

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION (STAMP) NO.11331 OF 2016

Indrapal Liladhar Sharma

.. Petitioner

Versus

Mumbai Municipal Corporation of
Greater Mumbai and others

.. Respondents

Mr. U. S. R. Singh, for the Petitioner.

Mr. Vinod Mahadik, for the Respondent No.1– BMC.

Mr. H. R. Pawar, for the Respondent No.2.

WITH

WRIT PETITION (STAMP) NO.12451 OF 2016

Nilabai Narayan Jindam

.. Petitioner

Versus

Mumbai Municipal Corporation of
Greater Mumbai and another

.. Respondents

Mr. H. R. Pawar, for the Petitioner.

Mr. Vinod Mahadik, for the Respondent No.1- BMC.

Mr. U. S. R. Singh, for the Respondent No.2.

CORAM : R.M. SAVANT, J.

DATE : 27th APRIL 2016

PC.

1. The writ jurisdiction of this Court is invoked against the

common order dated 23.02.2016 passed by the Learned Principal Judge of the City Civil Court, Greater Mumbai, by which order, the Appeals in question being Misc. Appeal No.95 of 2015 and Misc. Appeal No.99 of 2015 came to be dismissed and resultantly, the order dated 09.10.2015 passed by the Enquiry Officer, Municipal Corporation of Greater Mumbai (for short "MCGM") in proceedings initiated under Section 105B(1) of the Bombay Municipal Corporation Act (for short "BMC Act") came to be confirmed. Though in Writ Petition (Stamp) No.11331 of 2016 a reference is made to Article 226 of the Constitution of India, the said Petition is essentially one under Article 227 of the Constitution of India.

2. The subject matter of the proceedings under Section 105B are vacant land tenure premises bearing Site No.39 admeasuring 50.51 sq. mtrs. in Scheme No.DFL(North), S. S. Amrutwar Marg, Worli, Mumbai-400 013. It is an undisputed position that the said premises are of the ownership of the Respondent No.1 MCGM. In respect of the said premises a Leave and Licence Agreement dated 12.09.1983 was executed with one Narayan Jindam and the licence commenced from 01.07.1983. Along with the said Leave and Licence Agreement, the said Narayan also executed a Deed of Indemnity indemnifying the MCGM against any claim by the principal tenant one Surajbhan Chiranjilal Sharma. The said Narayan also executed an agreement dated 12.09.1983 to re-transfer the premises to

the MCGM. An undertaking dated 15.09.1983 was also executed by the said Narayan that he would not sub-divide the plot in question. It is significant to note that the said documents which have been referred to above have also been signed by the Petitioner in Writ Petition (Stamp) No.11331 of 2016, Indrapal Sharma as being a witness to the said documents.

3. On the ground that the said Narayan had sublet the premises and thereby violated the condition mentioned in the said Leave and Licence Agreement and the undertaking, a notice dated 03.01.2015 came to be issued by the MCGM revoking the licence of the said Narayan and since the said Narayan had then expired, the said notice was addressed to the legal heirs of the said Narayan. In the said notice, it was alleged that the said Narayan had sublet the premises and thereby violated the condition on the basis of which he was entitled to occupy the premises. In view of the fact that the reply addressed by both the Petitioners was not found to be satisfactory, the Respondent No.1 MCGM sent a presentation form to the Enquiry Officer to initiate proceedings under Section 105B of the BMC Act for eviction against the said Indrapal and the heirs of the said Narayan being Nilabai and Dharampuri. The Enquiry Officer of the MCGM issued a show-cause notice under Sub Section (2) of Section 105B calling upon the parties i.e. Nilabai and Dharampuri as the heirs of the Narayan

and Indrapal as to why they should not be evicted from the premises in question which were corporation premises. In so far as Nilabai is concerned, she filed her reply dated 16.04.2014 and contended that there is a long standing dispute between Narayan and Indrapal. She further stated that Indrapal has forcibly dispossessed Narayan from a part of the premises in question. She therefore prayed that the proceeding be dropped against her and the said Dharampuri.

4. Indrapal also filed his reply to the said show-cause. In his reply he has referred to the suit filed by him being Suit No.4959 of 1999 against Narayan claiming tenancy, which suit after it's dismissal resulted in a First Appeal being filed and the said First Appeal is pending in this Court. The said Indrapal also prayed that the proceeding under Section 105B may not be commenced against him in view of the fact that the Appeal was pending.

5. In so far as evidence in the Enquiry Proceedings are concerned, on behalf of the MCGM the evidence of one Rajendra Vithal Chavan, Rent Controller was adduced. Through the Rajendra Vithal Chavan inspection report disclosing that the premises have been divided into two parts was produced on record. In so far as the heirs of Narayan i.e. Nilabai and Dharampuri are concerned, the evidence of Nilabai was

adduced, she has produced documents which is the Leave and Licence Agreement dated 12.09.1983 and the other documents referred to hereinabove executed by the said Narayan. In so far as Indrapal is concerned, he cross-examined Rajendra Vithal Chavan, witness of the MCGM as also cross-examined Nilabai, but pertinently did not produce any evidence in support of his case. It seems that he also remained absent after cross-examining the witness of the MCGM and Nilabai and did not participate in the proceedings.

6. The Enquiry Officer taking into consideration the material on record and especially having regard to clause (3) of the undertaking filed by the said Narayan which was to the effect that "I shall not sub-divide the plot" as also having regard to the inspection report as also the averments made in the plaint by Narayan in the suit filed by him against the said Indrapal held that the said Narayan had violated the terms and conditions of the agreement as also the undertaking furnished by him in the matter of dividing the plot and subletting the premises to Indrapal. The Enquiry Officer accordingly by the order dated 09.10.2015 made the show-cause notice absolute and directed the eviction of the heirs of Narayan i.e. Nilabai and Dharampuri and Indrapal from the premises in question.

7. The Petitioners in the above Petitions i.e. heirs of Narayan and

Indrapal aggrieved by the said order dated 09.10.2015 filed Appeals, being Misc. Appeal No.95 of 2015 filed by Indrapal and Misc. Appeal No.99 of 2015 filed by Nilabai. As indicated above, the said Appeals have been dismissed by the Lower Appellate Court i.e. the Learned Principal Judge of the City Civil Court, Greater Mumbai by the impugned order dated 23.02.2016. The Lower Appellate Court i.e. Learned Principal Judge of the City Civil Court has whilst dismissing the Appeals referred to the averments made in SC Suit No.4489 of 1996 filed by Narayan especially paragraphs 2, 6, 7, 10 and 12 thereof. The sum and substance of the averments in the said paragraphs is that Narayan had permitted Indrapal to use part of the premises in question for residential purpose on humanitarian grounds. The Lower Appellate Court has also adverted to the compromise arrived in SC Suit No.8100 of 1984 between Narayan and Indrapal by virtue of which Indrapal was to reside temporarily in the premises in the portion marked D-1 and would pay Rs.1000/- per month as rent. The Lower Appellate Court on the basis of the said averments in SC Suit No.4489 of 1996 held that the said averments are binding on the heirs and therefore the factum of the premises being sublet in breach of the undertaking executed by Narayan stands proved. The Lower Appellate Court also held that breach of the undertaking would also invite an action under Section 105B as the undertaking can be said to be part of the

conditions which are applicable for occupying the premises in question. The Lower Appellate Court also adverted to the fact that Indrapal did not produce any evidence before the Enquiry Officer to substantiate his claim and establish that he is an authorized occupant. The Lower Appellate Court therefore recorded a finding that Indrapal has failed to establish legal authority to occupy any portion of the Corporation premises and therefore confirmed the order passed by the Enquiry Officer and accordingly dismissed the Appeal. As indicated above, it is the common order dated 23.02.2016 passed in the Appeals filed by the Petitioners which is taken exception to by way of the above Petitions.

8. Heard the Learned Counsel for the Petitioners in both the Petitions i.e. Mr. U. R. Singh and Mr. H. R. Pawar. On behalf of the Petitioner in Writ Petition (Stamp) No.11331 of 2016, the Learned Counsel Mr. U. R. Singh would submit that since the First Appeal filed by the Petitioner in said Writ Petition is pending in this Court, the Enquiry Officer ought not to have proceeded with the enquiry under Section 105B of the BMC Act. The Learned Counsel sought to reiterate the case of the Petitioner which was sought to be urged before the Enquiry Officer but not substantiated namely that Indrapal was a auction purchaser and therefore had tenancy rights in the premises. The Learned Counsel lastly sought to place reliance on the policy of the MCGM in respect of the regularisation

of unauthorized construction prior to the the year 1962 to 1964.

9. In so far as Mr. H. R. Pawar the Learned Counsel for the Petitioner in the companion Writ Petition (Stamp) No.12451 of 2016 is concerned, the principal contention urged by Mr. H. R. Pawar was that the charge of subletting cannot be said to be proved in view of the fact that the said Indrapal had forcibly taken possession of the premises in question. In support of which he sought to place reliance on the letters addressed by Nilabai to the local Police Station as well as to the Shops and Establishment Department of the MCGM.

10. Per contra, the Learned Counsel for MCGM Mr. Vinod Mahadik would support the impugned orders. The Learned Counsel by referring to the material on record namely the agreements which have been referred to in the earlier part of this order executed by Narayan to which the said Indrapal was a party, amongst which is also the undertaking dated 15.09.1983 submitted that the Enquiry Officer as well as the Lower Appellate Court have recorded a finding of fact that subletting/sub-dividing the plot of land in question is against the undertaking given by Narayan. It was therefore the submission of the Learned Counsel that case for initiation of proceedings under Section 105B of the BMC Act was made out, the orders passed by the Enquiry

Officer and confirmed by the Lower Appellate Court therefore did not merit any interdiction at the hands of this Court in its writ jurisdiction.

11. Having heard the Learned Counsel for the parties, I have considered the rival contentions. At the outset, in the context of the proceedings in question a reference to Section 105B of the BMC Act would have to be made :-

“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, taxes, fees or compensation] lawfully due from him in respect of such premises; or

(ii) sub-let,

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 impliedly under which he is authorised to occupy such premises;

(b) that any person is in unauthorised 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 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.

(3) If any person refuses or fails to comply with an order made under subsection (1), the Commissioner may evict that person and any other person who obstructs him and take possession of the premises; and may for that purpose use such force as may be necessary.

(4) The Commissioner may, after giving fourteen clear days notice to the person from whom possession of the corporation premises has been taken under sub-section (3) and after publishing such notice in the Official Gazette and in at least one newspaper circulating in the locality, remove or cause to be removed, or dispose of by public auction any property remaining on such premises. Such notice shall be served in the manner provided for the service of a notice under sub-section (1).

(5) Where the property is sold under sub-section (4), the sale proceeds shall, after deducting the expenses of sale, be paid to such person or persons as may appear to the Commissioner to be entitled to the same:

Provided that, where the Commissioner is unable to decide as to the person or persons to whom the balance of the amount is payable or as to the apportionment of the same, he shall refer such dispute to a civil court of competent jurisdiction, and the decision of the court thereon shall be final.

(6) If a person, who has been ordered to vacate any premises under sub-clause (i) or (iv) of clause (a) of sub-section (1), within one month of the date of service of the notice, or such longer time as the Commissioner may allow, pays to the Commissioner the rent and taxes in arrears, or as the case may be, carries out or otherwise complies with the terms contravened by him to the satisfaction of the Commissioner, the Commissioner shall on such terms, if any (including the payment of any sum by way of damages or compensation for the contravention aforesaid), in lieu of evicting such person under sub-section (2), cancel his order made under subsection (i); and thereupon such person shall continue to hold the premises on the same terms on

which he held them immediately before such notice was served on him.”

A reading of the said provision therefore discloses that the said provision can be invoked if the Commissioner is satisfied that the person authorised to occupy any corporation premises has, whether before or after the commencement of the Act, sublet, whole or any part of the Corporation premises, 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 person as well as any other person who may be in occupation of the whole or any part of the premises to vacate them within one month of the date of the service of the notice.

12. In the instant case, the said provision has been invoked as Narayan had sublet the premises to the said Indrapal. It is required to be noted that Narayan has been given the said premises on Leave and Licence basis on 12.09.1983 pursuant to the agreement executed between him and the MCGM. The said licence has commenced from 01.07.1983. The said Indrapal is a witness to the said Leave and Licence agreement. The said Narayan has thereafter executed a Deed of Indemnity dated 12.09.1983, the agreement dated 12.09.1983 to re-transfer the premises and the

undertaking dated 15.09.1983 that he would not sub-divide the plot in question. In spite of the said undertaking, it was found that the said Narayan had sub-divided the plot and sublet it to Indrapal. In so far as dividing the premises are concerned, it is required to be noted that it has come in the evidence of Nilabai that Indrapal has forcibly occupied a part of the premises in question. It has also come on record vide the inspection reports that the said original plot was divided into two parts by a partition wall. This is in so far as the sub-division is concerned. In so far as the subletting is concerned, the averments made by Narayan in the suit filed by him being SC Suit No.4489 of 1996 especially in paragraphs 2, 6, 7, 10 and 12 is to the effect that it is the said Narayan who permitted the said Indrapal to occupy part of the premises on the payment of compensation of Rs.1000/- per month. The occupation of Indrapal is also accepted by Nilabai who has deposed that there were various proceedings pending between Narayan and Indrapal. Hence, both the aspects i.e. sub-division and subletting, there is evidence on record which has been considered both by the Enquiry Officer and the Lower Appellate Court. In so far as Indrapal is concerned, it is significant to note that though he cross-examined Rajendra Vithal Chavan witness of MCGM, he did not produce any evidence on record, though he claimed that he had come into the premises by virtue of being a auction purchaser, the fact that he is a party

to the documents executed by the said Narayan albeit as a witness belies the case of the said Indrapal. It seems that the said Indrapal did not participate in the proceedings and make submissions before the Enquiry Officer. The said fact has been recorded both by the Enquiry Officer as well as the Lower Appellate Court. Hence, the case of the said Indrapal that he has got some independent right in the premises in question qua even the Respondent No.1 MCGM cannot be accepted.

13. In so far as Narayan is concerned, as indicated above, he is no more, his heirs have appeared before the Enquiry Officer as well as the Lower Appellate Court. In so far as his heirs are concerned, no doubt letters have been addressed to the local Police Station as well as the Shops and Establishments Department of the Mumbai Corporation of Greater Mumbai by Nilabai. Significantly no letter has been addressed to the MCGM as regards the unauthorized occupation of the said Indrapal. Hence, in so far as the case of the heirs of the said Narayan that Indrapal has forcibly occupied the premises in question, in the teeth of the material which is on record, the said case does not inspire confidence.

14. In so far as the contentions of the Learned Counsel for the Petitioner Mr. U. S. R. Singh are concerned, in the absence of any order passed in the First Appeal, there was no impediment for the MCGM to

proceed with the enquiry under Section 105B of the BMC Act. As observed by the Enquiry Officer and the Lower Appellate Court, Indrapal did not adduce any evidence though he claimed to be an auction purchaser. The fact that he is a signatory to the documents executed by Narayan also belies the said case of Indrapal. In so far as the policy of regularisation is concerned, an order passed under Section 105B of the BMC Act cannot be adjudicated on the said basis.

15. In so far as the submission of the Learned Counsel Mr. H. R. Pawar is concerned, though Narayan and Nilabai claimed that Indrapal forcibly took possession, there is no material placed on record that the said Narayan or after him his heirs i.e. Nilabai ever complained to the MCGM. Hence the said contention was rightly rejected by the Enquiry Officer and the Lower Appellate Court. It has been proved by the MCGM that the plot of land was to be occupied by the said Narayan on the terms and conditions on which it was granted by virtue of the Leave and Licence Agreement executed between the parties. The undertaking furnished by Narayan also states that the plot was not to be sub-divided by him. On the basis of the material on record, both the Enquiry Officer and Lower Appellate Court have reached a conclusion that the said condition has been breached by Narayan and therefore eviction under Section 105B of the BMC Act is required to be ordered. The Authorities below having

recorded findings of fact, this Court does not deem it appropriate to interfere in its writ jurisdiction under Article 227 of the Constitution of India. The Writ Petitions are accordingly dismissed.

16. Since the time granted by the Lower Appellate Court to vacate the premises is over on 23.04.2016. The Petitioners are granted further time up to 30.06.2016 to vacate the premises. No further extension would be granted.

[R.M. SAVANT, J]