

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

NOTICE OF MOTION NO. 346 OF 2019

IN

SUIT NO. 856 OF 1988

Municipal Corporation of Greater
Mumbai

.. Applicant
(Third Party)

In the matter between :

1. Mary Patricia wd./o. Joseph Peter
Gonsalves & Ors.

..Plaintiffs

Vs.

1. Hyacinth Walter Gonsalves
(since deceased)

1(a). Mary wd/o. Hyacinth Gonsalves
(since deceased)

1(b) Allan S/o. Hyacinth Walter Gonsalves
& Ors.

.. Defendants

Mr. Joel Carlos a/w. Mr. Sagar Patil for applicant (Third Party)-MCGM in
NMS-346-2019.

Mr.Cleutus Gonsalves, plaintiff No.5 in-person.

Mr. N.A. Bandodkar, 2nd Assistant to Court Receiver present.

CORAM : N.J. JAMADAR, J.

DATE : 24th FEBRUARY 2021

ORAL ORDER :

1. This notice of motion is taken out by the Municipal Corporation of Greater Mumbai ('Corporation') as a third party-applicant seeking the following reliefs :

“(a) This Hon’ble Court by an Order and injunction be pleased to permit the Applicant, subject to such terms and conditions as the Hon’ble Court deems it fit, to undertake and execute the improvement works of 63K Road on the Land situated and lying at Survey No. 149A, Hissa No.4, CTS 1382, Marol, Tal. Andheri (East), Mumbai and for that purpose to issue consequential directions to the Court Receiver to handover possession of

required strip of land for the 63K Road and do all other acts as may be necessary and incidental to accomplish the said work of road improvement.

(b) This Hon'ble Court may by an order of injunction restrain any of the owner/s or their heirs, assigns, successors, agents or anyone claiming title through them, from interfering with/obstruct in any manner the proposed road improvement works u/s. 63K for the Road on the Land situated and lying at Survey No. 149A, Hissa No.4, CTS 1382, Marol, Tal. Andheri (East), Mumbai."

2. The notice of motion arises in the backdrop of the following facts :

(a) One Mr. Gabriel Philip Gonsalves was the original holder of the properties including the property referred to in the afore-extracted prayer clauses (a) and (b) (property described in the first Schedule to the plaint in Suit No.856 of 1988 and hereinafter referred to as 'the suit property').

(b) The plaintiffs are the heirs of Joseph, the son of Gabriel. The plaintiffs have instituted the suit for declaration, partition and separate possession of their share in the suit properties. In the said suit, the Court Receiver came to be appointed by an order, dated 10th October 1988. A settlement was arrived at between the parties. The suit was decreed pursuant to the consent terms, dated 4th April 1991. The Court Receiver was ordered to continue to be the Receiver of the suit property till division of the properties by metes and bounds or final sale and disposal of the suit property. The plaintiffs and the defendants

sold the units in the building known as Gabriel Building, which stands on the suit property. Eventually, the purchasers formed a Co-operative Housing Society namely Gabriel Apartment Co-operative Housing Society Limited ('Gabriel Apartment'). The prayer of the society to discharge the Court Receiver came to be rejected by order, dated 19th January 2011.

(c) With the aforesaid historical background, the applicant-Corporation submits that there is an internal road which passes through the suit property. The said internal road, initially private in nature, meets the municipal road known as 'Church Road'. Over a period of time, a number of housing societies have been formed. The road constitutes the only access for the members and the occupants of those housing societies and for the public in general. The applicant-Corporation, thus, decided to develop the said road under the provisions of section 63(k) of the Mumbai Municipal Corporation Act, 1888 ('The Act'). The Corporation, thus, issued a notice on 3rd August 2009 (Exh.'B'). Objections were invited. After following the prescribed procedure, a notification to develop the said road as a public road came to be issued on 25th February 2014 (Exh.'H').

(d) The plaintiff No.5, who is the only contesting plaintiff, has, however, raised objection to the development of the said road. It was contended that the said road stands in the name of 'Gabriel'. This Court has appointed Court Receiver in respect of the suit property. Thus, the applicant cannot declare the said road as a 'public road'. In the wake of the said objection, the applicant is constrained to take out this notice of motion as the suit property is *custodia legis*. The applicant, *inter-alia*, asserts that public interest, convenience and safety involved in the proposal of development of the said road outweigh the private interest. In any event, the ownership of the said road would not stand transferred to the applicant and it would continue to vest with the owner of the suit property. Hence, this notice of motion.

3. The plaintiff No.5 has resisted the application by filing an affidavit in reply. It is averred that the said reply is also filed on behalf of plaintiff No.2, 3(b), and 4. The substance of the resistance put-forth by the plaintiffs is that the applicant-Corporation has no *locus standi* to take out the said notice of motion. The application is preferred with malafide intent of depriving the plaintiffs of the benefit of the suit property which they own. The application is stated to have been moved to advance the cause of

private interest of the persons who are instrumental in pursuing the said project. The road in question being a private road, and not in use by public in general, the resort to the provisions contained in section 63(k) of the Act is unwarranted. In any event, there are adequate provisions in the Act which empower the Municipal Corporation to develop a private road as a public road. The applicant, without resorting to those provisions and incurring the obligations which those provisions cast on the Corporation, intends to deprive the plaintiffs of their ownership rights. On these, amongst the other, grounds the plaintiffs have prayed for the dismissal of the notice of motion.

4. I have heard the learned counsel for the applicant and the plaintiff No.5 in-person, at some length.

5. The circumstances in which the suit came to be instituted and the orders passed therein, apparently, do not bear upon the controversy sought to be raised in the instant notice of motion, save and except the fact that the suit property is *custodia legis*. It is also not in dispute that the road in question is not a public road. The edifice of the application on behalf of the Corporation seems to be that for want of developmental work of the road in question, the general public suffers. Therefore, the applicant-Corporation be permitted to carry out the necessary developmental work.

6. Mr. Joel Carlos, the learned counsel for the applicant strenuously

urged that the Corporation is not concerned with the merits of the rival claims of the parties to the suit, or for that matter, Gabriel Apartment Co-operative Housing Society. The primary objective of the applicant-Corporation is to carry out the developmental work and ameliorate the hardship which the general public suffers on account of the lack of repairs and upkeep of the said road. Mr. Carlos would urge that the applicant-Corporation has followed the procedure prescribed under the Act. Reliance was placed on the notice, dated 3rd August 2009 (Exh.'B') and resolution, dated 25th February 2014 (Exh.'H'), to bolster up the submission that the applicant-Corporation is within its rights in developing the road in question. It was further urged that the ownership of the plaintiffs or any other person would not be divested.

7. In opposition to this, the plaintiff No.5 submitted that the claim of the applicant that the ownership of the owners of the suit property would remain intact is belied by the notice, dated 3rd August 2009 (Exh.'B') which reveals that the said road would eventually be declared as public road under section 306 of the Act, 1960. It was further submitted that the plaintiffs had lodged objections for the said proposal and, thus, the resolution, dated 25th February 2014 (Exh.'H') is *non-est* in the eyes of law.

8. In order to properly appreciate the controversy at hand, especially, the justifiability of the procedure adopted by the applicant, it may be

apposite to refer to the provisions of the Act. ‘Public Street’ and ‘Private Street’ are defined as under :

3(x) “public street” means any street heretofore levelled, paved, metalled, channelled, sewerred or repaired by the corporation and any street which becomes a public street under any of the provisions of this Act :[or which vests, in the corporation as a public street];
(y) “private street” means a street which is not a public street.

9. The provisions of section 63(k), on which the applicant banks upon, find place in Chapter III which incorporates the ‘obligatory and discretionary duties’ of the Corporation. Clause 63(k) is in the nature of residuary discretionary duty of the Corporation. It reads as under :

“63 Matters which may be provided for by the corporation at their discretion :

.....

(k) any measure not hereinbefore specifically named, likely to promote public safety, health, convenience or instruction.

10. Section 61 of the Act, on the other hand, enumerates the obligatory duties of the Corporation. It, *inter-alia*, provides that, it shall be incumbent on the corporation to make adequate provision, by any means or measures which it is lawfully competent to them to use or to take, for each of the following matters, namely,

“.....

(m) the construction, maintenance, alteration and improvement of public streets, bridges, culverts, causeways and also other measures for ensuring the safe and orderly, passage of vehicular and pedestrian traffic on streets.

(n) the lighting, watering and cleansing of public

streets.
.....”

11. Evidently, section 63(k) of the Act is not the sole repository of the powers of the Municipal Corporation, in the matter of development of the public street. Section 291 of the Act empowers the Commissioner to lay out and make new public street. It reads as under :

“291. Power to make new public streets. - *The Commissioner, when authorised by the corporation in this behalf may at any time-*

- (a) lay out and make a new public street;*
- (b) agree with any person for the making of a street for public use through the land of such person, either entirely at the expense of such person or partly at the expense of such person and partly at the expense of the corporation, and that such street shall become, on completion, a public street;*
- (c) declare any street made under an improvement scheme duly executed in pursuance of the provisions of the City of Bombay Improvement Act, 1898, or the City of Bombay Improvement Trust Transfer Act, 1925, to be a public street.*

12. Elaborate provisions have also been made in Chapter XI under the sub-heading “provisions concerning private streets”. Sections 305 and 306 are material for determination of the controversy at hand. They read as under :

“305. Levelling and draining of private streets. - *If any private street be not levelled, metalled or paved, sewered, drained, channelled and lighted to the satisfaction of the Commissioner, he may, with the sanction of the [the Standing Committee], by written notice require the owners of the several premises fronting or adjoining the said street or abutting thereon to level, metal or pave, drain and light the same in such manner as he shall direct.*

306. Power to declare private streets when sewered, etc., public streets. -

- (1) When any private street has been levelled, metalled*

or paved, sewered, drained, channelled and made good to the satisfaction of the Commissioner, he may and, upon the request of the owner or of any of the owners of such street, shall, if lamps, lamp posts and other apparatus necessary for lighting such street have been provided to his satisfaction [and if all land revenue payable to [the [State] Government] in respect of the land comprised in such street has been paid] by notice in writing put up in any part of such street, declare the same to be public street, and thereupon the same shall become a public street:

(2) Provided that no such street shall become a public street if, within one month after such notice has been put up, the owner of such street or of the greater part thereof shall, by notice in writing to the Commissioner, object thereto.

(3) Nothing in this section shall be deemed to affect the provisions of sections 37 and 38 of the Bombay Port Trust Act, 1879.”

13. From a plain reading of the aforesaid provisions, it becomes evident that section 305 empowers the Commissioner to require the owner/s of the premises to level, metal or pave, sewer, drain, channel and light the private street, if it is found that the private street is not adequately levelled, metalled or paved, drained and lighted to the satisfaction of the Commissioner. Section 306(1), on the other hand, addresses the contingency of declaring a private street as a public street. Sub-section (2) of section 306 incorporates a rider to the effect that no such street shall become a public street if, within one month after the notice, as envisaged by sub-section (1), the owner objects thereto in writing.

14. In the backdrop of the aforesaid fasciculus of the provisions, it is imperative to note that in the notice, dated 3rd August 2009, which was

purportedly issued under section 63(k) of the Act, it was explicitly mentioned that the procedure to declare the private street as public street under section 306 of the Act, would be initiated, if no objection is received within one month from the date of the publication of the said notice to treat it as a public street and declare as such. In the light of the aforesaid tenor of the notice, dated 3rd August 2009 (Exh.'B'), the submission on behalf of the applicant that the Corporation does not profess to divest the ownership over the said road does not seem to be sustainable.

15. The matter can be looked at, from another angle. Section 289(1) of the Act, in terms, provides that all streets within Brihan Mumbai, being or which at any time become public streets, and the pavements, stones and other materials thereof shall, vest in the corporation and be under the control of the Commissioner. The necessary corollary of the aforesaid provisions is that once a street is declared as a public street, at any point of time, the public street vests in the corporation and falls under the control of the Commissioner.

16. There are provisions in the Act which empower the Corporation to declare the private street as a public street and also to acquire the land for a public purpose. The question of competence and authority of the Planning Authority to either acquire or declare a private street as a public street is not in question. Whether the applicant has resorted to those

provisions is the contentious issue.

17. A useful reference in this context can be made to a Division Bench judgment in the case of *M/s. Earth Builders Vs. The State of Maharashtra & Ors.*¹, wherein in the face of the challenge to the action of the Corporation of widening the road, on the ground of diplomatic immunity, it was, *inter-alia*, observed that under Rule 22(5) of the Development Control Regulations read with section 291 of the Act, discretionary power is given to the Municipal Commissioner to provide an access to the land-locked property and if necessary to declare such access as a public street. Whether to exercise this power is a question within the sole discretion of the Municipal Commissioner.

18. In the case at hand, it does not appear that the applicant-corporation has resorted to the provisions contained in section 291 or section 306 of the Act. The device adopted by the Corporation of seeking to convert the private street into a public street by asserting that the ownership of the road in question would not be divested by such declaration does not merit countenance.

19. The correctness of the submission on behalf of the applicant that for lack of development of the road in question, public at large is facing serious hardship, may not be doubted. However, the applicant-Corporation has to follow the provisions under the Act and the rules to achieve the object of

1 1997(3) Bom.C.R. 390

providing the amenities to the public and ameliorating the hardship. The submission that public interest outweighs the private interest cannot be acceded to in the abstract.

20. In the circumstances, this Court is of the considered view that, the property being *custodia legis*, permitting the applicant-Corporation to resort to the provisions contained in Act and Development Control Regulations for the purpose improvement of the private street in the suit property, would meet the ends of justice.

21. Hence, the following order :

ORDER

(i) The applicant-Corporation is at liberty to initiate necessary steps for improvement of the road in question, which forms part of the suit property, in accordance with the provisions of the Act and the Development Control Regulations, after providing an opportunity of hearing to the owners/occupants of the suit property, wherever the provisions of the Act and Regulations envisage such opportunity of hearing.

(ii) The notice of motion stands disposed of in the aforesaid terms.

[N.J. JAMADAR, J.]

Shraddha
K.
Talekar

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signed by
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K. Talekar
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