
(2010) 02 BOM CK 0054
In the Bombay High Court
Case No : Writ Petition (L) No. 10 of 2010

Sushila Digamber Naik and Others

APPELLANT

Vs

Maharashtra Housing and Area Development Authority and
Others

RESPONDENT

Date of Decision : 04-02-2010

Acts Referred:

Development Control Regulations for Greater Bombay, 1991 — Regulation 33(5)(7)
Maharashtra Housing and Area Development Act, 1976 — Section 75, 95A

Citation : (2010) 2 ALLMR 1 : (2010) 6 BomCR 410 : (2010) 112 BOMLR 639

Hon'ble Judges : S.J. Kathawalla, J

Bench : Single Bench

Advocate : Kishor Tembe and Amol K. Tembe, for the Appellant; G.W. Mattos, AGP for Respondent Nos. 1 to 3 and P.K. Dhakephalkar, instructed by Ashwin Ankhad and Associates, for the Respondent

Final Decision : Dismissed

Judgement

S.J. Kathawalla, J.—Heard counsel for the parties.

2. Rule. Rule made returnable forthwith by consent. Mr. Mattos, learned AGP for respondent Nos. 1 to 3 waives service. Mr. P.K. Dhakephalkar, Senior Advocate, waives service on behalf of respondent No. 5.

3. By this writ petition, the petitioner Nos. 1 to 19 have impugned the order passed by the respondent No. 3 Executive Engineer, Bandra Division, Mumbai Board, giving 48 hours to petitioner Nos. 1 to 19 (non-cooperative members) to evict the tenements in their use, occupation and possession as mentioned against their names, failing which they be summarily evicted u/s 95A of the Maharashtra Housing and Area Development Act, 1976 (MHADA Act).

4. Respondent No. 4 Kher Nagar Ganeshkrupa Cooperative Housing Society Limited is a registered Cooperative Housing Society and is the licensee of the respondent No. 1 Maharashtra Housing and Area Development Authority

(MHADA) in respect of its lands and is the owner of the building No. 34, Kher Nagar, Bandra (East), Mumbai 400 051. The petitioners are the 19 out of 54 members of respondent No. 4 society holding their respective flats.

5. In the year 2003, the members of respondent No. 4 society decided to redevelop its property. 45 out of 54 members of respondent No. 4 (including petitioner Nos. 10 to 19) issued consent letters in support of the redevelopment project. However, petitioner Nos. 1 to 9 had not signed the consent letters. 83% of the total members of respondent No. 4 society therefore, supported the redevelopment project. Thereupon, the respondent No. 4 applied to respondent No. 1 (MHADA) for its no objection certificate. On 9th January 2004, respondent No. 1 (MHADA) issued its No Objection Certificate for redevelopment to respondent No. 4. On 19th June 2004, the Authorities under the Bombay Municipal Corporation Act, issued an IOD to respondent No. 4 society. In the year 2007, 34 members of the society vacated their tenements and shifted to the temporary alternative accommodation allotted to them. However, the petitioners who had since the year 2004 started opposing the redevelopment of the society's property through respondent No. 5 (the developer) refused to vacate their tenements.

6. In the year 2007, respondent No. 5 i.e. the developer filed in the City Civil Court, Mumbai S.C. Suit Lodging No. 2697 of 2007 against the petitioners for a permanent injunction restraining the petitioners from obstructing, interfering with the performance of obligations under the development agreement dated 17th June 2003 and for interim orders seeking appointment of Receiver in respect of the premises of the petitioners with power to take possession thereof and to deliver the same to the respondent No. 5 for demolition. Respondent No. 5 applied for interim orders which were granted by an order dated 1st September 2007. The petitioners preferred an appeal before this Court from the said order dated 1st September 2007. At the ad interim stage, this Court stayed the order passed by the City Civil Court dated 1st September 2007 and the said appeal is pending in this Court till date. Thereafter, respondent Nos. 10 to 18 who had already given their individual written consent in the year 2003, after more than four years, executed declarations withdrawing their consent for the redevelopment project.

7. Thereafter, show cause notices dated 10th August 2009 were issued by respondent No. 3 to the petitioners u/s 95A of the MHADA Act. The petitioners opposed the show cause notice by their Advocate's letters dated 13th August 2009 and 2nd September 2009. The petitioners also filed in this Court Writ Petition No. 1802 of 2009 challenging the show cause notices all dated 10th August 2009 which petition is pending. Between September 2009 and December 2009, respondent No. 3 proceeded with the hearing of the show cause notices and by the impugned order dated 29th December 2009, respondent No. 3 called upon the petitioners to vacate their premises within 48 hours failing which summary eviction of the petitioners u/s 95A of the MHADA Act is ordered. The

said order dated 29th December 2009 is impugned in the present petition.

8. The learned Advocate appearing for the petitioners submitted that the petitioners are impugning the order dated 29th December 2009 passed by respondent No. 3 u/s 95A of the MHADA Act, only on the following two grounds:

(a) That the Mumbai Housing Area Development Board has no jurisdiction to pass an order u/s 95A of the Maharashtra Housing and Area Development Act, 1976.

(b) That the redevelopment scheme is not supported by 70% of the members of the respondent No. 4 society.

9. As regards the first issue pertaining to the alleged lack of jurisdiction, the learned Advocate appearing for the petitioners submitted that the provisions of Section 95A are contained in Chapter VIII of the Maharashtra Housing and Area Development Act, 1976 and consequently, respondent No. 2 and/or respondent No. 3 being an Officer of respondent No. 2 would have no jurisdiction to take any action u/s 95A of the MHADA Act and that the Mumbai Building Repairs and Reconstruction Board is alone empowered u/s 75 of the MHADA Act to exercise the powers and perform duties and to take action under Chapter VIII of the MHADA Act.

10. The learned Advocate appearing for respondent Nos. 1 to 3 submitted that the Mumbai Building Repairs and Reconstruction Board is empowered to deal with all cessed private buildings in the island city of Mumbai interalia to which the provisions of DCR 33(7) applies. The Mumbai Housing and Area Development Board i.e. respondent No. 2 is concerned with the MHADA layouts in the island city of Mumbai and in Mumbai Suburbs. Though the provisions of Section 95A of the MHADA Act are found in Chapter VIII of the MHADA Act, the Development Control Regulations for Greater Mumbai, 1991 came to be amended by the Government by a notification dated 6th December 2008. By virtue thereof, the provisions of Section 95A of the MHADA Act were mutatis mutandis made applicable to the provisions of DCR 33(5).

11. The learned Advocate appearing for respondent Nos. 1 to 3 further submitted that for MHADA layouts in the island city of Mumbai as well as in the suburbs redevelopment is undertaken under DCR 33(5) to which Section 95A of the MHADA Act is made applicable. The heading of DCR 33(5) reads thus:

(5) Development / redevelopment of Housing Schemes of Maharashtra Housing and Area Development Authority

It is therefore, submitted that the provisions of DCR 33(5) are applicable to a MHADA layout. Admittedly, the building in question is situate in a MHADA layout at Bandra (East), Mumbai, i.e. in Mumbai suburbs. An application for approval of the Kher Nagar layout was forwarded to the Municipal Corporation of Greater Mumbai by the Senior Architect and Planner I, Mumbai Housing and Area Development Board on 24th October 2000. Clause 2 of the said application for

approval in terms states that the colony known as Kher Nagar colony is entitled to have 20% additional FSI as per DCR 33(5). The layout approval was granted by MCGM on 21st June 2001. The said layout was approved by the MCGM under DCR 33(5).

12. The learned Advocate appearing for respondent Nos. 1 to 3, has further submitted that in pursuance to an application dated 28th July 2003 made on behalf of respondent No. 4 society to respondent No. 2 (MHADA) for redevelopment, an offer letter dated 13th October 2003 was issued by MHADA, Clause 16 of which reads thus :

All the terms and conditions mentioned in the letter of MCGM's layout approval letter No. CE/72/BPWS/AH, dated 21.06.2001 are applicable to your society.

It is submitted that the said layout as aforesaid was approved by MCGM under the said Regulations. Thereafter, a No Objection Certificate for redevelopment was issued by respondent No. 2 on 9th January 2004. It is submitted that it is therefore, ipso facto clear that the redevelopment of respondent No. 4 society was undertaken under DCR 33(5) upon NOC from respondent No. 2 (MHADA) and thus, as per the said amended provision of DCR 33(5), the respondent Nos. 2 and 3 are empowered to invoke the provisions of Section 95A of the MHADA Act, 1976 and the respondent Nos. 2 and 3 have rightly exercised the jurisdiction u/s 95A of the MHADA Act. The learned Advocate appearing for respondent Nos. 1, 2 and 3 has submitted that this Court vide its order dated 29th August 2009 has held that MHADA is vested with statutory powers under 33(5)(7) of the D.C. Regulations, 1991 to issue notice to persons who failed to vacate the existing tenements.

13. In my view, the submissions made on behalf of respondent Nos. 1 to 3 are correct in its entirety. Though the provisions of Section 95A of the MHADA Act are found in Chapter VIII of the MHADA Act, the Development Control Regulations, 1991 came to be amended by the Government by a notification dated 6th December 2008. Regulation 33(5)(7) is reproduced hereunder:

(5) Development / redevelopment of Housing Schemes of Maharashtra Housing and Area Development Authority.

(1)

(2)

(3)

(4)

(5)

(6)

(7) In any Redevelopment scheme where the Cooperative Housing Society / Developer appointed by the Cooperative Housing Society has obtained No

Objection Certificate from the MHADA / Mumbai Board thereby sanctioning additional balance FSI with a consent of 70% of its members and where such NOC holder has made provision for alternative accommodation in the proposed building (including transit accommodation) then it shall be obligatory for all the occupiers/ members to participate in the Redevelopment Scheme and vacate the existing tenement for the purpose of redevelopment. In case of failure to vacate the existing tenements, the provisions of Section 95A of the MHADA Act mutatis mutandis shall apply for the purpose of getting the tenements vacated from the non cooperative members.

14. As submitted by respondent Nos. 1 to 3, admittedly, the building in question is situate in MHADA layout at Bandra (East) and therefore, it is clear that the provisions of DCR 33(5) are applicable to a MHADA layout. The application for approval of Kher Nagar layout made by the Senior Architect and Planner I, MHADA, dated 24th October 2000 states that the colony known as Kher Nagar Colony is entitled to have 20% additional FSI as per DCR 33(5). The application for approval was made under DCR 33(5) and the layout which was approved by the MCGM on 21st June 2001 was also under DCR 33(5). As submitted by respondent Nos. 1 to 3 Clause 16 of the offer letter dated 13th October 2003 issued by MHADA and the approval of the layout of the MCGM under the said Regulations and a No Objection Certificate for redevelopment issued thereafter by the respondent No. 2 on 9th January 2004 ipsofacto shows that the redevelopment of respondent No. 4 society was undertaken under DCR 33(5). Thus as per the said amended provisions of DCR 33(5), respondent Nos. 2 and 3 are empowered to invoke the provisions of Section 95A of the MHADA Act and the petitioners are not correct in their submission that respondent Nos. 2 and 3 had no jurisdiction to pass the impugned order u/s 95A of the MHADA Act.

15. The next contention of the petitioners is that 70% of the members of respondent No. 4 society did not support the redevelopment scheme. A Special General Body Meeting was convened by respondent No. 4 society on 29th March 2003 for taking up the property for redevelopment, wherein the Special General Body of respondent No. 4 society decided to take steps for redevelopment of the property. Thereafter, in pursuance to the said decision of respondent No. 4 society on or about 17th June 2003, a development agreement was entered into, wherein respondent No. 4 appointed respondent No. 5 as its developer. The said agreement has been signed by 45 members out of the 54 members of respondent No. 4 society, as witness thereto. On the same day, a declaration too was signed by 45 out of 54 members in favour of the respondent No. 5. Thus, 83% of the members granted their consent for the said redevelopment. The said declaration in terms states that the petitioners and other members of the society who are signatories to the said declaration, agree and undertake to duly perform the obligations cast upon them under the said agreement entered into by respondent No. 4 with respondent No. 5, as more particularly stated in paragraph 6 thereof. Petitioner Nos. 10 to 19 have signed the said agreement as well as the declaration. The petitioners have not challenged the resolution for redevelopment

passed by the society or the agreement with the developer in any Court. The petitioners have also not initiated any proceedings seeking cancellation/ withdrawal of the consent given by the petitioner Nos. 10 to 19 as far back as in the year 2003. If such withdrawals are taken cognizance of, the object of redevelopment of old and dilapidated buildings will never be achieved and will also encourage some of the members of societies to use it as a weapon to blackmail the developers. The belated withdrawal of consent by some members is, therefore, in consequential. The said aspect has been elaborately dealt with by the respondent No. 3 in the impugned order dated 29th December 2009 and as such, the contention of the petitioners that in view of the subsequent withdrawal of consent, the said redevelopment scheme does not have the consent of 70%, is devoid of merits and is rejected.

16. Under the circumstances, the contentions raised by the petitioners on both the above issues are untenable and baseless and are rejected. Consequently, the rule is discharged and the writ petition is dismissed with costs.

17. The learned Advocate appearing for the petitioners seeks a stay on eviction of the petitioners for a period of two weeks from today. The same is granted, subject to the petitioners filing an undertaking on or before 9th February 2010 that in the meantime, they shall not part with possession and/or create any third party rights in respect of the tenements in their possession. If the petitioners fail to file the said undertaking as directed, the stay on eviction shall stand vacated without reference to this Court.