

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION LODGING NO. 2639 OF 2018

WITH

NOTICE OF MOTION LODGING NO. 542 OF 2018

1. Sanjay Phulwaria and ors. .. Petitioners

Versus

1. Mumbai Metropolitan Region Development
Authority and ors. .. Respondents

WITH

CHAMBER SUMMONS NO. 238 OF 2018

Vinayak Pradeep Bhosle .. Applicant/
Intervener

In the matter between :

1. Sanjay Phulwaria and ors. .. Petitioners

Versus

1. Mumbai Metropolitan Region Development
Authority and ors. .. Respondents

Mr.Piyush Raheja with Mr. G. S. Godbole with Mr.Zain Mookhi, Mr.
Bhushan Shah and Ms. Palak Patel I/by Mansukhlal Hiralal & Co. for
petitioners.

Ms. Kiran Bhagalia for respondent no.1 – MMRDA.

Ms. Shital Mane-Tadke for respondent No.2 – MCGM.

Mr. Ajay Khaire for respondent no.4.

Mr. Janak Dwarkadas, Sr. Advocate a/w Mr. Sharan Jagtiani, Mr. Anirudh Hariani, Mr. Nooruddin Dhillia & Mr. Zaid Wahidi I/by Hariani & Co. for respondent No. 5.

Mr. Rajesh Datar a/w Mr. Dushyant S. Pagare for applicant-intervener in CHSW/238/2018.

**CORAM: NARESH H. PATIL, ACTING CJ. &
G. S. KULKARNI, J.**

RESERVED ON: October 09, 2018

PRONOUNCED ON: October 16, 2018.

ORAL ORDER :(Per G.S.Kulkarni,J.)

1. The petitioners claim to be purchasers of flats in a housing project of respondent no.5 named as "Lodha New Cuffe Parade" situated at Wadala in Mumbai.

2. The grievance of the petitioners is primarily in regard to the height of the building exceeding the permissible and the approved height, amounting to an illegality. The petitioners contend that a part occupation certificate dated 8 June 2017, ought not to have been granted by planning authority-Mumbai Metropolitan Region Development Authority

(for short “**MMRDA**”) which is impleaded as respondent no.1 to the petition. The second grievance of the petitioners is of respondent no.5 having undertaken demolition of the upper floors to bring the construction to the permissible height, causing damage to the lower floors of the different wings of the building. The petitioners accordingly pray for quashing of the part occupation certificate and the commencement certificate and/or pray for revocation of the part occupation certificate, as granted by MMRDA to respondent no.5. The relevant prayers as made in the petition read thus:-

“a) Issue a Writ of mandamus or a writ in the nature of mandamus, or any other appropriate writ, order or direction under the Articles 226 of the Constitution of India calling for the records and papers pertaining to issuance of the Part OC and CC and, be pleased to quash the same.

Or:

b) Issue a Writ of Mandamus or a writ in the nature of Mandamus, or any other appropriate writ, order or direction under the Articles 226 of the Constitution of India, as the circumstances of the case may require and direct the Respondent No.1 to revoke the Part OC dated 8 June 2017.

c) As the project is partially incomplete, that Respondent No.5 be directed to register the Ground to 40th floors of Wings 3-6 with the Authority established under the Real Estate Regulation and Development Act, 2016 once the said part OC is revoked/quashed or even otherwise.

d) Direct Respondent No.5 to provide the Petitioners with alternate accommodation till the demolition of the upper floors is complete.”

3. This Court on 14 August 2018 passed an order recording a statement as made on behalf of respondent no.5, that it will not carry out any demolition work till the adjourned date and leave of the Court would be sought before proceeding with the demolition work. The order has remained in operation till date.

4. The learned Counsel for the petitioners has made extensive submissions. It is submitted that respondent no.5 indisputedly has exceeded permitted height of the building which ought to have been 134.85 meters which is ground plus 43 floors for Wing 3 and 136.45 meters which is ground plus 45 floors for Wings 4, 5 and 6, by putting up construction of the height of 139.90 meters. The contention of the petitioners is that once by the modified commencement certificate dated 20 April 2016, height of the building was approved to 134.85 meters (ground plus 43 floors) for Wing 3 and 136.45 meters (ground plus 45 floors) for Wings 4, 5 and 6, the MMRDA could not have granted part occupation certificate dated 4 June 2017. This particularly, when it was to the knowledge of the MMRDA that the height of the building had exceeded the permissible limits. According to petitioners, this clearly violated the Development Control Regulations (for short 'DC Regulations'). The petitioner's contention is that the part occupation certificate was obtained

so that respondent no.5 could wriggle out of the obligations under the provisions of Maharashtra Real Estate Regulatory Authority (for short '**Maha RERA**'). The learned Counsel for the petitioners submits that in view of this illegality of respondent no.5 possession of the flats should not have been offered by respondent no.5 from November,2017. Thus, according to the petitioners, there is gross illegality on the part of MMRDA and respondent no.5 which has not only caused serious prejudice to the petitioners but there is glaring violation of the municipal laws and the rules.

5. The petitioners have also contended, as set out in paragraph 32 of the petition that, there are number of deviations by respondent no.5 from the terms as contained in the agreements to the extent of non fulfillment of the facilities which were promised but not complied. This grievances pertain to elevator, car drop-offs, pipelines, mosquito menace, garbage segregation, swimming pools, gymnasium, party halls, cricket ground, gas connections etc.

6. Respondent no.5 has appeared and has placed on record its affidavit in opposition. The case of respondent no.5 is of denial of all the allegations which are made by the petitioners. Mr.Dwarkadas, learned Senior Counsel for respondent no.5 has argued pointing out the documents pertaining to the height of the building. The learned Senior Counsel for

respondent no.5 has referred to the revised height NOC which was granted by Respondent no.4-Airport Authority of India (for short 'the **Airports Authority**'), by a communication dated 30 October 2013 addressed to MMRDA whereby the Airports Authority permitted construction upto 139.90 meters Above Mean Sea Level (AMSL) The Airports Authority of India in the said communication in paragraphs 2, 3, 10, 11, 12 and 13 has recorded as under :-

“1.

2. This office has no objection to the construction of the proposed building / structure / chimney by M/s. Mumbai Metropolitan Region Development Authority (MMRDA), Mumbai, here in after referred to as the applicant(s) at location Plot No.2, Wadala, Mumbai, (19 02 28.107N – 72 52 44.393E, 19 02 26.176N – 72 52 39.035E, 19 02 09.789N – 72 52 47.547E, 19 02 10.835N – 72 52 40.739E) to height 136.946 Mtrs ABOVE GROUND LEVEL, so that the top of the proposed structure when erected shall not exceed 2.954 Mtrs. (Site Elevation) + 136.946 Mtrs (Height of the structure) i.e. 139.90 Mtrs ABOVE MEAN SEA LEVEL.

3. This no objection certificate is being issued on the express understanding that the site-elevation reduced level (height above mean sea level) viz. 2.945 M, relative location of the proposed area Bldg / Structure & its distance and Bearings from the ARP / Runway ends, as tendered by the applicant are correct, if however, at any stage it is established that the said data as tendered by the said applicant is actually different from the one tendered & which could adversely affect aircraft operations, the structure or part (s) thereof in respect of which this 'NOC' is being issued will have to be demolished at his own cost as may be directed by the Airports Authority of India. The applicant(s) is/are therefore advised in his/their own interest to verify the elevation and other data furnished for the site, before embarking on the proposed construction.

.....

10. This NOC issued as per CHQ letter no. AAI/20012/149/2012-ARI (NOC) dated 03.10.2013.

11. “NOC FOR HEIGHT CLEARANCE ABOVE MEAN SEA LEVEL (AMSL) ONLY” - This NOC is issued as per the approval of the The Appellate Committee of Ministry of Civil Aviation in its meeting held on 23rd & 25th July, 2013.

12. “The building height has been cleared through Aeronautical Study and therefore the building shall not give shielding benefit to any other structures”.

13. No further review /appeal/Aeronautical Study for higher height than mentioned above will be considered”.

Note : This Supersede NOC issued Vide letter No. BT-1/NOCC/CS/MUM/10/ 761/ 27-80 dated 21/10/2011.

This certificate is issued with the approval of Competent Authority.

136.946 M AGL (One Three Six Deci Nine Four Six)

2.954 M RL (Two Deci Nine Five Four)

139.90 M AMSL (One Three Nine Deci Nine Zero).”

(emphasis supplied)

7. On behalf of Respondent no.5 it is contended that accordingly on 6 November 2013 the MMRDA issued a revised commencement certificate in extension of the first commencement certificate which was for construction upto 134.85 meters (ground plus 43 upper floors) for wing no.3 and 136.45 meters (ground plus 45 upper floors) for Wing Nos.4, 5 and 6. It is contended that Respondent no.5, was however, aggrieved by the height restrictions and on 31 July 2014 approached the 'appellate committee for height clearance', challenging the revised height NOC dated 30 October 2013 as fixed by the Airport

Authority. However, in the meantime, respondent no.5 continued construction as per the sanctioned height as per the revised height NOC dated 30 October 2013, which permitted height of 139.90 m. AMSL. It is pointed out that Respondent no.5 by its letter dated 24 April 2015 addressed to the authorities had reported that the building has already reached the height of 139.90 m. AMSL. It is pointed out that in the meeting of the 'appellate committee for height clearance' held on 24 June 2015 it was decided that as per fresh Aeronautical Study, the maximum permissible heights for Wing Nos.3 and 4 was 136.16 m. AMSL and 133.90 m. AMSL respectively and in regard to the maximum permissible heights for Wing Nos.5 and 6 it was 131.15 meters AMSL and 130.14 meters AMSL respectively. These heights as fixed were lower than the height of 139.90 m. AMSL which was earlier permitted under the NOC of the Airports Authority dated 30 October 2013. The appellate committee decided that the Mumbai International Airport Limited which is operating the Mumbai International Airport would carry out physical verification of the present status of construction of the towers and the matter was to be referred to the Law Department of Airport Authority of India for its legal opinion.

8. The learned Senior Counsel for respondent no.5 has also pointed out that as the civil aviation authorities had not released the necessary height clearances, respondent no.5 by its letter dated 14 September 2015('Exhibit B' page 115 of the petition) informed the flat purchasers inter alia of the decision to limit the height of the said wings to 45 livable floors only.

9. The appellate committee for height clearance in its meeting dated 6 November 2015 decided that as per fresh Aeronautical Study, the maximum permissible heights for Wings 3 and 4 was 136.16 m AMSL and 133.90 m AMSL respectively and for wings 5 and 6 it was 131.15 m. AMSL and 130.14 m. AMSL respectively. It was noticed on physical verification the permissible height was less than the heights already constructed and therefore, the revised height NOC dated 30 October 2013 stood cancelled. In pursuance of the meeting of the appellate committee for height restrictions held on 6 November 2015, the Airports Authority by three separate communications dated 15 December 2015 informed the MMRDA and respondent no.5 of the revised maximum permissible heights in respect of the said wings. However, as on the said date respondent no.5 had constructed 43 floors of Wing no.3 and 45

floors of Wing nos.4, 5 and 6 which were exceeding the newly fixed height. It is pointed out that respondent no.5 also filed Writ Petition No.1223 of 2016 challenging the decision of the appellate committee to impose revised maximum permissible height. The said writ petition was withdrawn with liberty to file a fresh petition in view of the fact that a fresh Aeronautical Study was agreed to be conducted by Ministry of Civil Aviation.

10. The learned Senior Counsel for respondent no.5 has also pointed out that in pursuance of the decision of the appellate committee on height restriction, the MMRDA on 20 April 2016 issued a third Commencement Certificate restricting the height of the building of Wing 3 to 134.85 meters (Ground plus 43 upper floors) and 136.45 meters (Ground plus 45 upper floors) for Wing Nos.4, 5 and 6. Further an amended Commencement Certificate dated 2 March 2017 modifying the said height was issued. It is pointed out that as the construction was completed and as the flat purchasers were awaiting possession, respondent no.5 approached the MMRDA for grant of a part occupation certificate. A part occupation certificate was granted by MMRDA to respondent no.5 on 8 June 2017 for ground plus 40 floors of the said

wings. Pursuant thereto respondent no.5 offered the possession of the flats to the flat purchasers. The possession was also taken over by the flat purchasers. It is submitted that in all there are more than 700 flat purchasers. The learned Senior Counsel has pointed out that the twenty four petitioners, are the only flat purchasers, who feel aggrieved against respondent no.5. It is submitted that Petitioner no.1 also had filed a complaint on 26 October 2017 against respondent no.5 before MahaRERA seeking registration of the entirety of Wing no.5 including the first 40 floors, under the Real Estate (Regulation & Development) Act, 2016 (for short “**RERA Act**”) and sought compensation for alleged delay in handing over the possession. On 18 December 2017 MahaRERA passed an order rejecting the complaint of respondent no.1 on the basis that a part occupation certificate was already granted in favour of respondent no.5 upto 40 floors on or before 31 July 2017 and therefore there was no need to register the entire wing no.5 under the RERA Act. The MahaRERA held that since the flat of petitioner no.1 did not come under the registered phase of the project, MahaRERA did not have jurisdiction to entertain the complaint. The learned Senior Counsel for respondent no.5 submits that these facts are suppressed in the writ petition.

11. On behalf of respondent no.5, it is submitted that to bring the height of the building in consonance with the height as prescribed under the revised commencement certificate dated 26 April 2017, respondent no.5 undertook demolition of the upper floors, which was undertaken taking all precautions. The demolition work as completed consisted of removal of units/slabs on floors 44 and 45 in Wing 5 and 6 and units/slabs on 44 and 43 of Wing no.3. Further the core of the building which was constructed as per the NOC height clearance and commencement certificate issued by respondent no.4 and MMRDA respectively, had not been removed. Respondent no.5 contended that the petitioners were ill advised on Technical and Regulatory Appraisal of Structural Demolition works as undertaken of the said wings, on a report as issued by Mr.Rafique Momin of Srujan Interiors & Architects Pvt. Ltd. to the Advocate for the petitioners. Mr.Rafique Momin suggested that analysis of the cracks and the tremors at site suggests that a review needs to be urgently undertaken as to the methodology of demolition and the movement/disposal of the demolished structural components. It is submitted that this report is incorrect and as a matter of fact all precautions were taken and there is no damage whatsoever to any of the wings. Respondent no.5 also approached Sterling Engineering

Consultancy Services Pvt.Ltd. who has issued a structural integrity certificate wherein it is certified that the works carried out on top of the said wings was done in accordance with the applicable construction safety norms and the works had no adverse impact on the structural strength and integrity of the said Wings.

12. The learned Senior Counsel for respondent no.5 has submitted that the entire case as sought to be made out on behalf of the petitioners is without any basis. It is submitted that there was no impediment for the MMRDA to grant part occupation certificate in view of the clear provisions of Regulation 6(8) of the Development Control Regulations, which permits granting of a part occupancy certificate, before completion of the entire work. The learned Senior Counsel for respondent no.5 has also relied on the provisions of Section 44 of the Maharashtra Regional and Town Planning Act, 1966 which provides for application for permission for development. It is submitted that proviso to sub-section (1) of this provision contemplates that no permission shall be necessary for demolition of an existing structure, erection or building or part thereof, in compliance of a statutory notice from a Planning Authority. It is submitted that the demolition of the upper floors was

required to be undertaken to bring the height of the building, in consonance with the height as approved and thus, when a lawful compliance was being undertaken and achieved by respondent no.5, the petitioners can have no complaints. It is submitted that none of the provisions of law supports the petitioners' contention.

13. The learned Senior Counsel for respondent no.5 has also serious objection to the locus of the petitioners to maintain this petition. It is submitted that the petitioners are purchasers of flats in the project in question. They have taken possession of the flat and having done so the petitioners surely cannot maintain the prayers that occupation certificate itself should be revoked. It is submitted that the petitioners are only 24 in number, there are more than 700 flat purchasers who do not have grievance. It is submitted that such a prayer which affects large number of flat purchasers certainly cannot be granted at the behest of these handful petitioners. It is submitted that looking at the tenor of the petition, the intention of the petitioners to approach this Court is not of bonafide litigants, but on considerations which are extraneous. The learned Counsel therefore submits that the petition shall be dismissed on this count also.

14. The learned Counsel for MMRDA has justified the commencement certificates issued from time to time qua the height restrictions. It is not disputed that the Airports Authority by a communication dated 30 October 2013 had in fact permitted height of 139.90 meters AMSL and that subsequently the same was revised under the orders which are passed by the appellate committee for height restriction. It is submitted that there is no illegality on the part of respondent no.5 in reducing the height of the building to make it commensurate with the revised building permission. It is submitted that the petitioners therefore can have no grievance when the demolition work is carried out in a lawful manner and without damaging the superstructure of the building.

15. We have heard the learned Counsel for the parties. We have perused the record. At the threshold we are somewhat astonished to note the nature of the prayers as made by the petitioners namely that the part occupation certificate granted, be revoked, when the petitioners, admittedly are purchasers of flats in the building in question as also they have taken possession of the flats and some of them are already residing

in their respective flats. If this be the factual position as to how the petitioners accept the consequence of the prayers as made by them, itself is surprising. The second issue of concern is that these limited number of petitioners do not say anything about the prejudice which would be caused to several other flat purchasers who are stated to be more than 700 in number and the legal rights vested in such large number of flat purchasers. The part occupancy certificate, if revoked, would undoubtedly cause a serious prejudice to this large number of flat purchasers who are not parties to the present petition. When we exercise the discretionary jurisdiction under Article 226 of the Constitution such issues assume relevance and a serious judicial concern. We find ourselves uneasy and not confident, much less inspiring about the locus of these petitioners to invoke the writ jurisdiction of this Court.

16. Be that as it may, as the petitioners alleged violation of municipal laws and rules, and we have heard the learned Counsel for the parties on this issue, for completeness we delve on the merits of the matter.

17. It is not in dispute that the Airport Authority had granted a no objection (NOC) to the MMRDA for height clearance permitting construction upto 139.90 meters AMSL at the location of respondent

no.5's project, by its communication dated 30 October 2013 as extracted by us above. Respondent no.5 however approached the “Appellate Committee for height clearance” of the Airports Authority being aggrieved by the height of the construction being fixed at 139.19 meters AMSL and prayed for a higher height to be fixed. By a decision dated 6 November 2015 the height of the building was decided by the appellate committee to be at 134.85 meters (ground plus 43 upper floors) for Wing no.3 and 136.45 meters (Ground plus 45 upper floors) for Wing nos.4, 5 and 6 as contained in modified commencement certificate dated 20 April 2016 and further modified in the commencement certificate 26 April 2018 to 134.36 meters (Ground plus 41 upper floors) for Wing no.3 and 136.90 meters (Ground plus 43 upper floors) for wing nos.4, 5 and 6.

18. It is not in dispute that earlier by virtue of the NOC dated 30 October 2013 as granted by the Airport Authority to MMRDA construction of a higher height was permitted that is construction upto 139.90 meters, which parameter had remained in operation till 15 December 2015 when the Airports Authority communicated the revised heights to MMRDA as a consequence of the decision of the appellate committee taken in the meeting dated 6 November 2015. In the meantime, on an assumption that NOC dated 30 October 2013 would remain in operation, respondent

no.5 had raised construction upto 139.90 meters. The result of the proceeding before the appellate authority was that the contention of respondent no.5 for a increase in height (above 139.90 meters) was not granted, but the height of 139.90 meters stood reduced by some margin.

19. In the meantime, in view of the completion of the construction of the building, respondent no.5 approached the MMRDA seeking part occupancy certificate so that the possession of the ready flats could be handed over to the flat purchasers who were awaiting possession of their units. The MMRDA on 8 June 2017 granted part occupation certificate exercising power under sub-regulation (8) of regulation 6 of the Development Control Regulations which reads thus:-

Regulation 6:-

Sub-regulation (8) : Part occupancy certificate :- When requested by the holder of the development permission, the Commissioner may issue a part occupancy certificate for a building or part thereof, before completion of the entire work, as per the development permission, provided sufficient precautionary measures are taken by the holder to ensure public safety and health. The occupancy certificate shall be subject to the owner's indemnifying the Commissioner in the form in Appendix XXIII. (emphasis supplied)

20. A plain reading of the above provision makes it clear that a part occupancy certificate of the building or part thereof before completion of the entire work, as per the development permission, can be granted subject to precautionary measures which may be provided by the authorities. By exercising these statutory powers, part occupancy certificate was granted in favour of respondent no.5. Accordingly acting on the occupancy certificate, possession of the tenements was also handed over to the flat purchasers since November 2017. Considering the aforesaid clear provision as contained in the Development Control Regulations, we do not see any substance in the contention as urged on behalf of the petitioner that the MMRDA in any manner was prohibited from granting part occupancy certificate and the issuance of part occupancy certificate was illegal. The contention of the petitioner that till the height of the building was brought to its permissible level, part occupancy certificate ought not to have been granted, also cannot be accepted, in view of the above provisions of the Development Control Regulations.

21. Now as regards the issue of demolition of upper floors, we may observe that the work of removal of the upper floors namely removal of the constructed tenements of the specified upper floors, was required

to be undertaken so as to comply with the building norms and the building height as permitted by the planning authority/MMRDA. The fact remains that as on date the majority of the demolition work is completed, except that the core of the building i.e. protective wall on the terrace is required to be restored alongwith certain other requirements on the terrace be formed. The learned Counsel for the petitioners was unable to point out any material which would show that removal of the upper floors in any manner affected the superstructure of the building. The report of the structural engineer as submitted on behalf of the petitioners also would not inspire confidence of any material illegality or defects, in removal/demolition of the construction on the upper floors by respondent no.5. Moreover, respondent no.5 has pointed out that Sterling Engineering Consultancy Services Pvt.Ltd. as appointed by respondent no.5 has issued a Structural Integrity Certificate certifying that the works being carried out on the top of the said Wings was carried out in accordance with the applicable construction safety norms and the works had no adverse impact on the structural strength and integrity of the said wings.

22. When it is a case of demolition of existing structure even when a statutory notice is issued, the proviso to sub-section (1) of Section

44 of the MRTP Act would become relevant which reads thus:-

“44. [(1)] Except as otherwise provided by rules made in this behalf, any person not being Central or State Government or local authority intending to carry out any development on any land shall make an application in writing to the Planning Authority for permission in such form and containing such particulars and accompanied by such documents, as may be prescribed:

[Provided that, save as otherwise provided in any law, or any rules, regulations or by-laws made under any law for the time being in force, no such permission shall be necessary for demolition of an existing structure, erection or building or part thereof, in compliance of a statutory notice from a Planning Authority or a Housing and Area Development Board, the Bombay Repairs and Reconstruction Board or the Bombay Slum Improvement Board established under the Maharashtra Housing and Area Development Act, 1976.]

..”

(emphasis supplied)

23. It is therefore clearly seen that no permission is necessary for demolition of an existing structure or building or part thereof which would be undertaken to comply any statutory notice issued by the planning authority save as otherwise if prescribed in any law or any rules, regulations or by-laws made under any law for the time being in force. The petitioners are not in a position to point out any embargo in law which would prohibit respondent no.5 from undertaking removal or demolishing of the upper floors so as to comply with the requirement of the height of the building in the approval and sanction granted by the concerned authorities. Thus, even on this count the contention of the

petitioners cannot be accepted.

24. However, considering the concern of the petitioners in regard to safety of the lower floors/superstructure of the building, we direct the MMRDA to supervise, the further work to be undertaken by respondent no.5 in regard to all precautions and safety norms to be observed in removal of the remaining part of the upper floors and restoration of terrace as per the requirements and the approved plans. Respondent no.5 shall inform the Competent Authority of the MMRDA before commencing the remaining work, so that MMRDA can supervise the said work by deputing appropriate technical persons. We also accept the statement as made by the learned Senior Counsel for respondent no.5 that respondent no.5 shall be taking all care and precaution in completing and restoring the balance work on the upper floors.

25. In the above circumstances, except for the above directions, we see no merit in the petition. It is accordingly rejected. No costs.

26. We clarify that we have not gone into any issues which are touching the agreements of the petitioners with respondent no.5, and all

contentions in that regard are expressly kept open.

27. In view of disposal of the Writ Petition, pending Chamber summons No.238 of 2018 and pending Notice of Motion (lodg) No.542 of 2018 do not survive. They are accordingly disposed of.

(G. S. KULKARNI, J.)

(ACTING CHIEF JUSTICE)