Amol

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 13323 OF 2023

Ashok Baliram Mirkute & Anr ...Petitioners
Versus
The Municipal Commissioner, Kalyan Dombivali Municipal Corporation & Ors ...Respondents

Mr Manoj Badgujar, *for the Petitioners.*
Mr Kedar Dighe, **Addl GP**, *with* **SL Babar**, **AGP**, *for the Respondent-State.*
Mr AS Rao, *for the Respondent-KDMC.*

CORAM	**G.S. Patel & Kamal Khata, JJ.**
DATED:	**26th October 2023**

PC:-

1. In our view, the Petition is thoroughly misconceived. The Petitioners have a property that is situated at Survey No. 1/5 at Village Barave, Taluka Kalyan. There is a structure on this property. It is said to be an ancestral house. It is routinely assessed to municipal taxes. The objection in this Petition is to a notice issued by the Kalyan Dombivali Municipal Corporation ("**KDMC**") under Section 212 of the Maharashtra Municipal Corporations Act, 1949 ("**MMC Act**"). The specific challenge is to three orders of 4th May 2023 and a vacate notice of 20th October 2023.

2. Mr Rao on behalf of the KDMC, states on instructions that the notice was properly served on the owners of the property namely the Petitioners. The structure is required to be removed for a road widening project.

3. We were first told, when the matter was mentioned for urgent circulation yesterday, that the KDMC was threatening demolition without offering any form of compensation. That turns out to be incorrect because Mr Rao clearly states that the procedure under Section 216 will necessarily have to be followed. Sections 212 and 216 read thus:

> "**212. Additional power of Commissioner to order setting back of buildings to regular line of street.**
>
> (1) If any building or any part thereof is within the regular line of a public street and if, in the opinion of the Commissioner, it is necessary to set back the building to the regular line of the street he may, if the provisions of section 211 do not apply, by written notice—
>
> > (a) require the owner of such building to show cause within such period as is specified in such notice by a statement in writing subscribed by him or by an agent duly authorised by him in that behalf and addressed to the Commissioner, why such building or any part thereof which is within the regular line of the street shall not be pulled down and the land within the said line acquired by the Commissioner; or
> >
> > (b) require the said owner on such day and at such time and place as shall be specified in such notice to attend personally or by an agent duly

authorised by him in that behalf and show cause why such building or any part thereof which is within the regular line of the street shall not be pulled down and the land within the said line acquired by the Commissioner.

(2) **If such owner fails to show sufficient cause to the satisfaction of the Commissioner why such building or any part thereof, which is within the regular line of the street shall not be pulled down and the land within the said line acquired as aforesaid the Commissioner may, with the approval of the Standing Committee, require the owner by a written notice, to pull down the building or the part thereof which is within the regular line of the street within such period as is prescribed in the notice**.

(3) If within such period the owner of such building fails to pull down such building or any part thereof coming within the said line, the Commissioner may pull down the same and all the expenses incurred in so doing shall be paid by the owner.

(4) The Commissioner shall at once take possession on behalf of the Corporation of the portion of the land within the said line theretofore occupied by the said building, and such land shall thenceforward be deemed a part of the public street and shall vest as such in the Corporation.

(5) Nothing in this section shall be deemed to apply to buildings vesting in the Government.

216. Compensation to be paid and betterment charges to be levied.

(1) Compensation shall be paid by the Commissioner to the owner of any building or land required for a public street under sections 211, 212, 213 or 214 for any loss which such owner may sustain in consequence of his building or land being, so acquired and for any expense incurred by

such owner in consequence of the order made by the Commissioner:

Provided that—

(i) any increase or decrease in the value of the remainder of the property of which the building or land so acquired formed part likely to accrue from the set back to the regular line of the street shall be taken into consideration and allowed for in determining the amount of such compensation;

(ii) if any such increase in value exceeds the amount of loss sustained or expenses incurred by the said owner, the Commissioner may recover from such owner half the amount of such excess as a betterment charge.

(2) If, in consequence of an order to set forward a building made by the Commissioner under section 215, the owner of such building sustains any loss or damage, compensation shall be paid to him by the Commissioner for such loss or damage after taking into account any increase in value likely to accrue from the set forward.

(3) If the additional land which will be included the premises of any person required or permitted under section 215 to set forward a building belongs to the Corporation, the order or permission of the Commissioner to set forward the building shall be sufficient conveyance to the said owner of the said land; and the price to be paid to the Corporation by the said owner for such additional land and the other terms and conditions of the conveyance shall be set forth in the said order or permission.

(4) If, when the Commissioner requires a building to be set forward, the owner of the building is dissatisfied with the price fixed to be paid to the Corporation or any of the other terms or conditions of the conveyance, the

> Commissioner shall upon the application of the said owner at any time within fifteen days after the said terms and conditions are communicated to him, refer the case for the determination of the Judge."

(*Emphasis added*)

4. It is at this stage that the Petitioners now change tack and present an argument that there can be no notice under Section 212 because there is no road to begin with. Instead, the Petitioners now canvass the theory that if the property has to be taken over then there must be an acquisition by or on behalf of the KDMC. In support of this proposition, reference is made to the definition of street in Section 2(63) of the MMC Act. It says:

> "(63) "street" **includes** any highway, and any causeway, bridge, viaduct, arch, road, lane, footway, sub-way, court, alley or riding path **or passage, whether a thoroughfare or not, over which the public have a right of passage or access or have passed and had access uninterruptedly for a period of twenty years**, and when there is a footway as well as a carriage way in any street, the said term includes both;"

(*Emphasis added*)

5. The argument that there is no street and that a street must exist for 20 years has only to be stated to be rejected. The expression "public have a right of passage or access or have passed and had access uninterruptedly for a period of twenty years" qualifies 'riding path or passage', not a street. It is the 20-year use by the public as a right of passage or access that elevates a riding path or a passage to the level of a 'street'. The 20-year limit cannot logically apply to a highway, causeway, bridge, road, etc., for that would result in an absurdity: no highway would be a 'street', though built as a highway, unless it is used for 20 years. Such an interpretation cannot possibly be accepted.,

6. Further Exhibit "D" at page 38 and the Google Satellite Map that is shown to us do not bear out what the Petitioners are saying.

7. In any case, it is not possible to entertain a factual dispute about the existence of a street.

8. The theory being canvassed is of a personal vendetta against the Petitioners by the KDMC. Such a submission has also only to be stated to be rejected.

9. The other ground taken is that there is no approval of the Standing Committee to the action in question. The allegation is that the proposal has come from the Municipal Commissioner, and it is the Municipal Commissioner who is himself approving his own proposal.

10. It is clear from any reading of the provisions of the MMC Act that in acting under Section 212, the Commissioner is exercising powers on behalf of the Standing Committee. This is inter alia obvious because any possession that the Commissioner takes is on behalf of the Corporation. The emphasis is on Section 212(2). That sub-section, which we have set out above, begins to operate if the owner fails to show sufficient cause to the satisfaction of the commissioner. It is only thereafter that the commissioner may with the approval of the standing committee require the owner by a written notice to pull down the building. The notice at Exhibit "G" prima facie indicates that prior approval has been obtained.

11. Mr Rao states that following the procedure under Section 212, if the noticed structure is not removed by the owner within the prescribed period, then the Municipal Corporation is empowered to cause that removal. He states on instructions that the KDMC is agreeable to giving the Petitioners a further period until 3rd November 2023 to remove the offending structure. We accept that statement. The Petitioners will have time until 3rd November 2023 to comply with the notice in question.

12. We see no reason to interfere. We find no merit in the Petition. It is rejected. There will be no order as to costs.

(Kamal Khata, J) **(G. S. Patel, J)**