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

WRIT PETITION NO.820 OF 2001

Elphinstone Premises Co-operative Society Ltd., a Society registered under the Maharashtra Co-operative Societies Act, having its Registered Office at Elphinstone House, 17, Marzban Road, Opp: Sterling Cinema, Mumbai – 400 001. .... Petitioners

- Versus -

1. The Collector,
   Mumbai City, Old Customs House,
   Shahid Bhagatsingh Marg, Fort,
   Mumbai – 400 001.

2. The State of Maharashtra

3. Pervez M. Batliwala

4. Hector F. Karanjawala

5. Dinshaw R. Mehta

6. Yazdi P. Dandiwala

7. Aspi D. Kotwal

8. Kersie N. Wadia

9. Noshir A. Khan

Nos.3 to 9 C/o Elphinstone Cricket Club, Elphinstone House, 17 Marzban Road, Mumbai – 400 001. .... Respondents

WITH

CHAMBER SUMMONS NO.211 OF 2013
IN
WRIT PETITION NO.820 OF 2001

Elphinstone Premises Co-operative
Society Ltd. .... Applicants
In the matter between
Elphinstone Premises Co-operative
Society Ltd. .... Petitioners
Vs.
The Collector of Mumbai City & Others .... Respondents

Mr. U.J. Makhija with Mr. Ajaraj D. Bagwe i/by
Mulla & Mulla for the Petitioners.

Mr. Ashutosh Kumbhakoni, Advocate General with
Ms Jyoti Chavan, Asstt. Government Pleader, for
Respondent Nos.1 & 2.

CORAM: S.C. DHARMADHIKARI &
PRAKASH D. NAIK, JJ.

DATE : MARCH 08, 2018

ORAL JUDGMENT (Per Shri S.C. DHARMADHIKARI, J.)**:**

1. By this petition under Article 226 of the Constitution of India, the petitioners are seeking a writ of certiorari or any other writ, order or direction in the nature thereof calling for the

records and proceedings relating to a demand contained in a communication dated 20-2-1999, Exhibit "D" to the petition, letter dated 7-8-2000, Exhibit "F" to the petition and a notice of attachment, dated 27-3-2001, issued pursuant thereto, Exhibit "I" to the petition.

2. The prayer is that, after the scrutiny of these records and verification of the demand this Court should proceed to quash and set aside the same.

3. By way of an amendment, prayer clause (a-1) is introduced seeking a writ of mandamus or any other appropriate writ, order or direction, directing respondent Nos.1 and 2 to withdraw and cancel a Government Resolution dated 23-11-1992, Exhibit "L" to the petition.

4. Importantly, by a prayer styled as prayer clause (c), the petitioners are seeking a direction to respondent Nos.1 and 2 to refund to them amount of Rs.27,54,310/- with interest thereon at the rate of 18% per annum from 31-3-1999 until payment.

5. On such a petition which is pending in this Court from 2001, we have heard Mr. Makhija, learned Advocate appearing for the petitioners and the learned Advocate General, appearing for respondent Nos.1 and 2. They were heard on the previous occasion and even today.

6. With their assistance, we have perused the petition and the annexures thereto so also all the affidavits placed on record.

7. The petitioners are a registered Co-operative Society. They are governed by the Maharashtra Co-operative Societies Act, 1960. The respondent Nos.1 and 2, who are the surviving respondents from the array of at least nine in number, are the Collector of Mumbai City and the State of Maharashtra.

8. By virtue of the powers conferred in the State vide Section 20 of the Maharashtra Land Revenue Code, 1966 and its predecessor legislation, the plot of land, more particularly described in an Indenture of Lease dated 14-5-1904, executed

between the Secretary of State for India in Council called a lessor and Burjorjee Hormasjee Dantra and two others, the then Trustees of the Elphinstone Cricket Club, came to be granted and for a period of 99 years from 25-5-1897. The terms and conditions of the Lease are highlighted and it was urged that in the year 1978, when the Trustees noticed that the building was in a dilapidated condition, required large scale structural repairs and/or reconstruction, the Club entered into an Agreement to assign the benefit of the remainder of the Lease to the petitioners before us. That would enable the petitioners to demolish the existing structure and put up a new building at their own expense. By letter dated 6-2-1978, addressed to the Collector, the first respondent before us, the then Trustees of this Club requested him to confirm this arrangement. On 18-5-1979, the first respondent granted the requisite permission but on an undertaking by the petitioners/Trustees that, they would agree to abide by the terms and conditions that may be imposed by the State in granting this permission.

9. This Undertaking was also given on 18-5-1979. It is

stated that by an Indenture dated 22-2-1979, the said arrangement was put in writing and that is how the benefit of the remainder of the Lease was derived by the present petitioners. This is a registered instrument. The Lease was to commence from 25-5-1897 and expired on 24-5-1996. However, a fresh Lease was not executed when this petition was instituted.

10. The dispute started when the demand contained in the letter dated 20-2-1999 (Exhibit "D") was raised, pointing out the Government Resolution dated 23-11-1992. In terms of this Resolution, the State derived a power to recover 50% of the market value of the land along with interest so as to enable the petitioners to insist on renewal of the Lease.

11. The petitioners resisted this demand by pointing out that they had paid the lease rent upto 1998. After a lapse of several years, decision has been taken and now to enforce that is unreasonable, unfair and unjust. However, without prejudice to the rights and contentions of the petitioners, they forwarded deposit of Rs.10,00,000/-. They were again told by a further

letter of demand to pay the balance sum of Rs.35,63,706/-. The petitioners made a representation. The grievances in the representation were redressed, but partially and the amount was scaled down to Rs.27,54,310/- and to be paid in three instalments. That amount was paid under protest.

12. The petitioners, however, made a representation but instead of that representation being duly considered, they were served with a demand for payment of interest. They were directed to pay a sum of Rs.55,80,620/- within seven days from the date of receipt of letter dated 7-8-2000, Exhibit “F” to the petition. The petitioners again pointed out that this demand cannot be said to be justified for substantial amounts were paid, though under protest. Having retained them, it is not permissible to then go on demanding interest. Since they were served with notices of attachment and eventually an attempt was made to attach the properties and other coercive measures being taken, that this petition was filed.

13. During the pendency of this petition, the attention of

this Court was invited by the Collector to several aspects of the matter. While not disputing the essential facts, the Collector in the affidavit in reply pointed out that the State cannot be expected to give up its right in such properties and lands which are continued to be enjoyed. In fact, the potential of the same is exploited without sharing any revenue. That is how the State was very reasonable in demanding the unearned income. That demand was raised on 20-2-1999 and in the sum of Rs.55,08,620/-. Several grievances made in the representation were duly noted. However, the waiver of interest cannot be acceded to given the powers conferred in the State Government. Therefore, Rs.28,09,396/-, in addition to the sum of Rs.27,54,310/- paid by instalments, was thus due and payable. The petitioners were also served with an affidavit of 19-6-2009 in which it is stated that, the Government Resolution is sought to be enforced but the petitioners were fully aware right from the time when they sought permission to demolish the existing structures and seek an assignment of the Lease in their favour that terms and conditions can be imposed on them including a demand for money. The plot admeasures 1397 sq. metres and the construction was 15048 sq. feet. The petitioners proposed to construct on total built-up area 36,867.59 sq. feet and also consumed FSI to the extent of 2.44. Thus the petitioner-Society having exploited the potential to the fullest, this is a fit case where the demand should be sustained.

14. The petitioners filed a rejoinder and pointed a pertinent fact. In para 6 of the affidavit in rejoinder, the petitioners stated that the Elphinstone Premises Co-operative Society Limited, by letter dated 26-12-1979, requested the Collector to fix the rent. Therefore, they expected that the permission would be granted and possibly revised rent would be charged and nothing more. There was no question of charging any unearned income as is now sought to be done. There was no unearned income in putting up the construction. It was pointed out that according to the Government Resolution dated 23-11-1992 the respondents thought fit to charge 50% of the market value along with interest at the rate of 8% per annum from October, 1979 till 1992. There was no such policy. The

policy itself came into force on 23-11-1992. From that day, the Government did not raise any demand and now the demands were scaled down. The issue of interest cannot survive. The State Government was not happy with this and it once again met the contentions in the affidavit in rejoinder by pointing out that in terms of the Government Resolution of 1992, the lease rent was fixed at the rate of Rs.1,324.09 per annum up to 1996 and thereafter the lease rent was to be charged taking into consideration the prevailing market value of the land. Once the petitioners have agreed to such terms and conditions which are otherwise reasonable, then the demand for interest cannot be resisted. The working of interest is also set out on page 113 of the paper-book. This is in para 6, internal page 4 of the affidavit in sur-rejoinder.

15. On such materials, we have heard both sides as indicated above. On the own showing of the State Government, we find the Government Resolution dated 23-11-1992 is relied upon. The value of the land in the year 1897 taken from the Elphinstone Premises Co-operative Society was Rs.26,480/- and

in the year 1992, the valuation was increased to the extent of Rs.55,08,620/- and therefore 50% amount of the unearned income received from the petitioners was Rs.27,54,310/- with interest thereon.

16. We are of the firm opinion that any larger controversy or issue need not be gone into. It is evident that the potential of the land was exploited and it is the petitioners who sought permission, firstly, through the predecessors for demolition of the old structure and building and thereafter to put up a new building/structure by exploiting the potential of the land. While granting that permission, the Collector had obtained an undertaking from the petitioners that they would abide by such terms and conditions, as may be imposed upon them. The terms and conditions have been, admittedly, imposed and by a Government Resolution. From the date the permission was sought till the Government Resolution was issued, there was no action and which could be traced to any provision of law under which the respondents could have demanded this sum. However, given the undertaking and given the power to fix or

revise the rent, vesting in the State Government, it was expected that the State Government takes a reasonable stand and in terms of the Lease Deed which dates back to 1904. To our mind, when the potential of the land was exploited and a new structure/building was erected at the site, the market value of the land being taken into consideration as the basis for fixation of the rentals and for sharing of the income, cannot be said to be unreasonable, unfair and unjust. In the peculiar facts and circumstances and without this order being treated as a precedent in future cases, we think that once the amount of Rs.27,54,310/- was sought to be recovered, but in instalments, then all the more the petitioners' allegation and charge that they were discriminated against or there is violation of the mandate of Article 14 of the Constitution of India, is unsustainable. To this extent, the State has acted reasonably and fairly and cannot be held to have contravened the mandate of Article 14 of the Constitution of India. However, the State has also been demanding interest at 8% from 1979 amounting to Rs.28,09,396/-. This is stated to be an admitted position. In the affidavit filed in sur-rejoinder and prior thereto in reply, it is evident that it is the State Government which through the mechanism at its command took its own sweet time to arrive at and determine the market value. It is clear from the pleadings and the admitted sequence of events that despite being conferred with the power, the State took good nine years to raise the demand. Thus, from the year 1979 till the Government Resolution was issued in 1992, the State itself did not move in the matter. Later on when it outlined its policy, it takes its own sweet time to make the computations. It is in these circumstances and peculiar to this case, particularly when the development/re-development was already completed, that we do not think that the demand for interest and to the extent of Rs.28,09,396/- can be sustained. The petitioners had requested for waiver of this interest which, to our mind, should have been granted. A welfare State, when it does not enforce its own demand, cannot turn around and demand interest from the party like the petitioners and for such a past period as is evident in this case. In the circumstances, we do not think that we can uphold the demand for the payment of interest.

17. We are of the view that rights and equities can be balanced by allowing the Government to retain the sum of Rs.27,54,310/- and by quashing the demand for interest in the sum of Rs.28,09,396/-. We proceed to direct accordingly. In the event, the renewal of the Lease has not been effected or a fresh Deed not executed till date, it is evident that the same will have to be executed in terms of the prevailing or current policies but by not insisting on the demand for payment of interest, which we have quashed as hereinabove.

18. Rule is made absolute in the above terms. There will be no order as to costs.

19. In view of the above, Chamber Summons No.211 of 2013 is disposed of.

(PRAKASH D. NAIK, J.) (S.C. DHARMADHIKARI, J.)