

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

WRIT PETITION NO.510 OF 2003

1.The Haji-Ali Municipal Officers Co-op
Housing Society Limited
a Housing Society bearing Registration No.
BOM/HSR/3153 of 1971, having its
address at Building N.4, 6th floor,
Keshavrao Khadye Marg, Govt. Colony,
Haji Ali Park, Mumbai- 400 034

2. Ramesh Shankar Honavar
of Bombay an adult Indian Inhabitant,
residing in Building No.4, Flat No.10,
Keshavrao Khadye Marg, Govt. Colony,
Haji Ali Park, Mumbai- 400 034

3. Muneer Ahmed Shaikh
of Bombay an adult Indian Inhabitant,
residing in Building No.3, Flat No.21,
Keshavrao Khadye Marg, Govt. Colony,
Haji Ali Park, Mumbai- 400 034

...Petitioners.

V/s.

1.The Municipal Corporation of Greater
Bombay
having its office at Mahanagarपालिका Marg,
Mumbai-400 001

2. The Municipal Commissioner for
Greater Bombay
having his office at the Municipal
Corporation Building, Mumbai.

...Respondents.

Mr. Kishor Jain a/w Mr. Darshit Jain, Ms. Minal Lodaya, Mr. Vijay i/b Ms.
Divya Jain for the Petitioners.

Mr. Vinod Mahadik a/w Mrs. Geeta Joglekar for the Respondent-BMC.

**CORAM : A.S.OKA &
V.L. ACHLIYA,JJ.**

DATE : 8th SEPTEMBER, 2015

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

. The submissions of the learned counsel appearing for the parties were heard on 31st August 2015 and today the petition is fixed for the dictation of judgment.

2. The challenge in this petition under Article 226 of the Constitution of India is to the impugned notice/impugned order dated 9th April 2002.

3. According to the case of the petitioners, in the year 1967 there was a proposal to allot certain under-construction blocks at Worli and Haji Ali to full time employees of the 1st respondent-Municipal Corporation. There was a resolution passed by the General Body of the Municipal Corporation dated 10th April 1975 by which it was resolved to grant lease of plot nos.20 and 21 admeasuring approx.3281.34 sq. yards at Haji Ali Park for 60 years to the 1st petitioner which is a Co-operative Housing Society.

4. By a communication dated 24th November 1975, the 1st respondent informed the 1st petitioner that the Mumbai Municipal Corporation by a Resolution dated 10th April 1975 has accorded sanction for the sale of building No.3 and 4 on plot Nos.20 and 21 as well as the grant of lease of plot no.20 and 21 on the terms and conditions incorporated in the said communication.

5. On 16th February 2000, a show cause notice was issued to the 1st petitioner by the concerned ward officer of the Municipal Corporation. It was contended therein that certain members of the petitioners were permitted to transfer or assign their respective flats as per the particulars mentioned in the notice without obtaining the permission of the Municipal Commissioner.

6. Reliance is placed on clause (9) of the sanction letter which provides that no member of the Society will be allowed to sell, transfer or give exclusive possession of any block/flat/tenement without previous written consent of the Municipal Commissioner. A reply was submitted by the 1st petitioner.

7. By the impugned order dated 9th April 2002, the 1st respondent informed the 1st petitioner that apart from the breaches set out in the show cause notice, certain unauthorized work has been carried out in the building. The impugned order records that the agreement with the 1st petitioner stands revoked and cancelled. The petitioners were informed on 24th April 2002, the possession of the buildings and the plots will be taken over by the Municipal Corporation.

8. The learned counsel for the petitioner has canvassed several submissions on merits of the decision taken by the Municipal Corporation of terminating the agreement/lease. According to the learned counsel for the petitioners, the 1st respondent is not entitled to take possession of the property subject matter of the lease without taking recourse to the due process of law. He alleged that firstly, there is no breach of any of the terms and conditions and, secondly, even assuming that there is breach, such a drastic action of termination could not have been taken. He urged

that the ground of carrying out unauthorized work was not incorporated in the show cause notice.

9. The learned counsel for the 1st respondent invited our attention to the terms and conditions of the allotment. He submitted that it is a clear case of breach as there were illegal transfers by the members of the 1st petitioner without prior permission of the Municipal Commissioner as specifically set out in the show cause notice and there is no answer to the said breach. He urged that in any case, the issue is regarding the breach of contract and, therefore, writ jurisdiction cannot be invoked.

10. We have carefully considered the submissions. The last part of the impugned order dated 9th April 2002 records that the possession of property subject matter of the lease shall be taken over by the Municipal Corporation. In any event, the Municipal Corporation could not have taken the law into its own hands by taking possession without taking recourse to the due process of law.

11. Section 105B of the Mumbai Municipal Corporation Act, 1888 (“the said Act” for short) reads thus:

“105B. (1) Where the Commissioner is satisfied —

(a) that the person authorised to occupy any corporation premises has, whether before or after the commencement of the Bombay Municipal Corporation(Amendment) Act, 1960,—

(i) not paid for a period of more than two months, the rent or taxes lawfully due from him in respect of such premises; or

(ii) sub-let, contrary to the terms or conditions of his occupation, he whole or any part of such premises; or

(iii) committed, or is committing, such acts of waste as are

likely to diminish materially the value, or impair substantially the, utility, of the premises; or

(iv) otherwise acted in contravention of any of the terms, express or implied under which he is authorised to occupy such premises;

(b) that any person is in unauthorized occupation of any corporation premises;

(c) that any corporation premises in the occupation of any person are required by the corporation in the public interest, the Commissioner may notwithstanding anything contained in any law for the time being in force, by notice (served by post, or by affixing a copy of it on the outer door or some other conspicuous part of such premises, or in such other manner as may be provided for by regulations), order that that person, as well as any other person who may be in occupation of the whole or any part of the premises, shall vacate them within one month of the date of the service of the notice.

(2) Before an order under sub-section (1) is made against any person, the

Commissioner shall issue, in the manner hereinafter provided, a notice in writing calling upon all persons concerned to show cause why an order of eviction should not be made, The notice shall,—

(a) specify the grounds on which the order of eviction is proposed to be made, and

(b) require all persons concerned, that is to say, all persons who are or may be in occupation of, or claim interest in, the corporation premises, to show cause against the proposed order, on or before such date as is specified in the notice. If such person makes an application to: the Commissioner for the extension of the period specified in the notice, the Commissioner may grant the same on such terms as to payment and recovery of the amount claimed in the notice, as he deems fit. Any written statement put in by any person and documents produced, in pursuance of the notice, shall be filed with the record of the case. and such person shall be entitled to appear before the Commissioner by advocate, attorney or pleader. The notice to be served under this sub-section shall be served in the manner provided for the service of a notice under sub-section (1); and thereupon, the notice shall be deemed to

have been duly given to all persons concerned.”

12. Sub-section (2) of Section 105B of the said Act provides that before passing an order of eviction, a show cause notice is required to be served on all concerned persons calling upon them to show cause as to why action should not be initiated against them. There is an elaborate procedure prescribed to deal with the show cause notice.

13. The power under section 105(B) of the said Act can be exercised to evict the persons from the Corporation premises. The word “premises” also includes buildings and lands.

14. Therefore, if the Municipal Corporation was of the view that certain breaches have been committed by the 1st petitioner thereby rendering the possession of the 1st petitioner unauthorized or that the 1st petitioner has acted in contravention of terms on which it was authorized to occupy the premises, the only remedy available to the 1st respondent was to take recourse to section 105B of the said Act. In the present case, section 105B has not been involved.

15. Looking to the scheme of section 105B of the said Act, it is not necessary that in case of every breach of terms and conditions, the power to evict a person from Corporation premises should be exercised. It all depends on facts and circumstances of every case and the extent as well as seriousness of the breach. Ultimately, it is the discretion of the Commissioner which is to be exercised in a rational manner.

16. Therefore, the impugned action of the 1st respondent of proposing to dispossess the petitioners on the basis of alleged breaches

committed by them is not in terms of the provisions of the said Act. Even for taking possession or for resuming possession, the 1st respondent will have to follow due process under section 105B of the said Act so that even the petitioners can be heard on all contentions.

17. The issue whether any breaches have been committed by the petitioners, will have to be gone into in the proceeding under section 105B, if initiated. In this petition, it is not necessary to deal with the contentions of the rival parties on merits of the issue of breaches.

18. We must note that at the time of conclusion of hearing, the learned counsel for the Municipal Corporation tendered on record a Note dated 4th September 2015 by the Assistant Commissioner(Estate). The said writing indicates the steps which are proposed to be taken by the Municipal Corporation. The said Note is marked 'X-1' for identification. We make it clear that we have made no adjudication on the legality of the steps proposed to be taken by the Municipal Corporation in terms of the said Note.

19. Accordingly, we pass the following order:

ORDER

i) We hold that the 1st respondent is disentitled to take action of dispossession on the basis of impugned notice/order dated 9th April 2002 without taking recourse to the procedure prescribed by section 105B of the said Mumbai Municipal Corporation Act, 1888;

ii) The issue whether the petitioners have committed breaches as alleged in the impugned order are expressly kept

open to be decided in the proceeding, if any, initiated under section 105B of the Mumbai Municipal Corporation Act, 1888;

iii) If the 1st respondent chooses to adopt the procedure under section 105B of the said Act and if an order made under section 105B be against the petitioners, we direct that the said order shall not be implemented for a period of 1 month from the date on which the same is served upon the 1st petitioner. This limited protection is granted to enable the petitioners to challenge the order in accordance with the law;

iv) Rule is made absolute on above terms;

v) There shall be no order as to costs.

(V. L. ACHLIYA, J.)

(A. S. OKA, J.)