

Atul

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CONTEMPT PETITION NO. 38 OF 2017
IN
NOTICE OF MOTION (L) NO. 553 OF 2017
IN
SUIT NO. 2160 OF 2009

Vijay A Gosrani & Ors	...Petitioners
<i>Versus</i>	
East and West Developers & Ors	...Respondents

Mr Mustafa Doctor, Senior Advocate, with Dr Birendra Saraf, Mr Tushar Gujar, i/b Solicis Lex, for the Petitioner.

Mr Cherag Bulsara, a/w T Moris, i/b ALJ & Partners, for Respondent No. 1.

Mr Cherag Bulsara, with Niranjana Shimpi, for Respondent No. 2.

Mr Joaquim Reis, Senior Advocate, with Mr RY Sirsikar, for Respondent No. 3-MCGM.

Mr Arvind Parkar, Secretary, is present in person.

Mr RB Dhanavade, Chairman, is present in person.

Mr Pankaj A Thakkar, Petitioner No. 10, and Ashish Thakkar, Dinesh D Thakur, Mazhar A Suttarwal, Vijay Maniram Kori, Vijay Amrutlal Gosrani, Avinash Shankar Kelaskar, Nathuram H Gawand, Ashalata R Raut, Anil M Kawankar, Shashikala S Kawankar, Rekha V Sawant, Mahendra Ruparel, Husain Suttarwala, Shabby Lewis, Kamruddin MF Husain & Mahendra Rajgor, Petitioners, present in person.

CORAM: G.S. PATEL, J
DATED: 14th February 2018

PC:-

1. I have heard this Contempt Petition at some length over several days. I will deal with the allegations to the extent that I believe necessary. The contempt jurisdiction of a Court is a restricted one and, ordinarily, the scope for moulding an equitable relief in contempt jurisdiction is limited. I will immediately state that I am not in the least satisfied that in this case any contempt has been made out, and, but for what follows, I should have been inclined to dismiss the Contempt Petition, perhaps even accompanied with an order of costs. However, Mr Doctor for the Contempt Petitioners, and Mr Bulsara for the Society — the most affected party — and for the Developer, both say that they are agreeable to the order that I propose to make. On previous occasions, I have broadly indicated the frame of this order to both sides, though not its details.

2. First, as to the parties. The 30 Petitioners are between them some of the original plaintiffs in the Suit. The 1st Respondent, East West Developers, is a proprietorship firm and, as its name suggests, undertakes development and redevelopment of properties. The 2nd Respondent is the Azad Nagar Coop Hsg Soc Ltd, through its Chairman and Secretary (“**the Society**”). The 3rd Respondent represented by Mr Reis is the Municipal Corporation of Greater Mumbai (“**MCGM**”).

3. The project in question is under Development Control Regulation 33(7) on a large tract of land at Wadala. On its own this

implies the re-development of a cessed, tenanted structure, and, therefore, the rehabilitation of a number of tenants or occupants (subject, of course, to their rehabilitation eligibility determination). The Petition itself says that the 1st and 2nd Respondents, acting collusively with the 3rd Respondent Corporation and its officers are in contempt of an order dated 11th March 2015 (KR Shriram J) by which certain Consent Minutes or Consent Terms were taken apparently in the Notice of Motion but resulted in disposal the Suit, as is apparent from Clause (g). These Consent Minutes, as we shall see, contain reciprocal obligations as well. The Contempt Petition is perhaps an over simplification, and possibly a gross simplification, of the events that transpired after 11th March 2015.

4. Before I come to the actual events themselves in brief, I must make reference immediately to an Affidavit dated 14th February 2018 filed by one Vidya S Virkar, Administrative Officer (Estates), F/North Ward of the MCGM. This Affidavit refers to a four-page list of occupants/tenants. The Affidavit was filed on my oral directions issued yesterday. I required and called for this Affidavit because it is for the MCGM to say which of the persons in this four-page list, all of them among the Petitioners, are or are not eligible for rehabilitation in the reconstruction. The four pages between them cover exactly 30 occupants. There is a 31st occupant, the son of one of the occupants or tenants, since deceased, but I will deal with that claim separately. The four lists are marked Annexures “A”, “B”, “C” and “D”, respectively to Ms Virkar’s affidavit.

5. As regards the six persons in Annexure “A”, Ms Virkar’s Affidavit says that these Petitioners have not made proper

applications or have not complied with the MCGM's requirements for ascertaining their eligibility. Their applications are pending. Separate directions are required in respect of these six Petitioners.

6. Of the eight Petitioners shown in Annexure "B", those at Serial Nos. 1 to 7 are all persons whose tenancy/occupancy transfer applications the MCGM has sanctioned, approved or accepted. They are all eligible for rehabilitation in the project. The occupant at Serial No. 8 of Annexure "B" passed away on 8th November 2017. One of his heirs has applied for a transfer. This is the "31st occupant" I mentioned earlier. Ms Virkar's Affidavit states that the name of the legal heir will be approved and will be included in the supplementary Annexure-II when that is finally readied. Irrespective of what the Affidavit says and how it is worded, this inclusion of the legal heir of Contempt Petitioner No. 8 is subject to his fulfilling MCGM's eligibility requirements. He is not entitled to inclusion in the supplementary Annexure-II merely or only by virtue of this order.

7. Annexure "C" contains a list of ten Petitioners. All ten are already included in the original Annexure-II and are, therefore, entitled to rehabilitation.

8. Annexure "D" is a list of six Petitioners. They were not included in the original Annexure-II. However, Ms Virkar's Affidavit clearly states that orders have been passed for including their names and these names will be included, without any further action being required, in the supplementary Annexure-II.

9. Returning to the six Petitioners in Annexure “A”, whose applications are irregular or non-compliant, they cannot possibly be given an indefinite time to rectify their applications. They will be required by this order to complete their applications in all respects, and submit these to the MCGM on or before 1st March 2018. Those applications will be considered by the MCGM on merits, completely unaffected and uninfluenced by the past litigation history in this matter, by the officer concerned of the MCGM on or before 23rd March 2018. Those of the six Annexure “A” Petitioners who are found eligible will have their names included in the supplementary Annexure-II. For those who do not fulfil the eligibility criteria, this order will not operate to afford them any benefit. They are free to pursue such remedies as they deem fit but in regard to, and only to, questions of their eligibility, all contentions in that limited regard being kept open. This order will, however, operate fully against them as regards the project itself, and also as regards all allegations of contempt or otherwise against the Society and builder, none of which will survive or be available to them in future. This is the essence of their instructions to Mr Doctor today to say that all the Petitioners are agreeable to the present order. In other words, should any of these six Annexure “A” petitioners be found ineligible by the MCGM, they will not be entitled to agitate, whether in revival or otherwise, their allegations against the project, the Society and the Developer. That door is now shut, locked and the key to it kept from reach.

10. The Consent Terms or Minutes of 11th March 2015 are very clear. Each Plaintiff was entitled to receive Rs. 40,000/- per month as interim rent. The Plaintiffs were to vacate, and unequivocally

committed to do so, by 30th April 2015. They were required to give unconditional and irrevocable undertakings to do so. The possession that was required and contemplated was peaceful and vacant possession. The date of 30th April 2015 is no mistake. It appears twice: in Clause (a) and again in Clause (e). The latter clause indeed says that the entitlement of the Plaintiffs to membership of the Society is contingent upon their vacating their premises and delivering vacant possession on or before 30th April 2015. As it happens these Petitioners, or at least some of them, did not abide by that undertaking and commitment. They moved Notice of Motion (L) No. 1416 of 2015 before SC Gupte J in the Summer Vacation seeking to stay the operation and effect of a notice — and this date is important — dated 11th May 2015 issued by the MCGM. The reason I say that the date is important is because it is 11 days after the date specified in the Content Terms for delivering vacant possession. This means that the Petitioners before Gupte J, some of them Contempt Petitioners before me, did not abide by their commitments to the Court. The Applicant before Gupte J was Plaintiff No. 28 in the Suit. She is the legal heir of original Plaintiff No. 28, present Contempt Petitioner No. 24. In that Notice of Motion the challenge was to a MCGM eviction notice. That notice was issued precisely because these parties had failed to vacate by 30th April 2015. Gupte J found that it was in fact Applicants before him, i.e. the Petitioners before me or at least some of them, were the ones who had refused to execute the permanent alternative accommodation agreement and to vacate the premises. At that time, the stated reason for the continued recalcitrance on the part of the Petitioners/Applicants was that they had not received their monthly compensation cheques of Rs. 40,000/-. This is what Gupte J said:

"4. ...**The justification, to say the least, is frivolous.** The Consent Minutes of Order require the Plaintiffs, including the Applicant herein, to vacate their premises by 30 April 2015. The Consent Minutes also require the Plaintiffs, including the Applicant herein, to execute the permanent alternative accommodation agreements in terms of the draft appended to the Minutes. **The obligation on the part of Defendant Nos. 3(a) to 3(d) to pay the monthly compensation at the rate of Rs. 40,000/- to each of the Plaintiffs in lieu of alternate accommodation arises only after execution of the permanent alternative accommodation agreement and after complying with the undertaking to vacate the suit premises and handing over physical possession thereof to Defendant Nos. 3(a) to 3(d)."**

(Emphasis added)

11. Defendants Nos. 3(a) to 3(d) agreed to deliver the cheques after the agreements were signed and possession delivered. It appears that with police protection and the assistance of the authorities, possession was taken the next day, 14th May 2015. There is no ambiguity whatsoever about what Gupte J said or meant. It is the application of this Contempt Petitioners that was found to be utterly frivolous and it was they who were found not to be complying with their obligations under the Consent Minutes of the order of 11th March 2015.

12. Having regard to these circumstances, it is difficult to see how it can possibly be said today that the Developers' alleged failure to execute a permanent alternative accommodation agreement is an act of contempt of court. They might have been in contempt if the

Petitioners could show that they themselves stood blameless, and had complied with the 11th March 2015 Consent Minutes in letter and spirit. They, the Petitioners, were not blameless. They did not comply with those Consent Minutes. They did not fulfil their commitments under those Minutes. Those commitments were to this Court. Today they cannot possibly rely on their forcible eviction on 14th May 2015, and only after an unsuccessful attempt to delay possession — found to be frivolous — allege contempt against either the Society or the builder, let alone allege collusion against the MCGM. It is not open to these Petitioners to constantly re-agitate their case in this fashion. It is not open to these Petitioners, or any others, to expect that their own defaults be whitewashed or be without consequence.

13. This is actually something of a fashion or perhaps even a disease in development projects in this city, and it is spreading. It must be stopped in its tracks. A handful of persons believe they know best; no, they believe they know everything. They have not the slightest regard for the condition and interest of their fellow tenants/occupants. They hold up the entire redevelopment on some imaginary, frivolous or fanciful reason, or, all too often, for an ulterior, self-serving purpose. In the pursuit of this unjust, and often illicit, purpose, nothing is spared; nothing is sacrosanct. Not even an undertaking to a court of law. Whatever be the objector's case on merits, there is simply no excuse for breaching an undertaking to a court. That is no mere peccadillo. It undermines judicial authority. Aggregated over time, and repeatedly done in case after case, it forsakes the rule of law and compromises the basis of civil, orderly society.

14. There is, underlying every such development of a society, a fundamental democratic structure. Once a decision is taken by a Society, it binds its members. Individual members are not entitled to hold either the Society or other fellow members to ransom, or to stamp their personal preferences on the society and fellow members. That is not democratic. That is the brute force of a mob. There are, to be sure, many cases where the developer is at fault. This Court takes such developers to task and shows them no great indulgence. It does so only with one objective in mind — to ensure that the members of the Society do not suffer. But when some members of the Society hold up development against a willing and cooperative developer, then the enemy is not outside the gates. The enemy is within. This is not a trend that I propose to encourage. To the contrary: I now suggest that in every such case we must evolve what I will call an Incessant Objector rule — not persistent, but incessant, one who files case after case re-agitating the same thing in one forum after the other, all in pursuit of a narrow, self-serving gain. That rule must require the I/O to be put to terms: any further default, and the Incessant Objector stands to immediately forfeit all benefits including rehabilitation eligibility. There must be a real risk to initiating and pursuing frivolous litigation. It cannot be entirely risk- and cost-free. That is the only way to balance equities, and by this I do *not* mean equities between the Incessant Objector and the developer, but equities between the Incessant Objector on the one hand and fellow members and the society on the other. The latter are the most severely prejudiced by the actions of the Incessant Objector, and there is no reason why an Incessant Objector's litigations of frivolity should be without consequence; or, worse yet, why the consequences of that litigation frivolity should be visited on

fellow members and the society. The lacuna in the Consent Minutes in this case is that they did not provide for an event of default. Every society would do well in future to include an appropriate default clause. Even without such a clause, for breach of an obligation and an undertaking, the Court will, and must, fashion an order imposing a consequence for default.

15. I make this plain because — and I have said this to Mr Doctor over several hearings — these Contempt Petitioner will now not get a free pass or all benefits after having been in default of their obligations under the Consent Minutes of 11th March 2015. That they are and were in default is established and cannot be questioned. There is a price to be paid for this defiance of the Minutes. This is not on account of their persistent opposition to the developer. A court in equity is unconcerned with that, on its own. What is unforgivable, and invites not just censure but a palpable and tangible cost, is the disobedience of an order of a court, and a failure to abide by an undertaking solemnly given to a court. It is of no purpose, and of absolutely no persuasive value, to say that these Petitioners are “poor slum dwellers”, or that they depend on the transit rent. This is a matter of complete and total irrelevance when it comes to enforcing commitments made to this Court; and that is something the Petitioners should have thought of before they set sail with their applications to Gupte J. Courts are agnostic. Prince or pauper, beggar or billionaire — we see them all as one, as equal. Our orders are not recommendations. They are not suggestions. They will be enforced and they will be enforced in full measure, swiftly and without mercy or latitude.

16. Mr Bulsara for the 1st and 2nd Respondents tells me a long story of the Developer's and Society's woes, including that they have had to face many litigations and obstructions, incur much in costs and so on. At each hearing, he gave me a steadily rising figure of these costs (the most significant of which are, predictably, legal costs). This is equally underwhelming. How Developers are handle their affairs in matters such as this is well-known. Delays are calculated and factored into profit calculations. It is useless to pretend otherwise. Any halo that Mr Bulsara holds up over his developer-clients' heads is less than inspiring. There is no question of asking these Petitioners to pay for costs allegedly incurred by the Defendants/Respondents Nos. 1 and 2.

17. That does not, however, mean that the Petitioners are entitled to every bit of the monthly rent or compensation. Mr Doctor points out that one Savitribai Kelaskar, Petitioner No. 13 has not been paid since inception, i.e. since May 2015 while others have received payment till March or April 2017. It appears that there are some disputes amongst the heirs of Petitioner No. 13 and, therefore, payment was withheld. Her name and that of her claimant heir is at Serial No. 4 of Annexure "B" of Ms Virkar's Affidavit, and her application for transfer has been accepted by the MCGM. Consequently, in her case she will receive the monthly rent/compensation at the same rate as paid to other occupants (with periodic increases), but subject to the deduction that I am ordering and directing ordered today.

18. Some of the Petitioners received cheques for March and April 2017, but these dishonored. These are set out in a list prepared by

Mr Doctor, a copy of which is given to Mr Bulsara in Court today. The list prepared by Mr Doctor is taken on record and marked “X” for identification with today’s date. These are Petitioners Nos. 26, 28, 22, 19, 25, 23, 21, 1, 2, 3, 4, 14, 11, 9, 12 and 16. Of these, Petitioners Nos. 25, 23, 21, 1, 3 and 16 have not received payments for two months, while the others mentioned earlier have not received payments for one month. This is the claim made by the Petitioners. Mr Bulsara will verify this. Unpaid arrears will be paid on or before 31st March 2018, again subject to the deduction ordered today.

19. None of the Petitioners have received any payment from May 2017 onwards. The total amount per month with agreed increases is, according to the Petitioners, Rs. 48,400/- per month according to the Petitioners, and Rs. 48,000/- according to the Developer and the Society. The aggregate claim by the Petitioners works just under Rs. 1,45,00,000/- or thereabouts. I am not deciding the figure. The amount to be reckoned is what is being paid, and has been paid, to the non-objecting members. The Petitioners will be treated on parity, i.e. entitled to exactly the same rates of transit rent with exactly the same periodic increases as all other members; subject to the deduction ordered today.

20. The question is how much of this unpaid amount should be forfeited to the Builder and Society from the Petitioners on account of their conduct. Having regard to the order of 11th March 2015 and the quite emphatic observations in Gupte J’s order, but also considering that the delay in obtaining possession was about 15 days, I direct the Respondent No. 1 Developer to withhold an amount of

Rs. 24,000/- from each Petitioner. This amount is entirely forfeit. It will not be paid to these Petitioners under any circumstances.

21. The remaining transit rent to be paid to the Petitioners (after the deduction) with all periodic increases will continue on the same basis as other occupants/tenants until possession of the rehabilitation units is delivered.

22. As regards the entitlement of the six persons in Annexure “A” to the transit rent, this will commence only from the date they are found eligible and subject also to the deduction of Rs24,000/-.

23. Further having regard to the litigation history, the Petitioners will, though entitled to a permanent alternative accommodation agreement, not be given membership, if not already given to them, of the Society until the date of possession. The reason for this is self-evident from the past history of this matter. In the permanent alternative accommodation agreement to be executed with those Petitioners, the clause regarding membership will stand modified or corrected to read that by virtue of this order the Petitioners (who do not already have membership) will be given membership only against possession.

24. As regards the allegations made by these Petitioners against the Society and the Builder, Mr Doctor has instructions to say that all these allegations stand withdrawn; and that the Petitioners will consent to all applications being made for quashing; and, where necessary, will apply within two weeks from today for necessary

orders of withdrawal of all proceedings they have initiated. This statement is noted and accepted as undertaking to the Court, with everything that this implies. A failure to abide by this will automatically result in the forfeiture of all benefits, including eligibility.

25. The Affidavit filed by Ms Vidya Virkar is to be paginted and filed in the Registry.

26. The Contempt Petition is disposed of in these terms with no further order as to costs.

27. Liberty to the parties to apply.

(G. S. PATEL, J)