was that each and every owner who would be affected should have been served personally with the notice of this proposal and that because he was not so served, the First Respondent remained in ignorance that a fresh line was to be prescribed. Reference was made to the provisions of Section 5A of the Land Acquisition Act in support of this submission. We are unable to understand this argument about personal service of notice or the reliance placed upon the provisions of the Land Acquisition Act for this purpose. Under Section 4 of the said Act when a land is intended to be acquired for a public purpose, a notification to that effect was at the relevant time required to be published in the Official Gazette and also made known by giving a public notice of the substance of such notification at convenient places in the concerned locality. Under Section 5A any person

interested in any such land could thereupon, within thirty days after the issue of the notification, file his objections to the intended acquisition. There is no provision in the Land Acquisition Act for personal service of a notice of the intention to acquire any land for a public purpose. It is true that Section 5A(2) provides for a personal hearing to be given to such person. A personal service of a notice and a personal hearing are not sine qua non for the exercise of every power by a public authority. Similar contentions with respect to the Maharashtra Regional and Town Planning Act, 1966, and the Bombay Town Planning Act, 1954, were raised before one of us (before Deshmukh J., as he then was) in Misc. Petn. No. 344 of 1974, Bharat Barrel & Drums Mfg. Co., Pvt. Ltd. v. The State of Maharashtra, decided on Feb. 24/25, 1976 (Unrep.) and were negatived. Even from the very nature of things, it would be extremely difficult, cumbersome and time-consuming, in cases such as this, to effect personal service of notice of the intention to prescribe a fresh regular line of the street upon each and every owner of the property who would be affected or to give them a personal hearing. Even under the Land Acquisition Act in cases of urgency referred to in Section 17 the Government or the Commissioner, as the case may be, has the power to direct that the provisions of Section 5A of the Land Acquisition Act should not apply, and in such a case there would be no scope for filing any objections or giving any personal hearing to anyone wanting to object.

Let us also see why personal hearing is provided for by Section 5A of the Land Acquisition Act. It is because of the type of objections which can be filed to the proposed acquisition. The type of objections which can be raised can be seen from the rules for the guidance of officers made by the Governor-in-Council under Section 55 of the said Act by G. O. No. 9173 Revenue, dated Oct. 4, 1926. These objections have to be specific such as:

"(i) the notified purpose is not genuinely or properly a public purpose;

- (ii) the land notified is not suitable for the purpose for which it is notified;
- (iii) the land is not so well suited as other land;
- (iv) the area proposed is excessive;
- (v) the objector's land has been selected maliciously or vexatiously;
- (vi) the acquisition will destroy or impair the amenity of historical or artistic monuments and places of public resort; will take away important public rights of way or other conveniences or will desecrate religious buildings, graveyards and the like."

These are objections which require to be heard and determined. It is obvious that hardly any one of these objections could have any relevance when a fresh regular line of the street is to be prescribed. Can it be contended that prescribing a regular line of the street, whether original or in substitution of the line already prescribed, is not a public purpose ? It cannot be for obviously this is a public purpose. Is it possible for a property-owner to raise the other objections listed above? The regular line of the street would have to be either a straight line or 8 regular curve. Can a property-owner say that the regular line of the street should pass through the properties of his neighbours but not his own? That would be tantamount to saying that the regular line of the street should not be regular but should be zig-zag. Can he say that his land has been selected maliciously and vexatiously when the regular line proposed to be prescribed passes regularly and uniformly through his property as also through the properties of his neighbours? The nature of the objections which can be raised to the proposed prescription of a fresh regular line are from their very nature so limited and restricted that no personal hearing is necessary for their consideration."

14 The learned Senior Counsel for the Respondent Corporation submits that section 297 to 301 of the said Act constitute the complete scheme for particular purpose. He submits that in the present proceedings, Corporation issued notice under section 299 of the said Act after complete procedure as per Chapter 11 of the said Act. He further submits that in any case in the interest of public at large, this court should not grant any ad interim order or interim relief in favour of the appellant. He submits that they already started the construction work of the road. If interim protection is granted to the appellant, irreparable loss and injury will be caused to them. He submits that in any case, the appellant is entitled for compensation as per the Act. Hence, Hon'ble Court be pleased to dismiss the present Appeal from Order.

15 I have heard both the sides at length. Section 297 and 299 of the said Act reads thus:

“Section 297 - Prescribing the regular line of a street
(1) The Commissioner may-

(a) prescribe a line on each side of any public street:

Provided that in the case of any public street in the suburbs the regular line of a public street operative under any law in force in any part of the suburbs on the day immediately preceding the date of coming into force of the Bombay Municipal (Extension of Limits) Act, 1950, and in the case of any public street in the extended suburbs the regular line of a public street operative under any law in force in any part of the extended suburbs on the day immediately preceding the date of the coming into force of the Bombay Municipal [Further Extension of Limits and

Schedule BBA (Amendment)] Act, 1956] shall be deemed to be a line prescribed by the Commissioner under this clause.]

(b) from time to time, but subject in each case to his receiving the authority of the corporation in that behalf, prescribe a fresh line in substitution for any line so prescribed, or for any part thereof provided that such authority shall not be accorded -

(i) unless, at least one month before the meeting of the corporation at which the matter is decided, public notice of the proposal has been given by the Commissioner by advertisement in local newspapers as well as in the [4] [Official Gazette], and special notice thereof, signed by the Commissioner, has also been put up in the street or part of the street for which such fresh line is proposed to be prescribed, and

(ii) until the corporation have considered all objections to the said proposal made in writing and delivered at the? office of the municipal secretary not less than three clear days before the day of such meeting.

(2) The line for the time being prescribed, shall be railed "the regular line of the street."

(3) No person shall construct any portion of any building within the regular line of the street except with the written permission of the Commissioner, who shall, in every case in which he gives such permission, at the same time report his reasons in writing to the [Standing Committee]."

"Section 299 - Acquisition of open land or of land occupied by platforms, etc, within the regular line of a street

(1) If any land not vesting in the corporation, whether open or enclosed, lies within the regular line of a public street, and is not occupied by a building, or if a platform, verandah, step or some other structure external to a building abutting on a public street, or a portion of a platform, verandah, step or other such structure, is within the regular line of such street, the Commissioner may, after giving to the owner of the land or building not less than seven clear days' written notice of his intention so to do, take possession on behalf of the corporation of the said land with its enclosing wall, hedge or fence, if any, or of the said platform, verandah, step or other such structure as aforesaid, or of the portion of the said platform, verandah, step or other such structure aforesaid which is within the regular line of the street, and, if necessary, clear the same and the land so acquired shall thenceforward be deemed a part of the public street.

[Explanation.- For the purposes of acquisition of open land lying within the regular line of a public street, and not occupied by a building constructed before the 25th March, 1991 and occupied without obtaining the permission to occupy the building from the Commissioner under section 353A, 'owner' of the said land or building means a co-operative housing society or a federation of co-operative housing societies registered under the Maharashtra Co-operative Societies Act, 1960 or any condominium or a company incorporated under the Companies Act, 1956 with limited liability or an association of person or any ad hoc body formed by the occupants of the building.]

(2) Provided that when the land or building is vested in the Government possession shall not be taken as aforesaid without the previous sanction of the Government concerned and, when the land or building is vested] in any corporation constituted by Royal Charter or by an Act of Parliament, [of the

United Kingdom] or [by an Indian law,] possession shall not be taken as aforesaid without the previous sanction of the [State] Government].”

16 It is to be noted that in the present proceeding, the Corporation issued notice under section 299 of the said Act to the Appellant calling upon them to hand over vacant possession of the land forming part of their premises C.S. No.164, Jivan Vihar Apartment situated at Manav Mandir Road, Malabar Hill, Mumbai 400 006 lies within the regular line of the public street as prescribed by the Commissioner under section 297 of the said Act. Corporation by their resolution No.371 confirmed the proceedings of the meeting of the Works Committee (City) held on 3rd, 7th, 11th and 21st March, 1967 by which the regular line of Ridge Road was sanctioned. The said resolution was not challenged by the appellant in the present proceedings.

17 On the basis of earlier resolution No.371 the Corporation started taking action under Chapter XI of the said Act. Even the Trial Court also recorded in the impugned order that appellant has not challenged the resolution 371 passed by the Corporation. The objection raised by the appellant in ground no.e, g, h, i and l of the Appeal Memo cannot be sustained in view of the Division Bench judgement of this court in the matter of Mumbai Municipal Corporation of Greater Bombay vs. Durgadas Shankarrao Rege (Supra). In that judgment our High Court held that the object of giving public notice and special notice is to bring to the notice of the property owners who are likely to be affected by the proposed Regular Line.

18 In the present proceeding, Corporation has passed resolution no.371 in the year 1967 and thereafter they issued a notice under section 299 of the said Act to the Appellant. The Division Bench of this court held that section 297 to 301 of the Act constitute a complete scheme for a particular purpose. Hence, the objection raised by the Appellant about non-service of notice etc. cannot be considered, at this stage.

19 In any case, the respondent Corporation has already started work of the road widening on the basis of road line. By the notice dated 6.12.2014 under section 299 of the said Act, Corporation is taking vacant land only. In any case if the appellant ultimately succeeds in the present litigation they can execute the decree according to law. If at present, interim stay is granted restraining respondent Corporation from taking possession of the vacant land as per notice under section 299 of the said Act, the entire public project of road widening will be affected. In the matter of Mahadeo Savlaram Shelke & Ors. V/s. Pune Municipal Corporation and Ors. (1995) 3 SCC 33 wherein Puna Municipality has undertaken widening of road to remove traffic congestion and initiated proceedings u/s.4(1) of the Land Acquisition Act, 1894 for acquiring two storied building belonging to N.H. Naik at Kotwal Chowk. The Notification u/s. 4(1) was published in the Gazette in December, 1996. Award also came to be passed on 14/12/1970. Thereafter, the compensation was deposited and paid to the owner. Pursuant thereto possession was taken on 13/3/1971 by the Competent Officer and handed over to the Corporation. However, the earlier 24 tenants/appellants who entered into Leave & License

Agreement with the corporation were allowed to get into possession. After the expiry of the period of leave and license, proceedings were initiated for eviction and an order in that behalf came to be passed. The tenants went in appeal and writ petition but were unsuccessful. Ultimately, they approached the Hon'ble Apex Court. In para 14 and 15 of the judgment, the Hon'ble Apex Court observed that "it is common experience that injunction normally is asked for and granted to prevent the public authorities or the respondents to proceed with execution of or implementing scheme of public utility or granted contracts for execution thereof. Public interest is therefore, one of the material and relevant consideration in either exercising or refusing to grant ad-interim injunction." It is further observed that "Public purpose of removing the traffic congestion was sought to be served by acquiring the building for widening the road. By orders of injunction, for 24 years, the public purpose was delayed. As a consequence, acquisition of the project has been delayed and costs now stands mounted. The court in the cases where injunction are to be granted should necessarily consider the effect on public purpose thereof and also suitably mould the relief.

20 Considering these facts, I do not find any reason to interfere with the oral order passed by the Trial Court dated 27.2.2015 in Notice of Motion No.4734 of 2015. Hence, following order:

- a) Appeal from Order is rejected.
 - b) In view thereof, Civil Application does not survive.
- The same is also dismissed as infructuous.

c) Hearing of L.C.Suit No.3367 of 2014 is expedited.

21 At this stage, the learned counsel for the Appellant seeks stay of the present order to carry the matter in higher court.

22 On the other hand, the learned senior counsel for the Respondent Corporation submits that the work is in progress and they have to complete the work in any case on or before 15/05/2015.

23 Considering these facts, the request of the learned counsel for the Appellant for granting stay to the present order is refused.

(K.K.TATED, J.)