

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 6664 OF 2016

Mr. Deepak Radha Raman
Mandal

...Petitioner

Versus

The Assistant Commissioner,
B.M.C. K West Ward, Municipal
Corporation Of Greater Mumbai

...Respondent

....

Mr.Ranjeet Aagashe a/w. Namrata Agashe i/b. Yuvaraj Takale,
Advocate for the Petitioner.

Mr. Pradeep Patil, Advocate for the Respondent-BMC.

....

CORAM : R. G. KETKAR, J.

DATE : 09th MARCH, 2017

P.C.

1. Heard Mr.Ranjeet Aagashe, learned Counsel for the petitioner and Mr.Pradeep Patil, learned Counsel for the respondent-BMC, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'plaintiff', has challenged the judgment and order dated 20.5.2016 passed by the learned Judge, City Civil Court, Borivali Division, Dindoshi,

Mumbai in Draft Notice of Motion No.____ of 2016 in L.C. Suit No.1565/2015. By that order, the learned trial Judge rejected prayer clause (d) of the Notice of Motion for appointment of the Court Commissioner.

3. In support of this Petition, Mr. Aagashe invited my attention to :

- i) Copy of the sanad/ extract of property card issued by the Taluka Inspector of Land Records which records that Shri Michael had produced sanad on 19.1.1931.
- ii) Permission dated 1.10.1990 issued by the respondent Corporation for re-erection of the existing tin-shed at room No.3, Motiya Misquitta Chawl, Gulmohar Marg, Irla Bridge, Vile-Parle. In that notice it was noted that according to the applicant (Shri Radha Raman Mandal) he is staying in hut admeasuring 12' x 32' which is a part of the total structure admeasuring 40"x35" and that he was occupying this structure since 1971. He was allowed to restore the status quo of the suit structure as was existing before the date of demolition on 28.8.1988.
- iii) The prayers made in L.C. Suit No.1565/2015 and in particular prayer clauses (b) and (c). By prayer clause (b), the petitioner/plaintiff sought declaration that the notice dated 4.7.2013 issued by the respondent corporation is bad in law, void ab-initio and not binding on the plaintiff. By

prayer clause (c) the plaintiff sought direction against the defendant to first carry out proper survey of the private land to be acquired and demarcate the same and thereafter issue fresh notice with correct address of the plaintiff seeking documents thereof and follow due process of law before acquiring the land.

- iv) Notice dated 4.7.2013 issued by the defendant to owner/occupier/to whomsoever it may concern and to the plaintiff. The address mentioned therein was Tata Compound Road, 13.40 mtr. D.P. Road, Andheri (W), Mumbai, calling upon the plaintiff to submit the documents to prove the authenticity of the structure occupied by him. Notice recited that on inspection of the site it was observed that the plaintiff's structure is falling in the alignment of 13.40 mtr. D.P. Road, Tata Compound, Andheri (W), Mumbai and for the construction of the road the structure under reference is required to be removed.
- v) Reply dated 5.8.2013 of the plaintiff. Mr. Aagashe submitted that in the reply the plaintiff specifically raised objection as regards mentioning wrong address in the notice as also not carrying out physical actual survey and verifications of the structure.
- vi) Affidavit in support of Notice of Motion taken out by the plaintiff.
- vii) Order dated 7.8.2013 passed by the learned trial Judge recording that the concerned officer of the defendant

undertook to verify the location of the plaintiff's structure and the matter was kept for ad-interim relief on 14.8.2013.

- viii) Order dated 14.8.2013 passed by the learned trial Judge recording therein that the concerned officer was again directed to verify the fact whether the structure of the plaintiff is in existence on the address mentioned in the notice dated 4.7.2013.
- ix) Order dated 2.12.2014 passed by this Court in C.A. No.1366/2014 in A.O. No.1135/2014 and in particular paragraph-3 thereof. In paragraph-3, the learned Single Judge of this Court referred to the order dated 7.8.2014 passed by the trial Court which recorded that the concerned officer of the defendant undertook to verify the location of the plaintiff's structure.
- x) Order dated 30.12.2014 passed by this Court. Mr.Aagashe submitted that the plaintiff is not party to the proceedings in which orders dated 2.12.2014 and 30.12.2014 were passed by this Court. He submitted that the plaintiff is however similarly situated as of the appellants before this Court.
- xi) The eligibility list of affected structures holders on 44 ft. D.P. Road (Tata Compound Road in K/W Ward) and in particular Sr. Nos.21, 38 and 39. At Sr. No.21 name of the plaintiff is shown as occupier of structure admeasuring 5.05 meter in length and 3.60 meters in width. At Sr. No.38 name of Shri Ajay Chhotu Phansekar is shown as occupier

of the structure admeasuring 4.14 meters in length and 1.90 meters in width. At Sr. No.39 name of Shri Sanjay Phansekar is recorded as occupier of the structure admeasuring 5.60 meters in length and 1.60 meters in width.

- xii) Reply dated 18.2.2015 given by the plaintiff to the notice dated 4.7.2013 and in particular paragraph-6 thereof setting out therein that the plaintiff failed to understand on what basis the defendant Corporation concluded that he is occupying an area of 5.05 meters in length and 3.60 meters in width.

4. Mr. Aagashe submitted that basically there is dispute as to whether the structure occupied by the plaintiff falls in D.P. Road. He submitted that before issuing notice the defendant Corporation has not carried out physical actual verification. The plaintiff, therefore, filed suit and one of the prayers made is for direction to the defendant corporation to first carry out proper survey of private land to be acquired and demarcate the same. He submitted that the structure occupied by the plaintiff is situate in Motiya Misquitta Chawl and is not in Tata Compound as alleged by the defendant Corporation. It is, therefore, necessary to appoint Court Commissioner for submitting report on whether the structure of the plaintiff is affected by the

proposed D.P. Road work. He submitted that the learned trial Judge was not justified in rejecting the prayer for appointment of Court Commissioner.

5. He relied upon following decisions :

1. ***Saminussa Tawakal Hussein and others vs. Municipal Corporation of Greater Bombay and another, 2007(2) Mh.L.J. 124***; and
2. ***Kisanlal Maniklal Rathi vs. Dinkar Yashwant Patil, 2004(1) Mh.L.J. 138***

6. On the other hand, Mr. Patil supported the impugned order. He invited my attention to the following :

- I) Paragraph-12 of the Petition wherein the plaintiff asserted that the defendant Corporation has demolished two rooms and are trying to demolish the remaining one room. In other words, the plaintiff claims to be in possession of three rooms out of which two rooms are demolished
- II) Order dated 1.10.1990 passed by the Deputy Municipal Commissioner giving permission for re-erection of existing tin-shed at room No.3, Motiya Misquitta Chawl, Gulmohar Marg, Irla Bridge, Vile-Parle.
- III) Notice dated 4.7.2013 addressed to the plaintiff.
- IV) Proposal dated 1.4.2016 addressed to the plaintiff offering

alternate accommodation as he was found eligible.

7. He submitted that basically the plaintiff was in occupation of one room i.e. room No.3. While rejecting the application, the learned trial Judge has observed that the plaintiff did not give description of the area of his premises. Though notice was issued to the plaintiff in the year 2013 and was held eligible for alternate accommodation, the suit is filed on 9.6.2015 and still then he did not make prayer for appointment of the Court Commissioner. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

8. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also gone through the written submissions filed by Mr.Agashe. The moot question is whether the plaintiff has made out a case for appointment of Court Commissioner. A perusal of the plaint shows that the plaintiff has not described the dimensions of the room in his possession. Merely it is asserted that the plaintiff is residing in the room in Motiya Misquitta Chawl. Prayer clauses (b), (c) and (d) read thus :

- “b) Be pleased to declare that the Notice No.KW/670/AEM/OD dated 04.07.2013 issued by the Defendant is bad in law, void ab initio and not binding on the Plaintiff, as same is issued by giving wrong address and same is not maintainable.
- c) Be pleased to direct the Defendant to first carry out proper survey of the private land to be acquired and demarcate the same thereafter to issue fresh notice with correct address of the Plaintiff seeking documents thereof and follow due process of law before acquiring land for their work.
- d) Be pleased to direct the Defendant to withdraw the said notice No.KW/670/AEM/OD dated 04.07.2013 if the structure of the Plaintiff falls outside the demarcation, that too with heavy cost.”

9. Mr.Aagashe relied upon the order dated 1.10.1990. The order merely recorded the version of the plaintiff as follows “according to the applicant he is staying in a hut admeasuring 12 ft. X 32 ft.” In other words, the Corporation *prima facie* did not accept the case of the plaintiff that he is in occupation of a hut admeasuring 12 ft. X 32 ft. That apart, the notice was issued as far back on 4.7.2013 and the motion is taken out for appointment of Court Commissioner in the year 2016. While rejecting the prayer clause (d) of the Motion, the learned trial Judge referred to the description given by the plaintiff in the

plaint. In paragraph-5, the learned trial Judge also noted that the plaintiff was held eligible for alternate accommodation. The learned trial Judge further observed that this is not a fit case for appointment of Court Commissioner under Order XXVI Rule 9 of C.P.C. It appears that under the guise of appointment of Court Commissioner, in fact the plaintiff wants to protect his structure and to stall the public project, namely, proposed DP road of 44 ft.. Though the Corporation gave time to shift to the alternate accommodation, same had expired on 5.5.2016. In paragraph-6, the learned trial Judge observed that as the plaintiff did not give description and area of his premises and public project is being carried by the defendant Corporation, the Court Commissioner cannot be appointed.

10. After considering the prayers made in the suit as also for the reasons recorded in paragraphs-4 to 6 of the impugned order, I do not find that the learned trial Judge has committed any error in rejecting prayer clause (d) of the Motion. Mr.Aagashe relied upon decision of **Saminussa Hussein** (supra). In paragraph-5 of that decision, the Court considered the deposition of Junior Engineer Wagh examined by the Corporation. He had produced certified copy of the possession

report and certified copy of the property card which were marked as Exhibits-1 and 2. This Court held that acquisition has not been challenged by the appellants and merely because the Corporation failed to place a copy of the award or any document in support of the acquisition it cannot be held that the land was not acquired and, therefore, notice under Section 314 was wrong and illegal. In that case, the Corporation had taken possession of land on 27.3.1991 and that was also not challenged. In my opinion, said decision is not applicable to the facts of the present case.

11. Mr.Aagashe also relied upon the decision of **Kisanlal Rathi** (supra). In that case, the plaintiff came with the case that the defendant has made encroachment to the extent of two gunthas on the land. Perusal of the prayers, extracted hereinabove, does not indicate that the plaintiff has alleged encroachment made by the defendant. In view thereof, this decision also does not assist the plaintiff.

12. In the light of aforesaid discussion, the Petition fails and the same is dismissed.

13. It is made clear that where a decree is challenged by

the petitioner, any error, defect or irregularity in impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of the proposed proceedings as contended by section 105(1) of C.P.C.

(R. G. KETKAR, J.)

Deshmane (PS)