

(2013) 06 BOM CK 0085
In the Bombay High Court
Case No : Writ Petition No. 749 of 2013

M/s. Crescent Property Developers

APPELLANT

Vs

Municipal Corporation of Greater Mumbai, The Commissioner
of the Municipal Corporation, The Assistant Engineer and The
Assistant Commissioner (Estates)

RESPONDENT

Date of Decision : 10-06-2013

Acts Referred:

Constitution of India, 1950 — Article 226
Mumbai Municipal Corporation Act, 1888 — Section 354A

Citation : (2013) 4 ABR 748 : (2013) 5 ALLMR 246 : (2013) 4 BomCR 462 :
(2013) 5 MhLj 801

Hon'ble Judges : Ranjit More, J

Bench : Single Bench

Advocate : Vijay Thorat, with Mr. J.S. Chandnani and Mr. H.V. Kode instructed by
Mr. Sanjiv A. Sawant, for the Appellant; S.U. Kamdar, with Ms. K.H. Mastakar,
Advocate for the respondents/BMC, for the Respondent

Judgement

Ranjit More, J.—Heard Mr. Thorat, senior counsel appearing on behalf of the petitioner and Mr. Kamdar, learned senior counsel appearing on behalf of the respondents. Rule. By consent, Rule is made returnable forthwith and the matter is taken for up final hearing.

2. By this petition under Article 226 of the Constitution of India, the petitioner is challenging the legality, validity and propriety of stop work notice dated 2nd March, 2012, issued u/s 354-A of the Mumbai Municipal Corporation Act, 1888 (for short " the Act") by the Corporation.

3. The brief facts leading to the present petition are as follows:

The property known as Gora Gandhi Chawl situated at C.S. No. 337(Part) and 1/337 (Part) of Malbar Hill, Tardeo Division, Belasis Road, Tardeo (Mumbai) (for short " the said property) was acquired by the Corporation under the Slum Clearance Scheme. The property consisted of old structures having 168

tenements, out of which, 165 were residential tenements and 3 were commercial tenements. In the year 1999, the tenants of Gora Gandhi Chawl formed a proposed society by name "Kranti Nagar Co-operative Society". The said society, in its general body meeting held on 11th April, 1999, appointed the petitioner as Developer. The petitioner thereafter submitted a proposal for development of the suit property under DC Regulation 33(7) with consent of more than 70% of the tenants. The Improvement Committee by its resolution dated 29th March, 2000, and the Corporation by its resolution dated 30th March, 2000, accorded their sanction to the proposal for redevelopment. The Corporation, thereafter, on 13th April, 2000, issued a Letter of Intent in favour of the Chief Promoter of the said Society for redevelopment of the said property on the terms and conditions mentioned in the said Letter of Intent.

Under Clause (9) of the Letter of Intent, 10% of the capitalized value was to be paid before the grant of commencement certificate to rehab building and the balance amount of 90% was to be paid before final occupation of the sale building in one installment. Under Clause 29 of the said Letter of Intent, the said society/petitioner was obliged to protect the said property from encroachment and commence construction work within a period of six months from the date of pulling down the existing structure. The construction work of the redevelopment project was to be completed within two years from the demolition of the old structure.

The petitioner, thereafter, entered into memorandum of understanding with the said society and also entered into agreements with 156 tenements and deposited substantial amounts with the Corporation for provision of transit accommodation. On 28th February, 2005, tripartite agreement between Corporation, Society and petitioner came to be executed. This agreement also provides that 90% of the capitalized value is to be paid at the time of grant of occupancy certificate for sale buildings in one installment. Meanwhile, redevelopment work was challenged by filing several proceedings by one Eknath Dalvi and few non co-operating tenants. These proceedings were fought up to the Apex Court. However, none of the above proceedings, objecting the redevelopment project of the petitioner could succeed. In these circumstances, the Corporation also extended Letter of Intent from time to time. The petitioner was granted commencement certificate for rehab building Nos. 1 & 2 in 2006 & for building No. 3 in 2004 respectively. There is no dispute that the petitioner has already paid 10% amount as the capitalized value before grant of commencement certificate and the petitioner by spending this amount completed construction of rehab buildings in 2009 and after getting occupation certificate thereof, handed the possession of tenements in rehab buildings.

In respect of two sale buildings, the commencement certificate was granted on 2nd March, 2010, which was renewed on 29th October, 2011. Prior to that, the Corporation issued show cause notice to the petitioner on 17th April, 2008, to show cause as to why 90% of the capitalized value should not be recovered due

to failure on the part of the petitioner to complete the project within the stipulated period. This notice was subsequently withdrawn. Another notice u/s 354A was issued on 18th June, 2011. This notice was, however, subsequently withdrawn. The respondent, thereafter, issued a notice u/s 354A on 27th January, 2012, in respect of redevelopment project of petitioner's sister concern. The same was, however, withdrawn on 2nd March, 2012, and on very same day, the notice impugned in this petition was issued mainly on the ground that the petitioner has not completed the project within the stipulated period and they have to pay 90% of the capitalized value. As stated above, this notice is impugned in the present petition.

4. Mr. Thorat, learned senior counsel appearing on behalf of the petitioner, invited my attention to the Letter of Intent and particularly Clauses 9 & 29 thereof and submitted that 10% of the capitalized value was already paid and balance 90% of the capitalized value was to be paid at the time of final occupation of the sale buildings in one installment. He submitted that the Corporation, therefore, could not have insisted for payment of 90% of the capitalized value at this stage. He also submitted that the petitioner is obliged to complete the redevelopment project within a period of two years from demolition of the old structure and as part of the old structure was not demolished as on March, 2012, the stipulated completion period is yet to get over. Mr. Thorat submits that Corporation having withdrawn the show cause notices u/s 354A issued earlier, could not have issued a fresh notice on the same cause of action. Mr. Thorat also submitted that the Corporation has acted with predetermined mind to stop the work of the petitioner which is commenced legally. Mr. Thorat lastly submitted that the statutory powers of the Corporation to stop the work has to be exercised only if there is illegality in the Construction. The Corporation has not alleged any illegality in the Construction in the impugned notice, therefore, powers u/s 354A of the said Act could not have been invoked in the present case.

5. Mr. Kamdar, learned senior counsel appearing on behalf of the respondents, on the contrary, vehemently opposed the petition. He invited my attention to the Minutes of Order dated 27th January, 2012 and submitted that the despite undertaking given by the petitioner in the said Minutes of Order, it was subsequently found that the petitioner had already created third party interest in favour of M/s. Shapoorji Palanji and the petitioner has also not deposited the amount of capitalized value in respect of another project which was the subject matter of the said minutes of order. Mr. Kamdar, in that view of the matter, submitted that the petitioner cannot seek any equity from this Court. Mr. Kamdar also relied upon the judgment and order dated 13th August, 2009, passed by a Division Bench of this Court in Writ Petition No. 72 of 2009. He submitted that wordings of Clauses 9 & 29 of the Letter of Intent in the present case and wordings of similar clauses of Letter of Intent which was subject matter of this petition are ditto and the same were under consideration of the Division Bench in aforesaid writ petition. The Division Bench took a view that Corporation can

demand payment of 90% of the balance amount of capitalized value prior to issuance of the occupation certificate. Mr. Kamdar lastly relied upon the condition of Letter of Intent, Layout Plan and IOD and submitted that breach of condition of the IOD can be a basis for an action u/s 354A of the Act. He submitted that the petition is devoid of any substance and the same deserves to be dismissed.

6. Having gone through the impugned notice and petition along with compilation of documents filed thereof and having considered the submission of the rival parties, I find merit in the petition.

7. There is no dispute that the said society appointed petitioner as Developer. The petitioner's development proposal was sanctioned by the Improvement Committee of the Corporation and the Corporation under DC Regulation 33 (7). There is also no dispute that the petitioner has obtained consent of more than 70% of the tenement occupants. Admittedly, the petitioner has also deposited 10% of the capitalized value with the Corporation and thereafter, the Corporation issued commencement certificate in favour of the petitioner in respect of 3 rehab buildings and the petitioner after spending huge amounts completed the construction and handed over possession of the same to the tenants. The sole controversy in the present petition is as to when the balance 90% of the capitalized value is to be paid by the petitioner to the Corporation. Clauses (9) and (29) of the Letters of Intent, in this regard, are relevant, which reads as under.

9. The Society/developer will also enter into an agreement with Municipal Commissioner agreeing to pay 10% of the capitalized value (Rs. 15,47,42,084.10) before grant of Commencement Certificate to rehab building and balance amount i.e. 90% before final occupation of the sale building in one installment. The Legal Department will prepare draft of this agreement.

29. The Society/developer shall pull down/demolish the structure, provide transit accommodation to the affected occupants, remove debris and building material/silt etc. at their cost and clean the site in order to take up the construction work in phase manner. The Society/developer may use salvage material for the purpose of construction of transit accommodation and dispose off unused materials. The Society/developer shall protect the plot from the encroachment and commence construction work within a period of 6-months from the date of pulling down the existing structure. The construction work of redevelopment project shall be completed within 2-years from the demolition of the old structure. The period may be extended by the Municipal Commissioner wherever necessary.

Perusal of the above clauses, makes it abundantly clear, that the petitioner was obliged to pay 10% of the capitalized value before grant of commencement certificate to the rehab buildings and 90% of the balance amount of the capitalized value was to be paid "before final occupation of the sale building in one instalment". The petitioner was further obliged to complete the construction

work of redevelopment project within a period of two years "from demolition of the old structure". Admittedly, after completion of 3 rehab buildings, the Corporation has issued occupation certificate and tenants are given possession thereof. The commencement certificate in respect of the sale buildings was granted on 2nd March, 2010, which is renewed on 29th October, 2011. The petitioner has annexed the photographs of the old structure at pages 346, 347 & 348 of the compilation. The Corporation has not disputed or denied these photographs by filing any affidavit-in-reply. The photographs show that as on 26th March, 2012, some of the old structures are still standing on the said property. From these photographs, it is clear that the sale property was not made clear to enable the petitioner to carry on construction of two sale buildings. In terms of Clause 29 of the Letter of Intent, the petitioner was duty bound to complete the redevelopment within two years from demolition of the old structure. In my considered view, this period of two years had not even commenced as on 26th March, 2012, in view of the existence of the old structures. The tripartite agreement executed between the petitioner, Corporation and the said society in the year 2005 also provides for 90% of capitalized value at the time of grant of occupation certificate for sale buildings. In these circumstances, in my view, the Corporation was not justified in requiring the petitioner to pay 90% of the capitalized value by issuing notice impugned in the petition.

8. Even assuming for the sake of argument that the Corporation could have invoked powers u/s 354A of the said Act for breach of conditions of Layout, IOD coupled with the conditions of Letter of Intent, in that case also, the Corporation is not justified in issuing the notice impugned in the petition without establishing any breach in Letter of Intent, Layout or IOD. As discussed in earlier paragraphs, under Letter of Intent, the liability of the petitioner to pay 90% of the capitalized value will arise at the time of issuance of occupation certificate in respect of sale buildings. I have also found that the period of two years allowed to the petitioner to complete the redevelopment work is not yet over. In these circumstances, I am of the considered opinion that there is no breach of any of the conditions of the Letter of Intent, Layout or IOD and, therefore, the Corporation could not have issued the stop work notice u/s 354A of the said Act to the petitioner.

9. Be that as it may, the record shows that the Corporation earlier issued two notices in respect of the project which is the subject matter of the present petition apart from the present notice which is impugned in the petition. The Corporation also issued one stop work notice to another project of the petitioner. The first stop work notice u/s 354A was issued on 17th May, 2008. This notice was issued on the premise that the petitioner has unlawfully commenced/unlawfully carried on erection of the building. Under the schedule of the notice, it is alleged that the petitioner has not completed redevelopment work even though the project period is over. In continuation of this notice, another notice is issued on 11th June, 2008 and the petitioner was directed to pay 50% of 90% capitalized value within 7 days and the balance 50% of capitalized value with

18% interest in the next three months from the date of receipt of this notice. Thus, this notice was issued on the ground of development work was not completed within the stipulated period and 90% capitalized value is not paid by the petitioner. The petitioner, thereafter, preferred Writ Petition No. 1557 of 2008. A statement was made on behalf of respondents before the Court that Section 354A notice issued on 17th May, 2008 is withdrawn and this Court recorded the said statement and, thereafter, the petitioner was allowed to withdraw the petition.

The Corporation thereafter issued another notice on 18th June, 2011 u/s 354A of the said Act. This notice was issued on the premise that the construction site is not kept clean and in hygienic condition. The petitioner, thereafter, replied to this notice. The Corporation, being satisfied, withdrew this notice by another letter dated 19th October, 2011.

The Corporation thereafter issued notice impugned in the petition on 2nd March, 2012. As stated above, this notice is issued on the ground that redevelopment project is not completed within the stipulated time and the petitioner has not deposited 90% of the capitalized value. In my view, the Corporation having issued earlier show cause notice u/s 354A on 17th May, 2008, and having withdrawn the same unconditionally, could not have issued the present notice on the same grounds. The impugned notice also cannot be sustained on this ground and the same deserves to be quashed and set-aside.

10. This takes me to consider the submission of Mr. Kamdar, learned senior counsel appearing on behalf of the Corporation. I will first consider his submission regarding exercise of the jurisdiction of this Court under Article 226 of the Constitution of India. Mr. Kamdar, in this regard, submitted that in respect of another project of the petitioner, similar notice was given. The petitioner challenged the same in the High Court by filing a writ petition. The said writ petition was disposed of in terms of Minutes of Order. He submitted that the petitioner gave an undertaking that he will not create third party interest, however, third party interest is created by the petitioner and the petitioner having breached the undertaking given before this Court is not entitled to seek equity from this Court. Mr. Thorat, learned senior counsel appearing on behalf of the petitioner, in this regard, relied upon a letter at page 336 to show the petitioner's bona fide. The undertaking which is referred by Mr. Kamdar is given by the petitioner in respect of redevelopment project on Corporation's property known as Janata Nagar, M.P. Mill Compound on CTS 1/725 and 725(part) of Malbar Hill Division in D-Ward (for short " Janata Nagar Property"). The project, in respect of which breach of undertaking is claimed, is not the subject matter of the present petition. The petitioner has in all undertaken 6 projects. Out of these 6 projects, the petitioner has completed 4 projects and deposited with the Corporation, 90% of the capitalized value. Only 2 redevelopment projects have remained to be completed. One redevelopment project is the subject matter of the present petition and another is in respect of Janata Nagar Property, and the

said undertaking was given in respect of Janata Nagar project. If it is the contention of the Corporation that the petitioner has breached in respect of the undertaking in respect of Janata Nagar Property, then, the Corporation is entitled to take independent action against the petitioner in respect of that project. So far as the present project is concerned, on the basis of record, I find that the Corporation's impugned notice u/s 354A of the said Act is not justified. At this stage, it is relevant to note that the petitioner has successfully completed 4 projects, from which the bona fide of the petitioner can be seen. In these circumstances, I do not find any merit in Mr. Kamdar's contention that the petitioner cannot seek equity from this Court for failure to fulfill undertaking given in respect of another project viz. Janata Nagar property.

11. Mr. Kamdar heavily relied upon a Division Bench Judgment in Writ Petition No. 72 of 2009. This petition was filed by the petitioner in respect of Janata Nagar property project. The petitioner challenged the demand of the Corporation calling upon to pay the balance amount of 90% of the capitalized value for utilisation of the surplus area as per the Scheme of redevelopment along with interest thereon at the rate of 18% per annum as condition precedent for considering their proposal to grant additional 0.5 FSI on the sale component of the Scheme.

12. So far as Janata Nagar property project is concerned, the petitioner was issued Letter of Intent on 5th August, 1996, and under Clause 29 thereof, it was obliged to complete the redevelopment project within two years from demolition of the old structure notwithstanding issuance of NOC and commencement certificate in the year 2006. The petitioner could not complete the work within stipulated time. Meanwhile, Regulation 33(7) of Development Control Regulations for Greater Bombay, 1991, came to be modified, in which it provided that in respect of new project and on going project where occupation certificate has not been granted, FSI would be to the extent of 2.5. The petitioner was initially granted 2.00 FSI. The petitioner wanted to take advantage of the amended D.C. Regulation 33(7). The Corporation, however, insisted payment of 90% of the capitalized value as a condition precedent to grant of additional 0.5 FSI. The Division Bench of this Court found that the petitioner did not complete the work within the stipulated time without any justification and despite wanted to take advantage of the amended provisions of DC Regulation 33(7) and, therefore, held that the petitioner is expected to pay the balance capitalized amount on expiry of two years from the date of issuance of commencement certificate i.e. 24th January, 2006. The petitioner's challenge before the Division Bench to the Corporation notice demanding 90% of the capitalized value was not entertained on the ground that the petitioner without any justification could not complete the redevelopment work within the stipulated time and, in addition, wanted additional 0.5 FSI in pursuance of amended DC Regulation 33(7). The facts of the present petition are quite different. In the present case, as discussed in earlier paragraphs, the petitioner was obliged to complete the redevelopment work within a period of two years from demolition of the old structure. The part

of old structures, as stated above, were not demolished at least till 26th March, 2012, therefore, two years time will not commence from the date prior to 26th March, 2012. Thus, in the present case, the petitioner is justified in not completing the work. The decision of the Division Bench of this Court in Writ Petition No. 72 of 2009, therefore, cannot be made applicable to the facts and circumstances of the present case.

13. It is also worth to take note that the impugned notice was issued on 2nd March, 2012. The petitioner, by giving reply to the Corporation, made its stand clear. The petitioner, thereafter, made as many as 8 representations from 14th May, 2012 to 5th January, 2013. However, the Corporation has not taken any action and, therefore, the petitioner was constrained to file the present petition in March, 2013. The inordinate delay on the part of the Corporation to decide the petitioner's representations coupled with the fact that the earlier notice on similar cause of action was withdrawn speaks volume.

14. Before concluding the judgment, I must make reference to the affidavit filed on behalf of the respondents in Writ Petition No. 3062 of 2004, a copy of which is annexed at Exhibit "N" to the petition. This petition was filed by one Arun Jadhav and others. By this writ petition, the said Arun Jadhav challenged the Letter of Intent granted in favour of the petitioner on various grounds. The petition was ultimately dismissed on 9th February, 2005, by the Division Bench. In this petition, one Deepak Kasbe-Administrative Officer in respondent-Corporation filed an affidavit. Para 7 of the said affidavit reads as follows:

7) I say that as per the conditions of Letter of Intent, remaining 90% of amount of capitalized value will be recovered from the Development before issuance of Occupation Certificate to the sale buildings. I say that moreover as informed by A.O. (Estate) "B" Ward vide note dated 9/11/2004, Rs. 88,75,610/- is shown as outstanding towards the electricity charges to be paid to the BEST Authorities by Respondent No. 3. However, the developer has now produced a copy No dues certificate as on December, 2004 issued by BES on 27/1/2005 stating that Estates charges up to December 2004 have been paid fully.

Thus, it was the stand of Corporation that 90% of the capitalized value was to be recovered at the time of issuance of occupation certificate. In the light of the Corporation's statement in the above affidavit, it is now not permissible to it to demand 90% of the capitalized value prior to issuance of the occupation certificate. On this ground also, the impugned notice cannot be sustained.

15. In the light of the above, the impugned notice is quashed and set-aside. The writ petition is, accordingly, made absolute in terms of prayer clause (a) which reads as under:

(a) That this Honourable Court be pleased to issue a Writ of Certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for records and proceedings leading to issuance of the order/stop work notice dated 2/3/2012 being Ex. MM hereto and after examining the

legality, validity and propriety of the same be pleased to quash and set-aside the same;

16. The Corporation shall not refuse renewal of validation of commencement certificate in respect of sale buildings on the ground of non-payment of 90% of capitalized value before issuance of occupation certificate. The writ petition accordingly stands disposed of.