

Mr. Rohan Kadam i/b. Mr. Mohanish Chaudhari for Petitioners.
Ms Jyoti Chavan, AGP for Respondents No.1, 2, 3 and 8.
Ms Pooja Yadav for Respondents No.4 to 7-M.C.G.M.
Dr. Birendra Saraf i/b. I. C. Legal for Respondent No.9.

P.C. :

Heard Mr. Kadam, learned Counsel for petitioners, Ms Chavan, learned AGP for respondents No.1, 2, 3 and 8, Ms Yadav, learned Counsel for respondents No.4 to 7 and Dr. Saraf, learned Counsel for respondent No.9 at length.

2. By this Petition under Article 226 of the Constitution of India, petitioners have prayed for setting aside the physical demarcation dated 07.01.2016 made by the Superintendent of Land Records, Mumbai (respondent No.1) as also the letter / order dated 15.07.2016 of the respondent No.1.

3. In support of this Petition, Mr. Kadam submitted that the order / letter dated 15.07.2016 records presence of petitioner No.2, Surendra Lad at the time of measurement work and demarcation work on the site on 07.01.2016. At the time of demarcation, petitioner No.2 raised objections. The order / letter however, does not record the objections so raised by petitioner No.2. It also records that the measurement plan could not be completed as the objection was raised by the petitioner No.2. Petitioners, therefore, instituted above Petition in this Court and

on 09.06.2016, this Court (Coram : S. C. Gupte, J.) directed respondent No.1 to pass and make available an order in respect of the purported demarcation done on the subject property, namely, Final Plot No.1008 of TPS IV of Mahim Division, GN Ward situate at Khed Gally, Sayani Road, Mumbai 400 025 on 07.01.2016, as expeditiously as possible, and in any event, within a period of two weeks from the date of the order.

4. Mr. Kadam relied upon Section 280 of the Maharashtra Land Revenue Code, 1966 (for short 'Code') as also the additional affidavit of respondent No.1, Parag Ashok Jadhav, Maintenance Surveyor, and in particular paragraphs 2 to 4 thereof. He submitted that the said affidavit was filed pursuant to the order dated 12.04.2017 passed by this Court. Mr. Kadam also relied upon the following decisions to contend that even if the alternate remedy is available, this is a fit case for invocation of powers under Article 226 of the Constitution of India:

- a. ***Whirlpool Corporation Vs. Registrar of Trade Marks, (1998) 8 SCC 1;***
- b. ***Popcorn Entertainment Vs. City Industrial Development Corpn., (2007) 9 SCC 593;*** and
- c. ***Ravi Yashwant Bhoir Vs. Collector, (2012) 4 SCC 407.***

5. On the other hand, Ms Chavan invited my attention to the statement recorded on 07.01.2016 and also plan of Measurement Register No.633 of 2015 and submitted that measurement was carried out on 19.10.2015 and the demarcation was made on 07.01.2016 and the measurement register plan of Measurement Register No.633 of 2016 was issued by the Assistant Superintendent / City Survey Officer No.9, Mumbai City on 18.06.2016. She submitted that under Section 247 read with Schedule E of the Code, petitioners have an equally efficacious, alternate remedy of challenging the orders herein / measurement plan before the Appellate Authority, and therefore, this is not a fit case for invocation of powers under Article 226 of the Constitution of India.

6. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, petitioners have challenged physical demarcation carried out on 07.01.2016 and the order / letter dated 15.07.2016. A perusal of letter dated 15.07.2016 indicates that petitioner No.2 was present at the time of carrying out measurement and demarcation work. In other words, it cannot be said that the work of measurement and demarcation was carried out behind the back of the petitioners. Mr. Kadam submitted that work of measurement and demarcation was not carried out on 07.01.2016. I do not find any merit in this submission. The order / letter dated 15.07.2016 recorded that as the petitioner No.2 raised objection, **measurement plan could not be completed**. The order did not record that no work of measurement and demarcation was carried out. This fact is also supported by the order passed by this Court on 09.06.2016 in this Petition. The order dated 09.06.2016 reads thus,

“The Superintendent of Land Records, Mumbai City Survey and Land Record, Old Custom House, Fort, Mumbai, is directed to pass and make available an order in respect of the purported demarcation done on the subject property, namely, Final Plot No.1008 of TPS IV of Mahim division, GN Ward situated at Khed Gally, Sayani Road, Mumbai-400 025 on 7 January 2016, as expeditiously as possible and, in any event, within a period of two weeks from today.”

7. A perusal of the order extracted hereinabove shows that this Court directed respondent No.1 to make available an order in respect of the demarcation done on 07.01.2016. In pursuance thereof, map is drawn, which is at page 86.

8. Section 247 of the Code provides for remedy of an appeal from any decision or order passed by a revenue or survey officer specified in column 1 of the Schedule E to the officer specified in column 2 of that

Schedule. As the demarcation is made by respondent No.1, Superintendent of Land Records, who is a Survey Officer, appeal lies before the Director of Land Records in terms of Schedule E.

9. Mr. Kadam relied upon the decisions referred hereinabove. In the case of **Whirlpool Corporation** (*supra*), the Apex Court has observed in paragraph 15 thus,

“15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this court not to operate as a bar in at least three contingencies, namely, where the Writ Petition has been filed for the enforcement of any of the Fundamental rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case law on this point but to cut down this circle of forensic whirlpool we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.”

10. The said principle was reiterated in the decision of **Popcorn Entertainment** (*supra*). In paragraph 22, the Apex Court referred to the decision of **Whirlpool Corporation** (*supra*). In **Whirlpool Corporation**, the Apex Court held that there are three clear-cut circumstances wherein the Writ Petition would be maintainable even in a contractual matter. Firstly, if the action of the respondent is illegal and without jurisdiction, secondly, if the principles of natural justice have been violated, and thirdly, if the appellants' fundamental rights have been violated. In paragraph 39, the Apex Court referred to the decision of the Apex Court in **Corporation of the City of Bangalore Vs. Bangalore Stock Exchange**, (2003) 10 SCC 212, where it has been held that once a concluded contract has been entered into between the parties,

the parties cannot be permitted to resile from the same contrary to the express terms of the concluded contract. It was also held that CIDCO cannot take recourse to Section 23 of the Contract Act alleging that the agreement is opposed to public policy. In **Popcorn Entertainment** (*supra*), the Apex Court on facts found that there was a concluded contract between the parties and three of the four grounds on which Writ Petitions can be entertained in a contractual matter were made out and the High Court committed error in dismissing the Writ Petitions on the ground of availability of alternate remedy.

11. In the case of **Ravi Yashwant Bhoir** (*supra*), the Apex Court has held that even in the administrative matters, it is incumbent upon the authorities to pass a speaking and reasoned order. In the present case, the dispute between the parties is as regards demarcation and measurement. In the presence of petitioner No.2, demarcation and measurement work was carried out. In the present case, there is a boundary dispute between the parties which raises a disputed question of facts. Petitioners have an equally efficacious, alternate, statutory remedy of filing an appeal. Petitioners can raise contentions raised in this Petition in that appeal as well. I, therefore, do not find that any case is made out for invocation of powers under Article 226 of the Constitution of India. The decisions relied by Mr. Kadam do not advance case of the petitioners. Hence, Petition fails and the same is dismissed reserving liberty to the petitioners to file appeal before the appellate authority in terms of Section 247 read with Schedule E of the Code. It is made clear that I have not examined the merits of the case and the appellate authority will decide the appeal in accordance with law and uninfluenced by the observations made herein. Order accordingly.

(R. G. KETKAR, J.)