

(2012) 06 BOM CK 0090

In the Bombay High Court

Case No : Writ Petition No. 1976 of 2010 and Writ Petition No. 2073 of 2010

M/s. Bevenu Infra Projects Pvt. Ltd. and Another APPELLANT

Vs

The High Power Committee and Others
 Bhikaji Vishnu RESPONDENT
Mahadeshwar and Others and Mahesh Baliram Sawant and
Others Vs The State of Maharashtra and Others

Date of Decision : 14-06-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Maharashtra Housing And Area Development Act, 1976 — Section 88(3), 88(3)(a)

Citation : (2013) 1 ALLMR 799 : (2012) 5 BomCR 784

Hon'ble Judges : R.D. Dhanuka, J;D.Y. Chandrachud, J

Bench : Division Bench

Advocate : Aspi Chinoy, with Mr. Pravin K. Samdani, Mr. Shrikant Shah, Ms. Sheetal Dasgupta instructed by Mehta and Girdharlal in Writ Petition 1976 of 2010, Mr. S.G. Surana with Mr. C.N. Gole in Writ Petition 2073 of 2010 and Mr. S.G. Surana in Writ Petition 2074 of 2010, for the Appellant; Aspi Chinoy with Mr. Pravin K. Samdani, Mr. Shrikant Shah, Ms. Sheetal Dasgupta instructed by Mehta and Girdharlal Respondent No. 5 in Writ Petition 2073 of 2010 and Writ Petition 2074 of 2010, Mr. S.G. Surana with Mr. C.N. Gole in Writ Petition 2073 of 2010 Respondents 15 to 21 in Writ Petition 1976 of 2010, Mr. D.A. Nalavade, GP Respondents 1, 2 and 14 in Writ Petition 2073 of 2010 and 2074 of 2010, Mr. J.G. Aradwad Respondent No. 1 in Writ Petition 1976 of 2010 and Respondent No. 15 in Writ Petition 2073 of 2010 and Respondent No. 14 in Writ Petition 2074 of 2010 and Mr. V.M. Parshurami Respondent No. 3 in all the three Petitions, Mr. Ivor Peter D'Cruz Respondent No. 5 in Writ Petition 1976 of 2010, Respondent No. 4 in Writ Petition 2073 of 2010 and Writ Petition 2074 of 2010 and Mr. Yatin N. Shah Respondent No. 6 in Writ Petition 1976 of 2010, for the Respondent

Final Decision : Dismissed

Judgement

Dr. D.Y. Chandrachud, J.—Rule, made returnable forthwith. Counsel appearing on behalf of the Respondents waive service. With the consent of counsel and at their request the Petitions are taken up for hearing and final disposal. The subject matter of the present proceedings is a proposed redevelopment under

Development Control Regulation 33(7) of a plot of land admeasuring 3297.68 sq. mtrs. being final plot No.1063, TPS IV of Mahim Division. The land houses 3 chawls consisting of a ground floor and one upper storey all of which admittedly are in a dilapidated condition. The Petitioners are the owners of the property under and in pursuance of a deed of conveyance dated 26 March 2010.

2. The Sixth Respondent is an association formed by the tenants and occupants. Respondent No.s 7 to 21 are occupants who have sought to form a rival association having once issued irrevocable consents for the redevelopment of the property by the First Petitioner.

3. On 30 September 2005 the managing committee of the Sixth Respondent agreed to the appointment of the First Petitioner for the redevelopment of the property. On 27 December 2005 all the occupants of the property furnished irrevocable consents to the First Petitioner to carry out the work of redevelopment. Accordingly a letter was executed by 230 occupants agreeing to the proposal for redevelopment by the First Petitioner. A memorandum of understanding was entered into on 11 July 2006 between the First Petitioner and the Sixth Respondent for redevelopment of the property. Following this, between August and November 2006, 227 individual tripartite agreements were entered into by the occupants with the First Petitioner. Under each of those agreements every occupant furnished an unconditional irrevocable consent to the Petitioner to develop the property.

4. On 20 April 2007 the First Petitioner submitted a proposal to the Executive Engineer of the Repair Board, the Third Respondent, for developing the property under DCR 33(7). On 8 October 2007 the Third Respondent addressed letters to the tenants, with reference to the proposal for redevelopment estimating the cost of repairs to be in excess of the statutory limit and calling upon the tenants to deposit a stipulated amount, failing which it was stated that action would be taken u/s 88(3)(a) of the MHADA Act 1976 to declare the building beyond the normal limits of repair. The Sixth Respondent by a letter dated 31 December 2007 reiterated that the occupants sought redevelopment and did not opt for repair since they were unable to pay the requisite deposit. On 25 April 2008 the Repair Board issued certificates u/s 88(3) certifying that the structures in question were beyond economic repair under the provisions of the Act.

5. Commencing from December 2007 and until April 2008 site visits were carried out by the officials of the Repair Board for inspecting the structures and for the purpose of verifying the irrevocable consents of the occupants. On 30 April 2008 the Executive Engineer of the Repair Board addressed individual letters to the occupants calling upon them to furnish documentary evidence in support of their individual status. On 10 June 2008 a report was prepared by the Executive Engineer certifying that out of a total 188 occupants, 185 occupants had furnished irrevocable consents. The report stated that 98.40% of the occupants had consented to the redevelopment of the property by the First Petitioner. As regards the non-consenting tenants, the First Petitioner had furnished an

undertaking agreeing to protect the tenancy rights of such persons. The report stated that on 8 May 2008 a list of tenants/occupants had been published in the newspapers and though objections were invited, no claim or objection had been received by the date stipulated.

6. The Deputy Chief Engineer in the office of the Repair Board certified by his report dated 12 June 2008 that 96.98% of the occupiers had consented to the redevelopment of the property by the First Petitioner. A certified list of tenants / occupants together with proof of occupancy was submitted to the Chief Officer of the Repair Board together with the irrevocable consents of all the occupants for further action. On 7 July 2008 the Repair Board prepared a report signed by its Section Engineer to the Resident Executive Engineer and Chief Officer recommending the grant of a no objection certificate to the First Petitioner. The report noted that the First Petitioner had irrevocable consents of 98% of the occupants. The proposal for the grant of a no objection certificate for the redevelopment of the property to the First Petitioner was to be tabled before the 109th Board meeting of the Repair Board for which a detailed item note dated 30 July 2008 was prepared and signed by the Section Engineer, Resident Executive Engineer and the Chief Officer recommending the grant of an NOC and an approval to the proposal. The note specifically recorded that the proposal has been verified and that it had the consent of 98% of the tenants / occupants. On 27 August 2008 it appears that the intervention of the local MLA was sought by some of the occupants of the property. On 16 October 2008 at a Board meeting of the Third Respondent it was recorded that since over 70% of the occupants had furnished their consents to the redevelopment, the proposal shall be approved. This was subject to the rider that if upon verification of the complaints, the complaints were found to be genuine, the proposal would be disapproved. Following this on 21 October 2008, the Executive Engineer recorded that the list of tenants / occupants had been certified by his office after verification of the original documents and the carpet area of the existing premises was also measured in the presence of the tenants / occupants. The report stated that the irrevocable consents were also verified on site and that video graph shooting of the entire process had been recorded. The report states that the inspection extract of the Municipal Corporation for 1995-96 shows that there were 182 tenements of which 97% occupants had furnished irrevocable consents. Similarly, the Sectional Engineer submitted a report stating that all the tenants / occupants had voluntarily executed agreements and had furnished their irrevocable consents. On the aforesaid noting the Chief Officer of the Repair Board stated that a proper enquiry needs to be conducted by the Executive Engineer who shall record the statement of some of the complainants as well as of the developer after which the facts should be verified from the record. The Chief Officer opined that a conclusion in regard to the grievance of the complaining occupants should be drawn thereafter.

7. According to the Petitioners some of the occupants, supported by "builders and politicians" have sought to form a new association of tenants with a view to

replace the Sixth Respondent and had sought to disrupt the redevelopment of the property by the Petitioners. In order to effectuate that object it is alleged that irrevocable consents which were earlier furnished to the Petitioners and were verified repeatedly by the appropriate authorities are now sought to be withdrawn. On 3 January 2009 the Executive Engineer of the Third Respondent once again certified that a verification in respect of the irrevocable consents given in favour of the developer had been done by personally meeting the tenants / residents. The Executive Engineer stated that there was no increase in the number of tenants / residents; the consent letters have been verified by an actual visit at site and the structures being in a dilapidated condition, the developer may be directed to carry out temporary repairs and to furnish alternate accommodation to the occupants.

8. The Petitioners had moved an earlier petition before this Court under Article 226 of the Constitution in which by an order dated 10 February 2009 the Division Bench directed MHADA to deal with the request of the Petitioners for the issuance of an NOC in accordance with law and policy within a period of three months after hearing the affected parties. On 22 April 2009 the Chief Officer of the Repair Board passed an order holding that the request of the Petitioners for the grant of an NOC for the redevelopment under DCR 33(7) cannot be considered on the basis that the Petitioners do not have the irrevocable consents of 70% tenants / occupants as on the date of the order. In passing the order the Chief Officer relied upon a letter addressed on 24 January 2009 by the President of the Wakadi Chawl Samanvay Samittee submitting affidavits of 132 occupiers for the cancellation of the irrevocable consents furnished to the developer in 2006. The order records that subsequently two further consents were withdrawn as a result of which the consents of 134 tenants stood cancelled. The order passed by the Chief Officer was challenged before the High Power Committee. By its order dated 17 April 2010 the High Power Committee observed that the process of certification of the irrevocable consents had been carried out by the Executive Engineer of the Repair Board after a site visit for the purposes of verification. In paragraph 9 of the order, the High Power Committee entered a finding of fact that 185 out of 188 tenants were certified on 10 June 2008 to have furnished their consents amounting in all to 98.40% of the occupants. Thereafter when the proposal for redevelopment was tabled before the Repair Board on 28 August 2008, the competent officer was directed to reverify the facts and to look into the grievance of some of the occupants. The Executive Engineer of the Repair Board personally visited the site and submitted his report dated 16 October 2008. Thereupon the Board approved the proposal for redevelopment subject to verification of the contents of the complaints received in the matter. The High Power Committee noted that the irrevocable consents granted to the proposal for redevelopment under DCR 33(7) had been duly verified at site and consequently the Chief Officer of the Repair Board erred in rejecting the grant of an NOC on a totally erroneous basis of the non-existence of 70% consents. The High Power Committee held, following the judgments of this

Court that the consents which were furnished by the occupants could not be withdrawn unless and until due process of law was followed. In that regard the Committee observed as follows :-

In the present case, it is very clear from the record that in spite of verification by officers of MHADA that the Appellant had complied with all the rules and regulations and have also obtained more than 70% irrevocable consent and in fact had entered into separate agreements with more than 70% of eligible occupants, have surprisingly not granted NOC to Appellant. It is observed that apart from that eligible occupants have not only given individual consent but have also individually entered into tripartite agreements by which they have expressly agreed to appoint Appellant for redeveloping the property and have also in these agreements given their irrevocable consent. In the circumstances the question here is, not only as to whether irrevocable consent can be revoked but here also the question is as to whether the valid and binding agreement entered into can be unilaterally terminated.

9. In paragraph 19 of its decision the High Power Committee observed as follows :

In view of the facts and circumstances stated above, the Committee is of the view that the decision of the Chief Officer MBRRB in not granting NOC to the appellant to redevelop the suit premises is not correct legal as per the provision of law and the observations of the Hon"ble Courts mentioned hereinabove which are binding on the Chief Officer while taking decision for redevelopment of the property under DCR 33(7).

10. After arriving at these conclusions the Committee has while setting aside the order of the Chief Officer remanded the proceedings back to the Repair Board with the following directions :

The order of the Chief Officer, MBRR Board, MHADA, is hereby set aside and the matter stands remanded back to the MBRR Board. The Chief Officer of the Board is directed to consider the documents such as irrevocable consents which were earlier submitted by the occupants for grant of NOC for redevelopment under DCR 33(7). The Chief Officer is also directed to consider whether the irrevocable consents given earlier in this matter by the occupiers, have been legally withdrawn by them. The Chief Officer of the Board is directed take decision within a period of six weeks from today.

11. The directions contained in paragraph 20 of the order are sought to be impugned in Writ Petition 1976 of 2010 filed by the developers. In addition, two other cross petitions have been filed before the Court. Writ Petition 2073 of 2010 seeks : (I) a direction to MHADA and to the Repair Board to acquire the property and rehabilitate all the eligible occupants; and (ii) the setting aside of the order of the High Power Committee dated 17 April 2010. Writ Petition 2074 of 2010 challenges the order passed by the High Power Committee on 17 April 2010.

12. The learned Senior counsel appearing on behalf of the Petitioners (in WP 1976 of 2010) submitted that :

(i) The property in question is private property which is owned by the First Petitioner. Hence, no redevelopment of the property can take place in any event without the consent of the owner;

(ii) Development Control Regulation 33(7) contemplates a redevelopment in pursuance of irrevocable written consents of not less than 70% occupants of the old building;

(iii) In the present case not only had 98% of the occupants issued declarations accepting the proposed redevelopment through the Petitioners, but each of them entered into individual tripartite agreements authorizing the redevelopment of the property by the Petitioners;

(iv) The issue as to whether the proposal for redevelopment had the requisite consent of at least 70% of the occupiers was verified by site visits and upon an actual scrutiny of the documentary material produced by the developers and by the Sixth Respondent society as well as the individual occupants;

(v) The High Power Committee has, as a matter of fact, arrived at a finding of fact that the Petitioners had the requisite consents and that the Board had granted its approval to the proposed redevelopment subject to verification of the complaints. The High Power Committee also held, following the decisions of this Court that consents once granted are irrevocable;

(vi) In spite of its findings, the High Power Committee erroneously directed the Chief Officer of the Repair Board on remand to consider the documents such as the irrevocable consents which were earlier submitted by the occupants and determine whether the irrevocable consents given earlier by the occupiers had been legally withdrawn by them;

(vii) The High Power Committee having once come to the conclusion that the irrevocable consents granted by the occupiers could not have been lawfully withdrawn, there was no occasion to remand the proceedings back to the Chief Officer to determine that very question;

(viii) In the present case there was no delay or deficiency on the part of the developers since the record before the Court would indicate that right since the execution of the proposal, the matter was pending before MHADA or, as the case may be, before the Repair Board for verifying the issue of consents

(ix) This is not a case where the developer has acted in breach of his obligations to redevelop the property. The whole process was sought to be obstructed only at the behest of a political leader and a few disgruntled occupants who have sought to withdraw their consents at the behest of a third party developer. In these circumstances, it was urged that the ultimate direction contained in the order of the High Power Committee should be set aside and the Repair Board

should be directed to issue its no objection certificate for the proposed redevelopment under DCR 33(7).

13. On the other hand, counsel appearing on behalf of the occupants who have opposed the proposal of the Petitioners submitted that :

- (i) Between 2005 and 2009 the Petitioners failed to obtain the NOC from MHADA;
- (ii) In the present case no NOC has been granted. Once an NOC is issued, consents irrevocably granted cannot be withdrawn, but this can have no application to a situation such as the present where MHADA has not issued an NOC for redevelopment;
- (iii) The competent authority must decide whether the consents which were granted by the occupants were wrongly withdrawn.

Counsel appearing on behalf of MHADA and the Repair Board assisted the Court in examining the underlying records as filed in these proceedings.

14. The record before the Court in the present case makes it abundantly clear that the fact that the original proposal for redevelopment by the Petitioners under DCR 33(7) had the requisite consents of atleast 70% of the occupants is beyond dispute. Initially, declarations were issued on behalf of 227 occupants out of 230. Thereafter individual agreements were entered into by the occupants with the developers. The issue as to how many of the occupants had furnished their irrevocable consents was investigated on four occasions and it was found that the proposal for redevelopment had the support of about 98% of the occupants. As a matter of fact, it must be noted that it has not been denied that the proposal initially did have the support of as many as 185 out of 188 eligible occupants. A verification, as the record indicates, was conducted at the site and the individual agreements were duly verified. Appendix III to DCR 33 (7) stipulates that a reconstruction or redevelopment of cessed buildings in the Island city by the landlord and/or by co-operative housing societies can be permitted in pursuance of irrevocable written consents of not less than 70% occupiers of the old building. The provisions of DCR 33(7) read together with Appendix III constitute subordinate legislation and the use of the expression "irrevocable consents" is not without significance. The whole object of a scheme for redevelopment is that there must exist an element of certainty in the process of redevelopment. Occupiers who grant their consents to a proposed scheme must be held down to the consents already granted unless the grant of the consent is demonstrated to be vitiated by fraud, misrepresentation or other valid consideration. Unless the sanctity of irrevocable consents voluntarily granted is maintained, a situation of chaos is liable to result. Rival developers may step into the fray and occupants are liable to become objects of bidding between unscrupulous rival interests. No scheme for redevelopment could possibly proceed if occupants are permitted to withdraw from the consents once granted. Hence, what was required to be verified by the public authority (MHADA or the Repair Board in the present case) is whether the consents that have been

granted are voluntary and genuine. The authenticity of the agreements between the developer and the individual occupants had to be verified in order to determine the correctness of the claim of the society of having the support of 70% of the occupiers. In the present case, the Petitioners have acquired title to the property in question under a deed of conveyance executed on 26 March 2010. The process of verification of whether the Petitioners had the requisite consents took place on several occasions. It was at the behest of a group of occupants, that the Chief Officer of the Repair Board directed an enquiry into the complaints made in respect of the project. The consents that were granted by the occupants were verified and it was found that the original consents were not vitiated. The record before the Court does not indicate that there was any dereliction on the part of the Petitioners in complying with their obligations. On the contrary, it is evident from the record that the issue as to whether the Petitioners had the requisite consents of the occupants was verified from time to time and it was found that the consents had been duly granted.

15. The High Power Committee has entered a finding of fact that the Petitioners had irrevocable consents of nearly 98% of the occupants. In that regard the High Power Committee has adverted to the certification by the Executive Engineer of the Repair Board on 10 June 2008, 16 October 2008, 21 October 2008 and 3 January 2009. The High Power Committee similarly entered a finding of fact that the Petitioners had in fact entered into separate agreements with more than 70% of the eligible occupants. In these circumstances, the Committee concluded by holding that the decision of the Chief Officer of the Repair Board in not granting an NOC to the Petitioners to redevelop the property is not correct or in accordance with the provisions of law. Having held this, the High Power Committee inexplicably remanded the proceedings back to the Chief Officer of the Repair Board to consider the irrevocable consents which were earlier submitted by the occupants and to determine whether they have been legally withdrawn by the occupants. Having once come to the conclusion, following a binding judgment of this Court in *Sushila Digambar Naik v. MHADA* (Writ Petition (L) 10 of 2010) and in *Sadanand Mandalik v. Municipal Corporation of Greater Mumbai* (Writ Petition 828 of 2009) decided on 1 February 2010 that a letter of consent once issued could not be withdrawn, the order of the High Power Committee calling upon the Chief Officer to determine as to whether the consents were legally withdrawn is inconsistent or erroneous. The principal findings which have been arrived at by the High Power Committee in the first 19 paragraphs of its decision dated 17 April 2010 have not been demonstrated by counsel appearing on behalf of the Petitioners in the cross writ petitions to be erroneous. In fact, no such submission was urged during the course of the hearing. That being the position, the consequential direction which has been issued by the High Power Committee is clearly contrary to the reasoning and the findings of fact which have been arrived at by the Committee in the earlier part of its decision and would have to be set aside.

16. We do not find any merit in the two cross petitions which have been filed

before the Court by the occupants. MHADA cannot be compelled by a writ of mandamus to acquire any particular property. In any event in the present case, the owners of the property having expressed an intent to redevelop the property under DCR 33(7) and having received the consents of the requisite number of occupants, there is no reason or justification as to why the proposal should not be allowed to proceed.

17. For the aforesaid reasons, we allow Writ Petition 1976 of 2010 in terms of the following directions :

(i) The directions contained in paragraph 20 of the impugned decision dated 17 April 2010 of the High Power Committee directing the Chief Officer of the Repair Board to consider the irrevocable consents and determine whether those consents given earlier have been legally withdrawn is quashed and set aside;

(ii) The Chief Officer of the Repair Board shall process the proposal submitted by the Petitioners for the grant of an NOC under DCR 33(7) in accordance with law having due regard to the direction contained in clause (i) above. We clarify that the NOC shall be processed on the basis of the finding of fact arrived at by the High Power Committee to the effect that the proposal of the Petitioners was supported by the requisite consents of atleast 70% of the occupiers. The Chief Officer of the Repair Board shall take a final decision expeditiously, preferably within a period of three months from today.

(iii) Rule is accordingly made absolute in Writ Petition 1976 of 2010 in the aforesaid terms.

For the reasons indicated above, Writ Petitions 2073 and 2074 of 2010 shall stand dismissed.

There shall be no order as to costs.