

Talwalkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 2648 OF 2021

Mahendrakumar Ambalalji Sankhala ...Petitioner
Versus
Municipal Corporation of Greater Mumbai & Ors ...Respondents

Mr Nirman Sharma, with Sharad Bansal & Jayesh Mestry, for the
Petitioner.

Ms Dhruti Kapadia, with Kunal Waghmare, i/b Sunil Sonavane, for
Respondent No.1-MCGM.

Mr Nilesh Gala, with Naresh Gala, Mihir Shah & Ankit Shah, for
Respondent No.2.

Mr Mayur Khandeparkar, with Arun Panickar & Vinay Nair, for
Respondent No.3.

CORAM G.S. Patel &
Kamal Khata, JJ.
DATED: 10th October 2023

PC:-

1. The conduct of the Petitioner, even *de hors* towards the merits of the Petition, is clearly an attempt to overreach the Court. It constitutes an abuse of the process of the court.
2. There are Affidavits in Reply and Rejoinder.
3. On 12th September 2023 we passed the following order:
 “1. Mr Khandeparkar on behalf of Respondent No. 3 tenders an area statement. This is taken on record and

marked “K1” for identification with today’s date. A copy is given to Dr Chandrachud for the sole Petitioner.

2. The name of the Petitioner appears at Sr. No. 3 in respect of offices 12, 13 and 14. **We note and accept as an undertaking to the Court Mr Khandeparkar’s statement that if there is a discrepancy between the area as per the Development Agreement and as per the MCGM sanctioned plan (which there is) then the Developer will provide to the Petitioner the larger of these two areas. However, Mr Khandeparkar states that the tenant must clearly opt for either the redeveloped premises on tenancy or ownership basis. That offer is recorded in paragraph 12 of the Affidavit in Reply. Mr Khandeparkar clarifies that if the Petitioner (or his relatives) wish to convert their occupancies to ownership then there is the cost of construction that must be paid as stated in paragraph 12. If they do not wish to pay the cost of construction, they will continue in the redeveloped premises on a tenancy basis.**

3. Dr Chandrachud states that this is sufficient provided a Permanent Alternate Accommodation Agreement (“PAAA”) is executed with the Petitioner in these terms. He says that there are other units in the occupation of the Petitioner’s relatives, i.e., those at Sr. Nos. 1 and 2 for Shop Nos. 2 and 6 and a further Room No. 22 in the occupancy of one Ambalal Meghraj Sankhala.

4. These other persons are not party Petitioners nor party Respondents to this Petition. If Dr Chandrachud has instructions to make a statement on behalf of these persons, **then we expect his attorneys to take proper instructions and obtain affidavits from each of these other persons that they have understood the terms of the Petition and what is being offered, and that they will also accept the**

statement made by the Developer regarding the area and the nature of the occupancy of the redeveloped premises (tenancy or ownership). We do not compel the Petitioner to obtain these consent affidavits. If the other relatives do not wish to sign such affidavits or accept the offer, then the Petitioner may proceed so far as his own premises are concerned.

5. In either view of the matter, we do not think that it would be appropriate to dispose of this Petition today itself without giving Dr Chandrachud's Attorneys an opportunity to obtain complete instructions.

6. Mr Khandeparkar lastly confirms that offers in identical terms have been made to all other tenants and that there is no discrimination whatsoever by either the Developer or the Municipal Corporation against this particular Petitioner.

7. List the matter for orders on 15th September 2023."

(Emphasis added)

4. There is no ambiguity about paragraphs 2, 3 or 4 of that order. It was clearly an indulgence to the Petitioner to take an informed decision whether the Petitioner desired to continue on a tenancy or ownership basis. Counsel for the Petitioner then said that the statement made by Mr Khandeparkar for the Developer in paragraph 2 would be sufficient provided there was a PAAA with the Petitioner.

5. As to the other relatives, our order permitting an affidavit was clearly an exceptional indulgence. The reason is plain from paragraph 2.2 of the Petition. It is here that the Petitioner says that he is the *sole* tenant in respect of Shop No 2, Shop No. 6, Office Nos

12, 13 and 14 and one residential Room No 22. This stand is now sought to be materially altered by claiming that certain relatives, none of whom are parties to this Petition, have *independent* claims to one or more of these other premises.

6. Pursuant to that order there are now three Affidavits by the Petitioner's relatives (father and brother). They are more or less in identical terms. We take the affidavit of Ambalal Meghraj Sankhala, presumably the Petitioner's father. He makes this affidavit in respect of Room No. 22. He says that he has understood the Petition. But that appears to be entirely incorrect. In paragraph 3, he references paragraph 12 of the Affidavit in Reply to the Petition. So that there is no ambiguity, it is best to reproduce paragraph 12, which we find at pages 88, 89 and 90 of the paper book. That paragraph has two sub-paragraphs A and B. Paragraph 12 with its sub-paragraphs reads thus:

"12. I say that time to time, the partners of Respondent met and offered various terms and conditions to grant consent in favour of Respondent No. 3 for the redevelopment of the said Building and to handover vacant possession of premises that were in occupation of the Petitioner. I say that the offers offered to Petitioner were never accepted on one pretext or the other and the same is admitted by the Petitioner in the present Petition. I say that the Petitioner along with few other tenants continued to create impediments and obstructions in the redevelopment of the said Building. I say that one such offer given by this Respondent was also indicated in an Affidavit filed this Respondent in Writ Petition (L) No. 1633 of 2017 and other connected Writs. I say that offer indicated in the aforesaid Affidavit was given at that relevant time however the same

was never accepted. I say that this Respondent vide letter dated 13th November, 2020, gave its final offer to the Petitioner and other similarly situated tenants of the said Building to amicably resolve the stalemate and to facilitate redevelopment of the said Building. I say that aforesaid offer has been accepted by 11 similarly situated commercial tenants out of total 14. I say that this Respondent vide said letter made it unequivocally clear that aforesaid offer supersedes all prior offers, understandings and representations, written and oral and also made it clear that in case of any inconsistency between aforesaid offer and any other document or representation made prior thereto, the aforesaid offer shall prevail. I say that the aforesaid offer in respect of commercial premises, which is in the alternative are as under:-

A. PREMISES IN THE NEW BUILDING ON OWNERSHIP BASIS.

Petitioner and similarly situated tenants will be provided a new premise in the new building on ownership basis comprising of area equivalent to area as mentioned in approved buildings plans and/or Development Agreement executed with the owners of the said Property, whichever is higher on payment of construction cost, which is Rs. 3,000/- (Rupees Three Thousand Only) per sq.ft and applicable service tax. The aforesaid payment has to be made in following tranches:-

- I. 25% of the aforesaid payment has to be made on execution of Agreement;
- II. 25% on issuance of Commencement Certificate by the Planning Authority;
- III. 25% on completion of piling work;

IV. 15% on completion of R.C.C. work with respect to commercial premises

V. Balance 10% simultaneously on possession of the new premises. The entire service tax is to be paid on execution of Agreement.

B. PREMISES IN THE NEW BUILDING ON TENANCY BASIS.

Petitioner and similarly situated tenants will be provided a new premises in the new building on tenancy as per prevailing terms and conditions; comprising of area equivalent to area as mentioned in approved buildings plans and/or Development Agreement executed with the owners of the said Property, whichever is higher. Petitioner would also be paid compensation at the rate of Rs. 54 (Rupees Fifty Four Only) per sq.ft per month until handing over possession of new premise.

A copy of the said letter is annexed hereto and marked as **Exhibit “F”**.”

(Emphasis added)

7. Equally important is paragraph 13 of the Affidavit in Reply which reads as follows:

“13. I say that majority of similarly situated commercial tenants in the said Building have already executed Permanent Alternate Accommodation Agreements with this Respondent. I say that 47 residential tenants out of total 53 tenants have executed Permanent Alternate Accommodation Agreements with this Respondent. I crave leave to produce aforesaid Permanent Alternate Accommodation Agreements as and when produced.”

8. In the fresh Affidavit dated 14th September 2023, the Petitioner's father restates what the Developer had already confirmed that if there is discrepancy the larger of the two areas will be provided. Then come paragraphs 4 and 5 of these two Affidavits. They read as follows:

“4. We say that we have no objection to the permanent alternate accommodation agreement for the new premises (in lieu of the Subject Premises) being executed solely in the name of the Petitioner. Insofar as the area of the new premises is concerned, we are willing to accept the area being offered by Respondent No. 3 in terms of the undertaking given to this Hon'ble Court as recorded in the Order dated 12 September 2023. However, we state that in the event that Respondent No. 3 has taken the benefit of any additional area in the redevelopment project which entitles the Petitioner to the benefit of extra area as per the prevailing position of law, such extra area ought to be provided to the Petitioner in the new premises.

5. **Further, the new premises ought to be offered by Respondent No. 3 on ownership basis free of cost. This is in consonance with the obligations of Respondent No. 3 under the Development Agreement, and the settled position of law that a permanent alternate accommodation agreement is a part and parcel of, included in, covered by the Development Agreement and only a particularisation per member of the redevelopment contemplated by the Development Agreement itself.”**

(Emphasis added)

9. These two paragraphs attempt entirely to rewrite our order of 12th September 2023 and to distort unacceptably what is stated in

paragraphs 2 and 3 of that order. Nobody had offered the Petitioner, let alone any of his relatives, additional area free of cost nor of taking premises on ownership basis free of cost, i.e., without payment of cost of construction. This is merely the *ipse dixit* in this further Affidavit and that too filed by a party who has filed no Petition and is not joined as a petitioner to the present Petition either. The submission now is an attempt to backtrack on the entire case and on the acceptance recorded in our 12th September 2023 order.

10. *Now it is argued by Mr Sharma on behalf of the Petitioner that the Petitioner must be given ownership of all the premises mentioned in paragraph 2.2 and that the Petitioner must be given transit rent or transit accommodation for the past period. We fail to understand how this kind of a relief can be sought in a Writ Petition under Article 226 of the Constitution of India. This is not a simple matter of an alternative statutory remedy.*

11. Prayer clause (b) of the Petition, which is the only prayer that is seriously pressed before us reads as follows:

“(b) that this Hon’ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India to Respondent Nos. 2 and 3 to execute and register Permanent Alternate Accommodation Agreement with the Petitioner for the Petitioner’s premises being shop Nos. 2, 12, 13, 14 and 6 and residential premises being Room No. 22 on the second floor and one room on the first floor, duly recording therein clauses for provision of temporary alternate accommodation or payment of monthly

displacement compensation, security deposit, security clauses for timely redevelopment of property and others as per prevailing norms;

The entire prayer is directed only against Respondent Nos. 2 and 3, both private parties, namely Mahaveer Developers and Aryan Enterprises. Neither of these is an instrumentality of the State and there is therefore no question of issuing a mandamus in this fashion. It is for this reason that we had made our order of 12th September 2023 so that the parties could arrive at a negotiated understanding or a settlement and put an end to these disputes. If there is a claim for transit rent, and it arises under an MOU or some other document, then that is the subject matter of a private commercial dispute, not the subject of a writ petition because there is no element of public law involved and there is no role of any public authority in that regard.

12. There is now an oral submission made across the Bar seeking leave to amend to join these relatives of the Petitioner as fellow Petitioners. We do not see how such an amendment can be permitted. Apart from anything else the amendment of these additional claimants would be directly contrary to the assertion in paragraph 2.2 of the Petition.

13. Notably, the verification of the Petition says *inter alia* that what is stated in paragraphs 1 to 2 and 2.1 to 2.7 is ***true to the knowledge of the sole Petitioner***. There is no possibility at all of any other persons making a claim contrary to what the Petitioner has deposed as being true to his knowledge; at least not without the

Petitioner running a very real risk of being cited for either contempt or perjury.

14. The last submission made on behalf of the Petitioner is that the private Respondents ought to be ordered to disclose on affidavits what arrangements they have arrived at with other tenants. That is surely a matter for a civil suit and not for a writ court. There is today merely an assertion that the Petitioner is being discriminated against by the private developers and is not being treated on parity. This has been denied in the Affidavit in Reply itself and Mr Khandeparkar has drawn our attention to the relevant portion of the reply and reiterated his statement that the same offer that is made to the Petitioner and reflected in our order of 12th September 2023 is the offer that was made to all others similarly situated. This is reflected in paragraphs 12 and 13 of the Affidavit in Reply that we have quoted above.

15. At page 113 of the Petition, there is also an Affidavit in support of the Writ Petition. We have seen the contents of this Affidavit. It is hopelessly inadequate. This order is to be placed before the Registrar Original Side and the Prothonotary and Senior Master with a request to issue appropriate directions for proper checking of all petitions. The reason is that the Affidavit at page 113 in paragraph 2, repeats, reiterates and confirms everything said in the Petition “*as if the same are specifically traversed herein verbatim*” and then seeks that this be treated as part of the Affidavit. This makes no sense whatsoever. The supporting Affidavit is required to reaffirm the correctness of the Petition and to say that the contents

are true to the knowledge of the Petitioner and that nothing has been suppressed from the Petitioner. A traverse is not an affirmation. It is a response, a reply, a denial or deals with opposing contentions. The reaffirmation of the correctness of the contents of the Petition is altogether missing in this Affidavit in support of the Petition. We do not understand how petitions of the Original Side of this Court are being filed in this completely casual fashion.

16. Returning finally to paragraph 5 of the further Affidavit of 12th September 2023, without any basis in public law, the submission by the Petitioner's father is that new premises ought to be offered by the Developer Respondent No 3 on ownership basis free of cost. The next sentence of that paragraph is curious because what is cited in support of this is a development agreement, not any default or failure on the part of the public authority, viz., the Municipal Corporation of Greater Mumbai. That immediately puts the entire Writ Petition outside the frame of Article 226 of the Constitution of India and requires the Petitioner or his father to follow such civil remedies as are available in law. The writ remedy is clearly being used to canvas private civil disputes.

17. The Petition is rejected. There will be no orders as to cost.

(Kamal Khata, J)

(G. S. Patel, J)

Note: This order is modified as per Order dated 30th October 2023. The corrections are shown in bold, italics and underline.