

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

WRIT PETITION NO.755 OF 2018

Aliasgar Razaali Zaboli ... Petitioner

Versus

The Chief Officer,
Mumbai Building Repair and
Reconstruction Board

And Others

... Respondents

.....

Mr. Rakesh Agrawal a/w Mr. Chanchal S. Sharma for the Petitioner.

Mr. P.G. Lad for Respondent Nos.1 and 2.

Mr. Ram U. Singh I/b G.S. Mehta & Associates for Respondent No.3.

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CORAM : S.C. GUPTE, J.

DATE : 22 APRIL 2019

ORAL JUDGMENT :

. Heard learned Counsel for the parties.

2 This writ petition challenges an order passed by the Chief Officer, Mumbai Building Repair and Reconstruction Board on 25 January 2018.

3 The controversy in this petition concerns the right of Respondent No.3 herein, who is the legal heir of original tenant/occupant of Room Nos.24, 25 and 26 ("premises"), in a building known as Mohammedi Mansion, situated on the plot of land bearing Final Plot No. 400 of TPS IV, Mahim Division, Junction of Gokhale Road (South) and Baburao Parulekar Marg, Dadar (West), Mumbai-400 028. The property is under development under a scheme under Regulation 33(7) of Development Control Regulations for Greater Mumbai, 1991 ("DCR"). Originally, the

premises were occupied by one Razaali Gulamhussain Zaboli (Razaali) as a tenant. Razaali expired on 1 October 1995, leaving his widow Munawar and his three sons, i.e. the Petitioner and Respondent Nos.3 and 4 herein, as legal heirs, who were also in occupation of the premises with him. Razaali's widow Munawar passed away on or about 31 August 2006. Subsequently, by a deed of conveyance dated 27 December 2009, the erstwhile owner of the building sold and transferred the building to one M/s Sugee Developers. At that time, in the deed of conveyance, the premises was shown in the name of Razaali. After this conveyance, Sugee Developers proposed redevelopment of the building under Regulation 33(7) of DCR. It is the case of the Petitioner that he was in actual physical possession of the premises as on the date when the scheme was proposed along with Respondent No.4, whilst, Respondent No.3 had shifted to Hyderabad. Respondent No.1-Chief Officer, by his communication dated 30 March 2011, certified only the name of Respondent No.4 herein as occupant of the premises. This was challenged by the Petitioner herein by filing a writ petition, being Writ Petition No.967 of 2012. By its order dated 11 June 2012, this Court disposed of that writ petition directing Respondent No.2 to consider the representation of the Petitioner. When the matter was remitted to Respondent No.1 for a fresh consideration, by his letter/order dated 26 December 2012, Respondent No.1 held the Petitioner and Respondent No.4 herein to be jointly entitled to the benefit of the scheme. The Petitioner was, accordingly, allotted transit accommodation for himself and Respondent No.4. When the matter came up for allotment of permanent alternative accommodation, the developer proposed to allot permanent alternative accommodation in the names of the Petitioner and Respondent Nos.3 and 4. This was objected to by the

Petitioner. At that stage, the Petitioner claims to have learnt about an order dated 3 December 2014 passed by Respondent No.1, which was said to be passed behind the back of the Petitioner, wherein Respondent No.1 had wrongly included the name of Respondent No.3 as a joint occupant along with the Petitioner and Respondent No.4. It is the Petitioner's case that when he accepted the joint occupation of the permanent alternative accommodation, he was not aware of the order dated 3 December 2014 passed by Respondent No.1. The Petitioner, after coming to know of the order challenged the same in another writ petition, being Writ Petition No.2106 of 2017. By an order dated 27 November 2017, this Court allowed the writ petition and quashed and set aside the order dated 3 December 2014 and remitted the matter back to Respondent No.1 for a fresh consideration by conducting a proper hearing. The order of Respondent No.1 impugned in the present petition was passed on remand and after hearing all parties. By the impugned order, Respondent No.1 *inter alia* held that the original tenant/occupant of the premises was late Razaali, father of the Petitioner and Respondent Nos.3 and 4. Respondent No.1 held that Respondent No.3 had the requisite documentary proof of his occupancy of the premises. Respondent No.1 held that occupancy right of Respondent No.3 could not be denied merely because at the relevant time he was working in Hyderabad and was not present during certification of occupancy and vacating of the original premises. Respondent No.1, accordingly, held the Petitioner and both Respondent Nos.3 and 4 to be jointly entitled to the occupation of the newly constructed premises in lieu of the premises occupied by them in the old building. Accordingly, Rehab Flat Nos.503, 504 and 505 on the fifth floor in the newly constructed building were directed to be allotted to all the three occupants with

direction to execute agreement of permanent alternative accommodation with all three occupants.

4 In his challenge to the impugned order, learned Counsel for the Petitioner submits that a scheme proposed under Regulation 33(7) of DCR, read with Appendix III of DCR, envisages accommodation only to the actual occupiers of the old building in the redeveloped building. Relying on the decision of this Court in the case of **Sharmila R. Kotian Vs. State of Maharashtra**¹ and the decision of the Supreme Court in the case of **Laxmi Ram Pawar Vs. Sitabai Balu Dhotre**², learned Counsel submits that the word “occupier”, in the context of Regulation 33(7) of DCR, means a person, who was actually dishoused and not a person, who was notionally dishoused.

5 The case of **Sharmila R. Kotian** (supra) involved a controversy concerning Sections 91(1) and 94(5) of the Maharashtra Housing and Area Development Act, 1976. Under Section 91(1), where a building suddenly collapses or becomes uninhabitable due to fire, torrential rain or tempest or otherwise and all or any of the occupiers thereof are dishoused, the Board is required to allot temporary accommodation to such occupiers in any building maintained by the Authority for such purpose at such places and to such extent as it deems fit. Section 94(5) provides, whether or not he accepts temporary accommodation, for the right of every occupier to get such accommodation in the new building free of cost. In the case before the Court, the original tenant of the premises had entered into a leave and licence agreement, under which a licensee was in occupation of the room.

1 AIR 1992 Bombay 53

2 Civil Appeal No.2789/05 dated 1 December 2010

Such occupation existed at the time the natural calamity happened. The Court held that the person in actual physical possession, who was dishoused as a result of the calamity, was meant to be the “occupier” within the meaning of Section 91(1). The Court held that persons dishoused are only those, who were in occupation of the building or a part of the building, which has been affected by the natural calamity referred to in the section; it does not speak of persons notionally dishoused, but of those actually dishoused. In other words, the expression “occupier” referred to in Section 91(1) has been equated with someone affected by the natural calamity and having become houseless. Just as Section 91 would envisage only those persons, who had become houseless, Section 94(5), which speaks of accommodation in the new building, also refers to such persons alone. The Court held that there can be no doubt that the word “occupier” in both Sections has to be understood as meaning only that person who is the victim of a natural calamity. In the particular case, the court held that it was the licensee, who was in occupation of the room when the calamity occurred. It was he who was the victim of that calamity and who was entitled to be housed in transit accommodation and re-accommodated in permanent alternative accommodation in lieu of the old premises. This case has nothing to do with the permanent alternative accommodation to be given to an occupier under a scheme proposed under Regulation 33(7) of DCR. The “occupier” of an old building who is required to be relocated to the newly developed building can only be a person, who was in occupation in a broader sense and who was entitled to occupy the old premises. It cannot imply a person who was in immediate physical occupation of the old building. For example, Clause (1)(a) of Appendix III, which implies 70 percent consent of occupiers, cannot imply

a person, who happens to be in actual possession of the premises. A licensee, who was in actual physical possession of the premises, cannot give his consent as an occupier for a scheme under DCR 33(7). It is only the person, who is originally entitled to occupation of the premises as on the date of the scheme, who is entitled to give such consent. If that is the meaning of the term “occupier” for a consent under Clause (1)(a) of Appendix III, which applies to schemes under DCR 33(7), there is no reason why the term “occupier” should have a different meaning under DCR 33(7) when it comes to allotment of permanent alternative accommodation under it.

6 In the present case, Respondent No.1 has come to a categorical conclusion that Respondent No.3 herein has adequate documentary proof to support his case of occupation of the premises; on the basis of these documents, Respondent No.3 is entitled to be declared as co-occupant of the premises. If it is the Petitioner's case that the original right, which Respondent No.3 admittedly had to the premises, has been permanently given up by him by permanently shifting to Hyderabad, it is for him to have such case adjudicated before a competent forum. The officer determining eligibility of occupants under Regulation 33(7) of DCR read with Appendix III is not empowered to decide such controversy.

7 The Supreme Court's decision in the case of **Laxmi Ram Pawar** (supra) does not take the Petitioner's case any further. In that case, which was under the Slum Act, the Court had held that even a trespasser would be included in the definition of “occupier” under Section 2(e)(v) of the Slum Act. It cannot possibly be suggested that word “occupier” used in

Appendix III read with Regulation 33(7) of DCR includes a trespasser. It would be preposterous to suggest that the consent of a trespasser can be included in 70 per cent consents so as to bring about a redevelopment scheme under DCR 33(7).

8 Accordingly, there is no merit in the writ petition. The petition is dismissed.

9 It is clarified that this order shall not come in the way of the Petitioner agitating his rights vis-a-vis permanent alternative accommodation as against Respondent No.3 before any appropriate forum.

(S.C. GUPTE, J.)