

AGK

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION (L) NO. 45 OF 2016**

Divya Malla & 9 Ors.	...Petitioners
<i>Versus</i>	
The State of Maharashtra & 6 Ors.	...Respondents

**WITH
WRIT PETITION (L) NO. 64 OF 2016**

Mrs. Shahnaz Zulfekar Shaikh & Ors.	...Petitioners
<i>Versus</i>	
The State of Maharashtra & Ors.	...Respondents.

Mr. Mathews J. Nedumpara, *with Mr. Nishant Sangle, Mr. Parvinder Singh Sethi & Mr. P.R. Nair, for the Petitioners in both Petitions.*

Ms. P.H. Kantharia, *Government Pleader, for Respondent Nos. 1, 2, 5 and 6 in both Petitions.*

Mr. S.U. Kamdar, Senior Advocate, *with Mr. H.C. Pimple, for Respondent No. 3-BMC, in both Petitions.*

Mr. V.P. Sawant, *with Mr. Prabhakar Jadhav & Mr. Nikhil Patil, for Respondent No. 4 in both Petitions.*

**CORAM: S.C. DHARMADHIKARI &
G.S. PATEL, JJ.**

DATED: 13th January 2016

PC:-

1. Writ Petition (L) No. 64 of 2016 is not on board. By consent, it is taken up for hearing.

2. By these two Petitions under Article 226 of the Constitution of India, the Petitioners, who claim to be slum dwellers occupying certain structures, complain that the Municipal Corporation of Greater Mumbai has demolished them without any notice or hearing.

3. It is the claim of the Petitioners in the first Petition, filed by one Ms. Divya Malla and others, that the Petitioners therein reside in shanties. These are small structures and which have been erected and constructed prior to 1995/2000. There are about 70 families like the Petitioners living in almost inhuman conditions in Bandra, Mumbai at Rahul Nagar. They are illiterate and, therefore, some of them do not have complete documents or once had them but these were lost, and the local police station has been approached for assistance.

4. The Petitioners moved these Petitions urgently on 10th January 2016 complaining that their structures/shanties were demolished on 7th January 2016 by using police force. These structures have been demolished without any opportunity being given to the Petitioners to remove their personal belongings, utensils, clothing, books of children etc.

5. The Petitioners include some pregnant women, mothers of nursing infants and toddlers, very old and senior citizens and the very young. They say they have been deprived of the basic needs of life, and that today, the situation is that they have been rendered homeless. They are unable even to approach any authority for rehabilitation.

6. Notice having been issued to it, the Municipal Corporation, which carried out the demolition in question, filed an Affidavit in the first Petition, viz., Writ Petition (L) No. 45 of 2016. The deponent is the Assistant Engineer (Maintenance), H/West Ward. He deposes on the basis of official records. In his Affidavit, the deponent claims that the Petition raises disputed questions of fact. The Petitioners are claiming to be residing in a colony styled as Rahul Nagar in Bandra, Mumbai. However, according to the deponent of the Reply Affidavit, none of the structures, shanties or huts at Rahul Nagar have been demolished by the Municipal Corporation. Those structures and shanties are still standing. Therefore, the occupants thereof can have no grievance against the Municipal Corporation.

7. The Petitioners' huts were not in Rahul Nagar but on an open nullah/drain, claims the Reply Affidavit. Since the continued existence of those structures on the nullah/drain would result in water logging and flooding, to take care of that aspect of the matter, on 6th January 2016, 7th January 2016 and 8th January 2016, the Respondents demolished such of the illegal huts and shanties as were on and were blocking the minor nullah/drain known as the Rahul Nagar nullah/Veronica nullah. Annexure "1" to the Affidavit of the Municipal Corporation is a copy of the demolition register. It states that these structures/shanties were unauthorizedly erected recently, after 2014. They were temporary in nature, made of tin and bamboo. Since these were on an open nullah, the Municipal Corporation took recourse to Section 312 and Section 314 of the Mumbai Municipal Corporation Act, 1888 ("**the MMC Act**").

8. Our attention has been invited to these two provisions. Section 314 confers power on the Commissioner to remove without notice anything erected, deposit or hawked in contravention of Sections 312, 313 and 313A of the MMC Act. True it is that there is a discretion vested in the Commissioner to cause to be removed without notice structures or fixtures erected or set up in or upon any street or over any open channel, drain, wall or tank. In the present case, this action is justified inasmuch as the Affidavit states that the nullah not only carries sewage and enables clearance but prevents water logging in the catchment area. On account of the blockage of the minor nullah, there was water logging on A.K. Vaidya Road in front of Lilavati Hospital, in Transit Camp Nos. 30 to 42 and on some part of K.C. Marg. It was in order to take care of this situation that the demolition was carried out.

9. We have heard Mr. Nedumpara for the Petitioners and Mr. Kamdar, learned Senior Counsel for the 1st Respondent on this material and on a compilation tendered by Mr. Nedumpara.

10. Mr. Nedumpara would urge that the Municipal Authorities have carried out the demolition activity illegally inasmuch as both the provisions which are relied upon in the Affidavit in Reply do not enable them to remove the Petitioners' huts without notice as a general rule. The law does not contemplate any such demolition even by recourse to summary powers. Where shanties on the portion styled as nullah have been removed, it is the Corporation's duty to ascertain firstly as to whether these structures are indeed blocking any drain or nullah. Secondly, a minimal notice so as to enable concerned persons to produce relevant documents and

satisfy the officer or authority concerned that they are not blocking it or in any event are entitled to alternate structures or rehabilitation elsewhere within the city was necessary. Not issuing any notice violates the mandate of Article 21 of the Constitution of India. It is urged that the demolition has been carried out in a most brutal and inhuman manner. Even personal belongings were not allowed to be taken away. If the shanties are occupied by mothers, toddlers and school-going children among others, then even their life has been disrupted. Several families are uprooted and are in danger of their means of livelihood. The Corporation has a duty to rehabilitate such persons for the simple reason that if alternate accommodation or rehabilitation measures are not evolved within the city, then this demolition would result in them being completely thrown out of the city itself. It is submitted that the cut-off dates that have been evolved as a matter of policy, viz., the so-called datum lines of 1st January 1995 or 1st January 2000 have no sanctity for they are inconsistent with the object sought to be achieved. If that avowed object is to rehabilitate slum dwellers and those residing in subhuman conditions, then such a classification between the occupants would be discriminatory and violative of the mandate of Articles 14 and 21 of the Constitution of India, the latter having been interpreted to be a guarantee to food, clothing and shelter. Reliance is placed by Mr. Nedumpara on the Constitution Bench decision of the Hon'ble Supreme Court in the case of *Olga Tellis & Ors. v Bombay Municipal Corporation & Ors.*¹

11. On the other hand, Mr. Kamdar, learned Senior Advocate for the Respondents, submits that it is false to suggest from the

¹ AIR 1986 SC 180

documents that any of the structures were authorized or were existing before the cut-off date, or that all such structures as were demolished have not come up in the recent past. They have come up recently on an open nullah. They have obstructed and blocked that nullah, which has to be kept open so as to carry sewage and fluid waste without obstruction. Any obstruction on an open drain or nullah results in a flooding of upstream areas. Flooding does not occur only because of heavy rains. It also occurs if water logging takes place for any reason. That adversely affects the health of residents and occupants nearby. That is equally the mandate of Article 21 of the Constitution of India.

12. Mr. Kamdar would submit that the documents tendered by the Petitioners do not inspire confidence inasmuch as they pertain to Rahul Nagar. None of the structures or shanties in Rahul Nagar have been removed. Further, full opportunity to remove all the belongings and articles was offered, and the occupants have indeed taken away their articles and belongings. Reliance is placed upon the photographs annexed to the Affidavit in that behalf.

13. After having heard both sides, and having perused both Petitions, the documents produced by the Petitioners and the Affidavit of the Municipal Corporation, we are of the view that it is evident that all the Petitioners claim to be residing at Rahul Nagar. There is a statement made by the Assistant Engineer on oath that not a single structure located at Rahul Nagar has been demolished. The Petitioners contend that they are residents of Rahul Nagar. The Respondents claim to have not demolished any structures at Rahul Nagar and say that the slum pocket named Rahul Nagar is

intact. The Respondents have only demolished the structures on the nullah.

14. In the Affidavit, it has been specifically stated relying on a map of H/West Ward that there are several major and minor nullahs. The portion marked pink in the map is the encroached portion of the nullah in question, and because of these encroachments there has been water logging and flooding in the portions marked yellow in the map. The Affidavit indicates that the construction of shanties was on open nullah. The nullah was completely closed (choked up) with debris. Because of this there was heavy water logging in the catchment area. That is indicated sufficiently in paragraph 4(b) at page 11 of the Affidavit. Directions were issued to carry out a demolition of the illegal shanties on the minor nullah, viz., the Rahul Nagar nullah/Veronica nullah. That is how the structures, which were unauthorized, erected recently after 2014, have been removed.

15. Sections 312, 313 and 314 of the Mumbai Municipal Corporation Act, 1888 deal with prohibition of structures or fixtures which cause obstruction not only in and on streets, but also on open channels, drains, etc. These sections prohibit the deposit, etc., of things in and on such streets, channels and drains. The sections mandate that no person shall, except with the written permission of the Commissioner, place or deposit upon any street or over or upon any open channel, drain, well or tank in any street or in any public place anything so as to form an obstruction thereto or an encroachment thereon. Section 314 must be read along with Sections 312 and 313, enabling the Commissioner to remove

without any notice any wall, fence, rail, post, step, booth or other structure or fixture which shall be erected or set up in or upon any street, or upon or over any open channel, drain, well or tank contrary to the provisions of sub-section (1) of Section 313.

16. We have referred to the relevant provisions or clauses of these Sections only to emphasize that the power of the Commissioner to cause such removal without notice is not questioned by the Petitioners. The provisions have also not been challenged as unconstitutional or violative of any constitutional mandate. It is the exercise of power which is questioned. The argument is that in the facts and circumstances of this case, the demolition should not have been carried out without notice and that too without allowing persons to take away their personal belongings and household articles.

17. It is with regard to this grievance that the reliance is placed on *Olga Tellis's* case. In *Olga Tellis*, the right to life has been held to be one incapable of being waived or taken away arbitrarily. The procedure prescribed in Section 314 was alleged to be arbitrary, unfair and not a procedure established by law. In dealing with that argument and the power of the Commissioner, the Hon'ble Supreme Court made certain observations which have been relied upon by Mr. Nedumpara. These observations would emphasize that the power must be exercised reasonably and *bona fide*. The provisions empower the Municipal Commissioner to cause to be removed encroachments on footpaths or pavements over which the public have a right to passage or access. In *Olga Tellis's* case, the structures or huts on the pavements and their removal was the

issue. The argument of the Petitioners was that the procedure prescribed for the removal is arbitrary and unreasonable since not only it does not provide for giving of a notice before the removal of an encroachment but it provides expressly that the Municipal Commissioner may cause encroachments to be removed without notice. In dealing with that, the Hon'ble Supreme Court made the observations and rendered conclusions, each of which must be read in the perspective and together. No paragraph or no sentence of any paragraph can be picked and read in isolation. Far from suggesting any fundamental or legal right to encroach on the drain, nullah and pavement, the judgment refers to Section 61 of the MMC Act. The same so far as is relevant reads thus:

“61. Matters to be provided for by the corporation.

— It shall be incumbent on the corporation to make adequate provision, by any means or measures which it is lawfully competent to them to use or to take, for each of the following matters, namely:-

- (a) the construction, maintenance and cleansing of drains and drainage works, and of public latrines, urinals and similar conveniences;
- (b) -----
- (c) scavenging and the removal and disposal of excrementitious and other filthy matters, and of all ashes, refuse and rubbish;
- (d) the reclamation of unhealthy localities, the removal of noxious vegetation and generally the abatement of all nuisances;
- (e) -----
- (f) -----

(g) measures for preventing the checking and spread of dangerous diseases;

(h) to (q)”

Hence, the provisions which aid the Corporation to provide for the above should receive an interpretation consistent therewith and not conferring an absolute right of the nature claimed before us. No right to encroach can be read in law.

18. While balancing the right of the public to pass over a public street, pavement or footpath, the Hon’ble Supreme Court emphasized that the Commissioner must exercise his discretionary powers reasonably and upon a satisfaction being reached that it is necessary to remove an encroachment without notice. Thus, the Commissioner is required to be satisfied that a notice need not be issued for removal of an encroachment made on any street or nullah or drain.

19. Upon a perusal of the materials produced before us by the Municipal Corporation, we are satisfied that it is the structures which were obstructing the flow of the nullah, and put up on such an open drain, that have been removed without notice. They have been removed after reaching a satisfaction that such structures are not on a land or on a piece or parcel thereof which cannot be styled as a nullah. The structures existed on an open drain or nullah and had come up only recently. These structures were required to be removed not only to avoid flooding in monsoon but also to remove any obstruction for the drainage and sewage to be carried through this open nullah. Hygiene and health considerations require the Municipal Corporation to act promptly whenever such structures

have been put up on an open nullah or drain. This would, therefore, enable us to conclude that the subject demolition is neither arbitrary nor unlawful, leave alone *mala fide*; more so, when the Respondents have clarified that the entirety of Rahul Nagar and the structures therein are untouched. They have not been demolished in any manner.

20. Secondly, we find that the stand of the Corporation is reasonable inasmuch as even now the Municipal Corporation through its Competent Officials and Authority are ready and willing to consider each and every Petitioner's case. If such documents are produced as will prove the existence of any structure prior to the cut-off date, then the Corporation is willing to extend to such persons all such rehabilitation assistance as is permissible under the existing rules and policy.

21. We note that the provisions of Sections 312 and 313 are in the nature of prohibitions. They prohibit the erection of obstructions on streets, and over or upon channels, drains and so on. Section 314 by itself does not create any prohibition. It is only consequential to Sections 312 and 313 and it is necessary corollary to those sections. Once certain actions or structures are prohibited unless expressly permitted, then an accompanying power of removal is essential. We also note that the provision for moving in demolition without notice is not general or omnibus. It is highly restricted and it is limited to certain types of obstructions. Keeping the specified areas or channels clear is essential to the maintenance of vital civic services and amenities. The obstruction of these specified channels, drains, wells, tanks, etc., is, thus, of such a type that its removal is always

exigent and always imperative. It is only when there is this type of an obstruction, and the failure to obtain permission, that the corporation may proceed to demolition without notice. Clearly, this is an extraordinary power for use in restricted circumstances of emergent need to protect vital civic amenities.

22. Mr. Nedumpara's submissions, unfortunately, fail to acknowledge any of this. He places his argument on what appears to us to be far too high a pedestal, by urging that it is wholly immaterial whether or not there is any such alleged obstruction; once it is found that the Petitioners had hutments in that area, then they are automatically entitled to notice and to rehabilitation. What Mr. Nedumpara's argument amounts to is saying that Sections 312-314 should be held to be inapplicable to the Petitioners. We can see no reason for holding so. The Petitioners do not, we note, claim that their structures are legal or have the necessary permissions under Sections 312 or 313 or the other relevant provisions of the MMC Act. They only claim that since they are there, and notwithstanding their obstruction of the nullah, they are (a) entitled to notice; and (b) entitled forthwith to rehabilitation and alternative housing. In other words, the submission is that the illegality of the Petitioners' structures is inconsequential and statutory prohibitions must be read off the statute book for them. We cannot countenance any such argument or submission. It would render otiose every attempt at balanced and sound city administration.

23. In saying this, we are particularly mindful of the reason given by the Municipal Corporation for this particular demolition. It has not been carried out on a whim. A reason is supplied. That reason is

that the obstruction caused by the Petitioners' illegal hutments resulted in water logging and flooding elsewhere, more particularly near a hospital, on a main road and, most pertinently, in transit camps Nos. 30 to 42. In other words, this becomes a case of competing claims to social and spatial justice within the city. Those in the affected areas (those affected by the water logging caused by the choking of the nullah) cannot be expected to sacrifice their legitimate claims to the claims made by the Petitioners, whose hutments are entirely illegal and contravene statutory prohibitions. If this was to be accepted, the task of municipal administration would become all but impossible. We do not agree with Mr. Nedumpara when he says that our view would result in granting the Municipal authorities unbridled and unrestricted license to demolish without notice. That is not even the case of the Municipal Corporation, and Mr. Kamdar has not advanced any such extreme proposition before us.

24. In any such contest, those whose claims are founded on an illegality or on a transgression of a statutory prohibition, must yield and give way to the wider public interest embodied in statutory provisions that are directed to the maintenance of order, health and hygiene. We find it difficult to believe that the Petitioners did not know of the illegality of their structures and the illegality of their actions in covering and blocking the nullah. Those actions have caused demonstrated and documented legal injury to others, including, perhaps most importantly, to those in transit camps Nos. 30 to 42; and the conditions in those camps are often utterly pitiable as well. Those camps are occupied by persons who are shown to have a valid legal entitlement to be there, and their

conditions in those transit camps ought not to be allowed to be threatened by the illegal choking of the nullah. It is neither just nor reasonable to ask any person to suffer flooding and water logging in his lawful accommodation because of the illegal structures put up by others downstream.

25. Once we take the above view, it is not necessary to consider any broader controversy with regard to the legality and validity of the cut-off date. The Petitioners have pleaded that their structures have been existing prior to 1st January 1995/1st January 2000. Therefore, they seem to be aware of the cut-off date. If, therefore, they can satisfy the Authorities with documentary evidence and proof of their existence, then, even if they are now removed, this would not prevent the Authorities from considering their claims in accordance with law. The Petitioners are not precluded from approaching these Authorities and requesting them to consider their cases.

26. If the Petitioners approach any of the Officers either of the Municipal Corporation or of the State Government, they shall scrutinize and verify their claims and pass an order as expeditiously as possible and within a period of fifteen days from the date of receipt of such claims.

27. Both the Writ Petitions are disposed of accordingly.

(G. S. PATEL, J.)

(S.C. DHARMADHIKARI, J.)