

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

APPEAL FROM ORDER (ST) NO.9209 OF 2019

Vithalnagar Co-operative Housing Society Ltd. .. Appellant

VS.

Municipal Corporation for Greater Mumbai .. Respondent

Mr.A.H.Fatangare i/b Ms.Vishakha Pandit for the appellant

Mr.J.Rais, Sr.Counsel with Ms.Madhuri More for the BMC

**CORAM : K. K. TATED, J
DATE : APRIL 30, 2019**

P.C.:

. Heard.

2 By this Appeal from Order, appellant original plaintiff is challenging the order dated 1.3.2019 passed by Bombay City Civil Court at Bombay dismissing their Notice of Motion No.4249 of 2017 in L.C.Suit no.3353 of 2018.

3 The learned counsel for the plaintiff submits that by L.C.Suit No.3353 of 2018, they challenged the notice dated 6.11.2018 issued by the Respondent Corporation under section

488 and notice under section 299 dated 20.04.2017 of the Mumbai Municipal Corporation Act, 1888 on various grounds in respect of the property bearing plot no.16, CTS No.305, JVPD Scheme Sant Dnyaneshwar Marg, Ville Parle (West), Mumbai 400 049. He submits that they preferred Notice of Motion No.4249 of 2017 for an order on injunction restraining Respondent Corporation from acting on the basis of notice under section 299 and 488 of the said Act and or to disturb their possession in respect of the suit property. He submits that Trial Court without considering the facts on record dismissed their Notice of Motion. Hence, they preferred the present Appeal from Order.

4 The learned counsel for the appellant submits that notice under section 299 and under section 488 was not issued to them. Therefore, there is no question of taking any action against them on the basis of these two notices. He further submits that even bare reading of the notice under section 299 of the said Act shows that Respondent Corporation failed to disclose exact area which they are going to take for 60' road winding.

5 The learned counsel for the appellant further submits that there is no question of issuing notice under section 299 and 488 of the said Act for taking possession of their land for construction of 60' road. He submits that 60' road is already in existence. Therefore, there is no question of again taking possession of the land for road winding.

6 The learned counsel for the plaintiff submits that in the present proceeding, in the year 2002-2003 for construction of 60' road, their land was taken by the Corporation. Therefore, there is no question of taking again the possession of the land for the same purpose. He further submits that if possession of the suit land is taken by the Corporation, their structure is going to affect. He further submits that if structure is going to affect, there is no question of implementing the notice under section 299 and 488 of the said Act. In support of this contention, he relies on the judgment of the Apex Court in the matter of Indian City Properties Ltd. vs. Municipal Commissioner of Greater Bombay, 2005(6) SCC 417.

7 On the basis of these submissions, the learned counsel for the appellant submits that pending the hearing and final disposal of the present Appeal from Order, Respondent may be restrained by an order of injunction from taking any coercive action against them on the basis of notice under section 299 and 488 of the said Act. He further submits that if injunction is not granted, irreparable loss will be caused to them.

8 On the other hand, the learned Senior Counsel for the Respondent Corporation vehemently opposed the present Appeal from Order. He submits that in the present proceeding, they already issued notice to the K. V Satyamurthy who is in possession of the said plot no.16 i.e. suit land. He submits that said K.V. Satyamurthy executed undertaking dated 25.2.2000 stating that he undertakes to hand over the portion of the land to the

Corporation without claiming any compensation. The said undertaking reads thus:

"TAKING OVER SET BACK LAND UNDER ROAD REGULAR LINE FREE OF COST, I, the owner of the above land do hereby solemnly say as under that I the owner of the above land do hereby solemnly say as under that I intend to/to erect a building on the above plot as per the plans submitted by my architect Shri Jayant C. Tipnis, by his letter to Brihanmumbai Mahanagarपालिका, Ref. No.JT 327 dated 18.10.199.

That for the work stated above, I intend to take benefit of the land falling in the set back of R.L. which is proposed to be widened by Brihanmumbai Mahanagarपालिका.

That I hereby agree and undertake to hand over this set back (under R.L.) land to Brihanmumbai Mahanagarपालिका free of cost without claiming any compensation.

This undertaking is binding on me, by heirs, administrators, assignees and all these who derive through me, however without prejudice to our rights."

9 The learned Senior counsel for the Respondent submits

that they filed affidavit in reply in the present Appeal from Order dated 5.4.2019. He submits that it is specifically stated in the said affidavit in reply that FSI in lieu of setback land area admeasuring 115.421 sq. has already been handed over to K.V.Satyamurthy. In support of this contention, he relies on paragraph 13 of the affidavit in reply. He submits that on one hand, owner accepted the FSI in respect of the said portion of land and on other hand, appellants are refusing to hand over the possession of the portion of land. He further submits that as per his instruction, they are going to take only the portion of land which is not going to affect the appellant's structure at all. Therefore, there is no substance in the present Appeal from Order. Same is required to be dismissed with costs.

10 Heard.

11 It is to be noted that admittedly, in the present proceeding, K.V.Satyamurthy has given his undertaking that he is ready and willing to hand over the set back area free of charge. Apart from that, he accepted additional FSI admeasuring 115.421 sq.mtr. Therefore, there is no question of entertaining the present Appeal from Order in which appellant raised several issues about the notice under section 299 and 488 of the said Act.

12 Bare reading of the notice under section 299 and 488 shows that same is issued to the owner and occupant. Apart from that, Respondent Corporation specifically made a statement in their affidavit in reply dated 5.4.2019, that the are going to take possession of the set back area from plot no.16 for road

winding purpose only. Therefore, objection raised by the learned counsel for the appellant for 60' road winding cannot be considered at this stage.

13 In view of these facts, I do not find any substance in the present Appeal from Order.

14 Hence, following order is passed:

- a. Appeal from Order stands rejected.
- b. In view of rejection of Appeal from Order nothing survives in the Civil Application. Same stands rejected as infructuous.
- c. Considering the facts and circumstances of the present case, hearing of L.C.Suit No.3353 of 2018 is expedited.
- d. This court expects Trial Court to decide the said Suit as early as possible but in any case on or before 31.3.2020.
- e. No order as to costs.
- f. At this stage, the learned counsel for the appellant submits that interim protection granted by this court be continued for four weeks.
- g. Considering the fact that Respondent Corporation wants to take possession of set back area for road winding, there is no question of continuing the said interim protection. Hence, oral

request made by the learned counsel for the appellant stands rejected.

(K.K.TATED, J.)