

(2021) 10 BOM CK 0050
In the Bombay High Court
Case No : Writ Petition (L) No.8794 Of 2021

Jugraj Tejraj And Sons & Anr

APPELLANT

Vs

Executive Engineer, E-1 Division, Mbr & R Board & Ors.

RESPONDENT

Date of Decision : 11-10-2021

Acts Referred:

Constitution Of India, 1950 — Article 226
Development Control Regulations For Greater Mumbai, 1991 — Regulation 32, 33(7)
Maharashtra Housing And Area Development Act, 1976 — Section 95A, 95(A)(2)

Citation : (2021) 10 BOM CK 0050

Hon'ble Judges : Ujjal Bhuyan, J; Madhav J. Jamdar, J

Bench : Division Bench

Advocate : Atul Damle, Y.E.Mooman, Akshay P. Shinde, Mayur Khandeparkar, Sanjay Kadam, Sanjeel Kadam, Nitisha Lad, Saylee Rajapurkar, Kadam & Company

Final Decision : Disposed Of

Judgement

Madhav J. Jamdar, J

1. Petitioner No.1 is a partnership firm and Petitioner No.2 is one of the partners of Petitioner No.1. The Petitioners are tenants/occupants in respect of godown bearing No.17-A, Doctors Compound, Dattaram Lad Marg, Chinchpokli (East), Near Chinchpokli Station, Mumbai 400 012. It is the claim of the Petitioners that said godown admeasures 436.21 sq. mtrs. plus 8.14 sq. mtrs. aggregating to 444.35 sq.mtrs. carpet area inclusive of toilet (hereinafter referred to as "tenanted premises").

2. The Petitioners by present Writ Petition filed under Article 226 of the Constitution of India are challenging legality and validity of notice dated 29.12.2020 as well as order dated 23.03.2021 passed by Respondent No.1- Executive Engineer, MBR & R Board, Mumbai. By the impugned order passed under section 95-A of the Maharashtra Housing and Area Development Act, 1976 (hereinafter referred to as "said Act") the Petitioners were directed to vacate

tenanted premises within 48 hours on receipt of said order and to handover possession to the developer i.e. Respondent No.6. By impugned order it was further directed that if Petitioners fail to handover possession of the tenanted premises then without giving any notice action of compulsory eviction under section 95(A)(2) of said Act would be taken.

3. Mr. Damle, learned Senior Counsel appearing for the Petitioners raised four issues.

(i) He submitted that no plan is handed over to the Petitioners showing rehab premises proposed to be handed over in lieu of tenanted premises. Therefore area of rehab premises which will be allotted to the Petitioner can not be verified.

(ii) He submitted that new rehab permanent premises after redevelopment are required to be allotted on ownership basis in the scheme which is being implemented under Regulation No. 33(7) of Development Control Regulations for Greater Mumbai, 1991 (hereinafter referred as "DCR, 1991"). In that behalf he pointed out various provisions of DCR, 1991 and also pointed out various clauses of NOC dated 24.11.2006 and revised NOC dated 30.04.2014. He relied on judgment of this Court dated 15.11.2019 passed in Writ Petition No. 231 of 2016 in the case of Surendra Vishnu Masurkar V/s M.C.G.M. and Anr. and particularly paragraphs 22 and 23 of the same in support of the said contention.

(iii) He submitted that rent in lieu of transit accommodation offered to the Petitioners is not in consonance with as offered to other occupants. Respondent No. 6 - Developer is discriminating Petitioners from other tenants/occupiers.

(iv) He submitted that Respondent No.6 is not executing registered agreement in favour of the Petitioners.

3.1. He submitted that unless all these requirements are fulfilled order under section 95-A of said Act cannot be passed.

4. Mr. Mayur Khandeparkar, learned Counsel appearing for Respondent No.6 raised following contentions :-

(i) He submitted that scope of proceedings under section 95-A of said Act is very narrow. Only requirement under said Section is irrevocable consent by minimum 70 % occupiers, issuance of NOC by M.B.R.R.B. (Board) and providing alternate temporary accommodation to all the occupants. He relied on judgment of this Court reported in 2012(5) Mah. L.J. 229 in Radhika George Vs. MHADA and Others on the point of scope of Section 95A of the said Act.

(ii) He pointed out Clause No.(2) of Annexure-III of D.C.R. 1991 and submitted that only requirement is that occupant shall be allotted rehab permanent premises and same need not be allotted on ownership basis. He submitted that the same can even be allotted on tenancy basis. To support this contention he relied on judgment of Learned Single Judge dated 13.03.2020 passed in Notice of Motion No. 94 of 2020 in Suit No. 203 of 2020 in Nellichery Shivaram Seshadri

and Ors. Vs. Shree Ram Builders and Ors.

(iii) He further submitted Respondent No.6 has filed three eviction suits against the Petitioners in the Small Causes Court, Bombay and therefore allotment of such rehab permanent premises can only be subject to result of said three suits.

(iv) He submitted that Respondent No.6 is ready and willing to provide rehab permanent premises to the Petitioners on tenancy basis of the area which is in Petitioners' possession and till that time he is ready to pay rent in lieu of transit accommodation.

(v) He submitted that rent in lieu of transit accommodation offered to the Petitioner is in accordance with the rent offered to other tenants. The tenanted premises were used for godown purpose and Petitioners are comparing the rent offered to them with the rent which is offered to shops/showroom etc. He pointed out that the rent as being paid to tenant of shops/showroom is also reduced in view of pandemic. Respondent No.6 is ready to pay Rs.1,31,000/- p.m. as rent towards transit accommodation to the Petitioners. Said rent is in accordance with the rent paid to the other commercial occupants.

4.1. Thus, he submitted that no interference in the impugned order is called for.

5. Mr. Damle, learned Senior counsel of the Petitioner as regards order passed by learned Single Judge in the case of Nellichery Shivaram Seshadri (supra) relied on behalf of Respondent No.6 submitted that the Suit was withdrawn and thereafter Writ Petition was filed.

6. Mr. Akshay P. Shinde, the learned Advocate appearing for Respondent Nos.2 to 4 supported the impugned order.

7. Submissions made by learned Counsel for the parties have received the due consideration of the Court.

8. Both the parties have relied on voluminous correspondence and various documents. Various contentions are raised in the Writ Petition and Affidavits/ Rejoinder filed by respective parties. However, we are only dealing with the contentions argued before us. We will make reference to the correspondence and documents which are relevant for the purpose of deciding the rival contentions argued on behalf of both the parties.

9. In the present case redevelopment scheme is being implemented under Regulation 33(7) of D.C.R., 1991. Earlier NOC issued by Board is dated 24.11.2006 when permissible FSI was 2.5. Thereafter regulation 33(7) was amended on 14.08.2013 increasing permissible FSI to 3. On the basis of said amended provision revised NOC was issued on 30.4.2014. Therefore, it is necessary to consider relevant provisions of D.C.R., 1991 as amended on 14.08.2013 as well as relevant terms of NOC dated 24.11.2006 as modified by NOC dated 30.04.2014.

(i) Regulation 33(7) of D.C.R., 1991 inter-alia provides that for reconstruction/

redevelopment to be undertaken by Co-operative Housing Societies of existing tenants or by Co-operative Housing Societies of landlords and/or Occupiers of cessed buildings existing prior to 30.09.1969 in Island City, which attracts the provisions of said Act, the floor space index (FSI) shall be 3 on the gross plot area or the FSI required for rehabilitation of existing tenants plus incentive FSI as specified in Appendix III, whichever is more.

(ii) Regulation 33(7) of D.C.R., 1991 makes reference to Appendix III. Clause 1(a) of Appendix III of D.C.R., 1991 provides that the new building may be permitted to be constructed in pursuance of an irrevocable written consent by not less than 70 per cent of the occupiers of the old building. According to clause (b) all the occupants of the old building shall be re-accommodated in the redeveloped building. Clause (2) specifies about rehabilitated area to be allotted to the occupiers. In case of non-residential occupier the area to be given in the reconstructed building is specified as equivalent to the area occupied in the old building. Clause (3) provides that the list of occupants and area occupied by each of them in the old cessed building shall be certified by the Mumbai Repairs and Reconstruction Board and the irrevocable written consent as specified in Clause 1 (a) above shall be certified by the Board. Clause (4) provides that the tenements in the reconstructed building shall be allotted by the landlord/occupants co-operative housing society to the occupiers as per the list certified by the Mumbai Repairs and Reconstruction Board. Clause (16) provides that each residential/non residential occupant shall be rehabilitated only for carpet area mentioned in clause (2). Clause (17) provides that a corpus fund is to be created by the Developer which will take care of the maintenance of the building for a period of 10 years. Clause (18) provides that restriction on transfer of tenements shall be governed by provisions of the Rent Control Act till co-op. society is formed and after that the same shall be governed by the provisions of the Maharashtra Co-op. Society's Act. Clause (19) is regarding non deduction of non-cessed structure area in the scheme of 33(7) for FSI purpose. The said clause provides that in case of mix of the structures i.e. cessed and non cessed structures and if the area of non cessed structures existing prior to 30th September 1969 and area of land component under non-cessed structure works out upto a limit of 25% of plot area, then FSI shall be considered on total plot area. If this area exceeds 25% of the total area, then area above 25% shall be deducted from plot area. FSI for deducted area shall be as per regulation 32 and the remaining plot area shall be as per 33(7).

(iii) The irrevocable written consent to which reference is made in Appendix III of D.C.R., 1991 is to be given in the format specified by MHADA Authorities. The relevant clause of said format of irrevocable written consent is as follows :

"Clause 7 - The scheme of redevelopment is clarified by the Owner/Developer along with proposed building plan, amenities to be given in the new building, likely maintenance charges of new tenement, arrangement of transit accommodation during course of reconstruction etc. and I/We have satisfied with

the same accepted without any hesitation, force and coercion from anybody".

(iv) Section 95-A of said Act makes reference to the No Objection Certificate (NOC) issued by the Board. Thus it is necessary to see various terms and conditions of the NOC granted in favour of Respondent No.6 by Board for redevelopment of the said property. The initial NOC is dated 24.11.2006 and thereafter revised NOC was granted on 30.04.2014 by which certain terms and conditions of NOC dated 24.11.2006 were modified. The relevant terms of NOC dated 24.11.2006 as modified by NOC dated 30.04.2014 are as follows :

(a) All the occupants of the old building shall be re-accommodated in the redeveloped building. Each occupant shall be rehabilitated and given the equivalent carpet area as occupied by him for residential purpose in the old building subject to the minimum carpet area of 27.88 sq.mt. (300 sq.ft. fixed) and/or maximum carpet area 70 sq.mt. (753 sq.ft.) as provided in the said Act. In case of non-residential occupier, the area to be given in the reconstructed building will be equivalent to the area occupied in the old building. Accordingly the plans be got approved from M.C.G.M. It shall be noted that the carpet area to be provided to the tenants/occupants will not include fungible area or free of FSI area (clause 1).

(b) There should not be any discrimination in providing rehab area (clause 3).

(c) Restriction on transfer of tenements shall be governed by provisions of Rent Control Act till co.-op. society is formed and after that the same shall be governed by provisions of Maharashtra Co-op. Society's Act. (Clause 4).

(d) During the period of reconstruction, the NOC holder have to provide temporary transit accommodation to the occupiers of old building (clause 9).

(e) As far as possible separate building for rehabilitation of existing tenants and for the purpose of free sale, taking into account the plot area of the captioned property shall be constructed. The NOC holder have to form the independent cooperative housing society for rehab building of tenants as well as for free sale component after giving possession to the existing tenants and prospective buyers. (clause 19)

(f) In case of mix of the structures i.e. cessed and non cessed structures and if the area of non cessed structures existing prior to 30.09.1969, area of land component under non-cessed structure works out upto a limit of 25% of plot area, then FSI shall be considered on total plot area. If this area exceeds 25% of the total area, then area above 25% shall be deducted from plot area. FSI for deducted area shall be as per regulation 32 and the remaining plot area shall be as per 33(7). (Clause 21)

(g) The Board will not be responsible for certifying the built up area of non-cessed structures, if any on the said property. The same shall be certified by developer's licensed architect, as this does not fall within the purview of the Board. The built up area of non-cessed structures on the captioned property, if

any shall be verified by MCGM prior to issue of IOD. (Clause 22)

(h) The NOC holder shall execute agreement with all the tenants/occupants stating therein the rehabilitation area agreed to be provided apart from other terms and conditions. Copy of such agreement shall be submitted to MHADA/MCGM before issue of Commencement Certificate by MCGM. (Clause 23)

(i) The proposal for issue of NOC for obtaining occupation certificate from MCGM to the newly constructed building will have to be submitted in the office of the Executive Engineer, "E" Divn/MBRRB alongwith the following documents/information :

(a) Copy of approved plan alongwith copy of IOD & C.C. from M.C.G.M. The name of the occupiers against concerned tenements proposed to be allotted in new building should be clearly shown in the plan alongwith carpet area to be given. Matching statement i.e. name of occupant, room number, existing area and proposed allotted area.

(b) The concerned Architect & NOC holder/developer should give certificate that the newly constructed building is in accordance with the plans approved by MCGM and the tenements constructed for rehabilitation of the occupiers of cessed building are as per the areas and amenities as prescribed in the agreement executed with the occupiers.

(c) Certified copies of agreements executed between the occupiers and NOC holder/developer.

(d) Photographs of the newly constructed building taken from various angles. (Clause 14)

(j) A corpus fund will have to be created by the developer which will take care of the maintenance of the new building for a period of 10 years. (Clause 26)

10. Thus, perusal of Regulation 33(7) and Appendix III of D.C.R., 1991 and various terms and conditions of NOC issued in favour of Respondent No.6 - developer and Section 95-A of said Act shows that following are the requirements to be fulfilled before taking action under Section 95-A of the said Act.

(i) Owner/developer to give all information regarding redevelopment scheme to the occupiers alongwith proposed building plans, amenities to be given in the new building, likely maintenance charges of new rehab premises, arrangements of transit accommodation during course of reconstruction etc. Thus, developer is bound to place before occupiers the entire information regarding scheme of redevelopment.

(ii) After considering redevelopment scheme of the developer/ owner and after satisfying about the same occupiers to execute necessary irrevocable consents towards such redevelopment in the format as prescribed by MHADA/Board and such irrevocable consent is to be given by at least minimum 70% of the occupiers.

(iii) MHADA to verify such irrevocable consents and area occupied by occupiers and on the basis of the same to issue necessary "No Objection Certificate" by imposing conditions for facilitating redevelopment scheme in effective and proper manner.

(iv) As regards non-cess structures M.C.G.M. shall verify area occupied by occupiers.

(v) Submissions of plans to the planning authority, namely, Municipal Corporation of Greater Mumbai (MCGM) by showing new rehab permanent premises for all the occupants including those who have not executed irrevocable consent.

(vi) Sanctioning of the plans (I.O.D.) by MCGM.

(vii) Execution of agreement with tenants and registration of the same.

(viii) Developer/owner to allot transit accommodation to the tenants or to pay rent in lieu of transit accommodation. Such transit accommodation or rent in lieu of transit accommodation is to be provided till possession of rehab permanent premises is handed over to the tenants/occupants.

(ix) The tenants/occupants to vacate the tenanted premises.

(x) MCGM to issue commencement certificate for reconstruction of the building. For said purpose NOC holder to submit agreement executed with all the tenants/occupiers stating therein rehabilitation area agreed to be provided along with other terms and conditions.

(xi) If any tenant/occupant obstructs the scheme by refusing to vacate the premises then action can be taken under section 95-A of the said Act.

11. Contention raised regarding scope of section 95-A of the said Act by Mr. Khandeparkar, the learned Counsel of Respondent No. 6 is required to be examined on the basis of above position. Relevant portion of section 95-A of said Act is set out herein below for ready reference:-

"95-A (1)Where the owner of a building or the members of the proposed co-operative housing society of the occupiers of the said building, submits a proposal to the Board for reconstruction of the building, after obtaining the written consent of not less than 70 percent of the total occupiers of that building and a No Objection Certificate for such reconstruction of the building is issued by the Board, to the owner or to the proposed co-operative housing society of the occupiers, as the case may be, then it shall be binding on all the occupiers to vacate the premises.

Provided that, it shall be incumbent upon the holder of such No Objection Certificate to make available to all the occupants of such building alternate temporary accommodation.

(2) On refusal by any of the occupants to vacate the premises as provided in sub-section (1), on being approached by the holder of such No Objection Certificate

for eviction of such occupiers, it would be competent for the Board, notwithstanding anything contained in Chapters VI and VII of this Act, to effect summary eviction of such occupiers."

12. A bare perusal of section 95-A of said Act shows that the following are the mandatory requirements to be fulfilled before action can be taken under the said provision :-

(i) Submissions of proposal to the Board for reconstruction of building after obtaining written consent of not less than 70% of the total occupiers of that building.

(ii) Granting of no objection certificate (NOC) for such reconstruction by the Board to owner/proposed co-operative housing society of the occupiers. It is to be noted that as per Clause (3) of Appendix - III of D.C.R., 1991 "Board" is duty bound to certify list of occupants and area occupied by each of them in the old cessed building and certify the irrevocable written consent submitted by the occupiers before issuance of NOC.

(iii) It is very important to note that certain terms and conditions of NOC are required to be fulfilled before occupants vacate their respective tenanted premises. Other terms of NOC are required to be fulfilled afterwards. Thus NOC holder has to fulfill the requirements of NOC which are to be complied with before asking tenants to vacate their respective premises viz. obtaining IOD, execution of agreement with occupants etc.

(iv) Making available to all the occupants of such building alternate temporary accommodation.

12.1. Thus, it is clear that the aforesaid conditions are mandatory requirements and unless the same are complied with the authority can not issue eviction order under section 95-A of said Act.

13. Submission of Mr. Mayur Khandeparkar, learned Counsel for the Respondent No. 6 is that scope of section 95-A of said Act is very limited. The said submission is required to be examined on the basis of above requirements. According to him, before passing order under section 95-A only aspects which are to be verified by the authorities is that irrevocable consent is given by minimum 70 % of occupiers, NOC is issued by Board and NOC holder has made available to all the occupants alternate temporary accommodation. In this behalf it is important to note the terms and conditions of NOC issued by the Board/MHADA on the basis of which redevelopment/reconstruction scheme is being undertaken. If NOC granted by the Board contemplates certain actions to be taken before asking the tenants to vacate their respective premises, then the said requirements are required to be fulfilled before passing eviction order under section 95-A of said Act.

14. A perusal of the various terms and conditions of NOC granted by Board in favour of Respondent No. 6- developer shows that the developer/owner is

required to comply with following requirements of NOC before initiating action under section 95-A of the said Act :-

14.1 It is admitted position that structure occupied by the Petitioner is non cessed structure. In case of non cessed structure as per clause 22 of NOC Board will not be responsible for certifying the built up area but it has to be verified by MCGM prior to issuance of IOD.

14.2 As per clause No.23 NOC holder is required to execute agreement with all the tenants/occupants stating therein about rehabilitation area agreed to be provided apart from other terms and conditions. Clause 23 further provides that copy of such agreement shall be submitted to MHADA/MCGM before issuance of commencement certificate by MCGM.

14.3 As far as carpet area is concerned, it is claim of the Petitioner that aggregate area occupied by them is 444.35 sq. mtrs. However, it is claim of Respondent No.6 that carpet area occupied by the Petitioners is 436.21 sq. mtrs. The disputed question is whether rehab permanent area to be provided to the Petitioners should be only of carpet area or in addition to that occupant is also entitled for fungible area or free of FSI area. Clause No.(1) of NOC may suggest that the occupants in addition to carpet area are entitled for fungible area or free of FSI area. In any case decision in that behalf will have to be taken by the planning authority i.e. MCGM while sanctioning the plans to be submitted by owners/developers. M.C.G.M. will have to verify whether fungible area is allotted to other tenants and sanction the plans in accordance with law. Authorities of M.C.G.M. as well as of Board/MHADA have to bear in mind that in that behalf Petitioners cannot be discriminated.

14.4. Thus, before getting vacant possession from the Petitioners the above compliances are required to be fulfilled.

15. The above analysis of section 95-A read with various terms and conditions of NOC which are to be complied with before asking the tenants/occupants to vacate their respective tenanted premises clearly show that argument made on behalf of Respondent No. 6 that the authority should only satisfy that NOC holder has consent of not less than 70 % of occupiers, NOC is issued by Board and NOC holder has made arrangement for transit accommodation is without any substance. The developer/owner/society has to comply with the terms and conditions of NOC before asking the tenants/occupants to vacate the tenanted premises.

16. Mr. Khandeparkar, learned Counsel has relied on the judgment of a Division Bench of this Court in Radhika George (supra) to contend about limited scope of section 95-A. Division Bench judgment on which Petitioners have relied was passed in appeal. In the said appeal before the Division Bench challenge was to the order passed by learned Single Judge in Writ Petition and said appeal was dismissed by the Division Bench confirming the order of learned Single Judge. The learned Single specifically concluded that NOC issued by the Board in that

case is valid and binding and all the subsequent actions based on NOC are also valid. The contentions raised by the Appellant/Petitioner in that case were concerning issues outside the scope of inquiry under section 95-A of the said Act. The said issues inter-alia were concerning acquisition of part of land by Railways, doubts regarding ownership of owners/NOC holders regarding entire land as part of land was claimed to be acquired and therefore consequential issues regarding exact area and measurement of the entire plot, clear description of the plot, boundaries of the plot etc. In fact the Division Bench recorded the finding that 70% of the occupiers had given consent for redevelopment scheme, NOC was issued by the Board, IOD was obtained and all other requisite documents were in place. Thus it is clear that even in that case the learned Single Judge and the Division Bench recorded satisfaction that the necessary actions as per NOC before asking the occupants to vacate the tenanted premises were complied with. Therefore reference to IOD and other requisite documents was made by the Division Bench. The observations of Division Bench on which Mr. Khandeparkar has relied to the effect that "what the authority needs to examine is whether it is a collective decision i.e. whether 70% of members have consented, whether permissions like the NOC are in order and whether the developer has provided adequate transit accommodation" also clearly show that requirements of NOC which are to be fulfilled before asking occupants to vacate their respective premises shall be complied with before action under Section 95-A of said Act can be taken. Therefore, the judgment on which Mr. Khandeparkar is relying do not support the contention sought to be raised by him.

17. The further contention raised is whether rehab permanent premises are to be allotted on ownership basis or they can be allotted on tenancy basis.

17.1 Mr. Khandeparkar, the learned Counsel on behalf of Respondent No. 6 submitted that only requirement under Clause No. (2) of Annexure-III of D.C.R., 1991 is allotment of permanent rehab premises. He submitted that there is no provision requiring the rehab permanent premises to be allotted on ownership basis.

17.2 He very heavily relied on Nellichery Shivaram Seshadri (supra) particularly paragraphs 8, 9, 17 and 18. The said paragraphs are reproduced hereinbelow:-

"8. Mr Madon's submission is that the tenants are not seeking possession, and therefore, there is no ouster of jurisdiction of this Court under the provisions of the Presidency Towns Small Causes Court Act read with the Maharashtra Rent Control Act. The tenants are seeking 'enforcement' of this Development Agreement. It matters not, he submits, that not one of the tenants is a party to this Agreement. Plainly read, he says, the Agreement was for the benefit of the tenants, and the provision of permanent alternative accommodation on an ownership basis was part of the consideration between the Parikhs as owners and Shree Ram Builders as developers, for without this requirement, the actual money consideration would have been much higher.

9. This submission by Mr Madon does not, prima facie, commend itself. To begin with, I am unable to see how the tenants can seek specific performance or can claim that the agreement was 'for their benefit'. It is, in fact, more likely that they represented an attendant and unavoidable liability, given the rent-control regime and the statutory limitations on recovery of possession. There is nothing to show that the tenants were paying market rent or were contributing to re-development and that this agreement was in substitution or an alternative to a landlord-tenants joint re-development venture. There is therefore no doubt that the tenants had to be re-accommodated so that the developer could unlock the available FSI under one or the other of available redevelopment schemes (for instance, DCR 33(7) or a similar provision) to put up free sale buildings and perhaps utilize TDR. It simply makes no commercial sense to see an agreement between the owners and the developer as being "for the benefit of" sitting tenants. Second, the submission that this was part of the consideration is complete speculation. Third, there is no legally enforceable right available to any tenant under the Rent Act to get a permanent alternate accommodation on ownership.

17. The application by the Plaintiffs is not to compel the 1st Defendant to complete reconstruction or to give them premises that they can occupy on a tenancy basis but is elevated to a claim by which the Plaintiffs say they are entitled in law to convert that tenancy into ownership as a matter of a contractually enforceable right. Prima facie I am unable to see how this can be said to be correct.

18. For the reasons set out above, there will be no ad-interim relief. I note Mr Godbole's statement that on reconstruction all the Plaintiffs will be given tenancy accommodation in the reconstructed building. His instructions are to make a categorical statement that the 1st Defendant is not willing and not agreeable to convert a single one of these tenancies into ownership."

17.3 He submitted that although said Suit was withdrawn as pointed out by Mr. Damle, the learned Senior Counsel for the Petitioner, the statements of law as laid down is applicable to the present case.

17.4 As regards this aspect Mr. Damle, learned Senior Counsel pointed to various provisions of D.C. Regulation, 1991 specifying that all the occupants of the old building shall be re-accommodated in redeveloped building, formation of co-operative housing society of occupiers, providing corpus fund to take care of maintenance of building for 10 years, specific provision to the effect that restriction on transfer of tenements shall be governed by provision of Rent Control Act till co-op. society is formed and after that the same shall be governed by the provisions of Maharashtra Co-op. Society's Act, occupants not to be discriminated etc. He submitted that cumulative effect of all these provisions clearly show that the new premises are required to be allotted on ownership basis.

17.5 He submitted that what is contemplated by Regulation 33(7) of DCR, 1991 is formation of co-operative housing society of all tenants/occupants. The society contemplated is of members who are allotted specified shares. Members hold their individual premises in society and interest therein on ownership basis as represented by the shares. What is further contemplated is creation of corpus to maintain the building for 10 years. He submitted that if intention is to allot new rehab premises on tenancy basis then such provision would not have been made.

17.6. In the present case other occupants/tenants have been allotted rehab permanent premises on ownership basis and only Petitioners will be allotted rehab permanent premises on tenancy basis which is discriminatory.

17.7 He submitted that provision to the effect that restriction on transfer of tenements shall be governed by provisions of Rent Control Act till co-op. society is formed and after that the same shall be governed by the provisions of Maharashtra Co-op. Society's Act is very significant and clearly shows that provisions of the Rent Control Act will not apply after formation of society.

17.8 Mr. Damle, learned Senior Counsel relied on observations of the Division Bench in Surendra Masurkar (supra) which are reproduced hereinbelow for ready reference :

"23. In short, since the MCGM issued a Commencement Certificate to the Landlord/Developer without protecting the rights/interest of the Petitioner and behind his back, the Landlord/Developer is now determined to deny the roof over the head of the Petitioner, which the Petitioner is entitled to on the same terms and conditions on which the Landlord/Developer has handed over the flats to the remaining seven out of eight tenants. If the Landlord /Developer is allowed to give flats to the tenants as per his choice i.e. on tenancy or ownership basis, the landlords will use the same as a tool to make the tenants sign agreements for permanent alternate accommodation on the dotted line, without the tenants/occupants raising any grievance, which will tantamount to sheer blackmail."

17.9 Mr. Damle, the learned Senior counsel pointed out to para 22 of the order passed in Nellichery Shivaram Seshadri (supra) whereby learned Single Judge has clarified that the observations in the said order are only prima-facie observations. He further submitted that relevant provisions of said Act and D.C.R., 1991/D.C.P.R., 2034 were not pointed out to the learned Single Judge. He submitted that in any case in the present case all the tenants/occupants except the petitioners are allotted permanent rehab accommodation on ownership basis and therefore Petitioners can not be discriminated. In the case before learned Single Judge all the tenants were to be rehabilitated on tenancy basis which is not the case here. He reiterated that on the basis of provisions of D.C.R., 1991/D.C.P.R., 2034 and various terms and conditions of NOC issued by the Board the Petitioners are required to be rehabilitated on ownership basis.

18. Prima facie there is substance in the contentions raised by Mr.Damle, learned

Senior Counsel for the Petitioners. Although we have noted the rival submissions in detail we are not examining these aspects. We deem it appropriate to grant liberty to the Petitioners to adopt appropriate proceedings including filing of separate Writ Petition. We make it clear that all the contentions in this behalf are expressly kept open.

19. As far as contention of the Petitioners that other occupants/tenants are allotted higher rent, Mr. Khandeparkar submitted that the tenanted premises were used as godown and the Petitioners are comparing the rent allotted to other commercial occupiers which were used as shop/showroom etc. Even the transit rent of such commercial occupiers has been reduced in view of pandemic. He submitted that Respondent No.6 is ready to provide rent of Rs.1,31,000/- p.m. and ready to provide the same for 11 months in aggregate. He submitted that said rent is comparable to the rent allotted to other occupants. He submitted that although Respondent No. 6 stated before the Authority that the payment of transit rent would be subject to the eviction suits, however, Respondent No.6 will pay the transit rent irrespective of the decision in the eviction suits.

20. We have already discussed hereinabove scope of section 95-A of the said Act. As per section 95-A it is the responsibility of the NOC holder to make arrangement of transit accommodation during redevelopment and therefore payment of transit rent making the same subject to result of eviction suits will not be in accordance with law and will be violative of section 95-A of the said Act. Mr.Damle, learned Senior Counsel has not seriously controverted the submission of Mr.Khandeparkar, learned Counsel for Respondent No.6 that payment of rent of Rs. 1,31,000/- p.m. will be at par with the rent paid to other commercial occupants in lieu of transit accommodation.

21. However, it is to be noted that there is serious dispute regarding area occupied by the Petitioners. The structure occupied by the Petitioners is non cessed structure and, therefore, MHADA/Board has not verified the same. If as a result of eviction order tenanted premises is demolished then the Petitioners will suffer grave hardship as dispute regarding area will remain unresolved. The other contention is regarding fungible area. The disputed question is whether rehab permanent premises to be provided to the Petitioners should be only of carpet area or in addition to that occupant is also entitled for fungible area or free of FSI area. Mr. Khandeparkar submitted that Respondent No. 6 is not taking any benefit of FSI as regards Petitioners' premises. Clause No.(1) of NOC may suggest that the occupants in addition to carpet area are entitled to fungible area or free of FSI area. In any case decision in that behalf will have to be taken by Planning Authority i.e. MCGM while sanctioning the plans to be submitted by owners/developers. M.C.G.M. will have to verify whether fungible area is allotted to other tenants and thereafter to sanction the plans in accordance with law. Authorities of M.C.G.M. as well as of Board/MHADA have to bear in mind that in that behalf Petitioners cannot be discriminated and aspect that Respondent No.6 is not taking any benefit of FSI will be totally irrelevant.

Another aspect is that agreement is required to be executed before asking the Petitioners to vacate the tenanted premises. On the basis of provisions of D.C.R., 1991 and NOC we have already set out earlier the requirements to be fulfilled. We may note that Respondent No. 1 has without taking into consideration these aspects passed the impugned order.

22. As the Respondent No.1 has overlooked very important aspects we could have remanded the matter by setting aside the impugned order. However it is to be noted that Rehab Building Nos.1, 2, 3 and 5 are constructed and almost all the tenants are given possession of rehab tenements. Out of 4 commercial tenants on the plot Respondent No.6 has settled with all the commercial tenants except the Petitioners. However we can not overlook the requirements to be fulfilled before passing eviction order under Section 95-A of the said Act. Therefore this is a fit case where reliefs sought in Writ Petition filed under Article 226 of the Constitution of India are required to be moulded.

23. In view of above discussion we pass the following order :

(1) Order dated 23.03.2021 passed by Respondent No. 1 is confirmed subject to the following:-

(i) Officials of MCGM shall measure the tenanted premises occupied by the Petitioners within 15 days from today in the presence of Petitioners and Respondent No. 6 or their respective representatives. Architect of both Petitioner and Respondent No. 6 are also at liberty to remain present at the time of carrying out measurement. At the time of carrying out measurement of the tenanted premises, the concerned official of MCGM to certify the area of the tenanted premises and signed copy of the same shall be forthwith given to the Petitioners and Respondent No.6.

(ii) Architect of Respondent No.6 to forward to the Petitioners plan showing rehab permanent premises as per the applicable provisions of law in proposed building No. 4 and submit the same to MCGM for sanction. MCGM to sanction the plans expeditiously by taking into consideration various relevant factors and in accordance with law.

(iii) As soon as sanctioned plans (IOD) are received from M.C.G.M., Respondent No.6 to serve copy of the same on the Petitioners and to execute agreement with the Petitioners regarding alternate permanent rehab premises proposed to be allotted on tenancy basis by incorporating terms as contained in the agreements executed with other occupiers/commercial occupiers. However the same will be without prejudice to the rights and contentions of the parties and subject to the decision regarding claim of Petitioners that rehab permanent premises are required to be allotted on ownership basis.

(iv) Petitioners to vacate the tenanted premises after compliance of direction Nos. (i) to (iii) above. Respondent No.6 to pay to the Petitioners rent in lieu of transit accommodation at the rate of Rs.1,31,000/- per month by paying the

same in aggregate for 12 months simultaneously at the time of handing over possession of the tenanted premises by the Petitioners. This shall be done in the presence of concerned officials of MHADA/Board.

(v) Respondent No. 6 to continue to pay to the Petitioners rent in lieu of transit accommodation in advance for each period of 12 months at the rate of Rs. 1,31,000/- p.m. till handing over possession of alternate permanent rehab premises.

(2) Petitioners are at liberty to adopt appropriate proceedings regarding their contention that rehab premises under Regulation 33(7) of D.C.R., 1991/D.C.P.R., 2034 are required to be allotted on ownership basis. All the contentions in that behalf are expressly kept open.

(3) Writ Petition is disposed of in above terms with no order as to costs.