
(2019) 11 BOM CK 0006

In the Bombay High Court

Case No : Writ Petition No. 746, 772, 773, 1057, 1158, 1604 Of 2019, 4359, 4366 Of 2018

Mumbai Building Repairs And Reconstruction Board And Ors **APPELLANT**

Vs

Dhirubhai Damani Nirwana Apparels Pvt. Ltd And Ors **RESPONDENT**

Date of Decision : 06-11-2019

Acts Referred:

Maharashtra Housing And Area Development Act, 1976 — Section 2(4), 66, 66(1)(a), 70, 102(1), 103I, 103J, 103I(1), 103I(2), 103I(3), 103I(6), 103J(3)
Constitution Of India, 1950 — Article 226

Citation : (2019) 11 BOM CK 0006

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Prakash G. Lad, Aparna Kalathil, Sayli Apte, Priyanka Naik, Gaurav Mehta, Vidya Kamble, Ayaz Bilawala, Yogesh Gaikwad, A. Sayed, Monil Punjabi, Sanjay Gawade, Viresh Purwant, Barsha Parulekar, Satyan N. Vaishanv, Nupur J. Mukherjee, N.N. Vaishnawa, Simil Purohit, Javer N. Mamniya, Virag Tulzapurkar, Jasmine Kachalia, Abinash Pradhan, Aryan Srivastava, Viren Mandhale, Pravin Samdhani, Wadia Ghandy, Nikhil Sakhardande, Viren Mandhale

Final Decision : Dismissed

Judgement

1. By these 8 petitions filed under Article 226 of the Constitution of India, the petitioner has impugned the order dated 4th September 2018 passed by the learned Appellate Officer allowing the appeals filed by the respondents and setting aside the order dated 13th August 2007 passed by the competent authority. By consent of parties, all the petitions were heard together finally at the admission stage and are being disposed of by a common order. Parties through their respective counsel agreed that this Court shall deal with the facts in Writ Petition No.746 of 2019 as lead matter in view of the facts being identical in all 8 matters. I am thus dealing with the facts in Writ Petition No.746 of 2019 and the order passed by this Court in the said judgment will apply to the remaining writ petitions. Some of the relevant facts in Writ Petition No.746 of 2019 are as under :-

2. By Deed of Conveyance dated 5th June 1975 between Badrivishal Pannalal Pittie & Ors. and Shivilal Ramnath Daga & Anr. Shivilal Ramnath Daga & Ashadevi L. Daga had purchased the suit property bearing Old no.661 & 676, Old Survey Nos.70 & 1/70, New Survey No.3/7131 sq.yards equivalent to 1435.58 sq.mtrs. together with structure standing thereon. The said property described in the said Deed of Conveyance is the land admeasuring 1647 sq.yards equivalent to 1376.97 sq.mtrs. or thereof together with the bungalow and the stable standing thereon.

3. It is the case of the petitioner that recital of the said Deed of Conveyance specifically mentioned that one Jamnadas Bhagwandas was the original tenant of the land together with the structure standing thereon since 1946 and the said Jamnadas Bhagwandas had sublet the same to one Ramnath Daga and the rent receipt was standing in the name of Ramnath Daga who was in possession and occupation of the same as a protected tenant under the Rent Control Act and as per the order passed by the Small Causes Court in suit bearing RAE No.56/413 of 1961.

4. It is the case of the petitioner that after getting the possession of the property, Shivilal Ramnath Daga & Ashadevi L. Daga had transferred the said property in the name of M/s.R.B.B.A. Properties Private Limited. In the month of August 1981, the said M/s.R.B.B.A. Properties Private Limited submitted proposal for development of the said property and obtained the IOD for reconstruction of the building with permissible FSI i.e. 1.33.

5. It is the case of the petitioner that after receipt of the said IOD, M/s.R.B.B.A. Properties Private Limited had demolished the structure of the said flat in the year 1981 and started reconstruction and had constructed 38 floors. In the year 1986, Chapter VIII-A was inserted in the Maharashtra Housing and Area Development Act, 1976 (for short "the said MHAD Act"). The said Chapter VIII-A provides for incentive FSI to be granted to the Society of the tenants/developer. The respondent no.2 i.e. Dilip Ramanlal Thakkar submitted a proposal to the MHADA for grant of NOC to develop the property for the purpose of getting FSI 2. It is the case of the petitioner that the respondent no.2 added 23 bogus tenants by submitting forged and fabricated documents thereby increasing the tenants count from 3 tenants to 26 tenants.

6. In the year 1997, adjacent occupants of the said property viz Breach Candy Residents' Association and Ashok Gupta filed a Writ Petition bearing No.1585 of 1997 against the Municipal Corporation and the Mumbai Building Repairs and Reconstruction Board (for short "the said board") and others seeking directions against the authorities to cancel all the permissions granted for reconstruction of the high rise residential building on C.T. S. No.694 in ward D, 3210 at No.71 Bhulabhai Desai Road, Mumbai. The said Association also applied for direction to the authorities to demolish parts and portion of the said building which was in violation of the Development Control Regulations for Greater Bombay 1991 and against the said board to take vacant possession of the surplus area in the said

building or part thereof which the said Board i.e. the petitioner herein was entitled to under Section 102(1) of the MHAD Act and for other consequential directions. The said writ petition was opposed by the respondent herein by filing affidavits.

7. By judgment dated 27th January 2000 passed by the Division Bench of this Court, this Court made various prima facie observations against the developer and the authority, however, refused to interfere with the said writ petition at that stage. The said Breach Candy Residents' Association had filed Special Leave to Appeal (Civil) No.5903 of 2000 before the Hon'ble Supreme Court of India. By an order dated 17th April 2000, the Hon'ble Supreme Court dismissed the said Special Leave to Appeal.

8. On 28th May 2004, the Executive Engineer of the petitioner issued show cause notice to the respondent no.2 Mr. Dilip Thakkar alleging that the said Mr. Dilip Thakkar of M/s.R.B.B.A. Properties Private Limited had applied for NOC in the month of June 1991 under Regulation 33(8) of the Development Control Regulation, 1991 along with list of occupants residing in the old cess building having cess NO.D-3510(1AB). It was further alleged in the said notice that on the basis of the calculation submitted on the part of Architect Mr.Hafeez Contractor representing Mr.Dilip Thakkar and earlier list furnished by Mr.Thakkar relying to be true, the then Chief Officer of the petitioner had issued NOC. In the said show cause notice, the petitioner had also referred to the writ petition filed by Breach Candy Residents' Association and Anr. and the judgment delivered by this Court in the said writ petition rejecting the said writ petition and the order passed by the Supreme Court rejecting the special leave to appeal.

9. In the said show cause notice, the petitioner referred to the report prepared by Mr.Tinaikar who was appointed pursuant to the observations made in the said order in the said writ petition. It was mentioned in the said show cause notice that the said Mr.Tinaikar had found that the said Mr.Dilip Thakkar of M/s.R.B.B.A. Properties Private Limited submitted false statement as regards number of tenants/ occupants in the old cess building. The complaint was accordingly lodged with the police station. It was further stated that on the basis of the said report submitted by Mr.Tinaikar, prima facie it was found that an area admeasuring 1096.87 sq.mtrs. is required to be handed over by the said Mr.Dilip Thakkar of M/s.R.B.B.A. Properties Private Limited to the petitioner. The petitioner had issued a notice dated 21st October 2000 to the said Mr.Dilip Thakkar to hand over possession of the said land admeasuring 1096.87 sq.mtrs. The said Mr.Dilip Thakkar filed suits bearing Nos.4513 of 2001 and 1820 of 2002 in the City Civil Court, Mumbai and filed notice of motion therein. The petitioner made a statement in the said proceedings that the possession of the said tenements in the newly reconstructed building shall be taken over by following due process of law.

10. In the said show cause notice, it was mentioned that on appraising the facts by way of report of the Executive Engineer, the competent authority was satisfied

that there was a prima facie ground to believe that the respondent no.2 was in unauthorised occupation of tenements for various reasons. By the said show cause notice under Section 66 read with Section 103-J of the MHAD Act, the competent authority proposed to order the respondent no.2 as well as any other person who may be in occupation of the said premises to vacate the same within the prescribed time limit and hand over the same to the petitioner. The competent authority called upon the respondent no.2 to appear before him and to avail reasonable opportunity to tender his explanation and to produce evidence in support thereof within a period of 10 days from the date of service of notice as to why such order should not be made.

11. On 13th August 2007, the petitioner no.1 issued a charge-sheet against the respondent no.2 and others alleging that the respondent no.2 and others were unauthorized occupants and had executed forged documents and had committed conspiracy in inflating 26 tenants from 3 tenants by gorging documents countersigning forged documents fabricated by all unauthorized occupants. The respondent no.2 had issued a rent receipt purporting to be the receipt for rent in the year 1976 although before 1986, he was nowhere concerned with the suit property. It was alleged in the charge-sheet that the names of the witnesses were written in the same hand writing, thus it was abundantly clear that all those documents were forged by unauthorized occupants /bogus tenants with the help of main conspirator Mr.Dilip Thakkar with clear intention to secure free accommodation in reconstructed building worth crores of rupees and depriving the petitioner of the legitimate share in surplus area admeasuring 1095.87 sq.mtrs. which works out to several crores of rupees.

12. The respondent no.2 filed written statement in response to the said charge-sheet in the month of November 2004 and referred to paragraphs 45 to 64 of the judgment of the Division Bench of this Court delivered on 27th January 2000 in the said writ petition filed by the Breach Candy Residents' Association. In the said written statement, the respondent no.2 also relied upon some of the paragraphs of the affidavit filed by the Executive Engineer of the petitioner dated 7th November 1997 denying the allegations made in the said writ petition. The respondent no.2 denied that he had fabricated any of the records or had inflated tenancy from 3 to 26.

13. Mr.Rajendra V. Kshirsagar, the then Deputy Engineer working in the office to Executive Engineer of the petitioner filed affidavit in lieu of examination-in-chief before the competent authority. The said witness was cross-examined by the learned counsel for the respondent no.2 in great detail on various days. Neither the respondent no.2 nor any of the respondents who were parties to the said charge-sheet before the competent authority led any oral evidence. By an order dated 25th April 2007 passed by the competent authority-III of the petitioner, the said competent authority allowed the claim of the petitioner for surplus area admeasuring 1096.97 sq.mtrs. along with proportionate area of balcony, terrace and staircases. The competent authority directed the respondent no.2 and

several other respondents, some of who are the respondents in the aforesaid petitions, to hand over the surplus area of 1096.87 sq. mtrs. along with proportionate area of balcony, terrace and staircases to the petitioner within 7 days from the receipt of the said order.

14. Being aggrieved by the order dated 13th August 2007 passed by the competent authority under Section 66 of the MHAD Act, the respondent nos.1 and 2 in Writ Petition No.746 of 2019 and the respondent no.1 in the remaining 7 petitions filed separate appeals before the Appellate Officer, the Maharashtra Housing and Area Development Authority under Section 70 of the MHAD Act. By an order dated 4th September 2018, the learned Appellate Officer of the petitioner allowed all the appeals filed by the contesting respondents and has set aside the common order dated 13th August 2007 passed by the competent authority. Being aggrieved by the said order dated 4th September 2018, the petitioner board has filed these 8 petitions under Article 226 of the Constitution of India.

15. Mr.Lad, learned counsel for the petitioner invited my attention to some of the annexures to the writ petition including the orders passed by the competent authority and the learned Appellate Officer. He strongly placed reliance on recital (c) and (e) of the Deed of Conveyance dated 5th June 1975 between Badrivishal Pannalal Pittie & Ors. and Shivilal Ramnath Daga & Anr. and would submit that the said recital would clearly indicate that the said Jamnadas Bhagwandas had sublet the land described in the First Schedule to the said Deed of Conveyance since 1946 to Ramnath Daga and issued rent receipt to the said Ramnath Daga who was in possession and occupation thereof. After dismissal of the suit bearing RAE No.56/413 of 1961, the said Ramnath Daga became the direct tenant of the said Raja Bahadur Sir Bansilal and sons. The said Raja Bahadur Sir Bansilal and sons were issuing rent receipts to the said Ramnath Daga in respect of the land and the premises described in the First Schedule of the said Deed of Conveyance.

16. It is submitted that the said bungalow constructed on the said land was occupied by two tenants who became the owners under the said Deed of Conveyance. The said Ramnath Daga had transferred the said property to M/s.R.B.B.A. Properties Private Limited who had submitted proposal in the year 1981 for development of the said property and had obtained the IOD for reconstruction of the building with permissible FSI i.e. 1.33. Letter of Intent (LOI) was issued pursuant to which the said party demolished the said structure on the land.

17. It is submitted by the learned counsel that after issuing the said LOI, in the year 1986, Chapter VIII-A was introduced in the said MHAD Act. On 10th July 1986, Mr.Dilip Thakkar became the Director of M/s.R.B.B.A. Properties Private Limited. On 30th September 1996, the said M/s.R.B.B.A. Properties Private Limited executed Deed of Conveyance in favour of a society for achieving benefit of 2 FSI. In the said proposal in the 2 FSI, the said M/s.R.B.B.A. Properties Private Limited submitted a list of 26 tenants instead of 3 tenants to MHADA for

approval. On 17th December 1991, the petitioner granted sanction on the said application filed by the said M/s.R.B.B.A. Properties Private Limited. He submits that the said property was already demolished as far back as in the year 1981.

18. Learned counsel for the petitioner strongly placed reliance on various observations made by this Court in the said judgment dated 27th January 2000 and more particularly about inflated tenancy from 3 tenants to 26 tenants. He submits that the said developer who had submitted a plan and had applied for NOC under Chapter VIII-A was required to return 1096.87 sq.mtrs. of surplus area to the petitioner. He strongly relied upon few paragraphs of the report submitted by Mr.Tinaikar in his submission. He submits that those tenements which were vested in the petitioner under the said Chapter VIII-A being surplus were required to accommodate the dishoused person. The petitioner had filed criminal proceedings against the developer for committing fraud upon the petitioner.

19. It is submitted by the learned counsel that though the competent authority after considering the evidence led by the petitioner and taking cognizance of the fact that no oral evidence was led by the contesting respondents had rendered various findings of fact that the owners had inflated tenancy from 3 to 26 tenants, the Appellate Officer while reversing the finding rendered by the competent authority did not evaluate the evidence led before the competent authority by the petitioner and without recording any separate and independent finding on the evidence led by the petitioner rendered a vague finding that the developer had not inflated any tenancy as alleged by the petitioner. He submits that the Appellate Officer thus was bound to independently consider the evidence recorded by the competent authority while reversing those findings. The impugned order deserves to be set aside on that ground itself.

20. Learned counsel for the petitioner invited my attention to few paragraphs in the written statement filed by the contesting respondents before the competent authority and would submit that the said written statement would itself indicate that the tenancy inflated by the contesting respondents was created after demolition of structure constructed on the said land. No tenancy could be created without there being any structure in existence for availing of benefit of the scheme under Chapter VIII-A of MHAD Act. He submits that even in the written statement filed by the contesting respondents, though various such facts were admitted by the contesting respondents, the Appellate Officer totally ignored those admitted facts.

21. Learned counsel also relied upon the depositions of the witness examined by the petitioner i.e. Mr. Rajendra V. Kshirsagar, the then Deputy Engineer and in particular paragraph 10 of the said affidavit and the portion of the cross-examination of the said witness carried out by the learned counsel appearing for the contesting respondents in great detail. Though the contesting respondents did not examine any witness to prove their case, the Appellate Officer has totally overlooked these crucial aspect and has rendered a finding that the tenancy was

not inflated by the contesting respondents. The Appellate Officer did not consider oral and documentary evidence produced by the petitioner at all in the impugned order passed by the said Appellate Officer while allowing the said appeals filed by the contesting respondents.

22. Mr.Lad, learned counsel for the petitioner tendered a copy of the report submitted by Mr.Tinaikar and placed reliance upon the said IOD, certified tenants list, survey carried out by the petitioner in the year 1991 and the guidelines for processing the application for FSI issued by MHADA. Learned counsel for the petitioner has also placed reliance on joint declaration filed by Shival Ramnath Daga & Ashadevi L. Daga dated 10th March 1976 and would submit that there were no 26 tenants on the suit property as sought to be declared by the respondent no.2. It is submitted that the decision taken by the competent authority was based on the report submitted by Mr.Tinaikar, observations made by the Division Bench of this Court in the judgment delivered in the writ petition filed by Breach Candy Residents' Association and on the basis of the evidence on record led by the petitioner. The Appellate Officer however, has set aside the entire findings rendered by the competent authority on the premise that the petitioner had allegedly failed to produce any evidence to prove that the respondent no. 2 had inflated the tenancy from 3 tenants to 26 tenants. He submits that the findings rendered by the Appellate Officer are ex facie perverse and contrary to the findings rendered by the Division Bench of this Court in the said writ petition filed by the Breach Candy Residents' Association.

23. It is submitted by the learned counsel that when the said Ramnath Daga purchased the property in the year 1972, there was an existing bungalow with two outhouses. The Appellate Officer, however, without recording the findings about infirmity in the findings rendered by the competent authority while setting aside the findings of the competent authority has simplicitor brushed aside the findings without application of mind. The respondent no.2 had not proved the relationship of the respondent no.2 with the alleged tenants and the tenements allegedly occupied by those tenants in the said list of 26 tenants submitted by the respondent no.2.

24. Mr.Tulzapurkar, learned senior counsel for the respondent no.2 in Writ Petition No.1158 of 2019 submits that there are several disputed question of facts involved in this writ petition which cannot be adjudicated upon by this Court in this writ petition filed under Article 226 of the Constitution of India and thus no interference with the impugned order passed by the Appellate Officer is thus permissible. It is submitted that the entire case of the petitioner in these writ petitions is based on the wrong belief that the findings of the Division Bench of this Court in the writ petition filed by the Breach Candy Residents' Association and the report submitted by Mr.Tinaikar were conclusive and were binding on the authorities below. He submits that the said report submitted by Mr.Tinaikar was obtained by the petitioner unilaterally. None of the contesting respondents were parties to the said report nor were issued any notice before appointing the said

Mr.Tinaikar or before submitting any report by the said Mr.Tinaikar. No evidence was recorded by the said Mr.Tinaikar before submitting the said report.

25. Learned senior counsel strongly placed reliance on covering letter dated 17th July 2000 signed by Mr.S.S. Tinaikar thereby sending report to the Vice-President & Chief Executive of the MHADA. He submits that the covering letter itself would clearly indicate that the said report is based on preliminary investigation in respect of tenancies in building on Survey No.694, Bhulabhai Desai Road. He submits that the said report was made only on the basis of the documents made available to him by the Legal Advisor of the petitioner. He submits that in the said report, Mr.Tinaikar himself had recommended that further investigation was required to be conducted since the record made available to him was not adequate or was silent on some important facts such as the NOC or permission granted in 1981-82 for redevelopment of the said property under the then prevailing law, or the extent to which in 1991-92, the officer of the petitioner made independent reference to the Revenue Survey Record or BMC record in respect of the area, tenancies, levy and collection of cess and property tax etc.

26. Learned senior counsel submits that admittedly the said Mr.Tinaikar had no means of knowing how the then Chief Officer of the petitioner looked at the various issues raised by his Engineers before NOC was granted in 1992.He submits that the said covering letter further indicates that the said Mr.S.S. Tinaikar referred his draft report to the Legal Advisor of the petitioner with a request to him to apprise him of his conclusions and desired to discuss with the Vice President & Chief Executive with the salient observations made by him. However, there was no response from the petitioner.

27. Learned senior counsel invited my attention to some of the paragraphs from the judgment delivered by the Division Bench of this Court in the writ petition filed by Breach Candy Residents' Association and more particularly paragraphs 43, 63 and 64 and would submit that the observations made by this Court that the developer had created additional tenancies was prima facie. This Court did not order any enquiry in the matter and did not render any final conclusion in the said judgment. No reliance thus could be placed on those prima facie observations made by the Division Bench in the said judgment by the competent authority as conclusive on the factual aspect. Special Leave to Appeal against the said judgment delivered by the Division Bench of this Court was already dismissed.

28. It is submitted by the learned senior counsel that show cause notice issued by the competent authority was only based on the prima facie observations made by the Division Bench of this Court and on the basis of the report submitted by Mr.S.S. Tinaikar and not based on any other elements. Learned senior counsel invited my attention to paragraph 33 of the report submitted by Mr.S.S. Tinaikar and would submit that even in the said report, Mr.Tinaikar had only made recommendation that an independent investigating authority must examine the record produced by the owner M/s.R.B.B.A. Properties Private Limited and the

Architect Hafeez Contractor in 1991 at the time of application was made, compare it with that produced in 1981-82 when a similar application was made and NOC for reconstruction obtained from MHADA, collect fresh evidence at least from the so called tenants who revealed later that they were "related" and wanted to amalgamate their independent apartments in the new building and ask them to prove their tenancy rights by producing evidence in their favour etc. He submits that no further investigation was carried out by the petitioner pursuant to the preliminary report submitted by Mr.S.S. Tinaikar. He submits that Mr.Tinaikar was not examined as a witness by the petitioner admittedly before the competent authority.

29. Learned senior counsel invited my attention to the list of tenants annexed at page 119 of the report submitted by Mr.S.S. Tinaikar and would submit that the said list showing the details of 26 tenants was duly certified by the petitioner in the year 1991. Even before the Division Bench of this Court, the petitioner in the said writ petition had canvassed that there were 5 structures demolished by the developer and thus the petitioner could not contend that the original structure was the bungalow plus 2 outhouses only.

30. Learned senior counsel invited my attention to the cross-examination of the witness examined by the petitioner and would submit that even the said witness could not explain the basis of the alleged surplus area of 1096.87 sq.mtrs. computed by the petitioner. He submits that the said witness had answered in the cross-examination that the petitioner would examine Mr.S.S. Tinaikar. Though the said witness examined by the petitioner clearly deposed that the petitioner would examine the witness, Mr. Tinaikar was not examined as a witness. It is submitted that though the said report submitted by Mr.S.S. Tinaikar was not tendered in evidence before the Competent Authority, the Competent Authority still relied upon the said report which shows perversity. The Competent Authority has relied upon the disputed documents.

31. It is submitted by the learned senior counsel that it was brought on record before the competent authority that the third party rights in respect of the tenements constructed in the building had been already created and the respective tenements are in possession of various third parties. The Competent Authority however while directing the respondents to hand over surplus area admeasuring 1096.97 sq.mtrs. along with proportionate area of balcony, terrace and staircases to the petitioner did not render any finding as to how the said area was declared as surplus and did not direct how many flats would be required to be vacated, which flat purchaser would vacate his flat.

32. Learned senior counsel submits that the said witness examined by the petitioner in his cross-examination clearly admitted that the exact surplus area in possession of the respondent no.2 and the other occupants could not be specified. In spite of such evidence on record, the competent authority directed the respondent no.2 and others to hand over possession of area as claimed by the petitioner.

33. Learned senior counsel invited my attention to the findings rendered by the Appellate Officer and more particularly paragraph 17 of the impugned order and would submit that since the observations made by the Division Bench of this Court in the said judgment were prima facie observations, the Appellate Officer was right in holding that the observations made by the Division Bench of this Court in respect of inflation of tenancy was prima facie observations. This Court had no occasion to investigate into the matter relating to inflation of tenancies. In these circumstances, the Appellate Officer was justified in holding that oral evidence submitted by the officer of the petitioner did not indicate any evidence relating to inflation of tenancies. The petitioner had miserably failed to produce any documents on record to prove that the tenancies were in fact inflated. He submits that the Appellate Officer had not ignored any evidence as sought to be canvassed by the petitioner. The findings rendered by the Appellate Officer being not perverse cannot be interfered by this Court in this writ petition. There is no infirmity in the order passed by the Appellate Officer.

34. Learned senior counsel invited my attention to the cross-examination of the said witness examined by the petitioner and would submit that the officer of the petitioner who had approved or certified the list of 26 tenants were admittedly promoted to higher posts. The petitioner thus could not allege that any fraud was committed by the respondent no.2 jointly with any fraud of the officer of the petitioner.

35. It is submitted by the learned senior counsel that though the judgment was delivered by this Court in the said writ petition on 27th January 2000 and Special Leave to Appeal was dismissed on 17th April 2000, the show cause notice was issued by the competent authority of the petitioner after 4 years on 28th May 2004. He submits that even the said report submitted by Mr.S.S. Tinaikar was on 17th July 2000. Third party rights in respect of tenements have been already created in favour of various respondents during the said period.

36. Learned senior counsel for the respondent no.2 submits that the Appellate Officer under Section 70 of the MHAD Act is the final authority on facts and law. This Court thus cannot be interfered with the findings of facts of the Appellate Officer under Article 226 of the Constitution of India in this writ petition.

37. Mr.Samdhani, learned senior counsel for the respondent no.2 in Writ Petition No.1057 of 2019 adopted the submissions made by Mr.Tulzapurkar, learned senior counsel for the respondent no.2 in Writ Petition No.1158 of 2019. Learned senior counsel placed reliance on Section 103-J and Section 66 of the MHAD Act and would submit that the competent authority in the show cause notice had invoked the said provision for seeking eviction of the contesting respondents. He submits that Section 103-J of the MHAD Act falls under Chapter VIII-A and the said provision does not apply to the facts of this case at all since the tenements were not handed over by the petitioner to the society. He submits that it is not the case of the petitioner that any of the contesting respondents are unauthorised occupants in respect of the tenements allotted to the society.

38. Learned senior counsel invited my attention to Section 66 of the MHAD Act and Regulation 33(7) of the Development Control Regulation and would submit that unless the property is acquired by MHADA, Chapter VIII-A will not apply. He submits that merely because the petitioner had claimed recovery of various tenements alleged to be the surplus from the respondent no.2, for the petitioner could not press in service Section 66 since such tenements were not the authority premises.

There was a serious dispute raised by the contesting respondents about the alleged right of the petitioner to recover such tenements from various occupants on the ground that those tenements were not authority premises. In support of this submission, learned senior counsel placed reliance on the judgment delivered by the Division Bench of Radhkishna Co-operative Housing Society Limited Vs. State of Maharashtra, 2016 SCC OnLine Bom 9356 and in particular paragraph 6 thereof.

39. Learned senior counsel also placed reliance on the judgment of this Court in the case of Bharat Kanakia & Anr. Vs. Mumbai Building Repairs and Reconstruction Board (MHADA Unit) & Ors., (2006) 1 Bom CR 201 and in particular paragraph 8 in support of the submission that Section 103-J of the MHAD Act was not at all attracted to the facts of this case and thus the entire proceedings initiated by the competent authority under Section 103-J read with Section 66 of MHAD Act is totally without jurisdiction and was not maintainable.

40. Mr.Purohit, learned counsel for the respondent no.1 in Writ Petition (L) No.4359 of 2018 adopts the submission made by Mr.Tulzapurkar, learned senior counsel for the respondent no.2 in Writ Petition No.1158 of 2019 and would submit that his client being bonafide flat purchaser without notice, no order could be passed by the competent authority against his client. He submits that no specific order is passed by the competent authority for possession against his client.

Alleged surplus area demanded by the petitioner was not even identified. There was neither any evidence nor any proof submitted by the petitioner in respect of the tenements purchased by his client. He submits that Division Bench of this Court in the said judgment in the case of Breach Candy Residents' Association (supra) had also taken cognizance of creation of third party rights by the respondent no.2 and thus rightly did not order any enquiry for further investigation in the matter.

41. Mr.Punjabi, learned counsel for the respondent no.1 in Writ Petition No.1057 of 2019 states that his case is also similar to the case of the respondent no.2 in Writ Petition (L) No.4359 of 2018. He adopts the submission made by Mr.Purohit, learned counsel for the respondent no.1 in Writ Petition (L) No.4359 of 2018. Mr.Vaishanv a/w Ms.Mukherjee, learned counsel for the respondent no.1 in Writ Petition No.773 of 2019 also adopts the submission made by Mr.Purohit, learned counsel for the respondent no.1 in Writ Petition (L) No.4359 of 2018 on the

ground that their client is also a bonafide flat purchaser.

42. Mr.Sakhardande, learned counsel for the respondent no.2 in Writ Petition No.746 of 2019 also submits that his client is one of the bonafide flat purchaser. He adopts the submission of Mr.Purohit, learned counsel for the respondent no.1 in Writ Petition (L) No.4359 of 2018. Ms.Kachalia, learned counsel for the respondent no.2 in Writ Petition No.4366 of 2018 adopts the submission made by Mr.Purohit, learned counsel for the respondent no.1 in Writ Petition (L) No.4359 of 2018.

43. Ms.Kamble, learned counsel for the respondent no.1 in Writ Petition No.1604 of 2019 adopts the submission made by Mr.Purohit, Learned counsel for the respondent no.1 in Writ Petition (L) No.4359 of 2018 submits that the petitioner did not disclose the tenancies created by the respondent no.2 and thus is not entitled to seek possession of any part of the alleged surplus area.

REASONS AND CONCLUSION :-

44. I shall first decide whether show cause notice dated 28th May 2004 issued by the competent authority-III, MHADA under Section 66 read with Section 103-J to the respondent itself was without jurisdiction or not. The competent authority in the impugned order had rendered a finding that the proceedings initiated under Section 103-J of the MHAD Act were tenable in view of judgment of this Court in the Writ Petition No.1587 of 1997 and the orders passed in Civil Suit and otherwise also. There is no dispute that respondent no.2 had filed civil suits before the City Civil Court impugning the notice issued by the MHADA for eviction bearing Nos.4513 of 2001 and 1820 of 2002 against MHADA. In the said suit, the petitioner made a statement that the possession of the said tenements in the newly reconstructed building shall be taken over by the petitioner after following the due process of law. It is vehemently contended by Mr.Samdhani, learned senior counsel for the respondent no.2 in Writ Petition No.1057 of 2019 that neither Section 103-J of MHAD Act nor Section 66 thereof was attracted to the facts of this case.

45. A plain reading of Section 103-J of the MHAD Act indicates that if any co-operative society unauthorisedly allots to any person any tenement which is to be allotted to a dishoused person from the building reconstructed or to a dishoused person from the other cessed demolished buildings by nomination by the Board, such unauthorized allotment shall be treated as invalid for all purposes and the authority shall be competent to evict such unauthorized allottee by taking action under Section 66 of the MHAD Act as if the the premises so allotted were authority premises and allot such premises to the person to whom they should have been allotted. Section 66 of the MHAD Act empowers the competent authority to evict certain persons from the authority premises more particularly if the conditions set out in Section 66(1)(a) of the MHAD Act are satisfied. The authority premises is defined under Section 2(4) i.e. "Authority Premises" means any premises belonging to, or vesting in the Authority, or taken

on lease by the Authority, or entrusted to, or placed at the disposal of, the Authority for management and use for the purposes of the MHAD Act.

46. It was the case of the respondents that the respondent no.2 had submitted proposal to the petitioner for grant of NOC to develop the property under Chapter VIII-A which provides for acquisition of cessed properties for Co-operative Societies of Occupiers. Section 103-I (3) of the said MHAD Act provides that the co-operative society shall, notwithstanding anything contained in any other law, reserve and allot, in the new building such percentage as is specified in the Third Schedule of the MHAD Act of the surplus area in the new building determined on the basis of the difference between the floor space index availed of by it while reconstructing the building and the floor space index that had been utilised in the construction of the old building, for housing. Such dishoused occupiers from other cessed demolished buildings are to be nominated by the Board and upon such nominations, the nominated occupiers shall be accepted by the co-operative society as its members in accordance with its bye-laws, and shall not dispose of tenements cover by such reserved surplus area to others.

47. It further provides that if any tenements are rendered surplus because of any of the occupiers in the old buildings not joining the co-operative society the percentage as is specified in the Third Schedule to the said MHAD Act of the surplus area to be made available to the Board in the new building for allotment to other dishoused occupiers shall be determined on the basis of the difference between the total floor area constructed in the new building and the area to be occupied therein by the participating occupiers in the old building. Under 103-I(5) of MHAD Act, the list of occupiers in the old building as also the area of the tenement therein shall be certified by the Board after such consultation with the co-operative society and the occupiers of the tenements concerned, as may be necessary.

48. The area of the tenement shall be determined having regard to the provisions of the Development Control Rules applicable in the area and after taking into account any specific area or part thereof as might be permitted by the Government for the purpose. The Board shall inform the occupiers about the area so determined. Section 103-I (6) of the MHAD Act provides that if there is a dispute as to who is the lawful occupier of the tenements in the old building, the parties shall be directed to get the disputes determined by the competent Court of law. Allotment of a transit accommodation to a person actually in occupation of such tenement or in a tenement in a new building shall not be deemed to have decided the issue and such allotment shall be without prejudice to the respective rights of the disputing parties.

49. A conjoint reading of Section 103-I and 103-J clearly indicates that the tenements which are in surplus which have to be computed in accordance with Section 103-I(3) have to be allotted to the dishoused persons. Under Section 103-I(3), an action can be taken by the competent authority under Section 66 of MHAD Act only if any co-operative society unauthorisedly allots to any person

any tenement which is to be allotted to a dishoused person, from the building reconstructed or to a dishoused person from the other cessed demolished buildings by nomination by the Board and such unauthorised allotment would be treated invalid for all purposes. A question that arises for consideration of this Court is whether there were any surplus tenements in the new building constructed by the developer which has to be determined on the basis of the difference between the floor space index availed of by it while reconstructing the building and the floor space index that had been utilised in the construction of the old building to be computed in accordance with the provisions of Section 103-I of the MHAD Act.

50. It was the case of the petitioner that originally there were three tenants only when the structures in question in respect of which the application under Chapter VIII-A of the MHAD Act were demolished and that those 3 numbers of tenancies were inflated to 26 subsequently when the said application under Chapter VIII-A was made by the society. Division bench of this Court in the case of Radhkishna Co-operative Housing Society Limited (supra) has held that under Section 103-I(1) and 103-I(2) of the MHAD Act, the co-operative society has to accommodate all the occupiers and its members set out in the said provision. Division Bench in the said judgment has held that such society gets the benefit of Section 103-I of the MHAD Act.

51. A learned Single Judge of this Court in the case of Bharat Kanakia & Anr. (supra) has held that under Section 66 (1)(a) of the MHAD Act, the competent authority is empowered to evict a person authorised to occupy any authority premises. It is held that the said provision, however, would not be applicable to the building which was the subject matter of the said case as it was not the authority premises. In my view, Section 66 of the MHAD Act can be invoked by the competent authority only if the premises for which such powers are required to be exercised is authority premises within the meaning of Section 2(4) of the MHAD Act. In this case, there was a serious dispute raised by the respondents as to whether there were any surplus tenements in the hands of the society after accommodating all the existing occupants/tenants in the old building in the newly constructed building. In my view, till such time, the petitioner was able to prove that there were any surplus tenements after accommodating all existing tenants who were occupying the old building were accommodated in the new building which surplus tenements vested in the petitioner and available for allotment to a dishoused person and were 'authority premises,' no action under Section 103-I read with Section 66 of the MHAD Act could be initiated by the petitioner.

52. The judgment of this Court in the case of Radhkishna Co-operative Housing Society Limited (supra) and in the case of Bharat Kanakia & Anr. (supra) would assist the case of the respondent no.2. In my view, if the petitioner would have been able to successfully prove that there were any surplus tenements calculated in accordance with Section 103-I(3) of the MHAD Act, the question of there being any surplus for allotment to a dishoused person would have been arisen only in

that circumstances. The powers of the petitioner to initiate action under Section 103-J read with Section 66 of the MHAD Act would arise only if the premises were the authority premises within the meaning of Section 2(4) of the MHAD Act and not otherwise.

53. In my view, Mr.Samdhani, learned senior counsel for the respondent no.2 in Writ Petition No.1057 of 2019 is thus right in his submission that since the petitioner had failed to discharge the onus before the Competent Authority that there were any surplus tenements computed in terms of Section 103-I (3) of the MHAD Act or such surplus tenements were unauthorizedly transferred by the society though were to be allotted to a dishoused person by the petitioner, no action could be initiated by the petitioner under Section 103-J read with Section 66 of the MHAD Act. In my view, for initiation of any action under Section 103-J read with Section 66 of the MHAD Act, the competent authority has to first prove that the premises in respect of which an action is proposed to those provisions were the authority premises within the meaning of Section 2(4) of the MHAD Act and thereafter to prove that the person who was authorised to occupy the authority premises had committed any of the breaches mentioned in Section 66(1) (a) (i) to 66(1) (a) (vi) of the MHAD Act.

54. In so far as the reference made to the order passed by the City Civil Court in the order passed by the competent authority is concerned, it appears that the petitioner had made a statement before the City Civil Court that in the suit filed by the respondent no.2, the petitioner would initiate action for recovery of possession of the said tenements in the newly reconstructed building after following due process of law. In my view, the said statement made by the petitioner before the City Civil Court, Mumbai itself would not empower the petitioner to invoke the provisions of Section 103-J read with Section 66 and Section 2(4) of the MHAD Act unless and until the conditions prescribed under those provisions for initiating such action for recovery of possession were satisfied.

55. In so far as the reference made to the judgment of this Court in Writ Petition No.1585 of 1997 wrongly mentioned as Writ Petition No.1587 of 1997 delivered on 27th January 2000 in the writ petition filed by Breach Candy Residents' Association Vs. Municipal Corporation of Greater Bombay is concerned, a perusal of the said judgment indicates that the said judgment did not grant any liberty to the petitioner to initiate any action under Section 103-I read with Section 66 of the MHAD Act against the respondents. Division Bench of this Court in the said judgment has not rendered any finding that there were surplus tenements available to the society for allotment to the dishoused persons in accordance with the provisions of Section 103-J (3) of the MHAD Act.

56. I shall now deal with the issue whether the petitioner had made out a case for interference with the order passed by the Appellate Officer in the appeals filed by the respondents under Section 70 of the MHAD Act.

57. A perusal of the show cause notice dated 28th May 2004 issued by the Competent Authority indicates that the said show cause notice is issued pursuant to the judgment delivered by this Court in the Writ Petition No.1585 of 1997 filed by the said Breach Candy Residents' Association. The said Show Cause Notice is issued also based on Tinaikar's report. The respondent had filed a detailed written statement in response to the said show cause notice issued by the Competent Authority raising various issues. In the said written statement, the respondent had referred to prima facie observations made by the Division Bench of this Court in the judgment delivered in the case of Breach Candy Residents' Association and Ashok Gupta (supra) and also the affidavit-in-reply filed by the Officers of the petitioner in the said writ petition and various other issues.

58. The petitioner had examined Mr. Rajendra V. Kshirsagar, the then Deputy Engineer working in the office to Executive Engineer (RU-1)/Mumbai of the petitioner as a witness before the Competent Authority. In the said affidavit in lieu of examination-in-chief, the said witness had alleged forgery of various documents/agreements and fabrication as against all the respondents. In the said affidavit, the said witness also referred to the observations made in the Tinaikar's report. In paragraph 19 of the said affidavit, it was deposed that during the scrutiny of the papers, it was revealed that out of 5 structures on the said property as C.S. No.694, 3 were categorised as cessed 'A' class, one was categorised as 'C' class cessed and one was categorised as non cessed. All these 4 cessed structures were used for residential purposes.

59. In paragraph 22 of the said affidavit, it was deposed that relying on the policy/guidelines dated 10th July 1991 of the Government and the City Survey Plan of the Collector of Mumbai and upon verification of inspection extract of 1958-59, required NOC was granted. The said witness was cross-examined at length by the learned counsel for the respondents. In the said cross-examination, the said witness admitted that the notice dated 28th May 2004 was issued on the basis of Tinaikar's report. The said report was available with the said witness. He had, however, not put it in evidence in affidavit dated 6th June 2005. The said witness deposed that the petitioner would examine other witnesses to make the facts more clear.

60. The witness admitted that as per the schedule C, the surplus area was not worked out by the office of Executive Engineer/RU- 1. In all such type of case, REE office worked out the surplus area. The witness had not worked out the surplus area. He did not know that claim for 1096.87 sq. mtrs. was correct or not. He deposed that from the 'surplus area statement' referred in affidavit in lieu of the examination-in-chief, it was not possible for him to say whether the said claim for 1096.87 sq.mtrs. was correct or not. He deposed that the area of 1096.87 sq.mtrs. was computed on the basis of built up area of 23 tenants. He had not produced the tenant list. The surplus area calculation statement and tenants list were provided in the report submitted by Mr.Tinaikar. The said surplus area calculation was made by R.E.E. office and not by Tinaikar's report.

The said witness deposed that the petitioner would be examining Mr.Tinaikar as a witness.

61. The said witness deposed that he was not aware as to what investigation was carried out after receiving the Tinaikar's report and before issuing Show Cause Notice. The said witness further deposed that his office had certified 26 tenants after investigation in the year 1991. Neither the witness not the petitioner called upon any person to produce any documents to accept them as tenants or not. The petitioner had not checked any documents in respect of 23 persons who according to the petitioner were not genuine tenants. The witness was not a party to the investigation carried out after receiving the Tinaikar's report. The Housing Department had carried out the investigation. No such copies of report of investigation was given to the witness. He came to know of the investigation because of Tinaikar's report regarding inflation of the tenancies.

62. The witness deposed that State Government of Maharashtra had appointed Mr.Tinaikar. The witness was not personally aware as to how Mr.Tinaikar had conducted enquiry. Mr. P.P. Trivedi, the then Executive Engineer, RUU, Mr. A.T. Deshmukh, the then Deputy Engineer, RUI were the concerned officers involved in the investigation carried out by Mr.Tinaikar. They were still working with the petitioner. None of them would be examined as witness. The witness volunteered that they had been transferred to other departments and may be called if required. The enquiry by Mr.Tinaikar was to be conducted in regarding inflation of tenancies in the building. The petitioner has taken action against the erring officers.

63. Mr.Deshmukh, Deputy Engineer was promoted as Executive Engineer in the last year before recording the said evidence and Mr.Trivedi was promoted as Deputy Chief Engineer in the month of May 2005 against whom the action was taken. In response to the question to the witness as to on what basis, he assumed that Mr.Tinaikar's report was correct, the witness deposed that because Mr.Tinaikar was appointed by Government of Maharashtra. Mr.Trivedi and Mr.Deshmukh were not appointed by Government of Maharashtra. Except that of Tinaikar' report, the petitioner did not verify any other document. The petitioner has not checked the record of registration of M/s.R.B.B.A. Properties Private Limited. In response to the question as to how the petitioner ascertained who was occupying which portion for the purpose of addressing the show cause notices prior to the service of show cause notice, the witness deposed that on the basis of the tenants list of the unauthorized occupants of the building provided by Chief Officer of the petitioner, the petitioner got such information. The Chief Officer had got such list from the respondent no.2.

64. In response to the question as to how the petitioner identified 16 occupants as unauthorized occupants, the witness deposed that 16 unauthorized occupants were occupying the area of 1096.87 sq.mtrs. He had identified them on the basis of their area tallying with the demand of the petitioner. The petitioner, however, did not call for any documents from those 16 respondents. The builder had not

informed that these 16 persons were unauthorized occupants. In response to the question as to whether the witness agreed that surplus area could not be calculated unless entitlement of Mr. Daga for the area in the building was first ascertained, the witness agreed with the said suggestion that the area of Mr.Daga family was 5250 sq.mtrs. approximately which was in the old building. According to the witness, except Mr.Daga, others were the unauthorised occupants of the area. The petitioner did not have any record of old building prior to 1986. The developer had issued rent receipts. It could not be traced out who was signing the rent receipts on behalf of M/s.R.B.B.A. Properties Private Limited. The witness agreed that Mr.Dilip Thakkar had not issued the said rent receipts.

65. The witness admitted that MHADA had validly granted permission in this case. The corporation has given permission even though the building had been demolished. The said witness deposed that the petitioner was going to examine Mr.Tinaikar. The witness admitted tht all tenancies in the suit were prior to 13th June 1996 and were valid tenancies under Regulation 33(7) of the DC Regulation which date was cut off date under DC Regulation.

66. The petitioner examined Mr.Trivedi working as Deputy Chief Engineer on the date of recording his evidence. The said witness deposed that the list of tenants was submitted to the Chief Officer of the Board by the developer which was submitted around May/June 1991 along with application. The NOC was given after that date. The witness was shown the affidavit of Mrs.Megha Shinde dated 7th November 1997 filed in the writ petition filed by Breach Candy Residents' Association before this Court. The affidavit was approved by the Legal Advisor of MHADA. The said witness agreed with the contents of the said affidavit. He also agreed with the contents of the affidavit-in-reply filed by Mr. Mahesh Dalvani, the then Deputy Engineer in the writ petition by Breach Candy Residents' Association. He admitted that the said affidavit was approved by the Legal Department of the petitioner. What was stated in the affidavit of Mr.Mahesh Dalvani was factually correct. He also admitted that all the affidavits must have been filed after verifying the concerned records from the office of the Chief Officer/RR of the petitioner. He also admitted that before filing these affidavits, the relevant records was verified by concerned department and after approval of Legal Advisor of MHADA, those affidavits were filed.

67. In reply to a suggestion put to the witness that the NOC was validly granted, the witness deposed that the NOC was granted by the Chief Officer and it should be considered to be validly granted. The witness deposed that the NOC was granted under Regulation 33(7) of DC Regulation. The witness deposed that there was no reason to doubt the documents furnished by the developer. The witness volunteered that BMC maintained the record of occupancy and type of use. The BMC record had shown 26 occupancies prior to 1991 in respect of the suit building. The witness admitted that scrutiny of the documents for the proposal was done according to law and on the basis of all the material available

at that time.

68. A perusal of the affidavit-in-reply filed by the Executive Engineer, (RU-1)-Mrs.Megha Shinde dated 7th November 1997 filed in the writ petition by Breach Candy Residents' Association which is referred in the written statement filed by the respondents before the Competent Authority indicates that it was the case of the petitioner itself in the said affidavit while opposing the said writ petition that along with the list of tenants submitted by the developer, affidavit and the indemnity bond, the developer had also furnished the inspection extract and the rent receipts which were verified by the petitioner and on ascertainment of the correctness of the information given by the developer and on the basis of the record available with MCGM, the decision to grant NOC was taken. Reference to the affidavit filed by Mr. Mahesh Dalvani, Deputy Engineer RU-1 dated 15th November 1999 was also made in the said written statement filed by the respondents.

69. The said officer also stated in his affidavit that the list of tenants along with affidavit and the indemnity bond supplied by the developer and inspection extract and rent receipt furnished by the developer were also verified and on ascertainment of the correctness of the information given by the developer and on the basis of the record available with MCGM i.e. record relating to the fixation of rateable value of 1988-89 showing number of tenaments, the collectors record viz. City Survey Record indicating the existence and the extent of the original structure, the decision of grant NOC was taken. In the said affidavit, it was also averred by the petitioner herein that list of tenants as submitted was verified on the basis of the available information. In view of the same, the NOC granted by the petitioner was in accordance with the then prevailing scheme and within its authority. BMC had verified the relevant available record and thereafter issued NOC.

70. It is thus clear that the stand of the petitioner in the affidavit filed by this Court in the writ petition filed by Breach Candy Residents' Association was that all permissions and NOC were granted in favour of the developer after verifying the documents produced by the said developer. A perusal of the relevant paragraphs of those affidavits clearly indicates that the petitioner had opposed the said writ petition filed by the said Breach Candy Residents' Association alleging various illegalities and breaches on the part of the petitioner in granting various permissions in favour of the developer and had justified its action. The petitioner thus could not be allowed to take a different stand in the said show cause notice issued by the Competent Authority after disposal of the writ petition filed by the Breach Candy Residents' Association.

71. In so far as the reliance placed by Mr.Lad, learned counsel for the petitioner on various observations made by this Court in the judgment delivered on 27th January 2000 in the writ petition filed by Breach Candy Residents' Association is concerned, a perusal of the said judgment indicates that the said petition was filed for seeking appropriate directions directing the authorities to cancel all the

permissions granted for reconstruction of the high rise residential building on the suit property and also seeking direction against the authorities to demolish parts or portion of the said building which were alleged to be in violation of the DC Regulation for Greater Bombay 1991 and for direction against the petitioner to take vacant possession of the surplus area in the said building or part thereof which the petitioner was entitled to under Section 102(1) of the MHAD Act.

72. This Court in the said judgment had taken a prima facie view that the affidavits filed by Corporation and the petitioner herein did not indicate that the proper scrutiny was undertaken to find out who were the real occupants, what was the area occupied by them, what area they were entitled to and most importantly what percentage of the built up area must go to the petitioner herein. The Corporation and the petitioner herein ought to have handled that aspect of the matter more carefully and vigilantly. The Court could have intervened in the matter so far as that question was concerned and could have directed the fresh examination of that aspect by MHADA however, since the said petition suffered from gross laches and third party rights had already intervened, this Court did not think it fit to issue directions for fresh examination at that distinct stage. This Court made prima facie observation that the developer had created additional tenancies. Special Leave to Appeal filed by the Breach Candy Residents' Association against the said judgment delivered by this Court came to be dismissed on 17th April 2000.

73. A perusal of the record clearly indicates that the said judgment delivered by this Court had though rendered some of prima facie findings, no action was initiated by this Court in view of the gross delay on the part of the said petitioner in filing the said petition and also taking note of fact that third party rights were already created even at that stage. In my view, Mr. Lad, learned counsel for the petitioner thus could not have urged that prima facie observations made by this Court were binding on the Competent Authority as conclusive.

74. The next question that arises for consideration of this Court is whether the said report submitted by Mr.Tinaikar which was one the reason for issuance of show cause notice by the Competent Authority upon the respondents was conclusive and binding on the respondents or not. It is not in dispute that the said report submitted by Mr.Tinaikar was obtained by the petitioner unilaterally. None of the contesting respondents were parties to the said report nor were issued any notice before appointing the said Mr.Tinaikar or before submitting any report by the said Mr.Tinaikar. No evidence was recorded by the said Mr.Tinaikar before submitting the said report. The said report was made only on the basis of the documents made available to him by the Legal Advisor of the petitioner.

75. A perusal of the said report clearly indicates that in the said report, Mr.Tinaikar himself had recommended that further investigation was required to be conducted since the record made available to him was not adequate or was silent on some important facts such as the NOC or permission granted in 1981-82 for redevelopment of the said property under the then prevailing law, or

the extent to which in 1991-92, the officer of the petitioner made independent reference to the Revenue Survey Record or BMC record in respect of the area, tenancies, levy and collection of cess and property tax etc.

76. The covering letter of the said report submitted by Mr.Tinaikar addressed to the Vice President & Chief Executive of the petitioner records that the said report was prepared after preliminary investigation based on the documents available to him by the legal advisor of the petitioner regarding the matter in which the verification of names of tenants and the area each one occupied, was done by the Officers of the MHADA/BHAD Board in respect of buildings on Survey No.694 which were demolished for reconstruction. In the said covering letter, the said Mr.Tinaikar also made it clear that further investigation was required to be conducted since the record made available to him was not adequate or was silent on some important facts. He had no means of knowing how the then Chief Officer of the petitioner looked at the various issues raised by his Engineers before NOC was granted in 1992.

77. In the said letter, it was further mentioned that he had referred his draft report to the Legal Advisor of the petitioner with a request to apprise him of his conclusions and desired to discuss with the Vice President & Chief Executive with the salient observations made by him. However, he did not receive any response from the petitioner. It is thus clear that the said report submitted by Mr.Tinaikar was also based on a preliminary investigation and was not conclusive. The said report was obtained by the petitioner unilaterally without notice and participation of the respondents.

78. In the evidence led by the witness examined by the petitioner, the said witness categorically admitted that the said report was not even placed on record in evidence by those two witnesses. They had not participated even in the preliminary investigation alleged to have been carried out by Mr. Tinaikar. Though the said witness had deposed that some more witnesses would be examined by the petitioner, no other witness had been examined except those two witnesses. Though it was stated in the evidence that Mr.Tinaikar would be examined as one of the witnesses, at the subsequent stage, the said witness deposed that the petitioner did not propose to examine the said Mr.Tinaikar as witness. The witness examined by the petitioner did not produce any documents for perusal of the Mr.S.S. Tinaikar while carrying out the said alleged preliminary investigation in respect of tenancies.

79. In my view, since the said report submitted by Mr. Tinaikar was unilaterally obtained by the petitioner and since no notice of any nature whatsoever was issued to the respondents either to participate before Mr.Tinaikar or to lead any evidence before Mr.Tinaikar and even otherwise the said report was based on the preliminary investigation with recommendation of having further detailed investigation, no reliance on the said report could be placed by the Competent Authority in the show cause notice or even thereafter. The fact remains that the said Mr.Tinaikar though was proposed to be examined as witness was not

examined by the petitioner. In my view, no cognizance of that report thus could be taken by the Competent Authority. No conclusion could be drawn against the respondents based on that report that the respondents had fabricated any documents or had inflated the tenancies.

80. Be that as it may, the petitioner had already taken a definite stand before this Court in the said writ petition filed by Breach Candy Residents' Association that all permissions were granted to the respondent no.2 was after proper verification of the documents including tenancy documents. In my view, Mr.Tulzapurkar, learned senior counsel for the respondent no.2 in Writ Petition No.1158 of 2019 is thus right in his submission that no cognizance of prima facie observation made by this Court in the said writ petition filed by Breach Candy Residents' Association or on the report submitted by Mr.Tinaikar based on the alleged preliminary investigation could be taken in the said show cause notice issued under Section 103-J read with Section 66 of MHAD Act.

81. Be that as it may, the witness examined by the petitioner failed to prove before the Competent Authority that the respondent no.2 had inflated any tenancy as sought to be alleged in the said show cause notice. In my view, the said show cause notice is contrary to the stand taken by the petitioner in the affidavit-in-reply filed by the petitioner in the said writ petition filed by Breach Candy Residents' Association. In these facts and circumstances, the Appellate Officer rightly held that no evidence was produced by the petitioner before the Competent Authority to prove their allegations that the tenancies were inflated by the respondent no.2 from 3 tenants to 26 tenants.

82. A perusal of the record indicates that even when the judgment was delivered by the Division Bench of this Court as far back as on 27th January 2000, the developer had already created third party rights in respect of various tenaments. The Division Bench of this Court took cognizance of that fact also as one of the factors for not directing any further enquiry in the matter and refusing to grant any relief in favour of the petitioner therein.

83. A perusal of the evidence led by the petitioner also indicates that those witnesses could not prove as to how the petitioner had computed the surplus area of 1069.87 sq.mtrs. which was demanded from the respondents under the said show cause notice. The witnesses examined by the petitioner have categorically admitted that they had not made that calculation and could not explain the basis of such calculation.

In my view, Mr.Purohit and other counsel appearing for the flat purchasers are right in their submission that in the impugned order passed by the Competent Authority, there was no definite finding as to how many tenaments were in surplus, those tenaments were not identified in the order, how many occupants were required to be returned their premises to the petitioner on the ground of those tenaments being surplus Section 103-J (3) of the MHAD Act. In my view, the order of the Competent Authority even otherwise could not have been

executed in the manner as passed. The Appellate Officer was thus justified in reversing the said order passed by the Competent Authority.

84. In so far as the submission of Mr.Lad, learned counsel for the petitioner that the Appellate Officer while reversing the findings rendered by the competent authority ought to have independently evaluated the evidence led by the witnesses examined by the petitioner and ought to have recorded the reasons as to why the findings recorded by the Appellate Officer were not in accordance with law or were factually incorrect is concerned, in my view, the Appellate Officer has considered the evidence in the impugned order and has rightly held that the petitioner had failed to prove that the tenancies were inflated by the respondent no.2. The onus was on the petitioner to prove that a fraud was committed or fabrication of documents carried out by the respondent no.2 or other flat purchasers which the petitioner failed to prove.

85. In my view, since the reference made to prima facie observations made by this Court in the writ petition filed by Breach Candy Residents' Association or the report submitted by Mr.Tinaikar based on the alleged preliminary investigation itself could not be relied upon, the respondents were not required to lead any separate evidence to prove their case. The case of the respondents was in fact admitted by the witnesses examined by the petitioner in the oral evidence as well as in the affidavit-in-reply filed in the said writ petition filed by Breach Candy Residents' Association. In my view, there is thus no merit in this submission made by the learned counsel for the petitioner.

86. A perusal of the record indicates that though the Division Bench of this Court has dismissed the said writ petition on 27th January 2000, Special Leave to Appeal was dismissed on 17th April 2000 and Mr.Tinaikar's report was submitted on 17th July 2000, the petitioner issued show cause notice only on 28th May 2004 i.e. almost after 4 years and that also without conducting any investigation in the matter.

The petitioner had ample opportunity to carry out investigation in the matter as observed in the said judgment delivered by this Court in the case of Breach Candy Residents' Association and in Mr.Tinaikar's report. The petitioner has considered the entire matter in casual manner and has made allegations of fraud and fabrication against the developer.

87. If the petitioner would have carried out proper investigation at the relevant time and would have produced the relevant documents in support of their case before this Court, in the said writ petition filed by Breach Candy Residents' Association, the situation in the matter could have been different. However, after considering the evidence placed on record before the Competent Authority and before this Court by the petitioner, this Court of the view that the petitioner has not made out a case for interference with the order passed by the Appellate Officer. I do not find any infirmity or perversity in the findings rendered by the Appellate Officer in the order passed under Section 70 of the MHAD Act. In my

view, all these petitions are devoid of merit.

88. I therefore passed the following order :-

(i) All the aforesaid writ petitions are dismissed.

(ii) It is made clear that if any criminal proceedings are pending arising of the same subject matter against the respondents, same shall be decided on its own merits.

(iii) There shall be no order as to costs.