

Urmila Ingale

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 2457 OF 2016

Pant Nagar Shankar Sadan Co-operative
Housing Society Limited .. Petitioner
Vs.
Shri Kalpanath Singh and ors. .. Respondents

Mr.PK.Dhakephalkar, Senior Advocate a/w Mr.D.S.Pagare, for
the Petitioner.
Mr.Pramod S.Bhosle i/b Mr.Sharad K. Bhosle, for Respondents
No.1 to 8.
Ms.Pallavi Thakar, for Respondents No. 9 & 10 - BMC.
Mr.Rajesh S. Patil i/b Mr.M.M. Kadam, for Respondent No.11.

**CORAM : NARESH H. PATIL AND
M.S.KARNIK, JJ.**

29th NOVEMBER, 2016

P.C. :

. The petitioner is a Co-operative Society having 30 residential members occupying different residential tenements who had decided to redevelop the said property by demolishing the same. It is an admitted position that the land belongs to MHADA. After taking necessary permissions from the statutory authorities like MHADA & Corporation, the Society granted

license to the respondent No. 11 - M/s.K.Nakrani Associates to construct the said building. It is submitted that after the construction of the building, the builder – developer was permitted to sell the salable area as described in the agreement reached between the Society and respondent No.11.

2. The learned Senior Counsel for petitioner submitted that at each plinth level construction, the said respondent No.11 has to request for a commencement certificate from the Corporation and at one such stage, the Corporation refused to grant the commencement certificate on account of non-execution of agreement by respondent No.11 with 7 members of the said Society. Admittedly, 23 members of the Society had already executed the agreement with respondent No.11.

3. The learned Senior Counsel appearing for the petitioner has brought our attention to the order dated 23/08/2013 passed by the Division Bench of this Court (Coram : S.J.Vazifdar & M.S.Sonak, JJ.) in Writ Petition (L) No. 1872 of

2013 which reads thus :

“1] Mentioned. Not on Board.

2] The petition is taken up for admission.

3] Rule. Rule is made returnable forthwith and heard finally.

4] The petitioners have challenged the implementation of the scheme under DCR 33 (5). The scheme involves 30 occupants. 23 of them have raised no objection. They have, in fact vacated the premises in order to facilitate the implementation of the scheme. The seven petitioners have raised various objections. The main objection is that a plan has yet to be sanctioned and that the IOD which had earlier been granted is no longer in operation and a fresh IOD will have to be issued. The IOD is of August 2011. The concept of fungible FSI was introduced in the year 2012. Indeed, therefore, fresh plans will have to be submitted. Respondent No.5- the developer has rightly made a statement that the plans would take into consideration the fungible FSI and that each of the members including the petitioners will be granted a minimum area as indicated in the agreement entered into between the society-respondent No.4 and the developer and as required in law. In the event of the sanctioned plans being contrary either to the agreement or to the law the petitioners are always at liberty to challenge the same.

5] Any order preventing the implementation of the scheme will adversely affect all the occupants including the petitioners themselves. Even the petitioners admit that the building is in a dilapidated condition. We, therefore, intend passing an order that would facilitate the implementation of the scheme and at the same time protect the alleged rights of the petitioners.

6] In fact, the petitioners have been granted temporary alternate accommodation close to the present structure. In view thereof and in view of the statement made on behalf of respondent Nos.4 and 5, which are accepted by this Court, the petitioners rights are protected.

7] The petitioners, however, seek compensation in lieu of transit accommodation. Mr. Dhond, the learned senior advocate appearing on behalf of Respondent No.5 states that the petitioners are at liberty either to continue in the transit accommodation to which they will have to shift or at the petitioners option they shall be paid the compensation in lieu of transit accommodation by respondent No.5 at the rate of Rs.20,000/- per month, commencing six months after they vacate the present premises. This option shall be exercised four weeks before the expiry of a period of six months. In the event of the project being delayed for any reasons, liberty to the petitioner to apply for enhancement of the compensation.

8] Mr. Dhond further states that the petitioners will be furnished the plans that will be submitted to the authorities as well as the sanctioned plans when received. He states that this is to enable the petitioners to raise any objection regards the plans even before the concerned authority. The petitioners, however, are at liberty to challenge the sanctioned plans, if they so desire.

9] In the circumstances, as far as this writ petition is concerned nothing further remains to be considered.

10] The writ petition is, accordingly, disposed of.”

4. The learned Senior Counsel appearing for the petitioner has also brought our attention to a Supplementary Development Agreement annexed at page 105 to this Petition, the impugned communication at Exhibit 'N' and affidavit-in-reply filed by respondent No.7. Learned Senior Counsel submitted that the Corporation misread the judgment of this Court in the case of **Municipal Corporation of Greater Mumbai Vs. State of Maharashtra and ors.** reported in

2014(6) Bom.C.R.860 and by applying guidelines prescribed under the said judgment, refused to issue commencement certificate. The learned Counsel further submitted that the guidelines were framed by the Division Bench of this Court in respect of the notices issued by the Corporation under Section 354 of the Mumbai Municipal Corporation Act, 1888 (for short 'MMC Act'). The guidelines do not apply to a case like the present one wherein the land belongs to MHADA and building was constructed by the Society over the MHADA land. It is further submitted that in case appropriate directions are issued, the construction can be carried on by respondent No.11 which would be in the interest of all members.

5. Learned Counsel appearing for the Corporation submitted affidavit-in-reply filed by Mr.Prakash S.Patil, Assistant Engineer. The learned Counsel further submitted that at one stage, the Corporation had issued notice to the petitioners under Section 354 of the MMC Act. The Corporation is of the view that even in the present facts of scenario, the petitioner /

respondent No.11 must get the agreement executed from the remaining 7 members. On that ground alone, for want of compliance, the Corporation had withheld issuance of commencement certificate.

6. Learned Counsel appearing for the respondents – members who are yet to execute the agreement submitted that they are not against the completion of the building. They had vacated the building and are residing in alternate accommodation on payment of monthly rent. They desire that building shall be completed at the earliest, but issues like more area to be allotted to them, arrangement regarding conveyance deed from respondent No.11 in favour of Society and appropriate bank guarantee to be submitted by respondent No.11 are required to be considered.

7. We perused the record put before us as also the judgment in the case of **Municipal Corporation of Greater Mumbai** (*supra*). We find that the issue can be resolved as

majority of the members of the Society which are 23 in number had already executed agreement in favour of respondent No.11. The construction had already commenced. Learned Counsel appearing for respondent No.11, on instructions, submits that written undertaking would be submitted within one week to the Court by respondent No.11 stating therein that from the date of subject commencement certificate is received from the Corporation, within 2 years, respondent No.11 will complete the construction of the subject building.

8. In the strict sense, we find that insistence of the Corporation for execution of the agreement by remaining 7 members may not be an essential criteria in the facts of this case. Even otherwise, the learned Counsel appearing from the respondents – members (7 members), on instructions of 4 members out of 7 members who are present in the Court, submits that without prejudice to the rights and contentions of the respondents – members, they would also execute agreement like others.

9. We clarify that irrespective of execution of the agreement by remaining members in favour of respondent No.11, this is a case where the Corporation shall grant commencement certificate without insisting the execution of agreement by remaining 7 members. If agreements are executed by remaining 7 members, copies of the same shall be handed over by respondent No.11 to the Corporation.

10. For the reasons stated above, we direct the Corporation to grant commencement certificate to respondent No.11 based on the application which was filed by respondent No.11 on 14/06/2016. Needless to mention that if the Corporation is of the opinion, that certain other necessary compliance are to be made by respondent No.11, it is clarified that the Corporation shall deal with the issue taking into consideration the other necessary and essential compliance by respondent No.11 except insistence on the said agreements.

11. Writ Petition is disposed of in view of the above directions.

12. Parties to act upon authenticated copy of this order.

(M.S.KARNIK, J.)

(NARESH H. PATIL, J.)