

Ashwini

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 4289 OF 2022

WITH

INTERIM APPLICATION (L) NO. 17752 OF 2023

IN

WRIT PETITION NO. 4289 OF 2022

Cherrrysons Estates Private Limited

...Petitioner

Versus

Mumbai Municipal Corporation & Ors

...Respondents

WITH

WRIT PETITION NO. 3892 OF 2022

WITH

INTERIM APPLICATION (L) NO. 17746 OF 2023

IN

WRIT PETITION NO. 3892 OF 2022

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Rajiben Mavji Patel & Ors

...Petitioners

Versus

Mumbai Municipal Corporation & Ors

...Respondents

WITH

WRIT PETITION (L) NO. 15448 OF 2023

(Not on board)

Yasin Esmail Gulam Hussain Esmail

...Petitioner

Versus

Municipal Corporation of Greater Mumbai

...Respondent

Mr Sharan Jagtiani, Senior Advocate, with Apurva Manwani & Aruna Savla, i/b Jeet Gandhi, for the Petitioners in both Writ Petitions.

Mr Anil Y Sakhare, Senior Advocate, with Kunal Waghmare, i/b Sunil K Sonawane, for the Respondent-MCGM in WPL/15448/2023.

Mr Dashrath Dube, with Kunal Waghmare, i/b Sunil K Sonawane, for the Respondent-MCGM in WP/3892/2022.

Mr Kunal Waghmare, i/b Sunil Sonawane, for the Respondent-MCGM in WP/4289/2021.

**CORAM G.S. Patel &
 Kamal Khata, JJ.**

DATED: 15th February 2024

PC:-

1. One Petition, namely Writ Petition (L) No 15448 of 2023 is not on board. It cannot be on board because it is yet on a lodging number. We have required all Petitions prior to 2024 to be finally numbered and objections removed, and we have made it clear that if this is not done, the Petitions will be dismissed and ad interim orders vacated. There is no ad interim order in Writ Petition (L) No 15448 of 2023.
2. We proceed therefore with the other two Petitions that are on board and the two new Interim Applications that are shown to us.
3. We begin with our first order of 17th October 2022. It reads thus:

“1. These two Writ Petitions presents an extremely sorry state of affairs. They relate to a building called Akbar Villa, a ground and one floor structure at Hill Road, Bandra (West), Mumbai 400 050. The building is more than 140 years old. The dispute today is whether or not the structure is sufficiently dilapidated to merit a categorisation as a C1 category building requiring evacuation and demolition. The eight petitioners claim to be eight of the nine tenants of the building. The ninth tenant is one Yasin Esmail Gulam Hussain Esmail. She is Respondent No. 4 in the companion Writ Petition filed by Cherrysons Estates Pvt Ltd, the owner and landlord of the property. Cherrysons is Respondent No. 6 to the tenants’ Petition.

2. We will first get out of the way an astonishing submission made by Yasin Esmail. She says that the other eight tenants are not tenants, and that she is the only tenant. Her landlord, Cherrysons, does not say so. It is never for one tenant to say that another person is not a tenant of the premises. That is always a matter between landlord and tenant.

3. This matters greatly because while the eight tenants who are Petitioners in Writ Petition No. 4289 of 2022 and Cherrysons, the landlord, agree that the building is dilapidated, inhabitable, dangerous and requires demolition, Yasin Esmail has taken the contrary stand. Cherrysons submitted a structural audit report to the MCGM and to its Technical Advisory Committee (“TAC”) constituted pursuant to 2014 directions of this Court in another matter. Yasin Esmail submitted her own report. On that basis and on a visual inspection the TAC seems to have concluded that the building is not dilapidated and is a category C2A building requiring eviction for the purposes of major repairs. The building does not appear to be an RCC or PCC structure. Nonetheless, there are a range of tests that can be carried out beyond a usual inspection. Yasin Esmail’s

consultant has done none of these. None of the mandatory tests have even been addressed. That report only says that those tests are not necessary. This is entirely unsatisfactory. Then Yasin Esmail got another report which also does not reflect that any mandatory tests were carried out. The two reports seem to be in conflict. We cannot understand how Yasin Esmail is more or less conducting herself as if she is the owner of the property. The approach of the TAC is entirely unsatisfactory. It could have called for its own report with adherence to its own guidelines. We do not understand why the TAC report at “Exhibit M” at page 208 of the first Petition prefers one report over the other or on what basis, other than the reports, TAC has concluded that the building only needs repairs.

4. We require TAC to reconsider its opinion and to obtain an independent structural audit report from any reputed engineering college of its choice. The costs of this report will be paid for by the landlord, which is before us and which agrees to bear these costs. The independent consultant will assess Akbar Villa’s structural stability without any regard whatsoever to the reports prepared by the consultants engaged by Yasin Ismail or by the landlord Cherrysons.

5. An Affidavit by the MCGM with the revised TAC report and the independent structural audit report is to be filed in both matters by 25th November 2022.

6. Even more curiously we find that in a building of which she is admittedly and demonstrably not the owner, Yasin Esmail has managed to get a ‘repair permission’ from the MCGM. We do not see how and by what authority a sole tenant can get permission for or carry out structural repairs to a building that is the ownership of somebody else. Indeed, paragraph 1 of an Additional Affidavit filed by the Petitioners shows a copy of this permission at “Exhibit A”.

This notice is addressed by the MCGM solely to Yasin Esmail and calls upon her to submit an online application complete in all respects for structural repairs. There is no question of allowing Yasin Esmail to effect any such repairs. The 25th August 2022 repair permission by the MCGM is stayed until further orders.

7. The MCGM will not grant any permissions to any of the parties without prior leave of the Court irrespective of whether there are messages and communications from any political person. We say this because paragraph 19 of the Petition mentions the intervention of an MLA in this matter. The MCGM will now follow orders of this Court and ignore all outsiders.

8. List the matter on 30th November 2022.”

4. Then, so that all orders are in one place, we turn to our order of 23rd October 2023. 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.”

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 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.

(Kamal Khata, J)

(G. S. Patel, J)