

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.729 OF 2013
WITH
NOTICE OF MOTION (L) NO.19 OF 2015

Pukhraj Chunilal Bafna	Petitioner
versus	
Maharashtra Housing and Area Development Authority and others	Respondents

Mr.Ritesh V. Jain for Petitioner.
Ms.Sharmila Deshmukh for Respondent nos.1 and 2.
Ms.Surekha Sonawane for MCGM (Respondent nos.3 and 4).
Mr.Girish Godbole with Mr.Tushar Dahibawkar i/by
M/s.Dahibawkar & Co. for Respondent no.5.

CORAM : S.C.DHARMADHIKARI AND
B.P.COLABAWALLA, JJ.

DATE : 23 October 2015

PC :

1. By this petition under Article 226 of the Constitution of India, the Petitioner is seeking to challenge a demand contained in letter dated 19 December 2012 (Annexure-DD to the petition). The Petitioner is also seeking a declaration that in view of the sale of the property by the Petitioner to Respondent no.5, the Petitioner is discharged and/or exonerated and/or is not liable to hand over and/or surrender the surplus tenements

and flats to Respondent nos.2 and 3 as per the conditions of the No Objection Certificate ('NOC') dated 18 April 1991 and development permission dated 20 October 1977.

2. The Petitioner is a sole proprietor of M/s.Paras Enterprise. The First Respondent is the Maharashtra Area and Development Authority ('MHADA') set up and established under the Maharashtra Housing and Area Development Act, 1976. The Respondent no.2 is a unit of Respondent no.1 and Respondent nos.3 and 4 are Municipal Corporation of Greater Mumbai and the Municipal Commissioner thereof. The Fifth Respondent is a private limited company incorporated under Indian Companies Act, 1956.

3. According to the Petitioner, the plot of land bearing C.S.No.248 of Tardeo Division, situate at 31, Dr.Bhadkamkar Marg, D-Ward, Tardeo, Mumbai was notionally sub divided into two plots and the rear portion of the said larger plot was reserved for the housing of dis-housed. The structure was subjected to cess under the Maharashtra Housing and Area Development Act. It was categorized as an 'A' category building. The structures standing on the larger plot were occupied by tenants and occupants. These tenants formed an association called Daruwalawadi Tenants Association. With the consent of the owner, they applied for the development of the rear portion. The Respondent no.3 passed a resolution, inter alia, permitting

the development of the rear portion on the conditions mentioned in its letter dated 20 October 1977.

4. The Petitioner does not dispute that one of the conditions was that the developer must surrender 30% of the surplus tenements to Respondent no.3 at the cost and charges to be determined by the City Engineer of Respondent no.3. The said letter of Respondent no.3 is annexed at Annexure-A to the petition.

5. Then, these tenants and occupants registered a co-operative housing society styled as "Daruwalawadi Co-operative Housing Society Limited" and engaged one M/s.Amit Builders. The said Amit Builders acquired title to the property and submitted a proposal for construction of a building and in terms of the conditions imposed and policy of Respondent no.3. There was another proposal to construct a building in front portion and such proposals were submitted and came to be accepted. According to the Petitioner, the construction envisaged a building of 55 flats on the rear portion. The Petitioner then stepped in and acquired ownership of this larger plot on 29 September 1986 and thereafter applied for NOC of respondent no.2. The Respondent no.2 informed the Petitioner about its intention to grant such NOC, but on a condition that the Petitioner should avail FSI of 2.00 and surrender some area out of the surplus area as per formula attached therewith at the rate

of Rs.135/- per sq.ft. after rehousing the existing tenants. The property registration cards denote that the larger property was sub-divided and front portion and the rear portion were assigned City Survey Nos.1/248 and 2/248 respectively. Thereafter, the Petitioner relies upon the final NOC annexed as Exhibit-D to the petition, dated 18 April 1991 issued by MHADA to the Petitioner. A perusal of this would indicate as to how the Petitioner's application seeking no objection certificate has been dealt with and we are concerned here with condition no.6, which reads as under :

"6. You will have to surrender built-up area admeasuring 12,508.00 sq.ft. to MHAD Board at the rate of Rs.136/- per sq.ft. of built-up area or as amended from time to time before obtaining occupation certificates from M.C.G.B. An undertaking to this effect should be submitted within 15 days positively."

6. It is common ground that the Petitioner proceeded in terms of this final NOC. He then approached the Respondent no.3 for sanction of building plans. The building plans submitted were also amended and brought in tune with the NOC. It is on the NOC itself and based on the terms and conditions therein that the Vice Chairman and Chief Officer of Respondent no.2 modified the condition with regard to the built-up area to be surrendered and clarified that the Petitioner is not required to surrender any area to Respondent no.2 and if Respondent no.3, in future sanctions FSI of 2 in respect of the

property, then the Petitioner would have to surrender the built-up area admeasuring 3,598 sq.ft. to Respondent no.2 at the Rate of Rs.235/- per sq.ft.

7. Then the Petitioner states that he executed an agreement for sale on 28 February 1992 with Respondent no.5 and sold the larger property on 'as is where is' basis, but subject to the benefits and obligations of the development permission dated 20 October 1977, NOC dated 18 April 1991 and all conditions laid down by Respondent nos.2 and 3 and claims of the housing society.

8. The Petitioner states that the housing society in August 1992 filed a suit being Suit No.2632 of 1992 against the Petitioner and M/s.Amit Builders for specific performance of the agreement and arrangements entered into by and between Amit Builders and the society so also by and between the Petitioner and the society as all these agreements and arrangements were cancelled and terminated. The Petitioner refers to all the legal proceedings between the society and Respondent no.5. In paragraph 15 of the petition, he refers to some Chamber Summons and in paragraph nos.16 and 17, he refers to some Contempt Petitions.

9. The Petitioner then refers to letter dated 18 January 2001 which is addressed, according to the Petitioner himself,

nearly eight years after execution of the said conveyance and it was duly registered. We do not understand the need and requirement to address such a letter and requesting Respondent no.5 to comply with the conditions and reserve 30% surplus area. Thus, the Petitioner seems to be aware of the obligations and consequences of the same not being complied with by Respondent no.5. In the mean while, Respondent no.2 by letter dated 22 October 2001 informed the Petitioner about condition no.11 of the NOC so also the obligation to surrender the surplus tenements. Despite receipt of this letter, we do not find that the Petitioner ever took a stand that such letters and coming from the authority, will not bind him, he having already sold the property with all the terms and conditions and on 'as is where is' basis to Respondent no.5. The Respondent no.5 informed the Petitioner that it has reserved flats for Respondent nos.1 and 2 and communicated that as the property has been conveyed to Respondent no.5, Respondent nos.1 and 2 must directly deal with Respondent no.5. The Petitioner places heavy reliance on said letter. The Petitioner then relies on the correspondence exchanged between Respondent nos.2 and 5. We do not find the reason for such correspondence being referred by the Petitioner. Thus, the Petitioner was fully aware of non compliance of the obligation either by him or by Respondent no.5. In the circumstances, we do not see how the Petitioner can express shock and surprise after he was informed on 24 November 2010 by the Respondent no.2 that there is no

surrender of the surplus tenements. It appears that Respondent no.4 has addressed the Petitioner four letters in all on the subject. The Petitioner, however, corresponded on 7 December 2010 informing the Respondent no.2 that he had not received any of the letters. He relied upon letter dated 6 June 2003 sent by him to Respondent no.2 and stated that 20 flats out of surplus area have been unauthorizedly occupied with water and electric connections, and further clarified that surrender of those flats was beyond his control. This letter dated 7 December 2010 has been annexed as Annexure-V to the petition. That would make interesting reading and the relevant portion reads as under :

" We would like to inform your goodself that we have not received any of the letters dated 04.09.2009, 27.10.2009 and 03.07.2010 and have received on 1st December, 2010. Only your goodself's above referred letter dated 24.11.2010.

We will reply to the above referred letters after receipt of the copies thereof and give our explanation in the matter of non-surrender of the surplus area in detail.

We have always been co-operative with MHADA and we have addressed our letter dated 06.06.2003 to The Chief Officer of Maharashtra Housing & Area Development Authority and Commissioner of Mumbai Municipal Corporation, a copy whereof is enclosed herewith for your goodself's ready reference and for information of the facts in the matter of flats to be allotted to the nominees of Maharashtra Housing & Area Development Authority and Mumbai Municipal Corporation. The flats/surplus area could not be surrendered to MHADA for the reasons beyond our control.

Your goodself would be able to guess that without blessings of officers of Mumbai Municipal Corporation and Maharashtra Housing & Area Development Authority, 20 flats could have not been occupied and continued to be occupied in the building without occupation certificate and the water connection for the building could have not been obtained to enable the unauthorized occupation and without the compliance of the conditions of surrender of flats to MHADA and MMC.

We would like to inform that the electric connections to the building and 20 flats had been obtained by forging the signature of the undersigned and the cognizance of the complaint of the undersigned to the police authorities of Nagpada Police Station for the act of the forged signature has not been taken and electric connection continued and in the circumstances, the question of surrender of surplus area did not arise and the same was/is beyond our control.

Please give us the copies of the above letters to enable us to reply in detail and until then we request your goodself not to initiate any action against us as we, the undersigned is not a party in any manner for illegal/unauthorized occupation of the flats and the surrender of the flats is beyond our control. However, we are ready to co-operate with MHADA authorities in all the ways and means."

10. Interestingly there is no straight refusal to comply with the condition in respect of surrender of surplus flats imposed and obligation is voluntarily invited by the Petitioner. Far from a challenge to the stand of MHADA, what we find is that following this letter, on 1 April 2011, once again, the Petitioner was addressed a letter by MHADA and Respondent no.2. It also referred to a letter of Respondent no.5 dated 30 March 2011. This letter, copy of which is at Annexure-W, refers

to a visit of one Ghewarchand Nahar, Director of Respondent no.5, approaching MHADA about surrender of surplus flats in the form of Flat Nos.101 to 104, 201, 202, 701 and 702. The flats were inspected along with Mr.Ghewarchand Nahar. Out of these eight flats, one flat is open in which some persons are living and other seven flats are in locked condition. Mr.Ghewarchand Nahar informed the Respondent no.2 that he has purchased the subject property from the Petitioner and he has given his willingness to surrender the said eight flats to the Board. Hence, the Petitioner was requested to submit approved plans and arrange to inspect the said eight flats with keys of eight flats. On 30 May 2011, a letter was addressed by the Petitioner to the Executive Engineer, Mumbai Building Repairs and Reconstruction Board and after referring to the previous litigations and the conveyance, what the Petitioner informs is that according to the orders of the High Court and the undertaking given by the Director of Respondent no.5, the said Respondent no.5 cannot part with possession of the flats to be handed over to the Board. He, therefore, submitted that the possession of said eight flats cannot be given to the Board till the orders of the High Court are set aside and/or modified and the same can be given to the Board or taken by the Board, if the orders of High Court are modified or set aside or if the Board obtains a specific order from the High Court to take possession of eight flats. Though the Petitioner informs the MHADA that he should not be held responsible for non-offer or non-

surrender of the eight flats and no action be taken against the Petitioner, he does not take any legal steps.

11. The Petitioner also denies that he is responsible to surrender the flats and reiterates his stand by a letter dated 29 June 2011 addressed to the Senior Inspector, Nagpada Police Station.

12. The Petitioner is aware that on 17 August 2011, MHADA and its unit Respondent no.2 informed Respondent no.5 that out of eight flats, which were earmarked for surrender, seven are in dilapidated condition and one flat is occupied by somebody else. There is, thus, no surrender of any flats and the stand of Respondent no.5 Honesty Builders was denied. The Petitioner who is the original NOC holder and Respondent no.5 are misguiding MHADA as well as Police and not complying with the condition. A copy of this letter was marked to the Petitioner. One would find every single letter thereafter also being marked to the Petitioner. On 5 August 2012, the Petitioner purports to inform the Senior Inspector of Police (Crimes), Economic Offences Wing, Yellow Gate Police Station about his stand and reiterates his innocence.

13. It is in these circumstances that we find that the Petitioner's challenge to the impugned communication dated 19 December 2012 is without any merit. The counsel for the

Petitioner not only relied on the averments in the petition and the letter addressed on 3 January 2013 to the Vice President and Chief Executive Officer of Respondent no.1 but also invites our attention to the further affidavit filed in this Court. The Petitioner is aware that criminal proceedings might be launched. The Petitioner also purports to rely upon certain correspondence and orders passed in legal proceedings. He relies upon the High Court suit. What we find is while relying on all this material and to question the impugned communication of MHADA, the Petitioner in paragraph 6 of his further affidavit states that the Petitioner and Respondent no.5 were required to file a writ petition in this Court being Writ Petition No.1189 of 1993. In the petition, the Petitioner has stated that he has sold his right, title and interest in the Plot bearing Plot No.2/248 to Respondent no.5. Yet he states that there was a misconception, dispute and differences over calculations/recalculations about 30% surplus tenements to be handed over to MHADA.

14. On the last occasion and today also, the learned counsel for the Petitioner relies upon the order dated 30 June 1993 disposing off Writ Petition No.1189 of 1993. He also relies upon the averments in paragraph 7 of this affidavit affirmed on 10 January 2014 and states that in compliance with the order dated 30 June 1993, the keys and possession of three flats of the building constructed on Plot-A bearing CTS No.1/248 were given by the Junior Project Officer, Office of Ward Office

(Estates) of MCGM to Deputy Engineer, RU1 of the Board. Reliance is placed by the Petitioner upon Annexure-D to the affidavit dated 10 January 2014 to state that three flats were already surrendered and keys and possession thereof were also surrendered. The Petitioner further relies on some correspondence between Respondent no.5 and the Vice President of the Board.

15. The Petitioner despite relying on such correspondence and orders of this Court, as observed above, has at no point of time, challenged the stand taken by the authorities that he is equally liable and obliged to surrender the flats, as agreed and undertaken. We have seen that despite the orders passed by this Court, the stand neither of the Petitioner nor of the Respondent no.5 and that of the authorities has ever changed. Rather at some stage, both Petitioner and Respondent no.5 colluded to deny the surplus tenement handing over obligation.

16. We do not see how the authorities can be faulted for their stand and this is reflected in their affidavit-in-reply filed in this writ petition. The Petitioner was issued a letter of intent on 28 September 1987. In the year 1988, there was a sub division of the property. The reliance is placed rightly on the NOC dated 18 April 1991 and the obligations therein at page 188 of the paper book and paragraph no.3 of the affidavit-in-reply of

Respondent nos.1 and 2 affirmed on 28 February 2014. Thereafter, a proposal for construction of another building on C.S. No.1/248 was sanctioned by MCGM for consumption of balance FSI of 0.67. The I.O.D. was sanctioned in the name of Petitioner on 29 June 1996. The Petitioner was called upon on 22 October 2001 to hand over the surplus tenements and on 29 November 2001 the Petitioner informed the Board that he had agreed to sell the above plot to Respondent no.5 with the benefits and obligations of NOC. The Respondent no.5 by letter dated 22 December 2001 requested the Board to transfer the NOC in its name. By the said letter, the Respondent no.5 expressed its inability to hand over the possession of the flats in favour of the Board in terms of the terms and conditions of NOC and in pursuance of the order passed in Appeal No.220 of 1997. The Board by letter dated 27 February 2002 called upon the Respondent no.5 to submit an undertaking to the Board that previous commitment made by the Petitioner is acceptable to the Respondent no.5. The Respondent no.5 was also directed to hand over possession of the surplus area to the Board. In paragraph no.6 of the affidavit-in-reply, the Respondent nos.1 and 2 have stated that the Respondent no.5 has not submitted the required undertaking to the above effect.

17. It is, thus, the stand of Respondent nos.1 and 2 that the Petitioner continues to be the NOC holder. All the compliances have to be made by him. Having taken complete

benefit and advantage not only of the NOC but also of the additional FSI, the Petitioner cannot wriggle out of the obligations thereunder and, therefore, he is liable to pay the amount as demanded. Thus, the Petitioner's stand in the additional affidavit is specifically denied. The Petitioner is faulted for non-surrender of flats. Rather the condition of flats which were sought to be surrendered is reiterated. Respondent nos.1 and 2 relied upon the directions issued by the Housing Department dated 15 October 2012 for enabling it to levy penalty. It is also stated that on account of negligence and failure of the Petitioner to hand over tenements, the Board is severely prejudiced in performing its statutory duty of providing permanent alternate accommodation to the dis-housed. It has also refuted the Petitioner's stand of handing over of three flats and by pointing out that same were not part and parcel of the surplus area to be handed over to the Board in compliance with the conditions of NOC but were handed over for rehabilitation of the original tenants of the building.

18. Respondent no.5 filed affidavit-in-reply dated 4 February 2015 and contradicted Petitioner's version on several aspects. It does not concur with the stand of the Petitioner. The Respondent no.5 relies upon letter dated 27 February 2002 and faults the Petitioner for not having complied with this letter though he is aware of the obligation. In paragraph 6 of this affidavit, the Respondent no.5 states that as per I.O.D; C.C; NOC

and records of City Survey Office, the Petitioner is still the owner of the property. It is admitted by him in the letter dated 6 July 2003. The Petitioner cannot assume the transfer of obligation under the NOC without it being actually recorded in the records of the Board. Respondent no.5, therefore, turns around and says that it is the Petitioner's obligation to surrender these flats. The Petitioner is faulted for not having taken any legal proceedings though a notice dated 18 July 2001 was addressed to Respondent no.5 calling upon the Petitioner to complete the construction of eight flats and ten rooms. The eight flats were to be handed over to Mumbai Repairs and Reconstruction Board. The Respondent no.5 states that despite addressing such a notice, no legal proceedings have been initiated. Therefore, the petition raised disputed questions of fact.

19. The affidavit of Respondent no.5 is dated 4 February 2015 and was very much on the file of the petition. Now, the Petitioner seeks to amend the petition and for that purpose states that he wishes to bring on record letter dated 10 December 2014. By this letter, the Chief Officer of the Board finally called upon the Petitioner and Respondent no.5 to hand over or surrender the area equivalent to eight flats and since that obligation has not been complied with, to pay a sum of Rs.1,39,54,535/- as penalty. This is an event, according to the Petitioner, which has occurred during pendency of the petition.

20. After having heard the learned counsel for the Petitioner and perusing the petition, additional affidavits and annexures thereto with his assistance, one fails to understand as to how the Petitioner can file a writ petition and seek any declaration. That declaration is sought by the Petitioner without in any manner enforcing his stand qua Respondent no.5. There is a clear dispute between the Petitioner and Respondent no.5. The position remains that there is no compliance with the obligation to surrender the flats. In the teeth of a conflicting stand but as records of the statutory authority do not reflect that the obligation to surrender the flats or to pay the amount equivalent thereto having been taken over by Respondent no.5, though there is some correspondence that has been exchanged between Respondent no.5 and the Board, we do not find how the Board can be faulted for having imposed the penalty on the Petitioner and to recover it in accordance with law. We are of the clear opinion that the Petitioner is guilty of not only non compliance with the obligations voluntarily incurred and invited but of suppression of vital and material facts. In the circumstances, we do not see that we can assist a party like the Petitioner. Apart therefrom, the Petitioner has not denied his liability any time. The Petitioner having not obtained any decision in his favour from any competent authority/Court relieving him of the obligation to surrender the flats or make payment in lieu thereof, we cannot assist him in our extraordinary, equitable and

discretionary jurisdiction under Article 226 of the Constitution of India. The petition is devoid of merits and is dismissed. However, the Petitioner is not precluded from initiating any legal proceedings against Respondent no.5 as he deems fit and this order shall not prevent institution of such proceedings.

21. Needless to clarify that in the event any civil and/or criminal proceedings are initiated by MHADA against Respondent no.5 in the competent Court, this order shall not prevent either the Petitioner or the Respondent no.5 from raising appropriate pleas and defences.

22. At this stage, the Petitioner's advocate prays that ad-interim order passed by this Court in terms of prayer clause (c) be continued for a period of three months to enable the Petitioner to adopt appropriate proceedings including challenging this order in the higher Court. The request is opposed by Respondent nos.1 and 2. In light of our conclusions recorded above, we do not see any justification to continue the ad-interim order. The request of the Petitioner's advocate is rejected.

(S.C.DHARMADHIKARI, J.)

(B.P.COLABAWALLA, J.)