

(2008) 01 BOM CK 0136

In the Bombay High Court

Case No : Writ Petition No. 1909 of 2007

Happy Home Estates

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 17-01-2008

Acts Referred:

Development Control Rules for Greater Mumbai, 1967 — Rule 33(7), 33(9)
Maharashtra Housing and Area Development Act, 1976 — Section 41, 88(3)

Citation : (2008) 3 ALLMR 155 : (2008) 3 BomCR 229 : (2008) 3 MhLj 182

Hon'ble Judges : Kumar Swatanter, C.J.;Devadhar J.P., J

Bench : Division Bench

Advocate : Aspi Chinoy and M.P. Rao, instructed by /, Vaithy and Co, for the Appellant; D.A. Nalawade, G.P. for Respondents 1 to 4, V.M. Parshurami and D.D. Madan and C.U. Singh, instructed by S.A. Sawant, for the Respondent

Judgement

Kumar Swatanter, C.J.—In furtherance to the order of this Court dated 21st February, 2007 in Civil Writ Petition No. 3160 of 2006, filed by the petitioners herein, the petitioners filed a representation before respondent Nos. 1 to 6 alleging that respondent No. 6 and its self-styled President and Secretary had no locus standi or right in relation to the property and/or its reconstruction in relation to non-cessed portion of the property in question. This representation dated 28th March, 2007 was disposed of by respondent No. 5 vide his order dated 11th July, 2007, whereby he rejected the representation of the petitioners and allowed respondent No. 6 to develop the property in question. It permitted the said respondent No. 6 to reconstruct the building with 4 FSI area, a joint venture project with third party builders/developers and submit their proposal for approval of respondent No. 1. This order of respondent No. 5 has been challenged in the present writ petition by the petitioners on the ground that the petitioners have the first right to develop the non-cessed portion of the property and they have been denied such a right contrary to law and the action of the said respondent is contrary to Rules, in violation of the principles of natural justice and MHADA cannot involve itself in commercial activities and make profits.

2. The petitioners, a partnership firm, . claim to be owners of the property admeasuring 3028 sq. yards located at Mithwala Chawl, Sayani Road, Prabhadevi, Mumbai-400 016, bearing Survey No. 1806 and Cadestral Survey No. 1169, Final Plot No. 1006, TPS-II, Mahim Division, Mumbai-400 025 (hereinafter referred to as "the said property"). They had entered into an agreement dated 19th April, 1985 with the erstwhile owners being Aboobaker Kasammiya Ishque and others. Out of the total area admeasuring 2469.38 sq. mtrs., 1048 sq.mtrs. is cessed property and the remaining 1421.38 sq.mtrs. is non-cessed property. In terms of the agreement, the petitioners were put in full use and possession of the property. On 28th December, 1979, Executive Engineer of the Sub-Land Acquisition Officer had issued a notice on behalf of Mumbai Housing and Area Development Board invoking provisions of Section 88 and Sub-section (3) of the Maharashtra Housing and Area Development Act, 1976 (hereinafter referred to as the "MHADA"), in relation to the said land. Part of the premises were demolished in the year 1980. Thereafter, on 6th January, 1981, the same Officer initiated acquisition proceedings in respect of non-cessed portion and a notification to that effect u/s 41(i) of MHADA was issued. This notification was challenged by the erstwhile owners in Civil Writ Petition No. 525 of 1983. During the pendency of the said writ petition, consent terms were recorded on 26th October, 1988, and the writ petition was accordingly disposed of. In terms of the conditions of the letter of intent dated 9th October, 1985, the notification was to be withdrawn and cancelled by respondent No. 1 and the project was to be completed within the stipulated, time in terms of letter of intent dated 9th October, 1985 and all the 62 tenants of the cessed portion were to be rehabilitated. The Housing Board did not make payment of any compensation and they took no steps to acquire the land.

3. It is the case of the petitioners that in terms of the consent terms, the notifications were withdrawn and the terms of settlement had been attained finality. The petitioners sought permission of respondent Nos. 1 to 5 to construct a building to accommodate the tenants. The original owners committed breach of the consent terms and the petitioners were compelled to file a suit being Suit No. 3120 of 1989 seeking specific performance of the agreement. This suit also culminated into filing the consent terms between the parties which were recorded on 18th January, 1990. All the tenants consented to permit the petitioners to reconstruct the building on the petitioners land and list of such people was also annexed to the consent terms. The petitioners forwarded their proposal to the authorities to accommodate 62 tenants.

4. Despite several representations to the Board, no response was received, resulting in filing of another writ petition by the petitioners being Writ Petition No. 1756 of 1993 in this Court. A further consent terms were filed on 22nd September, 1993. It was stated in the consent terms that petitioners were the owners of the said property at all relevant times but despite request of the petitioners, no actions were taken to rehabilitate 174 tenants. The consent terms had also provided that the plot in question Would be divided in the manner so

that the total plot would have contiguous area to both parties. Fresh plans were prepared and the cessed portion was to be redeveloped by the petitioners with the condition of rehabilitating 62 tenements and non-cessed portion was to be developed by the said authority to rehabilitate 112 occupants. According to the petitioners, at no point of time they had any way given up their ownership and no terms of any of the consent terms divested them of their ownership rights. The area was surveyed on 18th March, 1994 and the plan was sanctioned for redevelopment on 6th July, 1995. No effective steps were taken by the authorities for a period of fourteen years whereafter suddenly respondent Nos. 1 to 5 planned to cause redevelopment of the non-cessed portion to a joint venture with respondent No. 6 which was a bogus entity and was just to benefit the builders. This could not have been permitted by respondent Nos. 1 to 6 in face of Clause (6) of the consent terms dated 22nd September, 1993. Various representations moved by the petitioners to respondent No. 1 requesting the authority to initiate steps to cause construction on the non-cessed portion, the authorities did not take any steps and finally vide letter dated 10th March, 1998, the petitioners through their Advocates served a notice upon the Vice-President, Chief Engineer, MHADA and other authorities making the similar request. The petitioners also, inter alia, suggested grant of higher FSI for construction of building on the non-cessed property and, in the alternative, claimed payment of Rs. 50 lakhs to construct the tenements in furtherance to the consent terms.

5. For the first time, the Chief Officer on 8th September, 1998, informed the petitioners that their request to return the non-cessed portion of land for redevelopment could not be accepted as the authorities had decided to take reconstruction scheme on the said property. The petitioners responded to this letter on 4th October, 2001, and informed the authorities that petitioners had already the consent of 95 per cent of the tenants at the time of execution of the consent terms dated 22nd September, 1993 and the decision of the Chief Officer was contrary to law. Two persons by the name of Gattshyam Yeshwant Rautand Rajesh Namdev Kohli, claimed to be the President and Secretary of respondent No. 6 respectively, claimed that they had the right to develop and construct the building and they wanted to effect the ownership rights of the petitioners adversely. Seeing the non-co-operative attitude of the respondents and after serving the notice dated 28th March, 2007, the petitioners still filed another writ petition being Civil Writ Petition No. 3160 of 2006 which was, as already noticed hereinabove, disposed of on 21st February, 2007, directing the respondents to consider the representation of the petitioners in accordance with law and pass appropriate orders.

6. Affidavits-in-reply have been filed on behalf of respondent Nos. 5 and 6. In substance, the facts are really not in dispute but, according to the respondents, the petitioners are not the owners of the property and respondent No. 6 has the right to develop the said property. Respondent No. 6 would be allowed to develop the plot under the provisions of Rule 33(9) read with 33(7) of the Development Control Rules with the result that there will be an additional FSI plus incentive

FSL Respondent No. 5 has stated nothing in detail in the affidavit in reply and they reiterated that the authorities i.e. respondent Nos. 3 to 5 jointly with respondent No. 6 are to develop the said property and as per the consent terms, a plot admeasuring 1421.32 sq.mtrs. stands vested in MHADA along with non-cessed structure standing thereon and they have a right to redevelop the same.

7. While passing the order dated 21st February, 2007, a Division Bench of this Court had noticed that the representation of the petitioners should be dealt with and decided by the respondents. While issuing such a direction, the Court directed the respondents to hear the petitioners and pass order accordingly. The representation submitted by the petitioners in furtherance to the order of the Court has been disposed of vide order dated 16th July, 2007. In the opening part of the order it has been noticed thus:

The property in dispute was previously owned by the petitioners. Later on it was acquired by the Mumbai Building Repairs and Reconstruction Board under the provisions of the Act....

Further, it has been noticed:

Since the property is acquired and owned by MHADA, there is no claim of ex owner in existence.

8. The argument raised on behalf of the petitioners is that both these findings recorded by the Chief Officer are contrary to the record produced before him and in fact are opposed to the consent terms executed between the parties from time to time. There is no doubt that the representation of the petitioners has primarily been rejected on the ground that they are the erstwhile owners and have no right in the non-cessed portion of the property. But for this finding, the order hardly records any of the reasons for rejecting the representation of the petitioners. Various litigations initiated by the petitioners including three writ petitions and a suit ended in filing of consent terms and all of them recorded and gave right to the petitioners. The first paragraph of the consent terms which were recorded on 22nd September, 1993 reads thus:

It is declared, confirmed and recorded that the property more particularly described in the schedule being Exhibit-A hereto annexed and delineated on the plan hereto annexed and thereon shown red colour boundary line, absolutely belongs to the petitioners.

9. In paragraph 8 of the same terms, it has also been recorded that the petitioners agreed that the owners shall develop the cessed property as per the relevant Rules. It was agreed, recorded and confirmed between the parties that non-cessed portion of the property shall be simultaneously developed by respondent No. 3 therein at their own cost and expenses as per relevant Rules. In order to meet this contention, the Counsel for the respondents referred to the representation dated 11th August, 2006 issued by the petitioners to various authorities wherein the petitioners have stated that earlier they were owners of

the property and even if MHADA was owner of the property, preferential right of development of such property was also to be given to 70 per cent occupants who had already given their consent to the petitioners

10. Even in the terms recorded in Civil Writ Petition No. 525 of 1983 on 26th October, 1988, it was specifically stated that the petitioners who were the erstwhile owners would comply with the terms and conditions of the letter of intent dated 9th October, 1985, Exhibit-C to this writ petition. In the document dated 20th November, 1991 filed before the Chief Officer it was stated that the tenants of the cessed and non-cessed building of the premises are willing to take up the new tenements that will be constructed by the authorities on ownership basis.

11. The effect of the consent terms has not been considered by the authorities in the impugned order. There are several supporting documents which do not find any mention in the said order irrespective of the fact that they were produced before the authorities. It is true that the authorities are not required to write detailed order/judgment but they are expected to meet the points urged before the authorities. Such orders should not be contrary to the record produced before the authorities. Even in the representation dated 28th March, 2007, specific allegation was made in regard to breach of the conditions of consent terms and reference was made to other circumstances which have a bearing on the controversy in issue. The consent of 95 per cent of the tenants only to non-cessed portion was also filed. It was specifically averred that in terms of DC Rule 33(7), the Board could not carry out the redevelopment and the petitioners were entitled to the grant of request made to the authorities in their letter dated 11th August, 2006. Once the parameter has not been considered in its correct perspective by the authorities concerned, the impugned order can hardly stand the scrutiny of law. The order is completely silent as to the reason or ground or document on the basis of which the finding of petitioners being not owners of the property has been recorded, that too in complete contradiction to the consent terms dated 23rd September, 1993.

12. In our opinion, the impugned order suffers from an error apparent on the face of record as the material documents on record have been ignored and no basis for coming to a finding of fact has been recorded in the impugned order. Resultantly, we set aside the impugned order and remand the matter to the competent authority for fresh determination in accordance with law.

13. Writ Petition is disposed of accordingly. In the facts of the case, we leave the parties to bear their own costs.