

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

WRIT PETITION NO . 4568 OF 2016

Aurangabad Municipal Corporation,
Aurangabad
Through its Municipal Commissioner ... PETITIONER

VERSUS

M/s Shalaka Engineering & J. V.,
A Registered Partnership firm having
its office at Edge Archade, Sant Eknath
Mandir Road, Osmanpura, Aurangabad
Through its Partner-Smt.Suwarna Sunil Raka
Age: 45 years, Occu.Business
Having the address as above ...RESPONDENT

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Mr. Atul M. Karad, Advocate for petitioner
Mr. Anil S. Bajaj, Advocate h/f Mr. Aditya N. Sikchi, Advocate
for respondent

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CORAM : SUNIL P. DESHMUKH, J.

DATE : 21st APRIL, 2016

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally
with consent of learned advocates for the parties.

2. The petitioner – Aurangabad Municipal Corporation
(herein after referred to as "AMC"), aggrieved by judgment
and order dated 30th March, 2016, of the District Judge-7 at
Aurangabad in Miscellaneous Civil Appeal No. 35 of 2016 is
before this court, whereunder, District Judge-7 has directed

petitioner – Aurangabad Municipal Corporation to maintain *status-quo ante*, as had been existing on 25th July, 2015 by removing seal affixed to the suit property bearing C.T.S. No. 16261 situated at Jyotinagar, Aurangabad (herein after referred to as “suit premises” for convenience) and to restore the possession of the same until final hearing of the suit and further purporting to restrain the petitioner – AMC temporarily from disturbing possession of the respondent without following due process of law. Respondent had also been restrained from raising any kind of structure without permission of competent authority. Operation of this order has been stayed for appeal period, upon an application on behalf of AMC (Exhibit-15) by the appellate court.

3. Learned counsel Mr. Atul M. Karad appearing for petitioner and Mr. Anil S. Bajaj learned counsel holding for learned advocate Mr. Aditya N. Sikchi, for respondent, were heard extensively in the writ petition.

4. From submissions of the learned counsel and documents as have been appended to the writ petition, factual position emerges, around 2009, petitioner had entered into an agreement with the respondent dated 10th October, 2009

(BOT agreement for lease) for lease of suit premises with an intention to develop and manage swimming pool and amenities complex. This agreement appears to have been preceded by an agreement/document dating back to 2007. In the agreement of 2009, petitioner has been referred to as Aurangabad Municipal Council [AMC], whereas respondent has been referred to as "occupant/concessionaire". Said agreement, *inter-alia*, contains following two terms viz; clauses 5.6 and 7.19, which are extracted from annexure to writ petition and reproduced herein-below for ready reference;

.....

"5.6 In the occupant even of default after the concession period, AMC shall serve upon the occupant a notice in writing mentioning therein the default and shall time, as may deem fit and proper considering the nature of default, to the occupant for removal / rectification of the default. In case the occupant does not remove / rectify the default, AMC is empowered to terminate this lease agreement by giving a one month notice in this regard."

.....

"7.19. That the Occupant shall not carry on any illegal activity in the leased premises. In case he/she/it does so, the lease granted under this agreement shall liable to be terminated forthwith without notice."

5. Around July, 2015, upon visits, petitioner contendedly found some irregularities, unauthorised user and/or illegal activities being carried on/out over the suit premises. Some *panchnamas* were drawn. The property had been sealed, respondent purportedly had taken steps for corrective action and/or to carry out rectifications in respect of alleged irregularities, unauthorised user and/or illegal activities.

6. It appears that respondent had been before Division Bench of the High Court under Writ Petition bearing No. 6834 of 2015 and under order dated 10th July, 2015 the High Court, upon statement of the parties directed that *panchnama* be drawn on 11th July, 2015, de-sealing the suit premises. Pursuant to said order, AMC had liberty to take appropriate action in accordance with the BOT lease agreement and in consonance with the provisions of law.

7. It appears that notice dated 7th July, 2015 was issued by petitioner, imputing that the alleged activities by the respondent are in breach of terms and conditions of the agreement and as such, written explanation had been sought and the respondent was directed to be present before the authorised officer on 9th July, 2015.

8. It is contended that pursuant to the notice, respondent had submitted his reply. Thereafter, on 17th July, 2015, a communication/notice had been issued by the petitioner-AMC to the respondent stating that the alleged activities are in serious contravention and breaches of terms and conditions of the agreement. Said notice/communication was purportedly issued referring to clause 5.6 as reproduced hereinabove. It appears that respondent had submitted two responses to the notice/communication and the proceedings culminated into order dated 24th July, 2015 by petitioner, invoking clause 7.19 terminating the agreement dated 16th October, 2009 alleging commission various irregularities/ unauthorised/illegal activities, breaches and deficiencies by the respondent.

9. Immediately on 25th July, 2015, it appears that by drawing *panchnama*, seal had been put on the property and had been taken in possession by petitioner-AMC. It appears that the respondent had been to Division Bench of this court against aforesaid in Writ Petition No. 7796 of 2015 and under order dated 29th July, 2015 the respondent had been granted leave to withdraw the writ petition with liberty to file appropriate proceedings.

10. It appears that respondent also is being prosecuted in respect of alleged commission of certain offences and in respect of the same the respondent had applied, seeking anticipatory bail etc.

11. It also appears after withdrawal of writ petition No. 7796 of 2015, the respondent had been before the District Judge-1 by way of filing Municipal Appeal No.02 of 2015 against the order/communication dated 24th July, 2015 purporting to be appeal under Section 81 (F) of the Maharashtra Provincial Municipal Corporation Act, 1949. Said appeal was dismissed under order dated 27th October, 2015 finding that the appeal is predominantly directed against the order of taking over possession and did not challenge termination of lease agreement and the action taken by Aurangabad Municipal Corporation was not liable to be faulted with.

12. After aforesaid order dated 27th October, 2015, the respondent has instituted Regular Civil Suit No. 119 of 2015 in the court of Civil Judge, Senior Division - Corporation Court at Aurangabad, wherein, petitioner herein is the sole defendant and respondent herein is plaintiff. [The parties

hereto hereinafter are referred to by their status in Regular Civil Suit No. 119 of 2015 viz; respondent as plaintiff and petitioner as defendant].

13. The plaint prayers read as under;

" The suit of the Plaintiff be decreed with cost as under:-

a) By Decree of Declaration it be declared that the order dated 24.7.2015 passed by the Defendant terminating the Agreement of Lease dated 16.10.2009 is illegal, null and void and be quashed.

b) By Decree of Mandatory Injunction the Defendant be directed to remove the seal affixed from the suit property as described in the claim clause and description clause of the plaint on 25.7.2015, vide Panchanama of the even date.

c) By decree of Perpetual Injunction the Defendant be restrained from creating any sort of third party interest in the suit property of any nature and also from causing obstruction and interference in the peaceful possession of the Plaintiff of the suit property as described in the claim clause and description clause of the plaint.

d) any other relief be granted which the court deems fit in favour of the Plaintiff and oblige. "

14. Along with plaint, the plaintiff had also filed an application under Order XXXIX, Rules 1 and 2 read with Section 151 of the Code of Civil Procedure, for temporary injunction praying for following reliefs:-

“ The temporary injunction application be allowed with costs as prayed for till disposal of the suit by following orders and in following terms:-

a) By an order of Ex-party Temporary Injunction and Ad-interim Injunction the Defendant be directed to remove the seal affixed on the suit property as described in the claim clause and description clause of the plaint and Injunction Application on 25.7.2015, vide Panchanama of the even date.

b) By an order of ex-parte Temporary Injunction and Ad-interim Injunction the Defendant be restrained from creating any sort of third party interest in the suit property of any nature and also from causing obstruction and interference in the peaceful possession of the Plaintiff of the suit property as described in the claim clause and description clause of the plaint and Injunction Application.

c) Any other relief be granted which the court deems fit in favour of the Plaintiff and oblige. ”

15. The trial court, in proceedings pursuant to aforesaid application, had framed points for determination; whether the plaintiff has *prima-facie* case, whether balance of convenience lies in favour of plaintiff and whether plaintiff will suffer irreparable loss. Answering all the points framed partly in the affirmative, the Civil Judge, Senior Division, Corporation Court, Aurangabad has rejected the request for temporary mandatory injunction finding that the action has been taken by the defendant cancelling the agreement, invoking clause 7.19. Circumstances do not warrant grant of temporary injunction directing removal of affixed seal to the suit premises. However, having regard to the facts and circumstances, the defendant would not be able to create any third party interest over the suit premises, and as such, has granted relief to the plaintiff-respondent under order dated 11th February 2016 in Regular Civil Suit No. 119 of 2015 as under;

.....
“ 02. Defendant corporation or anybody claiming through it are hereby temporarily restrained from creating any sort of third party interest of any nature over the suit property, till disposal of the suit.”
.....

Rest of the prayers were rejected.

16. As such, plaintiff had been before District Judge-7 in aforesaid Miscellaneous Civil Appeal No. 35 of 2016 challenging the order dated 11th February, 2016 passed by Civil Judge, Senior Division, Corporation Court, Aurangabad for reliefs to the extent which were refused to be granted by the trial court.

17. The appellate court had framed a point for determination as to whether the order of the learned lower court calls for interference.

18. The appellate court under its judgment and order dated 30th March, 2016 directed the corporation – petitioner to maintain *status-quo ante* as it was existing on 25th July, 2015 by removing the seal affixed on the suit property, passing following order.

“ 1. The appeal is allowed and the impugned order under challenge is hereby set-aside with following directions:

The respondent Corporation is directed to maintain status quo ante as it was existing on 25.7.2015 by removing the seal affixed on the suit property bearing No. C.T.S.No.16261 at Jyoti nagar, Aurangabad i.e. premises 'Raka Life Style' and to restore the possession until the final hearing of the suit.

2. The respondent Corporation is temporarily restrained from disturbing the possession of the Appellant without following due process of law.

3. The appellant is also temporarily restrained from raising any kind of structure without permission of Competent Authorities.

4. Parties to bear their respective costs.

Dictated and pronounced in open Court. ”

As such, the present petition against aforesaid order by petitioner – original defendant.

19. Learned counsel Mr. Karad appearing for the petitioner contends that while the suit premises were visited and explanation considered, it surfaced that the situation has been grave and the damage/illegalities will have to be arrested, and as such, the order dated 24th July, 2015 had been issued. He submits that it cannot be said that the action is *ultra-vires* the terms and conditions of the agreement. The AMC was well within its power under the terms and conditions of agreement. The appellate court has not at all given due regard to the object, purport and underlying intention of the terms and conditions of agreement.

20. It is contended by learned counsel for petitioner that clause 7.19 of the agreement, enables the corporation to terminate the lease agreement forthwith for illegal activities on the leased premises and it was noticed that the respondent had been carrying on illegal activities over the leased suit premises. The agreement has been terminated as per terms of agreement.

21. Mr. Bajaj, learned counsel for respondent contends that the sequence of events as occurring is clear indication of that the order dated 24th July, 2015 is capricious. The plaintiff had initially issued a communication on 7th July, 2015 calling explanation which was duly given. Thereafter, AMC purported to move on with reference to clause 5.6 requiring giving of time to remove deficiencies/irregularities etc. and suddenly veered around and passed order dated 24th July, 2015 purporting to invoke clause 7.19 without giving any inkling whatsoever about such an action being mooted. Petitioner is estopped from approbating and reprobating. Such an action is abhorable in the facts and circumstances and in law.

22. Learned counsel for the respondent contended that the action of the corporation is high handed, without letting any

opportunity to the occupant and in breach of principles of natural justice, alleging breaches against the occupant without giving any notice as to consequential drastic action. In fact, there are no breaches and as such, the occupant is entitled to repossession of the property, possession of which has been taken high handedly, by taking law in hand.

23. Learned counsel further submits that having regard to the facts and circumstances. The order dated 24th July, 2015 is not only capricious, but is also whimsical and fanciful. The appreciation of facts and circumstances and treatment to the same cannot be as per the wishes of officials. The facts and circumstances require to be objectively looked at and not subjectively as is done by defendant in the present case. He, therefore, submits that the appellate court has seen the matter in its correct perspective, gauged its tenability and consequences, and has rightly passed the order, which does not deserve any disturbance/interruption.

24. It emerges that the action of petitioner – corporation dated 25th July, 2015 has been considered by the appellate court to be without following principles of natural justice.

25. With reference to certain citations which have been relied upon on behalf of the parties, the order has been passed, considering that process of fair action with due information does not appear to have been adhered to and as such, order has been passed directing the corporation – petitioner to maintain *status-quo ante* as it was existing on 25th July, 2015 by removing the seal affixed on the suit property, by passing following order.

1. The appeal is allowed and the impugned order under challenge is hereby set-aside with following directions:

The respondent Corporation is directed to maintain status quo ante as it was existing on 25.7.2015 by removing the seal affixed on the suit property bearing No. C.T.S.No.16261 at Jyoti nagar, Aurangabad i.e. premises 'Raka Life Style' and to restore the possession until the final hearing of the suit.

2. The respondent Corporation is temporarily restrained from disturbing the possession of the Appellant without following due process of law.

3. The appellant is also temporarily restrained from raising any kind of structure without permission of Competent Authorities.

4. Parties to bear their respective costs.

Dictated and pronounced in open Court.”

26. Perusal of the impugned judgment and order shows that although the appellate court had been apprised of the notices/communications dated 7th July, 2015 and 17th July, 2015, while it came to giving reasons, it had been in oblivion in respect of notice/communication dated 17th July, 2015. Both the notices/communications alleged irregularities/unauthorised user/illegal activities. The appellate court appears to have been overwhelmed by that the communication dated 7th July, 2015 does not ask plaintiff to show cause against consequences from failure to tender satisfactory/acceptable/proper explanation. It is discernible, the appellate court appears to have overlooked that one of the communications refers to clause 5.6 which sufficiently indicates the likely fall out of the communications/notices. The matter would not be looked at pedantically at this stage, wherein allegations have been made and further that the allegations of acts of violation and breaches of the terms of the contract veracity or otherwise of which would emerge on evidence. The matter appears to have been looked at only from a perspective of seeming breach of principles of natural justice. It is a debatable aspect, having regard to the events as those have occurred hitherto and would have to be

resolved upon evidence by parties. Lot of fact finding in the course appears to be involved. Forming judgment, at this stage appears to be premature even in respect of principles of natural justice.

27. Prima-facie, clause 7.19 appears to authorise the AMC to act without notice. Whether clause No. 7.19 could have been invoked in the facts and circumstances of the case is a question to be determined upon evidence.

28. Granting such relief at preliminary stages in a matter which would require decision on issues arising after leading evidence, may not be warranted in given facts and circumstances.

29. Looking at the prayer clauses, which have been reproduced hereinabove as well as temporary injunction application and the impugned order passed by the appellate court, it appears that impugned order would tantamount to deciding the *lis* between the parties, at preliminary stage. Such order can be passed only in very exceptional and rare cases where the situation demands such an order. One may not be able to say that the present matter gives rise to such a situation wherein such an order is required to be passed at

the interim stage.

30. Having regard to aforesaid, the order, directing to maintain *status-quo ante* as was existing on 27th July, 2015 is set aside. So also clause No.2 from the impugned order that the Corporation is temporarily restrained from disturbing the possession of the appellant without following due process of law, is set aside. Rule is made absolute in terms of prayer clause (C).

31. It is, however, made clear that the petitioner - Corporation – defendant would abide by the order passed by the Civil Judge, Senior Division, Corporation Court, Aurangabad about non creation of any third party interest over the suit property and further that the parties would maintain *status-quo* in respect of the suit property during the pendency of the suit.

32. In the circumstances, it would be appropriate that the suit itself which is pending between the parties be decided expeditiously. As such, the trial court to proceed with and decide the same as expeditiously as possible preferably within a period of three months from the date of receipt of writ of this order.

33. It is made clear that observations appearing in this judgment and order are only *prima-facie* in nature and shall not at all influence and/or impress on the decision making in the suit or any other proceeding. The observations have efficacy limited only for decision in writ petition and no further.

34. Learned counsel agree to co-operate with the trial court for expeditious disposal of the suit.

35. As such, writ petition stands disposed of.

(SUNIL P. DESHMUKH, J.)

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