

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

WRIT PETITION NO.453 OF 2012

Sohel Noor Mohamed and others

.. Petitioners

Versus

**The Municipal Corporation of Greater Mumbai
and others**

.. Respondents

Mr. A. R. Mishra, for the Petitioners.

**Mr. J. F. Reis, Senior Advocate a/w Mr. Dhananjay Deshmukh a/w Mr.
Sunil Sonawane, for the Respondent - BMC.**

CORAM : R.M. SAVANT, J.

DATE : 11th MARCH 2016

PC.

1. The writ jurisdiction of this Court is invoked against the order dated 07.12.2011 passed by the Learned Judge of the City Civil Court, Mumbai, by which order, the Appeal filed by one Rajdeo Mourya and Rajnarayan Mourya was dismissed and resultantly, the judgment and order dated 06.05.2010 passed in Rev. Enquiry No.PS/1/2009 (Old Enquiry No.PS/5 of 2007) came to be confirmed. The proceedings in question have been initiated by the Municipal Corporation of Greater Mumbai ("MCGM" for short) i.e. the Respondent No.1 herein under Section 105-B of the Mumbai Municipal Corporation Act, 1888 (For short "the said Act"). The said provision can be invoked if the Corporation requires the premises to

be vacated as they are to be used for a public purpose. It is required to be noted that the proceedings were initiated by a notice dated 26.08.2005 which notice apart from being addressed was also addressed to the Petitioners herein. Pursuant to the said notice, the proceedings were commenced before the Enquiry Officer under Section 105-B of the said Act and culminated in the order dated 05.05.2007 passed by the Enquiry Officer. The Enquiry Officer has recorded in the said order that alternate accommodation was offered by the Applicants i.e. Mumbai Corporation of Greater Mumbai to the opponents in the Municipal Market, Liberty Garden, Malad. The Enquiry Officer further observed that it was not necessary for him to go into the details in relation to the alternate accommodation granted in the said enquiry proceedings. The said order dated 05.05.2007 was taken exception to by the said Rajdeo Mourya and Rajnarayan Mourya by filing Misc. Appeal No.133 of 2007 in the City Civil Court. The said Appeal came to be allowed by the Learned Judge of the City Civil Court. The order dated 05.05.2007 came to be set aside and the matter came to be remanded back to the Estate Officer with a direction that he shall give an opportunity to both the sides to lead evidence on the point of the subject matter premises are not Corporation premises and thereafter decide the question of eviction under Section 105-B of the said Act. The remand was ordered for the reasons mentioned in the said order

dated 16.12.2008.

2. On remand, the proceedings once again recommenced before the Enquiry Officer. The Enquiry Officer on remand by order dated 06.05.2010 allowed the said application filed by the Mumbai Corporation of Greater Mumbai and ordered the opponents or any other persons who may be occupying the enquiry premises or part thereof to vacate the same within one month from the date of service of the notice under Section 105-B(1) of the said Act. In the said order, the Enquiry Officer has recorded the fact that the alternate accommodation has been granted by the Applicants to the opponents on the Municipal Market, Liberty Garden, Malad and Municipal Market, Village Eksar of Kandar Pada, Dahisar (W). The Enquiry Officer has also adverted to the fact that the total built up area of the alternate premises is 3400 sq.ft + 216 sq.ft.

3. The Opponents in the said enquiry proceedings i.e. Rajdeo Mourya and Rajnarayan Mourya filed Misc. Appeal No.79 of 2010. Pertinently the Petitioners herein did not take exception or even have not participated in the enquiry proceedings on remand or even when they were conducted for the first time. The Appeal filed by the said Rajdeo Mourya and Rajnarayan Moura being Misc. Appeal No.79 of 2010 came to be dismissed by the Learned Judge of the City Civil Court by judgment and

order dated 07.12.2011. In so far as the aspect of ownership is concerned, it was observed by the Learned Judge that since there was an admission in the cross-examination of the Opponents regarding the ownership of the MCGM in respect of the property in question then the ownership of the MCGM would have to be assumed and it would have to be held that there is no dispute or challenge to the fact and hence the Enquiry Officer had the jurisdiction or authority to decide the matter. It has been recorded by the Learned Judge that though an offer for alternate accommodation was given to the Opponents they have not accepted the said offer on two occasions. The Learned Judge as indicated above, therefore, deemed it appropriate to dismiss the Appeal and confirmed the order dated 06.05.2010 passed in the enquiry proceedings. The said two persons i.e. Rajdeo Mourya and Rajnarayan Mourya had filed a Writ Petition in this Court being Writ Petition No.654 of 2002 challenging the notice under Section 354-A under the said Act. In the said Writ Petition the offer made by the MCGM to the said Rajdeo Mourya and Rajnarayan Mourya was adverted to. However, the Petitioners in the said Writ Petition informed the Court that the said offer was not acceptable as the potential liability of the Petitioners would be to the extent of Rs.45,000/- per month which the Petitioners were not in a position to bear. The Learned Judge recorded the said fact that the Petitioners were not ready and willing to accept the

alternate accommodation which has been allotted by the MCGM. The Learned Judge further recorded that since the Petitioners are not ready and willing to accept the offer of alternate accommodation which was made by the MCGM, it was agreed before the Court that offer shall no longer subsist. The statement made on behalf of the MCGM that it would follow the due process of law the fact against the Petitioners in the said Writ Petition by terminating the tenancy was recorded. In so far as the aspect of ownership is concerned, it was sought to be raised by way of moving an amendment to the said Writ Petition, the Learned Judge observed that the rights and contentions of the parties are kept open in that regard to be urged in appropriate proceedings. It appears that in terms of the statement made before the Judge, the proceedings were initiated by the MCGM under Section 105-B of the said Act as the land in question was required for the public purpose of ward office, garden and road widening. The Enquiry Officer has concluded the proceedings by his order dated 06.05.2010 which has now been confirmed by the Learned Judge of the City Civil Court exercising the Appellate jurisdiction under the said Act by the impugned order dated 07.12.2011.

4. The Learned Senior Counsel appearing for the MCGM, Mr. J. F. Reis questioned the maintainability of the above Petition at the behest of the Petitioners who had neither participated in the first enquiry or after

the remand and had not filed any Appeal before the City Civil Court. It was the submission of the Learned Senior that the Petitioners having not challenged the first order passed by the Enquiry Officer are deemed to have accepted it and now cannot lay a challenge to the Appellate order passed by the Learned Judge of the City Civil Court that too in the second round after the proceedings were remanded.

5. Per contra, the Learned Counsel Mr. A. R. Mishra would contend that since the persons who had a superior right i.e. Rajdeo Mourya and Rajnarayan Mourya had laid a challenge to the order passed by the Enquiry Officer, the Petitioners did not deem it fit to participate in the proceedings or challenge the order passed by the Enquiry Officer. The Learned Counsel sought to re-urge the contentions which were urged on behalf of the Rajdeo Mourya and Rajnarayan Mourya, namely the dispute as regards the ownership of the land in question. It is also sought to be contended that the public purpose has already been served as the ward office has already been constructed.

6. In my view, it is not possible to accept the contentions urged on behalf of Mr. A. R. Mishra the Learned Counsel appearing on behalf of the Petitioners. The question is as regards the maintainability of the above Petition, it is an undisputed position that the Petitioners did not participate

in the enquiry proceedings before the Enquiry Officer in the first round and the order passed by the Enquiry Officer in the first round was challenged only by the said Rajdeo Mourya and Rajnarayan Moura. The Respondent Nos.3 to 6 i.e. the Petitioners herein did not file any reply to the said notice dated 26.08.2005 and did not cross-examine the witnesses of the parties. Even after remand the Petitioners did not participate in the proceedings before the Enquiry Officer and neither did they file an Appeal against the order passed by the Enquiry Officer. As indicated above, the Appeal was filed only by Rajdeo Mourya and Rajnarayan Mourya which Appeal came to be dismissed. The said Rajdeo Mourya and Rajnarayan Mourya did not challenge the order passed by the Learned Judge of the City Civil Court in Appeal. Therefore, in so far as the said Rajdeo Mourya and Rajnarayan Mourya are concerned, the order passed in Appeal has become final and binding. Obviously, the Petitioners cannot lay a challenge to the said order when they have not filed an Appeal nor participated in the proceedings. The contention of the Learned Counsel for the petitioners that since the said Rajdeo Mourya and Rajnarayan Mourya were prosecuting the proceedings the Petitioners did not deem it appropriate to participate cannot be accepted. It is required to be noted that the notice under Section 105-B(2) was addressed to the Petitioners also and therefore it was all the more necessary for the Petitioners to participate in

the said proceedings. Hence going by the case of the Petitioners that the said Rajdeo Mourya and Rajnarayan Mourya were superior holders and since they have accepted the orders passed by the Appellate Authority i.e. the Learned Judge of the City Civil Court, in my view, no challenge can be entertained on behalf of the Petitioners. In that view of the matter, no case for interference in the writ jurisdiction of this Court is made out at the behest of the Petitioners. The Writ Petition is accordingly dismissed.

7. Ad-interim order to continue for a period of four weeks from date to enable the Petitioners to take appropriate recourse on the usual undertaking to be filed in this Court by the Petitioners within one week. If the undertaking is not filed, the order would stand vacated and then the MCGM would be free to proceed to take possession.

[R.M. SAVANT, J]