

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3086 OF 2015

Shirish Bhaskar Sathye

..... Petitioner

Vs.

The Nashik Municipal Commissioner
and Another

..... Respondents

Mr. Sanjeev P. Kadam with Mr. Aditya S. Targe and
Sneha G. Sanap for the Petitioner.

Mr. R. S. Apte, Senior Advocate a/w. Mr. Vaibhav P.
Patankar I/b. Patankar & Associates for Respondent No.1.

**CORAM: A.A.SAYED &
ABHAY AHUJA, JJ.**

DATED : DECEMBER 17, 2021

P.C.

1 The Writ Petition has been filed seeking the following reliefs:

"a) Be directed to handover forthwith Vacant & Peaceful possession of Final Plot No. 105-B to Petitioner by removing encroachment with the help of Resp. No.2.

b) The Respondent No.2 be directed to provide necessary assistance and/or protection to the Respondent No.1 while removing the said encroachments.

c) Be ordered to issue necessary certificate and take necessary steps to record change of area of original plot from 955.00 sq. mtrs. to measure 1059.00 sq. mtrs. in final plot of the scheme in the revenue & city survey record of rights.

d) Be ordered to reimburse the Cost amounting to Rs.12,00,000/- (Rupees Twelve Lacs) damages for mental agony of the Petitioner."

2 The Petitioner had earlier filed Writ Petition No.399 of 2012 seeking a direction that the Respondent Corporation be directed to deliver vacant possession of Plot No.105-B admeasuring 955 sq.mtrs., Town Planning Scheme - II Nashik under section 88 of the Maharashtra Regional and Town Planning Act 1966 (MRTP Act) to the Petitioner and remove illegal encroachment on the said Final Plot No.105-B.

3 In the said Writ Petition, the Respondent Corporation had filed a joint Affidavit of the Assistant Director of Town Planning and the Dy. Commissioner (Encroachment) of the Respondent Corporation. Paragraphs 2 to 5 of the said joint Affidavit read as follows:

(2) I say that the subject matter of Writ Petition is the open land (hereafter the "said land") which is situated at Survey No. 615/2, T.P.S. - II, behind Kalika Temple, old Mumbai Agra Road, Nashik-2, as alleged by the Petitioner. I say that the Original Plot No. of the said land is 156 whereas the Final Plot No. is 105-B (T.P. Scheme No.II).

(3) We say that the petitioner, amongst all other prayers in Writ Petition No. 399 of 2012 interalia prayed for handing over the possession of Final Plot No. 105-B (T.P. Scheme No.II).

(4) We say that as shown in the map annexed to this affidavit the Respondent-Corporation, within period of three (03) months from the date of Order

of this Hon'ble Court, shall remove the Encroachment on the portion shown in blue (two triangles), pink (one triangle) & gray (one triangle) which forms the part and parcel of Final Plot No. 105-B (T.P. Scheme No. II) and handover possession of the said Final Plot No.105-B to the petitioner. We say that necessary Police help be provided for removal of encroachment. We say that the petitioner shall accept vacant and peaceful possession of the said Final Plot No.105-B soon after intimation regarding the same is issued to the petitioner:

(5) We say that as far as yellow portion shown in map annexed hereto is concerned the same is carved out of and which forms part of Original Plot No. 156 and is admittedly already in possession of the petitioner and question of handing over possession of the said portion of land does not arise. Hereto annex and marked "Exh.A" is the copy of Part Plan of Town Planning Scheme (II)."

4 On 1st December 2014 this court (Coram : A. S. Oka and A. S. Gadkari, JJ) passed the following order:

. Heard learned counsel appearing for the Petitioner and the learned counsel representing the first Respondent Nashik Municipal Corporation. An affidavit has been jointly filed by Shri Vijay B. Shende, the Assistant Director of Town Planning of the first Respondent and Shri Rohidas Mangu Bahiram, the Deputy Commissioner (Encroachment) of Nashik Municipal Corporation. The said affidavit has been filed by the said officers on behalf of the first Respondent Nashik Municipal Corporation. We accept the statements made in the said affidavit and in particular Paragraph 4 thereof. The statements made in the said affidavit and in particular Paragraph 4 thereof take care of the prayers made by the Petitioner in this Petition.

2. *The learned counsel appearing for the Petitioner invited our attention to the letter dated 18th December 2008 issued by the Deputy Commissioner (Encroachment) of the first Respondent Municipal Corporation to the Petitioner. The said letter records an assurance that a direction has been issued to remove the encroachments on 12.20 meters wide road bearing Survey No.615/2/3. The learned counsel appearing for the Petitioner urged that this road is also a road forming part of a town planning scheme and it is an obligation of the first Respondent Municipal Corporation to remove the encroachments on the said road. This grievance is not a part of the Petition. While disposing of the Petition, we grant liberty to the Petitioner to make an appropriate representation to the first Respondent Municipal Corporation. If the steps are not taken by the first Respondent Municipal Corporation, it will be open for the Petitioner to take appropriate proceedings in accordance with law.*

3. *Hence, we dispose of the Petition by passing the following order: -*

ORDER :

(a) *We accept the statements made on oath by Shri Vijay B. Shende and Shri Rohidas Mangu Bahiram in the affidavit dated 27th November 2014 as the statements made on behalf of the first Respondent Nashik Municipal Corporation*

(b) *The first Respondent Nashik Municipal Corporation shall comply with the said statements within the time stipulated in Paragraph 4 of the said affidavit;*

(c) *We direct the second Respondent to provide requisite police assistance to the officers of the first Respondent Municipal Corporation for removing encroachments on the plots described in Paragraph 4 of the said*

affidavit upon the Officers of the Municipal Corporation producing an authenticated copy of this order before the Officer in charge of the concerned local police station;

(d) Subject to the above directions, the Petition is disposed of;

(e) Place this Petition on 5th March 2015 for reporting compliance. Appropriate Officer of the first Respondent Nashik Municipal Corporation shall file compliance affidavit on or before the said date.

5 Accordingly, on 5th March 2015, the Petition was listed for reporting compliance. A joint compliance Affidavit was filed by the Dy. Commissioner (Encroachment) and the Dy. Engineer Town Planning of Respondent Corporation. It would be necessary to set out the contents of the said compliance Affidavit. Paragraphs 2 to 13 of the said compliance Affidavit read as follows:

"2) We say that we have also perused the joint affidavit (hereafter the said joint affidavit) sworn on 26.11.2014 by the Asst. Director of Town Planning and Dy. Commissioner (Encroachment) of Nashik Municipal Corporation so also the Order dtd. 01.12.2014 passed by this Hon'ble Court in the aforesaid matter.

3) We say that amongst all other clauses in the said joint affidavit paragraph Nos 4 and 5 reads as under:-

"We say that the as shown in the map as annexed to this affidavit the Respondent Corporation, within period of three (03)

months shall remove the Encroachment on the portion shown in blue (two triangles), pink (one triangle) gray (one triangle) which forms the part and parcel of Final Plot No. 105-B (T.P. Scheme No. II) and handover possession of the said final plot No. 105-B to the petitioner. We say that necessary police help be provided for removal of encroachment. We say that the petitioner shall accept vacant and peaceful possession of Final Plot No. 105-B soon after intimation regarding the same is issued to the petitioner."

"We say that as far as yellow portion as shown in map annexed hereto is concerned the same which is carved out of and which forms the part of Original Plot No. 156 and is admittedly already in possession of the petitioner and question of handing over possession of the said land does not arise."

Hereto annexed and marked "Exh.A" is the copy of joint affidavit alongwith the part plan of Town Planning Scheme - II.

4) We say that this Hon'ble Court having accepted statement made in the said joint affidavit made on behalf of the respondent-Corporation, by Order dtd 15.12.2014 directed the respondent Corporation to comply with the statement as per paragraph No. 4 of the said joint affidavit. Hereto annexed and marked "Exh.B" is the copy of Order dtd 01.12.2014 passed by this Hon'ble Court in Writ Petition No. 399 of 2012.

5) We say that for the necessary compliance of the said joint affidavit as well as the Order dtd. 01.12.2014 passed by this Hon'ble Court, the office order dtd.21.02.2015 was issued by the Commissioner of respondent-Corporation for removal of encroachment and accordingly the action to remove the respondent-Corporation took

action for removal of encroachment on 23.02.2015. Hereto annexed and marked "Exh. C" is the copy of Office Order dtd. 21.02.2015.

6) We say that respondent Corporation accordingly intimated the petitioner by letter dtd. 21.02.2015 stating therein the factum of action to be taken and directed him to remain present on 23.02.2015 for taking vacant possession of the land as per the Order dtd. 01.12.2014. We say that the petitioner duly acknowledged the said letter. Hereto annexed and marked "Exh.D" is the copy of letter dtd. 21.02.2015.

7) We say that as far as portion in blue (two triangles) and pink (one triangle) as show in the map annexed to this affidavit is concerned the same was forming the part and parcel of Original Plot No. 157-A, 157-C and 157-B respectively and there was no any encroachment upon the said portion of land except north-east corner where the small old temple is situated along the road side. We say that said triangles are now forming the part and parcel of Final Plot No. 105-B. We say that as far as portion of land which is shown in gray colour (one triangle) which formed part and parcel of Original Plot No. 155 is concerned four (4) unauthorised constructions were removed by the respondent-Corporation on 23.02.2015. We say that the said triangle is also forming the part and parcel of Final Plot No. 105-B (T.P. Scheme No. II). Hereto annexed and marked "Exh.E" is the copy of Panchnama dtd. 23.02.2015.

8) We say that Department of Encroachment by letter dtd. 23.02.2015 addressed to the Town Planning Department informed that as per the demarcation encroachment on the land was removed and possession receipt to that effect can be given to the land owner. We say that the Town Planning Department acknowledged the said letter on 23.02.2015. Hereto annexed and marked "Exh. F" is the copy of Letter dtd. 23.02.2015.

9) We say that it is pertinent to note that though the notice dtd. 21.02.2015 was issued to the petitioner and in spite of duly acknowledging the same, the petitioner though remained present on the site for some time walked away for the reason best known to him without taking possession of the portions as states in paragraph No. 4 of the said joint affidavit. We say that since the petitioner failed to take possession of vacant land and respondent-Corporation, therefore, issued notice dtd. 25.02.2015 to the petitioner and called upon him to remain present on 27.02.2015 on site at 11.00 am for taking possession of the portions of land as stated in Clause No. 4 of the said Joint affidavit. We say that it was categorically stated in the said notice that if the petitioner failed to remain present as stated hereinabove it will be presumed that possession is handed over to him. We say that since the petitioner refused to accept the notice dtd. 25.02.2015 the office bearers of the respondent Corporation pasted the said notice on the shutter/door of office of the petitioner in front of panchas on 26.02.2015. We say that the panchanama was accordingly drawn by the respondent-Corporation and the photographs were also taken while pasting the said notice. Hereto annexed and collectively marked "Exh. G" is the copy of Notice dtd. 25.02.2015, Panchanama dtd. 26.02.2015 and photographs.

10) We say that as per notice dtd. 25.02.2015 the Asst. Director Town Planning alongwith other office bearers and panchas remained present on the site alongwith necessary document for handing over possession of the portions mentioned in the said joint affidavit. We say that petitioner who was also remained present on the site went back without taking possession of the said portion. We say that it was noticed by the office bearers on that day that petitioner at eastern side and southern side i.e, on the portion from which the encroachment is removed has constructed precast cement slab (concrete fencing). We say that accordingly the

Panchanama was drawn in the presence of panchas. We say that one temple of temporary structure admeasuring 5 x 6 Sq Feet is situated in north-east corner of F.P. No. 105-B and the same is adjacent to the wall/concrete fencing constructed by the petitioner and facing to east side of 12.20 Meter T.P. Scheme Road. We say that the said temple is situated on O.P. No. 157-A (Blue Triangle) Hereto annexed and marked "Exh, H" is the copy of Panchanama dtd. 27.02.2015.

11) We reiterate that as far as possession of portion of land as mention in paragraph No. 5 of the said joint affidavit is concerned the same is admittedly is in possession of the petitioner and question of handing over possession of the said land does not arise.

12) We say that to comply with the Order dtd.01.12.2014 passed by this Hon'ble Court to have substantial compliance of the said joint affidavit and particularly the paragraph No. 4 of it, the Respondent-Corporation has removed encroachment and was and is always ready and willing to handover the vacant and peaceful possession of the said portions but inspite of the same petitioner twice kept himself present on the site but mischievously without taking possession of the portions mentioned in the joint affidavit walked away from site. We say that since the petitioner refused to take possession of the said portions the signatures could not be obtained on the possession receipt. We say that instead taking vacant and peaceful possession of the said portions by the respondent-Corporation the petitioner constructed wall/concrete fencing on some portion of the site as mentioned hereinabove and the petitioner therefore, has accepted the possession of said portions. Hereto annexed and collectively marked "Exh. I" is the copy of possession receipt, part plan and Redistribution and Valuation Statement.

13) We say that in view of the aforesaid facts and circumstances of the case the respondent-Corporation has full complied with the statement made in the said joint affidavit and also the Order dtd. 01.12.2014."

7 When the matter was listed for compliance on 5 March 2015, the Petitioner had also filed an Affidavit dated 5th March 2015. The said Affidavit reads as follows:

"1. I say that, I had filed above Writ Petition for seeking direction that the Respondent No. 1 be directed to deliver vacant possession of final plot No. 105 B Town Planning scheme, Nashik and to remove the illegal encroachments thereon.

2. I say that the said Final Plot No. 105 B consist of 155, 156 & 157 A, B & C.

3. I say that, in para 5 of the Affidavit dated 27.11.2014 the Respondent No.1 had wrongly stated that, since plot No.156 is in possession of the Petitioner & question of handing over the same to Petitioner does not arises.

4. I say that, at that stage the Advocate for the Petitioner did not point out about the illegal encroachment on approximate area of 194 sq. Mtr, on the said plot no.156 which was not in Petitioner's possession. As a result of which, this Hon'ble Court did not pass any order in respect of the Plot No. 156 which was marked in yellow colour. A copy of the said map is annexed hereto to and marked as Exhibit "A" and a copy of the sale deed dated 11.11.1997 evidencing the encroachment on Plot No. 156 the said plot is annexed hereto and marked as Exhibit "B".

5. I say that, in the above Petition I have categorically prayed for vacant possessions of

entire final plot No.105 B and of the part thereof. And it is admitted by the Respondent No. 1 that the plot was encroached after coming into force of the scheme when the means of protecting plot like compound fence were directed to be withdrawn by general notes no. 5 of the final scheme.

6. I say that, the Respondent No.1 have not satisfactorily complied with the order dated 1.12.2014 as the illegal encroachments of 157 A is not fully removed, which is evident from the photograph annexed hereto and marked as Exhibit "C". Apart from that, the illegal encroachments of plot no. 156 is also not removed, as a result of which at or about 7 hutments are still standing on the same which is evident from the photograph annexed hereto and marked as Exhibit-"C".

7. I say that, now the Respondent No.1 have not removed complete illegal encroachment of entire final plot no. 105 B and sent me a letter dated 25.2.2015 informing me that Respondent No. 1 have completed the action of removing illegal encroachment of Final Plot No. 105 B. A copy of the said letter dated 25.2.2015 is annexed hereto and marked as Exhibit "D". It is pertinent to note that Final plot 105 B consist of plot No. 156. Hence, the Respondent No. 1 are liable to remove the encroachments from the said plot.

8. I say that, u/s 88 (c) of The Maharashtra Regional & Town Planning Act, 1956 it is incumbent on the Respondent No. 1 to handover possession of the final plot to the owners to whom they are allotted in the final scheme. However, in the present case the Respondent No.1 have failed to handover to me possession of the final plot. Hence, the order dated 1.12.2014 does not amount to fully complied with.

9. In view of the above, I respectfully submit that, further necessary directions be kindly given to the Respondent No. 1 in this regard."

8 After hearing the Petitioner and the Respondent Corporation, this Court (A.S. Oka & A.S. Gadkari, JJ.) passed the following order on 5th March 2015:

"1. The joint affidavit of Shri Rohidas Mangu Bahiram, Deputy Commissioner (Encroachment) and Shri Daulat Valuba Ghule, the Deputy Engineer, Town Planning of Nashik Municipal Corporation which is dated 3rd March, 2015 is taken on record. We accept the statements made therein.

2. No further directions are required to be issued in this disposed of petition. If according to the Petitioner, the order of this Court is not yet fully complied with, he is free to take appropriate proceedings in accordance with law."

Curiously, the aforesaid order dated 5th March 2015 is neither referred to, nor relied upon or annexed to the present Writ Petition.

9 From the aforesaid order dated 5 March 2015, it is quite apparent that the Court found that there was substantial compliance and no further directions were required to be issued in the disposed of Petition. The Court recorded that, if according to the Petitioner, the order of the Court was not fully complied with, the Petitioner was free to take appropriate proceedings in accordance with law.

10 We record the statement made by learned Counsel for the Petitioner that the grievance of the Petitioner only relates to Final Plot No.105-B which is yellow colour portion marked in the plan annexed at Exhibit-C, page 45

to the Petition and he has no grievance in respect of other portions marked on the said sketch. We find that Petitioner had also filed a Contempt Petition No.3 of 2016 in Writ Petition No.399 of 2012 which came to be dismissed on 10th December 2017. Learned Counsel for the Respondent Corporation has pointed out that in the Sale Deed dated 11th November 1997, out of the said 955 sq.mtr., an area of 194 sq.mtr. was stated to be under encroachment and the Petitioner was well aware of the encroachment even at the time he had executed the Sale Deed.

11 We find that instead of filing a suit or appropriate proceedings in accordance with law, the Petitioner has filed the above Petition making the same grievances which were made in the earlier Writ Petition No.399 of 2012, wherein the Court while disposing of the said Writ Petition directed the Petitioner may file appropriate proceedings in accordance with law, if according to the Petitioner the order of the Court was not fully complied with.

12 In our view, it is not open for the Petitioner to file a fresh Writ Petition on the very issue which was raised in the earlier Petition and re-agitate the same. If the Petitioner was aggrieved by the orders passed in the Writ Petition No.399 of 2012 filed by him, he ought to have challenged the orders before the Supreme Court. The Petitioner has deliberately and conveniently not

disclosed the order dated 5 March 2015 passed in the earlier Writ Petition No.399 of 2012.

13 In the circumstances, we are not inclined to entertain the Petition.

14 We dismiss the Writ Petition, leaving the remedies of the Petitioner open to adopt appropriate proceedings against the encroachment, if so advised (as was directed by the order dated 5th March 2015 in Writ Petition No.399 of 2012).

(ABHAY AHUJA, J.)

(A.A.SAYED, J.)