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

WRIT PETITION NO. 2833 OF 2016
WITH
NOTICE OF MOTION LODING NO. 95 OF 2017
AND
CHAMBER SUMMONS NO. 84 OF 2017

1. Sarla Dilip Somaiya and anr. .. Petitioners

Vs.

1. The State of Maharashtra and ors. .. Respondents

Mr. P. K. Dhakephalkar, Sr. Advocate & Mr. Rajiv Chavan, Sr. Advocate
a/w Mr. Bipin Joshi, Mr. Y. M. Chaudhari and Ms. Perna Lalchandani for
petitioners.

Mr. P. G. Lad for respondent no.4 - MHADA.

Ms. Kejali Mastakar for MCGM.

Mr. M. P. S. Rao, Sr. Adv. a/w Mr. Vivek Walavalkar, Dhiraj Chavan i/by
Deven Dwarkadas and Partners for respondent no.7.

Ms. Kavita Solunke, AGP for State.

Mr. Simil Purohit a/w Rahul Karnik i/by Manish Varma for Intervener.

CORAM: NARESH H. PATIL &
DR. SHALINI PHANSALKAR-JOSHI JJ.

RESERVED ON : MARCH 31, 2017

PRONOUNCED ON : APRIL 18, 2017

ORDER [Per Naresh H. Patil, J.] :

1. The petitioners pray for following substantive reliefs :-

(a) this Honourable Court to issue Writ of Certiorari or any other appropriate writ, order or direction in the nature of Certiorari, calling upon records and proceedings of matter and after examining legality thereof, be pleased to quash and set aside the impugned NOC dated 13.4.2015 bearing No. R/NOC/F/2322/2755/MBR & RB/15, being Exhibit-L annexed hereto, issued by the Respondent No.2, MHADA in respect of property viz. CS No. 226/10 of Matunga Division, Plot No. 284, of Dadar Matunga Estate, Building No. 7, Shri Krishna Niwas bearing cess No. FN/7372(1) situated at Hindu Colony Road No. 15, and Junction of Chandawarkar Cross Road and B. A. Khimji Road, Matunga, CR, Mumbai – 400 019.

(b) this Honourable Court to issue Writ of Certiorari or any other appropriate writ, order or direction in the nature of Certiorari, calling upon records and proceedings of matter and after examining legality thereof, be pleased to quash and set aside the impugned IOD dated 25.4.2015 bearing No. CHE/CTY/1229/F/N/337(NEW), being Exhibit-P annexed hereto, issued by the Respondent No.2, MHADA in respect of property viz. CS No. 226/10, of Matunga Division, Plot No. 284, of Dadar Matunga Estate, Building No. 7, Shri Krishna Niwas bearing cess No. FN/7372(1) situated at Hindu Colony Road No. 15, and Junction of Chandawarkar Cross Road and B. A. Khimji Road, Matunga, CR, Mumbai – 400 019.”

2. The petitioners seek to quash No Objection Certificate dated 13/4/2015 issued by respondent No.2 – MHADA under the Development Control Regulation 33(7) and IOD dated 25/4/2015 granted by the respondent no.3 in respect of property viz. CS No. 226/10 of Matunga Division, Plot No. 284, of Dadar Matunga Estate, Building No. 7, Shri Krishna Niwas bearing cess No. FN/7372(1) situated at Hindu Colony Road No. 15, and Junction of Chandawarkar Cross Road and B. A. Khimji Road, Matunga, CR, Mumbai – 400 019.

3. It is contended by the petitioners that by an Agreement dated 27/7/2000 an Assignment Deed for development of the subject property was executed between late Sharadchandra Bhogilal Doshi and Dilip Somaiya, husband of petitioner no.1 and father of petitioner no.2 respectively, who agreed to acquire the leasehold rights in respect of the said property. On 25/6/2014, the respondent nos.5 to 7 through their Architects – J. G. Kawa & Associates applied for NOC for development of the said property in accordance with Development Control Regulation 33(7). It was wrongly mentioned that four numbers of the occupants were

occupying the cessed building. It is the petitioners' contention that two separately assessed structures were standing on the suit property, though only one structure was shown as cessed in the cessed category. On 31/10/2014, the Executive Engineer, F/North Ward by his letter addressed to Deputy Chief Engineer, Zone 4, furnished scrutiny report for the purpose of issuance of No Objection Certificate. On 13/4/2015, No Objection Certificate was issued by respondent No. 4. On 25/4/2016, respondent Nos. 5 to 7 obtained IOD from the Executive Engineer, Building Proposal Department of the respondent no.3. On 3/5/2016, respondent nos.5 to 7, through their Architect, forwarded a copy of IOD to the Resident Executive Engineer. It is contended by the petitioners that they came to know for the first time about the said NOC and IOD on receipt of letter dated 23/6/2016. Petitioners protested by a communication sent through their Advocate in respect of grant of the impugned NOC. The respondent nos.5, to 7 appointed a contractor to demolish the building and accordingly it was informed to the petitioners. Eviction proceedings were filed by respondent nos.5 to 7 in the Small Causes Court being R.A.E. Suit No. 1334/1989 of 2009. The said suit came to be dismissed. Appeal preferred by respondent nos. 5 to 7, against the judgment dismissing the suit, was withdrawn. By communication

dated 4/7/2016, sent by the petitioners, through their Advocate, to the Executive Engineer, F/North Division of the respondent no.4, it was informed that there were separate sets of documents in respect of two separate premises and, therefore, computation of 70% of consent was erroneous one. The petitioners, in reply to the letter of the respondent nos.5 to 7, objected to threatened action of disconnection of electricity connection. The petitioners were facing water problem, which was apparently created by respondent nos.5 to 7. Petitioners by their communication dated 29/7/2016 requested to de-club the tenancy of the ground floor rooms Nos.1 to 5 and rooms Nos. 6 to 8. Petitioners placed reliance on the receipt issued by Sharadchandra Joshi.

4. Learned Senior Counsel appearing for the petitioners referred to an affidavit filed by Kamlakar Dagadu Surwade, Executive Engineer, F/North Ward, Mumbai Building. In para 3, the deponent stated that four consents out of five tenants were received. In paras 5 and 8, deponent stated as under :-

“5. I say that the reply to same from the Petitioners is as per the letter dated 14th August, 2014 which is at Exhibit “E” to

the Petition. I say that in the said letter the Petitioners have stated that they will be obtaining the documents from Mr. Doshi and will submit the same. I say that as the Petitioners have not submitted the documents, my office has certified the Tenant List and the copy of the Certified Tenant List was forwarded to the Petitioners as per the letter dated 27th November, 2014 being Exhibit “I” to the Petition. I say that as the Petitioners' premises is having only one entrance, the Petitioner's premises is considered as a single premises and the Tenant List is certified. Hereto annexed and marked Exhibit “I” is the copy of the Certified Tenant List. I say that the said Certified Tenant List was served upon the Petitioner on 27th November, 2014. Hereto annexed and marked Exhibit “II” is the copy of the letter dated 27th November, 2014.

“8. I say that the Petitioners have accepted the certification i.e. acceptance of five tenant for the purpose of the benefit of the scheme and not challenged the certification before any Appellate Authority. I say that the Tenant List was certified on 15th November, 2014 and on 27th November, 2014 the Petitioners were furnished the copy of the Certified Tenant List. I say that the Petitioners have not initiated any proceedings for challenging the said Certification of Tenant List or the Order of the MHADA holding that there are only five tenants. I say that for the first time the Petitioners have made the grievance that they are the tenants/ occupants in

respect of two premises, if their two tenements have been considered as separate then the required number of consent is not there i.e. 70 per cent consent is not there and therefore, the NOC is not valid NOC and needs to be cancelled. I say that the said contention does not stand, in view of the MHADA's Order there are only five eligible tenants who are entitled for the benefit of the scheme. Hence, there is no substance in the Petition.”

It is the contention of the deponent that in view of the MHADA's order, there are only five eligible tenants who are entitled for the benefit of the scheme. The learned counsel submits that the tenancy has to be counted separately and if six tenants are counted, then the criteria of 70% persons giving consent will not be satisfied. In accordance with Development Control Regulation 33(7) minimum 70% tenants/occupants shall give irrevocable consent in favour of landlord/developer and only after obtaining 70% consent, the landlord / developer can apply for NOC. Learned counsel submits that respondent nos. 5 to 7 deliberately had put up proposal by suppressing material facts. Learned counsel placed reliance on a communication addressed by the petitioners to the Executive Engineer dated 14/8/2014. The last paragraph of the said communication reads as under :

“My clients state that the rooms which are in possession of my client are handed over to my client by Mr. Doshi in part performance of the contract Dated 24/7/2000. The required Documents will be obtained by me from Mr. Doshi and I shall submit the same to your office immediately upon obtaining the same from Mr. Doshi. Please confirm whether you have granted any permissions of the redevelopment of the above property and if so where claim of my client and pending litigation is brought to the knowledge of your office.”

5. The Executive Engineer, FN Division, M.B.R. & R Board, Mumbai, communicated to the Deputy Chief Engineer on 31/10/2014 in respect of the subject building. As regards the history of the buildings, in Column No.7, he stated that the number of occupiers were five. Learned counsel further referred to the list of tenants/occupants of redevelopment of subject property annexed at page 65 of the petition. Names of five tenants / occupants were mentioned in Column No.1 refers to names of “N. D. Somaiya & Mrs. S. D. Somaiya”. Their room /shop numbers are mentioned as 1 to 5 and 6 to 8. In the remark Column, it was mentioned that the petitioners did not allow to take measurement. Therefore, the measurement of ground floor premises, as per the plan approved by the MCGM, was taken into consideration. Appendix III of Guidelines of

Enhancement of FSI for Developers Builders etc. was also referred, which refers to occupiers, according to the learned counsel. During the course of argument, learned counsel referred to Exhibit – HH, page 135, inspection extract in respect of property for the year 1995-96.

6. Learned Senior Counsel appearing for respondent no. 7 Mr. Rao, placed reliance on the affidavit-in-reply filed by Mr. Janak Sharadchandra Doshi. In paras 10 and 11, the deponent stated as under :-

“10. At the further outset and without prejudice to what is stated hereinabove, I say that in March, 2000 the husband of Petitioner No.1 herein Mr. Dilip Somaiya had approached the occupants of the ground floor premises since he was desirous of occupying the same for his personal use. Accordingly the said Mr. Somaiya had negotiated for Room Nos.1 and 2 and Room Nos. 6 and 8 with the sister and wife of Respondent No. 7 viz. Ms. Bhavna Doshi and Mrs. Naina Doshi respectively who were in occupation of the ground floor. I say that my father Mr. Sharadchandra Doshi issued 2 rent receipts in favour of the Petitioner herein at the instance of Mr. Dilip Somaiya though the premises were occupied solely by him. This was done only at the request of Mr. Dilip Somaiya and for his convenience. These premises were never intended to

be used separately by each of the petitioners. I further say that the factual position is that there are eight different rooms in the ground floor premises of my above referred building and entrance floor premises of my above referred building and entrance to each room is through a common passage and the same is revealed based on the approved plan of the building. Hereto annexed and marked EXHIBIT - 'D' is a colour zerox copy of the approved plan of the existing building. I say that admittedly the Petitioner No.1 is Tenant in respect of Room Nos.1 and 2 (and Not 1 to 5) and the Petitioner No. 2 is Tenant in respect of Room Nos.6 and 8 (and Not 6 to 8); while the Petitioners have illegally encroached upon the balance portion including common passage and have thereafter unilaterally amalgamated the same and made it a one single unit. Despite the above, I have offered them Temporary Alternative Accommodation of more than the area occupied presently by them. Not only that, irrespective of their entitlement, I have also allotted the entire Sixth Floor, admeasuring about 2477 sq.ft. Carpet Area in the building to be newly constructed by way of their Permanent Alternative Accommodation. Hereto annexed and marked EXHIBIT - 'E' is a copy of the Extract of the approved plan pertaining to the premises allotted to the Somaiyas.

11. The Petitioners plea that a majority of 70% of the occupants have not supported the reconstruction of the subject

building is entirely misconceived. In the sanctioned plan for the building, 8 units were shown on each floor of the building. In fact, in respect of the 1st and 2nd floors multiple rent receipt had been previously issued but on the request of the tenants, the tenements on these floors were amalgamated into one. Similarly, Mr. Dilip Somaiya, acting through the Petitioners has amalgamated the tenements on the ground floor into a single unit. In doing so, the purported rent receipts issued to the Petitioners were disregarded. Further, as set out hereinabove, the said Dilip Somaiya has usurped possession of Units Nos.3 to 5 and 7. Despite the aforementioned illegality, I have, with a view to peacefully resolve the matters, treated the entire unit as being one Unit premises of the Petitioners and offered the Petitioners alternative accommodation on that basis. It is in view of the aforementioned circumstances that for the sake of redevelopment of the said building, each floor of the said building was treated as being a separate unit, aggregating to four in number. Further, one of the garages in the building, should be presently being used as an office, is in the possession of my son Mr. Rohan Janak Doshi. This structure, having been cessed, was also taken into account for the purpose of redevelopment under Regulation 33(7). Having illegally amalgamated the entire ground floor and having been given the benefit of such amalgamation, the Petitioners are now seeking to conveniently treat the ground floor as two

separate units to defeat the redevelopment. It is respectfully submitted that this attempt ought not to be contemplated and the above Petitioner ought to be diagnosed with compensatory costs.”

Learned counsel submitted that Dilip Somaiya usurped possession of Units Nos.3 to 5 and 7. Learned counsel submitted that the plea of the petitioners that they were enjoying two different tenancies and units is not supported by the material placed on record. They have made a false plea to stall the redevelopment of old dilapidated structure. The overwhelming material placed on record suggests that the petitioners' claim is required to be rejected. The effort of the petitioners is to stall the redevelopment of the building. Reliance was placed on the affidavit filed on behalf of the Corporation, wherein it was submitted by the deponent that four out of five tenants had consented for redevelopment. It is submitted that the petitioners' premises has only one entrance and it is a single premises. The Tenant List is certified on 15/11/2014 and on 27/11/2014. The petitioners were furnished a copy of the same. The petitioners did not initiate any proceeding for challenging the said certificate.

7. We have heard the learned counsel appearing for the other respondents. Perused the record placed before us, considered the submissions of the learned counsel. The subject issue has to be dealt with in accordance with the Development Control Regulation 33(7). The documents placed on record reveal that a proposal for redevelopment was submitted by Architects M/s. J. G. Kawa Associates. After scrutinizing the proposal, NOC was granted. The MHADA officers personally visited the premises to take measurement and verify the occupancy of the tenant list. Accordingly, the same was done. From the record placed before us, affidavits filed, we find that the subject premises of the petitioners has only one entrance. It is a single premises. The tenant list was certified by the competent officer. The copy of the same was provided to the petitioners. We find substance in the submissions that five tenants of the building are entitled for the benefit of the scheme under Development Control Regulation 33(7). Government Resolution dated 16/8/2010 issued by the Housing Department provides guidelines about deciding the eligibility and the Appellate Forum. Accordingly, we find that the guidelines were followed for deciding the eligibility of the tenants. It is curious to note that the petitioners did not challenge the tenancy certificate before any Appellate Authority though the list was certified on 15/11/2014. We do not

find that the distinction tried to be made between the terms “tenant” and “occupant” would any way benefit the petitioners. The subject building is cessed one.

8. Mr. Dilip Somaiya and another had filed Suit No. 2586 of 2012 in respect of the subject property, in which Notice of Motion No. 1111 of 2016 was filed for interim relief. By an order dated 29/6/2016, learned Single Judge (Coram: S. J. Kathawalla, J.) passed following order:-

“1. The Plaintiffs have since the year 2013 taken out several Notices of Motion in the above Suit. However, till date no ad-interim relief is granted in favour of the Plaintiffs. The Plaintiffs have now taken out one more Notice of Motion and have today moved an Application for urgent ad-interim relief/s on the ground that the Defendants shall be proceeding to demolish the Suit building. From the chronology tendered in Court on behalf of the Plaintiffs, I have noted that the Plaintiffs had on 28th August, 2015 filed an Additional Affidavit in Notice of Motion No. 882 of 2013, wherein it was stated that the Defendants are in order to make the above Suit infructuous, trying to demolish the Suit

building. However, no reliefs were sought and / or order/s were passed by this Court restraining Defendant No.1 from demolishing the Suit building. The question therefore of granting urgent relief/s on the same ground in June 2016 does not arise. The Application for urgent ad-interim relief/s is therefore rejected.

2. The Defendants to file their Affidavit in Reply within a period of two weeks from today.
3. The Plaintiffs to file their Rejoinder, if any, within a period of one week thereafter.
4. Place the above Notice of Motion for hearing and final disposal on 25th July, 2016.”

9. Sharandchandra Doshi had filed a Suit against Dilip Somaiya and others bearing R.A.E. Suit No. 1334/1989 of 2009. An application under Order 39 of C.P.C. was filed by the plaintiff. By an order dated 7/5/2010, the learned trial Judge rejected the application for injunction. Misc. Appeal bearing No. 187 of 2010 was preferred against the said order, which came to be dismissed on 8/2/2011. We may reproduce para 5 of the said order, which reads as under :-

“5. Defendants have filed their written statement wherein they specifically claimed that they are in possession of the

ground floor of the suit building and garages in view of the development agreement. It is their contention that plaintiff has accepted huge amount from them and inspite of it obstructing in the development of the property. That there is no relationship of landlord and tenant in between the plaintiff and the defendants and the dispute is of such nature that it can be adjudicated by the Civil court and not the Court of Small Causes.”

10. We do not find substance in the plea raised by the petitioners that there are two premises and therefore, two tenancies. The certificate of Corporation relied upon by the petitioners annexed at Exhibit – HH will not strengthen the case of the petitioners.

11. There is no merit in the petition, which is accordingly dismissed.

12. In the light of the above order, Notice of Motion (L) No. 95 of 2017 and Chamber Summons No. 84 of 2017 stand disposed of.

(DR.SHALINIPHANSALKAR-JOSHI,J.)

(NARESH H. PATIL,J.)

After pronouncement of the order, learned counsel appearing for the petitioners prays for continuation of order of status quo. Said request is objected by the other side.

In the facts, we are not inclined to continue the order of status quo. Prayer is rejected.

(DR.SHALINIPHANSALKAR-JOSHI,J.)

(NARESH H. PATIL,J.)