

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

WRIT PETITION NO.3075 OF 2015

Pameshkumar Nandnlal Sahu ...Petitioner

Versus

High Power Committee and Others ...Respondents

**WITH
WRIT PETITION NO.528 OF 2016**

Surendra Budhiram Patel (Verma) ...Petitioner

Versus

High Power Committee and Others ...Respondents

**WITH
WRIT PETITION NO.2231 OF 2016**

Phulchand Jaitul Nishad ...Petitioner

Versus

High Power Committee and Others ...Respondents

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Mr. R.V. Govilkar and Ms Shobha Khan for the Petitioner.
Mr. Arvind Aswani i/b. Mr. J.G. Reddy for the Respondent Nos.1 and 2.
Mrs. Jyoti Chavan, AGP for the Respondent -State.
Ms Asha Nair I/b. Diamondwala and Co. for the Respondent No.5.

**CORAM : RANJIT MORE AND
SMT. ANUJA PRABHUDESSAI, JJ.**

DATED : 13th JUNE, 2018.

Judgment (Per Anuja Prabhudessai, J.):-

1. Rule. With consent, rule made returnable forthwith.
2. The principal challenge in these petitions is to clause 4(5) of Government Resolution dated 11th July, 2001, which reads thus:-

“No Separate /independent Identity Card will be issued to the slum dwellers who are residing in loft or storey, mezzanine floor within the hut.”
3. The MCGM, (the Respondent No.3) is the owner of the land in question i.e. Gopal Nagar, Pandurang Budhkar Marg, Worli, which was proposed to be developed under SRA scheme through the Developer i.e. Respondent No.5 herein. The Petitioners were issued notices to show cause as to why the structures should not be demolished for effecting redevelopment scheme under DCR 33(10). The Petitioners claimed that they are entitled for permanent alternate accommodation. The claim of the Petitioner was rejected by SRA and the Appeal filed against the order was dismissed by the High Power Committee mainly on the ground that the occupants of the ground floor slum structures have been held eligible and provided permanent rehabilitation tenement under the Scheme. The High Power Committee has held that the Petitioners being occupants of lofts are

not entitled for protection in view of clause 4(5) of Government Resolution dated 11th July, 2001. In the light of above, the Petitioners have invoked the jurisdiction of this court under Article 226 of the Constitution of India to challenge the vires of clause 4(5) of the G.R. dated 11th July, 2001.

4. Shri Govilkar, the learned counsel for the Petitioners contends that the Petitioners and several other slum dwellers have been occupying lofts/ upper floors of the dwelling structures since much prior to cut off date. He contends that in view of the said clause, the petitioners and similarly placed slum dwellers are not eligible to obtain photo pass while there is no such restriction on the slum dwellers who are occupying the ground floor dwelling structures. He contends that said clause is arbitrary and discriminatory in as much as it discriminates occupiers on ground floor vis-e-vis upper floors and thus violates guarantee of equality enshrined under Article 14 of the Constitution of India.

5. Ms. Jyoti Chavan, the learned AGP contends that the decision not to issue photo pass to the slum dwellers, who are occupying loft /upper floor, mezzanine floor of the hutment is a policy

decision of the Government. The said decision, which prescribes the eligibility criteria, is neither arbitrary nor unreasonable and hence cannot be subjected to judicial review.

6. Since the Petitioners have challenged the legality of the Government decision, it would be appropriate to refer to the decision in *Ekta Shakti Foundation vs Govt. Of NCT Of Delhi AIR 2006 SC 2609* wherein the Apex Court has observed thus:-

"While exercising the power of judicial review of administrative action, the Court is not the appellate authority and the Constitution does not permit the Court to direct or advise the executive in matter of policy or to sermonize any matter which under the Constitution lies within the sphere of the Legislature or the executive, provided these authorities do not transgress their constitutional limits or statutory power. (See Ashif Hamid v. State of J. & K. (AIR 1989 SC 1899), [Shri Sitaram Sugar Co. v. Union of India](#) (AIR 1990 SC 1277). The scope of judicial enquiry is confined to the question whether the decision taken by the Government is against any statutory provisions or is violative of the fundamental rights of the citizens or is opposed to the provisions of the Constitution. Thus, the position is that even if the decision taken by the Government does not appear to be agreeable to the Court it cannot interfere. The correctness of the reasons which prompted the Government in decision making, taking one course of action instead of another is not a matter of concern in judicial review and the Court is not the appropriate forum for such investigation.

...

12. The policy decision must be left to the Government as it

alone can adopt which policy should be adopted after considering all the points from different angles. In matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental right is not shown Courts will have no occasion to interfere and the Court will not and should not substitute its own judgment for the judgment of the executive in such matters. In assessing the propriety of a decision of the Government the Court cannot interfere even if a second view is possible from that of the Government.

13. The Court should constantly remind itself of what the Supreme Court of the United States said in *Metropolis Theater Company v. City of Chicago* (1912) 57 L Ed 730. "The problems of Government are practical ones and may justify, if they do not require, rough accommodations, illogical it may be, and unscientific. But even such criticism should not be hastily expressed. What is the best is not always discernible, the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review. [See: [State of Orissa and others v. Gopinath Dash and Others](#) (2005) 13 SCC 495]."

7. In the case of ***Brij Mohanlal Vs. Union of India & ors.*** - (2012) 6 SCC 502, the Supreme Court has referred to certain tests as to interference in policy decisions of the State, which have been summed up as under:-

"100. Certain tests, whether this Court should or not interfere in the policy decisions of the State, as stated in other judgments, can be summed up as:

(I) If the policy fails to satisfy the test of reasonableness, it would be unconstitutional. (II) The change in policy must be made fairly and should not give the impression that it was so done arbitrarily on any ulterior intention.

(III) The policy can be faulted on grounds of mala fides, unreasonableness, arbitrariness or unfairness, etc.

(IV) If the policy is found to be against any statute or the Constitution or runs counter to the philosophy behind these provisions.

(V) It is de hors the provisions of the Act or legislations.

(VI) If the delegate has acted beyond its power of delegation."

8. Applying the afore stated tests laid down by the Supreme Court, we propose to decide whether clause 4(5) of Government Resolution dated 11th July, 2001 is opposed to the constitutional mandate or the provisions of the Slums Act.

9. The petitions proceed on the basis that the decision of the government not to issue Separate /independent Identity Card to the slum dwellers who are residing in loft, mezzanine or upper floor of the dwelling structure is discriminatory, ultra vires and contrary to the statutory provisions and /or rights conferred under the Constitution of India. It will therefore be advantageous to consider the object and the relevant provisions of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 ('the Slums Act') to appreciate the submissions advanced before us.

10. It is well known that rampant encroachment and mushrooming of slums on public and private land gave rise to

innumerable problems relating to sanitation, health, hygiene, safety, etc. of the slum dwellers as well as of public at large. A comprehensive legislation had to be enacted to address these concerns and to improve inhuman living conditions of the slum dwellers. Hence, the Slums Act came to be enacted. As the preamble states, this Act was enacted 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. The Act has been extensively amended from time to time to achieve the object. Slum rehabilitation scheme was introduced and Slum Rehabilitation Authority (SRA) has been established to facilitate rehabilitation. Special provisions have also been made in DC Regulations for redevelopment of slums. In short, several steps have been taken to provide basic necessities of life to the marginalized and weaker section of the society, classified as slum dwellers.

11. Now coming to some of the relevant provisions, in terms of Section 2(c-b) of the Slums Act "eligible slum dweller" means a slum dweller who fulfills such criteria of eligibility as may be prescribed, from time to time, and is declared so by the Competent Authority. The term 'prescribed' as defined under Section 2 (g) means prescribed by

Rules made under the Act whereas 'Competent Authority' means a person or body appointed to be the Competent Authority under Section 3 of the Slums Act.

12. Chapter 1 B, which is relevant to decide the issue in these petitions, was incorporated w.e.f 18th May, 2001 with an object of identifying the actual occupiers as on 1st January, 2001. Sections 3(X), 3(Y) and 3(Z), 3 (Z-1) and 3 (Z-2) which have been inserted in this Chapter, provide for issuance of Photo-Pass to the protected occupiers, maintenance of registers and also for protection, relocation and rehabilitation of protected occupiers of dwelling structures in existence on or prior to 1st January, 1995. Powers have also been conferred on the competent authority to demolish unauthorised or illegal dwelling structures erected after 1st January, 1995. By subsequent amendment of the year 2014, Section 3(Y) and Section 3(Z-1) of the Act have been amended and the cut off date of 1st January, 1995 has been substituted to 1st January, 2000. A penal provision has also been introduced to punish a person who constructs an illegal structure and abets such construction or fails to take action against such illegal construction. Thus, apart from rehabilitation, the Act also aims to check mushrooming of new slums.

13. Now coming to the definitions inserted under this chapter, the term "dwelling structure" as defined under Clause (a) of Section 3(X) means a structure used as a dwelling or otherwise and includes an outhouse, shed, hut or other enclosure or structure, whether of bricks, masonry, wood, metal, any other material whatsoever.

14. Clause (b) of Section 3(X) defines "photo-pass" to mean an identity card-cum-certificate issued by the Government in the prescribed format under Section 3(Y) and shall include such other document or documents declared by Government by order issued in this behalf, to be equivalent of photo-pass for the purposes of this chapter.

15. Clause (c) of Section 3(X) defines "protected occupier" to mean an occupier of a dwelling structure, who holds a photo-pass. Sub Section 1 of Section 3(Y) provides that the Government or any officer generally or specifically appraised in this behalf shall, after verifying certain documents and records, as may be prescribed issue a photo-pass for the purpose of this Act, in the prescribed format to the actual occupier of a dwelling structure, in existence or prior to 1st January, 2000.

16. Sub-Section 1 of Section 3(Z) provides that notwithstanding anything contained in this Act on and after the commencement of Maharashtra Slums Area (Improvement, clearance, Amendment Act, 2014 no protected occupier shall save as provided under Sub Section (2) be evicted from his dwelling structure.

17. Sub-Section 2 of Section 3(Z) provides that when, in the opinion of the State Government, it is necessary, in the larger public interest to evict the protected occupiers from the dwelling structures occupied by them, the State Government may, subject to the condition of relocating and rehabilitating them in accordance with the scheme or Schemes prepared by the State Government in this behalf, evict them from such dwelling structures. The proviso to the Section provides that, any of the protected occupiers does not comply with the terms and conditions of the scheme for relocation and rehabilitation, such occupier shall forfeit the claim for rehabilitation and relocation and shall become liable for eviction without being rehabilitated and relocated.

18. From a plain reading of these provisions, it is clear that in order to be an "eligible slum dweller" the slum dweller has to fulfill

such criteria as prescribed by rules made under the Act and he has to be declared to be eligible by the Competent Authority. The Act also makes provision for issuance of photo-pass and maintenance of register. The photo-pass has to be issued in a prescribed format to the actual occupier of a dwelling structure in existence on or prior to 1st January, 2000 and the same serves as an identity card-cum-certificate. An occupier of a dwelling structure, who holds a photo-pass is termed as a "protected occupier" and he cannot be evicted from his dwelling structure unless it is necessary in the larger public interest. Even in such case, eviction is subject to condition of relocating and rehabilitating the protected occupier in accordance with the scheme or schemes prepared by the State Government in this behalf.

19. Now coming to the Government Resolution dated 11th July, 2001, it is seen that by this resolution the Government has revised its policy to issue photo-pass to the eligible slum dwellers whose huts were existing on or before 1st January, 1995. The preface of this resolution states that as per the Resolution under reference the decision has been taken to issue photo-pass to the slum dwellers after making survey and census of the slum dwellers. It is further stated that the Government has taken decision to provide basic amenities to

eligible slum dwellers at the place of city or town of which population is 50,000/- or more as per the census of the year-1995 and the area of Municipal Corporation /Municipal Council for which Maharashtra Slum Act, 1971 has been made applicable. Paragraph 2 of the preface indicates that the objective of the Government Resolution is that the photo-pass would serve as a proof of residence in the hut existing prior to 1st January, 1995 and further to protect the passholder from eviction and provide them basic civic amenities.

20. Clause 2 of the Resolution refers to the purpose or scope for applicability of the scheme /policy, whereas Clause 3 prescribes eligibility conditions for getting the benefit of the scheme. Clause 4 lays down conditions for issuance of photo-pass /identity card. Clause 4(5) of the said Government Resolution with which we are concerned in this petition stipulates that no separate /independent identity card will be issued to the slum-dwellers, who are residing in loft/ upper floor, mezzanine floor of the hutment.

21. In terms of this clause, the occupier of a loft, mezzanine or upper floor is not entitled for a photo-pass and consequently he is not a protected occupier. In our considered view, this clause is not

inconsistent with the provisions under the Act. It is to be noted that under Section 3(Y) the photo-pass is to be issued to the actual occupier of the dwelling structure. The term "Occupier" is defined in Section 2(e), which is an inclusive section. This section stipulates that a person, who is eligible to pay to the owner damages for the use and occupation of any land or building. In terms of this section, a trespasser would also be an occupier within the meaning of this section.

22. Thus there can be no dispute that a slum dweller, who is in occupation of any encroached land or dwelling structure would be an occupier within the meaning of section 2(e) of the Slums Act. However, the question, which needs to be considered, is whether the person occupying lofts, mezzanine, or upper floors of the dwelling house can be termed as an occupier within the meaning of section 2(e) of the slum Act.

23. In this regard it is pertinent to note that one of the objects of the Slums Act is to afford protection to the slum dwellers, who do not have right, title or interest in the land or the dwelling structure. In other words, the Act protects the slum dwellers, who have already

encroached upon the land and are in actual occupation of the dwelling structures. But when such slum dweller erects or allows to erect a loft, mezzanine or upper floor above his dwelling structure, and /or allows his family members or any other person to occupy such extension i.e. loft/mezzanine or upper floor, such extension cannot be considered as an independent dwelling structure and the occupier of such extension cannot be termed as an independent encroacher and/or occupier within the meaning of Section 2(e) of the Slums Act. The Government Resolution dated 11th July, 2001 only clarifies this position when it states that no separate photo-pass should be issued to the person residing in the loft, mezzanine or upper floor of the dwelling structure. It may also be emphasized that the Slums Act does not encourage or perpetuate illegality, but seeks to protect and rehabilitate the slum dwellers, as also prevent growth of new slums. The Government Resolution dated 11th July, 2001, and the impugned clause in particular is in consonance with the said object.

24. Another aspect, which needs to be taken note of is that despite the legislation and schemes and extension of cutoff date from time to time, the State has not been able to achieve slum free status. In fact, laxity, inefficiency and inaction on the part of the authorities

and total administrative failure has led to fresh encroachments on public as well as private lands and has resulted in horizontal expansion of new slums. It is also a known fact that in addition to such new encroachments the occupiers of existing dwelling structures have been resorting to illegal vertical extension by erecting lofts, mezzanine and upper floors above the existing dwelling structures. Such lofts, mezzanine and upper floors are occupied by the family members of the slum dwellers or illegally let out or sold to the other persons for consideration. This has resulted in vertical expansion of slums. As a consequence of such horizontal as well as vertical expansion of slums, the aim of the State to attain slum free status has remained a distant dream.

25. Such illegal extension can pose danger to the life and property of occupants and is also detrimental to public health, hygiene, safety and convenience. Taking note of this situation, the State Government has empowered the authorities under the Act to take expeditious action against unauthorised and illegal construction and occupants thereof. The State Government has from time to time, imposed height restrictions to avoid vertical expansion of slums. By Government Resolution dated 4th January 1992, the State had

permitted extension of the height of the slum upto 14 ft. This Resolution was withdrawn vide Government Resolution dated 5th December 1995. Subsequently, by Resolution dated 5th June, 2002 the Government has once again restricted the height of the dwelling structure to 14ft. The said Government Resolution clarifies that if the construction is beyond 14 ft, the extra area should not be given on rent to any person. It also clarifies that even if extra floor is constructed, the photo-pass will be issued only as if there is only one structure. It further states that permission, if any required to be given, must be given only to eligible slum dwellers to carry on the construction upto 14 ft.

26. It is thus, clear that the endeavour of the State is to ensure that the slum-dwellers who had already encroached upon the land do not illegally increase the height of the dwelling structure and/or give the same on rent and thus discourage illegal extension. Said Government Resolution also states that even if, there is a loft in the dwelling structure having height of 14 ft the said dwelling structure would be considered as single unit and the occupier of the said structure would be entitled for only one photo-pass. In our considered view this is also one of the steps to curb vertical expansion of slums.

Thus the impugned clause is not violative, but is in consonance with the object of the Slums Act.

27. The grievance about infringement of right of equality enshrined under Article 14 of the Constitution is also devoid of any merits. In this regard a reference can be made to the decision of the Apex court in *Municipal Corporation of the City of Ahmedabad and Ors. vs. Jan Mohammed Usmanbhai and Anr. 1986 AIR 1205*, wherein the Apex Court has observed that :

“ It is now well-established that while Article 14 forbids class legislation it does not forbid reasonable classification for the purpose of legislation and that in order to pass the test of permissible classification two conditions must be fulfilled, namely (I) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) such differentia must have rational relation to the object sought to be achieved by the statute in question. The classification, may be founded on different basis, namely, geographical, or according to objects of occupations or the like and what is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. There is always a presumption in favour of constitutionality of an enactment and the burden is upon him, who attacks it, to show that there has been a clear violation of the constitutional principles. The courts must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed against problems made manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the legislature is free to recognize degrees of harm and may

confine its restrictions to those cases where the need is deemed to be the clearest, and finally that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common rapport, the history of the times and may assume every state of facts which can be conceived to be existing at the time of legislation.”

28. Similarly, in ***Ekta Shakti Foundation*** (supra), the Apex Court has observed that :-

“Article 14 proceeds on the premise that a citizen has legal and valid right enforceable at law and persons having similar right and persons similarly circumstanced, cannot be denied of the benefit thereof. Such person cannot be discriminated to deny the similar benefit. The rational relationship and legal back up are the foundations to invoke the doctrine of equality in case of persons similarly situated”.

29. In the instant case, the Petitioners have not been able to show that they have vested right and that the said right has been illegally invaded or threatened. Suffice it to say that the existence of a right is a foundation of a petition under Article 226. The Petitioners having failed to prove such right and or invasion thereof cannot allege infringement of Article 14 of the Constitution.

30. The Petitioners have failed to establish that the impugned

clause is arbitrary, discriminatory, unreasonable or violative of statutory or constitutional right. Hence they are not entitled for the reliefs as sought. The petitions are accordingly dismissed. Rule is discharged.

(SMT. ANUJA PRABHUDESSAI, J.)

(RANJIT MORE, J.)

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