

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

INTERIM APPLICATION NO.1573/2021
IN
WRIT PETITION (ST) NO.65/2021

Rupvakula Properties Pvt. Ltd. Applicant

Shri Ramkrishna Genu Borade Petitioner

Vs.

The Municipal Corporation of Greater
Mumbai & Ors. Respondents

Mr. Mayur Khandeparkar a/w. Ms. Arpita Srivastava I/b.
Mr. Chetan Raithath for the Applicant
Mr. Pradip Thorat I/b Aditi Naikare for the Petitioner
Mr. R. P. Kadam, AGP for the State

**CORAM: K.K.TATED &
PRITHVIRAJ K. CHAVAN, JJ.**

DATED : AUGUST 18, 2021

P.C.

1 Heard. By this Interim Application, the Applicant - original Respondent No.4 seeks following reliefs in the present disposed of Writ Petition.

“(a) That the Applicant be permitted to withdraw the Undertaking given to this Hon'ble Court and as recorded in the Order dated 7th January, 2021 in view of willful disobedience of the order of this Hon'ble Court dated 7th January, 2021 by the Petitioner by his willful failure to comply with the said order and not vacating the structure in his occupation, mentioned in the Schedule at Exhibit - A hereto

(b) in the alternative to the prayer clause (a) hereinabove, the Petitioner be directed by a mandatory order and direction of this Hon'ble Court to forthwith comply with the said order dated 7th January, 2021 and to vacate the structure in possession of the Petitioner and handover the same to the Applicant for the purpose of its demolition, mentioned in the Schedule at Exhibit - A hereto.

(c) that this Hon'ble Court may be please to declare that in view of the non-cooperation of the Petitioner in joining the Slum Scheme, Petitioner has become liable to be debarred from the Slum Scheme and also liable to lose the right to any built up tenement under the provisions of Section 33A of the The Maharashtra Slum Areas (Improvement, Clearance and Redevelopment Act, 1971;

(d) ad-interim and interim reliefs in terms of prayer above be granted;

(e) for costs of this Petition be provided for;

(f) for such further and other reliefs as the nature and circumstances of this case may require.”

2 The learned counsel for the Applicant submits that, initially, the Petitioner had filed the present Writ Petition for several reliefs for setting aside the order dated 23.12.2020 passed by the Superintendent of Gardens & Tree Officer and Resolution No.32 dated 23.10.2020 passed by the Tree Authority. He submits that the said Writ Petition was disposed of by order dated 07.01.2021 recording the Applicant's undertaking that he will not disturb the location of the said tree next to the Petitioner's hut till the Petitioner's eligibility is decided by the competent authority. Paragraph 2 of the order dated 07.01.2021 reads thus:

“2. The learned Advocate for the developer - Respondent No.4 states that the developer has already given an undertaking by his letter dated 10th September, 2020 addressed to the Deputy Superintendent of Gardens, Mulund (w), to the effect that until the Petitioner is evicted and his structure is demolished, the tree next to it will not be disturbed. He once again states on instructions from Respondent No.4 that tree No.19 shall not be disturbed until the Petitioner is legally evicted from the subject premises. The Petitioner who is present in Court submits through his Advocate that the structure occupied by him is not an illegal structure as alleged by the developer. However, he states that in the event of the eligibility being decided in his favour, he shall vacate the premises and accept the rent in lieu of temporary alternate accommodation from the developer.”

3 The learned counsel for the Applicant submits that thereafter the competent authority, Mumbai – MHADA by order dated 11.04.2021 held that the Petitioner Shri Ramkrishna Genu Borade is eligible in the said scheme and entitled to non residential accommodation. He submits that immediately after passing the said order, the Applicant had approached the Petitioner to vacate the said structure. As he has failed and neglected to do so, the Applicant had filed an application with the Dy. Collector (ES) for taking appropriate action against the Petitioner under the provisions of section 33 and 38 of the Slum Act against non cooperating hutment dweller in the said scheme.

4 The learned counsel for the Applicant submits that the Petitioner had also made an application before the competent authority challenging the Annexure-II issued by

the Additional Collector (Enc/Rem) in respect of the area occupied by the Petitioner. He submits that the Petitioner has alleged in the said application that the Petitioner is in possession / occupation of 18.95 sq.mtr. instead of 13.58 sq.mtr. as decided by the Additional Collector (Enc/Rem). He submits that the said application is also pending.

5 The learned counsel for the Applicant submits that bare reading of the order dated 07.01.2021 passed in Writ Petition (ST) NO.65/2021 clearly shows that till decision of the Petitioner's eligibility by the competent authority, the Applicants are restrained from taking any action to disturb the location of tree next to the Petitioner's hut. He submits that as the eligibility of the Petitioner has already been decided by the competent authority, there is no question of continuing their undertaking as recorded by this court in order dated 07.01.2021. Hence, they filed the present Interim Application.

6 The learned counsel for Applicant submits that in any case though the eligibility of the Petitioner is decided by the competent authority and he failed and neglected to vacate the same, they already filed application under section 33 and 38 of the said Act with the Dy. Collector (ES) for taking appropriate action against the Petitioner. The learned counsel for the Applicant submits that in the interest of justice, this Hon'ble Court be pleased to relieve the Applicant from the undertaking given before this court in Writ Petition No.65/2021 and also direct the Dy. Collector (ES) to decide their application under section 33 and 38 of

the said Act as early as possible on merits.

7 On the other hand, learned counsel for the Petitioner submits that they have already filed their reply in the present application on 30.07.2021. He submits that the application as it is filed by Respondent No.4 is not maintainable. He submits that the Writ Petition is already disposed of by order dated 07.01.2021. He submits that in disposed of matter, there is no question of entertaining any application and that also on behalf of the Respondents.

8 The learned counsel for the Petitioner submits that though the Petitioner's eligibility is decided by the Authority, they failed and neglected to consider the Petitioner's main grievance that the Petitioner is occupying the area 18.95 sq.mtr. instead of 13.58 sq.mtr. as held by the Authority. He submits that an appeal to that effect is pending before the Appellate Authority. He submits that till decision of the said appeal, there is no question of allowing the Applicant to disturb the Petitioner's occupation of the said premises.

9 The learned counsel for the Petitioner submits that the Applicant has alternate remedy to make an appropriate application before the Authority for allowing him to shift the said tree and that is required to be decided by the Authority on merits. He submits that in any case, the Applicant has already filed Contempt Petition (ST) No.12742/2021 against the Petitioner alleging the breach of order dated 07.01.2021 passed in the Writ Petition. Hence, the present application

is not maintainable In support of this contention, the Petitioner relies on paragraph No.4, 8, 16 and 19 of the Affidavit in Reply dated 30.07.2021 which reads thus:

4. *With reference to paragraph 5 of the Interim Application I deny that the Applicant / Respondent No.4 has given an Undertaking before this Hon'ble Court that the Tree No.19 shall not be disturbed until the petitioner is legally evicted from the subject premises. I say that the Applicant has given an Undertaking before the Dy Superintendent of Gardens Mulund (W) vide is letter dated 10th September, 2020 to the effect that until the Petitioner is evicted and his his structure is demolished the tree next to his Shop will not be disturbed. I say that the Statement of the Respondent No.4 that an Undertaking is already given before the Dy. Superintendent of Gardens Mulund (W) was recorded by this Hon'ble Court and the petition was disposed of. I say that there is no Undertaking given before this Hon'ble Court as alleged in the paragraph under Reply. I say that the Order dated 7th January 2021 is self explanatory. I say that rest of the contents of the paragraph being a matter of record need not be traversed with.*

8. *With reference to paragraph No. 11 of the Interim Application I deny that the Petitioner has neither responded nor shown any readiness and willingness to vacate the structure in spite of the Undertaking given to this Hon'ble Court. I say that the Applicant has already approached the Dy. Collector (Enc/Rem) for eviction of the Petitioner. I say that the Applicant has already adopted its remedy under the Maharashtra Slums (Improvement, Clearance and Redevelopment) Act. 1971 for eviction of the Petitioner. I say that rest of the contents of the paragraph under reply being a matter of record need not be traversed with.*

16. *With reference to paragraph Nos. 18 and 19 of the Writ Petition I deny that the Petitioner has become*

liable to be debarred from the Slum Scheme and also liable to lose the right to any built up tenement as alleged or at all. I deny that the Applicant has not filed any other Petition on the same subject matter of the present Petition in this Hon'ble Court or in the Hon'ble Court Supreme Court of India or in any other Court as alleged. I say that in fact it appears that the Applicant on 19th July, 2021 has already filed Contempt Petition (St) No. 13742 of 2021 against the Petitioner alleging breach of Order dated 7th January, 2021 passed in the present Writ Petition before filing of the present Interim Application. The Applicant states that infact at the behest of the Applicant proceedings under Section 33 and 38 of the Maharashtra Slum (Improvement, Clearance and Redevelopment) Act, 1971 have been initiated against the Petitioner. I say that the present Application filed by the Petitioner is abuse of process of law and is liable to be dismissed.

19. *I say that the Applicant has already approached the Dy. Collector (Enc/Rem) for taking action of eviction against the Petitioner and that on the complaint of the Applicant the Dy. Collector (Enc/Rem) has already initiated proceedings under Section 33 and 38 of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 against the Petitioner. I say that the Applicant has also initiated Contempt proceedings against the Petitioner for alleged breach or Order dated 7th January, 2021 passed in the present Writ Petition. I say that the Applicant is filing multiple proceedings with a view to cause unnecessary harassment to the Petitioner. I say that I have filed an Appeal before the Additional Collector (Enc/Rem) for challenging the Supplementary Annexure-II to the extent of entitlement of the Petitioner to larger area. I say that the area mentioned in the Supplementary Annexure-II is much less than what is actually occupied by the petitioner and hence the Petitioner has filed an Appeal seeking modification of the Supplementary Annexure-II by mentioning the area of the structure occupied by the Petitioner as 18.95 sq. mtrs. instead of 13.58 sq mtrs. I say that the Petitioner is aware of the proceedings filed before the Additional Collector*

(Enc/Rem). I say that the Applicant has already availed the remedy under the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 and the said proceedings are still pending. The Petitioner craves leave to refer to and rely upon the proceedings filed under Section 33 and 38 of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act.”

10 On the basis of these facts, the learned counsel for the Petitioner submits that there is no substance in the Writ Petition and same is required to be dismissed with costs.

11 Heard both sides. It is to be noted that this court, by order dated 07.01.2021 has specifically recorded that the undertaking given by the Applicant by letter dated 07.09.2020 addressed to the Dy. Superintendent of Gardens Mulund (W) to the effect that until the Petitioner is evicted and his structure is demolished, the tree next to his structure will not be disturbed. This court also recorded that till the Petitioner's eligibility is decided by the competent authority, and evicted from structure, there is no question of disturbing the Petitioner's possession in respect of the said structure. The letter dated 12.04.2021 issued by the MHADA shows that they have already decided the Petitioner's eligibility holding that he is eligible to non residential accommodation. Now the question remains, whether the Petitioner is occupying 18.95 sq.mtr. or 13.58 sq.mtr. It is to be noted that earlier a panchanama was carried out by the Authority on 26.03.2021 (Exhibit-F) page 28. The said panchanama gives the area of the structure which is in possession of the Petitioner. The Petitioner has

also signed the said panchnama at page 29. Apart from that the issue about the area is pending before the competent authority. Considering these facts and bare reading of the order dated 07.01.2021 clearly shows that the undertaking given by the Applicant does not survive in view of the subsequent development i.e. decision of the Petitioner's eligibility by the Authority i.e. MHADA by letter dated 12.04.2021. To that effect the Applicant is entitled to a declaration.

12 It is to be noted that in any case the competent authority i.e. the Dy. Superintendent of Gardens Mulund (W) has already granted permission to the Applicant to shift the said tree from one place to other place. The question remains whether the Applicant could do the same immediately. It is to be noted that unless and until the Petitioner vacates the said structure, there is no question of shifting the tree from one place other place. In view of these facts, we are of the opinion that the Applicant has made out a case to allow the present application in terms of the prayer clause (a). Apart from that the Dy. Collector is required to be directed to decide the Applicant's application dated 08.06.2021 under section 33 and 38 of the Slum Act on merits, as early as possible.

13 Hence, following order is passed:

a. The Interim Application is partly allowed in terms of prayer clause (a):

“a. That the Applicant be permitted to withdraw the Undertaking given to this Hon'ble

Court and as recorded in the order dated 7th January 2021.”

b. The competent authority i.e. Dy. Collector (ES) is directed to decide the Applicant's application under section 33 and 38 of the Slum Act against non cooperating hutments dwellers i.e. Shri Ramkrishna Genu Borade on merits as early as possible but in any case on or before 30.09.2021 and inform the decision to the parties.

c. The Interim Application stands disposed of accordingly.

d. No order as to costs.

(PRITHVIRAJ K. CHAVAN, J.)

(K.K.TATED, J.)