

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION***

APPEAL FROM ORDER NO. 264 OF 2016

Ornate Housing Pvt. Ltd.,
Registered Office at 774,
Ornate Galaxy, Parsi Colony,
Dadar (East), Mumbai – 400 028.

... Appellant

v/s

1. The Abhyuday Nagar Sahakari
Gruhanirman Sanstha Sangh Ltd.,
Samaj Mandir Hall, Veer Shrikant
Hadkar Marg, Abhyuday Nagar,
Kalachowki, Mumbai – 400 033.
2. Keystone Realtors Pvt. Ltd.,
Regd. Office at 702, Natraj,
M.V.Road Junction, Western Express
Highway, Andheri (E), Mumbai – 69.
3. M/s.Shilp Associates,
At A/301, Royal Apartment,
Madav Gadkari Chowk, Prarthana
Samaj Road, Vile Parle, Mumbai – 57.
4. The Abhyuday Nagar Sankalp Siddhi
Co-op. Housing Society Ltd.,
Bldg. No.20, Abhyuday Nagar,
Kalachowki, Mumbai – 33.

... Respondents

Mr.Janak Dwarkadas, senior advocate along with Girish Godbole, Vishwajeet Sawant, Amit Jamsandekar, Aditya Thakkar, Dhiraj Mhetre and Ms.Zaibaa Thingna i/by Harshad Rajeshirke and Nikhil Rajeshirke for the appellant.

Mr.Appasaheb Desai for Respondent No.1.

Mr.Virag Tulzapurkar, senior advocate along with Dhawal Mehta and Ms.Shachi Udeshi i/by Wadia Ghandy & Co. for Resp. No.2.

Mr.V.S.Kapse for Respondent No.3.

Mr.S.U. Kamdar, senior advocate along with Suraj Iyer i/by Ganesh & Co. for Respondent No.4.

CORAM: N.M. Jamdar, J.

DATED : 7 APRIL 2016

JUDGMENT:

The Appellant, M/s.Ornet Housing Pvt. Ltd. challenges the order passed by the City Civil Court, Mumbai, dated 28 October 2015 rejecting the ad-interim relief in the Notice of Motion taken out in the Suit instituted by the Appellant. The notice of motion was taken out for restraining Respondent No.1 Federation from permitting Respondent No.2 – Keystone Realtors to participate in the tender process.

2 The Appellant – Ornet Housing, the Plaintiff, is a Private Limited Company. Respondent No.1 is the Federation of co-operative housing societies, situated at Abhyuday Nagar, Kalachowki, Mumbai. Respondent No.1 - Federation comprises of 48 co-operative housing societies. Respondent No.2, is a private limited company. Respondent No.3, is a project management consultant and Respondent No.4, is a Association which represents 28 cooperative housing societies, within the Federation.

3 The dispute in the suit relates to the redevelopment of a plot of land

bearing C.S.No.6/148 of Parel Division, F/S Ward, Village Parel-Sewree, Mumbai . The plot admeasures 1,33,593.88 sq.mts. Forty eight buildings stand on this plot of land. They comprise of 3238 residential units and 172 non-residential units.

4 Between 1956 to 1960, the then Bombay Housing and Area Development Board constructed 48 buildings for housing the members of low income group, on tenancy basis. The Board was replaced by Maharashtra Housing and Area Development Authority (MHADA). Some time in the year 1984, MHADA took a decision to convert the tenements given on tenancy basis to ownership by charging a premium. The tenants paid the amount for ownership. They formed their own cooperative housing societies and as on today there are 48 cooperative housing societies for the 48 buildings. Respondent No.1, who is the Federation of 48 housing societies, was registered under the Maharashtra Co-operative Societies Act, 1960.

5 A general body meeting of Respondent No.1 (the Federation) was held on 12 May 2012. It was decided that since the buildings had become old and dilapidated, all the buildings need to be redeveloped together. The individual societies passed their respective resolutions on the same lines. The Federation appointed Respondent No.3, M/s.Shilp Associates, as the Project Management Consultant (the PMC). An agreement to that effect was entered into on 9 October 2012.

6 On 28 August 2014, the Federation issued a public notice inviting tenders from the developers. Seven developers submitted their bids.

When the bids were opened, it was found that the bids of three bidders were disqualified. The remaining four bidders were shortlisted by PMC. PMC submitted a comparative statement of offers on 2 November 2014. The comparative statement was circulated by the Federation amongst the member - societies. On 12 November 2014, a general body meeting of the Federation was held. In this meeting the shortlisted four developers made their presentation. The video recording of the presentations was circulated. The meeting was attended by 2800 members of the member-societies. On 13 July 2015, the PMC informed the Federation to take necessary steps for appointment of the developer. On 3 August 2015, the Federation informed all the member-societies to convene a general body meeting to choose their developer. Some of the member-societies asked the Deputy Registrar of Co-operative Societies to nominate an authorized officer to preside over the general body meeting for selecting the developer. Meetings of some of the member - societies in presence of the authorized officer were held.

7 On 21 July 2015, the advocate for Ornet Housing addressed a letter to the Federation and made a grievance that Respondent No.2 - Keystone Realtors Pvt. Ltd., one of the shortlisted developer, had submitted a tender in breach of the Tender terms. It was stated that the offer of Keystone Realtors of 531.78 sq.ft. carpet area plus 50 sq. ft. carpet area, “subject to approval of MHADA”, was a conditional offer in breach of condition Nos.17 and 20 of the Tender. Copy of the letter was sent by Ornet Housing to PMC and also to Mr.Prashant Karande, the legal advisor of the Federation. PMC, by letter dated 2 August 2015, wrote to the legal advisor of Federation and sought his opinion in respect of objection raised

by the Ornet Housing. Mr.Karande, the legal advisor of the Federation, replied on 14 August 2015 that the bid of Keystone Realtors was a conditional one and same was liable to be rejected. The PMC informed the Federation accordingly. On 23 August 2015, the Federation informed its members that they are not accepting the decision of PMC rejecting the bid of Keystone Realtors and such rejection was beyond the role of PMC.

8 In the meanwhile, one individual, a member of a member – society filed proceedings under Section 154 of Maharashtra Co-operative Societies Act, 1960, by way of Revision Application No.323 of 2015. An application for stay was moved. Grievance was made by this individual member that the Federation had not acted upon as per the guidelines issued by the State of Maharashtra on 3 January 2009 issued under the provisions of Section 79A of the Co-operative Housing Societies Act. Grievance was made about the bid of Keystone Realtors. The Deputy Registrar, by his order dated 29 September 2015 rejected the application.

9 Thereafter the S.C. Suit No. 2098 of 2015 was filed by the Ornet Housing in September 2015. Ornet Housing contended that the Federation was proceeding in violation of the tender conditions and violation of the Government circular dated 3 January 2009. It narrated the manner in which the Tender process was initiated and undertaken and made grievance regarding the bid submitted by Keystone Realtors. The grievance was that, inspite of mandate of the circular and clear order of the PMC, as well as opinion of its own legal advisor, the Federation was proceeding to consider ineligible bid of Keystone Realtors. It was contended that, participation of Keystone Realtors, whose bid was

disqualified, was unjust and unfair, not only to Ornet Housing but to all other bidders. It was alleged that Keystone Realtors tried to influence the members of the Federation, in contravention of the Tender conditions. Accordingly, the Ornet Housing prayed for a declaration that the bid of Keystone Realtors having been disqualified, cannot be considered by the Federation or its members for selecting it as their developer. The declaration was also sought that all actions done by the Federation in violation of the circular and the directions of the PMC, are illegal and an injunction was sought to restrain the Federation and its members from considering the bid of the Keystone Realtors.

10 A Notice of Motion No. 3479 of 2016 was taken out in the Suit for temporary injunction restraining the Federation and its members/officers and employees from acting upon or considering the bid and or permitting the Keystone Realtors to participate in the Tender process. An ad-interim relief on the same terms was sought. Reply affidavit was filed by the Federation. The Federation placed the agreement with PMC, relevant resolutions, correspondence between its members and various general body resolutions on record. It was contended by the Federation that it followed the Circular of 3 July 2009, appointed a Project Management Consultant and meetings were held under the supervision of the officers of Co-operative Department. It was contended that, both the PMC as well as the legal advisor of Federation had a very limited role to play and they acted unilaterally without consulting the Federation. It was stated that PMC has no authority to reject a bid and the Federation, which works under democratic principles, is the ultimate body to decide which developer is to be appointed for all the societies. The other Respondents

also filed their reply. The Federation, Keystone Realtors and Sankalp Siddhi Co-operative Housing Society, opposed the grant of any relief in favour of Ornet Housing.

11 The learned City Civil Court Judge, considered the rival contentions and concluded that the Ornet Housing had not made out any case for grant of an ad-interim relief. The learned Judge observed that only the Federation had the right to reject or accept any bids. Keystone Realtors had not tried to influence the members of the Federation contrary to Clause 27 of the tender nor the bid submitted by Keystone Realtors could be called a conditional one. The learned Judge observed that the PMC had no authority to unilaterally reject the bid of Keystone Realtors and prima facie there appeared to be a case of collusion against the Federation. Accordingly, by the impugned order dated 28 October 2015, the ad-interim relief prayed for was rejected.

12 The present appeal was filed on 20 November 2015. It was mentioned for urgent circulation on 9 March 2016 and it was placed on 29 March 2016 as per its due date and thereafter heard.

13 Mr.Dwarkadas, learned senior advocate for the Appellant, in short, submitted : The Directives issued by the State Government under the provisions of Section 79A of the Maharashtra Co-operative Societies Act, 1960 are binding on the Federation. The Directives are issued in public interest and for bringing the transparency in the redevelopment process. They provide for an appointment of an experienced Architect/Project Management Consultants, who are empaneled. The Directives require the

PMC to prepare a draft tender for inviting competitive offers. One of the conditions of the Directives, Clause 8-C, sets out that the unchangeable primary requirement of the tender should be the carpet area or corpus fund. It is not open to a cooperative society to deviate from or violate the guidelines. Regulation 33(5) of Development Control Regulations for Greater Bombay, 1991, by which the present redevelopment is governed, has three components, the Rehabilitation, Entitlement and Incentive F.S.I. The basic entitlement for each tenement is 531.78. It is open to a bidder to give additional area from the Incentive F.S.I., or to offer corpus. All components of F.S.I. are based on mathematical calculations and are capable of being ascertained before submitting the bid. Even though the MHADA is the owner of the land, it is not concerned with the offer of a developer regarding corpus or the additional area, and the only role of MHADA is to ascertain for which location the FSI is permissible, which has nothing to do with the extent of F.S.I. Once all the figures are ascertainable in advance and MHADA had nothing to do with F.S.I., the bid of Keystone Realtors with an offer 'Subject to approval of MHADA' was on the face of it a conditional bid in contravention of clauses 17 and 20 of Tender. The Keystone Realtors, in respect of commercial area, had not placed any such condition. The PMC has a role to play right upto the construction of the building, which is clear from the Tender. It cannot be said that the PMC had no power to reject the bid. If there is power to select, it is implicit therein that, there is a power to reject the bid as well. Once the PMC had taken a decision, the Federation had no power to sit in appeal and review the order passed by the PMC, which is within the statutory frame work and is binding. Whether the bidder satisfies the eligibility criteria is a matter exclusively within the domain of PMC.

Keystone Realtors could not have written letters to the members of the Federation calling upon them to visit their projects, which was a clear attempt to influence the outcome and was in violation of Condition No.27 of the Tender and, therefore, Keystone Realtors was disqualified. The Tender, and the Directives issued have their source in Section 78A of the Act and thus have a statutory colour. Ornet Housing cannot be made to compete with a disqualified bidder. Such action is not fair and is contrary to the fundamental right of the Ornet Housing to carry on business. The fact that, out of 30 societies, 26 have nominated Keystone Realtors as a developer, will not make any difference, as the action of the Federation is illegal. This Court in various decisions has laid down that the Directives issued under Section 78A are mandatory. The appeal therefore deserves to be allowed.

14 Mr.Desai, learned counsel on behalf of the Federation submitted: The Federation has not violated the Directives and there is no deviation from the same. Neither the PMC nor the Legal Advisor could have acted unilaterally. Ultimately, the Directives are for the benefit of the Co-operative Society, and an outsider cannot make grievance against its breach. The bid of Keystone Realtors was not conditional. MHADA is the owner of the land, and its permission is required. No attempt was made by Keystone Realtors to influence the decision making as the Keystone Realtors had only asked the members to visit the completed projects to decide for themselves. Nothing stopped the others from giving such invitation. The PMC is only to prepare comparative chart and the ultimate decision has to be taken by the Federation by majority. When the suit was filed, out of 48, 30 societies had nominated their developers. Out

of 30, 26 have chosen Keystone Realtors as their developer. The decision as to whom the Federation wants to appoint its developer has to be left to the Federation, and the Ornet Housing, who, on the face of it, does not enjoy confidence of majority of the members, cannot attempt to stall the redevelopment process.

15 Mr.Tulzapurkar, the learned senior advocate appearing for Keystone Realtors, adopted the arguments of Mr.Desai and submitted: The Keystone Realtors was a shortlisted developer. Its offer was not conditional as the permission of MHADA is implicit in any offer from the incentive FSI. The PMC, while drawing a comparative chart, never took any objection. In fact, the PMC asked Keystone Realtors to give presentations. Some of the societies have nominated Keystone Realtors as its developer. At such a belated stage, at the behest of Ornet Housing, the PMC and the legal advisor of the Federation, without consulting either the Federation or calling upon Keystone Realtors to explain, have proceeded to send a communication of rejection of Keystone Realtors' bid. Even assuming the bid was in minor deviation, it was in substantial compliance of tender condition and could not have been stated to be rejected. PMC had no such power to reject any bid. The observation of the learned City Civil Court that there is a collusion, is fully justified. No member of the society has come-forth in making grievance and one member had in fact approached the authorities of Cooperative Department and no relief was granted. Ornet Housing, once having come to know that it is not going to get the project, is making an attempt to stall the redevelopment.

16 Mr.Kamdar, learned senior advocate for the Abhyuday Nagar

Sankalp Siddhi Co-operative Housing Society, in addition, submitted that the Ornet Housing has no locus as there is no contract entered into, neither it can make any grievance regarding breach of its fundamental rights nor can notions of public law be made applicable to the present proceeding.

17 Having considered the rival contentions, no interference is warranted with the impugned order for the following reasons.

18 The present appeal is filed under Order XLIII Rule 1 of the Code of Civil Procedure. The scope of the appeal challenging the discretionary orders of the civil court is limited. The Supreme Court in the case of *Wander Ltd. & anr. v/s Antox India P. Ltd.*¹, has enunciated the principles governing interference with discretionary orders in appeal as under :

'14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion

1 1990 (Supp) SCC 727.

has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Pvt. Ltd. v/s Pothan Joseph:(SCR 721) ((1960) 3 SCR 713:AIR 1960 SC 1156).

'These principles are well established, but as has been observed by Viscount Simon in Charles Osenton & Co. v/s Jhanaton (1942 AC 130), '.....the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case.'

The appellate judgment does not seem to defer to this principle.

The position is reiterated in the case of *Mohd. Mehtab Khan v/s Khushnuma Ibrahim Khan*², as under :

'20. In a situation where the learned trial court on a consideration of the respective cases of the parties and the documents laid before it was of the view that the entitlement of the plaintiffs to an order of interim mandatory injunction was in serious doubt, the appellate court could not have interfered with the exercise of discretion by the learned trial Judge unless such exercise was found to be palpably incorrect or untenable. The reasons that weighed with the learned trial Judge, as already noticed, according to us, do not indicate that the view taken is not a possible view. The appellate court, therefore, should not have substituted its views in the matter merely on the ground that in its opinion the facts of the case call for a different conclusion. Such an exercise is not the correct parameter for exercise of jurisdiction while hearing an appeal against a discretionary order. While we must not be understood to have said that the appellate court was wrong in its conclusions what is sought to be emphasised is that as long as the view of the trial

² (2013) 9 SCC 221

court was a possible view the appellate court should not have interfered with the same following the virtually settled principles of law in this regard as laid down by this Court in Wander Ltd. v/s Antox India (P) Ltd. (1990 Supp. SCC 727).

Thus, what needs to be seen is, whether the discretion used by the City Civil Court in refusing to grant an ad-interim order can be considered as perverse or illegal. The City Civil Court has rejected the prayer for ad-interim relief on the ground that it cannot be said that the bid of Keystone Realtors is a conditional one and that no error was committed by the Federation in ignoring the unilateral cancellation by PMC of the bid of Keystone Realtors. The City Civil Court also prima facie held that Clauses 17, 20 and 27 of the tender were not violated by Keystone Realtors and that the PMC had no authority to reject or accept any bid.

19 The primary contention of Mr.Dwarkadas is regarding the legal effect of the Directives issued by the State of Maharashtra on 3 January 2009 in respect of appointment of PMC and redevelopment. According to Mr.Dwarkadas, these Directives are binding on the cooperative societies who have undertaken redevelopment activity and the decisions of the PMC cannot be brushed aside by the cooperative society as these decisions have a statutory backing. According to him, the Directives dated 3 January 2009 create a right in favour of Ornet Housing to be treated fairly in the tender process and the Ornet Housing cannot be asked to compete the Keystone Realtors who is disqualified. The Directives dated 3 January 2009 have been issued under Section 79A of the Maharashtra Co-operative Societies Act. Section 79A reads as under :

'Government's power to give directions in the public interest, etc.- (1) If the State Government, on receipt of a report from the

Registrar or otherwise, is satisfied that in the public interest or for the purposes of securing proper implementation of co-operative production and other development programmes approved or undertaken by Government, or to secure the proper management of the business of the society generally, or for preventing the affairs of the society being conducted in a manner detrimental to the interests of the members or of the depositors or the creditors thereof, it is necessary to issue directions to any class of societies generally or to any society or societies in particular, the State Government may issue directions to them from time to time, and all societies or the societies concerned, as the case may be, shall be bound to comply with such directions.

(2) The State Government may modify or cancel any directions issued under subsection (1), and in modifying or cancelling such directions may impose such conditions as it may deem fit.

(3) Where the Registrar is satisfied that any person was responsible for complying with any directions or modified directions issued to a society under sub-sections (1) and (2) and he has failed without any good reason or justification, to comply with the directions, the Registrar may by order--

(a) if the person is a member of the committee of the society, remove the member from the Committee and appoint any other person as member of the committee for the remainder of the term of his office and declare him to be disqualified to be such member for a period of six years from the date of the order:

(b) if the person is an employee of the society, direct the committee to remove such person from employment of the society forthwith, and if any member or members of the committee, without any good reason or justification, fail to comply with this order, remove the members, appoint other persons as members and declare them disqualified as provided in clause (a) above:

Provided that, before making any order under this sub-section, the Registrar shall give a reasonable opportunity of being heard to

the person or persons concerned and consult the federal society is affiliated.

Any order made by the Registrar under this section shall be final.'

This section enables the State Government to issue various Directives to the cooperative societies in public interest and in the interest of the society. The Directives dated 3 January 2009 have been issued under Section 79A of the Act of 1960.

20 It is important to notice the reason why the Directives dated 3 January 2009 were issued. The introduction to the Directives makes the object clear. Various cooperative housing societies are undergoing redevelopment process. The Government was in receipt of various complaints from members of such societies regarding the mal administration of the cooperative housing societies. Some of the complaints were regarding the manner in which the administrations of the societies, without taking their members in confidence, were carrying out the redevelopment. Various instances of the developers misleading the members and administration of the housing societies had also come to the light. The State Government formulated a study group, which opined that certain guidelines were necessary for the purpose of carrying out redevelopment in the cooperative housing societies. The Directives lay down a methodology. They specify the requirement of holding a special general body meetings, appointment of project management consultant / architect, considering the suggestions of the members, informing all the members, the role of the project management consultant, the selection of the developers, the agreement to be executed with the developers, etc. The primary object of the Directives is to protect the members of the

cooperative housing societies from being deprived of their rights and to protect them from being exploited. The Directives therefore are for the benefit of the cooperative housing societies. Ultimately the redevelopment process has to be carried out by the cooperative housing societies themselves. The Government, by issuing the Directives dated 3 January 2009, has not taken away this right of the cooperative housing societies. The final decision making vests with the society. The relation between the society and the developer is of trust and confidence. The members, by majority, select a developer in whom they repose their trust.

21 Thus the Directives have been issued to secure the interest of the members in the redevelopment process. While interpreting these Directives as either mandatory or directory the interpretation cannot be irrespective of the fact situation and for all persons. There cannot be a universal interpretation of these Directives in all fact situations and against all concerned. A member of a society may argue that the guidelines are mandatory. However, the Directives cannot be used by a third party to enforce the provisions in such a manner that it takes away the basic right of the members to appoint the developer of their choice. Such is not the objective of the Directives dated 3 January 2009.

22 Before the notice of motion was moved, the member - societies of the Federation had conducted their own meetings pursuant to the Directives dated 3 January 2009. Out of 30 societies, 26 voted in favour of Keystone Realtors. Thus, majority has already shown their trust and faith in Keystone Realtors. If the argument of Mr.Dwarkadas is to be accepted, it would mean that the Directives which were enacted by the

State Government for protection of the cooperative housing societies, like the Federation, will be used against the Federation itself to take away their choice to appoint a developer with whom they have trust and faith. Such would be a completely absurd reading of the Directives.

23 There was also a debate at the bar as to the invocation of elements of public law in the present controversy. Mr.Dwarkadas relied upon the decision of the division Bench in the case of *Mont Blanc Co-operative Housing Society Ltd. & anr. v/s State of Maharashtra & ors.*,³ to contend that the bye laws framed under 79A of the Act are binding on a society. He also relied upon the decision of the Division Bench in case of *Vinod Subhashrao Shinde & ors. v/s State of Maharashtra & ors.*⁴, to contend that the bye laws have a statutory force. In *Mont Blanc* the order in question was issued under Section 79A of the Act of 1960 not to charge non-occupancy charges beyond 10% of the service charge. The order was issued by the State Government against the Cooperative Society in the interest of the members of the society. The Division Bench noted the decision of the Apex Court in *Karvenagar Sahakari Griha Rachana Sanstha Maryadit & another v/s State of Maharashtra & others*⁵, wherein the Apex Court observed that, what is in the interest of the society is primarily for the society alone to decide and it is not for outside agency. It also took note of the decision of the Division Bench in *Sahebrao Kancharu Patil & ors. v/s Collector, Aurangabad & ors.*⁶ to the effect that the direction issued under Section 79A are concerned with business of affairs

3 2007(4) Mh.L.J. 595.

4 2008(1) Bom.C.R. 485.

5. 1989 Mh.L.J. 320 = AIR 1989 Bom. 392.

6. 1983 Mh.L.J. 476.

of the society being conducted in a manner detrimental to the interest of the members. The Division Bench in *Mont Blanc* upheld the impugned order therein on the ground that it was issued to secure proper management and business of the society. It found that the impugned action of the State Government was to prevent exploitation of minority members of the cooperative housing society at the hands of management using its power to hike non-occupancy charges at its whims and fancy, and to curtail this misuse a ceiling was fixed by the government. Therefore, the Court kept in mind the interest of the members of the society while deciding the validity of the impugned order and held that it was binding on the society. In the present case, no member has come forth making any grievance, and therefore, the law laid down in the decision of *Mont Blanc society* by the Division Bench will not apply facts of the present case. Similar is the position in the case of *Vinod S. Shinde*. In that decision, the division Bench did not entertain a challenge to the circular issued under Section 79A and held that the object of issuing the circular in question was to implement the law laid down by the Apex Court. In the case of *Karvenagar*, the Apex Court has emphasized that generally a cooperative society must be left to decide what is best for its members. Mr.Dwarkadas relied upon the decisions relied upon in the case of *B.S.N. Joshi and sons v/s Nair Coal Services*⁷, reported in and *Rajasthan State Road Transport Corporation & anr. v/s Bal Mukund Bairwa (2)*⁸. These cases arise from decisions of statutory bodies, and not applicable to the present case. Neither the PMC nor the legal advisor are public bodies. There is no contract entered into between the Ornet Housing and the Federation. In

7. A.I.R. 2007 SC 437

8. (2009) 4 SCC 299

the circumstances, the dispute cannot possibly lie in the realm of public law for attracting the principles of public law.

24 Even assuming the guidelines are mandatory against the Federation, no case is made out for the breach. The allegation is that the Keystone Realtors committed breach of the tender conditions and therefore their bid was liable to be kept out of consideration. Reliance is placed by Mr. Dwarkadas on Clauses 17, 20 and 27 of the Tender. These clauses read as under :

'Cl. 17. The bid offer shall be firm and shall not be subjected to any calculation/variation, condition, etc. and shall hold good till completion of works and handing over the possession of the new buildings and amenities to all members of the cooperative housing societies represented by Abhyuday Nagar Sangh.

Cl. 20. Conditional bid offers are liable to be rejected; therefore bidders are advised to avoid putting conditions that are in variance with the terms and conditions stipulated in the tender document.

Cl. 27. Any efforts by a bidder to influence the Project Management consultants of this project, their personnel, members of Abhyuday Nagar sangh or members of the concerned cooperative housing societies on matters relative to bid offers considered for the process of examination, clarification, evaluation and comparison of bids, and in decisions concerning award of contract, may result in rejection of their bid and forfeiture of their EMD.'

According to Mr.Dwarkadas, clauses 17 and 20 contemplate that a conditional bid cannot be given by a tenderer and if it is so given, the bid is not a valid bid and is liable to be rejected. Mr.Dwarkadas contended that, when Keystone Realtors gave their bid regarding commercial/class

room tenement, no such conditional bid was given. Mr.Dwarkadas placed on record the detailed analysis of the relevant Development Control Regulations to demonstrate that all the figures are known to the parties and therefore there is no question of there being any uncertainty. According to the learned counsel for the respondents, the MHADA being the owner of the plot , is to grant approval and, therefore, all that the Keystone Realtors has stated is something which is implicit in every offer. The relevant Development Control Regulations i.e. 33(5) speaks of rehabilitation area, incentive FSI and sharing of balance FSI. The minimum entitlement of tenement is 531.78 sq.ft. If a developer has to give more area than this area, then he has to make provision from the incentive FSI. Mr.Tulzapurkar relied upon the proviso to the clause regarding incentive FSI in 33(5), which states that the incentive would be subject to availability of FSI on the plot under redevelopment and its distribution by MHADA. The proviso reads as under :-

'Provided that the above incentive will be subject to the availability of the FSI on the Plot under redevelopment and its distribution by MHADA.'

According to Mr.Dwarkadas, this provision only refers to a geographical allocation and not by entitlement *per se*.

25 The bid given by the Keystone Realtors is reflected in the comparative chart prepared by PMC. As regard the bid regarding carpet area for residential tenement buildings, Ornet Housing offered 531.78 and the corpus fund of Rs.10,00,000/-. The Keystone Realtors offered 537.78 plus 50 i.e. = 582 sq.ft. “subject to approval of MHADA”. As far as the comment of PMC on the said bid of Keystone Realtors in the

comparative chart as under :

'At this juncture, it would be prudent to mention that under the present DCR 33(5) dated 8th October 2013, residential tenements admeasuring carpet area of 208.71 sq. ft. are entitled for carpet area of 531.78 sq. ft., nevertheless keeping the larger interest of the tenements in mind, the bidder would be invited to justify the feasibility of the offer under the current policy during the presentation.'

(emphasis supplied)

26 The question in this appeal is, whether the bid which refers to a permission of MHADA can be considered as a conditional bid. It cannot be said that the MHADA has no connection with the redevelopment at all and there is no need to mention MHADA in the bid. MHADA has a role to play in respect of allocation of incentive FSI, may be *qua* its location. Neither the Federation nor its members have found that the bid as ambiguous or conditional. They have proceeded to accept the position that the bid of a developer is always subject to MHADA's permission, who is ultimately the owner of the land. Therefore once the MHADA has some connection with the distribution of FSI on the plot, the view taken by the learned City Civil Court Judge that the bid of Keystone Realtors cannot be considered as a conditional, is a possible one.

27 The next ground urged by Mr.Dwarkadas was regarding breach of tender condition No.27. This tender condition stated that any efforts by bidder to influence the PMC, their personnel, members of the Federation or members of concerned cooperative societies may result in rejection of their bid and forfeiture of their EMD. Mr. Dwarkadas submitted that the Keystone Realtors had written to the residents/secretary of the Federation on 3 July 2015 calling upon them to visit their existing project. According

to him, this was an attempt to influence the members of the Federation and entailed rejection of the bid of Keystone Realtors. Mr.Tulzapurkar submitted that, this letter only invites to see the existing project and cannot be said to influence the Federation in any manner. Mr.Desai submitted that nothing stopped the other bidders from making similar request.

28 I do not think that the letter dated 3 July 2015 disqualifies the bid of Keystone Realtors. All the bidders had given their bids and it was left to the societies to take a decision. The members could have by themselves gone and seen the construction carried out by the bidders to make a decision on their own. All that the Keystone Realtors had done was to invite the members to decide for themselves by looking at the work. If the Keystone Realtors' work was not of good quality, it would have a negative impact. By merely calling upon the members to have a look at the work earlier carried out by them, Keystone Realtors could not have, in any manner, be stated to have influenced the members. Such arguments only shows that Ornet Housing somehow wants to eliminate competition.

29 Various arguments were advanced by the counsel on the role of PMC as well as the legal advisor. The Project Management Consultant is contemplated under the Directives of 3 January 2009. The Project Management Consultant is established to assist the societies for the purpose of redevelopment process. The Directives of 3 January 2009 to the Project Management Consultant state that the society will appoint an experienced architect or project management consultant impaneled with the Government and local authority. The initial work to be carried out by

the Consultant is illustrated in clause 7, which reads as under :

Clause 7. The initial work to be carried out by the Architect/PMC.

- a) To carry out survey of the Land and Building.*
- b) To seek information regarding the conveyance of the society's land.*
- c) To seek information about available F.S.I. and T.D.R. For the building and land considering Rules of the MHADA/S.R.A./ Municipal Corporations, as applicable from time to time, according to ownership of the land and current provisions of the Government.*
- d) To prepare a feasible project report considering suggestions, references and recommendations made by the society members about the redevelopment taking into account the residential area, commercial area, open spaces, garden, parking, the specification of construction, etc.*
- e) The Project Report shall be prepared and submitted to the committee by the Architect/PMC within 2 months from the date of their appointment.'*

Clause (8) contemplates that the Consultant will prepare a draft tender for inviting competitive offers and after receipt of tender, prepare a comparative chart. In the Tender issued by the Federation, the process of awarding tender is dealt with in the following manner:

- (1) After taking into consideration the aspects like comparison chart and remarks submitted by the PMC, presentations by the shortlisted bidders and the bid offers, every individual cooperative housing society that is a member of Abhuday Nagar Sangh will select one of the shortlisted bidders as per the procedures prescribed under 79(A). Thereafter, the tender shall be awarded to the bidder who is selected by the*

highest number of cooperative housing societies.

- (2) The aforesaid decision taken by the highest number of cooperative housing societies shall be binding on all the cooperative housing societies represented by Abhyuday Nagar Sangh, their members and all bidders.*
- (3) The selected bidder may be invited to redefine its bid offer that shall be finalised with the approval of cooperative housing societies represented by Abhyuday Nagar Sangh.*
- (4) The offer given under DCR 33(9) in Annexure V is a provisional offer and will not be considered for selection of developer. If DCR 33(9) will be finalised in future and if the same is beneficial to the members of the cooperative housing societies represented by Abhyuday Nagar Sangh, the said provisional offer may be taken into consideration for negotiations with the Selected Developer, if feasible and accepted by member Cooperative Housing Societies of Abhyuday Nagar Sangh.'*

30 Mr.Dwarkadas submitted that the power of PMC to select tenders will also include the power to reject. He relied upon the other clauses of the tender which refer to the PMC along with the society till almost end of the clauses in the tender. According to Mr.Dwarkadas, since the PMC is appointed as per the Directives issued under Section 77A of the Act of 1960, its decision is binding. It was also submitted by him that even the legal advisor had opined that Keystone Realtors is disqualified and the legal advisor was named in the tender. According to him, the decision of the PMC and the legal advisor could not have been simply overridden by the Federation.

31 Firstly, the PMC is only to assist the Federation. The legal advisor was appointed by the Federation to advise it in the matters of

redevelopment. In the entire Tender document or in the Directives, no express power has been given on the PMC to reject any bid. There is no question of such implied power to the PMC. The PMC is not a statutory body. The PMC is to assist the Federation in making comparative chart to enable the Federation to take an informed decision. The final power of rejection or acceptance of a shortlisted bid is with the Federation as can be seen from the clauses reproduced above. The argument that, power to select, which include power to reject, cannot be accepted looking at the nature and function of the PMC, which is of purely advisory in nature. Again, this interpretation of the powers and PMC and the legal efficacy of its recommendation as to whether it is mandatory or recommendatory will depend on the fact situation. If a member had made a complaint, then the matter will be looked in different perspective. Ornet Housing cannot take away the choice of the Federation of considering the bid of Keystone Realtors by elevating the PMC to a body above the Federation. The same is the position with the opinion of the legal advisor who was appointed by the Federation only to assist itself. The Federation who appointed the PMC and a legal advisor, cannot become subordinate to its own advisors. Such is not the intention of the Directives. Mr.Tulzapurkar rightly submitted that, if the Ornet Housing is invoking principles of public law, then, the unilateral decision of PMC without even considering this version of Keystone Realtors as to whether they were disqualified or not, is grossly unfair. Therefore, the conclusion of the learned City Civil Court Judge that the PMC had no power to reject the bid, cannot be said to be perverse.

32 The stage at present is that the Federation has only called for tenders

for its redevelopment. The PMC and the legal advisor had opined that one bidder is disqualified, which is not accepted by the Federation. The Federation has come to the conclusion that the bidder is not disqualified and the societies are proceeding ahead in a transparent and democratic manner to select their developer.

33 The Federation has followed the Directives by holding meeting under the supervision of the officers of Department of Cooperation. General body as well as the special body meetings have been held. More than 2000 individuals have attended. All shortlisted tenderers have given their presentations. Compact discs of the presentation have been circulated. Majority of societies have already selected Keystone Realtors. The grievances made by Ornet Housing that the Keystone Realtors is disqualified, has no substance. The entire attempt of Ornet Housing is to somehow stall the redevelopment process having once come to know that it is not likely to get selected as the developer.

34 Forty eight cooperative housing societies with thousands of tenement dwellers are awaiting redevelopment of their dilapidated houses. To have best possible outcome from the redevelopment process, widest possible choice must be made available to the members. None of the members have made any grievance against Keystone Realtors. Majority of the members have already selected Keystone Realtors. In the circumstances no any impediment can be placed in the way of the Federation and its members to have the redevelopment done from the developer of their choice.

35 In the circumstances, no case is made out for interference in the impugned order. The appeal is dismissed. No costs.

(N.M.Jamdar, J.)