

(2015) 03 BOM CK 0034

In the Bombay High Court

Case No : Writ Petition No. 1663 of 2011

Vijaylaxmi Anandrao Mujumdar and Others

APPELLANT

Vs

Mumbai Building Repairs and Reconstruction Board and
Others

RESPONDENT

Date of Decision : 19-03-2015

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2015) 03 BOM CK 0034

Hon'ble Judges : Mohit S. Shah, C.J.;G.S. Kulkarni, J.

Bench : Division Bench

Advocate : Virag Tulzapurkar, Virendra Tulzapurkar, Senior Advocates, S.V. Kadam, Apeksha Sharma and Sanjeel Kadam i/b Kadam and Co., for the Appellant

Final Decision : Allowed

Judgement

Mohit S. Shah, C.J.—By this petition under Article 226 of the Constitution of India, the petitioners have challenged the communication dated 6 July 2007 (Exhibit C) of the Mumbai Building Repairs and Reconstruction Board (a unit of MHADA) (hereinafter referred to as "the Board") calling upon the petitioners to surrender built up area admeasuring 26.84 sq.mtrs. to the Board as surplus area as per Third Schedule to Maharashtra Housing and Area and Development Act, 1976 (MHAD Act).

During pendency of the petitions, the petitioners were asked to challenge the same in appeal. The petitioners' appeal came to be rejected by an order dated 25 January 2012 of the CEO and Vice President of Maharashtra Housing and Area Development Authority (MHADA). The petitioners have, therefore, challenged the said appellate order also. Since the impugned communication was based on condition no.22 of the NOC dated 27 September 2006 (Exhibit B) issued by MHADA for the purposes of redevelopment of the petitioners' property, the petitioners have also challenged the said condition.

2. The facts leading to the filing of the present petition, broadly stated, are as under:

(a) Petitioner nos.1 to 8 were owners of land (and the building thereon) admeasuring about 546 sq. mtrs. being Final Plot No. 649 of TPS III of Mahim Division in Mumbai. Petitioner nos.1 to 8 entrusted development rights of the said property to petitioner no.9 developer. The petitioners approached the Board for an NOC for redevelopment of the said property. The relevant portion of DCR 33(7) Appendix III at the relevant time reads as under:

"1. (b) All the occupants of the old building shall be reaccommodated in the redeveloped building.

2. Each occupant shall be rehabilitated and given the carpet area occupied by him for residential purpose in the old building subject to maximum carpet area upto 70 sq. mtrs.

3. The list of occupants and area occupied by each of them in the old cessed building shall be certificated by respondent no.1 Board.....

4. The tenements in the reconstructed building shall be allotted by the landlord/ occupants cooperative housing society to the occupiers as per the list certified by respondent no.1 Board. The prescribed percentage of the surplus built up area shall be made available to respondent no.1 Board"

(b) There were in all 10 tenements in the old building. Out of these 10 tenements, 5 tenements on the ground floor and 1 tenement on the first floor were occupied by the tenants of the petitioners and the remaining 4 flats (popularly known as tenements) on the second and third floor were occupied by petitioner no.1 (Vijayalaxmi Anandrao Mujumdar), petitioner no.4 (Dilip Shrinivas Mujumdar) and petitioner no.5 (Urmila Sudhir Mujumdar).

(c) The officers of the Board undertook an inspection in regard to the occupation of the tenements in the existing building. Based on the site inspection of the said property, the Board prepared the following statement showing details of the tenants / occupants of the said old building in what is commonly known as Certified List dated 31 July 2006:

As per the said Certified List, 2 tenements described as room nos.4 and 7 on the second and third floor were shown to be in occupation of Vijaya A. Mujumdar and Devraj Mujumdar and the said tenements were shown as clubbed together and treated as a single unit. The remaining 2 tenements, i.e. room no.5 on the second floor occupied by Urmila Sudhir Mujumdar and room no.6 on the third floor occupied by Dilip Shrinivas Mujumdar, were shown as separate units. The officer made the following remark in the said Certified List in respect of each of the said tenement nos.5 and 6: "The separate electricity bill in respect of tenement produced by the occupant and his (her) name is reflected in the electoral list of year 1995, hence occupancy accepted". Thus, as per the said Certified List, out of 10 tenements 9 tenements were considered for the proposal

for redevelopment of the said property, because room nos. 4 and 7 were clubbed together and considered as one tenement.

(d) The final statement of the Board, however, contained the following remarks:

"No. of tenements accepted for NOC: 8 (eight)

No. of tenements rejected for NOC: R.No.5, 6 at 2nd and 3rd floor respectively have been clubbed together and treated as single tenement."

On 27 September 2006, the respondent Board issued NOC. Condition nos.11 and 22 of the said NOC were as under:

"11) The NOC holder has to surrender a surplus built up area s per IIIrd Schedule of MHAD Act, 1976.

The exact surplus built up area if any as provided in the IIIrd Schedule of MHAD Act, 1976 shall be communicated to you after you submit to this office the plans of proposed buildings with permissible FSI, duly approved by MCGM. The surplus area, if any required to be surrendered to the Board will have to be made available to the Board at an amount as may be decided by the Board.

22) The room No. 5 and 6 at 2nd floor respectively occupied by co-owners have been clubbed together and treated as single tenement. Thus total 8 (Eight) tenements in this NOC proposal has been considered."

Subsequently by a communication dated 6 July 2007, the Board informed the developer notifying the area of 26.84 sq. mtrs. which was required to be surrendered as surplus area.

(e) It is the petitioners' case that upon completing the construction of the rehab tenements in the new building, petitioner no.9 by its letter dated 27 February 2010 informed the Resident Executive Engineer of respondent no.1 about such completion and their intention to offer possession of the rehab tenements to the respective occupants. Petitioner no.9 requested the Board to grant NOC for obtaining part Occupation Certificate from the Municipal Corporation in respect of rehab component of the new building. The Executive Engineer of the Board conducted the site visit and submitted his report to the Resident Executive Engineer, inter alia, recommending issuance of NOC as per the application of petitioner no.9 wherein it was indicated that 9 units were required to be allotted as rehab units.

(f) Even while giving their undertaking dated 7 October 2010, petitioner no.9 developer mentioned that the petitioners have been agitating the issue regarding surplus area with the Board and the same was yet to be decided and, therefore, the undertaking was given that the petitioners will surrender to the Board the surplus area as demanded by it as and when the issue will be ultimately decided requiring the petitioners to surrender any such area.

(g) Since the issue was not resolved as the respondent Board was not issuing

NOC for issuance of Occupation Certificate by the Municipal Corporation, the petitioners moved this Court by filing the present petition in August 2001. Thereupon by order dated 17 October 2001, this Court directed the petitioners to file an appeal to the Chief Executive Officer and Vice President of MHADA challenging the conditions in the NOC dated 27 September 2006 wherein tenements, viz. room nos. 5 and 6 were clubbed together. However, such an appeal was to be filed after the petitioners would hand over the said area of 26.84 sq.mtrs. to the respondent Board without prejudice to the rights and contentions of the petitioners in the present petition. This Court, however, clarified that even after the petitioners would hand over the said area of 26.84 sq.mtrs. to the respondent Board, the respondent Board would not allot the said area to anyone till the petition is decided one way or the other. Accordingly, the petitioners without prejudice to their rights and contentions handed over the said area of 26.84 sq.mtrs. to the respondent Board.

3. It needs to be noted that in the present petition, the petitioners have challenged the provisions of clause (4) of Appendix III to Regulation 33(7) of the Development Control Regulations for Greater Mumbai, 1991 (DCR) requiring the owner to surrender part of the surplus area being constructed in a redevelopment scheme under Regulation 33(7) of DCR. Without prejudice to the said general challenge, the petitioners have also challenged stipulation of condition nos.11 and 22 in the NOC dated 27 September 2006 issued by the respondent Board and also the subsequent communication dated 6 July 2007 requiring the petitioners to surrender 26.84 sq.mtrs. of built up area to the respondent Board.

4. As far as the challenge to clause (4) of Appendix III to Regulation 33(7) of the DCR is concerned, that question is being examined in a separate group of petitions and, therefore, we do not propose to address that issue in the present matter because, in our view, the petition deserves to be allowed by accepting the petitioners' challenge to the determination of surplus area of 26.84 sq.mtrs. solely on the basis of clubbing of room no.5 on the second floor and room no.6 on the third floor.

5. The Certified List prepared by the officer of the respondent Board clearly indicated that room no.5 on the second floor was occupied by Urmila Sudhir Mujumdar and room no.6 on the third floor was occupied by Dilip Shrinivas Mujumdar. It may be that Sudhir and Shrinivas were brothers and linear descendants of Anandrao. But the families of Urmila Sudhir Mujumdar and Dilip Shrinivas Mujumdar were two families and the respective families had produced separate electricity bills, ration cards and electoral list of the year 1995. The authorities have not challenged or doubted the authenticity of those documents produced by the respective families.

6. The only ground on which respondent no.1 took the impugned decision of clubbing the two tenements was on the basis of inspection extract of the Municipal Corporation for the year 1995-96 wherein the following entries were

made:

The learned counsel for the Board has submitted that it has been the policy of the Board to count the number of occupancies or families on the basis of the inspection extract of the Municipal Corporation and that it is on the basis of the said document alone that the respondent Board has prepared the number of occupancies.

7. It is, however, necessary to note that the inspection extract does not indicate the number of tenements on each floor. The statement that 2nd floor is wholly owned by the owner and 3rd floor is also wholly owned by the owner was not factually incorrect, because the four flats on these two floors were occupied by the owners, i.e. three separate branches of the common ancestor Anandrao.

We also find considerable substance in the submission made on behalf of the petitioners that the petitioners have been acting bona fide by themselves showing that room no.4 on the second floor and room no.7 on the third floor were clubbed together by the petitioners as one tenement because both the rooms belonged to Vijaya Anandrao Mujumdar and Devraj Anandrao Mujumdar staying together. However, the petitioners have been rightly contending that since Urmila Sudhir Mujumdar and Dilip Shrinivas Mujumdar are heading two separate families, their tenements cannot be clubbed into one tenement. They belong to separate branches and merely because they have one common ancestor being Anandrao Mujumdar, who was father of Sudhir and Shrinivas, it cannot be contended that the two families were occupying the same tenement. Respondent no.1 had clearly indicated in the Certified List dated 31 July 2006 that the two families had produced separate electricity bills, ration cards and electoral list of the year 1995.

8. The learned counsel for the petitioners also relied upon Annexure "B" to the Government Resolution dated 16 August 2010 in support of the contention that when different families occupied different tenements and it is proved that families actually occupied such tenements prior to 1996, then such tenements have to be considered as independent tenements and the tenants/occupants thereof have to be considered eligible for rehab tenements.

9. The learned counsel for the respondent Board would, however, submit that the Government Resolution dated 16 August 2010 can only be applied prospectively and not retrospectively. It is submitted that since the NOC of the Board in the instant case was issued in the year 2007, the Government Resolution dated 16 August 2010 cannot be applied, and that applying the said Government Resolution retrospectively would unsettle the older cases in which the concerned owners / developers have already handed over the surplus area under the Third Schedule to the MHAD Act, which is in force since 1986.

10. The submission urged on behalf of the respondents is misconceived for more than one reason.

Clauses 14 and 18 of Annexure "B" to the Government Resolution dated 16 August 2010 read as under:

"14. Tenements shown as clubbed in the inspection Extract, but actually occupied separately:

Sometimes more than one tenement are shown as clubbed in the Inspection Extract (eg.1354), but it is observed that different families occupy such tenements. Even though the tenements are shown to be clubbed, but if it is proved that the families actually occupying such tenements have been in independent occupation prior to 1996, then such tenements should be considered as independent tenements and the tenants/occupants thereof should be considered as eligible.

18. Area shown to be with the owner in the Inspection Extract:

Sometimes it is recorded in the Inspection Extract that the entire floor with the owner. However, sometimes other tenants/occupants occupy such tenements in reality. In such cases, if the tenants/ occupants occupying the tenements are possessing strong proof of occupation of prior to 1996 and if the same tenants/ occupants are in occupation at the time of inspection, then they should be considered as eligible. Further, if it is proved that the area shown to be with the owner is divided among the owner's different families prior to 1996, then such families should be considered as independent families."

(Emphasis supplied)

11. The above clauses clearly deal with the situations where the families were actually occupying the tenements prior to 1996 and, therefore, the Government Resolution was intended to apply to such cases where a claim was made and proof was given to show that families were actually occupying the tenements as independent families prior to 1996 and, therefore, they should not be clubbed on the basis of the inspection extract of the Municipal Corporation. In the facts of the present case, the issue was very much live on 16 August 2010.

12. As regards the apprehension that by applying the said Government Resolution dated 16 August 2010 to NOCs issued prior thereto, settled affairs will be unsettled, the apprehension is misconceived. The cases where owners/ developers had handed over surplus area in accordance with the Third Schedule to MHAD Act prior to 16 August 2010 are not to be unsettled and we make it clear that this judgment will not apply to cases where the surplus area was already handed over to the respondent Board under the Third Schedule to MHAD act prior to 16 August 2010. In the facts of the present case, the surplus area was not handed over to the respondent Board prior to 16 August 2010 and, therefore, it cannot be said that the Government Resolution dated 16 August 2010 has been applied retrospectively.

13. We may note that in the impugned decision dated 25 January 2012, the CEO and Vice President of MHADA has also solely relied upon the inspection extract of

the Municipal Corporation for the year 1995-96 and has proceeded on the basis that since the inspection extract for that year indicated total 8 occupancies, the Board has to follow the said inspection extract. The said impugned order also indicates that the permissible FSI is depending upon the number of occupancies and the actual area occupied by the occupants and it is further mentioned in the said impugned order that considering the circulars and guidelines issued at the relevant time, the inspection extract of MCGM was considered primary evidence. As can be seen from the impugned decision, the intention of the guidelines appeared to be to avert claim of bogus occupancies/tenancies. In the present case, the Board has not discarded the case of the petitioners in regard to the separate occupancy of room nos.5 and 6. This finding of fact in the Certified List remains uncontroverted.

14. The learned counsel for the respondents are not in a position to controvert the submission made on behalf of the petitioners that by showing 9 occupancies and not 8 occupancies as contended by respondent no.1, the petitioners did not gain any advantage of additional FSI because the land being within CRZII area, the petitioners were entitled to get FSI of 2.0 at the relevant time and accordingly the petitioners had availed of 2.0 FSI. Even if the number of tenancies were 20 instead of 9, the petitioners would not have got an additional FSI at the relevant time over and above 2.0. Similarly even if the number of tenancies had been 7, 8 or 9, there would have been no change in the availability of FSI which was pegged at 2.0.

15. As indicated above, the land in question was in CRZII area and there is no dispute about the fact that availability of FSI was not depending upon the number of occupancies. For this reason, it appears that the impugned order dated 25 January 2012 suffered from non-application of mind. The unimpeachable documentary evidence produced by the petitioners at the relevant time has not been challenged or doubted by any of the respondent authorities and since the said documentary evidence clearly shows that prior to 1996 two families of Urmila Sudhir Mujumdar and Dilip Shrinivas Mujumdar were separately occupying the two tenements, there was no question of any occupancies having been created after 1996.

16. For all the aforesaid reasons, we allow the writ petition by setting aside the impugned appellate order dated 25 January 2012 passed by the Vice President and CEO of the Board and the communication dated 6 July 2007 (Exhibit C) and direct the respondent Board to proceed on the basis that room no.5 on the second floor and room no.6 on the third floor were occupied by two separate families of Urmila Sudhir Mujumdar and Dilip Shrinivas Mujumdar respectively.

17. Since the petitioners had handed over 26.84 sq.mtrs. of built up area to the respondent Board, without prejudice to the rights and contentions of the petitioners and in compliance with the interim order of this Court, now that the petition is allowed the respondent Board will hand over the said area to the petitioners after 4 weeks, but before expiry of 6 weeks, from today.