

(2013) 02 BOM CK 0169
In the Bombay High Court
Case No : Writ Petition No. 974 of 2012

Kagalwala Building

APPELLANT

Vs

Maharashtra Housing and Area Development Authority and
Others

RESPONDENT

Date of Decision : 26-02-2013

Acts Referred:

Citation : (2013) 4 ABR 546 : (2014) 3 ALLMR 615 : (2013) 6 BomCR 609 :
(2014) 4 MhLj 191

Hon'ble Judges : S.J. Vazifdar, J;Mridula Bhatkar, J

Bench : Division Bench

Advocate : Arshad Shaikh, Bomi Ansari and Manoj Kadam, for the Appellant;
Vishwajeet P. Sawant, Vinod Mahadik, Rajiv Narula and A. Dasgupta instructed
by Jhangiani Narula Associates, for the Respondent

Final Decision : Disposed Off

Judgement

S.J. Vazifdar, J.—Rule is made returnable forthwith. The petition is, with the consent of the parties, heard finally. Respondent Nos. 2 and 3 are the Mumbai Building Repairs and Reconstruction Board and the Municipal Corporation of Greater Mumbai, respectively. Respondent No. 4--Aaraaish Developers are a partnership firm.

2. It would be convenient to preface this judgment with a summary of it.

The petitioners members are residents of a building which respondent No. 4 is redeveloping under Development Control Regulation 33(7). Respondent No. 4 is to provide the residents, permanent alternate accommodation in the new building and to pay them compensation for temporary accommodation till they are put in possession of their respective premises in the new building.

In this regard, notarized agreements were admittedly executed by the parties in or about July, 2008, whereunder the residents were to be put in possession within 24 months and till then, the residents were to be paid compensation

towards temporary alternate accommodation. An increase in respect thereof beyond the period of 24 months was also provided. However, the amount of compensation, according to the petitioners, was not filled in, whereas according to the respondents, the same was filled in. We have proceeded on the basis that the amount of compensation and the increment for the period beyond 24 months stipulated therein was filled in.

The fact is that respondent No. 4 has not even commenced construction of the said building. The residents have been out of their homes now for about five years. They, therefore, seek a cancellation of the NOC and the IOD obtained by respondent No. 4 and an order directing the completion of the construction by a third party. In our opinion, these reliefs sought by the petitioners are justified. Respondent No. 4 contends that the delay was only on account of certain disputes between the petitioners and respondent No. 3--BMC. Admittedly, however, the petitioners and the other tenants were not responsible for this delay.

Despite the same, we have decided to grant respondent No. 4's request for another opportunity of completing the construction within 24 months as they have obviously expended a considerable amount of money on the project and have now unconditionally undertaken to this Court to complete the construction of the new building within 24 months irrespective of any difficulties that they may face.

In our opinion, however, they are not entitled to this indulgence unconditionally for that would operate unfairly and unjustly against the petitioners members. Even assuming that the alleged agreements provided for the increase in the rent beyond the period of 24 months which expired in the year 2010, the petitioners members are entitled to a further increase in the rate of compensation towards temporary alternate accommodation on account of respondent No. 4 being granted further time as sought by them. The tenants cannot be expected to obtain temporary alternate accommodation during the extended period at the rate fixed in the year 2008. We have, therefore, enhanced the rate based on agreements entered into between respondent No. 4 themselves with certain other tenants which we will refer to later. Respondent No. 4 have, in fact, benefited substantially by this delay for the prices of real estate in Mumbai have increased enormously from 2008.

3. The petitioners members were residents of a building owned by one Akbarali Jivaji. In the year 2004--The developer informed the petitioners members that they had purchased the building and that they were interested in redeveloping the same. The petitioners members agreed to the redevelopment. In April, 2004, they gave their irrevocable consent for the redevelopment of the property to respondent No. 4. The members executed irrevocable consents under which they were allotted premises in the building proposed to be reconstructed.

4(A). Respondent No. 2--Mumbai Building Repairs and Reconstruction Board, by a letter dated 26th August, 2004, granted a NOC in favour of respondent No. 4

for the redevelopment of the building under DCR 33(7) on the terms and conditions mentioned therein. Clauses 3, 9, 10 and 12 thereof read as under:--

(3) There should not be any discrimination in providing rehab area to all occupants. The minimum and maximum area should be allotted as per rules and no clubbing of areas is allowed.

(9) During the period of reconstruction, you will have to provide temporary transit accommodation to the occupiers of old building. Such Transit Camps if constructed on the same plot should be demolished within one month from the date of Occupation Certificate granted by M.C.G.M. for the reconstructed building.

You shall pay the rent at the rate of Rs. 600/- per month for such tenants/occupants who might be staying in the Board's Transit Camp and at the rate of Rs. 1200/- p.m., if found staying in the multi-storeyed Transit Camp building at Sion from the date of issue of NOC, till they are re-housed in the newly reconstructed building.

(10) If you fail to start the redevelopment work within 12 months from the date of issue of NOC, the Board reserves the right to cancel the NOC, without any notice which please note.

(12) The reconstruction of new building for the rehabilitation of old occupiers shall be completed within a period of 30 months from the date of issue of this NOC. In case you fail to do so, extension to the above time limit may be granted by the Board depending on the merits of the case and on payment of an extension fee of Rs. 5000/- or an amount as decided by Board.

The validity of the NOC was extended by a letter dated 23rd January, 2007.

(B) On 27th July, 2007, respondent No. 3--BMC issued the IOD.

5. The petitioners case is that its members were ready to vacate the premises and approached respondent No. 4 for execution of the agreements for temporary and permanent accommodation. However, at that stage, respondent No. 4 stated that the IOD was awaited and that the agreements would be executed upon the receipt thereof. According to the petitioners after the IOD was issued, they once again called upon respondent No. 4 to execute the agreements for temporary and permanent alternate accommodation stating that they would vacate the premises only after such agreements were executed between the parties.

6. There is a dispute as to whether all the members had executed agreements in writing with respondent No. 4, as alleged by respondent No. 4. Agreements were indeed executed in the year 2008. The question, however, is whether the amount of compensation for temporary accommodation was filled in or not. The petitioners have annexed notarized photocopies of the agreements wherein the amount is left blank. Respondent No. 4, however, relies upon photocopies wherein the amount has allegedly been filled in.

7. One thing is certain-it is, that when the agreements were notarized, the

amount was not filled in. This is evident from the photocopies annexed to the Writ Petition which are notarized but the amount is left blank. Presumably, the case of respondent No. 4 is that the consideration was filled in later. The question then is whether it was filled in unilaterally by respondent No. 4 or whether the consideration was filled in by consent. It is difficult to resolve this controversy in a writ petition. For instance, though the consideration was not filled in when the agreements were notarized, the petitioners admittedly received the rent towards compensation for temporary accommodation for a certain period.

8. We will presume for the purpose of this writ petition that the agreements were, in fact, entered into and that the amount of compensation was agreed upon between the parties. The agreements were purportedly entered into in the year 2008. Clauses 1, 2 and 3 thereof read as under:--

1. The Owner shall provide and allot to the Tenant and the Tenant shall obtain and acquire from the owner a self contained flat/shop, admeasuring 300 sq. ft. (carpet including nitch & elevation area) or (equivalent area the Tenant possess in the Old building) this allotment will be entirely free of cost without construction cost and charges, on Ownership basis in new building to be reconstructed in place of old Structure on the said property.

2. The Tenant shall handover the vacant possession of his/her existing room/shop to the Owner within 30 (Thirty) days of intimation by the Owner to enable the owner to reconstruct the said property whenever called upon by the owner to do so in the manner PROVIDED that the owner in their turn shall provide to the Tenant amount of Rs.../- for per month for 24 months which will be altogether Rs.../- 6 (Rupees...Only) & Rs.../- (Rupees...Only) per Sft. of the existing shop area towards compensation for the temporary accommodation which the Tenant shall arrange by himself/herself, until the completion of the construction work of the said property together with...for a period of another twelve months. In the event the building is not completed within time mentioned hereinafter the owner shall further provide to the Tenant Rs...per month until the construction of the proposed building is completed and the possession is handed over to the Tenant. Further if some tenants does not vacant his/her premises say within 60 days the owner shall deducts his/her the compensation for temporary accommodation rent for 2 months and so on. It is also agreed that all cost, charges and expenses of land incidental to this agreement including stamp duty and registration charges in respect of the tenant agreement thereof shall be borne and paid by the Owner only.

3. The owners shall give to the Tenant the possession of the new flat/shop premises in the newly proposed reconstructed building within a period of 24 months from the date of entire building is vacate. The owner shall provide amenities in the flat/shop to be allotted to the Tenant, as per the list of the amenities annexed herewith.

9. The petitioners members have admittedly been paid a sum of about Rs.

7,500/- per month since then.

10. Respondent No. 4 agreed to provide the petitioners members an additional area of 75 sq. ft. and paid compensation at the rate of Rs. 7,500/- month for the period July, 2008 to June, 2010. However, certain other tenants are being paid a sum of Rs. 15,000/- per month pursuant to separate agreements entered into between them and respondent No. 4. This was pursuant to terms filed between them in proceedings adopted by such tenants in this Court and in the Bombay City Civil Court.

11. Even thereafter, the construction of the building has not even started. There is admittedly a dispute between respondent No. 4 and the BMC. Suffice it to note for the purpose of this Writ Petition that the dispute relates to the alleged assignment of the lease in respect of the property granted in favour of the erstwhile owner, in favour of respondent No. 4. According to respondent No. 4, they are entitled to the unexpired term of lease of 99 years. The BMC is, however, willing to execute a fresh lease only for a period of 30 years. This dispute was the subject-matter of Writ Petition (Lodg.) No. 2104 of 2011, which was disposed of by an order and judgment dated 19th December, 2011. A review petition has been filed in respect of the said order. Respondent No. 4 states that they will take necessary steps in the proceedings or otherwise to execute the lease deed as agreed to by the BMC without prejudice to their rights and contentions that they are entitled to the remainder of the lease period.

12. This brings us to the reliefs claimed by the petitioners. The petitioners contend that respondent No. 4 has been granted sufficient time to complete the construction. They are not concerned with the difficulties that respondent No. 4 may have. The petitioners members have been out of their premises since the year 2008. They, therefore, contended in the first instance that the NOC and the IOD ought to be cancelled and that redevelopment of the building ought to be entrusted to another party.

13. We are not inclined, at this stage, to grant the reliefs as prayed for. In the facts and circumstances of the case, we would grant respondent No. 4 a further opportunity of completing the construction. Respondent No. 4 has already expended a reasonably large sum of money in respect of the project. Respondent No. 4 has agreed to execute the lease with respondent No. 1 for a period of 30 years without prejudice to their rights and contentions that they are entitled to the benefit of the entire unexpired term of the lease. They agreed that irrespective of the outcome of the proceedings they would reconstruct the building as per the scheme. Respondent No. 4 further gives an unconditional undertaking to complete the construction of the building within 24 months from today, irrespective of any difficulties that they may face on account of the disputes regarding the lease. The undertakings are accepted.

14. Having granted respondent No. 4 this indulgence, the question is whether it ought to be unconditional or subject to certain conditions. Mr. Narula, the learned

Counsel appearing on behalf of the respondent No. 4 submits that respondent No. 4 ought not to be required to pay any amount in excess of what has allegedly been stated in the said agreements towards compensation for temporary accommodation which the tenants are to arrange by themselves. He states that the agreements specifically provide for the amount to be paid even in the event of the building not being completed within the stipulated time of 24 months.

15. We are not inclined to agree with this submission. In view of the inordinate delay for which the petitioners members are in no manner whatsoever responsible, they would, strictly speaking, be entitled to the relief of having the NOC and the IOD quashed and the construction being entrusted to a third party. Having been granted the indulgence of another 24 months, they cannot insist that the same ought to be on the same terms and conditions. This, of course, is assuming that the consideration was filled in by consent or that the petitioners members had consented to the same. We proceed on the basis that they had consented to the same. In the facts and circumstances of the case, it would make no difference. To accept Mr. Narula's submission would not only permit respondent No. 4 to take advantage of its own failure to complete the construction within the period stipulated in the alleged agreement and even within a reasonable period thereafter, but to make capital of and to benefit from it. Respondent No. 4 would benefit by this delay for it is a fact of which judicial notice may be taken that prices of real estate have increased in this city enormously since the year 2008.

16. Further, the alleged agreements contemplated the construction being completed and the petitioners members being put in possession of their respective premises in the newly constructed building within 24 months i.e. latest by the year 2010. It is inconceivable that the parties had agreed to accept the amounts allegedly mentioned therein in perpetuity. A view to this effect would entitle respondent No. 4 to delay the construction indefinitely and during this period, pay the petitioners members the amounts allegedly agreed upon in the year 2008. This would be highly inequitable and unfair to the petitioners members who have already suffered substantially by having been kept out of their premises for about five years. If that were the case, we would not have been inclined to exercise our powers in favour of granting respondent No. 4 further time to complete the construction of the building.

17. This brings us to the question of the quantum of increase in the monthly compensation to be granted to the petitioners members.

18. Mr. Shaikh, the learned counsel appearing on behalf of the petitioners relied upon the agreements entered into between respondent No. 4 and certain other tenants. Mr. Narula stated that those agreements were entered into under compulsion as those tenants had filed proceedings and were refusing to vacate. As Mr. Shaikh rightly pointed out the petitioners members cannot be penalized for having cooperated with respondent No. 4 by vacating the premises without

adopting legal proceedings and having had to suffer on account of this inordinate delay. The agreements entered into between respondent No. 4 and the other tenants would be an indication of the fair amount to be paid towards compensation for the temporary accommodation.

19. We will, for the purpose of this writ petition, however, restrict the period for which this additional amount ought to be paid. We will presume that the agreements were entered into between the petitioners members and respondent No. 4 around July, 2008. The lump sum consideration of Rs. 1,80,000/- was paid from July, 2008 to July, 2010. Under the agreements, the tenants were to be put in possession of their premises within 24 months. 24 months from July, 2008, takes us to July, 2010. The agreements provide for enhanced compensation for any delay beyond 24 months. We will presume in favour of the respondent No. 4 that a further extension of 6 months would be reasonable. This would, therefore, take us to the end of the year 2010. In the facts and circumstances of the case, the enhanced rate ought to apply from January, 2011.

20. Mr. Narula contended that an enhancement in the amount of compensation for the extended period would amount to the Court varying an agreement between the parties. The contention is not well founded. We have not varied the terms of the alleged agreement. As we noted earlier, the petitioners would be justified in having the NOC and the IOD quashed on account of respondent No. 4 not having handed over the permanent alternate accommodation within 24 months or even within a reasonable time thereafter. Mr. Narula had re-requested that respondent No. 4 be granted a further opportunity of completing the construction within a further 24 months from today. In granting this extension upon certain conditions we are not altering the terms and conditions of the agreement at all. It is the basis for acceding to the fourth respondent's request for such indulgence.

21. In the result, therefore, we are inclined not to cancel the NOC and IOD issued in favour of respondent No. 4 as a matter of indulgence in view of the above statements made and undertakings furnished on behalf of respondent No. 4 and subject to the condition that respondent No. 4 pay the petitioners members compensation on the basis of the orders/consent terms between respondent No. 4 and the other tenants. In the circumstances, the Writ Petition is disposed of by the following order:--

(i) Respondent No. 4 is granted time up to and including 28th February, 2015, to complete the construction of the building and to hand over the premises therein to the respective members of the petitioners subject to their paying the petitioners members compensation for the temporary accommodation at the rate stipulated in the agreement between respondent No. 4 and the other tenants of residential premises as per the Consent Terms filed in Appeal from Order No. 1098 of 2008 in the Notice of Motion in S.C. Suit No. 1800 of 2008 and the order dated 29th June, 2012 in the said AO and other connected AOs. Exhibits 1 and 2 to the affidavit in reply filed on behalf of respondent No. 4. The amount will be in

proportion to the area occupied by each of the petitioners members qua the area occupied by the parties in the above proceedings of the residential premises. The amount, if any, actually paid shall be adjusted. The arrears shall be paid by 1st June, 2013.

(ii) The undertakings recorded on behalf of respondent No. 4 are accepted.

(iii) Liberty to file separate proceedings for the other reliefs, including regarding the documentation and registration, if necessary.

The writ petition, accordingly, stands disposed of.