lgc/Darshan Patil

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL (L) No. 29687 OF 2023
IN
INTERIM APPLICATION NO. 1133 OF 2022
IN
SUIT NO. 42 OF 2022

1. **MUNICIPAL CORPORATION OF GREATER MUMBAI,**
A statutory Corporation under the Mumbai Municipal Corporation Act, 1888 and having its Office at Mahapalika Marg, Mumbai 400001

...APPELLANT (ORG. DEFT. NO.1)

~ VERSUS ~

1. **SAMARATH DEVELOPMENT CORPORATION,**
Through its Managing Partner, Vikas Kamalakar Walawalkar, a Partnership Firm registered under the Indian Partnership Act, 1932 and having its registered address At: 11-A, Suyash, Gokhale Road, (North) Dadar (West), Mumbai 400028

2. **PANKAJ UNIT NO.1 HOUSING DEVELOPMENT CO. PRIVATE LIMITED,**
a company incorporated Under the Companies Act, 1956 having its Its registered office at: Parijat, Gokhale Road (North), Dadar,

Mumbai 400028

3. **PANKAJ UNIT NO.2 HOUSING DEVELOPMENT CO. PRIVATE LIMITED,**
a company incorporated Under the Companies Act, 1956 having its Its registered office at: Parijat, Gokhale Road (North), Dadar, Mumbai 400028

4. **NSJ ENGINEERS INDIA PRIVATE LIMITED,**
a company incorporated under the Companies Act, 1956 having its registered Office at 18, Shailesh Society, Ganesh Nagar Karve Nagar, Pune 411 052
And its Mumbai office at:
106, Dhatri Darshan, Thakur Complex Near Suraji Hotel, Kandivali (East)
Mumbai 400010

5. **MICHIGAN ENGINEERS PRIVATE LIMITED AND MAHALSA CONSTRUCTIONS PRIVATE LIMITED,**
Being in Joint Venture and having their Address at : D-7, Commerce Centre Coop. Society, 78, Javji Dadaji Marg, Tardeo Road, Mumbai Maharashtra 400034

... RESPOINDENTS NOS. 1 TO 3

6. **SUB DIVISIONAL OFFICER,**
Mumbai Western Suburbs, 9th floor, Administrative Building
Government Colony, Bandra (E), Mumbai 400051

...ORG. PLAINTIFF NOS.4 TO 6, ORG. DEFT. 2 TO 4

WITH
INTERIM APPLICATION (L) NO. 29692 OF 2023
IN
APPEAL (L) NO. 29687 OF 2023

1. MUNICIPAL CORPORATION OF GREATER MUMBAI,
A statutory Corporation under the Mumbai Municipal Corporation Act, 1888 and having its Office at Mahapalika Marg, Mumbai 400001 ...APPLICANT

~ IN THE MATTER BETWEEN ~

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A statutory Corporation under the Mumbai Municipal Corporation Act, 1888 and having its Office at Mahapalika Marg, Mumbai 400001 ...APPELLANT (ORG. DEFT. NO.1)

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6. **SUB DIVISIONAL OFFICER,** Mumbai Western Suburbs, 9th floor, Administrative Building Government Colony, Bandra (E), Mumbai 400051

...ORG. PLAINTIFF NOS.4 TO 6, ORG. DEFT. 2 TO 4)

APPEARANCES

FOR THE APPLICANT-BMC	Mr G. S. Godbole, Senior Advocate, *a/w Mr Rahul Soman, Ms Vandana Mandlik, Ms Pooja Yadav, i/b Mr Sunil Sonawane.*
FOR RESPONDENT NOS.1 TO 3	Mr Ziyad Madon, *a/w Mr Nilesh Tated, Ms Sharanya Mahimtura, i/b Mahimtura & Company.*
FOR RESPONDENT NO.5	Ms Anjali Helekar, *a/w Shalaka More.*
FOR RESPONDENT-AGP	Ms Jyoti Chavan.
PRESENT IN COURT	Mr Sushant Matkar, *Assistant Engineer (DP)*

CORAM : M. S. Sonak &
Kamal Khata, JJ.

RESERVED ON : 28 August 2024

PRONOUNCED ON : 04 September 2024

JUDGMENT (*Per M S Sonak J*):-

1. Heard learned counsel for the parties finally, in this Appeal.

2. This appeal is directed against the order dated 21 September 2023 ("**impugned order**") made by the learned Single Judge of this Court injuncting the Municipal

Corporation for Greater Bombay ("**MCGM**") from entering any part of the No Development Zone ("**NDZ**") land, admeasuring 158.05 acres described secondly in the Schedule, Exhibit `C' to the plaint and shown in pink hatched lines on the village map (Exhibit `A' to the plaint) either for undertaking construction of the Storm Water Pumping Station ("**SWPS**") or otherwise.

3. This appeal was initially placed before the Division Bench of B.P. Colabawalla and Firdosh P. Pooniwalla, JJ. But, on the recusal of one of the learned Judges, the matter was placed before another Division Bench comprising G.S. Kulkarni and Somasekhar Sundaresan, JJ. Again, upon recusal of one of the learned Judges and on the directions of the Hon'ble the Chief Justice made on 12 July 2024, this appeal was placed before this Bench.

4. On this appeal being taken up on 30 July 2024, we directed that it be placed for final disposal, subject to overnight part-heard matters, on 19 August 2024 at 2.30 pm.

5. On 19 August 2024, we made the following order:-

> "1. Heard learned counsel for the parties.
>
> 2. Mr. Godbole, Senior Advocate for the Appellant /Corporation tenders an additional affidavit on behalf of the Corporation. Mr. Godbole submits that in this affidavit, MCGM has offered to deposit an amount of Rs.16,29,45,000/- without prejudice to its contention that the Respondent / original plaintiff have no right, title and

> interest in the suit land, which is in the midst of the Creek. Mr. Godbole clarifies that this amount is assessed based on ready reckoner's rate and no amount towards solatium is included. He submitted that by securing this amount, the MCGM may be permitted to proceed with the construction / installation, which is in public interest.
>
> 3. To the query as to what would be the tentative compensation as per the ready reconer's rate by including the solatium, Mr. Godbole states that the compensation would be in range of Rs.33 Crores or thereabouts. He states that if the Court directs, the MCGM would not be averse to even deposit this amount of Rs.33 Crores in the Court.
>
> 4. Mr. Madon, learned counsel for Respondent No.1 /original Plaintiff requests that this matter be posted on 27 August 2024 to enable him to obtain instructions on the without prejudice offer now made by MCGM in this matter.
>
> 5. Accordingly, list this matter on 27 August 2024 for directions / disposal."

6. This matter could not be heard on 27 August 2024 due to an overnight part-heard matter. It was finally heard on 28 August 2024 with the consent of the learned counsel for the parties and reserved for orders.

7. The learned Single Judge has set out a chronology of events leading to the institution of the suit. Therefore, such chronology is not repeated in this order, disposing of this appeal.

8. The respondents/plaintiffs claim to be the owners of the NDZ land measuring 158.05 acres (including the portion of the bed of Mogra Nallah going through the same), which

forms part of CTS No. 739 corresponding to Survey No. 41 (part) of village Oshiwara ("**suit property**").

9. The appellant-defendant (MCGM) disputes the plaintiffs' claim of ownership and contends that the State Government owns the suit property. The State Government also asserts that it owns the suit property, including Mogra Nallah or Creek.

10. The MCGM proposes to construct and install SWPS amid the Mogra Nallah/Creek and provide a road on the bank of this nallah/creek to facilitate the construction, installation, and maintenance of SWPS. The MCGM claims to have obtained clearance from the Maharashtra Coastal Zone Management Authority ("**MCZMA**") to undertake these works in the No Development Zone (**NDZ**).

11. The respondents/plaintiffs maintain that the MCGM should not be allowed to undertake the proposed work on the SWPS until the State Government/MCGM acquires the suit property and pays the entire compensation and solatium. The learned Single Judge, by the impugned order, has injuncted the MCGM and the State from interfering with the suit property and constructing SWPS until the suit's final disposal. Hence, this appeal against the impugned order.

12. The analysis of the impugned order indicates the following:-

(a) The objection to the maintainability of the suit for want of notice under Section 527 of the Mumbai Municipal Corporation Act ("**MMC Act**") was rejected on the ground that the suit was not for an injunction simpliciter, but the plaintiffs had also sought for declaration of absolute ownership in the suit property. (See the discussion in paragraphs 33 to 35 of the impugned order);

(b) The suit property originally formed part of the estate of the predecessors in title of Byramjee Jeejeebhoy under a Cowl or Grant dated 02 October 1830 on behalf of the East India Company. Ultimately, by Consent Decree dated 15 October 1969 and Consent Judge's Order dated 26 March 1979, the predecessors in title of the plaintiffs, i.e. Oshiwara Land Development Corporation ("**OLDC**"), acquired ownership of the suit property. Since the suit property was the subject matter of the suit or proceedings in which the Consent Decree and the Consent Judge's Order were made, the Consent Decree/Consent Judge's Order could not be ignored at the *prima facie* stage on the ground that they were not registered under Section 17 of the Registration Act. (See the discussion in paragraphs 36 to 41 of the impugned order);

(c) In the past, the MCGM had issued development and construction permissions to OLDC. Similarly, for the acquisition proceedings initiated on the right bank of the Mogra Nallah/Creek, the MCGM/State had acknowledged the plaintiffs as persons with interest in the suit property. Based upon these circumstances coupled with the Consent Decree/Consent Judge's Order, it was held that the plaintiffs had made out a *prima facie* case of ownership of the suit property. (See the discussion in paragraphs 46 and 47 of the impugned order);

(d) The MCGM and State Government's contentions based upon the provisions of the Maharashtra Land Revenue Code and the Salsette Estates (Land Revenue Exemption Abolition) Act, 1951 ("**Salsette Act**") were rejected as *prima facie* not sufficient to displace the plaintiffs' claim of ownership of the suit property;

(e) The MCGM and State Government's contention about public interest outweighing private interest was rejected by distinguishing the decision of the Hon'ble Supreme Court in **Dr Abraham Patani of Mumbai and another Vs. State of Maharashtra and others**[1] (See the

[1] 2022 SCC OnLine SC 1143

discussion in paragraphs 44 and 46 of the impugned order);

(f) In paragraph 48 of the impugned order, it is held that since respondents/plaintiffs have made out a case establishing their *prima facie* ownership, they will suffer grave and irreparable loss if the MCGM/State enters upon their land and starts the construction of SWPS thereby depriving the respondents/plaintiffs of the enjoyment of their land, without any steps towards acquisition and payment of proper compensation;

(g) In paragraph 49 of the impugned order, it is held that the balance of convenience is in favour of the respondents/plaintiffs because if the State/MCGM enters upon the suit land, that would negate the respondents/plaintiffs' claim regarding title and lead to an irreversible interference with their rights.

13. Mr Godbole, the learned Senior Advocate for the MCGM, assailed the impugned order on several grounds. He submitted that the unilateral declarations based upon which the Consent Decree and Consent Judge's Order were made could not bind the State, and based thereon, not even *prima facie* findings could have been reached about the plaintiffs' ownership claim to the suit property.

14. Mr Godbole submitted that, in any event, the Consent Decree or the Consent Judge's Order did not declare or accept any pre-existing right or title. The Judge's Consent Order dated 26 March 1979 acknowledged that the Consent Decree dated 15 October 1969 had conveyed the suit property to the OLDC. He submitted that in such circumstances, the exemption under Section 17(2)(vi) of the Registration Act would not apply, and such Consent Decree or Judge's Consent Order had to be necessarily registered. He submitted the decision in **Mohammade Yusuf and Ors. Vs. Rajkumar and Ors.**[2] was distinguishable, and this case was governed by the Hon'ble Supreme Court decisions in **Bhoop Singh vs. Ram Singh Major and Ors.**[3],

15. Mr. Godbole submitted that under the provisions of the Maharashtra Land Revenue Code and the Salsette Act, the suit property was vested in the State Government and not the plaintiffs or their predecessors in title. He submitted that this aspect has not been adequately considered in the impugned order. Based upon all these, he contended that the *prima facie* finding about the plaintiff's ownership of the suit property is vitiated by perversity and warrants interference.

16. Mr Godbole submitted that, in any event, there was hardly any discussion on the twin aspects of balance of

[2] (2020) 10 SCC 264

[3] (1995) 5 SCC 709

convenience and irreparable loss or injury in the impugned order. He submitted that the suit property was in NDZ, and it is not as if the plaintiffs were using or capable of using the suit property for any commercial purposes. He submitted that the plaintiffs could not force the State Government or MCGM to acquire the suit property when there was a serious dispute about the plaintiffs' title. He submitted that the SWPS project was conceived in public interest inter-alia to prevent recurrent flooding in the locality. All these aspects were most relevant but not considered. Therefore, the impugned order warrants interference.

17. Without prejudice, Mr Godbole submitted that the MCGM was willing to deposit the market price of Rupees Thirty-three crores in the Court to secure the plaintiffs, should they succeed in obtaining a declaration about their title to the suit property. He submitted that if the SWPS project is delayed, the public exchequer will lose crores of rupees because of cost overruns, flood mitigation, pollution, etc. He submitted that the MCGM, representing the public interest in such matters, would suffer irreparable loss and injury that the Petitioners could never be able to compensate. He submitted that the injuries to public interest cannot even be measured in monetary terms in the present case. He submitted that because these aspects have not been considered, the impugned order warrants interference.

18. Ms Chavan, the learned AGP for the respondent-State, submitted that the suit property belongs to the State Government, not the plaintiffs. She submitted that the ownership of the Mogra Nallah or Creek is vested in the State Government under the provisions of the Maharashtra Land Revenue Code, and the burden is weighty on a private party to establish that it is the owner of a nallah or creek. She submitted that the Plaintiffs have not discharged such burden.

19. Ms Chavan submitted that the SWPS project is conceived in the public interest, and any delay in its execution will severely affect that interest. She submitted that if, after trial, it is found that the plaintiffs are the owners of the suit property, they can always be compensated by payment of compensation, solatium, etc. However, the plaintiff's insistence that the State acquires the suit property, even though the State, for good reasons, believes it is the property owner, is not quite equitable. She submitted that since the MCGM is willing to deposit the compensation and solatium amount in this Court, the impugned injunction may be vacated.

20. Mr. Ziyad Madon, the learned counsel for the Respondents-Plaintiffs, defended the impugned judgment and order based on reasons reflected therein. He submitted that the decision in **Bhoop Singh and others** (Supra) relied upon

by Mr. Godbole was considered by the Hon'ble Supreme Court in **Mohammade Yusuf** (supra), and therefore, relying upon **Mohammade Yusuf** (supra), it was correctly held that non-registration of the Consent Decree or Judge's Consent Order was not a bar to their consideration.

21. Mr Madon submitted that the MCGM had issued the development and construction permissions to OLDC, from whom the Plaintiffs claimed the title. He submitted that even when the MCGM/State proposed the acquisition of the property on the right bank of the Mogra Nallah, the Plaintiffs were shown as the title holders. He, therefore, submitted that the MCGM and the State were estopped from denying the Plaintiffs' title to the suit property, and such denial was not in good faith.

22. Mr Madon submitted that there was nothing in the provisions of the Maharashtra Land Revenue Code or the Salsette Act based upon which any dent could be said to have been made to the Plaintiffs' title to the suit property. He submitted that the Additional Collector had rejected a similar contention on 09 January 1965. He also submitted that the observations in the judgment dated 29 August 2022 disposing of Writ Petition No.739 of 2021 and connected Petitions favoured the Plaintiffs' claim to the title of the suit property. He submitted that based on all these materials, the impugned

order correctly concluded that the Plaintiffs had made out a *prima facie* case of owning the suit property.

23. Mr Madon submitted that refusal of an injunction would mean that the MCGM/State would trespass upon the Plaintiffs' suit property without following the due process of acquisition after payment of compensation under the provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. He submitted that in such circumstances, the balance of convenience favoured the Plaintiffs, and irreparable injury would result if the SWPS were allowed to be installed without acquiring and paying full compensation and solatium to the Plaintiffs.

24. Finally, Mr Madon submitted that the Impugned Order was not arbitrary or perverse so as to warrant interference given the law laid down in **Wander Ltd and another Vs. Antox India P. Ltd.**[4]

25. For all the above reasons, Mr Madon submitted that this Appeal may be dismissed.

26. The rival contentions now fall for our determination.

27. It is trite that an applicant seeking a temporary injunction must show a *prima facie* case, balance of

[4] 1990 (Supp) Supreme Court Cases 727

convenience, and that they would sustain irreparable loss or injury if the injunctions were to be refused. All these parameters have to necessarily coexist.

28. The relief of temporary injunction cannot be insisted upon as a matter of right or merely because it may be lawful to do so. Such a relief is equitable and discretionary by its very nature. The discretion must be guided by law, and the Court is bound to consider all aspects of the matter. No hard and fast rules exist to guide such discretion, but it must be exercised with great circumspection.

29. **Brehme v. Watson**[5] held that the power to issue an injunction should be exercised with great caution and only where the reason and necessity are clearly established. The power to grant a temporary injunction must be exercised cautiously and only upon clear and satisfactory grounds; otherwise, it may work the greatest injustice (See **Phulwati v. Munna Lal**[6],). The exercise is attended with no small danger, both from its summary nature and its liability to abuse. Otherwise, instead of becoming an instrument to promote public and private welfare, it may become a means of extensive and, perhaps, irreparable injustice (*See Story's Equity Jurisprudence, section 1293*).

[5] 67 F 2d 359

[6] AIR 1983 All 20

30. At the same time, the caveat in **Wander Ltd.** (supra) also cannot be ignored. This provides that the Appellate Court would not interfere with the exercise of discretion of the Court of first instance and substitute its discretion except where the discretion has been shown to have been exercised arbitrarily, capriciously or perversely or where the Court had ignored the settled principles of law regulating grant or refusal of interlocutory injunction.

31. The *prima facie* finding on the maintainability of the Suit, even though no notice was served under Section 527 of the MMC Act, does not warrant any re-visit at this stage in this Appeal. So also, on an overall assessment of the material on record and given the discipline in **Wander Ltd.**(supra), we are inclined to proceed on the premise that the Plaintiffs have made out a *prima facie* case of ownership of the suit property. At the same time, we cannot say that the MCGM/State's version regarding the ownership of the suit property is frivolous or not arguable. Our reason for proceeding on this premise is mainly because the findings on this aspect in the Impugned Judgment and Order cannot be styled as arbitrary, capricious or perverse.

32. Still, we think that Mr Godbole's contention that Section 17(2)(vi) of the Registration Act applies only in situations where any pre-existing right or title is declared or accepted by

the parties to the consent terms and that the said provision would not apply if some right or title in immovable property is created or conveyed by the consent terms does not appear to have been adequately considered in the impugned order. This contention raises an arguable issue that requires deeper examination at the final hearing of the suit.

33. The impugned order places the most significant emphasis on the Consent Decree dated 15 October 1969 and the Consent Judge's Order dated 26 March 1979 to hold that the Plaintiffs have made out a *prima facie* case of title to the suit property. The Consent Decree dated 15 October 1969 was admittedly made in Suit No.660 of 1968, seeking specific performance of an agreement of sale dated 25 January 1965. Therefore, there was no declaration of pre-existing rights in the suit and, consequently, in the Consent Decree. Similarly, the Consent Judge's Order dated 26 March 1979, in turn, purports to declare that the Consent Decree dated 15 October 1969 shall operate as a conveyance in favour of OLDC from whom the Plaintiffs claimed title. Therefore, the question as to whether the decision in **Mohammade Yusuf** (supra) would apply to such facts was arguable. At least the defence raised by the MCGM and the State was not some frivolous defence to avoid acquiring the suit property.

34. The decisions in **Bhoop Singh** (supra), **Phool Patti and Anr. Vs. Ram Singh (Dead) Through Lrs. and Anr.**[7] or even **Ratanlal Sharma Vs. Purushottam Harit**[8] suggests this would be the correct interpretation of Section 17(2)(vi) of the Registration Act. Still, at the same time, even Mr Madon pointed out that these decisions were considered in **Mohammade Yusuf** (supra). Therefore, at this stage, the rival versions of this issue are evenly poised. Similarly, defences based on the provisions of the Maharashtra Land Revenue Code or the Salsette Act may or may not be ultimately accepted. But such defences cannot be styled as frivolous or raise no arguable issues.

35. For instance, the Plaintiffs are claiming ownership of the Mogra Nallah. Section 20 of the Maharashtra Land Revenue Code provides that all public roads, ditches, dikes, the bed of the sea and harbours and creeks below the high water mark, and of rivers, streams, nallahs, lakes and tanks and all canals and watercourses, and all standing and flowing water, and all lands wherever situated, which are not the property of persons legally capable of holding property, and except in so far as any rights of such persons may be established, in or over the same, and except as may be otherwise provided in any law for the time being in force are and are hereby

[7] (2015) 3 SCC 164

[8] (1974) 1 SCC 671

declared to be, with all rights in or over the same, or appertaining thereto, the property of the State Government. Therefore, unless the plaintiffs made out an apparent case of ownership, some deference is due to the provisions of Section 20 of the Maharashtra Land Revenue Code.

36. The MCGM indeed granted some permissions to the plaintiffs in the past. The acquisition proceedings on the right bank may also have treated the plaintiffs as persons interested in receiving the compensation. However, title issues are not decided only on estoppel or unilateral declarations. The explanation about municipal authorities only relying upon revenue records is not implausible. In any event, given the **Wander Ltd.** (supra) discipline, we proceed on the premise that the plaintiffs have made out a prima facie case of owning the suit property or having a better claim to the suit property than the State.

37. Still, as noted above, a mere *prima facie* case would not suffice to grant an injunction, particularly against a public authority from undertaking the construction of SWPS in the suit property. This is more so because the suit property is land in the No Development Zone. The SWPS is sought to be installed amid the Mogra Nallah or Creek, which is not being used and cannot be used by the Plaintiffs for any purposes. The plaintiffs, therefore, were required to make out a case in

which the balance of convenience favoured the grant of injunction and would suffer irreparable injury or loss were such injunction refused in the facts and circumstances of the present case. In this, the plaintiffs have failed.

38. The expression 'balance of convenience' is not a term of art. All that it means is that the Court when considering a motion for a temporary injunction, must be alive to the aspect of the comparative mischief or inconvenience to the parties which may arise from granting or withholding the injunction. The Court must take care to see that no party is ultimately deprived of the benefit due to it if it turns out that the party in whose favour the temporary injunction was granted was in the wrong.

39. In doubtful cases, if it appears on a balance of convenience or inconvenience that more significant damage would be caused to the defendant by granting the injunction if it turns out afterwards to have been wrongly granted than to the Plaintiff from withholding it if the legal right proves to be in their favour, the temporary injunction would be refused. If, however, the position appears reversed, the temporary injunction would be granted (*See Kerr on Injunctions, pages 24 to 26, Sixth Edition by J.M. Paterson*).

40. The burden lies upon the plaintiff as the person applying for the temporary injunction to show that their inconvenience

exceeds that of the defendant. They must make out a case of comparative inconvenience or mischief entitling them to a temporary injunction. In balancing the comparative convenience or inconvenience from granting or withholding a temporary injunction, the Court would consider what means it has of putting the party who may be ultimately successful in the position they would have stood if their legal rights had not been interfered with (*See Kerr on Injunctions, pages 24 to 26, Sixth Edition by J.M. Paterson*).

41. The expression 'irreparable loss or injury' is defined by Courts in varying languages. It is believed that the characteristics which the Courts should seek as certainly making an injury irreparable, and which the majority of the decisions show to be its essential feature, are: (i) That the injury is an act which is a serious change of or is destructive to, the property it affects either physically or in character in which it has been held or enjoyed; (ii) That the property must have some peculiar quality or use such that its pecuniary value, as estimated by the jury, will not fairly recompense the owner for the loss of it (*See Nelson's Law of Injunctions, page 145, 10th Edition*).

42. In the law of injunctions, the expression 'irreparable injury' has acquired a meaning different from its literal signification. It means an injury for which a fair and

reasonable redress may not be had in a Court of law so that to refuse a temporary injunction would amount to a denial of justice. In other words, where from the nature of an act, the circumstances surrounding the person injured, or the financial condition of the person committing it, it cannot be readily, adequately and wholly compensated with money (*See Nelson's Law of Injunctions, page 145, 10th Edition*).

43. To be irreparable, the injury need not be beyond the possibility of repair or compensation in damages. Where there is a full, complete and adequate remedy in a court of Law for an injury, it is not irreparable. If full compensation can be obtained by damages in an action in that form, equity will not apply the extraordinary remedy of an injunction. In some instances, it is held that the term 'irreparable injury or damage' does not refer to the amount of damage caused but rather to the difficulty of measuring the amount of damage inflicted. An injury is irreparable if there is no certain monetary standard for measuring damages (*See Nelson's Law of Injunctions, pages 145-146, 10th Edition*).

44. Applying the above well-settled principles to the material on record in the present case, the plaintiffs have not pleaded and established that the balance of convenience favours the grant of injunction. Similarly, the plaintiffs have not, in the facts of the present case, made out a case that they

would suffer 'irreparable injury and damage' should the injunction be refused. No injunction could have been granted without establishing these twin requirements and merely based on a prima facie case.

45. In this case, we cannot ignore the nature of the suit property and the character and extent of the threatened infringement. The circumstance that undertaking the construction of the SWPS by a public authority was a project imminently in the public interest was not an irrelevant circumstance. The tremendous urgency of setting up such a project was also not an irrelevant circumstance. Setting up the SWPS amid the nallah or creek was essential to filter the solid wastes that otherwise flow into the sea, clogging the nallah or creek and leading to floods in the locality and pollution of the sea waters. The floods in the locality are a recurrent feature, mainly when the heavy monsoons and the high tides align. The public element involved in the project and the necessity of its early implementation are equally relevant considerations for the grant or refusal of a temporary injunction that could not be excluded.

46. In paragraph 4 of the plaint, the respondent plaintiffs have pleaded that they are seeking a declaration that they are entitled to "*the NDZ land admeasuring 158.05 acres 9 including the portion of the bed of the Mogra Nala flowing*

through the same), which forms a part of CTS No. 739 corresponding to survey No. 41(part) of Village Oshiwara, and a permanent injunction restraining Defendant Nos. 1 to 3 from entering any part of the NDZ land for any purpose."

47. The plaintiffs have described the suit property, i.e. the NDZ land measuring 158.05 acres, secondly in schedule at Exhibit "C" to the plaint. This description reads as follows:-

> "Secondly :
>
> The chunk of land, out of the lands described Firstly hereinabove bearing City Survey No.739 corresponding to Survey No.41 (part) of village Oshiwara, taluka Andheri, district Mumbai Suburban admeasuring 6,39,949.9 square metres equivalent to 7,65,385.54 square yards equivalent to 158.05 acres which is identified in pink hatched lines village map (Exhibit 'A'), which land has been reserved for No Development Zone under 1991 Development Plan and now as Natural Area under the 2034 Development Plan bounded as follows :-
>
> On or towards the North by the creek;
>
> On or towards the South by the 36.60 metre wide Development Plan Road beyond which are buildings of Shree Swami Samartha Co-operative Society; Yamuna Nagar and Millat Nagar;
>
> On or towards the East by creek/nala, beyond which lies village Pahadi Goregaon;
>
> On or towards the West by land which is reserved for Sewerage Purification Work and is described Firstly in the Third Schedule hereinabove."

48. In the list of documents furnished by the plaintiffs, the document at Serial No. 30 acknowledges that the suit

property is reserved for a Storm Water Pumping Station on the D.P. Sheet, which is annexed to the D.P. remarks wherein the land reserved for Pumping Station is referred to as "*RMS6.1 (Storm Water Pumping Station) (739(PT):12941sqm*".

49. Thus, the plaintiffs' property is in the No-Development Zone (NDZ). The plaintiffs have themselves pleaded that the suit property was shown as reserved for a No-Development Zone in the 1991 plan and that it is now shown as a 'natural area' in the 2034 development plan. Some photographs were produced on record which show that the SWPS was to be constructed in the middle of the Mogra Nallah (as the plaintiffs choose to describe it) or the Mogra Creek (as the MCGM and the State Choose to describe it). Whether it is a nallah or creek makes no significant difference. The proposal is to construct the SWPS amid this water body, ultimately linked to the sea. A small road is proposed to be built on the banks of this nallah or creek only to provide access to the construction site and to facilitate the eventual operation of the SWPS.

50. Under the CRZ notification, several restrictions exist for undertaking activities in an area classified as NDZ. Similarly, there are several restrictions on the user of an area classified as a 'natural area' in a development plan. MCGM claims to

have obtained a clearance from the MCZMA for constructing and operating SWPS, which, according to them, is one of the few permissible activities in this No Development Zone.

51. Mr Godbole explained that this SWPS will filter solid waste such as plastics and prevent such waste from choking the nallah or the creek. He submitted that such filtration would also prevent such waste from entering the sea, polluting the sea and the marine life therein. He submitted that SWPS was a dire necessity on account of the recurrent flooding in the area, particularly when the monsoons and high tides align. He submitted that SWPS would pump the water into the sea in such a situation and thereby control flooding of densely populated areas.

52. Mr Godbole submitted that earlier, this project was proposed on the right bank of the creek, and some compensation amount was deposited under the mistaken belief that the plaintiffs might be the persons interested in receiving such compensation. However, he submitted that this site was abandoned for technical considerations after experts opined that setting up SWPS amid the creek was most advisable. He submitted that experts had opined that constructing SWPS amid the creek was the best way to pump excess water into the sea and control flooding in the densely populated locality.

53. Given the nature of the suit property described by the plaintiffs themselves and the eminent public interest involved in constructing and operationalising SWPS at the earliest, we do not think that the plaintiffs have established that the balance of convenience favours the grant of any injunction against the MCGM or the State in this matter. Suppose such an injunction is granted or continued. In that case, MCGM, which is a public body, will either have to abandon all its objections to the plaintiffs' title claim to the suit property and proceed to acquire the suit property or indefinitely delay the public project of the construction of SWPS.

54. The plaintiffs are builders/developers. The suit property, as it presently stands, is quite useless to the plaintiffs in the sense that the plaintiffs are in no position to use this property for any construction or development purposes. The suit property is in the No Development Zone. It forms a part of the natural area cover, so the suit property cannot be exploited for any commercial purposes of construction/development. The prospect of the plaintiffs being able to construct anything amid the nallah or on its banks is most bleak, if not impossible.

55. Therefore, the plaintiffs cannot be said to be presently "using" or "enjoying " the suit property even if we proceed on the premise that a nallah or a creek could be the subject of

private ownership, notwithstanding the provisions of the Maharashtra Land Revenue Code and other laws dealing with this subject. The plaintiffs have also not made out any case of nuisance or that such construction could affect any other portion of their nearby properties.

56. Considering all these aspects, we cannot say that the balance of convenience in this case favours the grant or continuance of the injunction. The inconvenience to MCGM/State and the members of the public who would be the beneficiaries of the SWPS is far more significant than the inconvenience, if any that the plaintiffs might have to suffer if the injunction is refused.

57. Much more significant damage would be caused to the MCGM/State by granting or continuing such an injunction if it ultimately turns out that the plaintiffs cannot be granted the declaration of title, which is the main relief they seek in the suit. Besides, this is a case where the defendants are the MCGM/State. Therefore, it cannot be the plaintiffs' case that the MCGM/State would not be in a position to suitably compensate the plaintiffs with the total market value and solatium should the plaintiffs succeed in obtaining a declaration of title to the suit property. The MCGM has offered to deposit upfront an amount of Rupees Thirty-three crores assessed on the ready reckoner rates should the injunction be

vacated and the plaintiffs succeed in establishing their title claim to the suit property.

58. From the pleadings and submissions, the plaintiffs insist that the MCGM must first acquire the suit property by paying the total price and solatium and then proceed with the project of public importance and interest. This is much before the plaintiffs finally established their title claim to the suit property. Based on a prima facie determination, the MCGM or the State cannot be forced to acknowledge the plaintiffs' alleged title and proceed to acquire the suit property or delay a project of utmost public importance until the suit concludes. Such an approach is hardly equitable. The equitable and discretionary jurisdiction cannot be exercised for such purposes. Instead, an equitable arrangement would be to secure the compensation amount for the plaintiffs without holding the public project to ransom.

59. This is also not a case in which the plaintiffs have pleaded or established any case of irreparable injury or damage. The plaintiffs only want total compensation and solatium, and they want it now, i.e., even before the suit goes to trial and they secure a declaration of ownership. By insisting upon a temporary injunction, the Plaintiffs are virtually demanding that the MCGM and the State abandon their serious objections to the plaintiffs' title to the suit property if this project of public importance is not to be

delayed. Such an approach would even amount to practically decreeing the suit at this stage because no provision was shown to us providing for any "without prejudice acquisition" by the State or the MCGM under the Land Acquisition laws.

60. The injury or loss to the plaintiffs of waiting to receive compensation and solatium until they establish their title can hardly be called irreparable. The compensation or damages are and would be readily ascertainable. Even today, the plaintiffs demand total compensation and solatium for the suit property before their title claim is decided. Therefore, it is not as if the plaintiffs cannot be adequately compensated should the injunction they seek be refused.

61. But if the injunction is now granted or continued, and later on, the plaintiffs fail to establish their title, the loss or injury that the MCGM or the public would suffer would be irreparable. The project costs would spiral substantially. Given the nature of the public project and the necessity of its early completion, the injury to the public interest would not even be capable of being measured in terms of money. Thus, in this case, the irreparable loss would be caused to the public interest if a project of this nature and magnitude is delayed based upon title claims yet to be finally established.

62. As noted above, In paragraph 48 of the impugned order, it is held that since respondents/plaintiffs have made out a case establishing their *prima facie* ownership, they will suffer

grave and irreparable loss if the MCGM/State enters upon their land and starts the construction of Storm Water Pumping Station thereby depriving the respondents/plaintiffs of the enjoyment of their land, without any steps towards acquisition and payment of proper compensation.

63. Similarly, in paragraph 49 of the impugned order, it is held that the balance of convenience is in favour of the respondents/plaintiffs because if the State/MCGM enters upon the suit land, that would negate the respondents/plaintiffs' claim regarding title and lead to an irreversible interference with their rights.

64. Apart from the above paragraphs, there is no discussion of the crucial aspects of the balance of convenience or irreparable injury in the context of this case's peculiar facts. Although we proceed on the premise that a prima facie case or prima facie title was established, the plaintiffs have not established the other essential requirements for securing a temporary injunction, viz., the balance of convenience and irreparable injury. Without establishing these, no injunction can be granted or continued.

65. The plaintiffs did accept that public interest would trump private interest in the context of *Dr Abraham Patani's Decision (supra)*. But they contended that nothing prevented the MCGM or the State from acquiring the suit property for constructing the stormwater pumping station, which was

obviously in the public interest. Now, to insist that the MCGM and the State must, despite their serious objections to the plaintiffs' title claim, must give up all their objections, acknowledge the plaintiffs' ownership claims, and pay compensation of crores of rupees to the plaintiffs does not sound an equitable approach, particularly given the nature of the suit property and the statutory restrictions on its development. Although the facts in Dr Patani's case may have differed from those in the present case, the principle that public interest prevails over private interest was crucial.

66. In Court interventions with public projects, the Hon'ble Supreme Court has held that project delays escalate project costs and burden the public exchequer immensely. Therefore, the Court has to be satisfied that the public interest in holding up a public project far outweighs the cost of carrying it out within time. The Court has held that where a private party is to be secured with an interim order stopping a public authority from proceeding with a public project, the court must provide for the reimbursement of costs to the public should the litigation ultimately fail. The public must be compensated both for the delay in the implementation of the project and the cost escalation resulting from such delay. Unless an adequate provision is made, the interim order may

be counterproductive (See *Raunak International Ltd. v. I.V.R. Constructions*[9]).

67. In **Mahadeo Shelke v. Pune Municipal Corporation**[10], the Hon'ble Supreme Court approved the Appeal court dissolving the interim injunction granted by the trial court. It held that the courts should necessarily consider the effect of such injunctions on the public purpose involved in setting up the public project. The Court held that in granting injunctions against public authorities and preventing them from proceeding with public projects, public interest is one of the material and relevant considerations in either exercising or refusing to grant injunctions. Since the Appeal Court, which granted the temporary injunction, had not adverted to any of such material aspects, the High Court correctly dissolved the injunction, and the Hon'ble Supreme Court upheld such a dissolution.

68. MCGM's offer to deposit the entire compensation amount and solatium was not a circumstance before the learned Single Judge when the impugned order was made. If the plaintiffs succeed in the suit, they will get the deposited amount with accrued interest, subject to MCGM and the State's right to appeal. The plaintiffs have neither pleaded nor established any case of serious injury if the SWPS is installed

[9] 1999 (1) SCC 492
[10] 1995 (3) SCC 33

in the middle of the Mogra Nallah or creek except for saying that this would amount to an infringement of their ownership rights. It is not as if the plaintiffs had planned or could have planned any project amid the nallah or on the banks of the nallah and are now deprived of this business opportunity. There is also no case of any nuisance pleaded or made out should the public project proceed. Even the plaintiffs and the residents of the projects they have developed would benefit along with the other public members once the project is established.

69. *Wander Ltd (Supra)* leaves a window where the settled principles of law regulating the grant or refusal of interlocutory injunctions are not considered. An appeal against the exercise of discretion is an appeal on principle. The principle in this case is that no injunction could have been granted without the plaintiffs pleading and establishing the other essential requirements, viz., the balance of convenience and irreparable injury.

70. Accordingly, as the MCGM offers, it must deposit Rs 33 crores in this Court to Suit No. 42 of 2022 account within six weeks from today. Subject to such deposit, the impugned order and the injunction granted therein shall stand set aside and vacated.

71. The MCGM shall, however, claim no equities, and the construction of the SWPS amid the Mogra Nallah or creek or

the access roads on the bank for facilitating access to the SWPS in suit property shall be subject to final decree in the suit. Needless to say, the MCGM must obtain permission from the prescribed authorities, including the MCZMA, before it undertakes the construction of the stormwater pumping station amid the Mogra Nallah or creek or the access roads on the bank to facilitate access to the station. The vacation of the impugned injunction is not a licence to undertake any activity in the suit property without permission from the prescribed authorities. The deposited amount must be invested and MCGM shall abide by the orders in the suit.

72. All observations in this order are only in the context of the interim arrangements and are not intended to influence the suit's final hearing.

73. This Appeal and the interim applications are disposed of in the above terms without any cost order.

74. All concerned can act on an authenticated copy of this order.

(Kamal Khata, J) **(M. S. Sonak, J)**