

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

WRIT PETITION NO. 2270 OF 2014

1. Jai Ganesh SRA CHS (prop.)	}	
having its office at Kanu	}	
Compound, General Arunkumar	}	
Vaidya Marg, Malad (East),	}	
Mumbai - 400 097, through its	}	
Secretary, Mr. Vishwanath	}	
Dharmaji Kadam	}	
	}	
2. Arun Shantaram Sakpal	}	
Chief Promoter of Jai Ganesh SRA	}	
CHS (Prop.) having his office at	}	
Kanu Compound, General	}	
Arunkumar Vaidya Marg,	}	
Malad (E), Mumbai - 400 097	}	Petitioners

versus

1. State of Maharashtra	}
Government Pleader,	}
Original Side	}
	}
2. Chief Executive Officer,	}
Slum Rehabilitation Authority	}
having his office at	}
Administrative Building,	}
Anant Kanekar Marg, Bandra (E),	}
Mumbai 400 051	}
	}
3. Deputy Collector,	}
Slum Rehabilitation Authority	}
having his office at	}
Administrative Building,	}
Anant Kanekar Marg, Bandra (E),	}
Mumbai 400 051	}
	}
4. Controller of Slums, Greater	}
Mumbai having his office at	}
Administrative Building, 7 th floor,	}
Government Colony, Bandra (E),	}
Mumbai 400 051	}

Dr. Milind Sathe – Senior Advocate with
Ms. Shamima Taly i/b. M/s. S.
Mahomedbhai and Co. for the petitioners.

Mr. M. D. Naik – AGP for respondent no. 1.

Mr. Jagdish G. Reddy (Aradwad) for
respondent nos. 2 and 3.

**CORAM :- S. C. DHARMADHIKARI &
DR. SHALINI PHANSALKAR-JOSHI, JJ.**

**Reserved on 4th May, 2016
Pronounced on 28th July, 2016**

JUDGMENT :- (Per S. C. Dharmadhikari, J.)

1. Rule. Respondents waive service. By consent, Rule made returnable forthwith.

2. By this writ petition under Article 226 of the Constitution of India, the petitioners are claiming the following declaration:-

“(a) That this Hon'ble Court be pleased to declare that:

(i)

(ii)

(iii) the provisions of the Slum Act will prevail over the provisions of section 36A of the MLR Code insofar as there is any conflict between the provisions;

(iv) a Slum Rehabilitation Scheme can be implemented on land declared as a Slum Rehabilitation Area under section 3C of the Slum Act even if such land is owned by a member of a Scheduled Tribe;

(v)

(b) That this Hon'ble Court be pleased to issue a Writ of Certiorari or any other appropriate writ, order or direction in the nature of Certiorari under Article 226 of the

Constitution calling for the records and proceedings relating to the notification dated 7th August, 2012 (at Exhibit B hereto) in so far as it makes redevelopment on Slum rehabilitation area subject to permission under the Maharashtra Restoration of Land to Schedule Tribe Act, 1975 and communication dated 26th February, 2013 (at Exhibit E hereto) and after going through the legality, validity and propriety thereof the same be quashed and set aside insofar as it questions the legality of the Petitioners' proposal dated 8th January, 2013 on the ground that the said proposal is to be implemented on land owned by a member of the Scheduled Tribes;
.....”

3. The petitioners are also claiming certain incidental and ancillary declarations.

4. The above reliefs are claimed in the following background:-

5. The plot of lands bearing CTS No. 677/A (part), 610/A/1C (part) of village Malad (East), Taluka Borivli admeasuring 2330.10 square meters was declared as a slum rehabilitation area under section 3C of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 (hereinafter referred to as “the Slum Act”).

6. Petitioner no. 1 being a proposed society of the slum dwellers submitted a proposal to the second respondent Slum Rehabilitation Authority (for short “the SRA”) dated 8th January, 2013 for redevelopment of these plots. The scrutiny fees have been accepted and a number has been assigned to the petitioners' proposal by the SRA.

7. The petitioners have then pointed out as to how the proposal came to be submitted. It is stated that the said land is shown in the relevant revenue records as owned by a member of the Scheduled Tribe.

8. On 2nd October, 2010, in a General Body Meeting of petitioner no. 1, a resolution was passed approving the redevelopment of slums existing on the said plot of land. In the same meeting, resolutions were passed appointing petitioner no.2 as the Chief Promoter and M/s. Harasiddh Corporation as the developer for the said slum redevelopment project.

9. On 26th October, 2010, a development agreement was entered into between the developer M/s. Harasiddh Corporation and petitioner no. 1.

10. On 26th October, 2010, petitioner no. 1 granted a power of attorney to the partners of M/s. Harasiddh Corporation authorising them to take all steps with respect to implementation of the said slum redevelopment project.

11. The said M/s. Harasiddh Corporation has, by an agreement dated 11th August, 2010, agreed to purchase from the tribal owners all their rights, title and interest in the said slum land, with consent to develop the same as a SRA project, and have paid the tribal owners the entire consideration amount as agreed.

12. On 28th November, 2011, a proposal was submitted to respondent no. 2 on behalf of the petitioners to notify plot of land bearing CTS No. 677/A (part) and 610/A/1 C (part) as slum rehabilitation areas in order to implement the said slum redevelopment project.

13. On 7th August, 2012, respondent no. 2 passed an order under section 3C of the Slum Act notifying CTS No. 677/A (part) as measuring 2,200 square meters as a slum rehabilitation area as defined under section 2(h-b) of the Slum Act. The order stated that the provisions of the Maharashtra Restoration of Land to Scheduled Tribe Act, 1974 (for short “the Restoration Act”) were applicable to the said area and necessary permission in this regard should be taken. The order was published in the official gazette on 9th August, 2012.

14. On 15th August, 2012 in a General Body Meeting of petitioner no. 1, the implications of the order dated 7th August, 2012 were discussed. A resolution was passed confirming the appointment of petitioner no. 2 as Chief Promoter and M/s.Harasiddh Corporation as the Developers and ratifying acts done in respect of implementation of the said slum redevelopment project.

15. On 8th January, 2013, in the light of the order dated 7th August, 2012, a proposal for redevelopment and rehabilitation of the slums existing on the plot of land bearing CTS No. 677/A (part) and 610/A/1C (part) admeasuring 2330.10 square meters was submitted to the SRA on behalf of the petitioners.

16. It is submitted that more than 95% members of the first petitioner society have consented to the slum rehabilitation scheme proposal dated 8th January, 2013. It is further submitted that as per the draft Annexure - II submitted along with this proposal, out of a total of 129 structures existing on the slum rehabilitation area, 80 are protected structures, namely, existing on or before 1st January, 1995 and whose occupiers are on the electoral rolls prepared on the same date.

17. On 8th January, 2013, respondent no. 2 accepted scrutiny fees with respect to the petitioners' proposal and assigned a computer number to the said proposal.

18. On 26th February, 2013, respondent no. 4 addressed a letter to respondent no. 3 questioning the petitioners' proposal on the ground that a member of the Scheduled Tribes owned the land on which the slum rehabilitation project proposed by the petitioners was to be implemented.

19. On 30th May, 2013, petitioner no. 1 addressed a letter to respondent no. 2 regarding the concerns raised by respondent no.4 vide his letter dated 26th February, 2013.

20. The respondents are not processing the petitioners' proposal only on account of the objection raised by respondent no.4 that it was necessary for the SRA to examine whether it would be lawful to implement a slum rehabilitation scheme given that the land in question belongs to adivasis.

21. It is in the above circumstances that the writ petition has been filed and the reliefs have been claimed.

22. An affidavit in reply has been filed by respondent nos. 2 and 3, in which, after denying all the allegations, it is contended as under:-

“3. I say that the answering Respondent - Slum Rehabilitation Authority is the Planning Authority for implementation of the Slum Rehabilitation Projects, which is established under the provisions of Chapter 1(A) of the Maharashtra Slum Areas (I C & R) Act, 1971. I say that the Slum Rehabilitation Authority is constituted with the aims, objects and functions of implementing the Slum Rehabilitation Schemes/Projects in Mumbai city and suburban districts and to provide permanent alternate accommodation to the eligible slum dwellers free of cost and without consideration as per the Slum Rehabilitation Scheme. I say that the duties and functions of the Slum Rehabilitation Authority are as under:-

(a) To survey and review the existing position regarding slum areas;

- (b) To formulate schemes for rehabilitation of slum areas;
- (c) To get the Slum Rehabilitation Scheme implemented;
- (d) To do all such other acts and things as may be necessary for achieving the objects of rehabilitation of slums;

4. I say that even the Slum Rehabilitation Authority has been given the status of corporate entity w.e.f. 3.1.1997 and it is an independent Autonomous body. Even by amending the MRTP Act, 1966, the Chief Executive Officer of Slum Rehabilitation Authority has been delegated with the powers exercisable U/secs. 44, 45, 46, 51, 53, 54, 55, 56, 135 and 136 of the MRTP Act, 1966. Similarly, the Slum Rehabilitation Authority has been empowered U/sec. 37 (1-B) to prepare and submit proposals for modifications to the development plan of Greater Mumbai. So also the Slum Rehabilitation authority has been delegated with powers to declare any area as slum rehabilitation area for rehabilitation.

5. I say that the Slum Rehabilitation Authority carries out its functions through different operating departments, such as planning and implementation, building permission and supervision, eligibility, certification, registration of co-operative housing societies, land management, community development, accounts and finance, general administration etc. etc.

6. I say that the property bearing CTS No. 610/A/1C (part), 677/A (part) of village Malad, Malad (E), Mumbai 400097. Admeasuring near about 2330.10 sq. meters (which is hereinafter referred to as the **subject property** for the sake of brevity and convenience), is private owned land and the subject property is fully encroached by the slum dwellers, who are residing thereon in very much unhygienic condition and without having any basic civic amenities. I say that in view of the squalid and unhygienic conditions of the subject property the slum dwellers residing on the subject property formed society in the name and style as Jai Ganesh C.H.S. Ltd. (Proposed) and submitted application to the CEO/SRA requesting to declare the subject property as slum rehabilitation area U/sc. 3-C of the Act.

7. I say that on the basis of the application made by the Petitioner proposed society, the City Survey Officer of the answering Respondent visited the subject property and prepared panchanama. Even the Dy. Collector of the answering Respondent personally visited the subject property and found that the subject property is required to be declared as slum rehabilitation area since all the ingredients for declaration of the subject property as slum are found fulfilling. I say that considering the conditions prevailing on the subject property and further considering the report of the officers of the answering Respondent, the CEO/SRA being satisfied that the subject property is required to be declared as slum rehabilitation area, issued Notification 01 on 7.8.2012, and which is published in the Official government Gazette on 9.8.2012, declaring the subject property as slum rehabilitation area U/sec. 3-C(1) of the Maharashtra Slum Areas (I C & R) Act, 1971. I say that in the said Notification the CEO/SRA specifically mentioned that the provisions of Maharashtra Restoration of the Land to Schedule Tribe Act, 1975 are applicable to the subject property and as per the said provisions of the Act and rules thereunder, necessary permission should be taken. Hereto annexed and marked as **EXHIBIT-A** is a copy of said Notification dated 7.8.2012 issued U/sec. 3(C) of the Slum Act by CEO/SRA.

.....”

23. Thus, the SRA does not dispute the factual position as set out by the petitioners. It also does not dispute that the subject property belongs to Adivasis and the SRA is required to first consider as to whether on Adivasi lands, a slum rehabilitation scheme can be implemented or not. It is in these circumstances that the SRA has not taken any further steps.

24. It is on the above material that we have heard the learned counsel appearing for the parties. Dr. Sathe learned Senior Counsel appearing for the petitioners submits that the land is

fully encroached by the slum dwellers, who are all protected slum dwellers as per the provisions of the Development Control Regulations for Greater Mumbai, (for short “the DCR”) No.33(10). Mr. Sathe submits that the petitioners are challenging requirement of obtaining permission under the Restoration Act, because the Restoration Act applies to transfer of lands belonging to Scheduled Tribes between the period 1st April, 1957 and 6th July, 1974 for any transfer of agricultural land. After 6th July, 1974, section 36A of the Maharashtra Land Revenue Code, 1966 (for short “the Code”) is applicable. However, the relevant provisions of even the Code are not applicable, because the Code envisages that no occupancy of a member of a Schedule Tribe shall be transferred without prior permission of the Collector or the State Government, as the case may be. This embargo is placed under section 36A of the Code. Section 36 provides for the procedure with regard to the action to be taken in the event the occupancy of a member of a Scheduled Tribe is transferred in contravention of section 36A of the Code.

25. Mr. Sathe has invited our attention to both these provisions to submit that section 36A of the Code is applicable only to agricultural lands. That is evident by sub-sections (5) and (6) of section 36. That envisages that the land shall be transferred to

tribal provided he undertakes to cultivate the same personally and if the land is transferred, it is liable to be declared invalid.

26. Mr. Sathe submits that the Restoration Act and section 36A of the Code apply to agricultural lands. Mr. Sathe places heavy reliance upon a judgment of the Hon'ble Supreme Court of India in the case of *Lingappa Pochanna Appealwar vs. State of Maharashtra*¹.

27. Mr. Sathe submits that the lands in question are not agricultural lands and a vested right has accrued in favour of slum dwellers, who are protected from eviction. Mr. Sathe submits that it is an undisputed position that the lands are declared as slum rehabilitation area under section 3C of the Slum Act. An area can be declared as slum rehabilitation area provided it answers the description of "slum" as contemplated under section 4 of the Slum Act. The slum rehabilitation scheme is being implemented under the provisions of DCR 33(10) read with Appendix IV to DCR 33(10). Appendix IV, which is to be read with DCR 33(10) provides for rehabilitation of slum dwellers on the slums regardless of ownership of land. Mr. Sathe further submits that this court has held that any land which answers the description of definition of "slum" under para II of DCR 33(10),

¹ AIR 1985 SC 389

slum rehabilitation scheme can be implemented. Thus, it is evident that in respect of land which is declared as a slum, either under section 4 or under section 3C or the land which answers the description of definition of “slum” under para II of DCR 33(10), there is an accrued right vested in slum dwellers to get the slum rehabilitation scheme implemented. Therefore, the land legally ceased to have character of agricultural land and, therefore, the provisions of section 36A of the Code will not be applicable to such land. That the provisions of section 36A of the Code are not applicable is also evident from the fact that for the conditions precedent for applicability of section 36A are the occupancy of a tribal owner. Sections 36 and 36A both contemplate occupancy of a tribal. This occupancy, therefore, necessarily would mean an occupant in possession. Once the lands are encroached upon by slums and are declared as slums or are eligible for redevelopment under DCR 33(10) as defined under para II of DCR 33(10), in law dispossession of a tribal is recognised and that the occupation of slum dwellers is recognised with a right accrued in their favour for rehabilitation and, therefore, also the provisions of section 36 and 36A will not be applicable. The Code is an Act of 1966 made by the State Legislature on Entry 18 of List II of Seventh Schedule. Section 36A and certain sub-sections of section 36 were introduced in the

Code by Maharashtra Act 35 of 1994. Maharashtra Act No. 35 of 1994 amending the Code and the Restoration Act of 1974 were passed as a common scheme of legislation in respect of occupancies belonging to members of Scheduled Tribe. The Slum Act was amended by Maharashtra Act No. 4 of 1996 under which Chapter I-A was introduced in which particularly sections 3A, 3B, 3C and 3D of the entirely new scheme in respect of slum lands were introduced.

28. Mr. Sathe then submits that in any case, the provisions of the Slum Act will have overriding effect in the case of conflict between it and the Code. That is because the Code is enacted by virtue of Entry 18 of List II of the Seventh Schedule to the Constitution of India. Section 36A and certain sub-sections of section 36 were introduced in the Code by Maharashtra Act 35 of 1994. The amending Act, by which the Code is amended and the Restoration Act, were passed as a common scheme of legislation in respect of occupancy belonging to members of Scheduled Tribe. However, the Slum Act was amended by Maharashtra Act 4 of 1996, under which, Chapter I-A was introduced, by which sections 3A, 3B, 3C and 3D were introduced. Once there is a declaration in the instant case under this amendment Act and by which the subject land has been declared as slum rehabilitation

area, then, if both enactments are made on the same subject under Entry 18 of the Seventh Schedule of the Constitution of India, the later Act would prevail in case of any inconsistency. Mr. Sathe then submits that in respect the laws made by the same legislation on the same subject, the later law abrogates the earlier law and the later law would prevail. In any case, the Slum Act is a special law and the Land Revenue Code is a general law and therefore, the special law would prevail over general law.

29. Summing up these contentions, Mr. Sathe would submit that in any event, the prohibition contained in section 36A of the Code will not apply in case of transfer of occupancy of the tribal to a non tribal by virtue of a statute or by operation of law. Mr. Sathe would submit that in this case, the Maharashtra Regional and Town Planning Act 1966 and the DCRs made thereunder are relevant. For the purposes of protection of eligible slum dwellers and there being an acute shortage of reasonable accommodation available for such slum dwellers, their continuation at the site or in the lands would not be conducive to public health. It would be detrimental because health and hygiene over the entire city can be affected if such an interpretation and as is suggested is placed. Tomorrow, it will be impossible for the slum dwellers to take any steps including volunteering to form a co-operative housing

society. It is the slum dwellers who have taken the initiatives for their own rehabilitation and that is how the problem of erecting the slums can be tackled. Therefore, an interpretation, which is consistent with this intent and purpose, should be placed on the legal provisions. Mr. Sathe, while concluding his submissions, referred to the settled principle that if both the above enactments and assuming without admitting are treated as special laws, in that event, the later special law would prevail over the prior one. Therefore, looked at from any angle, the writ petition should be allowed and the declarations as prayed be granted.

30. Mr. Sathe has relied on the following judgments and decisions:-

(i) Lingappa Pochanna vs. State of Maharashtra and Anr., **AIR 1985 SC 389**.

(ii) Om-Sai Darshan Co-operative housing Society and Anr. vs. State of Maharashtra and Ors., **2007(1) Bom. C. R. 476**.

(iii) Ashoka Marketing Ltd. and Anr. vs. Punjab National Bank and Ors., **AIR 1991 SC 855**.

(iv) Cantonment Board, MHOW and Anr. vs. M. P. State road Transport Corporation, **(1997) 9 SCC 450**.

(v) Life Insurance Corporation of India vs. D. J. Bahadur and Ors., **AIR 1980 SC 2181**.

(vi) Ethiopian Airlines vs. Ganesh Narain Saboo, **(2011) 8 SCC 539**.

(vii) *Krishi Upaj Mandi Samiti, Narsinghpur vs. Shiv Shakti Khansari Udyog and Ors.*, **(2012) 9 SCC 368**.

(viii) *Dattatray Kashinath Patil and Ors. vs. State of Maharashtra and Ors.*, **2008(1) Bom. C. R. 276**.

(ix) *Puna Arjun Mali and Anr. vs. Mana Maka Bhil and Ors.*, **Writ Petition No. 3184 of 1989**, decided on 23rd August, 1991 (Bombay High Court Aurangabad Bench).

(x) *Anant Kana Mhatre vs. Mathibai Ladkya Janale and Ors.*, **2011(2) Bom. C. R. 490**.

(xi) *Solidaire India Ltd. vs. Fairgrowth Financial Services Ltd. and Ors.*, **AIR 2001 SC 958**.

31. On the other hand, Mr. M. D. Naik learned AGP has submitted that there is no merit in the submissions of Mr. Sathe. Once there is an embargo or prohibition and no tribal can transfer his occupancy to a non-tribal, then, all modes of transfer are prohibited. The restriction is placed in larger public interest. Mr. Naik submits that this is not a conventional or traditional mode of transfer of lands belonging to tribals. Every day new methods and ways will be invented to defeat a benevolent and beneficial legislative provision. The object and purpose sought to be achieved is that tribals, who are illiterate, uneducated, not well versed with the current trends prevailing in the society, would be exploited by non-tribals. They would be divested of their occupancy. That is sought to be prevented. In such circumstances, this court should not accept the arguments of Mr. Sathe. The court should proceed to dismiss the petition.

32. Mr. Naik has relied upon a judgment of a learned Single Judge of this court in the case of *Atul Projects India Ltd. vs. Babu Dewoo Farle and Ors.*²

33. Mr. Reddy appearing on behalf of the SRA relied upon the Division Bench judgment in the case of *Atul Projects India Ltd. vs. Babu Dewoo Farle and Ors.*, delivered on 28th July, 2011 in **Original Side Appeal (L) No. 250 of 2011** to submit that the view of the learned Single Judge has been upheld and maintained. Mr.Reddy also submits that the further appeal to the Hon'ble Supreme Court of India against the said order of the learned Single Judge has been dismissed by the Hon'ble Supreme Court of India on 11th April, 2013 being **Special Leave to Appeal (Civil) No. 27515 of 2011**.

34. Mr. Reddy then brought to our notice a Division Bench judgment delivered in a Public Interest Litigation in the case of *Adivasee Sarvangin Vikas Samitee vs. State of Maharashtra and Ors.*³

35. Mr. Sathe, while controverting the above submissions, in rejoinder, submits that the situation dealt with and considered in these decisions is not identical with the present case. The law

² 2011 (5) ALL MR 625

³ 2014 (7) Bom. C. R. 706

involved in the present case is the Slum Act. Secondly, once a declaration under the Slum Act is issued, that would override the so called beneficial provisions in the Code. Thirdly, the above arguments and with regard to which enactment will prevail are crucial. Therefore, no assistance can be derived by the contesting respondents from the observations and conclusions in the above judgments.

36. For properly appreciating the rival contentions, a reference will have to be made to the Maharashtra Land Revenue Code, 1966.

37. It is an Act to unify and amend the law relating to land and land revenue in the State of Maharashtra. Some of the provisions of this Code and leading up to section 36 are material and relevant for our purpose. Chapter I of this Act contains preliminary provisions, including the definitions (section 2). Then, there is a specific provision dividing the State into revenue areas. Sections 3 and 4 read as under:-

“3. Division of State into revenue areas

For the purpose of this Code, the State shall be divided into divisions which shall consist of one or more districts including the City of Bombay, and each district may consist of one or more sub-divisions and each sub-division may consist of one or more talukas, and each taluka may consist of certain villages.

4. Constitution of revenue areas

(1) The State Government may, by notification in the *Official Gazette*, specify -

- (i) the districts including the City of Bombay which constitute a division;
- (ii) the sub-divisions which constitute a district;
- (iii) the talukas which constitute a sub-division;
- (iv) the village which constitutes a *taluka*;
- (v) the local area which constitutes a village; and
- (vi) alter the limits of any such revenue area so constituted by amalgamation, division or in any manner whatsoever, or abolish any such revenue area and may name and alter the name of any such revenue area; and in any case where any area is renamed, then all references in any law or instrument or other documents to the area under its original name shall be deemed to be references to the area as renamed, unless expressly otherwise provided:

Provided that, the State Government shall, as soon as possible after the commencement of this Code, constitute by like notification every *wadi*, and any area outside the limits of the *gaothan* of a village having a separate habitation (such *wadi* or area having a population of not less than three hundred, as ascertained by a Revenue Officer not below the rank of a Tahsildar) to be a village; and specify therein limits of the village so constituted.

(2) The Collector may by an order publish in the prescribed manner arrange the villages in a *taluka* which shall constitute a *saza*; and the *sazas* in a *taluka* which shall constitute a circle, and may alter the limits of, or abolish any *saza* or circle so constituted.

(3) The divisions, districts, sub-divisions, talukas, circles, *sazas* and villages existing at the commencement of this Code shall continue under the names they bear respectively to be the divisions, districts, sub-divisions, talukas, circles, *sazas* and villages, unless otherwise altered under this section.

(4) Every notification or order made under this Section shall be subject to the condition of previous publication; and the provisions of Section 24 of the Bombay General Clauses Act, 1904, shall, so far as may be apply in relation to such notification or order, as they apply in relation to rules to be made after previous publication."

38. Mr. Sathe does not dispute that Code divides the State into divisions, which shall consist of one or two districts, including the city of Mumbai. These words were added by Maharashtra Act 47 of 1981. Prior thereto, this area was included in Konkan Division. However, from 1981, Bombay Division is a separate division. Therefore, the city of Bombay is governed by the Code.

39. Mr. Sathe then relies upon section 1(2) of the Code. Section 1 reads as under:-

“1. Short title, extent and commencement

(1) This Act may be called the Maharashtra Land Revenue Code, 1966.

(2) This Code extends to the whole of the State of Maharashtra; but the provisions of Chapter III (except the provisions relating to encroachment on land), IV, V, VI, VII, VIII, IX, X, XI, XII (except Section 242) and XVI (except Sections 327, 329, 330, 330A, 335, 336 and 333, shall not apply to the City of Bombay.

(3) It shall come into force in the whole of the State of Maharashtra, on such date, as the State Government may, by notification in the *Official Gazette*, appoint and different dates may be appointed for different provisions.”

40. Mr. Sathe would submit that some meaning will have to be given to this section. What it purports to do is that it extends the Code to the whole of the State of Maharashtra, but the provisions of certain Chapters enumerated in sub-section (2) of section 1 shall not apply to the city of Bombay. There are certain exceptions to this rule. As far as Chapter III is concerned, except the provisions relating to encroachment on land, that Chapter will

not be applicable to the city of Bombay. Similarly, with regard to the applicability of other Chapters, barring certain sections thereof, these Chapters would not apply to the city of Bombay. Pertinently, section 36 appears in Chapter III. By section 20, it is clarified that there will be title of the State in all lands, public roads etc., which are not property of others. By section 21, extinction of rights of public in or over any public road, lane or path not required for use of public is provided for. Then, by section 22, certain lands will be assigned for special purpose and when assigned, shall not be otherwise used without sanction of Collector. Then, there are certain regulatory and declaratory provisions. However, barring section 50, which deals with removal of encroachment on lands vesting in Government, provisions of penalty and other incidental matters, Chapter III does not apply to the city of Bombay.

41. Mr. Naik does not dispute this position. However, he would submit that the judgment of the learned Single Judge in the case of *Atul Projects India Ltd.* (supra) dealt with the lands situate in Mumbai. They were claimed on ownership basis by the defendant Nos. 1 to 18 in that matter. That is by virtue of the certificates which were issued under section 32G read with section 32M of the Bombay Tenancy and Agricultural Lands Act, 1948 (for short

“the Tenancy Act”). Mr.Naik, therefore, would submit that so long as the lands were held by tribals, it is not relevant whether the Chapters and relied upon by Mr. Sathe of the Code are applicable or not. In any event, Mr. Naik would submit that there are separate provisions for the city of Bombay. He, in that regard, relies upon Chapter XIV of the Code and would submit that by section 260, the applicability of this entire Chapter to the city of Bombay is postulated. We would, therefore, have to look at these special provisions and Chapter XIV in that regard. Before we do that, we will refer to the three sections, which are relied upon by Mr. Naik, namely, sections 36, 36A and 36B. They read as under:-

“36. Occupancy to be transferable and heritable subject to certain restrictions

(1) An occupancy shall, subject to the provisions contained in Section 72 and to any conditions lawfully annexed to the tenure, and save as otherwise provided by law, be deemed an heritable and transferable property.

(2) Notwithstanding anything contained in the foregoing sub-section occupancies of persons belonging to the Scheduled Tribes (hereinafter referred to as the “Tribals”) (being occupancies wherever situated in the State), shall not be transferred except with the previous sanction of the Collector:

Provided that nothing in this sub-section shall apply to transfer of occupancies made in favour of persons other than the Tribals (hereinafter referred to as the 'non-Tribals') on or after the commencement of the Maharashtra Land Revenue Code and Tenancy Laws (Amendment) Act, 1974.

(3) Where an occupant belonging to a Scheduled Tribe in contravention of sub-section (2) transfers

possession of this occupancy, the transferor or any person who if he survives the occupant without nearer heirs would inherit the holding, may, within thirty years from the 6th July, 2004, apply to the collector to be placed in possession subject so far as to the Collector may, in accordance with the rules made by the State Government in this behalf, determine to his acceptance of the liabilities for arrears of land revenue or any other dues which form a charge on the holding, and notwithstanding anything contained in any law for the time being in force, the Collector shall dispose of such application in accordance with the procedure which may be prescribed:

Provided that, there a Tribal in contravention of sub-section (2) or any law for the time being in force has, at any time, before the commencement of the Maharashtra Land Revenue Code and Tenancy Laws (Amendment) Act, 1974 transferred possession of his occupancy to a non-Tribal and such occupancy is in the possession of such non-Tribal or his successor-in-interest, and has not been put to any non-agricultural use before such commencement, then, the collector shall, notwithstanding anything contained in any law for the time being in force, either *suo motu* at any time or on application by the Tribal (or his successor-in-interest) made at any time within thirty years from the 6th July, 2004, after making such inquiry as he thinks fit, declare the transfer of the occupancy to be invalid, and direct that the occupancy shall be taken from the possession of such non-Tribal or his successor-in-interest and restored to the Tribal or his successor-in-interest.

Provided further that where transfer of occupancy of a Tribal has taken place before the commencement of the said Act, in favour of a non-Tribal, who was rendered landless by reason of acquisition of his land for a public purpose, only half the land involved in the transfer shall be restored to the Tribal.

(3A) Where any Tribal (or his successor-in-interest) to whom the possession of the occupancy is directed to be restored under the first proviso to sub-section (3) expresses his unwillingness to accept the same, the Collector shall, after holding such inquiry as he thinks fit, by order in writing, declare that the occupancy together with the standing crops therein, if any, shall with effect from the date of the order, without further assurance, be deemed to have been acquired and vest in the State Government.

(3B) On the vesting of the occupancy under sub-section 3(A) the non-Tribal shall, subject to the provisions of sub-section (3C), be entitled to receive from the State Government an amount equal to 48 times the assessment of the land *plus* the value of improvements, if any, made by the non-Tribal therein to be determined by the Collector in the prescribed manner.

Explanation. - In determining the value of any improvements under this sub-section, the Collector shall have regard to -

- (i) the labour and capital provided or spent on improvements;
- (ii) the present condition of the improvements;
- (iii) the extent to which the improvements are likely to benefit the land during the period of ten years next following the year in which such determination is made;
- (iv) such other factors as may be prescribed.

(3C) Where there are persons claiming encumbrances on the land, the Collector shall apportion the amount determined under sub-section 3(B) amongst the non-Tribal and the person claiming such encumbrances, in the following manner, that is to say -

- (i) if the total value of encumbrances on the land is less than the amount determined under sub-section (3B), the value of encumbrances shall be paid to the holders thereof in full;
- (ii) if the total value of encumbrances on the land exceeds the amount determined under sub-section (3B), the amount shall be distributed amongst the holders of encumbrances in the order of priority:

Provided that, nothing in this sub-section shall affect the right of holder of any encumbrances to proceed to enforce against the non-Tribal his right in any other manner or under any other law for the time being in force.

(3D) The land vested in the State Government under sub-section (3A) shall, subject to any general or special orders of the State Government in that behalf, be granted by the Collector to any other Tribal residing in the village in which the land is situate or within five kilometers thereof and who is willing to accept the occupancy in accordance with the provisions of this Code and the rules and orders made thereunder and to undertake to cultivate the land personally, so, however, that the total land held by such Tribal, whether as owner or tenant, does not exceed an economic holding within the meaning of sub-section (6) of Section 36A.

(4) Notwithstanding anything contained in sub-section (1) or in any other provisions of this Code, or in any law for the time being in force it shall be lawful for an Occupant Class-II to mortgage his property in favour of the State Government in consideration of a loan advanced to him by the State Government under the Land Improvement Loan Act, 1883, the Agriculturists Loans Act, 1884, or the Bombay Non-Agriculturists Loans Act, 1928 or in favour of a co-operative society or the State bank of India constituted under Section 3 of the State Bank of India Act, 1955, or a corresponding new bank within the meaning of clause (d) of Section 2 of the Banking companies (Acquisition and Transfer of Undertakings) Act, 1970, or the Maharashtra State Financial Corporation established under the relevant law in consideration of a loan advanced to him by such co-operative society, State bank of India, corresponding new bank, or as the case may be, Maharashtra State Financial Corporation, and without prejudice to any other remedy open to the State Government, the co-operative society, the State Bank of India, the corresponding new bank or as the case may be, the Maharashtra State Financial Corporation in the event of such occupant making default in payment of such loan in accordance with terms on which such loan is granted, it shall be lawful for the State Government, the co-operative society, the State Bank of India, the corresponding new bank, or as the case may be, the Maharashtra State Financial Corporation to cause the occupancy to be attached and sold and the proceeds to be applied towards the payment of such loan.

The Collector may, on the application of the co-operative society, the State Bank of India, the corresponding new bank or the Maharashtra State Financial Corporation, and payment of the premium prescribed by the State Government in this behalf, by order in writing reclassify the occupant as Occupant-Class-I; and on such reclassification, the occupant shall hold the occupancy of the land without any restriction on transfer under this Code.

Explanation. - For the purposes of this section, "Scheduled Tribes" means such tribes or tribal communities or parts of, or groups within, such tribes or tribal communities as are deemed to be Scheduled Tribes in relation to the State of Maharashtra under Article 342 of the Constitution of India and persons, who belong to the tribes or tribal communities, or parts of, or groups within tribes or tribal communities specified in part VIIA of the

Schedule to the order made under the said Article 342, but who are not residents in the localities specified in that Order who nevertheless need the protection of this Section and Section 36A (and it is hereby declared that they do need such protection) shall, for the purposes of those Sections be treated in the same manner as members of the Scheduled Tribes.

36A. Restrictions on transfers of occupancies by Tribals

(i) Notwithstanding anything contained in sub-section (1) of Section 36, no occupancy of a tribal shall, after the commencement of the Maharashtra Land Revenue Code and Tenancy Laws (amendment) Act, 1974, be transferred in favour of any non-tribal by way of sale (including sales in execution of a decree of a Civil Court or an award or order of any Tribunal or Authority), gift, exchange, mortgage, lease or otherwise, except on the application of such non-tribal and except with the previous sanction -

- (a) in the case of a lease, or mortgage for a period not exceeding 5 years, of the Collector; and
- (b) in all other cases, of the Collector with the previous approval of the State Government:

Provided that, no such sanction shall be accorded by the Collector unless he is satisfied that no tribal residing in the village in which the occupancy is situate or within five kilometers there of is prepared to take the occupancy from the owner on lease, mortgage or by sale or otherwise.

(2) The previous sanction of the collector may be given in such circumstances and subject to such conditions as may be prescribed.

(3) On the expiry of the period of the lease or, as the case may be, of the mortgage, the Collector may, notwithstanding anything contained in any law for the time being in force, or any decree or order of any court or award or order of any Tribunal or Authority, either *suo moto* or on application made by the Tribal in that behalf, restore possession of the occupancy to the tribal.

(4) Where, on or after the commencement of the Maharashtra Land Revenue Code and Tenancy Laws (amendment) Act, 1974, it is noticed that any occupancy has been transferred in contravention of sub-section (1) the Collector shall, notwithstanding anything contained in any law for the time being in force, either *suo moto* or on

an application made by any person interested in such occupancy, within thirty years from the 6th July, 2004 hold an inquiry in the prescribed manner and decide the matter.

(5) Where an occupancy vested in the State Government under sub-section (5) is to be disposed of, the Collector shall give notice in writing to the tribal-transferor requiring him to state within 90 days from the date of receipt of such notice whether or not he is willing to purchase the land. If such tribal-transferor agrees to purchase the occupancy, then the occupancy may be granted to him if he pays the prescribed purchase price and undertakes to cultivate the land personally; so however that the total land held by such tribal-transferor, whether as owner or tenant, does not as far as possible exceeds an economic holding.

Explanation. - For the purpose of this Section, the expression "economic holding" means 6.48 hectares (16 acres) of *jirayat* land or 3.24 hectares (8 acres) of seasonally irrigated land, or paddy or rice land, or 1.62 hectares (4 acres) of perennially irrigated land, and where the land held by any person consists of two or more kinds of land, the economic holding shall be determined on the basis of one hectare of perennially irrigated land being equal to 2 hectares of seasonally irrigated land or paddy or rice land or 4 hectares of *jirayat* land.

36B. Damages for use and occupation of occupancies in certain cases

A non-tribal who after the occupancy is ordered to be restored under either of the provisos to sub-section (3) of Section 36 or after the occupancy is vested in the State Government under sub-section (3A) of Section 36 or under sub-section (5) of Section 36A continues to be in possession of the occupancy, then the non-tribal shall pay to the tribal in the former case, and to the State Government in the latter case, for the period from the year (following the year in which the occupancy is or is ordered to be restored to the tribal or is vested in the State Government as aforesaid) till possession of the occupancy is given to the Tribal or the State Government, such amount for the use and, occupation of the occupancy as the collector may fix in the prescribed manner."

42. Since heavy reliance is also placed on Chapter XIV of the Code, which contains special provisions in respect of land revenue

in the city of Bombay, we will refer to these provisions as well. By section 260, the provisions of the Chapter extend to the city of Bombay only. The reason for the same was there was an abolition earlier of a law called as Bombay City Land Revenue Act, 1876. That law and the Bombay City (Inami and Special Tenures) Abolition and Maharashtra Land Revenue Code (Amendment) Act, 1969 regulated the matters connected with the lands, land revenue and survey in the city. These Acts applied to a small area and therefore, the legislature thought that it is not desirable to have separate enactment for the city. It is in these circumstances that comprehensive amendments have been made to the existing Code itself. In the Chapter, there are certain definitions. Section 261 of the Code reads thus:-

261. Interpretation

In this Chapter, unless the context requires otherwise, -

(1a) “City Tenures Abolition Act” means the Bombay City (Inami and Special Tenures) Abolition and Maharashtra Land Revenue Code (amendment) Act, 1969:

(a) “holder”, in relation to any land, means the occupier of such land, or where rent is paid for such land, any person in receipt of rent for such land who does not pay rent to another person;

Explanation. - “Rent” in this clause does not include, money paid for land to the Government or to the Municipal Corporation of Greater Bombay or to the Trustees of the port of Bombay or to a fazendar, except when such money is paid by a person holding such land on a tenancy for a term of less than one years;

(aa) 'revenue division' means such local area in the City of Bombay as the Collector may, subject to the order of the State Government, by an order in the *Official Gazette*, constitute to be a revenue division for the purpose of determining the standard rate of assessment of lands therein;

(b) "superior holder" means the person having the highest title under the State Government to any land in the City of Bombay;

(c) "survey" includes identification of boundaries and all other operations antecedent to, or connected with, survey;

(d) "survey-boundary-mark" means primarily any iron or other mark set up by the officers who conducted the Bombay City Survey hereinafter described; and include any such new mark that may hereafter be set up by the Collector or under his orders, according to the provisions of this Chapter.

(e) words and expressions used but not defined in this Chapter shall have the meanings respectively assigned to them in the City Tenures Abolition Act.

43. Then comes section 262, which falls under the sub head "Assessment and Collection of Land Revenue". That section reads thus:-

"262. Power of Collector to fix and to levy assessment for land revenue

(1) It shall be the duty of the Collector to fix and to levy the assessment for land revenue subject to the provisions of sub-section (2) and sub-section (3).

(2) Where there is no right on the part of a superior holder in limitation of the right of the State Government to assess, then, subject to the provisions of the City Tenures Abolition Act, the assessment shall be fixed in accordance with this Chapter.

(3) Where there is a right on the part of a superior holder in limitation of the right of the State Government to assess in consequence of a specific limit

established and preserved, and not abolished under the City Tenures Abolition Act, the assessment shall not exceed such specific limit.”

44. Section 262A deals with rate of assessment not to exceed percentage of market value, whereas section 262B provides for standard rent of assessment. The provisions following them deal with this aspect of the matter and right up to sections 264, 265, 266 and 267. The default in payment of land revenue results in the sale of the property of the defaulter and how that is to be conducted and equally whether the defaulter can be arrested and confined, what is the exemption contemplated is then clarified.

Section 270 reads thus:-

“270. Exemption from attachment and sale

(1) All such property as is by the code of Civil Procedure, 1908, exempted from attachment and sale in execution of a decree, shall also be exempted from attachment and sale under Section 267.

(2) The Collector's decision as to what property is so entitled to exemption shall be conclusive.”

45. Since sub-section (1) of section 270 specifically refers section 60 of the Code of Civil Procedure, 1908, we would have to refer to the same. That is reproduced hereinbelow:-

“60. Property liable to attachment and sale in execution of decree.-

(1) The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, bank-notes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts,

shares in a corporation and, save as hereinafter mentioned, all other saleable property, movable or immovable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf:

Provided that the following particulars shall not be liable to such attachment or sale, namely:-

(a) the necessary wearing-apparel, cooking vessels, beds and bedding of the judgment-debtor, his wife and children, and such personal ornaments as, in accordance with religious usage, cannot be parted with by any women;

(b) tools of artisans, and, where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed-grain as may, in the opinion of the Court, be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following section;

(c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist or a labourer or a domestic servant and occupied by him;

(d) books of account;

(e) a mere right to sue for damages;

(f) any right of personal service;

(g) stipends and gratuities allowed to pensioners of the Government or of a local authority or of any other employer, or payable out of any service family pension fund notified in the Official Gazette by the Central Government or the State Government in this behalf, and political pensions;

(h) the wages of labours and domestic servants, whether payable in money or in kind;

(i) salary to the extent of the first one thousand rupees and two-third of the remainder in execution of any decree other than a decree for maintenance:

Provided that where any part of such portion of the salary as is liable to attachment has been under attachment, whether continuously or intermittently, for a total period of twenty-four months, such portion shall be exempt from attachment until the expiry of a further period of twelve months, and, where such attachment has been made in execution of one and the same decree, shall, after the attachment has continued for a total period of twenty-four months, be finally exempt from attachment in execution of that decree;

(ia) one-third of the salary in execution of any decree for maintenance;

(j) the pay and allowance of persons to whom the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957), applies;

(k) all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1925 (19 of 1925), for the time being applies, in so far as they are declared by the said Act not to be liable to attachment;

(ka) all deposits and other sums in or derived from any fund to which the Public Provident Fund Act, 1968 (23 of 1968), for the time being applies, in so far as they are declared by the said Act as not to be liable to attachment;

(kb) all moneys payable under a policy of insurance on the life of the judgment-debtor;

(kc) the interest of a lessee of a residential building to which the provisions of law for the time being in force relating to control of rents and accommodation apply;

(l) any allowance forming part of the emoluments of any servant of the Government or of any servant of a railway company or local authority which the appropriate Government may, by notification in the Official Gazette, declare to be exempt from attachment, and any subsistence grant or allowance made to any such servant while under suspension;

(m) an expectancy of succession by survivorship or other merely contingent or possible right or interest;

(n) a right to future maintenance;

(o) any allowance declared by any Indian law to be exempt from liability to attachment or sale in execution of a decree; and

(p) where the judgment-debtor is a person liable for the payment of land-revenue, any movable property which, under any law for the time being applicable to him, is exempt from sale for the recovery of an arrear of such revenue.

Explanation I. - The moneys payable in relation to the matters mentioned in clauses (g), (h), (ia), (j), (l) and (o) are exempt from attachment or sale, whether before or after they are actually payable, and, in the case of salary, the attachable portion thereof is liable to attachment, whether before or after it is actually payable.

Explanation II. - In clauses (I) and (ia), “salary” means the total monthly emoluments, excluding any allowance declared exempt from attachment under the provisions of clause (l), derived by a person from his employment whether on duty or on leave.

Explanation III - In clause (l) “appropriate Government” means -

(i) as respects any person in the service of the Central Government, or any servant of a Railway Administration or of a cantonment authority or of the port authority of a major port, the Central Government;

(ii) * * * * *

(iii) as respects any other servant of the Government or a servant of any other local authority, the State Government.

Explanation IV - For the purposes of this proviso, “wages” includes bonus, and “labourer” includes a skilled, unskilled or semi-skilled labourer.

Explanation V - for the purposes of this proviso, the expression “agriculturist” means a person who cultivates land personally and who depends for his livelihood mainly

on the income from agricultural land, whether as owner, tenant, partner or agricultural labourer.

Explanation VI – For the purposes of *Explanation V*, an agriculturist shall be deemed to cultivate land personally, if he cultivates land -

- (a) by his own labour, or
- (b) by the labour of any member of his family, or
- (c) by servants or labourers on wages payable in cash or in kind (not being as a share of the produce), or both.

(1-A) Notwithstanding anything contained in any other law for the time being in force, an agreement by which a person agrees to waive the benefit of any exemption under this section shall be void.

(2) Nothing in this section shall be deemed to exempt houses and other buildings (with the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for their enjoyment) from attachment or sale in execution of decrees for rent of any such house, building, site or land.”

46. Then comes section 271 with regard to the finality of the Collector's decision taken in respect of the matters covered by section 270 of the Code. We are not concerned with sections 272 to 275, which are incidental provisions. Then comes section 276, which enumerates the powers of the State Government to make grant of lands free of revenue. Then, the Chapter contains the heading “Bombay City Survey and Boundary Marks” and provisions in relation thereto. We are not concerned with the rest of the provisions in this Chapter.

47. Since heavy reliance is placed by Mr. Naik on the judgment in the case of *Atul Projects India Ltd.* (supra), we must closely analyse the facts in that case. The facts as are set out by the learned Single Judge are that a suit was filed seeking a declaration that an agreement for sale/confirmation is valid, subsisting and binding. That its termination on 22nd April, 2010 is invalid and the defendants 1 to 18 to the suit shall be ordered and decreed to specifically perform this agreement for sale. A consequential relief has been sought, including a declaration that the subsequent deed of conveyance dated 23rd July, 2010 is null and void. In para 3 of this decision, the facts are set out. That para and paras 4, 5 and 6 read as under:-

“3. Defendants 1 to 18 claim ownership of certain lands in pursuance of Certificates which were issued under Section 32G read with Section 32M of The Bombay Tenancy and Agricultural Lands Act, 1948 (“the Tenancy Act”). They are Tribals. The Maharashtra Housing and Area Development Authority claimed title under a Deed of Conveyance of 27th October, 1958 and had filed three Writ Petitions under Article 226 of the Constitution inter alia challenging the validity of the Certificates which were issued under the Tenancy Act. Defendants 1 to 8, 9 to 13 and 14 to 18 claimed ownership in respect of three plots of land. Their Petitions were disposed of by a learned Single Judge on 14th December, 2004 upon consent terms filed in Court. The consent terms recognized that lands admeasuring 30,620 sq. meters bearing Survey No. 56 Hissa Nos. 2 and 3, Survey No. 53 and Survey No. 55 Hissa No. 1 corresponding to C. T. S. Nos. 273, 274 and 183 of Village Magathane, Taluka Borivali, belonged to MHADA as owner under a Registered Deed of Conveyance dated 27th October, 1958. The consent terms recognized that the tribals were in occupation of an area admeasuring about 40% of the land more particularly described in the

consent terms. The certificates issued under Section 32G were quashed and set aside. MHADA, in consideration of the tribals agreeing to give up their claims against it agreed to transfer three plots of land to Defendants 1 to 18 or to their nominees.

4. Defendants 1 to 18 had entered into agreements with Bagve Housing Private Limited which in turn had a transaction with J. B. Associates, a partnership firm. On 1st December, 2003 an Agreement for Development and Sale was entered into by Defendants 1 to 18 inter alia with the Plaintiffs by which they agreed to grant development rights on the lands which were to be allotted to them by MHADA for a consideration of Rs.3 Crores. The First Schedule of the Agreement adverts to a larger property; whereas the Second Schedule elucidates 40% thereof which MHADA was to allot to Defendants 1 to 18 and which in turn formed the subject matter of the Agreement to Sell in favour of the Plaintiff.

5. On 24 December 2004 a further agreement was entered into between Defendants 1 to 18, Bagve Housing Private Limited, J. B. Associates and the predecessor of the Plaintiff recording that in pursuance of the Development Agreement dated 1 December 2003 physical possession had been handed over to the Plaintiff. The Agreement confirmed that under the Development Agreement dated 1 December, 2003 the parties including the tribals had agreed to transfer and assign the development rights in respect of 40% of the property at Magathane to the Plaintiff. A possession receipt was executed.

6. The Plaintiff paid an amount of Rs.3 Crores under the Development Agreement and assumed the obligation to furnish a built up area of 4000 sq. ft. to Defendants 1 to 18. A Power of Attorney was executed in favour of the Plaintiff. The Plaintiff claims to have put up its board on the property and to have engaged a security agency.

48. An application under section 36A of the Code was submitted by the predecessor of the plaintiff for permission to alienate the property. Defendant nos. 23 to 27 were claiming certain rights in the property and on 22nd December, 2005 a deed of release was

executed by them against payment. The application under section 36A was made, statements were recorded and the Tahsildar and the Sub-Divisional Officer recommended for grant of permission. However, an advocate's notice was issued by contesting parties seeking to repudiate the agreement both on the ground that the plaintiff had not performed its obligation under the agreement and that the agreement was null and void for want of permission of the Collector under section 36A of the Code. It is in this backdrop that the rival contentions, which were noted, have been considered in para 11. Since heavy reliance is placed upon paras 12 and 13 of this decision, the same are reproduced hereinbelow:-

“12. Section 36A prohibits the transfer of an occupancy of a tribal in favour of non tribal except with the previous sanction of the Collector (where the period of lease or mortgage does not exceed five years) or with the previous sanction of the Collector and the previous approval of the State Government (in other cases). The transfer of occupancy may be by way of a sale, gift, exchange, mortgage, lease “or otherwise”. The legislature has designedly used broad language so as to incorporate all the five recognised modes by which property may be transferred under the Transfer of Property Act, 1882. Significantly the legislature has expanded the ambit of the modes in which property can be transferred by using the words “or otherwise”. The plain object of the legislature was to reach out to all modes by which the occupancy of a tribal may be conveyed to a non tribal. The legislature was conscious of the fact that devious methods may be employed to divest tribals of their occupancy and the modes of transfer which are taken recourse to may not conform to the conventional modes for the transfer of property such as by sale, gift, exchange, mortgage or lease. Whatever be the mode of transfer, if the consequence is to effect a

transfer of the occupancy of a tribal to a non tribal, the requirement of prior permission would be attracted. The Collector, even when he grants his sanction is empowered to do so subject to such conditions as may be prescribed. A transfer in violation of the provisions of Sub Section (1) of Section 36A would be invalid and of no legal consequence.

13. While deciding upon a challenge to the constitutional validity of Section 36A, a Division Bench of this Court in **Raoji Baliram Urkude vs. State of Maharashtra & Anr. 1985 Mh. L. J. 843**, held that the provision has been enacted with a view to protecting tribals against invidious discrimination and that the classification which was made by the legislature had a clear nexus to the object sought to be achieved. The Division Bench held as follows:

“Historical truth is that the Tribals belong to weaker sections of society which have been subjected to varied and words types of exploitation by taking undue advantage of their backwardness, meekness and helplessness. Promoting with special care interest of such sections is one of the major items of our national goals (Article 46 in Part IV). If in this background, the legislature came forward to protect their interest, it is difficult to see how question of invidious discrimination can at all arise. It is a distinct class. Classification has clear nexus with the objects. Section 36, as it originally stood, made certain transactions by a tribal voidable at his instance, provided application was made within two years of such transaction. This provision had received the assent of the President and there can be hardly any doubt about it being under the protective umbrella of Articles 31A and 31C. Thus under the old provisions, the purchaser could acquire only a defeasible right which could be defeated by appropriate action within appropriate time. Experience of those who are better equipped to know the prevailing social condition revealed that the protection earlier granted was inadequate. The unfortunate truth about many of our social and beneficial legislations is that the beneficiaries thereunder many times even do not know them. Even if they come to know about their right, they are wholly illequipped to exercise those rights. Even if the rights are exercised, it is not always that they are able to keep the fruits of the legislation.

Procedural delays, official negligence and apathy come in the way. Not ignoring these realities, in case legislation further intervenes and puts in more stringent restrictions including total conditional ban on future transfers, it is difficult to see how Courts come into picture. It is equally difficult to see how it can be said that such a legislation is wholly unreasonable. The possibility to such bans operating unjustly in case of certain transactions cannot be ruled out. But that is no ground to hold a legislation bad. In any legislation intended to bring about such major social changes on large scale generalization is inevitable; for it is not possible to legislatively contemplate every kind of exceptional situation. If that is attempted and several qualifications and exceptions are introduced, the very legislative object would be defeated. It is a rule of life that every revolutionary cause claims its martyr.””

49. The learned Single Judge referred to section 32M of the Bombay Tenancy and Agricultural Lands Act, 1948. That section reads as under:-

“32M. Purchase to be ineffective on tenant-purchaser's failure to pay purchase price

(1) On the deposit of the price in lump sum or of the last instalment of such price, the Tribunal shall issue a certificate of purchase in the prescribed form, to the tenant-purchaser in respect of the land. Such certificate shall be conclusive evidence of purchase. In the event of failure of recovery of purchase price as arrears of land revenue under sub-section (3) of section 32K, the purchase shall be ineffective and the land shall be at the disposal of the Tribunal under section 32P and any amount deposited by such tenant-purchaser towards the price of the land shall be refunded to him.

(2) Where the purchase of any land has become ineffective for default of payment in time of the price in lump sum or in instalments, but the tenant-purchaser has nevertheless continued in possession at the commencement of the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1964, then the purchase of the land shall not be deemed to be ineffective, until the

Tribunal fails to recover the amount of the purchase price under sub-section (3) of section 32K.”

50. Section 43C of the Tenancy Act, which falls in Chapter III-B reads as under:-

“43C. Certain provisions not to apply to municipal or cantonment areas

Nothing in section 31 to 32R (both inclusive) 33A, 33B, 33C and 43 shall apply to lands in the areas within the limits of -

- (a) Greater Bombay,
- (b) a municipal corporation constituted under Bombay Provincial Municipal Corporations Act, 1949,
- (c) a municipal borough constituted under the Bombay Municipal Boroughs Act, 1925,
- (d) a municipal district constituted under the Bombay District Municipal Act, 1901,
- (e) a cantonment, or
- (f) any area included in a Town Planning Scheme under the Bombay Town Planning Act, 1954:

Provided that if any person has acquired any right as a tenant under this Act on or after the 28th December, 1948, the said right shall not be deemed to have been affected by the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1952, or by the Amending Act, 1955, notwithstanding the fact that either of the said Act has been made applicable to the area in which such land is situate.”

51. A bare reading of the same would indicate as to how nothing in sections 31 to 32R, 33A, 33B, 33C and 43 shall apply to lands in the areas within the limits of the above.

52. A reading of this judgment would indicate that the facts and circumstances before the learned Single Judge were peculiar. Though the lands were situate in village Magathane, Taluka Borivli and they belong to Maharashtra Housing and Area Development Authority (MHADA), it is apparent from a reading of para 3 that ownership was claimed in these lands by defendant nos. 1 to 18 to the suit on the strength of the certificates issued under section 32G read with section 32M of the Tenancy Act. These persons were tribals. The MHADA claimed title to these lands under conveyance deed. A writ petition was filed by MHADA challenging the validity of the certificates, which were issued under the Tenancy Act. The petitions were disposed of by a learned Single Judge of this court on consent terms being filed in this court. The consent terms recorded that certain percentage of the lands (40%) were in possession and occupation of the tribals. The certificates issued under section 32G of the Tenancy Act were set aside. The MHADA, in consideration of the tribals agreeing to give up their claim against such certificates, agreed to transfer 3 plots of lands to defendant nos. 1 to 18 or to their nominees. It is such lands which were sought to be dealt with and further to the detriment of the interest of the tribals. Since section 43 of the Tenancy Act was pressed into service, the learned Judge underlined the distinction between sections 36 and

36A of the Code and section 43 of the Tenancy Act. Based on the difference in the language thereof, he reached a conclusion that the occupancy of the tribals is protected by law and therefore, the relief claimed at an interlocutory stage cannot be granted.

53. Chapter IIIB of the Tenancy Act was not noticed and which we have reproduced above.

54. On the facts and circumstances, therefore, the decision of the learned Single Judge is clearly distinguishable.

55. In the case at hand, the petitioners have specifically stated that they are a proposed society of occupants of slums existing on the subject land. It is stated that the land as shown in the relevant records is owned by member of Scheduled Tribe. However, there was a resolution passed by General Body of the occupants of the slums and development agreement was executed. On 28th November, 2011, a proposal was submitted to the second respondent to this writ petition to notify the plot of land, more particularly described in para 3.6 as the slum rehabilitation area in order to implement a slum development project. On 7th August, 2012, the second respondent passed an order under section 3C of the Slum Act notifying CTS No. 677/A (part) admeasuring 2200 square meters as slum rehabilitation

area and defined under section 2(h-b) of the Slum Act. The order stated that the provisions of the Restoration Act were applicable to the same area and necessary permission in this regard should be taken. Annexure 'B' is a copy of this notification. That reads as under:-

“SLUM REHABILITATION AUTHORITY

NOTIFICATION

No. SRA/CTSO/Desk-1/T-S1/3C/Jay Ganesh/2012/1977

Where as the Slum Rehabilitation Authority has formed S. R. Scheme under the provision of section 3B(3) of Maharashtra Slum Area (Improvement, Clearance and Redevelopment) Act, 1971 and published in Gazette on 9th April, 1988;

And whereas, in view of the provision of section 3C(1) of the Maharashtra Slum Area (Improvement, Clearance and Redevelopment) Act, 1971 the Chief Executive Officer, Slum Rehabilitation Authority is empowered to declare any area as “Slum Rehabilitation Area”.

And whereas, provision of the Maharashtra Restoration of Land to Schedule Tribe Act, 1975 is applicable to the said land. As per the said rule necessary permission should be taken. In view of the said provision of section 3C(1) of the Maharashtra Slum Area (Improvement, Clearance and Redevelopment) Act, 1971. I. S. S. Zende, the Chief Executive Officer, Slum Rehabilitation Authority hereby declare the area shown in schedule as “Slum Rehabilitation Area”. On the said area the Slum Rehabilitation Scheme is propose to submit as per Greater Bombay Development Control Rule, 1991, section 33(10).

Schedule

Village Malad (E), Tahsil Borivali, Mumbai Suburban District

Sr. No.	C.T.S. No.	Area as per Property Card (Sq. mtr.)	Area declared as "Slum Rehabilitation Area" (Sq. mtr.)	Boundaries			
				East	West	North	South
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1	677/A	6,510.50	2,200.00	C.T.S. No. 680	C.T.S. No. 610/A/1/C	C.T.S. No. 677/B/4	C.T.S. No. 677/A (pt.)

S. S. ZENDE,

Chief Executive Officer,
Slum Rehabilitation AuthorityAdministrative Building,
Anant Kanekar Marg,
Bandra (E.), Mumbai 400 051.
Dated 7th August 2012

56. We have reproduced the above notification, but we do not see a reference to any specific provision much less section 36A of the Code. Mr. Sathe is right in his contention that it is not the Restoration Act, but what is meant by this notification is section 36A of the Code. The Restoration Act would apply to transfers of lands belonging to Scheduled Tribe between 1st April, 1957 and 6th July, 1974 and for any transfer of tribal land/agricultural land after 6th July, 1974, section 36A of the Code was applicable.

57. Section 36A opens with a non-obstante clause. No occupancy of a tribal shall, after the commencement of the

Maharashtra Land Revenue Code and Tenancy Laws (Amendment) Act, 1974, be transferred in favour of any non-tribal by way of sale, gift, exchange, mortgage, lease or otherwise.

58. It is difficult to accept the suggestion of the learned AGP that mere endorsement in the notification reproduced above that a distinct exercise of the statutory power by a statutory authority under the Slum Act would be affected by section 36A(1) of the Code and can be styled as a transfer. However, restrictions on transfer of occupancy by tribals would apply provided there was something more other than this endorsement in the notification.

59. That is why we called for a better explanation from the State and the SRA. The SRA, in the affidavit, states that it is carrying out statutory functions. As far as the subject property is concerned, it says, it is privately owned land and fully encroached by slum dwellers. In the affidavit in reply, there is no indication as to why this endorsement has been made in the notification reproduced above.

60. We do not see how in the absence of any material produced on record, either by the State Government or by the SRA and rather the SRA confirming the factual position as set out in the petition that section 36A of the Code would be attracted and

applicable. The details of the tribal, namely, the particular tribe, the extent of holding, the transfer of the land and occupancy, its date and the terms of the transfer recorded in writing are all crucial and vital. Merely saying that the agreement dated 11th August, 2010 with M/s. Harasiddh Corporation is transfer would not be enough. The reason for the endorsement in the notification is thus not forthcoming. At one place the word "Adivasi" is used, whereas at another the reference is to a tribal. It is not clear what is meant by these expressions. All that has been set out in para 9 of the affidavit of SRA states that the SRA forwarded draft Annexure - II, namely list of eligible and ineligible slum dwellers, which was forwarded by the concerned developer and the petitioner society to the competent authority, namely, Deputy Collector (Encroachment and Removal), Greater Mumbai for verification on 2nd February, 2013. In reply to this letter written by the office of the SRA in respect of verification of Annexure - II, it was informed that as per the record, the subject property belongs to Adivasi and SRA is required to first consider whether on Adivasi land the slum rehabilitation scheme can be implemented or not. The SRA, therefore, did not take any further steps. However, it is strange that such statements are made on affidavit after the SRA has issued the notification reproduced above. The SRA already formed a slum rehabilitation scheme

under the provisions of section 3B of the Slum Act and published it in the gazette on 9th April, 1998. Sections 3B and 3C of the Slum Act read as under:-

“3B Slum Rehabilitation Scheme.

(1) The State Government, or the Slum Rehabilitation Authority concerned with the previous sanction of the State Government, shall, prepare a general Slum Rehabilitation Scheme for the areas specified under sub-section (1) of section 3A, for Rehabilitation of slums and hutment colonies in such areas.

(2) The General Slum Rehabilitation Scheme prepared under sub-section (1) shall be published in the *Official Gazette*, by the State Government or the concerned Slum Rehabilitation Authority, as the case may be, as the Provisional Slum Rehabilitation Scheme for the area specified under section 3A(1), for the information of general public, inviting objections and suggestions, giving reasonable period of not less than thirty-days for submission of objections and suggestions, if any, in respect of the said Scheme.

(3) The Chief Executive Officer of the Slum Rehabilitation Authority shall, consider the objections and suggestions, if any, received within the specified period in respect of the said Provisional Scheme and after considering the same, and after carrying out such modifications as deemed fit or necessary, finally publish the said scheme, with the approval of the State Government or, as the case may be, the Slum Rehabilitation Authority in the *Official Gazette*, as the Slum Rehabilitation Scheme.

(4) The Slum Rehabilitation Scheme so notified under sub-section (3) shall, generally lay down the parameters for declaration of any area as the slum rehabilitation area and indicate the manner in which rehabilitation of the area declared as the slum rehabilitation area shall be carried out. In particular, it shall provide for all or any of the following matters, that is to say, -

- (a) the parameters or guidelines for declaration of an area as the slum rehabilitation area;
- (b) basic and essential parameters of development of slum rehabilitation area under the Slum Rehabilitation Scheme;

- (c) Provision for obligatory participation of the landholders and occupants of the area declared as the slum rehabilitation area under the Slum Rehabilitation Scheme in the implementation of the Scheme;
 - (d) provision relating to transit accommodation pending development of the slum rehabilitation area and allotment of tenements on development to the occupants of such area, free of cost;
 - (e) scheme for development of the slum rehabilitation areas under the Slum Rehabilitation Scheme by the landholders and occupants by themselves or through a developer and the terms and conditions of such development; and the option available to the Slum Rehabilitation Authority for taking up such development in the event of non-participation of the landholders or occupants;
 - (f) provision regarding sanction of Floor Space Index and transfer of development rights, if any, to be made available to the developer for development of the slum rehabilitation area under the Slum Rehabilitation Scheme;
 - (g) provision regarding non-transferable nature of tenements for a certain period, etc.
- (5) for the purposes of this Chapter, the State Government may register any person or an association of persons, or a partnership firm registered under the Partnership Act, 1932 or a company registered under the Companies Act, 1956, as a Developer in the prescribed manner.

3C Declaration of a slum rehabilitation area.

- (1) As soon as may be, after the publication of the Slum Rehabilitation Scheme, the Chief Executive Officer on being satisfied that circumstances in respect of any area, justifying its declaration as slum rehabilitation area under the said scheme, may by an order published in the *Official Gazette*, declare such area to be a “slum rehabilitation area”. The order declaring slum rehabilitation area (hereinafter referred to as “the slum rehabilitation order”) shall also be given wide publicity in such manner as may be specified by the Slum Rehabilitation Authority.

(2) Any person aggrieved by the slum rehabilitation order may, within four weeks of the publication of such order prefer an appeal to the Special Tribunal; and the decision of the Special Tribunal shall be final.

(3) On the completion of the Slum Rehabilitation Scheme, the Slum Rehabilitation Area shall cease to be such area.”

61. A perusal of the provisions of the Slum Act reveals that it is an Act to make better provision for the improvement and clearance of slum areas in the State and their redevelopment and for the protection of occupiers from eviction and distress warrants. Chapter I of this Act contains preliminary provisions including definitions. Some of the definitions are important. The words and expressions such as “building”, “land”, “occupier”, “owner”, “eligible slum dweller”, “slum area”, “slum”, “clearance”, “slum rehabilitation scheme”, “work”, “SRA” and “slum rehabilitation area” are defined comprehensively, broadly and in an inclusive manner to denote as to how this Act also is a welfare measure. It seeks to achieve the policy enshrined in Articles 38, 39(b) and (c) and Article 41 of the Constitution of India. Chapters I-A, I-B, I-C and II, III, IV and V would indicate as to how the legislative mandate is carried forward. It is apparent that the SRA and the State do not urge that this Act and its provisions cannot be invoked to rehabilitate or improve the plight of the slum dwellers on the subject land. Once the Act can be invoked

and applied, then, it is futile to urge in the absence of a clear embargo or prohibition that the SRA cannot carry the declaration and notifications further and to their logical end. In the absence of any statutory prohibition to process the petitioners' proposal, the SRA could not have refused to take the further steps.

62. Despite indicating in the notification that the Restoration Act is applicable to the land and as per rules, necessary permission should be taken, the SRA proceeded to declare the area shown in the notification as slum rehabilitation area. On this area, the slum rehabilitation scheme is proposed as per DCR, particularly Regulation 33(10).

63. How could all these steps be taken in relation to alleged tribal land has not been clarified at all. We do not see how the notification under the aforesaid provisions of the Slum Act came to be issued in respect of the subject lands. The Slum Act would apply to such lands and on slums thereto is not disputed before us by either SRA or the State. Merely because such an endorsement has been made in the notification, the SRA could not have thereafter withheld further permissions and approvals or the State, through its competent authority, refused to carry forward the notification to its logical end. We do not see how by merely relying on the provisions of the Restoration Act or the Land

Revenue Code and that too in the absence of better and proper particulars, the slum rehabilitation scheme, as proposed, was obstructed and not allowed to go further.

64. In the teeth of the factual position as we have narrated above, we do not think that the communication at page 79 of the paper book can be upheld. The Annexure – II should have been issued and the objection to the extent noted above, namely that the proposals cannot be finalised as lands are owned by tribals, cannot be sustained. We are of the opinion that having allowed the petitioners to take all the steps as indicated above, it was not open for the respondents to insist on compliance with the Restoration Act or section 36 of the Code. The insistence, in the peculiar facts, is unsustainable.

65. In the view that we have taken on facts, it is not necessary to decide any larger question and posed by the petitioners. We do not think that it is necessary to decide as to whether the lands or any part there of were agricultural and section 36A is restricted in its applicability to such lands or whether the protection to tribals can be said to be unavailable after the Code was amended and as indicated in the foregoing paragraphs of this judgment.

66. Once we reach the conclusion in para 64 above and we are unable to sustain the actions of the respondents, then, all that is required to be done is to direct them to consider the petitioners' application and take up the draft Annexure – II for finalisation in accordance with law. Let that process be initiated and completed within a period of four months from the date of receipt of a copy of this judgment.

67. The writ petition is allowed. Rule is made absolute in the aforesaid terms. There would be no order as to costs.

(DR. SHALINI PHANSALKAR-JOSHI, J.) (S.C.DHARMADHIKARI, J.)