

Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 784 OF 2024
WITH
INTERIM APPLICATION NO. 3362 OF 2023
IN
WRIT PETITION NO. 784 OF 2024

Yasin Esmail Gulam Hussain Esmail	...Petitioner
<i>Versus</i>	
Municipal Corporation of Greater Mumbai	...Respondent

SHEPHALI
SANJAY
MORMARE

Digitally signed
by SHEPHALI
SANJAY
MORMARE
Date: 2024.03.06
10:40:44 +0530

Ms Sonal, *with Ankit Tripathi, Asadali Mazgaonwala, Ali Kazmi & Sanobar Fatima, i/b Ali Kazmi, for the Petitioner.*

Mr Sharan Jagtiani, Senior Advocate, *with Apurva Manmmani, Aruna Savla & Akash Gupta, i/b Jeet Gandhi, for Respondent No 1.*

Mr Anil Sakhare, Senior Advocate, *with Kunal Waghmare, for the MCGM.*

Ms Apurva Manwani, *i/b Aruna Savla & Akash Gupta, for Respondent No 4.*

CORAM G.S. Patel &
Kamal Khata, JJ.
DATED: 5th March 2024

PC:-

1. This is one of a group of matters. On 23rd October 2023, this Writ Petition along with Writ Petition No 4289 of 2022 (*Cherrysons Estates Pvt Ltd v Mumbai Municipal Corporation & Ors*) and Writ Petition No 3892 of 2022 (*Rajiben Marji Patel & Ors v Mumbai Municipal Corporation & Ors*) were before us. The present Petitioner was represented by Ms Sonal. She was heard. We passed an order. Although it is long, in view of the controversy today, it needs to be reproduced in full. It reads thus:

“1. Writ Petition (L) No. 15448 of 2023 is filed by an individual, one Yasin Esmail Gulam Hussain Esmail. Ms Sonal for the Petitioner does not press prayer clauses (a) and (b). The only other final prayer is prayer clause (c), a direction to the developer/owner, Respondent No. 4, to enter into a Permanent Alternate Accommodation Agreement (“PAAA”) and to ‘immediately’ provide temporary alternate accommodation to the Petitioner. But this necessarily postulates that the Petitioner will vacate the premises and that the area of the Petitioner’s existing occupancy is known as and when Respondent No. 4 undertakes that redevelopment. If that redevelopment has not yet been undertaken, there can be no question of a PAAA, let alone temporary alternate accommodation.

2. The building may have been categorised as “C-1”. But there is as we shall presently see, controversy about the area that was under occupation of this particular tenant and possibly others.

3. In this regard, we notice the order of 22nd June 2023 by the previous Division Bench of this Court. It reads thus:

“1. Heard.

2. It appears that there are many irregularities being committed in this matter. One such example is of area statement issued

by the Corporation. There is area statement dated 16th March, 2023 which indicates that ground floor of building in question i.e. plot No.83 is vacant and on the attic floor of building on plot No.83-A is also vacant. This statement also shows the carpet area under occupation of the Petitioner the first floor of building on plot No.83 is 174.49 sq. mtrs. Normally such area statement would have to be taken as conclusive proof of statements made therein. But, the Corporation has issued another area statement on 20th May, 2023 and it is completely inconsistent with the area statement dated 16th March, 2023. In the first area statement dated 16th March, 2023, the ground floor of the building on plot No.83 and the attic floor of building on plot No.83-A have been shown to be vacant. In the second area statement, there are tenants occupying these floors and their names are mentioned therein. The second area statement also reduces carpet area under occupation of the Petitioner from 174.49 sq. mtrs to 124.95 sq. mtrs. It is obvious that the record of the Corporation is being manipulated by those having vested interest. They are also indicative of a malaize in the state of affairs of the Corporation. By issuing such inconsistent area statements, the Corporation appears to be playing with precious lives of human beings and the rights of the occupants of the old and dilapidated buildings. With such inconsistencies created in the record, the occupants of the old and dilapidated building are in a quandary about their position today

and they would not be certainly in a position to take any informed decision about vacating of dilapidated buildings.

3. Their dilemma arises from the fact that if they vacate the buildings, the evidence available for taking correct measurements of the carpet area under occupation will vanish and if they continue to occupy such dangerous buildings, their lives themselves will be in danger. But, some solution has to be found out in such a case whereby the Petitioner's safety is ensured and also the Petitioner's rights are protected.

4. In this view of the matter, we direct that the carpet area of 174.49 sq. mtrs. stated in the area statement dated 16th March, 2023 (page 75) shall be the carpet area under occupation of the Petitioner and all entitlements of the Petitioner regarding alternate accommodation, if any, accommodation in redeveloped property, if any, shall be determined with reference to this area i.e. 174.49 sq. mtrs. We further direct that the Petitioner shall vacate the premises in question at the earliest and in any case within ten days from the date of this order, while making it clear that any continuation of occupation of premises by the Petitioner in the building in question from today and onwards shall be at the own risk and danger of the Petitioner, and so it is better that the petitioner evacuates himself at the earliest.

5. Stand over to 6th July, 2023.”

4. We have the gravest reservations as to whether a writ court could ever have arrived at a factual determination of the actual occupancy of any tenant in square meters of carpet area, this being clearly a contentious question of fact, let alone arrived at it by a process of elimination, i.e., by disregarding one or the other of conflicting records. We do not believe it is the province of this Court to itself start measuring areas under occupation. There is a defined structure in law for this and in our view, it must be followed. We are not dismissing or rejecting the contentions of the Petitioner as regards the area under his occupation, but we do not believe that we are entitled in our writ jurisdiction to consider such disputed questions of fact or to take on record material that is more properly evidence before a Civil Court. But adopting that approach, i.e., driving the Petitioner to a civil remedy may be inequitable especially when there is a statutory or administrative framework available. Having said that, though the order of 22nd June 2023 is an interim or ad-interim order, we cannot sit in appeal over it. The area statement affirmed by that court will have to be followed. That is simply a matter of judicial discipline.

5. In such cases of redevelopment of buildings occupied by tenants or under other occupancies, the normal procedure is for the owners/developer to submit to the Municipal Corporation of Greater Mumbai (“MCGM”) a list of the occupants, identifying particulars of the premises in their occupation (such as the floor, wing, unit number etc) and then the developer/owner’s estimate or statement of the area under occupation of each tenant/occupant. This statement is then to be verified by the MCGM. It is this list of verification that is the foundation of everything going forward including the development agreement, all planning permissions and permanent alternate accommodations. It is

before the MCGM that the documents in question must be submitted by the Petitioner and, indeed, all others.

6. We note, however, from the order of 22nd June 2023 that previous statements of the Corporation have been found to be in conflict. The statement about manipulation is without any reference to any part of the record, any discussion of rival submissions or any analysis that no other conclusion is possible, having considered alternative possibilities. There are several other possibilities such as misstatements by one or the other party, or even a common mistake. We prefer to direct that the 4th Respondent will within ten days from today, i.e., by 6th November 2023 submit to the Assistant Engineer, H/West Ward the area statement in respect of all tenancies and occupancies in the building in question called Akbar Villa at Ramdas Nayak Marg, Hill Road, Bandra (W), Mumbai 400 050. Within 25 days thereafter, i.e., by 30th November 2023, the MCGM will issue notices to individual occupants calling upon them to submit within a period of ten days i.e., no later than by 11th December 2023, all documents in their possession regarding the areas. The notice must state the area that has been set out by the developer, Respondent No. 4 in the area statement. If no objection or submission is received within that period, the tenant or occupant will be deemed to have accepted the area statement when submitted. If there are any submissions received, the Assistant Engineer will schedule a hearing with those who have put in submissions and will do so within a period of ten days thereafter. Then the Assistant Engineer will prepare a final area measurement sheet. This is to be done at the earliest and in any event by 15th December 2023. This area statement is not to be acted upon without a further order of the Court. The area statement will have to be placed on Affidavit by the MCGM along with a copy of the area statement as received from Respondent No. 4, copies of the notices that

were set out and other necessary particulars. A tabulation of those persons who have sent their submissions or objections and those who have not must also be annexed to that Affidavit. It is thereafter that we can consider any submissions that the present Petitioner may have in that regard.

7. At this stage we are not rejecting nor disposing of the Writ Petitions. Other contentions are kept open. We believe this is adequate protection for the present to the Petitioner and balances the competing equities.

8. Mr Sakhare draws our attention to paragraph 14 at page 135 of the Affidavit in Reply. This statement is disputed by Ms Sonal for the Petitioner. We are making no observations in this regard at this stage.

9. We do however note that part of the building is said to have collapsed. Ms Sonal maintains that the building is still standing. However, it has been entirely vacated. This only means that there may be some urgency to completing the process of physical inspection and measurement of the various premises. It may also furnish a reasons for conflicting area statements.

10. There are two other Writ Petitions. Writ Petition No. 4289 of 2022 is filed by the developer/owner. Writ Petition No. 3892 of 2022 is by eight tenants out of the nine tenants supporting the owner/developer. Both these Petitions are also adjourned to the next date.

11. There are two Interim Applications, Interim Application (L) No. 17752 of 2023 in Writ Petition No. 4289 of 2022 and Interim Application (L) No. 17746 of 2023 in Writ Petition No. 3892 of 2022. The learned Advocate for the Applicant attempted to appear online. Unfortunately, today there is a problem with the internet connectivity throughout the High Court because of some disruption to the incoming lines. The hearing was not

possible. We had to temporarily suspend for these reasons the hybrid VC facility. We are not disposing the Interim Applications although the reliefs in the Interim Applications seem substantially similar to the Interim Application sought by Ms Sonal in Writ Petition (L) No. 15448 of 2023, namely for a recognition of redevelopment benefits including temporary accommodation, permanent alternate accommodation etc. The difference perhaps is that the Applicant and her siblings claim to be the legal heirs of the original tenant, one Peter Lobo. This is by no means an uncommon situation. But it does mean that certain steps will have to be taken towards representation to the estate and providing for adequate indemnities in favour of the public authority as well as the developer undertaking development. If there are any other issues, these will be considered on the next occasion. As we have not been able to hear the learned Advocate for the Petitioner in the circumstances mentioned above, we are passing no orders in the two Interim Applications.

12. Liberty to the Applicants to seek a listing if required.”

2. Then on 15th February 2024, we had before us Writ Petition No 4289 of 2022 and Writ Petition No 3892 of 2022. The present Petition, Writ Petition (L) No 15488 of 2023, now numbered as Writ Petition No 784 of 2024, was not on board. That was because, despite repeated notices of this Court, the Petitioner’s Advocate had not found time to remove office objections. We have deprecated this practice of obtaining ad interim orders and continuing them on a lodging number indefinitely, especially if matters on a lodging number are not permitted to be listed. This causes prejudice to the other side.

3. We passed an order,¹ in which we noted our previous order of 17th October 2023. Then we referred to our order of 23rd October 2023 which we have reproduced above. Then, in paragraphs 5 to 14 of our 15th February 2024 order, we held as follows:

“5. As the quoted orders show, the Court took adequate precautions to have the structural condition of this 160 year old entirely dilapidated, entirely empty building correctly assessed. We also required the Municipal Corporation of Greater Mumbai (“**MCGM**”) to undertake the process of area verification and assessment. That too has been done.

6. What remains now, as Mr Jagtiani for the owner says, is to proceed with the implementation of the Section 354 notices under the Mumbai Municipal Corporation Act, 1888 (“**MCGM Act**”) so that the entire property can be taken up for the development when such a scheme is proposed.

7. At this stage, there come to be made Interim Applications on a lodging number. Interim Application (L) No 17752 of 2023 is by one Aureen Peter Lobo. Her grievance is that she and her siblings must be held to be entitled to the benefits of redevelopment. The difficulty with this application is that it is not for the MCGM, the owner of the property or the writ court to decide a question of heirship. There is a process in law for that purpose and this kind of a relief cannot possibly be granted.

8. Interim Application (L) No 17746 of 2023 in Writ Petition No 3892 of 2022 is also by Aureen Peter Lobo. It seeks the same relief.

9. Both these Interim Applications will stand rejected but with liberty to the Applicant to make an appropriate application to a jurisdictionally competent Court to

¹ *Cherrysons Estates Private Ltd v Mumbai Municipal Corporation & Ors*, Order dated 15th February 2024, 2024:BHC-OS:2565-DB.

establish heirship to the tenancy rights of the original tenant.

10. If such an order has been obtained, then that is a simple matter of placing the relevant order before the authority at the time of grant of sanction for redevelopment. In any case, there is no question of this Court granting such a relief recognizing individual heirs.

11. Apart from anything else, there is little purpose achieved in mentioning a Will when a Court is considering claims of tenancy that are before it.

12. Accordingly, the Writ Petitions are disposed of with a direction to the MCGM to now proceed to implement the notices under Section 354 of the MCGM Act.

13. This order will also dispose of Writ Petition No 3892 of 2023.

14. Mr Jagtiani points out that the present Petitioners gave notice to Yasin Esmail Gulam Hussain Esmail the writ Petitioner in Writ Petition (L) No 15448 of 2023 that the companion Petitions were listed today. Even the listing serial number was mentioned. Yet none appears for Esmail.”

4. Now this shows us that on 23rd October 2023 to ensure that a correct balance was struck, we directed the 4th Respondent to submit to the Assistant Engineer, H/West Ward of the Municipal Corporation of Greater Mumbai (“**MCGM**”) an area statement in respect of all tenancies and occupancies of Akbar Villa at Ramdas Nayak Marg, Hill Road, Bandra (W), Mumbai 400 050. Within 25 days of that, by 30th November 2023, the MCGM was to issue notices to individual occupants, i.e., no later than by 11th December 2023. The notice would have to state the area set out by the developer,

Respondent No 4. The Assistant Engineer then had to schedule a hearing and then prepare a final measurement sheet.

5. The MCGM has filled an Affidavit in Reply starting at page 209. The Affidavit of 24th January 2024 is short. Its annexures are many. We are emphatically concerned not with any previous area measurements that the MCGM may have taken because these were disputed by the present Petitioner who constantly says that no matter what area is measured, it is on the lower side. Now, pursuant to our direction the developer did submit an area statement of Room No 8 on the first floor in the name of the present Petitioner, Yasim Esmail Gulam Hussain Esmail. The Petitioner said the carpet area was 79.43 sq mts. Objections submitted by the Petitioner were noted. There was a physical measurement on 13th December 2023 and the MCGM records this as 84.03 sq mts.

6. But now even this is disputed. Ms Sonal would have it that despite this physical measurement pursuant to an order of this Court and obviously under supervision of this Court, this area is still on the lower side and that unless and until the Petitioner's statement is wholly accepted, this building that is clearly dangerous and dilapidated and has been subjected to the notice under Section 354 of the MCGM Act should not be pulled down. She also claims that the developer has created fake tenancies. In a question of redevelopment, such an allegation by one tenant of some other tenancies being fake is wholly immaterial because a tenant is entitled to re-accommodation either as a tenant or an owner depending on whether incentive Floor Space Index is not used or is used.

7. The area statement has been signed by as many as four officers of the MCGM including the Assistant Commissioner H/West Ward who inspected the Petitioner's structure. The allegation is that all these officers betrayed a non-application of mind — or worse. We are not prepared to draw any such inference.

8. The real dispute is to the carpet area claimed by the Petitioner. Ms Sonal has instructions to say that within a few weeks the Petitioner will file a suit for determination of all these factual disputes. Nothing prevented the Petitioner from filing a suit in the first place. She could not possibly have taken her chances by filing a Writ Petition raising seriously disputed questions of fact and then, finding that she is confronted with these factual disputes, now seek to withdraw the writ proceedings and to take a second bite at the cherry by filing a civil suit. There must be a finality to this.

9. Ms Sonal argues that if the Section 354 notice is allowed to be implemented 'evidence will be lost'. There is no substance to this. It is pegged to the same argument that the Petitioner can go on and on indefinitely repeating the same weary story of the measurements of her tenanted premises being 'less'. No matter how often it is measured, it is always less. Ms Sonal says there are conflicting measurements by the MCGM. We are not concerned with anything that happened in the past. The reason is self-evident. We ourselves set up a protocol and monitored it so that the measurement was taken by the MCGM after notice with all documents and even a hearing. Indeed, the fact that not a single measurement has met the

Petitioner's demands tells us that *prima facie* there is no substance in her contention that her tenancy is of a larger area.

10. More than anything else, we note that despite wanting all these injunctions this Petitioner is in obviously no position to offer any form of security as might routinely be required of any applicant or petitioner seeking interim injunctive relief. All these applications made day in and day out before us proceed on the footing that injunctions are utterly innocuous and that no prejudice is caused to the respondent and that the petitioner is under no obligation to even offer security for the injunctive relief that is being sought. In this context, it is now beyond controversy that the building is extremely dangerous. We see no reason why the narrow and self-serving interests of the Petitioner should be allowed to prevail over others — and there are others who are tenants and who are affected. Their rights to improved flats on re-development are compromised by this Petitioner's obduracy.

11. There will be no deviation from the final area statement as certified by the MCGM pursuant to orders of this Court.

12. We are not inclined to grant any further reliefs to the Petitioner. The Petition is rejected.

(Kamal Khata, J)

(G. S. Patel, J)