

ORAL JUDGMENT : (Per A.S. Oka, J.)

1. Parties were put to the notice on 17th April 2018 that an endeavour shall be made to decide the Petition finally at the stage of admission. Accordingly, today, the Petition is taken up for final disposal at the admission stage.

2. The Government Resolution dated 14th April 1980 records that the land admeasuring about 60,520 sq.meter at Nepean Sea Road and the land admeasuring about 31,995 sq.meter at Bhulabhai Desai Road were reclaimed by the State Government. The said Government Resolution provides that the entire available reclaimed land admeasuring about 69,735 sq.meters should be transferred to the 1st Respondent-the Municipal Corporation of Greater Mumbai (for short “***the said Corporation***”) for being developed as a ground (Maidan), garden, green area and a fire brigade station. The terms and conditions on which the land was resolved to be transferred to the said Corporation were also set out in the said Government

Resolution.

3. There was an agreement executed by and between the 1st Petitioner which is a society registered under the Societies' Registration Act, 1860 and the said Corporation on 5th July 1985 in respect of the land admeasuring about 65,000 sq.meters (for short "*the said land*") out of the aforesaid reclaimed land. The said agreement describes the 1st Petitioner as a Licensee. It provides that the Licencee shall develop and maintain the garden on the said land which was more particularly described in the schedule to the said agreement. It was provided that the 1st Petitioner shall not use the said land for any purpose other than maintaining the same as a garden. Various other terms and conditions were incorporated in the said agreement including a termination clause. As evidenced by the possession receipt at Exh.F, the Superintendent of Garden of the said Corporation handed over possession of the said land to the 1st Petitioner on 5th July 1985. The 1st Petitioner developed a garden on the said land which is known as Priyadarshini Park.

4. There is one more agreement executed by and between the 1st Petitioner the said Corporation on 23rd February 1987 in respect of the said land in which the 1st Petitioner is described as the Licensee. The relevant clauses in the said agreement read thus:-

“(1) The Corporation shall allot to the LICENSEES the Licence to develop and maintain the Park, Playground and Sports situated at Reclaimed Land at Nepean Sea Road. The LICENSEES shall not use the said plot for any purpose other than for maintaining the same as a Playground, Park and for Sports as aforesaid.

(2) The LICENSEES shall during the continuance of this Agreement pay to the Corporation as and by way of the Royalty a sum of Re. 1/-. The LICENSEES also agree to pay the Corporation any other charges as may be fixed by the Corporation

from time to time.

(3) -----

(4) *The Licence shall be determined either by the Corporation or by LICENSEES by giving a three months notice determining the licence to the other party and on expiration of the period of three months from service of such notice on the other party, the licence shall be deemed to be determined. In the event of the determination of the licence or sooner termination thereof, the LICENSEES shall at their own cost and expenses remove all the fittings and properties belonging to the LICENSEES except the plants which shall be deemed to be the properties of the Corporation to the satisfaction in all respects of the Municipal Commissioner. In the event of the LICENSEES falling to remove the fittings and belongings of the LICENSEES the Corporation shall be entitled to*

get removed such fittings and properties at the entire cost and expenses of the LICENSEES.

(5) The LICENSEES shall not let out the plot to any other party without the knowledge of the Corporation and shall not part with the possession of the said plot or any portion thereof to any other party, the Licence being personal for the LICENSEES only.

(6) -----

(7) -----

(8) Any dispute or question arising in regard to this permission or these presents or the construction thereof or any way relating thereto shall be referred to the Municipal Commissioner whose decision thereon shall be final and binding on the LICENSEES.

(9) Nothing herein contained shall be construed as conferring upon the LICENSEES ANY right or

interest over the land or property of the Corporation.

(10) In the event of the breach of any of the terms and conditions of this agreement by the LICENSEES, the Corporation is at liberty to revoke this agreement.”

5. A show cause notice dated 3rd January 2017 was served by the Superintendent of Garden of the said Corporation upon the 1st Petitioner setting out several alleged breaches committed by the 1st Petitioner and the terms and conditions of the agreement dated 23rd February 1987 (for short “the said agreement”). By the said show cause notice, the 1st Petitioner was called upon to show cause as to why the licence granted under the said agreement shall not be terminated. The notice was replied by the 1st Petitioner. After considering the reply of the 1st Petitioner and after giving an opportunity of being heard to the 1st Petitioner, the Deputy Municipal Commissioner

(Disaster Management) of the said Corporation passed the order dated 17th April 2017 holding that there were major violations of the said agreement committed by the 1st Petitioner which are of serious nature and that the same are instances of wilful breach. He held that the licence was determined by the Municipal Corporation. He directed the Superintendent of Garden to issue a notice of termination and take over possession of the said land with immediate effect as provided in clause (4) of the said agreement. On the basis of the said order, on the very day, the Superintendent of Garden issued a notice to the 1st Petitioner calling upon the said Petitioner to handover the peaceful possession of the said land within the period of three months, failing which the possession will be taken over by his office without any further notice. The challenge in this Petition under Article 226 of the Constitution of India is to the said order and said notice both dated 17th April 2017. There is also a challenge to the demand of property tax made by the said Corporation.

6. The first submission of the learned Senior Counsel appearing for the Petitioners is that the 1st Petitioner was placed in possession of the said land under both the agreements and therefore, for dispossessing the 1st Petitioner, due process of law will have to be followed. He submitted that on 23rd September 2016, the Municipal Commissioner of the said Corporation had already passed an order directing taking over the possession of the said land as per law. He submitted that before the Deputy Municipal Commissioner who passed the impugned order dated 17th April 2017, the Superintendent of Garden had made a specific submission that the Municipal Commissioner of the said Corporation had already directed taking over of the possession of the said land. He submitted that the Deputy Municipal Commissioner being an officer subordinate to the Municipal Commissioner was bound by the said direction and therefore, the impugned order made by him is completely illegal.

7. The learned Senior Counsel has placed reliance on

the decision of this Court in the case of *the Haji-Ali Municipal Officers Co-op Housing Society Limited & Ors. Vs. the Municipal Corporation of Greater Bombay & Anr.*¹ and submitted that the 1st Petitioner can be evicted only after taking recourse to Sub-Section (1) of Section 105B of the Mumbai Municipal Corporation Act, 1888 (for short “*the said Act*”). He submitted that if the said land does not vest in the said Municipal Corporation, the only remedy available will be to file a civil suit for evicting the 1st Petitioner. He urged that on the basis of the order dated 17th April 2017, the 1st Petitioner cannot be evicted as passing of the said order does not amount of following the due process of law.

8. The learned Senior Counsel appearing for the said Corporation invited our attention to the terms and conditions of the said agreement as well as the earlier agreement. He submitted that there is a specific clause in both the agreements

¹ *Writ Petition No. 510 of 2003 decided by the judgment and order dated 8 September 2015*

that nothing contained in the agreements shall be construed as conferring upon the 1st Petitioner any right or interest over the said land. He submitted that the only authority conferred upon the 1st Petitioner under both the agreements was to develop and maintain the said land as a garden and playground. He pointed out that the 1st Petitioner was liable to pay by way of royalty only a sum of Rs. 1/- apart from the other charges which were demanded by the said Corporation. He would, therefore, urge that there is a right conferred on the said Corporation take over possession of the said land as it was found that the 1st Petitioner has committed several breaches.

9. He submitted that the principles of natural justice were followed as after giving an opportunity to file a reply to the show cause notice and after giving an opportunity of being heard, a detailed order dated 17th April 2017 has been passed by the Deputy Municipal Commissioner. He pointed out that findings of facts have been recorded in the said order holding that the breaches of very serious nature have been committed by

the 1st Petitioner. Inviting our attention to the clause 8 of the said agreement, he submitted that if the 1st Petitioner has any dispute about the action taken by the Deputy Municipal Commissioner, it is for the 1st Petitioner to make a reference to the Municipal Commissioner whose decision shall be final and binding. He, therefore, submits that it is not necessary for the said Corporation to take recourse to Section 105B of the said Act. He submitted that the 1st Petitioner being a licensee of the said Corporation cannot dispute the title of the said Corporation by contending that the said land does not vest in the said Corporation. He submitted that as no right was created by the 1st Petitioner in respect of the said land, which is a public property, in the light of the breaches committed by the 1st Petitioner, no inference is called for in writ jurisdiction under the provision of Article 226 of the Constitution of India. He submitted that the decision relied upon by the Petitioners is in relation to a residential premises allotted by the Corporation which will not apply to the facts of the case.

10. We have given careful consideration to the submissions. We have perused the record including the Affidavit in Reply.

11. There is a Chamber Summons being the Chamber Summons No. 65 of 2018 taken out by the Petitioners for amendment of the Petition for adding grounds of challenge. On earlier date, the parties were put to the notice that the Court will proceed on the footing that the amendment has been allowed. We may note here that for the reasons which are recording, it is not necessary for this Court to go into the additional grounds proposed to be added by the Chamber Summons.

12. Under the first agreement executed by and between the 1st Petitioner and the said Corporation, the 1st Petitioner was placed in the possession of the said land having an area 65,000 sq.meters. In fact, a possession receipt was executed on 5th July 1985 by the Superintendent of Gardens.

Clause 5 of the said agreement specifically provides that the 1st Petitioner as a Licensee was not to part with the possession of the garden or any portion thereof to any other party without the knowledge of the said Corporation. Clause 5 incorporated in the said agreement is similar to the clause 8 of the earlier Agreement. Perusal of the show cause notice and the material on record shows that the said plot of land was developed by the 1st Petitioner at its own cost by creating facilities of a park, a playground and sports activities. In fact, the show cause notice makes an allegation that the 1st Petitioner has been subletting a portion of the said land to private parties. Thus, the admitted position appears to be that from 5th July 1985, the 1st Petitioner is in possession of the said land, the 1st Petitioner has created at its own cost the aforesaid facilities and is managing the garden, playground, etc. made on the said land. Thus, the 1st Petitioner is in a settled possession for last more than 30 years.

13. It appears that on 22nd November 2016, the

Assistant Superintendent of Garden submitted a note referring to the fact that on a part of the said land, the 1st Petitioner is organizing various sports competitions for the students in the schools. The note records that this activity is being conducted by the 1st Petitioner without permission of the said Corporation. Therefore, a direction was sought in terms of prayer clause (a) of the said note to make applicable the charges for sports activity at the rates determined by the said Corporation on 18th March 2013. The said note was signed subsequently by several Municipal Officers and lastly, the Municipal Commissioner made an endorsement on 23rd December 2016 thereon to the following effect :-

“Have we taken over PDP. Please initiate taking over and complete as per law & report compliance.”

14. Thus, there was a direction issued on the said note by the Municipal Commissioner to take over the said land as per law. Perhaps it is on the basis of the said note that the

show cause notice was issued to the 1st Petitioner on 2nd January 2017.

15. Now coming to the order dated 17th April 2017 passed by the Deputy Municipal Commissioner, it appears that a submission was made on behalf of the 1st Petitioner that the Deputy Municipal Commissioner cannot delegate authorities to the Superintendent of Garden to issue a show cause notice. It appears that one Shri. Pardeshi, the Superintendent of Garden relied upon the aforesaid order of the Municipal Commissioner passed on 23rd December 2016. The relevant part of the impugned order dated 17th April 2017 reads thus:-

“Shri Pardeshi also submitted the documentary evidence wherein Hon'ble Municipal Commissioner, Mr. Ajoy Mehta has ordered to take over Priyadarshani Park which reads as under:

“Have we taken over PDP. Please initiate

taking over and complete as per law & report compliance.”

After examining the above arguments and counter arguments and documents submitted before me, in support of the say of Supdt. of Gardens, it is clear that Hon'ble Municipal Commissioner has specifically directed to initiate taking over the possession of PDP and has also directed to complete the process as per the law which simply means the issuance of show cause notice and completing the procedure of taking possession as per the process of natural justice. Being incharge of Garden Deptt. and being Priyadarshani Park reserved as a recreation ground/park in the development plan of Mumbai Municipal Corporation, I am satisfied that the authority granted to Supdt. of Gardens is just and proper and signing and issuance of notice by him holds good.

I would like to cite a case law established in the judgment delivered by Justice M.F. Saldhana in a Criminal Appeal No. 138 of 1986 decided on 23.11.1992 in the case of the Municipal Corporation of Greater Mumbai V/s. P.V. Sabestaian allies Charian & Ors. [MAH. M.C.(364)]. In this judgment it was held that the Dy. Municipal Commissioner has got powers vested in Municipal Commissioner and which can be further delegated to Municipal Officers. It is pertinent to note there that Dy. Municipal Commissioner of MCGM has got powers and authorities by virtue of the BMC Act Sec. 56 and his deputed authority can be further delegated to other officers for implementation of various provisions of Act and polices of Corporation which includes the issuing of notice, taking over possession of municipal property, granting punishment to Municipal officers and so on. A written reply for his objection have already been

*given to the Learned Advocate on 11.01.2017 and
17.01.2017 is sufficient.”*

(Underline added)

16. In the earlier part of the order, the Deputy Municipal Commissioner has observed that in view of Section 68 of the said Act read with Section 58 thereof, the Municipal Commissioner can delegate his powers to a Deputy Municipal Commissioner. In fact, on page 78, there is an observation made to the effect that he was exercising the delegated powers of the Municipal Commissioner. According to the Deputy Municipal Commissioner, the due process of law as suggested was the issuance of a show cause notice and taking over the possession after following the principles of natural justice. The tenor of the order shows that the Deputy Municipal Commissioner was under an impression that he has to complete only a formality for giving effect to the directions issued by the Municipal Commissioner to take over the possession of the said land. What the Deputy Municipal Commissioner has done by passing the

said order is that he has implemented the directions issued by the Municipal Commissioner on 23rd December 2016. In any event, the reference to the Municipal Commissioner under the relevant clause of the said agreement for disputing the correctness of the impugned order cannot be an efficacious remedy as the Municipal Commissioner has already taken a decision and the Deputy Commissioner passed the impugned order by purportedly exercising the delegated power of the Municipal Commissioner.

17. Section 105B of the Act of 1988 reads thus:-

“Power to evict person from Corporation premises.

105B. (1) Where the Commissioner is satisfied —

(a) that the person authorised to occupy any corporation premises has, whether before or after the commencement of the Bombay Municipal Corporation (Amendment) Act, 1960,—

(i) not paid for a period of more than two months, the rent or taxes lawfully due from him in respect

of such premises; or

(ii) sub-let, contrary to the terms or conditions of his occupation, he whole or any part of such premises; or

(iii) committed, or is committing, such acts of waste as are likely to diminish materially the value, or impair substantially the utility, of the premises; or

(iv) otherwise acted in contravention of any of the terms, express or implied under which he is authorised to occupy such premises;

(b) that any person is in unauthorized occupation of any corporation premises;

(c) that any corporation premises in the occupation of any person are required by the corporation in the public interest, the Commissioner may notwithstanding anything contained in any law for the time being in force, by notice (served by

post, or by affixing a copy of it on the outer door or some other conspicuous part of such premises, or in such other manner as may be provided for by regulations), order that that person, as well as any other person who may be in occupation of the whole or any part of the premises, shall vacate them within one month of the date of the service of the notice.

(2) Before an order under sub-section (1) is made against any person, the Commissioner shall issue, in the manner hereinafter provided, a notice in writing calling upon all persons concerned to show cause why an order of eviction should not be made, The notice shall, —

(a) specify the grounds on which the order of eviction is proposed to be made, and

(b) require all persons concerned, that is to say, all persons who are or may be in occupation of, or

claim interest in, the corporation premises, to show cause against the proposed order, on or before such date as is specified In the notice.

If such person makes an application to: the Commissioner for the extension of the period specified in the notice, the Commissioner may grant the same on such terms as to payment and recovery of the amount claimed in the notice, as he deems fit.

Any written statement put in by any person and documents produced, in pursuance of the notice, shall be filed with the record of the case and such person shall be entitled to appear before the Commissioner by advocate, attorney or pleader.

The notice to be served under this sub-section shall be served in the manner provided for the service of a notice under sub-section (1); and thereupon, the notice shall be deemed to have been duly given to

all persons concerned.

- (3) *If any person refuses or fails to 'comply with an order made under sub-section (1), the Commissioner may evict that person and any other person who obstructs him and take possession of the premises; and may for that purpose use such force as may be necessary.*
- (4) *The Commissioner may, after giving fourteen dear days' notice to the person from whom possession of the corporation premises has been taken under sub-section (3) and after publishing such notice in the Official Gazette and in at least one newspaper circulating in the locality, remove or cause to be removed, or dispose of by public auction any property remaining on such premises. Such notice shall be served in the manner provided for the service of a notice under sub-section (1).*
- (5) *Where the property is sold under sub-section (4),*

the sale-proceeds shall, after deducting the expenses of sale, be paid to such person or persons as may appear to the Commissioner to be entitled to the same:

Provided" that, where the Commissioner is unable to decide as to the person or persons to whom the balance of the amount is payable or as to the apportionment of the same, he shall refer such dispute to a civil court of competent jurisdiction, and the decision of the court thereon shall be final.

- (6) *If a person, who has been ordered to vacate any premises under sub-clause (i) or (iv) of clause (a) of sub-section (1), within one month of the date of service of the notice, or such longer time as the Commissioner may allow, pays to the Commissioner the rent and taxes in arrears, or as the case may be. carries out or otherwise complies*

with the terms contravened by him to the satisfaction of the Commissioner, the Commissioner shall on such terms, if any (including the payment of any sum by way of damages or compensation for the contravention aforesaid), in lieu of evicting such person under sub-section (2), cancel his order made under sub-section (1); and thereupon such person shall continue to hold the premises on the same terms on which he held them immediately before such notice was served on him.”

(Underline added)

18. According to the case of the said Corporation, the said land vests in it. Section 105B of the Act of 1988 confers a power on the Municipal Commissioner to initiate proceedings of eviction in respect of the Corporation premises. Under clause (gg) of Section 3 of the Act of 1988, the Corporation premises includes buildings and lands of any tenure, whether open or

enclosed, whether built on or not and whether public or private. Thus, the provisions of Section 105B are applicable to the land vesting in the said Corporation. Section 105B also deals with a case where a person is in unauthorised possession of any Corporation premises or in breach of the terms and conditions on which he is allowed to occupy the premises. It contemplates initiation of proceedings for eviction against such person who is in possession of a Corporation premises on various grounds, such as contravention of any of the terms under which he has authorised to occupy such premises or on the ground that any person is in unauthorized occupation of any Corporation premises. As can be seen from Sub-Section (1) of Section 105B, in such a case, the Municipal Commissioner is empowered to issue a notice and order that a person in possession of the Municipal premises to vacate the same within one month from the date of the service of the notice. Sub-Section (2) provides that before the order is made under Sub-Section (1) of Section 105B, a show cause notice is required to be issued. The person to whom show cause notice is issued, is entitled to file a Written

Statement and is entitled to appear before the Commissioner through an Advocate, an Attorney or a Pleader. Thus, the proceedings under Section 105B are quasi judicial proceedings. An Appeal is provided under Section 105F of the Act of 1988 from every order of the Commissioner under Section 105B to the Appellate Authority which is the learned Principal Judge of the City Civil and Sessions Court at Mumbai.

19. Even according to the case of the said Corporation, the 1st Petitioner was placed in possession of the said land as a Licensee and that the said land vests in the said Corporation. From the show cause notice, it appears that the case of the said Corporation was that the 1st Petitioner has committed breaches of the terms and conditions of the said agreement on the basis of which it was authorised to occupy the said land. Therefore, by invoking clause a(iv) of Sub-Section (1) of Section 105B, the said Corporation could have taken recourse to the eviction proceedings. The impugned order of the Deputy Municipal Commissioner holds that the said agreement stands

determined and therefore, he instructed the Superintendent of Garden to take possession. Even assuming that the termination is lawful, the only consequence of such termination will be that the possession of the 1st Petitioner will become unauthorized and therefore, a proceeding could have been taken by invoking sub-clause (b) of Sub-Section (1) of Section 105B.

20. Section 105B confers power on the Municipal Commissioner to evict a person from Corporation premises. If the law requires a particular thing to be done in a particular manner, the said thing must be done in the manner stated by law and in no other manner.

21. On a query being made by this Court, the learned Senior Counsel appearing for the said Corporation on instructions stated that the Deputy Municipal Commissioner who passed the impugned order dated 17th April 2017 is not an officer authorised by the Municipal Corporation to initiate and conduct the proceedings under Section 105B of the Act.

Therefore, the order passed by the Deputy Municipal Commissioner cannot be an order of eviction contemplated under Sub-Section (1) of Section 105B of the Act. Moreover, when the said order is passed, it was brought to the notice of the Deputy Municipal Commissioner that his superior officer (the Municipal Commissioner) had already taken a decision that the said land should be taken over. As stated earlier, the said officer has no power to act under Section 105B of the said Act.

22. Firstly, the passing of the said order is an exercise undertaken by the Deputy Municipal Commissioner which is nothing but a step taken to give effect to the direction already issued by the Municipal Commissioner to take possession of the said land. Secondly, the said officer had no statutory power to pass an order of eviction under Section 105B of the Act of 1988. Thirdly, at the highest, after holding that as there is a determination of the said agreement, the possession of the 1st Petitioner has become unlawful, the Deputy Municipal Commissioner could have directed initiation of proceedings

under Section 105B of the said Act.

23. Under Section 105B of the Act of 1988, there is a power vesting in the Commissioner or an officer authorised by him to make an adjudication on the question, whether a person to whom the notice has been issued has committed breaches of the terms and conditions on which he was permitted to occupy the Corporation premises. He has also a power to decide whether the possession of any such occupant is unauthorised. The findings recorded by the officer in exercise of the power under Section 105B are subject to an Appeal before the learned Principal Judge, City Civil and Sessions Court at Mumbai. Therefore, looking at the matter from any angle, even assuming that the impugned order dated 17th April 2017 was lawful, the 1st Petitioner could not have been evicted by the Superintendent of Garden in as much as the said Corporation must follow the due process of law provided under Section 105(B).

24. It is not necessary for us to go into the

question whether the said land is vested in the said Corporation when the said agreement was executed or as of today. It is for Municipal Commissioner to decide what proceedings should be adopted. Suffice it to say that unless the due process of law as contemplated by law is followed, the 1st Petitioner cannot be dispossessed. If at all proceedings are initiated under Section 105B of the said Act, the Petitioners can always raise a contention that the said land is not vesting in the said Corporation. As regards, the demand for taxes, the Petitioners have a statutory remedy over the said Act.

25. For the reasons which we have recorded, it is not necessary to look into the additional grounds sought to be taken by way of the Chamber Summons.

26. To the above extent, the Petition must succeed and we pass the following order.

(i) For the reasons which we have recorded above,

we hold that the said Corporation is not entitled to dispossess the 1st Petitioner on the basis of the impugned order dated 17th April 2017 (Exh.C) passed by the Deputy Municipal Commissioner and the notice dated 17th April 2017 issued by the Superintendent of Garden on the basis of the said order;

- (ii) We direct the said Corporation not to evict the 1st Petitioner on the basis of the said order and the said notice without following due process of law as indicated in the judgment;
- (iii) We make it clear that we have made no adjudication on the question whether the 1st Petitioner has committed breaches of the terms and conditions of the said agreement and whether the said agreement stands lawfully determined. These questions remain open to be

decided in appropriate proceedings which may be adopted by the said Corporation;

(iv) We have also made no adjudication on the question whether the said land is vested in the said Corporation. The question is left open to be decided in the appropriate proceedings which may be adopted by the said Corporation;

(v) Rule is made partly absolute in the above terms;

(vi) In view of disposal of the Writ Petition, the Chamber Summons does not survive;

(vii) As regards the challenge to the demand of property taxes, statutory remedies are available to the 1st Petitioner and the said remedies are kept open;

[RIYAZ I. CHAGLA J.]

[ABHAY S. OKA, J.]