Sonali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 2624 OF 2019

Anandbai Gaikwad & Ors ...Petitioners

Versus

Maharashtra Housing and Area Development Authority & Ors ...Respondents

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Mr Amogh Singh, *i/b Jeet Gandhi, for the Petitioners.*
Mr Tejas D Deshmukh, *with HD Chavan, for Respondents Nos.1 to 4.*
Mr Sagar Patil, *for Respondent No.5-MCGM.*
Dr Birendra Saraf, **Senior Advocate**, *with Karl Tamboly, Jasmine Kachalia, Tanvi Shah & Aryan Srivastava, i/b Wadia Ghandy & Co,for Respondent No.6.*
Mr Amit Shastri, *for Respondent No.7-State.*

CORAM **G.S. Patel &**
Madhav J. Jamdar, JJ.
DATED: **10th February 2022**

PC:-

1. We have heard learned Counsel for the parties.

2. The Petition seeks the following final reliefs:

"a) That this Hon'ble Court be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, order or direction under Articles 226 of the Constitution of India, directing the Respondent Authorities to declare that Building No.48 falls under MIG Category.

b) That this Hon'ble Court be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any

> other appropriate Writ, order or direction under Articles 226 of the Constitution of India, directing the Respondent Authorities to give the benefits of additional area to the Petitioners, as are received by the residents of the other MIG Category Buildings in the Redevelopment of the larger property;"

3. The development in question is arguably one of the largest such projects being undertaken in the city. It is at Samata Nagar, Kandivali (East), Mumbai 400 101. It spreads over CTS Nos. 837 to 840 of Poisar village and involves a colossal 2,13,865 sq mtrs and possibly more. At least 48 old buildings are being redeveloped under the scheme. The redevelopment follows the usual pattern: the existing authorised tenants or occupants, i.e. those who are found eligible, are entitled to re-accommodation in the reconstructed or redeveloped buildings known as rehab units. As an incentive, the developer is granted additional FSI for constructing free-sale buildings.

4. There have been certain developments in the Petition since its filing. There were originally nine Petitioners. Of these, Petitioners Nos. 1, 8 and 9 accepted the allotment that was made to them and therefore no longer have a cause of action to pursue. It is the remaining six who continue to press for relief.

5. We summarise very briefly our outstanding of the case brought in the Petition and canvassed by Mr Singh for Petitioners. The Petitioners all say that they are in Building No. 48. This building, according to them, is of the MIG or Middle Income Group category. According to the Petitioners, this is an admitted position.

The Respondents do not accept this assertion. We will consider the documents referred to by Mr Singh shortly hereafter.

6. It is undisputed, however, that the Petitioners occupy premises of approximately 18 sq mtrs in their existing tenements.

7. As we shall presently see, the area of the existing tenements is not only an important factor but, in our view, is dispositive of the issue that the Petitioners raise.

8. Mr Singh's submission is that the area under occupation is immaterial for deciding whether an occupant is MIG or LIG. That, he submits, is to be decided by one factor and one factor only: the income of the occupant. He places his case on three submissions. *First*, that according to MHADA itself, which is the regulatory authority, and on the basis documents that he shows us, it is accepted that Building No. 48 in which the Petitioners have their tenements is an MIG building. *Second*, that the area in actual occupation is immaterial. *Third*, that although the Petitioners' predecessors-in-title (or ancestors) were of the MIG category on an income-based determination, they just happened to have been allotted smaller units of 18 sq mtrs.

9. Before we turn to the documents that Mr Singh shows us, we turn straightaway to the reason why this question of area becomes important. This can be seen from MHADA's Affidavit at page 143. At page 144 the Affidavit points out that as per the layout plan in question, five schemes are being implemented at Samata Nagar.

These are shown in a table in paragraph 3 at page 144 which reads thus:

Sr No.	Scheme	Building Nos.	Carpet Area (sq.mt.)	Built up Area (sq.mt.)
1.	700 MIG T/s	1 to 22 & 35 to 47	38.34	45.94
2.	240 HIG T/s	23 to 34	58.94	67.55
3.	672 LIG (Big) T/s	48 to 92	17.08	23.70
4.	816 LIG (small) T/s.	93 to 123	13.68	14.23
5.	296 EWS T/s	124 to 160	12.47	16.19

10. Now this is to be read with Exhibit "B" to the Petition (a translation is available in the Petition from page 51A). This is a Government of Maharashtra Housing Department decision of 26th August 2009. The decision is that in these redevelopment schemes, all eligible occupants would get a defined maximum increased permissible area. For those in the lowest income bracket (the so-called EWS or Economically Weaker Section category), the maximum permissible increased area in the redeveloped premises was 27.88 sq mtrs. Those in the LIG group would get 45 sq mtrs as the maximum permissible carpet area. Those in the MIG or Middle Income Group would get 80 sq mtrs. With the fungible FSI that is now available, the actual area increases for each of these categories. For our purposes, the LIG entitlement on redevelopment goes up from 45 sq mtrs to roughly 60 sq mtrs (there is a corresponding increase for EWS and MIG respectively).

11. What the Petitioners actually want, on the factual assertions they make as set out above, i.e. that Building No. 48 is in fact an

MIG building, and that the Petitioners or their predecessors-in-title were in the MIG categories, is to move from premises that are 18 sq mtrs for the purposes of the development calculations to a much larger area that is unlinked to the size of their present occupancies but is determined only by income determination. Mr Singh says that MHADA has accepted that Building No. 48 is in fact an MIG building. He draws our attention to page 56 and Exhibits "A", "B" and "C" which are the original allotments, though not in the name of the Petitioners. Mr Singh says that these premises have been transferred but the documents all say that Building No. 48 is in the Middle Income Group Housing Scheme. There is also a reference to Exhibit "D" at page 56 dated 9th May 2013 (again there is a translation provided) which purports to state that Building No. 48 is in the MIG category.

12. About the fact that those who are in 18 sq mtrs being entitled to a base increase of not more than 45 sq mtrs (plus later fungible FSI utilisation increasing the available rehab tenement area to 60 sq mtrs) is undisputed.

13. Essentially, what the Petitioners seek is that *at the stage of redevelopment* it is once again their income, or their ancestors' original income, that should be a determinant and not the area that is under their undisputed existing occupancy.

14. We are unable to accept this submission made by Mr Singh. There is a conceptual difficulty in accepting it. It is entirely true that at the time of an original allotment, as the categorisation itself indicates, income will determine into which category a particular person falls. But a very different consideration arises and must indeed arise in a situation of redevelopment. During redevelopment neither the authority nor the developer is any longer concerned with the income determinant. That is not being redetermined again. The reasons are self-evident and obvious. In a redevelopment what is material is the area of the occupancy and the increased area that is available against the original area occupied. In a redevelopment, therefore, it is an area-to-area correspondence and not an income-to-area correspondence. This is a fundamental flaw in the Petitioners' entire argument, one that they fail to recognize.

15. What the Petitioners also do not seem to realise is the necessary consequence of accepting their argument. The entire Samata Nagar redevelopment scheme is predicated on an area-for-area calculation to determine how much the developer must construct and for how many persons. This entire sanctioned scheme is computed, sanctioned and under development solely on the footing that the area in a person's occupation or a possession will determine the increased area to which that person is entitled. Thus, it is the areas in occupation that determine the size of the re-accommodation flat and not the income of the occupant.

16. If one is today to go on the basis of income, the entire scheme would collapse and would be rendered entirely unviable.

17. We believe we are fortified in the view that we have taken by the observation of a Division Bench of this Court, and of which one of us (Madhav J Jamdar, J) was a member in *Samta Nagar Co-operative Housing Societies Union Limited & Anr vs Municipal Corporation of Greater Mumbai & Ors.*[1] In paragraph 139 the Division Bench held:

> "139. **In our view, the present income of the occupants who were then classified under any of the EWS/LIG/MIG category cannot be considered now for considering their eligibility under the category of EWS/LIG/MIG under the project undertaken by the petitioners under Section 33(5) of the D.C. Regulations to rehabilitate the existing occupants under EWS/LIG/MIG**. The respondents could not point out any provision in the terms of the original allotment of the tenements to those occupants under EWS/LIG/MIG allotted by MHADA in the original buildings constructed by MHADA to the effect that in future at any stage, if the income of any of those occupants/tenants would exceed the income that was considered for their eligibility for allotment of those tenements under EWS/LIG/MIG, they would cease to be tenants/occupants and would have to vacate their respective tenements on such ground. The submission of the learned Senior Counsel for the Municipal Corporation and learned Counsel for the MHADA that as of today those occupants/tenants no longer continues to be of the status of EWS/LIG/MIG and thus the project under taken by the petitioners could not be considered as a project for rehabilitation of EWS/LIG/MIG under Regulation 33(5) is totally untenable and ex-facie contrary to the Housing Policy framed by the State of Maharashtra and the provisions of Regulation 33(5) of the D.C. Regulations."

1 2021 SCC OnLine Bom 144 : (2021) 3 ALL MR 267.

18. Indeed it may be true that what is being argued before us today is an inversion of the submission in *Samta Nagar*, but it is, nonetheless, just as untenable today as it was then. What the Division Bench rejected was the submission that there is a correlation between income and the area entitlement in the redeveloped structures. It makes no difference if the submission is about the original allottees' income level or the present income level. The only criteria can be put simply like this: if an occupant or tenant occupies an area of X sq mts, he/she is entitled on re-development to X+Y sq mts, where Y represents the increase expressed as either a percentage or a fixed number. There is no room in this formula for income at all.

19. This would ordinary have been enough to persuade us to reject the Petition. But there is another reason. It is in this context the paragraphs 5 to 8 of the MHADA's Affidavit at pages 145 and 146 are relevant. They read thus:

> "5. **I say that the sale price of unit in a building constructed under the scheme 700 MIG T/s was Rs.68,000/- in the year 1982, whereas the sale price of a unit in building constructed under the scheme 672 LIG (Big) T/s was Rs.20,786/-. I say that in the year 1983, the sale price of a unit in building constructed under the scheme was increased to Rs.30,383/-. I say that it is not the case of Petitioners that they have been allotted units in buildings constructed under the scheme Rs.68,000/- which are 'middle income group' (MIG) buildings. Further, it is not the case of Petitioners that they have purchased units for an amount of Rs.68,000/-.** Hereto annexed and marked as **<u>Exhibit-'A'</u>** is copy of offer letter

dated 20.5.1982 with respect to one of the units in a building constructed under scheme Rs.68,000/-.

6. **I say that the State Government by a circular dated 26.8.2009 has classified tenements in according to their carpet areas. I say that the carpet area of a LIG (small) unit is 27.88 sq.mt. The carpet area of a LIG (big) unit is 45 sq.mt. and the area of a MIG unit is 80 sq.mt. I say that the area of units allotted to Petitioners somewhere in the year 1983 or thereabout in building no.48 is 17.08 sq.mt. and hence the same has been classified as an LIG building even according to the circular dated 26.8.2009.** Hereto annexed and marked as **Exhibit 'B'** is copy of circular dated 26.8.2009.

7. I say that the sanctioned layout plan of Samata Nagar Co-operative Housing Society for CTS nos. 837 to 840 of village Poisor, Kandivili (E) dated 1.5.2010 **also shows said building no. 48 as a LIG building.** I say that layout dated 1.5.2010 has also been sanctioned by the Mumbai Municipal Corporation. Hereto annexed and marked as **Exhibit 'C'** is copy sanctioned layout plan dated 1.5.2010.

8. **I say that even the Senior Architects certificate dated 31.7.2010 also classifies building no. 48 as a LIG building.** Hereto annexed and marked as **Exhibit 'D'** is copy of certificate dated 31.7.2010."

(*Emphasis added*)

20. There are, thus, seriously disputed questions of fact on the very assertions that Mr Singh claims. There is a serious dispute about the actual classification of Building No.48. There is also disputed question as to whether the original allotments could be construed as being in MIG under the present policy as it stands. We decline to entered into any such controversies or disputed questions or facts, simply because we cannot.

21. Moreover, this affidavit establishes precisely our view of there being an area-to-area correlation in re-development and not an income-to-area correlation.

22. There are other reasons to hold against the Petitioners. There is no doubt that the Petitioners are members of the 8th Respondent Cooperative Society. We are quite unable to see how the Petitioners, only a few members of the 8th Respondent society, can proceed to raise issues contrary to the majority decision of the very Society of which they are a member. The cooperative law is clear: members are bound by the decision of majority taken at properly convened meetings. There is no challenge to the Society's decision in general body. Other Society members who are similarly situated — indeed three of the original Petitioners themselves — accepted the majority decision. It is not possible for us to accept that the Petitioners have a some independent or separate rights. The law in this regard is settled: upon membership of a society a person loses his individuality to the extent that he longer has stand-alone rights except for those specifically conferred by the statute. It is only the society that can speak or act on behalf of the member. Absent any challenge to the 8th Respondent Society's decision, we do not see how the Petitioners can maintain such a petition.

23. In this context, the assertion by MHADA in paragraph 9 at page 146 of the record is important. It read thus:

> "9. I say that **none of the other occupants of building no.48 or none of the occupants of any of any of the buildings constructed under 672 LIG (Big) T/s, except the present Petitioners, have disputed their allotment and entitlement. I say that as against an area of 17.08 sq.mt. of the units in buildings constructed under scheme 672 LIG (Big) T/s, the Respondent no.6 developer has agreed to give to all the occupants units admeasuring 602 sq.ft. in redeveloped building.**"
>
> (*Emphasis added*)

24. From this it is clear that the Petitioners have been allotted an area of approximately 60 sq mtrs (602 sq ft) against their present occupancy of 17.08 sq mtrs. The present occupancy is 17.08 sq mtrs (about 183 sq ft). This exactly corresponds or equivalent to the LIG category of other buildings. The increase is about four times the existing tenement size. But the Petitioners want even more; and it is only they in such occupancies who want even more.

25. At the end of the day one critical factor must not be overlooked. This additional area including the fungible area of 60 sq ft is being provided on ownership basis free of cost. There are absolutely no equities in favour of the Petitioners. Indeed it seems to us it is the other way around. For, accepting the Petitioners' contentions, would result in a manifestly unfair and unequitable situation throwing into disarray and jeopardy the entire Samata Nagar redevelopment. The Petitioners do not seem to care what happens to others or to the entire re-development project. We deplore and deprecate this approach of a few members striking out on their own seeking their own narrow and self-serving interests unmindful of the consequential adverse impact on their neighbours and on others. No court of equity will ever countenance such an approach. Of course, the Petitioners are equally unable — and unwilling — to provide a single rupee in security for the potential loss and damage caused to others similarly situated if, on account of their Petition being accepted, the entire re-development project collapses. Hundreds will be deprived of their redeveloped homes with increased areas as contemplated by the scheme. To the Petitioners, this consideration matters not a whit. To us, it matters a very great deal.

26. We reject the Petition. In light of this rejection of the Petition, it follows that the Petitioners must now vacate the premises so that the redevelopment can continue. The rejection of the Petition does not mean that the Petitioners allotments are in any way adversely affected. Their rehab premises are physically constructed. An Occupation Certificate is yet to be received but transit rent will be paid to the Petitioners until the date of the Occupation Certificate or possession, on the same footing as all others similarly placed.

27. Mr Singh requests for some time for the Petitioners to vacate. At his request, we give the Petitioners four weeks from today, i.e. from 10th February 2022 until 21st March 2022 to vacate. If the Petitioners do not vacate by that date, MHADA will take the necessary steps.

28. Liberty to MHADA and the developer to apply to Court should there be any difficulty in implementing this part of the order.

29. Parties to bear their own costs.

30. All concerned will act on production of a digitally signed copy of this order.

(Madhav J. Jamdar, J) **(G. S. Patel, J)**