

(2011) 01 BOM CK 0110
In the Bombay High Court
Case No : Writ Petition No. 95 of 2011

Lokhandwala Infrastructure Pvt Ltd. and Aliasgar M. APPELLANT
Lokhandwala, Indian Inhabitant, a shareholder and Director
of Petitioner No. 1

Vs

State of Maharashtra and Others RESPONDENT

Date of Decision : 28-01-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Constitution of India, 1950 — Article 226
Maharashtra Co-operative Societies Act, 1960 — Section 72
Maharashtra Regional and Town Planning Act, 1966 — Section 22

Citation : (2011) 2 ALLMR 856 : (2011) 3 BomCR 240 : (2011) 3 MhLj 469

Hon'ble Judges : D.Y. Chandrachud, J;Anoop V. Mohta, J

Bench : Division Bench

Advocate : Virag Tulzapurkar, Pravin Samdhani, Farid Karachiwala, Bhavik Manek and Arnav Shah, instructed by Wadia Ghandy and Co, for the Appellant; D.A. Nalavade, Government Pleader, Milind More, AGP for Respondent No. 1, J.G. Aradwad, for Respondents 2 and 3, S.U. Kamdar Pooja Patil, instructed by C.N. Gole, for Respondent No. 4, S.G. Surana, for Respondent No. 5, J.J. Bhatt, Senior Advocate, Zubin Behramkamdin and Vivek Vashi, instructed by Bharucha and Partners, for the Respondent

Judgement

D.Y. Chandrachud, J.—The subject matter of these proceedings is a Slum Rehabilitation Scheme under DCR 33(10) of the Development Control Regulations for Greater Mumbai. The Petitioners who are developers seek to impugn an order dated 6 December 2010 passed by the Chief Executive Officer of the Slum Rehabilitation Authority by which he has issued directions to process a letter of intent in favour of the Sixth Respondent on the ground that 70% of the members of the cooperative society eligible and present have " " supported the Sixth Respondent at a meeting of the general body. The Petitioners also seek the issuance of an appropriate writ directing the Slum Rehabilitation Authority to process a proposal for redevelopment submitted by them and to consider the

issuance of a letter of intent. Until that is done, the Petitioners have sought an injunction restraining the authority from considering any other proposal or application for the change of a developer.

2. The Fourth and Fifth Respondents are cooperative societies proposed to be formed of slum dwellers of land comprised in City Survey No. 136 Part, 2/136 Part, 110 Part and 109 Part of Lower Parel Division at Worli, Mumbai. On 16 August 2003 the Fourth and Fifth Respondents executed two separate development agreements with the Petitioners. This was preceded by a resolution of the general body dated 13 October 2002. The Petitioners claimed to have obtained consents in writing of 95% of the slum dwellers. On 22 September 2003 a proposal was submitted for the redevelopment of the slum situated on the land under DCR 33(10). The land is owned by the Municipal Corporation of Greater Mumbai. Hence, Annexure II which would certify the list of eligible occupants was required to be certified by the Municipal Corporation.

3. On 30 June 2009 and 6 July 2009 a letter was addressed by the cooperative societies to the Petitioners recording that at a meeting which was held of the general body, it had been resolved to terminate the agreement with the Petitioners on the ground that over the previous six years, no steps have been taken by the Petitioners to develop the property or to rehabilitate the residents. Since there was an arbitration agreement in the development agreements entered into by the Petitioners with the cooperative societies, the Petitioners moved a petition u/s 9 of the Arbitration and Conciliation Act 1996. On 18 September 2009, an order was passed by a learned Single Judge of this Court (Hon"ble Mr. Justice " Anoop V. Mohta) directing that pending the hearing and final disposal of the Petition any decision, if it was taken in a meeting proposed to be held on 20 September 2009 of the society, would be subject to the result of the Petition. A statement was also made on behalf of the society that the termination of the agreement with the Petitioners as well as the appointment of any new builder or developer would be subject to the approval of the Slum Rehabilitation Authority.

4. On 18 September 2009 the Municipal Corporation issued Annexure II by which it certified the slum dwellers who were eligible to participate in the Scheme, being occupants prior to the cut off date of 1 January 1995. Annexure II states that in the censused slum of 1976, there were 500 eligible slum dwellers of which 462 representing 92.4% had consented to the scheme. On 25 February 2010 a meeting was convened of the general body of both the cooperative societies on the direction of the Assistant Registrar, Cooperative Societies of the Slum Rehabilitation Authority (the Third Respondent). A Petition under Article 226 of the Constitution was filed by the Petitioners in order to challenge the notice convening the meeting. A Division Bench of this Court by its order dated 4 October 2010 disposed of the Petition with the observation that the meeting had only been called to ascertain and decide as to which of the two developers had the consent and support for the development of the scheme for the benefit of the

members. The Court observed that since the notice did not purport to decide the rights of any party and the Petitioners were themselves afforded an opportunity to attend the meeting, the Petition was premature. The Petition was thus disposed of. A meeting was convened thereafter on 20 November 2010. The case of the Fourth and Fifth Respondents is that at the meeting, 401 out of the 500 eligible slum dwellers were present and out of them 343 slum dwellers gave their consent in favour of the Sixth Respondent whereas 50 have furnished their consent in favour of the Petitioners. Following this an order was passed on 6 December 2010 by the Chief Executive Officer of the Slum Rehabilitation Authority by which he directed the Engineering Department to process the letter of intent in favour of the Sixth Respondent on the ground that 70% of the eligible slum dwellers who were present at the meeting had supported the resolution in favour of the Sixth Respondent. That decision is sought to be questioned in these proceedings under Article 226 of the Constitution.

5. On behalf of the Petitioners, learned Senior Counsel submitted that

(i) The Petitioners had submitted the first application for redevelopment of the slum in question under DCR 33(10);

(ii) The application submitted by the Petitioners was not rejected at any stage;

(iii) In view of the judgment of a Division Bench of this Court in *Awdesh Vasistha Tiwari and Others Vs. The Chief Executive Officer, Slum Rehabilitation Authority and Others*, , another application by a competing developer could not be entertained until a decision was arrived at on the application based on the association of the Petitioners as developers;

(iv) The Sixth Respondent has not even made an application as developer;

(v) The Petitioners have the consent of 95% of the slum dwellers which has been verified by the Municipal Corporation of Greater Mumbai while issuing Annexure II;

(vi) The consents which were issued on the basis that the Petitioners would be the developers cannot be treated as consents to the Sixth Respondent;

(vii) The procedure that is followed in directing that the letter of intent be processed in favour of the Sixth Respondent is unknown to the law;

(viii) The Third Respondent was not an authority vested with the jurisdiction to verify consents and had no authority in law to call for a meeting of the cooperative societies and (ix) The order by the Chief Executive Officer of the Slum Rehabilitation Authority is perverse. The requirement of the consents of 70% of the slum dwellers cannot be substituted by 70% of the consents of those eligible and present at the meeting.

6. On the other hand, it has been urged on behalf of the Fourth and Fifth Respondents that

- (i) DCR 33(10) read with Annexure IV contemplates a proposal by a cooperative society and Clause 1.14 requires the consents of 70% of the slum dwellers;
- (ii) The developer is merely an agent of the cooperative society whose role arises under Clause 1.4 of Annexure IV while entering into an agreement to provide rehabilitation tenements to the hutment dwellers;
- (iii) DCR 33(10) does not contemplate the consent of 70% of the hutment dwellers to substitute a developer;
- (iv) Section 13(2) of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 does not envisage the consents of 70% of the dwellers to remove a developer and to appoint a new one in his place;
- (v) All that is required is for a society to pass a resolution terminating an earlier developer and appointing a new developer u/s 72 of the Maharashtra Cooperative Societies Act 1960;
- (vi) Even if there is a requirement of a new developer obtaining the consents of 70% of the hutment dwellers, this has been substantially complied with because out of the 500 eligible slum dwellers, 401 attended the meeting at which 343 supported the proposal for the appointment of the Sixth Respondent;
- (vii) Though the development agreement with the Petitioners was entered into in 2003, the Petitioners had remained inactive for over six years and Annexure II was obtained only after the agreement was terminated in July 2009. The dispute in regard to the termination of the agreement is the subject matter of a private dispute between the society and the developer in which the developer has invoked the provisions of Section 9 of the Arbitration and Conciliation Act 1996.

7. Counsel appearing on behalf of the other Respondents have substantially supported the submissions which were urged on behalf of the Fourth and Fifth Respondents.

8. The provisions of DCR 33(10) enure to the benefit of the actual occupants of hutments in slums and pavements who are in occupation with reference to the electoral roll as of 1 January 1995. Clause 1.15 of Annexure IV stipulates that where 70% or more of the eligible hutment dwellers in a slum or pavement in a viable stretch at one place agree to join a rehabilitation scheme, it may be considered for approval. Under Clause 1.14 a Slum Rehabilitation Project shall be considered preferably when submitted through a proposed or registered cooperative housing society of hutment dwellers on site. Under Clause 1.6 an individual agreement shall be entered into by the owner / developer / cooperative housing society / NGO with the eligible hutment dwellers of each structure in the slum / pavement. In a judgment of the Supreme Court in *Ramchandra Mahadev Jagpat and Others Vs. Chief Executive Officer and Others*, the Court has referred to the procedure for submission, processing and approval of Slum Rehabilitation Schemes, tendered before the Court by the learned Solicitor General of India appearing for the Slum Rehabilitation Authority.

The procedure envisages the certification of Annexure II which is a list of hutment dwellers eligible to participate in the Slum Rehabilitation Scheme. Annexure III is prescribed to assess the financial capability of the developer.

9. A Slum Rehabilitation Scheme which is implemented under DCR 33(10) read with Appendix IV does not lie in the realm of a purely private contractual agreement. Undoubtedly, the scheme postulates a cooperative housing society of slum dwellers. Appendix IV of DCR 33(10) clarifies that the provisions will apply to redevelopment / construction of accommodation for hutment / pavement dwellers through owners / developers / cooperative housing societies of hutment / pavement dwellers or by public authorities or by nongovernmental organisations within the limits of Brihan Mumbai. The Scheme regulates the rights of hutment dwellers, the grant of building permission for a Slum Rehabilitation Project, rehabilitation and free sale components in the total floor space index, the construction of temporary transit camps, the relaxation in building and other requirements, development plan reservations and payments to be made inter alia to the Slum Rehabilitation Authority. The Development Control Regulations, it is well settled, constitute subordinate legislation enacted with reference to the provisions of Section 22(m) of the Maharashtra Regional Town Planning Act 1966. Slum Rehabilitation Schemes have a public law element.

10. The execution of Slum Rehabilitation Schemes is impressed with a public character. The lands on which the Scheme is sought to be sanctioned and implemented may be lands belonging to the Municipal Corporation or to the State of Maharashtra or, for that matter, its instrumentalities such as the Maharashtra Housing and Area Development Authority. The title to the land does not vest in the society or in its members at the stage when the Scheme is propounded and subjected for sanction. Where it owns the land, the Municipal Corporation of Greater Mumbai is the authority responsible for issuing a certification of Annexure II containing the list of eligible occupants who can participate in the Scheme. The interest of the Municipal Corporation as the owner of the land is recognized by conferring upon the Municipal Corporation the role of verifying and authenticating who are the actual and genuine occupants of the land as on 1 January 1995. Public land is sought to be utilized in order to further the object of providing dignified accommodation to those living in slums. The cooperative societies of slum dwellers and developers through whom the Slum Rehabilitation Scheme is sought to be implemented facilitate the implementation of the Scheme. The agreements or arrangements that may be arrived at between them cannot be treated at par with purely private or contractual agreements entered into in respect of land belonging to private individuals. The State as the owner of the land upon which a slum is situated has a vital public interest in ensuring that the object for which the land is utilized subserves the purpose of rehabilitation of the slum dwellers. It is in that context that diverse provisions are made by the Development Control Regulations to regulate every stage of the Slum Rehabilitation Scheme, from the submission of the proposals, the evaluation of proposals, scrutiny and verification, grant of sanctions and the actual

implementation of the Scheme. Though a dispute between the cooperative society and its developer has a private element, it is not as if that a recourse to private law remedies is the only available form of redress. The Slum Rehabilitation Authority as the authority which is vested with the power to regulate the implementation of the Scheme and the owners of the land such as the Municipal Corporation or, as the case may be, the State Government are vital components in the implementation of the Slum Rehabilitation Scheme. Their statutory powers to ensure that the Scheme is not misused and is utilized to subserve the public purpose underlying the Scheme is not trammled by private contractual arrangements.

11. In this background, it would now be appropriate to consider the facts of the present case. As we have noted earlier, Clause 1.6 of Appendix IV requires an individual agreement to be entered into by the developer or, as the case may be, cooperative housing society with eligible hutment dwellers. Similarly, under Clause 1.15, 70% or more of the eligible hutment dwellers in a slum must agree to join a rehabilitation scheme upon which it may be considered for approval. The Petitioners have placed on the record the consents which they had obtained from the hutment dwellers. The consents provide in Clause 9 that the hutment dweller concerned is conscious of the fact that the managing committee had appointed the Petitioners as developers; in Clause 12 that during the period of development, the hutment dwellers would be provided with temporary transit accommodation and in Clause 15 that the developer would deposit an amount of Rs. 20,000/for each member with the society for the maintenance of the building of the society. The Municipal Corporation of Greater Mumbai by a letter dated 18 September 2009 to the Deputy Collector of the Slum Rehabilitation Authority directed that certain conditions should be incorporated while issuing a letter of intent to the Scheme. The conditions include amongst others the following requirements:

- (i) The developer shall deposit a capitalized value amounting to Rs. 5.97 Crores with the Municipal Corporation after the sanction of the Scheme by the Slum Rehabilitation Authority;
- (ii) The Slum Rehabilitation Authority would not issue an intimation of approval to the developer without a specific No Objection Certificate confirming receipt of the capitalized value from the developer;
- (iii) The developer would build a separate rehabilitation building for the vacant land tenanted structures (VLT) and to the project affected persons;
- (iv) The society and the developer would treat the VLT structure holders at par with other members of the society; and
- (v) The developer would submit a registered undertaking to pay the capitalized value after sanction of the Scheme.

12. The Municipal Corporation while issuing Annexure II certified that out of 500

eligible slum dwellers, 462 representing 92.4% had consented to the Scheme. Some of these provisions only go to establish that the Municipal Corporation as the owner of the land had a vital interest and was involved in the process of certifying the list of eligible slum dwellers when it issued Annexure II and when it imposed various conditions to secure the proper implementation of the Scheme.

13. In this background, it would now be necessary to advert to the judgment of a Division Bench of this Court in *Awdesh Vasistha Tiwari v. Chief Executive Officer* (supra). The Division Bench consisting of Mr. Justice H. L. Gokhale (as His Lordship then was) and Mr. Justice Abhay S. Oka emphasized that under DCR 33(10) an individual hutment dweller gets a limited right, apart from the right to seek protection from eviction under the Slums Act to obtain a tenement by way of permanent alternate accommodation of 225 sq. ft. in exchange of the hut in his occupation. The Division Bench noted that if 70% of the slum dwellers on a particular area come together and apply after the formation of the proposed cooperative society, the application has to be independently considered in accordance with law. The Division Bench was of the view that the scheme does not contemplate simultaneous consideration of such an application made by a proposed society with an application subsequently made by another proposed society relating to the same land. The application, the Court observed, received first has to be processed independently and it is only if it fails to get 70% support, that the second application has to be examined. The obvious intention, according to the Court, was to avoid unhealthy competition between different builders who are interested in supporting such societies. For, if such a course of simultaneous consideration were to be permitted, unscrupulous persons and builders would try to win over the hutment dwellers who had made an application earlier by another society. In this context, the Division Bench held as follows:

Therefore, it is not desirable that an application which is earlier made and the one which is subsequently filed should be considered together. That is not the scheme provided under D.C. Regulation 33(10). It is necessary that the application which is first received in respect of a particular property by the SRA should be processed and decided first. After decision of the first Application, the second Application made by another society can be considered depending on the result of the first Application. The reason is that none of the societies have any right, title and interest in respect of the property. Such a course will prevent the unhealthy competition between the builders or between the leaders of two groups in a slum area.

14. The judgment of the Division Bench is sought to be distinguished on behalf of the Fourth and Fifth Respondents by submitting that, that was a situation where another society had submitted an application despite the acceptance of a pending application filed initially by an earlier society. Now it is true that in that case there was an application by a particular society which was pending. During the pendency of that application, another application made by a builder was entertained by the Chief Executive Officer of the Slum Rehabilitation Authority.

This, the Division Bench held, was not permissible. The principle which is enunciated by the Division Bench is that where there is an existing application which claims the support of 70% of the slum dwellers, it is but necessary that the merits of that application be evaluated and considered first before any other application is considered. The reason for this is that it would otherwise be possible that unscrupulous elements would exploit the slum dwellers. The Slum Rehabilitation Scheme would then degenerate only into a battle between rival builders who set up opposing groups of slum dwellers ostensibly to pursue their own interest.

15. Now undoubtedly, a developer who has been appointed by a cooperative society is required to fulfill the mandate of DCR 33(10) by securing the implementation of the scheme. Where a developer fails to implement the scheme, that would not preclude the society which represents the interests of hutment dwellers from proceeding to terminate the contract with the developer. The act of termination may, as in the present case, give rise to a private dispute to which a remedy may be available in accordance with the rights which the contractual arrangement creates between the parties. But, where the society seeks to appoint a new developer, it would be necessary that a proper verification and scrutiny is made of the authenticity of the proposal and of the grounds on which the society seeks to enter into a new contractual arrangement. Section 13(2) of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act 1971 inter alia contemplates that where the Slum Rehabilitation Authority is satisfied that the land has not been developed within the time, if any, specified under such conditions as have been prescribed, the authority may determine to develop the land by entrusting it to any agency recognized by it for the purpose. It was urged on behalf of the cooperative society that Section 13(2) operates where a letter of intent is issued to the developer and would have no application where as in the present case a letter of intent was yet to be issued. We are not prepared to accept the submission which has been urged on behalf of the society that a proposed society of slum dwellers is entitled without any scrutiny or regulation of its activities by the statutory authorities to enter into and terminate development agreements at its own whim and fancy without any application of mind by the authorities concerned. To accept such a submission would only lead to a situation of chaos in the implementation of Slum Rehabilitation Schemes. Members of the managing committees of the societies which are still proposed societies would then be at liberty to pursue their own private ends and to switch loyalties between rival builders on considerations of exigency. Once the proposal has been submitted to the authority under DCR 33(10), the authorities are entitled to scrutinize whether a proposal involving the change of a developer is in the interest of the slum dwellers; whether the developer would fulfill the needs and requirements of the scheme and has the necessary capacity to do so and whether the new developer has the consents of 70% of the slum dwellers. There is absolutely no merit in the submission that while the initial proposal needs to have the consents of 70% of

the slum dwellers, a proposal for a change or substitution of a developer need not possess the requisite majority. The acceptance of such a submission would only defeat the object and purpose of the provisions made in DCR 33(10) and Appendix IV and would result in rendering the schemes subject to misuse. Such an interpretation cannot be accepted. We are clearly of the view that the dispute between a society and the developer does not lie purely in the realm of a private contractual dispute. The dispute has an important bearing on the proper implementation of the Slum Rehabilitation Scheme. The dispute has consequences which go beyond the private interests of the society and the developer. The scheme involves other stakeholders in the process including the land owning public bodies and the slum dwellers whose interests are sought to be protected by the scheme.

16. The manner in which the Chief Executive Officer of the Slum Rehabilitation Authority has passed the impugned order leaves much to be desired. The order passed by the Chief Executive Officer is as follows-

The Hon^{ble} High Court's Order is clear.

The decision of the GBR is also clear.

Engg. Deptt. to process the LOI in favour of the developer who has got 70% eligible and present for GBR, Members support i.e. Shri OM Omega Shelters.

17. The Chief Executive Officer was of the view that the order of this Court "is clear". On this aspect, it would be necessary to take note of the fact that in the order of this Court dated 18 September 2009 the learned Single Judge had observed that any decision that was taken in the meeting that was to be held on 20 September 2009 would be subject to the Petition. As a matter of fact, the Court also recorded the statement made on behalf of the cooperative society that the termination as well as the appointment of any builder or developer was subject to the approval of the Slum Rehabilitation Authority. In the subsequent order of the Division Bench dated 4 October 2010 the Division Bench declined to entertain the Petition on the ground that it was premature since the meeting of the cooperative society was convened only to ascertain as to which developer has the consent or support of the members. The Chief Executive Officer of the Slum Rehabilitation Authority proceeded on the basis that the Sixth Respondent had the support of 70% of the members of the cooperative societies "eligible and present" at the meeting of the general body. Now, nowhere in DCR 33(10) has the requirement of those eligible and present been incorporated. Clause 1.15 of Annexure IV requires 70% or more of the eligible slum dwellers in a slum to join a rehabilitation scheme. The Chief Executive Officer of the Slum Rehabilitation Authority has directed the department to process the letter of intent in favour of the Sixth Respondent without as much as verifying as to whether the Sixth Respondent did as a matter of fact have valid consents or agreements with more than 70% of the slum dwellers. Counsel appearing on behalf of the Sixth Respondent states before the Court that 201 out of 247 of the eligible members

of the Fourth Respondent (representing 81.37%) have executed individual agreements and consents in favour of the Sixth Respondent and that 170 out of 211 members of the Fifth Respondent (representing 80.56%) have entered into agreements and consents in favour of the Sixth Respondent. This is a matter which needs to be scrutinized and verified by the Slum Rehabilitation Authority. The Chief Executive Officer of the Slum Rehabilitation Authority preempted the process of verification by coming to the conclusion that a letter of intent should be processed in favour of the Sixth Respondent purely on the basis that 70% of those eligible and present at the meeting of the general body had supported the Sixth Respondent. The Chief Executive Officer of the Slum Rehabilitation Authority ought to have been cognizant of the fact that the Petitioners claimed the consents of 95% of the slum dwellers. Though these consents dated back to 2003, the question as to whether the new developer proposed by the cooperative societies has requisite consents of slum dwellers in excess of 70% needed a proper scrutiny and verification. In the absence of this process having been completed, a direction issued by the Chief Executive Officer, to process the issuance of a letter of intent to the Sixth Respondent is unsustainable and would have to be set aside.

18. We accordingly set aside the impugned order of the Chief Executive Officer of the Slum Rehabilitation Authority dated 6 December 2010. We, however, direct that the Chief Executive Officer of the Slum Rehabilitation Authority after furnishing an opportunity to the Petitioners as well as to the Sixth Respondent, to arrive at a decision as to whether the Petitioners continue to have the support of over 70% of the slum dwellers. In the event that the Chief Executive Officer of the Slum Rehabilitation Authority comes to the conclusion that the Petitioners do not have the support of at least 70% of the slum dwellers, the authority shall consider as to whether the Sixth Respondent has the requisite consent in support of a majority representing at least 70% of the slum dwellers. This exercise shall be completed and carried out after furnishing an opportunity of being heard both to the Petitioners and to the Sixth Respondent and to the Fourth and Fifth Respondents. It would be open to the Slum Rehabilitation Authority to seek a certification from the competent authority in the Municipal Corporation in that regard. Once the aforesaid exercise is completed, the Slum Rehabilitation Authority would be at liberty to proceed further in accordance with law for processing the issuance of a letter of intent.

Rule is made absolute in the aforesaid terms.

There shall be no order as to costs.