

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

PUBLIC INTEREST LITIGATION NO. 109 OF 2006

1. Malabar Hill Citizens Forum Society,
a Society registered under the Societies
Registration Act, 1860 and a Charitable
Trust registered under the Bombay
Public Trust Act, having its registered
office at 70/B, Nalanda, 62, Pedder
Road, Mumbai- 400 026.
2. Narayan Dattatraya Dandawate,
the General Manager of the first Petitioner
abovenamed, residing at Meera-Madhura
Plot No.26, Flat No.A/1, Gen. Arunkumar
Vaidya Nagar, Bandra (W), Bandra
Reclamation, Mumbai 400 050. ... Petitioners.

V/s.

1. The Assistant Municipal Commissioner,
'D' Ward, Brihan Mumbai Municipal
Corporation having its office at
Jobanputra Compound, Nana Chowk,
Grant Road (West), Mumbai 400 007.
2. The Municipal Corporation of Greater
Mumbai, a body corporate established
under the provisions of the Bombay
Municipal Corporation Act, 1888 with
its headquarters at Mahapalika Marg,
Mumbai 400 001.
3. The Municipal Commissioner,
Brihan Mumbai Municipal Corporation,
Mahapalika Marg, Fort, Mumbai 400 001.

4. The State of Maharashtra,
through the Secretary, Urban Development
Department, Mantralaya, Mumbai 400 032.
5. The Collector of Mumbai.
With his office at Mumbai Collectorate,
Old Custom House, Near Town Hall,
Mumbai 400 001.
6. The Union of India,
Ministry of Environment and Forests,
Union of India, Pariyavaran Bhavan,
CGO Complex, Lodi Road, New Delhi.
7. The Maharashtra State Road Development
Corporation Ltd., an undertaking of the
State of Maharashtra and a Company
incorporated under the provisions of the
Companies Act, 1956 with its Registered
Office at Nepean Sea Road Barracks, Next
to Priyadarshini Park, Mumbai 400 006.
8. Maharashtra Coastal Zone Authority,
having its registered Office at
Environmental Department, Room
No.217 (Annex), Mantralaya,
Mumbai- 400 032. ... Respondents.

WITH
NOTICE OF MOTION NO. 405 OF 2017
IN
PUBLIC INTEREST LITIGATION NO. 109 OF 2006

Mumbai Municipal Corporation of
Gr. Mumbai. ... Applicant.

In the matter between:
Malabar Hill Citizens Forum Society
and another. ... Petitioners.

Versus

The Assistant Municipal Commissioner
D Ward and others.

... Respondents

WITH
NOTICE OF MOTION NO. 329 OF 2017
IN
PUBLIC INTEREST LITIGATION NO. 109 OF 2006

Malabar Hill Citizens Forum
Society and another.

... Applicants/
Petitioners.

Versus

The Assistant Municipal Commissioner
D Ward and others.

... Respondents

Mr.Darius Khambatta, Senior Advocate with Mr.Arif Doctor, Mr.Anirudh Hariani, Mr.Pheroze Mehta, Mr.Bhojraj Bara i/b M/s.Sanjay Udeshi & Co. for the Applicant/Petitioner in PIL/109/2017

Mr.J.Reis, Senior Advocate with Mr.A.Y. Sakhare, Senior Advocate with Ms.Kejali H. Mastakar and Ms.Vandana Mahadik for the respondent-MMC.

Ms.Geeta Shastri, Addl.G.P. for Respondent-State.

Mr.PP.Chavan with Ms.Reshmarani Jethanand Nathani for Respondent No.7 in PIL/109/06.

Mr.Y.S. Bhate i/b. Mr.Dharmesh Joshi for respondent No.6 in PIL/109/06.

Ms.Sharmila Deshmukh with Ms.Jaya Bagve for respondent No.8 in PIL/109/2006.

CORAM : A.S.OKA AND PN.DESHMUKH, JJ.

DATE : 16th & 17th January 2018

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

Our attention was invited on the earlier date i.e. on 12th January 2018 to the order of the Apex Court dated 8th January 2018 in Special Leave Petition (Civil) Diary No.39943/2017 by which a request was made to this Court to hear and dispose of Notice of Motion No.405/2017 within a period of ten days. When the Notice of Motion was listed on 12th January 2018, considering the fact that arguments will have to be canvassed in the Notice of Motion on the merits of the Public Interest Litigation, we were of the view that even the main Public Interest Litigation (PIL) will have to be decided along with the Notice of Motion and, therefore, by a specific order passed on 12th January 2018, we put the parties to the notice that even the main PIL will be taken up for final hearing along with Notice of Motion. The connected petition being Writ Petition No.1706/2017 also relates to the same property. Only for the purpose of perusal of the documents on record therein that the said writ petition was ordered to be placed along with PIL.

2. The subject matter of the present PIL is the land which is the subject matter of leave and licence agreements dated 4th July 1985 and 28th February 1987 executed by and between the first respondent- the Mumbai Municipal Corporation and the first petitioner. With a view to appreciate the controversy, a brief reference to the terms and conditions incorporated in both the agreements will have to be made. As can be seen from the first agreement dated 4th July 1985, the same is in respect of a garden on the reclaimed land at Nepean Sea Road admeasuring about

65,000 sq.meters (for short "the said land"). Clause-1 of the said agreement provided that the first respondent shall allot to the licensee (first petitioner) the said land for developing and maintaining the garden. Clause-2 of the said agreement provided that the first petitioner shall not fence the said garden of the height more than two/three feet and the same shall be in accordance with the rules under the Traffic Regulations. The licence fee/ royalty was agreed at Re.1/- It was also provided that the first petitioner will pay the first respondent- Municipal Corporation other charges as may be fixed by the Corporation from time to time. Clauses- 7 and 8 of the said agreement read thus:

"7. The Licence shall be determined either by the corporation or by LICENSEES by giving a three months notice determining the License to the other party and on expiration of the period of three months from service of such notice on the other party, the license shall be deemed to be determined. In the event of the determination of the license 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 failing to remove the fittings and belongings of the LICENSEES from the said Garden, the Corporation shall be entitled to get removed such fittings and properties at the entire cost and expenses of the LICENSEES.

8. The LICENSEES shall not let out the Garden to any other party without the knowledge of the Corporation and shall not part with the possession of the said Garden or any portion within the said Garden to any other party, the Licence being personal for the LICENSEES only."

Clause-13 provided that in the event of any breach of the terms and conditions of the agreement by the first petitioner, the first respondent will be at liberty to revoke the agreement by giving 24 hours notice. On 5th July 1985, the possession of the said land was handed over by the Superintendent of Gardens of the first respondent to the first petitioner. The second agreement dated 28th February 1988 is on the same terms. The first agreement provides for development and maintenance of a park. The only difference is that in the second agreement it is mentioned that the first respondent shall allot to the first petitioner the said land to develop and maintain a park, a play ground and sports. Clauses- 4 and 5 of the second agreement are the same as the clauses- 7 and 8 of the first leave and licence agreement.

3. By a Government Resolution dated 14th April 1980 (Exh.B to the petition), the said land was transferred to the first respondent-Corporation for being developed as a Maidan (ground), Garden, Green Area and a portion for a Fire Brigade Station. The terms and conditions on which the said land was transferred to the first respondent-Corporation by the State Government have been set out in the Resolution. There are other conditions incorporated in the said Government Resolution. On the basis of the said two agreements, it is the case of the petitioners that the first petitioner has developed a park and sports complex. The park is known as Priyadarshini Park.

4. It is pointed out in the petition that on 6th July 1991, the State Government published a gazette notification stating therein that the

first respondent- Corporation has proposed that the reservation for Post Office and Fire Brigade Station should be shifted to the north of Priyadarshini Park numbered as 139A and Priyadarshini Park be numbered as 139B.

5. In this PIL, the first substantive prayer is for challenging the impugned order dated 18th July 2005 (Exh.O to the petition). The only other substantive prayer is for issue of a writ of mandamus directing the second and third respondents (the Municipal Corporation) to modify the development plan for “D” Ward for relocating the Fire Brigade Station and the Post Office by taking recourse to section 37 of the Maharashtra Regional and Town Planning Act, 1966.

6. In the impugned order dated 18th July 2005, it is stated that there were demands received from the Superintendent of Post Office to develop the reservation of Post Office on the area admeasuring 600 sq.meters and also from the Chief Fire Brigade Officer to develop the reservation for Fire Brigade Office. By the impugned order, the petitioners were directed to hand over the portion of the said land reserved for Post Office and Fire Brigade Station as per the revised Development Plan to the Assistant Commissioner of “D” Ward within seven days failing which legal action as per clause-4 of the agreement will be taken. There is no dispute that clause-4 referred therein is the clause-4 of the second agreement dated 28th February 1987 which is on par with clause-7 of the first leave and licence agreement which we have quoted earlier.

7. We may note here that on 9th March 2007, an order was passed in the PIL restraining the Municipal Corporation from carrying out demolition till 13th March 2007. We may also note here that though rule was issued in PIL, there was no specific interim order passed in PIL. Before we advert to the subsequent orders, we may note here that on 5th June 2017, PIL was dismissed for want of prosecution. Thereafter, Notice of Motion (Ldg.) No.369/2017 was taken out by the petitioners for restoration of PIL. Clause-1 of the order dated 19th June 2017 passed on the said Notice of Motion reads thus:

“1. Notice of motion is allowed for the reasons stated in the affidavit in support of motion and the order of dismissal dated 5th June, 2017 is recalled. We are satisfied that for the sufficient reasons, the counsel appearing on behalf of the Petitioners could not remain present when the matter was called out on 5th June, 2017. PIL No.109 of 2006 alongwith Notice of Motion No.154 of 2007 and Chamber Summons No.106 of 2007 are accordingly restored to the file. Notice of motion is accordingly disposed of in terms of prayer clause (a). Parties are directed to maintain status-quo ante.”

(Underline supplied)

It is under the said order that PIL was restored and the parties were directed to maintain status-quo ante. On 19th June 2017 itself, Notice of Motion No.329/2017 was taken out by the petitioners. In the affidavit-in-support of the said notice of motion, it was mentioned that after the dismissal of the petition, on 14th June 2015, the petitioners were shocked to find that a Fire Engine was illegally and forcibly brought inside the Priyadarshini Park on the said land. It was alleged that it was brought

inside the park by causing a damage to the gate of the Park and was parked in the middle of the walking track causing hindrance to the use of the walking track by the citizens. It was further alleged that permanent benches fixed for senior citizens were also removed for making way for ingress of the Fire Engine. It was alleged that branches of several trees were hacked for ingress of the Fire Engine. It was further stated that a canopy of bamboo and plastic was erected as a cover for the said Fire Engine. It was also alleged that this act on the part of the Municipal Corporation lead to public outcry and furore and, accordingly, it was widely reported in the newspapers. Therefore, by taking out the said Notice of Motion, the petitioners sought mandatory injunction directing the first to third respondents to forthwith remove the Fire Engine and the Firemen occupying Priyadarshini Park since 14th June 2017. Notice of Motion No.368/2017 was also taken out by PIL petitioners on 10th July 2017 in which an allegation was that the Municipal Corporation has breached that part of the order dated 19th June 2017 by which the parties were directed to maintain status-quo ante. The allegation was that the Fire Engine was not removed notwithstanding the said order. Therefore, various prayers were made in the said Notice of Motion including the prayer for initiating action under the Contempt of Court Act, 1971 against the Municipal Corporation and its officers.

8. On 3rd October 2017, on Notice of Motion No.368/2017, the first Court passed an order directing the Municipal Corporation to file an affidavit stating whether within Malabar Hill, an area to station a fire engine which requires 10 sq.meter open area, is not available anywhere else other than Priyadarshini Park. Further order was passed on 11th

October 2017 by the first Court by which the Maharashtra Coastal Zone Management Authority (for short "MCZMA") was ordered to be impleaded as a party to PIL as the case made out in PIL was that the area designated for Fire Brigade Station is covered under CRZ-1. By the said order, the Member Secretary of the Maharashtra State Legal Services Authority and the Court Receiver were directed to inspect the spot and file report indicating whether Fire Brigade Station will come in the way of users of the park either for morning walk or otherwise. Various other directions were also issued to the said committee of two officers. MCZMA was also ordered to place on record as to which of the areas of the Park will attract CRZ-1 or CRZ-2, especially, with regard to identified 5,000 sq.meters area for Fire Brigade Station. There was a further order passed on 30th October 2017 by the first Court. Paragraphs- 4 to 8 of the said order read thus:

"4. On 14th June 2017, it is stated that a Fire Engine came to be stationed at Priyadarshani Park which obstructs the walkers as well as joggers to make use of the walking as well as jogging tracks. However, this was denied by the Corporation time and again. As a matter of fact, on 3rd October 2017, this Court directed the Respondent Corporation to identify or file an affidavit indicating that there is no other place available to shift the Fire Engine from the place it is now stationed. But there is no categorical statement to that effect till date except saying that a place is identified in the Hanging Garden.

5. The fact remains that till the recall application is entertained and disposed of or till further directions are given in the matter, the parties are bound to obey the directions of the Court dated 19th June 2017. Admittedly, till 14th June 2017, the Fire Engine in question was not brought to the Priyadarshani Park from Nana Chowk for the reasons best known to the parties. The status quo ante

would mean the Fire Engine should not be at the place where it is now stationed at the Priyadarshani Park. It is stated that some temporary construction is also made for the purpose of stationing the Fire Engine which would also come in the way of directions if it is allowed to continue since it would violate the directions to maintain status quo ante.

6. Since factual situation was disputed, we directed the Member Secretary of Maharashtra Legal Services Authority along with Court Receiver, High Court, Mumbai, to inspect the spot and file a report. This was prior to Diwali Vacation. Today, a report is placed after inspection along with a rough sketch indicating the position of the Fire Engine and how it is obstructing the existing walking track as well as jogging track. So far as the walking track is concerned, it is obstructing the path/track to an extent of 4 feet and so far as the jogging track is concerned, it is obstructing to an extent of 18 feet. It is categorically denied by the Respondent Corporation contending that there is no such plan sanctioned for jogging and walking tracks. The fact remains that till date, the general public are making use of the existing walking track and also the jogging park which cannot be doubted since the report of the Member Secretary of Maharashtra Legal Services Authority along with Court Receiver, High Court, Mumbai and photographs indicate how those tracks are used till today.

7. When the Bench remarked that the directions issued on 19th June 2017 in respect of maintaining of status quo ante not being complied with and when we insisted upon complying with such directions, wisdom seems to have prevailed on the officials of the Respondent Corporation after spending more than one hour on submissions. However, we note that the Respondent Corporation after proper instructions from the Competent Authority has come forward voluntarily to remove Fire Engine from the place where it is now stationed and also to remove temporary structure which is constructed for the Fire

Engine. We make it clear that no opinion is expressed on merits of the PIL.

8. We hope and believe that the Respondent Corporation would remove the Fire Engine and the temporary construction by 31st October 2017.”

(Underline supplied)

On 1st November 2017, the learned senior counsel appearing for the Municipal Corporation stated that the fire engine and the temporary structure have been removed and the site is cleared without any obstruction to either the walking track or the jogging track. In the light of the statements made, the first Court directed disposal of Notice of Motion No.368/2017 in which action for contempt was sought.

9. For the sake of completion of facts, we may note here that an order was passed on 17th April 2017 by the Deputy Municipal Commissioner of the said Corporation. Before the said order was passed, on 23rd December 2016 a notice was issued by the Municipal Corporation to the first petitioner in PIL, to hand over the plot of Priyadarshini Sports Complex and Environmental Park within seven days. Subsequently, the said notice was withdrawn and a fresh show-cause-notice was issued on 2nd January 2017. The parties were heard on the said notice and, thereafter the said order dated 17th April 2017 was passed by the officer of the Municipal Corporation. By the said order, the petitioners were informed that the agreement between the petitioners and the Municipal Corporation is determined and, therefore, the first petitioner was called upon to hand over peaceful possession of the Priyadarshini Park within a

period of three months failing which the possession will be taken by the office of the Corporation without further notice. Thus, under the said order, time was granted to the PIL petitioners to hand over the possession of the Priyadarshini Park till 16th July 2017. We may also add that in Writ Petition No.1706/2017, there is an ad-interim relief granted which protects the possession of the first petitioner.

10. It is in the light of this factual controversy, the submissions canvassed across the bar are required to be considered.

11. There is a Chamber Summons bearing No.106 of 2007 was taken out by the petitioners for amendment of the petition. The prayer in the said Chamber Summons was for allowing challenge to be incorporated to the notices dated 2nd and 7th March 2007. Notices were in respect of an office, a stall and mali rooms admeasuring 20 x 50 feet, 6 x 20 feet and 10 x 20 feet respectively.

12. As stated earlier, Notice of Motion No.405/2017 has been taken out by the Municipal Corporation for vacating the direction issued under order dated 19th June 2017 to maintain *status quo ante*. Chamber Summons No.315/2017 has been taken out by the petitioners for incorporating a prayer for declaration that the subject land falls under CRZ-I and hence, no fire brigade station can be constructed thereon. Notice of Motion No.329/2017 is filed by the petitioners for removal of fire engine and firemen occupying the Priyadarshini Park.

13. The learned senior counsel appearing for the petitioners has taken us through both the leave and licence agreements. He invited our attention to the impugned order. His submission is that even assuming that the reservation of a part of the subject land for Fire Brigade Station and Post Office continues, the possession of the portion of the land can be taken over only by following due process of law. He submitted that in any event, the subject land falls in CRZ-I under the CRZ notifications and therefore, no construction, which is required to be carried out for setting up a Fire Brigade Station, can be carried out. He submitted that going by the Coastal Regulation Zone Notification, 2011 (for short "CRZ Notification of 2011"), even assuming that the said land is falling in CRZ-III, it becomes a no development Zone and the permitted activities under the CRZ Notification of 2011 do not include use as a Fire Brigade Station. He invited our attention to an order passed by the first Court on 3rd October 2017 in Notice of Motion No.368 of 2017 by which the said corporation was directed to file an affidavit disclosing whether within Malabar Hill, an area to station a fire engine which requires of 10 sq.meters open area, is available anywhere else other than Priyadarshini Park. He submitted that though an affidavit was filed in response to the said order, it is not even the case that any such open area is not available elsewhere.

14. He also invited our attention to the affidavits on record, and in particular an affidavit of Dr.Bhagwantrao N. Patil, Director, Environment and Member Secretary of the Maharashtra Coastal Zone Management Authority. He submitted that interpretation sought to be put by the said Officer in paragraph-21 may not be correct as the CRZ

Notification of 2011 itself provides for permissible users of land falling in CRZ-III. He submitted that adjacent to the said land, a large open land of MSRDC (a Government of Maharashtra Undertaking) is available where a fire station can be set up. He also invited our attention to the report of the committee constituted under the order of the first Court dated 11th October 2017. He pointed out that the said committee found that the shed erected by the Municipal Corporation for fire engine obstructs walking track and jogging track which is being used by members of the public for last about 30 years.

15. He invited our attention to the findings recorded on perusal of the said report by the first Court in paragraph-6 of the order dated 30th October 2017. As regards the second substantive prayer, he submitted that the State Government and/or Municipal Corporation has already initiated proceedings for modification of the development plan for shifting the reservation of Post Office and Fire Brigade Station.

16. The learned senior counsel representing Mumbai Municipal Corporation submitted that when PIL was dismissed for non-prosecution on 5th June 2017, there was no interim or ad-interim order operative and, therefore, after dismissal of the petition, the Municipal Corporation could have always acted upon the order impugned in PIL and set up a Fire Station. He submitted that area of the land under leave and license agreements is more than 65,000 sq. meters and therefore in public interest a small portion of area out of the large area of 65,000 sq. meters can be allotted to use for fire station or parking of fire engine. He submitted that the Municipal Corporation is acting in public Interest. He stated that

Municipal Corporation is not in a position to construct any super structure or shed without permission of MCZMA. There is no prohibition in CRZ Regulations of 2011 on parking of fire engine and, therefore, parking of fire engine cannot be prevented even assuming that a small part of walking track or jogging track will get affected. He invited our attention to the terms and conditions of both the leave and licence agreements and submitted that no interest is created in favour of the first petitioner by both the agreements in respect of the subject land and it is not open for the petitioners to claim any right, title or interest in the said land. He submitted that it cannot be said that the first petitioner was put in possession of the subject land. He submitted that as the first petitioner was never put in possession, the Municipal Corporation can always enter the said land and, that too, for parking of fire engine and/or for construction of a fire brigade station which itself is in public interest. He submitted that therefore, in PIL, an order of restoration of the *status quo ante* could not have been passed as it restrains the Municipal Corporation from parking the fire engine. He invited our attention to paragraph-5 of the order dated 30th October 2017 passed by the first Court. He submitted that the Municipal Corporation agreed to remove the fire engine to restore *status quo ante* only till the Notice of Motion for recall of the order taken out by the Municipal Corporation was heard and it is not an unconditional action. It is, therefore, submitted that the action of restoration of the *status quo ante* cannot be held against the Municipal Corporation, as paragraph 5 of the said order dated 30th October 2017 makes it very clear that till the disposal of the recall application, *status quo ante* will have to be restored. He submitted that the first petitioner has no right, title or interest in respect of the subject land and therefore, no interference is

called for. As far as the second substantive prayer is concerned, he stated that the Writ Court cannot issue a writ of mandamus enjoining the Planning Authority and the State Government to amend the development plan, therefore, no such relief can be granted.

17. We have given careful consideration to the submissions. Firstly, it will be necessary to make a reference to the terms and conditions of both the leave and licence agreements. We have also observed that condition Nos.4 and 5 of the second agreement are virtually similar to condition Nos.7 and 8 of the first agreement. Clause No.4 of the second agreement permits determination of licence either by the Municipal Corporation or by the first petitioner by giving three months' notice. It is provided that on expiration of the period of three months from the service of the notice on either party, the licence shall be deemed to be determined. It is provided that after termination/determination of the licence, the first petitioner will have to remove at its own cost all the fittings and properties belonging to it except the plants. It is further provided that on the failure of the first petitioner to remove fittings belonging to it from the said land, the Corporation shall be entitled to get removed such fittings and properties at the cost and expenses of the first petitioner. Clause-8 of the first agreement and clause-5 of the second agreement restrain the first petitioner from letting out the subject land to any other party. It also restrains the first petitioner from parting with possession of the said land as the licence being personal to the licensee only. Clause-13 of the first licence agreement provided that in case of breach of any of the terms and conditions of the agreement by the licensee, the Municipal Corporation is at liberty to revoke the agreement

by giving 24 hours notice. We find that a similar clause is not included in second licence agreement of permitting termination by giving 24 hours notice. There is also a clause in both the agreements that nothing contained in the agreements shall be construed as conferring upon the first petitioner any right or interest over the said land. This clause is consistent with the fact that what was created by the said agreements was a licence. However, on conjoint reading of various clauses especially clauses 7 and 8 of the first agreement and clauses 4 and 5 of the second agreement, it is apparent that the first petitioner was placed in possession of the subject land as there is an embargo imposed restraining the first petitioner from parting with possession thereof. Moreover, there is a possession receipt dated 5th July 1985 under which the Superintendent of Gardens of the said Corporation handed over the possession of the said land to the first petitioner.

18. At this stage, it would be advantageous to look at the impugned order/impugned communication dated 18th July 2005. It directs the first petitioner to hand over the portion of the land reserved for the Post Office and the Fire Brigade Station to the Assistant Municipal Commissioner, "D" Ward. What is important is the last paragraph of the said order which reads thus :-

"In view of the above, you are hereby directed to hand over the portion of land reserved for Post office, Fire Brigade etc. as per revised Development Plan of 'D' ward peacefully to this office within seven days, otherwise, legal action as per Clause no.4 of above Agreement for taking over the entire land back to Municipal Corporation will be initiated at your risk and cost."

(Underline supplied)

19. Thus, all that is stated in the impugned order is that on the failure of the first petitioner to hand over the possession of the land reserved for the Post Office and the Fire Brigade Station within a period of 7 days, a legal action as per clause-4 of the agreement will be initiated for taking over the entire land at the cost and risk of the first petitioner. Obviously the reference to clause-4 in the said impugned order is to the clause-4 of the second agreement which provides for determination of the licence by giving three months notice.

20. In this PIL, it is not necessary to go into the wider question whether on termination or determination of the licence as provided in clause-4 thereof, the Corporation will have to adopt procedure under section 105B of the said Act or whether on determination, the Municipal Corporation can straightaway enter in the subject land. That issue will have to be dealt with while deciding Writ Petition No.1706/2017 as the purported action of the Municipal Corporation of determination of license is under challenge in the said writ petition. Exh.C to the said writ petition is a copy the impugned notice dated 17th April 2017 issued by the Superintendent of Gardens. Along with it, a copy of order signed by the Deputy Municipal Commissioner dated 17th April 2017 was enclosed. In the operative part of the order, the Deputy Municipal Commissioner has stated that he has come to the conclusion that the first petitioner has committed breaches of various clauses of the licence agreements and, therefore, the same are determined by the Mumbai Municipal Corporation. However, he directed the Superintendent of Gardens to issue notice of determination and for taking over possession of the subject land

with immediate effect as per clause-4 which contemplates service of three months notice for determining the licence. That is how, in the order dated 17th April 2017, a direction has been issued to the first petitioner by the Superintendent of the Gardens to handover peaceful possession of the said land within three months from the date of order, failing which the possession will be taken over by his office. Even assuming that both the orders subject matter of challenge in the writ petition are legal and valid, the termination of agreement could have taken effect at the highest from 16th July 2017 and that is why under the order dated 17th April 2017 the first petitioner in PIL was ordered to handover peaceful possession of the subject land within three months from 17th April 2017. The specific contention of the learned senior counsel appearing for the Mumbai Municipal Corporation is that after the order of dismissal of PIL on 5th June 2017, there was no impediment in the way for taking over the possession of the part of land for the Fire Brigade Station and, therefore, possession was taken over on 14th June 2017. This contention is fallacious as even according to the case of the Municipal Corporation, the determination of the licence was to take effect from 16th July 2017. Before the termination of licence, the Municipal Corporation had no authority to enter the said land. Coming back to the impugned order in PIL, as pointed out earlier, all that it records is that if the possession of the land is not handed over by the first petitioner, a legal action as per clause-4 of the agreement will be taken. What is contemplated by clause-4 is of determination of license by giving three months' notice. That action was eventually taken in April 2017 by the orders impugned in the other writ petition. Even taking the stand of the Municipal Corporation, which is reflected from the order impugned in the said writ petition, as correct, the

termination of the licence could have taken effect on 16th July 2017. Therefore, looking at the matter at any angle, the action of the Municipal Corporation of entering the subject land on 14th June 2017 for parking of the Fire Engine and erection of shed was completely illegal. In PIL, it is not necessary for us to go into the legality and validity of the action of determination which is the subject matter of challenge in the other writ petition. Moreover, the impugned order in PIL only threatens the first petitioner with action of determination of licence which has been taken effective from 16th July 2017. In the order impugned in PIL, it is stated that there is a reservation for the Post Office and the Fire Brigade Station which is not disputed. Therefore, as far as PIL is concerned, it is not necessary to interfere with the impugned order dated 18th July 2005 as on the basis of the said order, the first petitioner could not have been dispossessed. In any event, the first petitioner is now in possession as the Municipal Corporation has removed the shed and the Fire Engine. Whether the first petitioner can continue in possession and whether the action of determination of licenses is valid or not are some of the issues to be gone into in the Writ Petition No.1706/2017. In this PIL, it is not necessary to consider the issue as to what due process of law can be followed for taking possession of the said land inasmuch as only threat under the impugned order was of taking action of determination as per clause-4.

21. Therefore, the relief which is sought by the Municipal Corporation in Notice of Motion No.405/2017 cannot be granted inasmuch as on the day on which the Municipal Corporation entered into possession of the part of said land, it was not entitled to enter as the

determination of the licence purportedly made by the Corporation, even according to its own case, shall come into existence on 16th July 2017. On 14th June 2017, the action taken by the Municipal Corporation was completely illegal and perhaps that is the reason why at the time of restoration of the writ petition, the order of restoration of *status quo ante* was passed. The reason appears to be that Municipal Corporation was not expected to take such high handed action of entering into possession of a part of the said land even before the determination of the licence.

22. It is necessary for us to consider one more argument. The argument is that in a PIL whether the PIL petitioners can oppose parking of the fire engine which requires an area of 10 sq. meters. By order dated 3rd October 2017, the first Court directed the Municipal Corporation to file an affidavit setting out whether anywhere else in Malabar Hill, an open area of 10 sq. meters is available where the fire engine could be parked. There is an affidavit filed pursuant to the said order by the Municipal Corporation. The Municipal Corporation has not stated in the said affidavit that the area of 10 sq. meters is not available in any other part of the Malabar Hill for parking the fire engine. The Municipal Corporation was specifically called upon to disclose whether such open area of 10 sq.meters was not available elsewhere at Malabar Hill. It is not the stand taken by the Municipal Corporation in the affidavit filed on 11th October 2017 that no such open area of 10 sq. meters is available in any other part of the Malabar Hill. As observed earlier, there is one more aspect, namely, that even taking the case made out by the Municipal Corporation in the notice of termination and the order of termination as correct, in June 2017, the Municipal Corporation could not

have taken high handed action of entering the said land and erecting a shed for parking a fire engine. The report submitted by the committee appointed under order dated 11th October 2017 is on record. The contents of the report have been already considered. In order dated 30th October 2017, in paragraph-6, after perusing the report the first Court has observed that the fire engine is parked in such a manner that it was obstructing the existing walking track and jogging track. The extent of obstruction is also noted in the said order. As observed by the First Court, after having carefully perused the report submitted by the Committee consisting of the Member-Secretary of Maharashtra State Legal Services Authority and the Court Receiver, we find no reason to doubt the contents thereof.

23. As regards the controversy whether the said land falls within CRZ-I or CRZ-II, it is not necessary for us to go into the said controversy as the real issue which is involved in the other petition is whether the action of termination of licence is right or wrong and whether Municipal Corporation will have to adopt procedure under Section 105B of the said Act. If the Municipal Corporation ultimately succeeds and takes possession of the said land, it is obvious that the land can be utilized for lawful purposes subject to the provisions of CRZ Regulations of 2011. Therefore, the chamber summon taken out by the PIL petitioners for incorporating a prayer for declaration that the said land is covered by CRZ-I need not be entertained.

24. Chamber Summons No.106/2007 seeks to challenge a show cause notice and communication dated 7th March 2007. In the

communication dated 07th March 2007, all that is stated is that if unauthorized structure of office, stall and mali room are not removed within 48 hours, recourse will be taken by the Municipal Corporation to Section 314 of the said Act. For a limited period, there was ad-interim relief in PIL. However, thereafter no action has been taken by the Municipal Corporation. Obviously, before taking any action in respect of the structures, the Municipal Corporation will have to serve a notice provided Municipal Corporation desires to take action of demolition during the pendency of the other petition. Therefore, it is not necessary for us to allow the amendment in terms of the said Chamber Summons. If notice under Section 314 of the said Act or any other provision of law is to be served on the first petitioner, action of demolition can be taken by the Municipal Corporation only after the expiry of the period of two weeks from which the notice is served to the petitioner.

25. Now we turn to the second prayer which is the only substantive prayer made in the petition wherein the petitioner seeks a writ of mandamus enjoining the Municipal Corporation to take recourse to the provisions of Section 37 of the MRTP Act for relocation of the reservation for Fire Brigade Station and the Post Office. In short, a writ of mandamus was prayed for enjoining the said respondent to amend the development plan. This Court has held that the process of preparation and modification of development plan partakes character of a legislative function and therefore, a writ of mandamus as prayed cannot be issued.

26. Accordingly, we dispose of the PIL by passing the following order:-

ORDER

(i) In view of the subsequent action of the Mumbai Municipal Corporation of determination of the leave and licence agreement which is subject matter of challenge in Writ Petition No.1706/2017, the challenge to the impugned order dated 18th July 2005 has become academic inasmuch as the impugned order threatens the action of determination of licence, which has already been taken by the Municipal Corporation. The issue of legality and validity of the said action will have to be naturally determined in Writ Petition No.1706/2017 which is pending before this Court;

(ii) Prayer (b) is rejected;

(iii) However it is always open for the petitioner to make appropriate representation to the State Government or to the Municipal Corporation calling upon them to invoke provisions of Section 37 of the MRTP Act;

(iv) For the reasons which are recorded, we hold that the action of the Mumbai Municipal Corporation of entering the subject land for parking of Fire Engine and erecting the shed taken in June 2017 (on or about 14th June 2017) is completely illegal inasmuch as on that day even, according to the case of the Municipal Corporation, the leave and licence agreement was valid and subsisting;

(v) As regards Chamber Summons No106/2007, we make it clear that if the Municipal Corporation desires to demolish the three structures subject matter of the said chamber summons, the Municipal Corporation is free to issue

notice under Section 314 of the said Act or under any other provisions of the said Act. However, action of demolition shall not be taken for a period of two weeks from the date on which the notice is served to the first petitioner;

(vi) We make it clear that we have not made any adjudication on the question whether the three structures are lawfully constructed and whether Section 314 of the said Act will apply. All these issues will have to be gone into by the Mumbai Municipal Corporation;

(vii) Notice of Motion No.405 of 2017 is dismissed.

(viii) All pending chamber summonses and the notices of motion stand disposed of subject to the above directions;

(ix) We make it clear that we have not made any adjudication on the legality of the action of the Municipal Corporation of determination of the leave and licence agreements. The issue will have to be decided in the companion writ petition;

(x) Rule issued in PIL is disposed of on the above terms. Pending Chamber Summonses/ Notices of Motion stand disposed of.

(P.N.DESHMUKH, J.)

(A.S.OKA, J.)