

**(1978) 12 BOM CK 0017**

**Bombay High Court**

**Case No:** Misc. Petition No. 969 of 1973

Madhavdas Dwarkadas and  
Another

APPELLANT

Vs

Municipal Corporation of Greater  
Bombay and Another

RESPONDENT

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**Date of Decision:** Dec. 6, 1978

**Acts Referred:**

- Bombay Municipal Corporation Act, 1888 - Section 329(2), 489, 499, 503

**Hon'ble Judges:** S.K. Desai, J

**Bench:** Single Bench

**Advocate:** D.H. Mehta and D.R. Dhanuka, for the Appellant; M.N. Kothari and F.N. P.D'Mello, for the Respondent

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### **Judgement**

S.K. Desai, J.

In this writ application the decision given by the learned Additional Chief Judge of the Court of Small Causes in Municipal Reference No. M/70 of 1970 is impugned. This was a reference to the Court of Small Causes u/s 503 of the Bombay Municipal Corporation Act in respect of expenses incurred by the Commissioner in taking temporary measures u/s 329(2) of the Bombay Municipal Corporation Act.

2. The petitioners before me were the owners of a property which bore Nos. 42-52 at Shaikh Memon Street, Bombay. In the early hours of 4th January, 1967 fire broke out in the said building and the building suffered extensive damage. It was suspected that some bodies were hidden under the debris and for the purpose of searching these bodies as also for protecting the standing portion of the building, certain work was required to be done, including putting up of props. This was done by the contractor. The Municipal Officers certified payment in the sum of Rs. 7,203/-. The owners were thereafter served with the Municipal bill in the amount of Rs. 8,283.45, which was followed by service of the demand notice. However, the owners did not make the payment and the reference was filed in the Court of Small Causes

on 17th January, 1970.

3. It is the case of the corporation that as the building was in a dangerous condition and was likely to fall, temporary measures of pulling down the damaged portion and clearing the debris were taken through one contractor, A.P. Barot, who had billed the corporation in the sum of Rs. 7,203/-. The amount demanded from the owners is made up of the said amount and supervision charges of Rs. 1,080.45. The owners have resisted the claim and the reference on several grounds. It was inter alia, contended that the payment made to the contractor was excessive. It was further submitted that the corporation was not entitled to claim any supervision charges, which amount was determined on a fixed percentage, namely, 15.

4. In support of the reference, the corporation examined four witnesses whose deposition has been summarised in paragraph 4 of the impugned order. On consideration of the evidence led by these four witnesses, the learned Additional Chief Judge opined that there was no substance in the dispute raised by the owners regarding the necessity for taking temporary measures or the extent of these measures. This conclusion appears to be correct. However, it appears that the learned Additional Chief Judge was of the opinion that the owners were not entitled to raise a dispute about the amount of the expenses and, accordingly, he did not allow any cross-examination of the Municipal Officers on these points. In his view, if, in the reference u/s 503 of the Bombay Municipal Corporation Act, the claim was of expenses incurred by the Commissioner for measures taken u/s 329(2), the only dispute that can be raised is about the necessity for taking temporary measures. In his opinion, the amount of the demand was not open to question by an opponent in such reference. For this purpose, the learned Judge has relied on the phraseology of section 489 compared it with the phraseology of section 499 of the Bombay Municipal Corporation Act and has come to the conclusion that the absence of the word "reasonable" in the earlier section requires the conclusion that the quantum of expenses cannot be disputed by the owners. He has also considered the phraseology of section 329(2) of the Bombay Municipal Corporation Act and held that there is a deliberate departure from the phraseology of the other two sections. In section 329(2) the words used are "any expenses incurred by the Commissioner" and, according to the learned Additional Chief Judge, since these were expenses incurred in an extra-ordinary situation, the Commissioner was entitled to claim from the owners the actual expenses incurred and the owners were not entitled to raise a dispute as to the quantum of expenses.

5. Now, to some extent, there is merit in the learned Additional Chief Judge's interpretation of the section quoted by him in his judgment, but the final conclusion which he has drawn appears to me not to be fully justified. The phraseology of the section must have some effect on the Court's decision of such reference, and the effect will be that the Court will not require the Bombay Municipal Corporation or the Commissioner to satisfy that the Corporation or the Commissioner had incurred

only reasonable and proper expenses. The onus will be on the owner, who is resisting the claim to satisfy the Court that for the work alleged to be done the payment is highly exaggerated or grossly inflicted only then he may be able to succeed to that extent against the corporation, even though the corporation may, in fact, have made the payment to the contractor. If the Commissioner or the Corporation has made the payment without checking on the rates, the quantum of work and other relevant matters, it cannot succeed against the owner merely by proof of payment. The absence of the word "reasonable", which has been noted by the learned Additional Chief Judge, must influence to some extent the Court's decision and will govern what is required to be proved by the owner is resisting such a claim. The owner will not be entitled to succeed in the reference fully or partially by satisfying the Court that had the Corporation or the Commissioner been more selective or more choosy, then the work could have been done at lower rates than the ones paid to the contractor. Unless the payment to the contractor is grossly inflated or totally or thoroughly excessive, the owner may not succeed in repelling the claim of the Commissioner. The question then is a question of burden of proof and the degree of what has to be proved by the owner in resisting such a claim. It will not and cannot be that the owners can never dispute the expenses incurred by the corporation, and the portion of the decision which holds that the owners are not entitled to cross-examine the officers or raise a dispute on the quantum of expenses appears to me to be totally erroneous.

6. In this connection, my attention was drawn to the bill of one A.P. Barot, the approved municipal contractor. A copy of the said bill is annexed as Exhibit "D" to the petition. The bill consists of three items, of which only the second item contains details regarding 12 props. Items Nos. 1 and 3 of the bill are lump sum items without any detail and from the bill it is not possible to find out the basis on which the lump sum payment is made. The advocate for the petitioners says that his clients had kept certain details about the men working at the site. According to the petitioners, there was only one gang of about eight persons working for about six days and the total amount payable on any reasonable footing to the contractor, including the contractor's reasonable margin of profit, should not be in excess of about Rs. 1,000/- to Rs. 1,500/-.

7. Since, in my opinion, the burden is on the owners to establish the unreasonableness, the owners would have the right to cross-examine the Municipal Officers concerned in order to find out how the lump sum claim of the contractor was fixed and considered satisfactory by the corporation before the payment was made.

8. It is contended by the Advocate for the petitioners that certain valuable debris material has been removed by the contractor. This will be a point which will be required to be considered in the reference, can the claim of the Commissioner is such reference can be reduced by considering such pleas or whether the owners

should have established the claim in separate proceedings?

9. Since the remand appears to be necessary and since there is considerable passage of time, I think, some observations must be made regarding the manner of future trial. Since the petition has been filed and admitted, the corporation is aware that the matter is at large and it should be further aware of the possibility of remand. Therefore, if the corporation is at this juncture not able to lead the evidence of any particular person and offer the witness for cross-examination, which cross-examination was wrongfully denied by the learned Additional Chief Judge, the blame for such non-production of a document or the witness cannot be laid at the door of the owners and the necessary adverse inference in case of such failure must be drawn against the corporation.

10. It is to be observed that these are just general observations regarding the exercise of judicial discretion and the matter will be completely within the control of the learned Judge of the Court of Small Causes to whom the learned Chief Judge of the Court will assign the matter on the necessary remand being made under this order.

11. In the result, the judgment and order dated 19th July, 1973 will stand quashed and the matter is remanded back to the Court of Small Causes for proper disposal of the reference in accordance with the observations made in this judgment. The parties will be at full liberty to lead further evidence. The Municipal Officers will be subject to cross-examination and can be recalled for the purpose. As the matter is an old matter, the learned Chief Judge is directed to assign the same forthwith to an appropriate Judge for expeditious disposal. The writ to go down forthwith. The parties are directed to bear their own costs.