

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

**WRIT PETITION NO.7936 OF 2013
WITH
CIVIL APPLICATION NO.192 OF 2016
IN
WRIT PETITION NO.7936 OF 2013**

Dr. Rajesh Virendra Tivari & Ors. Petitioners

Versus

Maharashtra Housing Area &
Development Authority & Ors. Respondents

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Mr. Vishal Talsania a/w. Netaji Gawade i/b. Sanjay Udeshi & Co.
for the Petitioners / Applicants.

Ms. Sharmila Deshmukh for Respondent No.1

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CORAM : N. M. Jamdar J.

Tuesday 23 AUGUST, 2016

ORAL ORDER

. The Petitioners challenge the order passed by the learned Judge of the City Civil Court on 2 July 2013 in Notice of Motion No.1455 of 2011. The Notice of Motion was taken out by the respondent - MHADA (Maharashtra Housing Area & Development Board) for setting aside compromise decree passed in the suit on 5th May 2005.

2. Heard the learned counsel for the parties.

3. The subject matter of the suit is a plot of land admeasuring 3303.20 sq. mtrs. bearing Survey No.34/1 Hissa No.1, corresponding to CTS No.212 situated at Village Maghathane, Tal. Borivali, Mumbai – 400 066. According to the Respondents, the property was acquired on 4 August 1970 under the provisions of Land Acquisition Act for a public purpose. According to the Respondents, the original Plaintiffs made an encroachment on the suit property and constructed certain structures. It was a case of the Respondents that the Plaintiffs agreed to sell 1/3 share in the suit property in favour of Respondent No.6 when the Plaintiffs had no title thereto. A consent decree came to be executed between parties and the suit was disposed of. The Notice of motion was taken out for setting aside the compromise decree on the ground that it was a nullity and was void. The Petitioners filed their reply and contended that the consent terms were infact based upon the decision taken by the Respondent – MHADA on 23 August, 2004 and the decree cannot be stated to be illegal or obtained by fraud. The learned Judge of the City Civil Court came to the conclusion that the compromise decree was opposed to the public policy and that the such consent decree was not lawful was not pointed out to the Court when compromise was recorded and therefore the learned Judge of the City Civil Court thought it fit to restore the suit to file by allowing the notice of motion.

4. Before considering the rival contentions, parameter of power of superintendence under Article 227 has to be kept in mind.

It is not for every error that this power has to be exercised and unless it shown that the impugned order will lead to failure of justice or there is fragrant abuse of procedure. While exercising this power, larger public interest also is not an irrelevant criterion. In the present case, the land belongs to the Government and the original Plaintiffs are not the owners of the property but have claimed ownership by virtue of adverse possession. Even if the Petitioners are claiming right to this property under certain policy stated to be formulated by the Respondent – MHADA, the basic fact is that, what is being dealt with is a public property. Public property cannot be given to a private person without following a procedure which is transparent and well established. Therefore, present dispute is not a case of litigation between two private individuals and that there is an element of public interest involved in the outcome of this litigation. It is this public interest that the learned Civil Judge has kept in mind before exercising his powers, to restore the suit and set aside the consent decree. As far as prejudice caused to the Petitioners is concerned, if the Petitioners is entitled to succeed in their claim to this public property, the Petitioners' claim is not foreclosed as the suit will be tried on its own merits. On the basis of consent terms executed by some of officers of the Respondent – MHADA, without there being any trial, public property cannot just handed over to the Petitioners. After the suit is restored, no doubt the learned Judge of the City Civil Court will consider the same on merits. If the Petitioners have good case on merits, they will succeed in the suit.

5. The learned counsel for the Petitioners submitted that the Petitioners are not the original Plaintiffs. If that is the position it is open to the Petitioners to make an application in the suit for transposing / substituting themselves as the Plaintiffs. If such application is made it will be considered by the learned Judge of the City Civil Court, more particularly, in view of the restoration of the suit in the above circumstances. The contention of the learned counsel for the Petitioners is that the Petitioners are entitled to relief in the said suit pursuant to the policy of the Respondent - MHADA is a ground on merits of the suit and it is needless to state that the Petitioners are entitled to take such ground as may be advised in support of their claim in the suit. It is open to the Respondents to counter the same.

6. In the above circumstances, considering the fact of the order passed by the learned Judge of the City Civil Court is in public interest and directs the trial on merits in respect of the public land, I do not find any reason to interfere with the impugned order. As stated above, it is open to the Petitioners to make an application for impleadment / transposition as the Plaintiffs, and take all grounds in support of the claim of the petitioners on merits of the suit.

7. The writ petition rejected. In view of disposal of the petition, all pending Civil Applications stand disposed of.

(N. M. Jamdar, J.)