

R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY O.O.C.J.

WRIT PETITION (L) NO. 1957 OF 2019

1. **Pratibha Veekay Real Estate LLP,**]
A partnership firm having its address at Unit No. 311,]
3rd Floor, Kaliandas Udyog Bhavan, Century Bazar]
Lane, Prabhadevi, Mumbai – 400 025.]
2. **Swastik Plaza “C” Cooperative Housing Society**]
A society having its office at 54, Swastik Plaza ‘C’]
Co-operative Housing Society Ltd., Swastik Park,]
Chembur, Mumbai – 400 071.] .. Petitioners

Versus

1. **Sub Engineer, M/West Ward-1**]
Municipal Corporation of Greater Mumbai having]
his office at Brihan Mumbai Mahanagar Palika]
Office, Vikhroli, Mumbai – 400 083.]
2. **Executive Engineer, Building Proposal**]
(Eastern Suburbs), Municipal Corporation of Greater]
Mumbai, having his office at Brihan Mumbai]
Mahanagar Palika Office, Vikhroli, Mumbai – 400 083]
3. **Municipal Commissioner**]
Municipal Corporation of Greater Mumbai, having]
his office at Mahapalika Bhavan, Mahapalika Marg,]
Mumbai – 400 001.]
4. **State of Maharashtra**]
Through Government Pleader, High Court, Bombay.] .. Respondents

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- Dr. Milind Sathe, Sr. Advocate a/w Mr. Bhushan Deshmukh, Mr. Ravi Gandhi, Mr. M.A. Kamdar, Mr. Rishabh Ranka i/by M/s. Kanga & Co., for the Petitioners

- Ms. Geeta Shastri, Addl. G.P. for Respondent No. 4
- Ms. Sheetal Metkari for MCGM

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**CORAM : AKIL KURESHI &
S.J. KATHAWALLA, JJ.**

**Reserved on : OCTOBER 1, 2019.
Pronounced on : OCTOBER 18, 2019.**

JUDGMENT (Per Akil Kureshi, J.)

1. Petitioner No. 1 is a partnership firm. Petitioner No. 2 is a co-operative housing society. The petitioners have challenged a communication dated 23.5.2019 issued by the Municipal Corporation of Greater Mumbai which imposes a condition to submit NOC from the Collector as per the letter of the Collector dated 16.10.2017.

2. The case of the petitioners is as under:-

Petitioner No. 2 was the owner of a plot of land bearing No. 366/11 admeasuring 867 sq. yards bearing Survey No. 14A (part), CTS No. 366/11 along with superstructure which contained 20 flats situated at Swastik Park, Chembur (hereinafter referred to as the '**said land**'). The society in its annual general meeting dated 14.8.2013

resolved to undertake redevelopment of the said property. For such purpose, the society decided to invite tenders. Petitioner No. 1 was appointed as a developer as per the resolution of the society passed in its meeting dated 6.4.2014. Registered redevelopment agreement was executed between petitioner Nos. 1 and 2 on 30.9.2014. The agreement envisaged demolition of the existing building and construction of a new building which would resettle the existing members of the society as well as permit the developer to induct new purchasers. This would be done by selling the existing FSI and available benefit of additional FSI by way of transfer of development rights. Pursuant to the said agreement, petitioner No. 1 submitted necessary plans and documents for construction to the Municipal authorities on 6.12.2014. With proper permissions from the Municipal authorities at various levels of construction, the same was completed. According to the petitioners, new building of ground plus fifteen floors has been constructed at an approximate cost of Rs. 22 crores. This building has 20 flats for existing members of the society and 9 flats for free sale. Petitioner No. 1, therefore, applied to the Municipal

authorities on 17.5.2019 for occupation certificate. The same came to be rejected by the impugned communication dated 23.5.2019 with following remarks:-

“Please submit the compliances as per the IOD, Amended conditions and also submit the compliance in view of order of Hon’ble Supreme Court of India in Dumping Ground case dated 15/03/2018 (SLP Civil No. D-23708 of 2017) and arrange the joint site visit. Also submit the NOC from the Collector MSD as the tenure of the plot is B-1, as per the letter received from the Collector office dated 16.10.2017. Copy of letter is attached in the additional document.”

3. Main grounds of challenge of the petitioners are that while issuing development permission and commencement certificate, no condition was imposed that NOC from the Collector should be obtained. Such condition cannot now be imposed. The case of the petitioners also is that the occupation certificate is required to be issued by the Municipal authorities. The condition for obtaining NOC from the Collector cannot be imposed by such authorities while considering the request of the petitioners for grant of occupation certificate.

4. Respondent Nos. 1 to 3 i.e. the authorities of Municipal Corporation have filed reply dated 15.7.2019 in

which entire basis for imposing the said condition in the impugned communication is a letter dated 19.7.2017 received by the Municipal authorities from the Collector. Learned counsel for the said respondents had stated before us that the building is otherwise fully constructed and the construction is in accordance with the plans passed. In other words, the sole objection of the Municipal authorities against grant of occupation certificate is that NOC from the Collector may be obtained before occupation certificate can be granted.

5. An affidavit dated 27.8.2019 filed by one Mrs. Vandana Chintamani Maku, Tahsildar (Additional Chitnis), Mumbai Suburban on behalf of respondent No. 4 State of Maharashtra is more elaborate in which detailed history pertaining to the land in question has been given. It is pointed out that the land bearing Survey No. 14 admeasuring 1,03,000 sq.mtrs. of Village Chembur was granted by two Government Resolutions dated 12.7.1947 and 25.9.1948 to M/s. P. Kashinath & Co on certain terms and conditions *inter alia* that the land was granted to provide for housing of

labour, that the same shall not be used for any purpose other than for residential or industrial without prior permission of the Government and that the land will not be alienated by way of sale to any person without the prior permission of the Government. It is further pointed out that M/s. P. Kashinath & Co. had applied to the Collector on 6.1.1949 for permission to sell the land to Swastik Textile Mills Ltd which permission was granted by the Collector under letter dated 12.7.1949. Out of the entire area of land, 7513 sq.mtrs. was occupied by encroachers and the possession of remaining area of 95487 sq.mtrs. was handed over to Swastik Textile Mills Ltd under receipt dated 1.7.1965. Swastik Textile Mills Ltd executed an agreement dated 8.9.1966 in HH-1 Form under Rule 43 of Land Revenue Rule 1921. Thereafter, Swastik Textile Mills Ltd applied for permission to sell the land which permission was granted by the State of Maharashtra on 23.10.1971 on following conditions:-

- i. The Swastik Textile Mills Ltd should surrender the area of 7,029 square yards;
- ii. The Swastik Textile Mills Ltd should pay the cost of removal of encroachment viz. Rs. 41,950/-;
- iii. All the conditions of the original grant should apply to the purchaser;

- iv. The purchaser should start construction work within 2 years from the date of taking over possession of the land and should cover the entire area as permissible under the relevant rules within a period of 5 years;
- v. If the purchaser wants to sell or transfer the land, and if Government agrees to such sale or transfer, the purchaser shall pay to the Government 50% of the difference between the market value of the land at the time of such sale / transfer and the purchase price paid by him.”

6. It is further pointed out that as per the said conditions, the construction on land had to commence within two years from the date of taking of possession and the construction should have been completed within a period of five years. Further, the purchaser could sell or transfer the land with permission of the Government on payment of 50% of the difference between the market value and the purchase price paid to the Government. The Collector initiated inquiry in the year 2012 for breach committed by Swastik Textile Mills Ltd. It was found that the land was divided into 56 plots without taking necessary permission of the Collector. On further inquiry, it was revealed that the development work was going on on the land in question. The Collector thereupon issued show-cause-notice dated 18.5.2018 to the plot holder societies. Hearing was held on 22.6.2018.

However, the Collector who had heard the proceedings was transferred and the new Collector who took charge on 18.7.2019 has decided to give fresh hearing before passing final orders.

7. With respect to the plot in question, it is pointed out that the development of plot No. 54 admeasuring 867 sq.mtrs. had been carried out under power of attorney granted by M/s. Swastik Textile Mills Ltd to Subhash Runwal and Chanda Runwal. M/s. Runwal Construction obtained permission for development on 22.11.1989. The tenements were sold to various tenants who later on formed Co-operative Society known as Swastik Plaza CHS in the year 1992. The possession of the land was transferred to the said society. It is pointed out that these transactions were in breach of the conditions of grant of land. In particular, it is contended that the transaction of transfer of land between M/s. Runwal Construction and Swastik Plaza CHS was without permission of the Collector.

8. From these facts, three main grounds of

opposition to the prayer of the petitioners that emerge are :-

- (i) That there is a breach of the condition of commencement of construction within two years from taking over possession and completion of construction within five years;
- (ii) That there was breach of condition of transfer of land without prior permission of the Collector;
- (iii) That at the time of sale, 50% of the unearned income had to be surrendered to the Government which was not done.

In the context of objections Nos. 2 and 3 noted above, it is contended that since the transfer was without permission of the Collector, as per the Government Resolution dated 21.11.1957, 75% of the unearned income had to be deposited with the Government. It is also pointed out that for such breach, show-cause-notice has been issued and the proceedings are being conducted by the Collector.

9. In background of said facts, Dr. Milind Sathe for the petitioners submitted that the objection of the Government is wholly unsustainable. The construction on the land in question was carried out way back in the year 1989. Petitioner No. 2 society many years later desired to redevelop the plot. Resolution to this effect was therefore passed on 14.8.2013. Petitioner No. 1 was appointed as an

agency to carry out said redevelopment work. The existing building was demolished. New building has been constructed with necessary development permissions from the Municipal authorities. At various stages, the Municipal authorities had inspected and granted permissions to carry out further construction. Eventually, the construction of the building in question came to be completed whereupon the petitioners had applied for occupation certificate. The Municipal authorities agree that such construction was according to the plans passed, however, occupation certificate is refused only on the ground that the petitioners must first obtain NOC from the Collector. He submitted that the said condition was wholly untenable and invalid. Any objection raised by the Collector cannot be a basis for refusing occupation certificate. It is not within the purview of the Municipal authorities to require the petitioners to obtain NOC from the Collector. In this context, learned counsel relied on a decision of the Division Bench of this Court in the case of **Hiren Bharani & Ors. Vs. State of Maharashtra**¹. Reliance was also placed on a later decision in case of **Dhiren CHS Ltd & Ors. Vs. State of**

¹ Judgment dt. 5.10.2006 in OS WP 3119/03 (Coram : F.I. Rebello & Anoop V. Mohta, JJ)

Maharashtra & Ors.² .

Learned counsel submitted that for redevelopment of the plot in question, the members of the petitioner No.2 society had vacated their premises and the building was demolished. For want of occupation certificate, the members of the society are unable to occupy their allotted flats. Petitioner No. 1 developer is unable to give possession of remaining flats to the new purchasers. The building has been constructed at a heavy cost of more than Rs. 20 crores. Entire project is being frustrated on account of technical objection raised by the respondents.

10. Learned counsel for Respondent Nos. 1 to 3 merely reiterated what is stated in the affidavit in reply. To a specific query from us, she had, however, stated that the construction of the building is according to the plans passed and that the only impediment in granting occupation certificate to the petitioner is the objection raised by the Collector under letter dated 16.10.2017 because of which the condition of obtaining NOC from the collector is inserted in the impugned communication.

² Judgment dated 14.8.2018 in OS WP No. 1491 of 2018 (Coram : A.S. Oka & Riyaz I. Chagla, JJ)

11. Having thus heard learned counsel for the parties and having perused the documents on record, what emerges is that petitioner No. 2 - a cooperative housing society had become the owner of the land in question on which building consisting of 20 flats was constructed. Petitioner No. 1 was chosen as an agency to carry out the redevelopment work. The existing building was demolished. After obtaining permission from the Municipal authorities, construction of new building was commenced. Said construction has been completed. The new building contains 20 flats for existing members and 9 flats for free sale. It is also not disputed by the Municipal authorities that the construction was carried out as per the building plans passed. Ordinarily, therefore, the petitioners were entitled to receive occupation certificate from the Municipal authorities. This certificate is withheld at the instance of the Collector on the ground that NOC from the Collector must be obtained. In the present case, the Collector would point out that there is prima facie evidence to suggest that there has been certain breaches of the conditions for grant of land and for which purpose, the

Collector has issued show cause notice dated 18.5.2018. Such proceedings are pending. Broadly the breaches were:-

- (a) The condition for commencement and completion of construction within two years and five years respectively was not fulfilled;
- (b) There was transfer of land without prior permission of the Collector; and
- (c) At the time of sale, 50% of the unearned income was not surrendered to the Government.

12. In the facts of the present case, we are not inclined to go into the question of jurisdiction of the Municipal authorities to require the petitioners to obtain NOC from the Collector. In this context, therefore, it is not necessary to refer to the facts and the legal conclusions of this Court in case of Hiren Bharani (supra) and Dhiren CHS Ltd (supra). The facts in the present case are glaring. Petitioner No. 2 society was the owner of the land in question. The members of the society were occupying building constructed thereon. Many years later, the society went for development. With all necessary permissions of the Municipal authorities, redevelopment has been completed. When the construction

concededly is according to the plans passed, at that stage, to link the question of granting occupation certificate to the inquiry initiated by the Collector for alleged breaches in the grant of land would be wholly unjust and impermissible. At present, such breaches are not yet established. Noticees have responded to the show cause notice issued by the Collector and denied any breach having been committed at any stage. Surely, the Collector will take a final decision on the basis of available material on record. What would be the contentions of the Collector on the alleged breaches is not possible for us to foresee. Even if some of the breaches are established, what would be the ultimate order, the Collector may pass, at this stage would be unclear. In such a case, before the Collector, the question would be whether to cancel the grant or to levy penalty but not to cancel the grant of land. Any order of Collector would be subject to challenge. In the meantime, the members of the society are occupying temporary residence. They would be deprived of occupying the allotted residential units though the construction of the entire building according to the plans passed is over. The construction of the building would

obviously have required considerable investment by the developer. Such investment would remain idle. No useful purpose would be served in preventing the occupation of the constructed building. Such occupation can always be made subject to outcome of the proceedings before the Collector. We cannot lose sight of the fact that the alleged breach of the condition of prior permission by the Collector before transfer of land is raised after several decades. The alleged breach of non payment of half of the unearned income is also subject to interpretation of the relevant conditions. In any case, it would perhaps be possible to regulate such breach even if one found to have been committed by monetary adjustment. In other words, even if the Collector holds the allegations made in the show cause notice as established, it is doubtful whether fully constructed building would be allowed to be demolished. The issue can be looked from a different angle. This issue has arisen because of the redevelopment. Had society not opted for redevelopment, the members of the society would have continued to occupy their residential units pending inquiry by the Collector. Further, it was perhaps open to the authorities to examine

the society's title to the land in view of the inquiry initiated by the Collector and issuance of show cause notice, however, the construction permission having been granted, occupation of the completed building cannot be prevented on the basis of pending show cause notice proceedings before the Collector.

13. Learned AGP had however submitted that the petitioners have not challenged the Collector's communication dated 16.10.2017 and therefore, the petition must fail. For the following reasons, this contention and reliance on said communication are wholly untenable. Firstly, this is an internal communication by the Collector to the Municipal authorities. It is not in the nature of delegated legislation. It is not even an order against the petitioners. It is a general communication between two wings of the State. If contents of said communication are contrary to law, the same can be discarded while giving relief without formal challenge and quashing the same. Further, this communication requires confirmation from Collector even before issuance of IOD. Relevant portion of this communication reads as under:-

“However as per Section 41(2)(3) of Maharashtra Land Revenue (Disposal of Government Land) Rule, 1971, the condition, the Lessee is required to complete the construction within a period of 3 years from date of taking possession. Further in the Sanction Order in respect of Government lands granted to various persons / societies / companies on lease or occupancy basis and also in the Agreement between the concerned persons and this office, the condition is mentioned to complete the construction in prescribed time. The instructions given pursuant to letter referred under Reference No. 1 are applicable in present matter.

Therefore, you are once again requested that while issuing Intimation of Disapproval (IOD), Extension to IOD, Occupation Certificate and also Part Occupation Certificate in respect of buildings on Government Lands allotted by Government / Collector office on lease / occupancy basis, issue such Intimation of Disapproval (IOD), Extension to IOD, Occupation Certificate and also Part Occupation Certificate to concerned parties only after confirming whether the said party obtained such extension by depositing premium in this office for extension of IOD.”

In the present case, IOD came to be issued long before issuance of this communication, construction had commenced and substantial construction was also completed. Occupation of the building cannot be withheld on account of proceedings pending before the Collector.

14. For such reasons, by allowing this petition, we direct respondent Nos. 1 to 3 to grant occupation certificate to the petitioners in relation to the newly constructed building. This shall be done within a period of four weeks from the date of receipt of the copy of this order. Any such occupation certificate would be subject to outcome of the proceedings before the Collector under show cause notice dated 18.5.2018. The petitioners shall not claim any equity on the basis of grant of occupation certificate or occupation of the constructed unit by any one pursuant to such certificate. The members of petitioner No. 2 society as well as the purchasers of the free sale flats would also be put to the notice in writing by the petitioners that there shall not be any such equity.

15. The petition is accordingly disposed of.

[S.J. KATHAWALLA, J.]

[AKIL KURESHI, J]

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