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REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 1115 OF 2005

IN

SUIT NO. 3553 OF 2004

WITH

NOTICE OF MOTION NO. 1320 OF 2013

Mahendra Builders …Plaintiff

Versus

Brihan Mumbai Municipal Corporation of Greater Mumbai & Ors …Defendants

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Mr Aspi Chinoy, Senior Advocate, *with Sandeep A Bhagwat, for the Plaintiff and Applicant in NMS/1115/2005.*

Mr Pritvish Shetty, *i/b Vidhii Partners, for Defendant No. 2 and Applicant in NMS/1320/2013.*

Smt Uma Palsuledesai, *AGP, for Defendant No. 11.*

Mr AY Sakhare, Senior Advocate, *with RS Mirpury & D Shingade, for Defendant No. 1–MCGM.*

CORAM: G.S. PATEL, J

DATED: 11th February 2019

PC:-

1. This order will dispose of the Plaintiff's Notice of Motion No. 1115 of 2005 and the 2nd Defendant's Notice of Motion No. 1320 of 2013. The 2nd Defendant is an association of occupants ("**the Association**") of what was once called the Empire Building and later renamed Mahendra Chambers. The Plaintiff is a partnership firm. The 1st Defendant is the Municipal Corporation of Greater Mumbai (**"MCGM"**). The 3rd Defendant is the Chairman of the 2nd Defendant. Defendants Nos. 4 to 10 are, or at the relevant time were, the Trustees of the Parsee Punchayet Funds and Properties Trust, a public charitable trust ("**Parsee Punchayet**").

2. Given the age of these Notices of Motion, I have declined an application for adjournment by the Defendants.

3. The dispute pertains to a plot of land and a building known as Mahendra Chambers at 134/136, DN Road, Fort, Mumbai 400 001.

4. A brief history is necessary. On 28th July 1908, at a time when these areas were yet being developed across the Island City, the Trustees of what was then called the Improvement Trust for the City of Bombay leased 2,724 sq yards of land at DN Road to one Lallubhai Dharamchand. The lease was for 99 years with effect from 1901. This was one of about 146 such plots leased by the Government of Bombay to the Improvement Trust. Some decades later there followed an Act of 1933 by which Section 91-B was added to the MCGM Act 1881 and these plots were thus transferred to the

MCGM. The plots were to re-vest in the State Government on the expiry of the 99-year lease.

5. Lallubhai Dharamchand assigned his lease to one Vicaji Taraporewalla. Sometime around 1908, Vicaji constructed the building in question on the plot. He died on 4th March 1949, and his executors surrendered the lease to the MCGM and secured two separate leases for what was then called Plot A1 (1298 sq yards) and Plot B1 (to another entity called Narayana Trust) for the remainder of the lease period some 37 years and six months until 13th December 2000. Vicaji left a Will, and his executors apparently obtained probate to it. On 20th January 1966, these executors assigned the leasehold Plot A1 and the building on it (then called the Empire Building) to the Parsee Punchayet. On 23rd August 1974, the Parsee Punchayet and the Plaintiff–firm entered into an agreement for assignment of the leasehold rights of Plot A1 and the Empire Building, (by now included in Schedule W to the MCGM Act), together with another adjacent Plot A2. This lease was valid until 2008 for Plot A2 and the MCGM had permitted an open-air garden restaurant to be operated on it. The total consideration was Rs. 10 lakhs. Rs. 1 lakh was paid on execution. The remaining Rs. 9 lakhs was paid by 29th January 1976.

6. Evidently, the Parsee Punchayet required prior permission of the Charity Commissioner, and it obtained this on 24th June 1975 to complete the sale of the building and to assign the lease. This was to be completed within six months.

7. On 14th November 1975, the Parsee Punchayet applied to the MCGM for its consent to the assignment of these leases in Plots A1 and A2. We are not concerned with Plot B1, assigned to the Narayana Trust. There is no dispute regarding the renewal of the lease for Plot A2, but it assumes some significance because of the contrasting action taken in regard to Plot A1. On 1st February 1976, having received the full consideration, the Parsee Punchayet put the Plaintiff–firm in possession of Plots A1 and A2 and the Empire Building on Plot A1. There were several tenants in the building, and the Parsee Punchayet issued Letters of Attornment on 29th January 1976. The Plaintiff began collecting rent from the tenants of the Empire Building and then re-named it Mahendra Chambers. The Plaintiff continued to pay all assessments and taxes.

8. Two years later, on 15th November 1978, the MCGM required the Parsee Punchayet Trustees to pay Rs. 2,000/- as transfer fees and 5% of the agreement consideration: an amount of Rs. 50,000/-. This was done, and the MCGM issued receipts.

9. Eleven years went past without a formal response by the MCGM to the application for its consent to the assignment. It was not until 4th June 1986 that the MCGM forwarded its permission or no objection or licence dated 24th February 1986 for the assignment of these two plots by the Parsee Punchayet to the Plaintiff. This was made subject to the Parsee Punchayet submitting a registered deed of assignment

> "within a period of 4 months from the date of execution along with a certified copy of the registration slip and the

> Index II for registration and bringing the names of the purchasers on this office record."

10. By this time, the composition of Parsee Punchayet Board of Trustees had changed. This required a fresh application to the Charity Commissioner and an extension of time to complete the transaction. There are certain intervening events regarding some illegal constructions and the MCGM action against those, but I will pass over these quickly because they do not seem to me to affect the issue that falls for consideration. On 16th February 1994, the Parsee Punchayet explained to the MCGM the reason for the delay, *inter alia* pointing out that the Charity Commissioner's permission was required afresh, and that the MCGM's delayed permission had compelled these extensions of time. Four years later, on 25th September 1998, the MCGM called on the Plaintiff to submit certified true copies of the assignment deed duly executed along with Index II. Thus, up to this point, there was no problem with the assignment of Plot A1 and the Empire Building/Mahendra Chambers to the Plaintiff.

11. On 13th December 2000, the 99-year lease period for all the properties in Schedule W to the MCGM Act expired. There followed an Ordinance of 20th October 2001 amending Section 91-B and permitting the Government to grant fresh leases of these Schedule W plots for up to 30 years. On 2nd November 2001, the MCGM told the Plaintiff that it would consider a renewal of Plot A1's lease after it received an order from the Government 're-vesting' the properties in the MCGM. In the meantime, the MCGM continued to accept lease rent from the Plaintiff.

12. Pausing briefly, I must note that this concept of 're-vesting' seems to have been wholly misunderstood by both the State Government and the MCGM. They seem to have proceeded on the footing that a 're-vesting' is lawful reason for a lessor to re-enter demised property without following the due process of law, that is to say, a re-vesting supposedly permits a unilateral resumption of actual physical possession without either a surrender or an order of the Court. As we shall see, this is wholly incorrect in law. It is also entirely misdirected on facts. The reason suggests itself. These plots are all ones of which the erstwhile Government of the State of Bombay, now the Maharashtra State Government, is the owner and head lessor. The MCGM statute permits the State Government to 'vest' these properties in the MCGM so that the MCGM can lease them out (or renew existing leases) in accordance with government-mandated policy. Therefore, this vesting on the expiry of the leases in the government, and the re-vesting in the MCGM for renewals or fresh leases, is a matter between the head lessor and its delegate or subordinate lessor. The State Government does not lease the plots to the MCGM. It 'vests' the plots in the MCGM, so that MCGM can be the lessor. This relationship between the State Government and the MCGM is one entirely distinct from the relationship, in law and on facts, between the MCGM as the lessor and individual lessees. Neither the expiry of a lease, nor its 'vesting' on such expiry in the State Government, nor a later 're-vesting' in the MCGM in accordance with policy operate to dispense with the requirement that the lessor/MCGM must proceed only in accordance with law, and by following the due process of law, to recover possession from a lessee.

13. In 2002, the MCGM asked the Plaintiff to get its assignment deed registered. Later that year, the Association was formed. On 7th August 2002, the MCGM granted the 2nd Defendant some repair permissions but did so without reference to the Plaintiff. The Plaintiff filed a Writ Petition in this Court, which said that the Plaintiff had to establish its title. The Plaintiff withdrew that petition with liberty to adopt appropriate proceedings.

14. I come now to the events of 21st September 2002, when a meeting was apparently held between the MCGM, the Association, its Chairman and the Chief Minister. A copy of these minutes is at Exhibit "R" to the plaint. Pages 125–126 have the typed text in Marathi and pages 127–128 have an office translation in English. I am reproducing the translation (about which there is no dispute; and I am myself satisfied that it is a reliably accurate translation of the original Marathi, which I have read myself).

Issues raised during the meeting

> Mahendra Chambers estate is Scheduled estate and was let out on lease to Parsi Panchayat Funds Properties. But they transferred it in the name of M/s. Mahendra Builders. However, as appropriate documents were not complied with **BMC did not approve this arrangement**. Meanwhile the lease period of this property expired and since now it is vested with the Government, the commissioner has clarified that now it can be leased out for a period of 30 years.
>
> Presently the said buildings are in unrepaired state and applicants occupants Welfare Association have commenced repair work with the permission of the BMC.

> **The applicants have proved that in the interest of the residents, the lease of the said building may be transferred in the name of Association.** The Association is willing to pay the arrears of lease rent amount, property tax, etc. **Pursuant to the said application, if the Government vests the said property with the Commissioner, then the said property can be given on lease to the Association, stated the Commissioner, Mumbai Municipal Corporation.**
>
> **Decisions in the meeting**
>
> Suggestion of Commissioner is approved. But this case should not be related to any other matter in Schedule 'D' Cadre or should not be treated as precedent and firstly the said property should be vested with the Commissioner and thereafter the same be leased out to applicant Welfare Association, Commissioner should verify the legal aspect of this matter and submit appropriate proposal.
>
> (*Emphasis added*)

15. As the emphasised portion shows, the representation was in equal parts factually wrong and legally unsound. It was incorrect to say that the MCGM had not approved the transfer; it had, though very late, forcing a fresh application for sanction to the Charity Commissioner. The representation assumed that since the lease had expired, the MCGM could resume possession by just walking in; and that a 're-vesting' (as between the State Government and the MCGM) was valid justification for a forcible re-entry, bypassing the due process of law; thus setting the MCGM at liberty to introduce a new lessee. This proceeds on the footing that since the term of the lease had expired, therefore, the Plaintiff more or less in law lost

possession and all juridical rights over the property in question and that the matter stood at large. At the very least, the representation at the meeting was, in my view, though *prima facie* at this stage, over-simplistic.

16. On 13th January 2003, the Charity Commissioner extended the time for the assignment of the plot. The MCGM invited objections from the Plaintiff regarding re-assessment of Plots A1 and A2. There followed on 20th January 2003 a formal notification by the State Government vesting Plot A1 in the MCGM for another 30 years. On 4th March 2003, the Parsee Punchayet executed what was effectively a fresh deed of assignment in favour of the Plaintiff. This was duly registered, and an Index II was issued. On 10th April 2003, the MCGM issued a Letter of Intent in favour of the 2nd Defendant–Association to execute a fresh lease in its favour.

17. On 27th April 2003, a registered post notice was allegedly issued by the MCGM to the Parsee Punchayet claiming that since the lease had expired, Plot A1 and the Empire Building/Mahendra Chambers 'vested' in the MCGM and that it was entitled to re-enter the plot. This is the entirely erroneous basis of the MCGM's action. There is simply no warrant for it in law. The notice purported to state that the MCGM would attend the site on 2nd May 2003 "to take back the possession of the plot with building". This notice was pasted on the property in question. The Parsee Punchayet maintains that it never received any such notice. On 2nd May 2003, the MCGM caused a panchanama to be drawn stating that it had re-entered the property by pasting the notice on 2nd May 2003 as none was present from the lessees.

18. On 11th June 2003, the Plaintiff sent to the MCGM the registered assignment deed and a copy of the Index II. On 21st July 2003, the MCGM wrote to the Plaintiff alleging that it had taken possession and, therefore, the lease no longer subsisted. It contended that the assignment was, therefore, invalid. Some correspondence ensued, and ultimately the Plaintiff filed Writ Petition No. 2421 of 2003 for a mandamus seeking renewal of the lease. Holding that the Plaintiff's title was in serious dispute, the Court said the petition was not maintainable.

19. The Plaintiff then issued a statutory notice under Section 527 of the MCGM Act. The Plaintiff has continued to pay rent for Plot A2 (although the receipts are for some unfathomable reason still issued in the name of Parsee Punchayet). On 24th June 2004, the MCGM threatened to terminate the Letter of Intent in favour of the 2nd Defendant–Association, which then filed Writ Petition No. 1829 of 2004 for a mandamus to execute the lease in its favour. An order of *status quo* in that petition was made on 20th September 2004. A few days later, on 30th September 2004, the Plaintiff filed the present suit.

20. In April 2005 the Plaintiff filed Notice of Motion No. 1115 of 2005. SC Dharmadhikari J made an ad-interim order on 24th June 2005 restraining the MCGM from renewing or executing a fresh lease of Plot A1 and Mahendra Chambers. This was confirmed on 4th October 2005 by DK Deshmukh J (obviously in a time yet within living memory era when Notices of Motion came up for final hearing reasonably soon after ad-interim orders). The 2nd Defendant–Association went in appeal. On 7th March 2007, the

Appeal Court by consent set aside the final order on the Notice of Motion and remanded it for a fresh hearing but without expressing any opinion on the points raised. It clarified that the previous ad-interim *status quo* order would continue.

21. A few further points of note.

(a) On 15th December 2009, the lease for Plot A2 stood transferred by the MCGM to the Plaintiff.

(b) The 2nd Defendant filed its Notice of Motion No. 1320 of 2013 seeking to modify the ad-interim order on the Plaintiff's Notice of Motion.

(c) There is a more recent Government Policy of 15th March 2017 allowing renewal of leases for a further period of 30 years. The Plaintiff has applied for a renewal of the lease.

22. The very short point involved here is whether the MCGM could have, first, claimed a re-vesting of the property to the detriment of the Plaintiff or the Parsee Punchayet (as distinct from any question of vesting or re-vesting as between the MCGM and the State Government); and, second, whether the law permits any lessor, even an instrumentality of the State, to simply re-enter leasehold property in this fashion by giving a notice or pasting it on the site. If this cannot be done in law, then at least in this Notice of Motion, Mr Chinoy for the Plaintiff must necessarily succeed and, consequently, the 2nd Defendant–Association's application for variation of the ad-interim order must fail.

23. I believe it is settled law that in any tenancy or lease, possession can be regained or resumed by the lessor or landlord only in a way known to the law, i.e. either by an appropriate order of eviction and delivery of possession, or by a surrender of the tenancy or lease. Merely marching in is not a known mode of resumption of possession. The reason for this is plain. A lessee is not on the same footing as, say, a trespasser. A lessee's possession position is from the inception *juridical*, i.e. such as the law recognises. A tenant or a lessee may be 'holding over'. The concept of a tenant or lessee holding over is also well-known to law.

24. Mr Chinoy is, therefore, completely justified in his reliance on *State of Uttar Pradesh v Maharaja Dharmander Prasad Singh & Ors*.[1] The facts there were somewhat peculiar but the statement of law on which Mr Chinoy relies, set out in paragraphs 30 and 31, is wholly unambiguous:

> "30. **A lessor, with the best of title, has no right to resume possession extra-judicially by use of force, from a lessee, even after the expiry or earlier termination of the lease by forfeiture or otherwise. The use of the expression "re-entry" in the lease deed does not authorise extra-judicial methods to resume possession. Under law, the possession of a lessee, even after the expiry or its earlier termination is juridical possession and forcible dispossession is prohibited; a lessee cannot be dispossessed otherwise than in due course of law. In the present case, the fact that the lessor is the State does not place it in any higher or better position. On the contrary, it is under an additional inhibition stemming from the requirement that all actions of**

1 (1989) 2 SCC 505.

> **Government and governmental authorities should have a "legal pedigree".** In *Bishan Das v. State of Punjab*, [AIR 1961 SC 1570 : (1962) 2 SCR 69] this Court said: (SCR pp. 79-80)
>
> > "We must, therefore, repel the argument based on the contention that the petitioners were trespassers and could be removed by an executive order. The argument is not only specious but highly dangerous by reason of its implications and impact on law and order ...
> >
> > Before we part with this case, we feel it our duty to say that the executive action taken in this case by the State and its officers is destructive of the basic principle of the rule of law."
>
> 31. Therefore, there is no question in the present case of the Government thinking of appropriating to itself an extrajudicial right of re-entry. **Possession can be resumed by Government only in a manner known to or recognised by law. It cannot resume possession otherwise than in accordance with law. Government is, accordingly, prohibited from taking possession otherwise than in due course of law.**"
>
> (*Emphasis added*)

25. The emphasised portion shows, *prima facie* that the MCGM had no authority in law whatsoever to merely give notice of re-entry, paste some notice on the building, and to then claim that it had taken back possession. The observations in paragraph 31 of the Supreme Court decision of a government appropriating to itself an

extra-judicial right of re-entry seem to me to apply entirely to a case like this. The words of the Supreme Court are clear, and this will apply whether the authority is the MCGM or the State Government. Possession can be resumed only in accordance with law, i.e. in due course of law. It cannot be by forcible entry or by pasting notices. I believe this is of importance to this day, throughout the city, wherever properties or plots are held on lease whether from the MCGM or the Collector representing the State Government. Merely putting up large boards that the property is leasehold does not mean the government is entitled to resume possession otherwise than in accordance with law. That phrase, 'in accordance with law' with all its many variants ('due process of law', 'procedure according to law') means that, like any other lessor — indeed, *more* than any other lessor, for its actions are constrained by constitutional safeguards — the government in any avatar can only resume possession as a lessor of leasehold property only under a valid order and decree of a court of competent jurisdiction, or if the lessee surrenders possession. Acquisition and requisition proceedings stand on a different footing, but we are not concerned with those capacities where the government exercises the police power of the state over property. Merely because the government is the lessor it enjoys no extra-judicial rights over the property to regain possession.

26. The response of the MCGM, therefore, on 21st July 2003 (Exhibit "AA" to the Plaint at page 165) that the leasehold rights in Plot A1 did not subsist since it had taken possession on 2nd May 2003 cannot be sustained.

27. This leaves the question of the minutes of 21st September 2002. The issue before the authority was not at all of possession of the property being with the MCGM or even with the State Government. The entire discussion of vesting and re-vesting was utterly misdirected because that was a matter between the State Government as the superior title holder and the MCGM, and the State Government's policy of allowing the MCGM to renew leases. This required the formality of the State Government to vest leasehold properties in the MCGM so that those leases could be renewed, but those could not be equated or read to mean that the MCGM had resumed, or could resume, possession of any property or that it could give a fresh lease to whomever it liked. To do so, it had to follow the due process of law. It had to obtain an eviction decree and execute it.

28. The Plaintiff's Notice of Motion No. 1115 of 2005 seeks a temporary injunction against the Defendants from interfering with the Plaintiff's possession of the property. The second relief sought is to restrain the MCGM, the Association and its Chairman from receiving any rent from the tenants. Prayer (c) seeks an injunction against renewal of the lease, and this is the subject matter of the presently operative ad-interim order.

29. In my view, Notice of Motion No. 1115 of 2005 must succeed. It is made absolute in terms of prayer clause (a), (b) and (c) with a clarification that it is open to the MCGM to adopt such proceedings as it may be advised in accordance with law regarding the termination of the lease or the resumption of possession.

30. The direct consequence of this, inevitably, is that the 2nd Defendant's Notice of Motion — for modification of the ad-interim order of 24th June 2005, for the appointment of a Receiver and for a direction that lease rent be accepted by the MCGM from the 2nd Defendant — must necessarily fail. Notice of Motion No. 1320 of 2013 is accordingly dismissed.

31. In the facts and circumstances of the case, there will be no order as to costs.

(G. S. PATEL, J)