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

WRIT PETITION NO. 2015 OF 2015

WITH

CHAMBER SUMMONS NO. 56 OF 2017

Rahul Patil & Ors. ... Petitioners
Versus
State of Maharashtra & Ors. ... Respondents

Mr. G.S. Hegde, io/b C.M. Lokeshappa for the Petitioners.
Mr. Amar Mishra, AGP.
Mr. Milind Sathe, Senior Advocate, with Mr. R.A. Malandkar, i/b MSR and Associates for Respondent No.5.
Mr. Vaibhav M. Parashurami for Respondent No.7.
Mr. M.B. Kale, for Respondent No.8.
Mr. Aspi Chinoy, Senior Advocate with Mr. Ravi Kadam, Senior Advocate, Mr. M.A. Kamdar, i/b Kanga & Co for Respondent No.9.
Ms. Jaya Bagwe, i/b Sharmila Deshmukh for Respondent No.2.
Mr. A.Y. Sakhare, Senior Advocate, with Ms. K.H. Mastakar, Ms. Vandana Mahadik for MCGM.

**CORAM: SMT. VASANTI A NAIK AND
MR. RIYAZ I. CHAGLA, JJ.**
DATED: 6TH NOVEMBER 2017

PC:-

By this writ petition, the petitioners challenge the occupation certificate dated 9th January 2015 issued by the respondent nos. 2 to 4 in respect of the rehabilitation building developed by the respondent no.5. The petitioners also challenge the documents, plans, sanctions and permissions issued by the respondent nos. 2 to 4 in respect of the construction of the rehabilitation building by the respondent no.5. The no objection certificate granted by the respondent corporation dated 13th July 2006 for the construction

of the rehabilitation building is also challenged.

The petitioners claim to be the tenants of the premises that was sought to be redeveloped in pursuance of the permissions granted by the Maharashtra Housing and Area Development Authority (“**MHADA**”) and the respondent corporation under DCR 33(7) of the Mumbai Municipal Corporation Development Control Rules, 1991. According to the petitioners, the grant of the IOD in the year 2004 as also the NOC granted by the respondent no.7 – MHADA on 13th July 2006 is bad in law inasmuch as the same was granted despite the fact that the entire FSI that was available for the plot of land admeasuring 12,202.40 Sq. meters was utilised for the construction of the 'Matru Mandir' in the year 1964. According to the petitioners though certain objections were raised by the petitioners and some others in the matter of grant of occupation certificate in respect of the building constructed in pursuance of the IOD and NOC, without giving a reasonable opportunity to the petitioners, a provisional occupation certificate is granted in favour of the petitioners. The challenge to the occupation certificate is based mainly on the ground that FSI was not available for the construction of the building in pursuance of the impugned NOC and IOD as the entire FSI was utilised for the construction of the Matru Mandir.

The respondents have opposed the prayers made in the writ petition and have raised a preliminary objection to the tenability thereof. It is stated that the present petition is filed since the proceedings under Section 95A of the MHADA Act were contemplated against the petitioners. It is submitted that after the

NOC was granted by MHADA, in July 2007, Patil Estate Tenants CHS had filed writ petition (L) no. 1408 of 2007 challenging the redevelopment *inter alia* on the ground of wrongful calculation of the FSI. It is submitted that petitioner no.2 was a member of Patil Estate Tenants CHS that had filed writ petition (L) no. 1408 of 2007. It is stated that if the petitioners were aggrieved by the grant of IOD or NOC in favour of the respondent no.5 due to the absence of availability of the FSI, they ought to have challenged the IOD and the NOC in the years 2004 and 2006 respectively. It is submitted that yet another tenant by name Philomena Phatarpekar had also filed writ petition no. 37 of 2008 challenging the redevelopment *inter alia*, on the ground of wrongful calculation of FSI. It is submitted that while disposing of the petitions filed by Patil Estate Tenants CHS Ltd. and Philomena Phatarpekar, this Court had granted liberty to the petitioners, to approach the High Power Committee. It is submitted that the application filed by the Patil Estate Tenants CHS Ltd. before the High Power Committee was dismissed in the year 2008 and the High Power Committee disposed of appeal filed by Philomena Phatarpekar in the year 2009. It is submitted that since the orders of the High Power Committee were not being implemented the respondent no.5 had filed writ petition no. 43 of 2011 seeking the implementation of the orders of the High Power Committee. It is stated that the said writ petition was disposed of by an order dated 3rd February 2011 after issuing certain directions to the MHADA. It is stated that this Court permitted the 5th respondent in the said writ petition that represented some of the occupants to submit requisite details to MHADA within a period of four weeks and MHADA was directed to follow the procedure for certification of the cessed and non-cessed

structures. It is stated that in pursuance of the directions issued by this Court in the order dated 3rd February 2011, the survey was conducted by the MHADA. It is stated that the petitioners were held eligible under DCR 33 (7) as per the order of the MHADA. It is submitted that by an order dated 27th April 2017, an application filed by Patil Estate Tenants CHS Ltd before the High Power Committee was dismissed. It is stated that none of the orders passed by the High Power Committee are challenged by any of the petitioners. It is submitted that if the petitioners were of the view that the entire FSI was utilised for the construction of the Matru Mandir, the petitioners should have approached this Court for challenging the IOD and NOC, 10 years earlier as the petitioners had clear knowledge in respect of the construction of the building and the grant of NOC. It is submitted that in the circumstances of the case, the writ petition is liable to be dismissed, more so, when it is apparent from the documents annexed to the affidavit in reply filed on behalf of the respondent no.5 that the entire FSI could not have been utilised for the construction of the Matru Mandir in the year 1964. It is submitted that survey no.654 admeasures 12,202.40 Sq. meters and permission for the construction of Matru Mandir was granted only on a property admeasuring 3453.10 Sq. meters. It is submitted that permission could not have been granted for the construction of Matru Mandir on the entire 12,202.40 Sq. meters of land as 7,130 Sq. meters of land was reserved for recreation ground and was de-reserved for the first time in the year 1991 and was earmarked for housing the dis-housed. It is submitted that the conveyance in respect of the land of Matru Mandir, of the year 1971 refers only to 3,453.10 Sq. meters of land. It is submitted

that balance land admeasuring 7,130 Sq. meters was conveyed to the respondent no.5 on 29th September 1972. It is submitted that there is a sub-division of the land, in as much as both the lands admeasuring 3453.10 Sq. meters and 7130 Sq. meters bear separate survey numbers. It is submitted that the MOFA agreement in respect of the Matru Mandir refers to only 3453.10 Sq. meters of land. The learned counsel for the respondents seek for the dismissal of the writ petition.

On hearing the learned counsel for the parties and on a perusal of the writ petition, the affidavit in reply filed on behalf of the respondents as also the documents annexed thereto, it appears that the petitioners have belatedly approached this Court with a view to challenge the occupation certificate though they were aware of the developments pertaining to the re-development of the building in the year 2004 onwards with a view to avoid their eviction. It appears that all the petitioners had consented for the scheme for redevelopment. It is apparent that the petitioners had not approached this Court at the relevant time in 2004 or immediately thereafter as they had agreed for the redevelopment. The IOD was granted in favour of the respondent no.5 in the year 2004 and the NOC was granted by the MHADA for the construction of the building in the year 2006. The petitioners however chose not to take any action. Most of the tenants were the members of the Patil Estate Tenants CHS Ltd and the said cooperative housing society had chosen to file a writ petition in July 2007 in the representative capacity. We have perused the copy of the writ petition. It appears that the grant of the NOC was *inter alia* challenged on the ground of wrongful calculation of the

FSI. According to the Patil Estate Tenants CHS Ltd, the respondent no.5 had secured benefits pertaining to the FSI under the Development Control Regulation No. 33 (7) in connivance of the the respondent nos. 1 to 3 and 7 i.e. the officers of the corporation and MHADA. The said writ petition was disposed of by granting liberty to the Patil Estate Tenants CHS to approach the High Power Committee. The High Power Committee has decided the matter on 27th April 2017. Neither the petitioners nor the Patil Estate Tenants CHS has challenged the said order of the High Power Committee. The petitioners did not take any steps for challenging the IOD, the NOC or even the orders passed by the High Power Committee at any point of time. In fact, the respondent no.5 had filed the writ petition for seeking a direction against the MHADA and the other concerned authorities for implementing the order of the High Power Committee. The directions in the order dated 3rd February 2011 in writ petition no. 43 of 2011 were implemented by MHADA and a survey was made. At that time also the petitioners did not make any grievance. They submitted themselves before the MHADA to prove their eligibility, which was granted to them. The petitioners are held to be eligible under DCR 33 (7). If the petitioners had no objection for the redevelopment and if the petitioners had not challenged the IOD and NOC, we are surprised that the petitioners have challenged the occupation certificate granted in respect of the building in pursuance of the permission. It is not the case of the petitioners that the building has been constructed in violation of the sanction plans. If that is not the case of the petitioners, the petitioners would not be entitled to challenge the occupation certificate when the petitioners had not challenged the permissions granted in

favour of the respondent no.5 more than 10 years earlier, at the relevant time. The petitioners had never objected to the construction that was made by the respondent no.5 since the year 2010 till the year 2015. It is not the case of the petitioners that the petitioners were not aware of the litigation between the respondent no.5 and Patil Estate Tenants CHS Ltd. of which one of the petitioners is a member. It is also necessary to note that out of 126 occupants 107 have already shifted to the alternate accommodation. We do not find any merit in the submission made on behalf of the petitioners that since some specific grounds in regard to the non-availability of the FSI were not raised in the earlier petition, the petitioners would be entitled to raise the same. It appears that when the petitioners were sought to be served with the notices for eviction under section 95 A of the Maharashtra Housing and Area Development Authority Act, the petitioners have filed the instant petition by making some allegations in respect of the non-availability of the FSI. In our considered view, if at all, the petitioners were really aggrieved by the redevelopment of the property and the illegal grant of IOD and NOC by the concerned authorities, the petitioners ought to have approached this Court at the appropriate stages in between the years 2004 to 2006. We find from the documents on record that out of the total area of 12,202.40 Sq. meters only 3453.10 Sq. meters was earmarked for the residential zone and the Matru Mandir was constructed by utilizing the said land. From the documents tendered by the respondent on record, it appears that the 7030 Sq. meters of land was reserved for recreation ground and the same could not have been utilized for construction of residential buildings till it was freed from reservation in the year 1991. It is clear that after

having agreed to the redevelopment of the land the petitioners have filed instant petition only with a view to defend the action that was proposed against them under section 95A of the MHADA Act.

In the circumstances of the case, we dismiss the writ petition with costs.

(RIYAZ I. CHAGLA J.)

(SMT. VASANTI A. NAIK, J.)