

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

NOTICE OF MOTION NO. 360 OF 2017  
IN  
WRIT PETITION NO. 2062 OF 2013

|                                         |     |              |
|-----------------------------------------|-----|--------------|
| Achintya Mukherjee and another.         | ... | Applicants.  |
| In the matter between                   |     |              |
| Achintya Mukherjee and another.         | ... | Petitioners. |
| V/s.                                    |     |              |
| Municipal Corporation of Greater Mumbai |     |              |
| And others.                             | ... | Respondents. |

Ms.Sheetal Parkash with Mr.Jayesh Desai and Mr.Durgaprasad Halwai  
i/b. Singhi and Co. for the applicant/ petitioners.  
Ms.Shital Mane for respondent Nos.1 to 4- MMC.  
Mr.Sukanta Karmakar, AGP for the respondent- State.

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CORAM : A.S.OKA AND RIYAZ I. CHAGLA, JJ.

DATE : 10th July 2018.

P.C.:

The submissions of the parties were heard on the earlier date. The applicant is the first petitioner in Writ Petition No.2062/2013 filed by him on behalf of the second petitioner therein- the Bombay Telephone Users' Association. It appears that the writ petitioners were permitted by the first respondent- Municipal Corporation to occupy by way of leave and licence, one room in a municipal school. The Head Master of the said school put a lock on the said room and that is the reason why the aforesaid writ petition was filed. The writ petition was disposed of by the

order dated 29<sup>th</sup> February 2016. Paragraph-14 of the said judgment and order reads thus:

“14. Hence, we dispose of this petition by passing the following order:

O R D E R

(i) The first respondent- Municipal Corporation shall place the second petitioner in possession of one room in the Petit Municipal School at Bandra (West) on 1st April 2016 at 9.30 a.m.;

(ii) The second petitioner shall be entitled to use the said room, subject to the terms and conditions which are incorporated in the last agreement/ letter dated 15th October 2011. The second petitioner will be entitled to use the room so allotted between 9.30 a.m. to 6.00 p.m. on every day and will be bound by the other terms and conditions of the said writing except the condition regarding payment of licence fee. As noted earlier, for the period of 20 months, the licence fee has already been paid by the petitioners. However, the petitioners will be liable to pay the electricity charges as provided in clause (2) of the said agreement;

(iii) The undertaking filed by the first petitioner for himself and on behalf of the second petitioner is hereby accepted. In view of the said undertaking, it will be open for the petitioners to use and occupy the room which will be allotted to the second petitioner with effect from 1st April 2011 only till 30th November 2017;

(iv) We may make it clear that it will be open for the petitioners to apply for continuation of the facility after 30th November 2017. However, the said application will be considered by the Municipal Corporation provided the petitioners vacate the said room on or before 30th November 2017 and hand over the possession thereof to the

Head Master of the said school. We make it clear that on the failure of the petitioners to vacate the said room on or before 30th November 2017, it will be open for the first respondent- Municipal Corporation to take over the possession of the said room without issuing any notice to the petitioners;

(v) The explanation of the officers be accepted as directed in paragraph 5 above;

(vi) The petition is disposed of in the above terms;

(vii) All concerned to act on an authenticated copy of this order.”

The present notice of motion is taken out by the first writ petitioner pointing out that pursuant to the order passed in Writ Petition, the writ petitioners were never placed in possession of a room could be used. Therefore, a prayer is made in the notice of motion for issuing a direction to the Mumbai Municipal Corporation to allot a room which can be used without any health hazard and which is fit for human use.

2. By placing reliance on additional compilation, our attention is invited to the correspondence made from time to time by the writ petitioners with the Municipal Corporation starting from the letter dated 15<sup>th</sup> April 2016. The said letter records the condition of the room which was put in possession of the writ petitioners. By the said letter, it was pointed out that when the room was taken over, it was in a damaged condition and it was having moist walls. It was pointed out that the second petitioner will not be able to function in the room considering its

condition. Our attention was invited to several such letters addressed by the petitioners. Our attention was also invited to the letter dated 6<sup>th</sup> December 2016 addressed by the Deputy Education Officer to the second petitioners. Our attention was invited to photographs annexed to the compilation. The submission in short is that the Mumbai Municipal Corporation has not complied with the directions contained in the order dated 29<sup>th</sup> February 2016 in its true letter and spirit by allowing effective use of one room.

3. The learned senior counsel appearing for the Mumbai Municipal Corporation invited our attention to an affidavit-in-reply filed by Shri Vinod Kadam, Administrative Officer (School) dated 31<sup>st</sup> January 2018. He submitted that the possession of the room was handed over to the writ petitioners on 1<sup>st</sup> April 2016. He pointed out an annexure to the said affidavit which records that the same room which was earlier allotted to the writ petitioners was handed over to them. He also invited our attention to the affidavit of the same officer to which photographs of the adjacent rooms in the school have been annexed. The submission of the learned senior counsel appearing for the Municipal Corporation is that the condition of room No.5 was the same as condition of the adjacent class rooms and the Municipal Corporation was not expected to carry out the repairs to the extent to which the petitioners wanted the Municipal Corporation to carry out. His submission is that the condition of the said room is the same as the other rooms in the school. He pointed out that the possession of the room was handed over to the writ petitioners way back on 1<sup>st</sup> April 2016 and the notice of motion is taken out in July 2017.

He pointed out that the room was permitted to be used by the writ petitioners only till 30<sup>th</sup> November 2017 and the notice of motion is filed belatedly in July 2017. He submitted that this delay has to be considered against the petitioners. He submitted that the Municipal Corporation has made compliance with the order passed in the writ petition by placing the petitioners in possession of the same room which was occupied by them before filing of the writ petition. He submitted that an indulgence was shown to the petitioners under the order passed in the writ petition though the writ petitioners have no right. Lastly, he pointed out that the writ petitioners have given a solemn undertaking to use the room only for a period of 20 months and now after the undertaking is accepted by the Court, the petitioners cannot seek reliefs which are contrary to the undertaking. The learned senior counsel submitted that the petitioners are having no right and in any event they cannot seek any relief which will be directly contrary to the undertaking given by them and which is accepted by the Court under the order dated 29<sup>th</sup> February 2016.

4. We have given careful consideration to the submissions. We have perused the order dated 29<sup>th</sup> February 2016 passed in the writ petition. Paragraph-10 of the said judgment and order records that initially the second petitioner was allowed to use room No.5 in the said school. As repair work was to be carried out in the said room, the second petitioner shifted stationery, computers, files, etc. to room No.3 in the said school. It is noted that the room was sealed by the Municipal Corporation. In paragraph-12, this Court also noted that before dispossessing the petitioners by sealing the room, the Municipal

Corporation was under obligation to follow due process of law. The Court also recorded a finding that though the petitioners had paid licence fee for the period from 1<sup>st</sup> April 2011 to 31<sup>st</sup> March 2013 (for a period of 20 months), the Municipal Corporation did not allow the petitioners to use the room allotted to them. In fact, there is specific finding recorded in paragraph-12 on the basis of the documents on record that the petitioners could not use the said room from 1<sup>st</sup> April 2011 to 31<sup>st</sup> March 2013. It is in the light of this finding and the undertaking given by the petitioners to vacate the room within 20 months that the order which we have quoted above was passed. The idea was to compensate the petitioners by allowing them to use the room for a period of 20 months as they had paid licence fee for the said period.

5. Going by the stand taken by the Municipal Corporation in the present notice of motion, in terms of the order dated 29<sup>th</sup> February 2016, the petitioners were placed in possession of the room on 1<sup>st</sup> April 2016. On 15<sup>th</sup> April 2016, the second petitioner addressed a letter to the Administrative Officer of the H-West Ward. The letter records that the same room which was sealed in November 2012 was handed over to the petitioners. In paragraphs-6 and 7 of the said letter, the applicant/ first petitioner has stated thus:

“(6) On entering the room, the electrical wires continued to hang loosely as they had, when we last occupied the room in the beginning of November 2012. None of the lights or fans was functioning just as they were not earlier. As the room is situated in a corner of the building, visibility without lights is poor, even at daytime.

All furniture, bundled files, equipment and floor were covered with layers of heavy dust. A cursory inspection revealed that some of the bundles of files were not in the same place as we had left them. As this room was given to us for storage until work was completed, we had not taken any inventory of the items in the room. And as BMC had sealed it without notice, it was not possible to do any such inventory at any time thereafter.

(7) The south wall was badly damaged as a result of the leakage. The wooden shelf along the wall has become totally unusable. The floor, at several spots, also showed signs of watermarks that were there when we had last occupied the room. The source of these had to be disposed off as totally unusable. Rats had eaten away many records and files at several places. It also showed that the walls along the east wall, behind the wooden table and shelves were moist. Preliminary inspection indicated the possibility of leakage, by capillary action, from the building water storage tank, located in the compound, immediately outside this wall.”

The petitioners have further stated that they have taken over the room which is still in a damaged condition with moist walls and the leakage through walls will make it difficult to the second petitioner to use the said room. In fact, the letter mentions that if repairs are not carried out, the petitioners will be compelled to seek additional period. There is a further letter dated 3<sup>rd</sup> May 2016 addressed by the petitioners to the Administrative Officer. It records that an Officer of the Municipal Corporation visited the room and stated that a Contractor has taken steps to waterproof the walls of the water room which was the source of leakage. There is a further letter dated 28<sup>th</sup> July 2016 addressed by the petitioners which notes the suggestion made by the Administrative Officer

of occupying kindergarten room by interchanging the room. The letter records the reasons for which interchange was not possible. It was also mentioned that instead of room No.5 which was originally allotted to the petitioners, they were placed in possession of room No.3. The letter records that four months out of 20 months have been completely lost. There are further letters addressed by the petitioners to various officers of the Municipal Corporation on 5<sup>th</sup> August 2016, 16<sup>th</sup> August 2016, 22<sup>nd</sup> August 2016 and 23<sup>rd</sup> September 2016. In all these letters, it is pointed out that considering the condition of the room, the second petitioner has not been able to use the room. The damaged condition of the room is described in most of the said letters. Perhaps the only reply sent by the Municipal Corporation is the reply dated 6<sup>th</sup> December 2016 by the Deputy Education Officer. It refers to the request of interchanging room No.3 with another room which can be used. All that the letter records is that if the petitioners want to change the room, the facility will be available only till November 2017 and if the petitioners want continuation after November 2017, they will have to vacate the room and then apply for extension. On 5<sup>th</sup> March 2017, the petitioners received a report of Shri Rakesh Chavan, Chartered Engineer with photographs which have been annexed thereto. The condition of the room is described in the said report. The report refers to the leakages. If the said correspondence which is part of the compilation is perused, though every letter addressed by the petitioners right from April 2016 incorporates the poor condition of the room and records that the second petitioner was unable to use the said room, there is no response from the Municipal Corporation to any of the said letters. We have referred to the letter dated 6<sup>th</sup> December 2016

addressed by the Deputy Education Officer to the petitioners. The said letter is in response to the letter dated 24<sup>th</sup> August 2016 addressed by the petitioners. Even the said officer who has addressed the said letter has not come out with the case that the room which was allotted to the petitioners could have been used by the petitioners.

6. Considering the failure on the part of the municipal officers to respond to the repeated letters addressed by the petitioners, we have no option but to accept the contention of the petitioners that the room which was allotted to them on the basis of the aforesaid order dated 29<sup>th</sup> February 2016 could not be used by them due to its poor condition. We have already referred to the findings recorded in the judgment and order dated 29<sup>th</sup> February 2016. If the said order was to be implemented in its true letter and spirit by the first respondent- Municipal Corporation, it was necessary for them to allot to the petitioners a room in a reasonable condition which could have been used by the second petitioner for a period of 20 months. However, that was not done by the Municipal Corporation.

7. Perhaps only one fault can be found with the petitioners which is the delay in approaching the Court. The petitioners went on addressing letters to the Municipal Corporation right from 15<sup>th</sup> April 2016 but, ultimately, filed the present notice of motion on 4<sup>th</sup> July 2017.

8. To resolve the controversy, during the course of hearing of the notice of motion, we had asked the learned senior counsel appearing

for the Municipal Corporation as to whether the Municipal Corporation is willing to refund the licence fee paid for 20 months. On instruction, he expressed inability to refund the amount.

9. As the Municipal Corporation has not implemented the judgment and order of this Court in its true letter and spirit, the Municipal Corporation will have to be issued a direction to implement the same. Considering the delay in approaching the Court, we propose to direct the Municipal Corporation to provide a room to the petitioners for a limited period. When the notice of motion was filed, period of five months remained out of the period of 20 months granted under the final order in the writ petition. Therefore, we propose to direct the Municipal Corporation to allot a room in a reasonable condition which can be used by the second petitioner for a period of five months. There will not be any question of payment of licence fee as the petitioners have already paid licence fee for a period of 20 months.

10. Accordingly, we dispose of this notice of motion by pass the following order:

- (i) We direct the Mumbai Municipal Corporation to allot a room of approximately the same size which was allotted to the petitioners in the same municipal school or in a nearby Municipal school. We direct the Municipal Corporation to issue intimation about the particulars of the room to be allotted to the second petitioner by

addressing a letter to the first petitioner. Such a communication shall be issued within the period of one month from the date on which this order is uploaded. Inspection of the room offered to the second petitioner shall be given by the Municipal Corporation to the second petitioner within the aforesaid period of one month from today;

- (ii) We make it clear that the room to be offered shall be in a reasonable condition which can be used by the second petitioner for the purpose of office;
- (iii) In the event the allotted room is not in a reasonable condition, we grant liberty to the petitioners to move this Court;
- (iv) If the room is in a reasonable condition, the possession thereof shall be handed over by the Municipal Corporation to the petitioners for a period of five months from the date of delivery of possession;
- (v) We direct the petitioners to file a fresh undertaking to this Court to vacate the room which may be allotted to them as per this order within a period of five months from the date on which the room is placed in possession of the second petitioner. Such an undertaking shall be

filed within a period of one month from the date this order is uploaded. Unless such undertaking is filed, the Municipal Corporation shall not place the second petitioner in possession of the room in terms of the order;

(vi) The notice of motion is disposed of on the above terms.

(RIYAZ I. CHAGLA, J.)

(A.S.OKA, J.)