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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 677 OF 2017**

Naperol Tower Condominium ...Petitioner
Versus
Maharashtra Housing and Area Development ...Respondents
Authority & Ors

**WITH
CONTEMPT PETITION NO. 26 OF 2017**

Naperol Tower Condominium ...Petitioner
Versus
Maharashtra Housing and Area Development ...Respondents
Authority & Ors

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**WITH
INTERIM APPLICATION (L) NO. 21707 OF 2021**

Naperol Tower Condominium ...Applicant
Versus
Maharashtra Housing and Area Development ...Respondents
Authority & Ors

**WITH
INTERIM APPLICATION (L) NO. 19962 OF 2021**

Maharashtra Housing and Area Development ...Applicant
Authority & Ors
Versus
Naperol Tower Condominium ...Respondents

WITH

INTERIM APPLICATION NO. 373 OF 2019

Naperol Tower Condominium ...Applicant
Versus
Maharashtra Housing and Area Development ...Respondents
Authority & Ors

Mr Rohaan Cama, *with Jyoti Shah, Jesal Shah, i/b Daru Shah & Co
for the Petitioner.*

Dr Milind Sathe, *Senior Advocate, with PG Lad, Aparna Kalathil
& Bhushan Deshmukh for the Respondent No.1-MHADA.*

Mr A Daver, *with Rutuja Patil i/b Negandhi Shah & Himayatullah
for Respondent Nos. 5 & 6.*

Mrs Uma Palsuledesai, *AGP, for State-Respondent No.7.*

**CORAM G.S. Patel &
Madhav J. Jamdar, JJ.**
DATED: 9th December 2021

PC:-

1. The matters before us are a Contempt Petition No.26 of 2017 and an Interim Application (L) No. 19962 of 2021 in Writ Petition No. 677 of 2017.

2. The disputing parties are differently arrayed in the various proceedings. The principal dispute is between the Naperol Tower Condominium and the Maharashtra Housing Area Development Authority (“MHADA”). The dispute pertains to an access road running roughly from west to east to the Naperol Tower. There is no dispute that the Naperol Tower has a separate access road to the east from or off Rafi Ahmed Kidwai Road.

3. The disputed road lies in what was once part of the property of a now defunct cotton textile mill. This was the Spring Mill and was run by Bombay Dyeing and Manufacturing Company Limited. Bombay Dyeing and another company, National Peroxide Limited, had rights over the whole of this property.

4. The development of the lands under the erstwhile cotton textile mills received a special statutory consideration in the form of Development Control Regulation⁵⁸ of the Development Control Regulations, 1991. That was interpreted by the Supreme Court in *Bombay Dyeing & Mfg Co Ltd v Bombay Environmental Action & Ors.*¹ The upshot of this was that a certain portion of the erstwhile mill land, computed on the basis set out in the Supreme Court decision, was to be handed over to MHADA for public housing.

5. In the present case, the Naperol Tower Condominium had an access road running roughly from or off the Bhoiwada Samashan Bhumi Road to the west, and aligned in a north-east direction towards the Naperol Tower. This access road ran through the Spring Mill land.

6. The time came for Bombay Dyeing to deliver possession of MHADA's entitlement to it. A portion of the land identified for being given to MHADA covered this access road through the Spring Mill property from JD Ambedkar Marg, Dadar to Naperol Tower.

1 (2006) 3 SCC 434.

7. Correspondence between Bombay Dyeing and MHADA began in early 2014. For our purposes, the first letter on record is at page 202 of the Writ Petition. This is dated 26th February 2014 from Bombay Dyeing to MHADA. It speaks of the development of the Spring Mill land. Bombay Dyeing proposed that MHADA should accept land of approximately 4000 sq mtrs in satisfaction of the DCR 58 requirement. It then said that:

“a portion of which is currently being used as a road by BDMCL and a Condominium known as Naperol Tower Condominium within the area to be handed over to MHADA by BDMCL.”

BDMCL is, of course, a reference to Bombay Dyeing.

8. The next letter is of 28th March 2014 at page 203 of the Writ Petition. It refers to a meeting held with the Vice-President of MHADA. The second paragraph of clause (1) speaks of a license granted by Bombay Dyeing to National Peroxide and the occupants of Naperol Tower as an additional access as a non-exclusive license through the strip of land in the Spring Mill property. This was shown on a plan annexed to the Leave and Licence Agreement with National Peroxide. The Leave and License Agreement was for a period of 18 years. The Bombay Dyeing proposal, after setting out some of the history, was that while it was required to deliver possession to MHADA of 33,822 sq mtrs, there was a requirement to provide an internal road with a minimum width of 6 to 12 meters under DCR 22. Bombay Dyeing pointed out that there was an *existing* road and specified that this was in fact the additional access to Naperol Tower. It suggested that this road could be used by MHADA as part of its internal layout road, thus decreasing

infrastructure cost and saving physical land. The proposal is set out in paragraph 9 of Bombay Dyeing's letter at page 205 of the Writ Petition. Sub-clause (ii) specifically asked that MHADA permit Naperol Tower's occupants to continue to use the additional access road as existing or as realigned towards the southern side wall as proposed "**on a permanent basis.**"

9. MHADA responded by its letter of 10th April 2021 at page 37 of the Writ Petition. It referenced the two letters we have mentioned above. It specifically accepted that from the land to be delivered to MHADA, about 4000 square meters, there was a strip of land:

"which is access road to the adjacent Condominium known as Naperol Tower".

10. Thus, the historical fact that the access road was being used by Naperol Tower prior to the delivery of possession to MHADA was accepted by MHADA.

11. What MHADA then said was, as requested by Bombay Dyeing, MHADA "**may make** provisions in its layout for non-exclusive access to Naperol Tower on condition that Bombay Dyeing would hand over the total land of 33822.89 sq mtrs earmarked for MHADA free from all encumbrances and pending Court disputes". On 18th June 2014, Bombay Dyeing replied to MHADA referring to the previous correspondence and seeking a clarification. Item 1 of the clarification was that the current access road would continue to be used or accessed by Naperol Tower *even after the land was handed over to MHADA*. This was said to include the access road handed

over by Bombay Dyeing to MHADA. Clauses 1, 2 and 3 of this letter of 18th June 2014 are reproduced below:

“1. That the current access road from Vithal Mandir Road will continue to be used/accessed by NTC, post-handover of the land, which includes the access road handed over by BDMC to MHADA. The said non-exclusive access to be maintained by MHADA will be irrevocable and permanent i.e. in perpetuity with no charge or fee or sum levied on NTC for such unhindered use/access when the same is to be shared with the residents of the proposed MHADA colony. For any change in layout of the access road post handover, NTC will be kept informed of the same and that the terms and conditions of right of access will not change in perpetuity.

2. That the width of this access road shall be adequate with a minimum width of 12 meters (approximately 40 feet) and/or as may be required by safety norms & Development Control Regulations 1991, or any such law which is in force, from time to time. Adequate space (appropriately 100 feet for 6-8 cars) to be there between the gate of NTC and the internal road to avoid traffic/safety issue. NTC will be permitted to place a security cabin with a security guard, at entry/exit gate.

3. That MHADA will enter into formal agreement for the use of such access road with NTC as per above terms after the Company handovers to MHADA the said land free from all encumbrances and pending litigations.”

12. MHADA’s response to this on 2nd July 2014 is at page 40. It is a single paragraph which reads thus:

“Please refer to your letter under reference dated 18/06/2014. You have asked for clarification from MHADA which are actually concessions being sought from MHADA.

MHADA has earlier informed you of its commitment to allow non-exclusive access to the Naperol CHS through the property proposed to be handed over by you. This commitment is reiterated. However no other concession or commitment as sought by your letter seeking clarification can be given as this would severely restrict MHADA's freedom to develop the property. It would be appreciated if any further communication on this issue is done after possession of the land to MHADA as per layout approved by MCGM."

13. On 9th December 2014, Bombay Dyeing delivered possession to MHADA and an advance possession receipt was obtained.

14. It is to be noted that in 2013, prior to this correspondence, Naperol Tower had filed a suit in the City Civil Court against Bombay Dyeing and National Peroxide. . This is SC Suit No. 326 of 2013. The matter went to the Supreme Court, which by an order of 9th July 2013, issued notice and continued *status quo* in regard to the access road.

15. Ultimately, Naperol Tower and Bombay Dyeing arrived at Consent Terms in the City Civil Court Suit. These Consent Terms were dated 28th August 2014, i.e., before Bombay Dyeing delivered possession to MHADA. The SLP was accordingly withdrawn.

16. In 2017, Naperol Tower filed the present Writ Petition. On that, an order came to be made on 3rd March 2017 which reads thus:

"1. Issue notice before admission, returnable on 17.3.2017. Humdust permitted.

2. Ms. Jyoti Sinha waives service of the notice on behalf of Respondent Nos. 5 and 6.

3. It is submitted that in the suit filed by the Petitioner, respondent Nos. 5 and 6 and Petitioner had filed the consent terms in the Bombay City Civil Court and Respondent Nos. 5 and 6 had agreed that the portion of the said plot would be given by the MHADA to the Petitioner for the purpose of using it as an access road. It is submitted that the order of status quo was also granted by the Apex Court only on account of filing of the consent terms, the suit was disposed of in terms of the consent terms and, therefore, the SLP filed by the Petitioner was also withdrawn.

4. Despite service of notice, none appears on behalf of MHADA. The contention of the Petitioner is that the MHADA Authorities started the activity of digging the said plot without informing the Petitioner. We have perused the order and consent terms filed by the Petitioner and respondent Nos. 5 and 6 in the City Civil Court. Prima facie, case is made out by the Petitioner for grant of ad-interim relief. The Respondents are restrained from using the said road, which was agreed to be handed over to the Petitioner, in any manner and they shall stop the activity of digging the road. Stand over to 17.3.2017.”

17. It is of this order that Mr Cama for Naperol Tower alleges contempt saying that MHADA has not in fact maintained the status quo and that for a portion of the access road, the width has been reduced from 12 meters to 9 meters.

18. We have heard Dr Sathe for MHADA and Mr Cama for the Petitioners. We note the rival submissions of each in view of the factual background and correspondence referred to earlier. Mr

Cama submits that MHADA has unequivocally committed to maintaining the access road for non-exclusive use as an alternative access for the Naperol Tower Condominium. His submission is that Bombay Dyeing delivered possession to MHADA against MHADA accepting this condition. The condition is, therefore, not an “encumbrance” as contemplated in law. This is because the access is non-exclusive. It would have been otherwise, i.e. it would have been an encumbrance, had that access been exclusive to Naperol Tower. He further says that MHADA’s letter of 10th April 2014 in which it agreed that it “*may make*” provisions for a non-exclusive access for Naperol Tower was on condition that Bombay Dyeing would deliver possession free from all encumbrances and pending Court disputes. In Mr Cama’s submission, this in itself shows that MHADA agreed that the access road was not an encumbrance as contemplated even by MHADA. The word “may” does not mean or include a discretion to MHADA to withdraw the access. It was a condition accepted by MHADA and it is condition that attaches to the delivery of possession by Bombay Dyeing “free from encumbrances and pending Court disputes”. It is his submission that there is no possibility whatsoever now of MHADA resiling from this position i.e. of denying Naperol Tower all access altogether. He accepts that the access will be non-exclusive, that is to say, shared access. On instructions, he goes a step further and says that the alignment pre-dated the delivery of possession to MHADA. It is mere accident or happenstance that the land handed over to MHADA covers the access road. The requirement under DCR 58 was not that a particular portion be handed over to MHADA but that land *admeasuring* a certain area, precisely calculated in square meters, was to be handed over to MHADA.

This necessarily means that if MHADA wanted or agreed to take this particular portion of land and on which there was already an access road, MHADA accepted — or must be deemed to have accepted — the delivery of possession subject to non-exclusive access to Naperol Tower. Therefore, MHADA accepted this condition and did not regard it as an encumbrance at all.

19. Mr. Sathe's submission on the other hand is that in the letter of 10th April 2014, MHADA only said that it "may make" such provisions, meaning that it was not bound to do so. He submits that a commitment to do so would constitute an encumbrance and would be contrary to the governing State Government Land Disposal Rules, which MHADA cannot do.

20. As it happens, we may not be required to pronounce on these rival submissions at all. This is because Mr Sathe has placed before us a letter on MHADA's letterhead. It is dated 8th December 2021. It identifies the access road in its current alignment (although with a slightly reduced width for a portion of its length) and specifies marker points for the Naperol Tower access. The letter reiterates that the access is non-exclusive between the points marked A-B-C-D-E-F-G-H-I-J on the plan.

21. We take this letter on record and mark it "X" for identification with today's date. A scanned copy of the letter and the accompanying plan are appended to this order. We accept the letter and its commitment as sufficient to resolve the present controversy subject to two conditions that we believe are necessary having

regard to the short historical narrative we have set out above. *First*, that if MHADA proposes to change or alter the present provision for access it will give the Petitioners at least four-weeks' notice in writing. *Second*, that if MHADA proposes or plans to withdraw access altogether, it must, having regard to the previous correspondence and the documents on record seek leave of this Court in an appropriate application to be filed in Writ Petition No. 677 of 2017.

22. We clarify that the statement in the 8th December 2021 letter from MHADA that “although MHADA is under no obligation whatsoever to provide access to occupants of Naperol Tower constructed by Bombay Dyeing, MHADA is willing to offer the occupants of Naperol Tower non-exclusive access of 6 meter width without creating any right of any nature whatsoever at any point of time, in favour of either Naperol Tower or any of its occupants or Bombay Dyeing or anyone claiming through them” is subject to the foregoing two conditions.

23. In any case, we clarify that all rights and contentions are expressly kept open.

24. Dr Sathe, on instructions, formally withdraws MHADA's letter of 2nd September 2021 purporting to withdraw the access to Naperol Tower.

25. The Writ Petition stands disposed of subject to the liberty to parties to apply in the Writ Petition itself.

26. In view of this, no orders are necessary in the Contempt Petition.

27. All other IA's stand disposed of.

28. All concerned will act on production of a digitally signed copy of this order.

(Madhav J. Jamdar, J)

(G. S. Patel, J)

मुंबई गृहनिर्माण व क्षेत्रविकास मंडळ

(म्हाडाचा घटक)

**MUMBAI HOUSING AND
AREA DEVELOPMENT BOARD
(A MHADA UNIT)**

**म्हाडा
MHADA**



No. EE /City / MB/ 2069 /2021

Dated: 08/12/2021

To,

- 1) Daru Shah & Co.
Advocate for the Naperol Tower
- 2) M/s. Negandhi Shah & Associates
Advocates for Bombay Dyeing & Mfg. Co. Ltd.

Re: High Court
O.O.C.J.

Write Petition No. 677 of 2017
Naperol Tower Condominium ... Petitioner
V/s.
MHADA & Others ... Respondents

Sub:- Permission of access from MHADA Land at Spring Mill

As per the provision of DC Regulations 58 of 1991 DCR various orders passed by the Bombay High Court and Bombay Dying was under obligation to land over to MHADA 33822.89 Sq. Mts. of land free from all encumbrances and free from any pending disputes in any court.

Accordingly such possession of land is handed over to MHADA upon which MHADA has constructed tenements for mills workers and for transit camp.

Although MHADA is under no obligation whatsoever to provide access to occupants of Naperol Tower constructed by Bombay Dying, MHADA is willing to offer the occupants of Naperol Tower non exclusive access of 6 meter width without creating any right of any nature whatsoever at any point of time, in favour of either Naperol Tower or any of its occupants or Bombay Dying or anyone claiming through them.

The passage though which such non- exclusive access is provided is marked on the plan annexed herewith by letter A-B-C-D-E-F-G-H-I-J.

D.A. As above.

Vice President & Chief Executive Officer
Maharashtra Housing & Area Development Authority

