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

WRIT PETITION (L)NO.2162 OF 2015

Siddharth Builders and Developers & Ors. ..Petitioners
Versus
State of Maharashtra & Ors. ..Respondents

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Mr. Pravin Samdani, Senior Advocate, a/w Chetan Kapadia &
Kishore Thakordas i/b. Kishore Thakurdas & Co. for the Petitioners.
Mr. H. S. Venegaonkar, Addl. G.P., for the Respondent-State.
Ms. Vandana Mahadik for the Respondent-BMC.
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**CORAM: MOHIT S. SHAH, C.J. &
A. K. MENON, J.**

DATE :- 30 JULY 2015.

PC.:

In this petition under Article 226 of the Constitution of India, the petitioners have prayed for a direction to the Municipal Corporation of Greater Mumbai and the Municipal Commissioner and the Officers of the Municipal Corporation to consider the application dated 20 March 2014 (Exhibit-F) for issuance of commencement certificate in furtherance of IOD dated 31 December 2012, without taking into consideration the Notification dated 10 February 2014.

2] Petitioner no.1 is a partnership firm carrying on business of development in the city of Mumbai. Petitioner no.2 is a partner of the partnership firm. Petitioner no.3 is the owner of a plot of land admeasuring 505.02 sq. mtrs. situated at Grant Road, Mumbai, bearing C.S. No.1122 of Girgaum Division. Petitioner nos.4 to 6 are tenants out of 17 tenants of the two buildings and one ground and single storeyed non cessed building on the said land.

3] The said buildings were constructed almost 100 years back and being in a dilapidated and dangerous condition required re-development. Accordingly, Development Agreement was entered into between petitioner no.1- firm and petitioner no.3-owner of the land, on 23 August 2010. The first petitioner secured consent of more than 70% of the tenants and obtained re-development N.O.C. from Maharashtra Housing Area Development Authority (MHADA) on 5 October 2012. The petitioners, then, applied for N.O.C. to the Chief Fire Officer and the Chief Fire Officer issued the N.O.C. on 17 December 2012. Thereafter the Municipal Corporation of Greater Mumbai granted appointment of the building plans called IOD (Intimation of Disapproval) on 31 December 2012. The tenants vacated the respective flats occupied by them after receiving transit rent and petitioner no.1 carried out the demolition of land buildings on the above plot admeasuring 505.02 sq. mtrs. sometime in July 2013 and the N.O.C. for removal of debris was obtained by petitioner no.1 on 23 July 2013.

4] Thereafter on 17 December 2013, the Supreme Court rendered a judgment in Municipal Corporation of Greater Mumbai and Others V/s. Kohinoor CTNL Infrastructure Company Private Limited and another (Civil Appeal No.1150 of 2013) holding, inter alia, as under:-

“Issue No. (iv) – The second proviso to DCR 43(1) (A), concerning fire protection requirements, is held to be bad in law. We hold that even for the reconstruction proposals of plots upto the size of 600 sq. mts. under DCR 33(7), open space of the width of 6 meters at least on one side at ground level within the plot, accessible from the road side will have to be maintained for the maneuverability of a fire engine, unless the building abuts two roads of 6 meters or more on two sides, or another access of 6 meters to the building is available, apart from the road abutting the building.

The decision as contained in Clause (i) and (iv) above will apply to those constructions where plans are still not approved, or where the Commencement Certificate (CC) has not yet been issued. All authorities concerned are directed to ensure strict compliance accordingly.”

5] It appears that an interlocutory application was made before the Supreme Court seeking a clarification that the judgment

in Kohinoor case would not apply in the facts of that applicant. By order dated 19 February 2014, the Supreme Court specifically rejected the contention that the judgment should not apply where the building plans were sanctioned before 17 December 2013. The Court observed that if the contention were to be accepted it would mean that merely because the plans are sanctioned and construction had not yet started should be permitted though commencement certificate has not been issued. So long a commencement certificate is not issued and construction had not started, the plans will have to be modified as per the directions in the judgment.

6] Learned counsel for the petitioner submits that the Supreme Court judgment dated 17 December 2013 or the clarificatory order dated 19 February 2014 did not deal with a situation where not only the building plans had been sanctioned but the whole building had been demolished before 17 December 2013. But before the commencement certificate could be granted and, therefore, before the construction could be started, the Kohinoor judgment came to be rendered on 17 December 2013.

7] The learned counsel has relied upon the following definition of development in section 2(7) of the Maharashtra Regional and Town Planning Act in support of the contention that development commences with the demolition of the existing structure:-

“Section 2(7) “development” with its grammatical variation means the carrying out of buildings, engineering, mining or other operations in or over or under, land or the making of any material change, in any building or land or in the use of any building or land or any material or structural change in any heritage building or its precinct and includes demolition of any existing building structure or erection or part of such building, structure or erection; and reclamation, redevelopment and lay-out and sub-division of any land; and “to develop” shall be construed accordingly”.

(emphasis supplied).

8] Relying on the underlined words, the learned counsel submits that since the petitioners had demolished the existing building structure prior to 17 December 2013, the development contemplated by Maharashtra Regional and Town Planning Act had already commenced and the situation had become irreversible. Therefore, the Kohinoor judgment would not apply to the petitioners' case. It is further submitted that in view of the area and measurements of the land, it is not possible to provide for 6 meter road and, therefore, there will be tremendous prejudice to the occupants of the flats who have already vacated the flats two years back and have been waiting for the new building to come up.

9] The learned counsel also relies upon the provisions of Regulation 64(b) of the Development Control Regulation which reads as under:-

“64(b) In specific cases where a clearly demonstrable hardship is caused, the Commissioner may for reasons to be recorded in writing, by special permission permit any of the dimensions prescribed by these Regulation to be modified, except those relating to floor space indies unless otherwise permitted under these Regulations, provided that the relaxation will not affect the health, safety, fire safety, structural safety and public safety of the inhabitants of the building and the neighbourhood.”

The learned counsel submits that the Municipal Corporation should be directed to remove the petitioners' hardship by exercising the above power.

10] It may, prima facie, appear that the Supreme Court judgment and the clarificatory order dated 19 February 2014 did not deal with a case where a building was demolished before 17 December 2013 but the commencement certificate was not issued before 17 December 2013. But it will not be appropriate for this Court to give any direction when the petitioners can avail of the remedy of moving the Supreme Court for appropriate reliefs/clarification.

11] We are of the view that since the Supreme Court while rendering the judgment dated 17 December 2013 and thereafter by clarificatory order dated 19 February 2014 indicated how the judgment is to be implemented, it is not for us to place any other or further interpretation as to how direction given in the judgment should be implemented. We are, therefore, not inclined to entertain this petition.

12] Subject to the above observations, the petition is disposed of.

CHIEF JUSTICE

(A. K. MENON, J.)