

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

WRIT PETITION [LODGING] NO.786 OF 2019

Pushpa Co-operative Housing Society
Ltd.

.... Petitioner

Vs.

The Brihanmumbai Mahanagar Palika
& Others

.... Respondents

Mr. Denzil D'Mello with Mr. Austin Fernandes &
Ms Geeta Sonawane for the Petitioner.

Mr. J.F. Reis, Senior Advocate with Mr. Abhijeet
Kandarkar & Ms Rupali Adhate for Respondent
Nos.1 to 5.

Mr. Alok Singh, Sub-Engineer (Maintenance),
H/W Ward, Mumbai, present.

CORAM: S.C. DHARMADHIKARI &
B.P. COLABAWALLA, JJ.

DATE : APRIL 09, 2019

P.C:

1. By this writ petition under Article 226 of the
Constitution of India, the petitioner is questioning the legality,
validity and propriety of a Notice, the copy of which is at
Exhibit-L to the petition, and seeking a direction to the

respondents to withdraw it. Else, this Notice be quashed and set aside by this Court.

1. Before proceeding further, we would reproduce Exhibit-L to this petition.

3. That reads as under:-

“MUNICIPAL CORPORATION OF GREATER MUMBAI
Office of the Asst. Commissioner 'H/W' Ward, St. Martin's Road,
Bandra (W), Mumbai 400 050.
H/W/1996/Gen/AEM Dt.12/11/2018

Notice

To,
Owner/Occupier
CTS NO.711 & 712
Off Peter Dias Road
Bandra (W)
Mumbai – 400 050.

WHEREAS certain land not occupied by a building forming part of your premises situated at CTS NO.711 & 712 Off Peter Dias Road Bandra (W), Mumbai 400 050 lies within the regular line of the widening of off Peter Dias Road as prescribed by the Commissioner under section 297 of the Mumbai Municipal Corporation Act, I hereby give you notice under section 299 of the said act after the expiration of seven clear days from the service of this notice. I, intend on behalf of the Corporation to take possession of the said land together with its enclosing walls hedge or fence, if any and any platform verandah, step, or other such structure which may be found upon the said land and if necessary I shall then proceed to clean the same.

A plan of the land referred to may be inspected in the office of the Assistant Engineer (Maintenance), H/West Ward an application made him during office hours.

Sd/- 28/9/18
Asstt.Engr.(Maint)
H/West Ward

Sd/-10/10/18
Asstt.Commissioner,
H/West Ward

Sd/- 10/10/18
Dy.Municipal Commissioner,
(Zone-III)”

4. The facts and circumstances leading to the petition are that, the petitioner is a Co-operative Housing Society and it says that it has constructed a building, or is the owner of a building, or its Members are occupying this building. They are 26 in number and the building is situate at 107-E & 107-F, Hill Road, Bandra (West), Mumbai-400 050. The petitioner's building derives an access from and is abutting a lane known as Hill Road. The description of that is set out in para 2 and it is stated that the lane once formed part of a private property which was acquired by the Municipal Corporation of Greater Mumbai from private individuals. That is now shown as an independent Development Plan (DP) Road. The para 2 of the writ petition reads as under:-

*“2. The Petitioner's building derives access from & is abutting a lane (hereinafter referred to as '**the said Lane**') known as “Hill Road” leading from the roundabout at Mehboob Studio, the address of the Petitioner is '107E & 107F, Hill Road', Bandra (West), Mumbai 400 050. The said Lane once formed part of private properties which were acquired by the Respondent No.1 from private individuals many years ago & is shown as an independent DP Road in the latest Development Plan (DP) 2034 as also in the earlier Development Plan*

1991. Hereto annexed & marked Exhibit-'A' is a plan showing the Petitioner's building on Plots bearing C.T.S. Nos.B 711 & B 712 & the said land in the Development Plan of 2034. Hereto annexed & marked Exhibit-'B' is a plan showing the Petitioner's building on Plots bearing C.T.S. Nos.B 711 & B 712 & the other buildings/structures abutting the alleged "off Peter Dias Road". The Petitioner & its members have over the years through their own efforts, nurtured several large trees & plants within their compound on land bearing C.T.S. No.B 711 & B 712. Hereto annexed & marked Exhibits – 'C' to 'G' are copies of photographs showing the Petitioner's plot bearing C.T.S. No.B 711 & B 712 with trees, plants & other greenery. The Petitioner has a watchman's cabin/quarters, water tank & pump room on plot bearing C.T.S. B 711 & B 712 abutting the alleged 'off Peter Dias Road' falling within the proposed road widening. Hereto annexed & marked Exhibit – 'H' & 'I' are copies of photographs showing the watchman's cabin/quarters. While the Petitioner's building derive access from & are abutting a lane (hereinafter referred to as 'the said Lane') known as "Hill Road", the other end i.e. the Southern end of the lane is completely blocked by encroachments namely Gurav Chawl located on C.T.S. No.1059-A & 1060, Sawant Chawl located on C.T.S. No.1061 & Jadhav Chawl located on C.T.S. No.1062. Hereto annexed & marked Exhibits – 'J' & 'K' are copies of photographs showing the encroachments completely blocking the Southern end of the said lane."

5. The petitioner says that, it received the Notice and it was shocked and surprised to note that having already set back the portion of its property and allowed respondent Nos.1 to 5 to make a road, now, the petitioner could not have been called upon to surrender a portion of its land.

6. The emphasis in the petitioner's case is on the phraseology of Sections 297, 298 and 299 of The Mumbai Municipal Corporation Act, 1888 ("the MMC Act" for short). Mr. Denzil D'Mello, appearing for the petitioner, would argue that there is a regular road line or a regular line prescribed and once that is prescribed, the Municipal Corporation can request the occupiers and owners of buildings, which are affected by a regular line of the road, to set back their properties and allow the Municipal Corporation to lay the road as per the line already prescribed. However, in the event that regular line is modified or proposed to be modified, then an entire procedure enumerated in law would have to be followed. That envisages a prior opportunity to parties like the petitioner to object to the modified road line or the amended or changed road line prescribed by the Municipal Commissioner. Once that is done and there is no voluntary act, then the law envisages acquisition of that portion. In the instant case, the petitioner had already set back portions of its property and allowed the road to be laid. This was done way back in 1982. Now, the road line prescribed

earlier is sought to be modified and therefore Exhibit-L could not have been issued. A Notice simpliciter, as reproduced above, then would not suffice in law, according to Mr. D'Mello.

7. Mr. D'Mello places reliance upon a Two Judge Bench Judgment of the Hon'ble Supreme Court in the case of **Indian City Properties Ltd. & another v. Municipal Commissioner of Greater Bombay & another** [Civil Appeal No.4801 of 2005, decided on 5-8-2005], reported in 2005 (5) Bom. C.R. Page 529.

8. Additionally, it is argued by Mr. D'Mello and with emphasis on the rejoinder affidavit that, when this petition was placed before this Court on the prior occasion, an Engineer or the official of the Municipal Corporation present in Court had admitted the fact that the Corporation had followed the due process in prescribing a fresh road line, as laid down in Section 297(1)(b) of the MMC Act. The Advocate then appearing for the Municipal Corporation stated before the Court, on instructions, that he would produce the file or record so also place an affidavit demonstrating and proving due compliance with the

law. Having failed to do that, Mr. D'Mello argues that this writ petition be allowed.

9. We are not in agreement with Mr. D'Mello and for more than one reason. In the writ petition itself, at more places than one, the petitioner admits that there was an existing road line and that the petitioner set back its land in 1982. The dispute is, whether the setting back from the property/land by the petitioner met the requirements of the prescribed road line? In other words, this set back enabled the Municipal Corporation to lay a road or widen it in terms of its prescribed road line. The further assertions in the writ petition would show that the petitioner is aware that the plot on which the building stands, namely, B-711 has been subjected to a set back of 65.9 sq. yards and Plot B-712 has also been subjected to a set back of 23.8 sq. yards. In totality, the plot on which the society's building stands has already been subjected to a set back of 89.7 sq. yards in 1982. This indicates the existence of a road line in 1982. Since there was an existing road line prior to 1982, pursuant to which its land was set back in 1982, any fresh line in substitution for

any line so prescribed, would have to follow the procedure set out in Section 297(1)(b) and that having not been followed or complied with, the impugned Notice must fail, is the argument. This argument itself is misconceived because on the basis of the official records and the admitted assertions, it emerges that the issue of prescribing regular line to any public road/street is being carried out by the Executive Engineer (Traffic & Co-ordination) and the Assistant Engineer (Survey). In the present case, the Executive Engineer (Traffic & Co-ordination) has prescribed the road line in 1979. After this Court's order of 14-3-2019, the said Executive Engineer offered his remarks and copy thereof is annexed at Exhibit-A to the affidavit in reply. It may be that a file is not traceable but what is clear from this document is that the type of road is an existing road and approved/sanctioned regular line is 13 metres. The affidavit further recites that the road line in front of this property, namely, CTS Nos.711 & 712 is 13 metres and and there is no change in the regular line till date from 1979. At present the width of the road in front of the petitioner-society is 11.2 metres

whereas the prescribed regular line is 13 metres, for the road adjacent to Mount Mary Road. The documents, including the sanctioned plans of 23-10-1979 denote that it is a regular line already prescribed. However, the road to that extent could not be laid or the road already laid fell short by 2 metres in width. Since it had to be laid in terms of the regular line prescribed, that the petitioner was called upon by the impugned Notice to surrender or set back the portion of its land so as to enable the Municipal Corporation to lay this road. We do not think that any oral statement made to this Court and contrary to the records would, therefore, merit acceptance. Further, the statements made on affidavit are now supported by a copy of the plan sanctioned on 23-10-1979 (Exhibit-B, page 70). This is a part and parcel of the affidavit in reply. In relation to that, all that the petitioner would state, in the rejoinder, is once a statement is made before this Court that the records to prove the prescribed regular line will be produced and that they having not been produced, this Court should not accept this affidavit. We are unable to agree and for the reasons assigned above. We

are clear in our mind that when public documents and public records maintained in the ordinary and regular course of business have been produced by the official and they are relied upon during the course of the arguments, then, any oral statements contrary thereto do not deserve to be accepted. Apart therefrom, if this was an unassailable and undisputed position, then, there was no occasion for the petitioner to bring on record, in its rejoinder affidavit, that the petitioner surrendered/handed over a set-back of 65.9 sq. metres. This is obviously an error because in the writ petition itself the petitioner claims to have surrendered or to have set back its property to the extent of 65.9 sq. yards. The petitioner has then stated in its petition itself that its plot was affected by a proposed road running through it and it was required to surrender the portion so as to enable the laying of that road to respondent No.1 and also to bear the charges for the development of the said road. If this was the correct position according to the petitioner, then, there was no occasion for relying on the facts pertaining to Gobind Laxmi Co-operative Housing Society Limited, whose property is situate

diagonally across the same road, to support the argument that the society also set back its property and which enabled the road to be laid and equally in terms of the prescribed regular line. That was wholly unnecessary. We are clear in our mind that when a regular line of 13 metres wide road was prescribed, it cannot be that on one side it will have that width and on other side of the said road it would narrow down upto 2 metres. The true position is as now projected by the Municipal Corporation. The road line of 13 metres was prescribed in the year 1979. There is absolutely nothing on record which would indicate that there was a prescription in the year 2006 of a regular line of 13.4 metres width.

10. To our mind, therefore, none of the assertions in the petition or in the affidavit in rejoinder would assist the petitioner-society in this case.

11. Equally misplaced is the reliance by Mr. D'Mello on the Judgment of the Hon'ble Supreme Court in **Indian City Properties Limited** (supra). The facts there were that the

appellant/owner claimed that on the plot there is a bungalow, an out-house, cooling towers, a pump room, servants' quarters and a watchman's room. Once the bungalow was let out and the out-house was used by the 2nd appellant as a guest house, then, the Municipal Corporation invoked Section 299 of the MMC Act and indicated that it would take possession of certain land not occupied by a building forming part of the premises within the regular line of public street as prescribed by the Commissioner. The controversy there was, whether this land was not occupied by a building, as projected by the appellant or to the contrary to the Municipal Corporation? The Hon'ble Supreme Court held that once there is a power to take possession conferred on the Commissioner in respect of certain structures and that is a summary power, it was always open to the Municipal Authorities, subject to the provisions, to acquire any land or building under Section 296. It could not have straightaway threatened to take possession of the said land.

12. On the basis of this Judgment, another faint attempt made by Mr. D'Mello is to impress upon this Court that in the

petitioner's property there are structures, namely, a watchman's cabin and a pump room. There is also a water tank. These constructions are on CTS Nos.B-711 & B712.

13. The Municipal Corporation in its affidavit in reply disputed this position and it has pointed out that there is no construction at all and there is no record in relation thereto available. In fact, the assertion of the petitioner is not true. The site was inspected by the Municipal Corporation staff and it observed that there was a society's office affected by the regular line of the road, which to our mind is 13 metres wide. No water tank and pump room was observed in the regular line of the road. Thus, this is a misleading position.

14. We do not think that in writ jurisdiction we can enter into this controversy for it is not an admitted position, emerging from the records, that there exist structures like a watchman's cabin/quarters, water tank and pump room falling within the regular line of the street.

15. To our mind, therefore, even the argument based on

the above Judgment has no merit. The Judgment itself is distinguishable on facts. It has no application to the controversy at hand.

16. As a result of the above discussion, this writ petition fails. It is dismissed but without any order as to costs.

17. At this stage, Mr. D'Mello prays that the implementation and enforcement of the impugned Notice be stayed for a period of four (4) weeks so as to enable the petitioner to consider its position and if advised, to challenge this Judgment in a higher Court. This request is opposed by Mr. Reis, learned Senior Counsel appearing on behalf of respondent Nos.1 to 5. Having found that there was no structure such as a watchman's cabin/quarter, pump room and water tank at the site, all the more we are not inclined to grant the request of Mr. D'Mello. The regular line of the street prescribed way back in 1979 is still not taken to its logical conclusion. The road is to be widened on either side and laid accordingly. It is a common ground that such roads and public streets are for the

benefit of the public. They are dedicated to the public after they vest in the Municipal authorities. As a public street is meant for use by the public, then, we should not deprive the public of this basic amenity like a road. In cities like Mumbai, all the more in congested residential areas, roads have to be widened so that there is smooth flow of traffic. The request is, therefore, refused.

(B.P. COLABAWALLA, J.)

(S.C. DHARMADHIKARI, J.)