

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***ORDINARY ORIGINAL CIVIL JURISDICTION*****WRIT PETITION (L) NO. 1554 OF 2019**

**1. Rashida Hussain Kathawalla,)
Aged 31 years, Muslim Inhabitant,)
residing at 2404, Aquagem Tower-1,)
Nesbit Road, Mazgaon,)
Mumbai 400 010)**

**2. Zoharbhai Ismailbhai Mustafabhai)
An adult, Aged 60 years,)
Muslim Inhabitant, residing at)
Flat nos. 1705 and 1706, 17th Floor,)
Sterling Tower, Nesbit Road,)
Mazgaon, Mumbai 400 010)**

..... Petitioners**VERSUS**

**1. The Executive Engineer,)
'G-N' Division, having office at)
M.B.R.&R. Board, Sonawala Building)
S.A.Palav Marg, Shinewadi,)
Dadar (East), Mumbai 400 014)**

**2. The Chief Officer,)
Maharashtra Housing & Area)
Development Authority,)
Bandra Reclamation, Bandra Kurla)
Complex, Bandra (East),)
Mumbai 400 051)**

**3. Safee Burhani Upliftment Trust,)
a Public Charitable Trust, registered)
under the provisions of)
Bombay Public Trust Act, 1950)
having its administrative Office at)
Ezzy Hall, 47/49, Raudat Tahera Street)
Ground Floor, Mumbai 400 003)**

**4. Mustafa Ismailbhai Lokhandwala,)
of Mumbai Indian Inhabitant,)
residing at 117, Mamji House,)
6th Floor, E.R.Road, Near J.J.Hospital,))
Mandvi, Mumbai 400 003)**

..... Respondents

Ms.Rajiv Narula, a/w. Ms.Ekta Pandav, i/b. M/s.Jhangiani Narula & Associates for the Petitioners.

Mr.P.G.Lad for the Respondent nos. 1 and 2.

Mr.Pravin Samdhani, Senior Advocate, a/w. Mr.Denzil Aramban, Mr.Nanki Grewal, Mr.Shlok Bolar, Ms.P.Saraf, i/b. M/s.Wadia Ghandy & Co. for the Respondent no.3.

CORAM : R.D. DHANUKA, J.

DATE : 12th JUNE, 2019

JUDGMENT

By this petition filed under Article 226 of the Constitution of India, the petitioners have impugned the order dated 30th August,2018 annexed at Ex.F to the petition and communication letter dated 4th May, 2019 annexed at Ex.G to the petition.

2. It is the case of the petitioners that prior to 7th February, 2019, the petitioners and the respondent no.4 were the tenants in respect of the premises in Shop No.2, situated at Ground Floor, in the building known as Kanchwala Building, situated at 60/62, Saifee Jubilee Street, Bhendi Bazar, Mumbai 400 003 admeasuring 43.18 sq.mtrs (built-up) area bearing C.S.No.4211 of Bhuleshwar Division.

3. The respondent no.3 is a public charitable trust and has undertaken cluster redevelopment scheme under regulation 33(9) of the Development Control Regulation at Bhendi Bazar, Mumbai 400 003. The respondent no.3 followed the requisite procedure under the said provision. The redevelopment scheme of the respondent no.3 is however obstructed by some of the non-co-operative occupants.

4. It is the case of the respondent no.3 that though the respondent no.3 had offered permanent alternate accommodation to the petitioners, they did not vacate the structures in their occupation. The respondent nos. 1 and 2 accordingly issued notice under section 95A of the Maharashtra Housing and Area Development Act, 1976 (for short the said Act), to the petitioners calling upon them to vacate the structures in their occupation. The Executive Engineer, GN Division of the Board passed an order dated 30th August, 2018 directing the petitioners to handover the vacant possession of the shop no.2 of the Ground Floor, in the building known as Kanchwala Building, C.S.NO.4211, Saifee Jubilee Street, Bhendi Bazar, Mumbai 400 003. This order passed by the Executive Engineer is impugned by the petitioners along with the notice of eviction.

5. Mr.Narula, learned counsel for the petitioners makes the following submissions :-

- (a) No notice of hearing was issued by the authority before passing impugned order dated 30th August, 2018.

(b) The Executive Engineer who passed the impugned order had no authority to pass any such order and even to issue notice of eviction against the petitioners.

(c) No proof of service is produced by the respondents.

(d) The permanent alternate accommodation offered to the petitioners is not suitable. The respondent no.3 has offered permanent alternate accommodation of the first floor though the shop of the petitioners was situated on the ground floor.

6. Learned counsel placed reliance on section 95A(1) of the said Act in support of his submission that the Executive Engineer has not recorded any finding contemplated under section 95A(1) that the respondent no.3 had complied with all the conditions before invoking the provisions of section 95A(2). He submits that the entire action thus initiated by the Executive Engineer was thus illegal and without jurisdiction.

7. Learned counsel placed reliance on section 95A(2) in support of his submission that such action could be initiated only by the Board as defined under section 2(6) which is established under section 18 of the said Act. He also invited my attention to section 18 of the said Act and would submit that insofar as city of Mumbai is concerned, Mumbai Housing Area Development Board is the Board established for the

purposes of carrying out the provisions of the said Act.

8. It is submitted by the learned counsel that the powers of delegation, if any, under section 181 of the Act vest with the authority defined under section 2(3) i.e. Maharashtra Housing and Area Development Authority established under section 3 and not with the Board defined under section 2(6). He submits that in any event, such Board defined under section 2(6) has also not delegated any such powers to the Executive Engineer who has passed the impugned order.

9. It is submitted that under regulation 33(9) of the Development Control Regulation, authority of the Board under section 95(A) under the said Act is not contemplated and thus in absence of any such powers prescribed under the scheme sanctioned under regulation 33(9) of the Development Control Regulations, the Executive Engineer or board could not have exercised any such power under section 95(A)(2) for evicting the petitioners.

10. Mr. Narula, learned counsel for the petitioner invited my attention to the agreement entered into between his client and the respondent no.3 and the rent receipt in support of his submission that the petitioners have been already recognized as tenants by the respondent no.3. He submits that unless appropriate permanent alternate accommodation was provided to the petitioners, no such action could be initiated by the authority.

11. Mr.Samdhani, learned senior counsel for the respondent no.3 on

the other hand invited my attention to page (53) of the compilation of documents tendered across the bar in support of his submission that the petitioners were issued a notice by the MHADA on 1st June, 2018. He submits that the petitioners however chose to remain absent before the authority. The authority thereafter considered all the facts and has rendered a finding that the compliance under section 95(1)(A) is already made with by the respondent no.3.

12. Learned senior counsel also invited my attention to the agreement entered into between the petitioners and the respondent i.e. the agreement for transfer of tenancy on 7th February, 2019 which agreement is entered into after the date of the impugned order passed by the authority. He submits that under the said agreement, the petitioners agreed to vacate the shop in question and to handover the vacant possession thereof in favour of the respondent no.3. In turn, the respondent no.3 had agreed to enter into a permanent alternate accommodation agreement with the petitioners after expiry of the five years from the date of registration of the said agreement dated 7th February, 2019. He submits that though the said agreement is entered into between the petitioners and the respondent no.3, the petitioners have refused to vacate the premises.

13. It is submitted by the learned senior counsel that all the tenants occupying various tenaments have already vacated their respective tenaments. The respondent no.3 has already demolished the tenaments already vacated by the other occupants. The structure of the petitioners however could not be demolished in view of this petition having filed

by the petitioners. He submits that large number of the tenants/occupants are already affected in view of the petitioners not having vacated the shop in occupation of the petitioners.

14. Insofar as the issue raised by the learned counsel for the petitioners that the tenement offered by way of the permanent alternate accommodation is not suitable and thus the said question ought to have gone into under section 95A of the said Act by the Executive Engineer is concerned, learned senior counsel placed reliance on the judgment of this court in case of ***Radhika George and others vs. Maharashtra Housing and And Development Authority and others, 2012(5) Mh.L.J.229*** and in particular paragraphs 22 and 23. He submits that the authority has no power to adjudicate the rival claims of the tenants while exercising the powers under section 95A of the Act. The issue regarding title can be decided only by the civil court.

15. Learned senior counsel placed reliance on an unreported judgment of this court dated 14th June, 2016 in case of ***M/s.Karim Esmail, vs. State of Maharashtra in Writ Petition (L) No.1350 of 2016*** and in particular paragraph (10) in support of his submission that his clients cannot be compelled to make any offer to the petitioners of accommodation on the ground floor or the exchange of the said nature. He submits that all the tenants cannot be accommodated on the ground floor. The permanent alternate accommodation would be offered to the petitioners. He invited my attention to the affidavit in reply filed by his client and more particularly paragraph (9) in which the respondent no.3 had rendered an undertaking to execute permanent alternate

accommodation agreement and to allot the permanent alternate accommodation to the petitioners. The respondent no.3 has also offered the rent which is mentioned in the said agreement. He submits that the undertaking rendered by his clients may be accepted by this court. Various undertakings recorded in the affidavit in reply are accepted.

16. Insofar as the submission of Mr.Narula, learned counsel for the petitioners that in regulation 33(9) of the Development Control Regulation, no powers which can be exercised under section 95A of the MHADA Act are not contemplated is concerned, learned senior counsel submits that under section 95A of the Act, vide powers in the Board of summary eviction of the occupants in certain cases. These powers are independent powers given to the authority to evict the occupiers in the event of conditions under section 95A(1) having been satisfied and any such occupants refusing to vacate the premises in their occupation.

17. Insofar as submission of the learned counsel for the petitioners that the powers are not delegated in favour of the Executive Engineer is concerned, learned senior counsel invited my attention to the minutes of the meeting dated 24th February, 2015 attended by the Chief Officer of the Board and several other officers. The tenants as well as the occupants were also present. He submits that in the said meeting, it was clearly provided that in case the eviction is required, concerned Executive Engineer shall take hearing with respective tenants/occupants as prescribed under section 95A of the said Act and

shall submit the summary eviction action proposal to the office for approval. He also tenders a copy of the letter dated 11th June, 2018 from the Chief officer of the Board to the Engineer ratifying the action already taken by the Executive Engineer pursuant to the earlier authority issued.

18. Learned senior counsel produced a photo showing the demolition of the adjoining structures by the respondent no.3 and also showing that only the structure of the petitioners has not been demolished.

19. It is submitted by the learned senior counsel that in view of the dishonest conduct of the petitioners in not vacating the shop in question to the respondent no.3 after entering into the agreement for offering permanent alternate accommodation, even if this court comes to the conclusion that any of the hyper-technical objections raised by the petitioners in such writ petition deserves to be accepted, since the justice is not on the side of the petitioners, this court shall not interfere with the impugned order while exercising powers under Article 226 of the Constitution of India. In support of this submission, learned senior counsel placed reliance on the judgment of this court in case of ***Dinoo Baji Todiwalla and others vs. State of Maharashtra and others, 2011(1) Mh.L.J.974*** and in particular paragraphs 14 and 15.

20. Mr.Lad, learned counsel appearing for the authority adopts the submissions made by Mr.Samdhani, learned senior counsel for the respondent no.3 and would submit that the Executive Engineer was

authorized to initiate action under section 95A(2) against the petitioners and has recorded the findings. He submits that though the petitioners were already issued notice of hearing, the petitioners remained absent before the Executive Engineer.

21. Mr.Narula, learned counsel for the petitioners in rejoinder would submit that no proof of service is produced by the authority even before this court. No finding has been recorded by the Executive Engineer as contemplated under section 95A(1) of the MHADA Act.

22. A perusal of the record clearly indicates that the Executive Engineer has recorded finding in the second paragraph on page 39 of the petition in the impugned order that all conditions initiating actions under section 95A of the MHADA Act against the tenants are fulfilled by the respondent no.3. There is thus no substance in the submission of Mr.Narula, learned counsel for the petitioners that no such finding contemplated under section 95A(i) is recorded by the Executive Engineer.

23. Insofar as challenge to the impugned order on the ground that the Executive Engineer was not authorized to initiate any action against the petitioners is concerned under section 181(2) of the MHADA Act, the authority may, by general or special order, delegate any power exercisable by a board by or under this Act to any of its officers to any officers of the board on such terms and conditions as may be specified in such order.

24. Under section 16 of the Act authorities who are charged with execution of the said Act are provided. Under section 16(1)(e), the chief officers of the boards, having part time chairman and also part time vice-chairman is also one of the authority charged for execution of the Act under section 16.

25. The minutes of the meeting annexed at page 52 of the compilation i.e. dated 24th February, 2015 which was attended by not only the chief officer of the board but also by the tenants and occupants clearly indicates that considering overall grievances of the tenants/occupants, it was resolved that there was no proper communication between the SBUT and tenants/occupants. The chief officer has instructed that first at all the trust should discuss again with the tenants/occupants to amicably settle the issue within one month. In case if the eviction is required, the concerned Executive Engineer shall take hearing with respective tenants/occupants as prescribed under section 95A of the MHADA Act, 1976. The Executive Engineer is thereafter directed to submit the summary eviction action proposal to the office of chief officer. None of the tenants have challenged those minutes of meeting held on 24th February, 2015 thereby the chief officer authorizing the Executive Engineer to initiate such action under section 95A of the MHADA Act.

26. Be that as it may, MHADA has ratified this action by issuing another letter dated 11th June, 2018 to the Executive Engineer. I am thus not inclined to accept the submissions made by Mr.Narula, learned counsel for the petitioners that the Executive Engineer was not

authorized to initiate action under section 95A (2) of the MHADA Act.

27. Insofar as submission of the learned counsel for the petitioners that the petitioners were not offered permanent alternate accommodation and this issue ought to have been decided by the Executive Engineer before passing an order of eviction is concerned, the Division Bench of this court has already decided this issue in case of ***Radhika George and others*** (supra). This court has clearly held that the object of the legislature by introducing the amendments was to give an opportunity to the occupants of old structures who were unable to develop themselves due to lack of resources to move to better accommodation and at the same time create additional housing for general consumption. It is also held that once the authority under section 95A finds that these requirements are fulfilled, all that it does is to direct the members to shift to the transit accommodation awaiting reconstruction. It is held that action under section 95A does not result in determining rights of the parties *per-se*. The authority under section 95A does not finally determine or terminate any ownership rights of the members of such societies. The said rights, if any, has to be determined by the court of law. Admittedly in this case, the petitioners have entered into agreement with the respondent no.3. Whether the petitioners are offered permanent alternate accommodation properly or not can be adjudicated in the appropriate proceedings in case of any such breach if committed by the respondent no.3. This court has already recorded the undertaking rendered by the respondent no.3 which are rendered in the affidavit in reply filed before this court. In my view, such issue of no suitable permanent alternate accommodation

cannot be decided in the proceedings under section 95A of the said Act. Scope of interference with the order under section 95A of the said Act is very limited. The petitioners cannot be allowed to stall the project.

28. Insofar as submission of Mr.Narula, learned counsel for the petitioners that the respondent no.3 or MHADA has not produced any proof of service of notice is concerned, in my view, there is no substance in this submission of the learned counsel. The Executive Engineer has recorded a finding in the impugned order that the petitioners were served. I am not inclined to interfere with this finding rendered by the Executive Engineer. Be that as it may, in view of the agreement for permanent alternate accommodation entered into between the petitioners and the respondent no.3, this argument even otherwise does not survive. Be that as it may, since the respondent no.3 has rendered an undertaking that they would comply with the agreement entered into by them with the petitioners after passing of the impugned order, this argument does not survive.

29. In my view, even if this court would have taken a view that no such notice was issued by the authority upon the petitioners before passing of the order of eviction is concerned, since the petitioners have not complied with their part of obligation after entering into the agreement for permanent alternate accommodation with the respondent no.3 and since the justice would not be in favour of the petitioners, I am not inclined to exercise powers of this court under Article 226 of the Constitution of India in favour of the petitioners. The judgment of

this court in case of *Dinoo Baji Todiwalla and others* (supra) would squarely apply to the facts of this case. I am bound by the said judgment delivered by the Division Bench of this court.

30. In my view, the petition is totally devoid of merits and is accordingly dismissed.

31. The petitioners shall pay a cost quantified at Rs.50,000/- to the Tata Memorial Hospital, Parel, Mumbai within one week from today and shall produce the receipt showing such payment of cost before the Associate of this court.

32. MHADA is authorized to demolish the impugned structure within 48 hours from today.

33. The parties to act on the authenticated copy of this order.

[R.D.DHANUKA, J.]