Ashwini

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CONTEMPT PETITION (L) NO. 131 OF 2019

IN

CONTEMPT PETITION NO. 30 OF 2017

IN

WRIT PETITION NO. 1071 OF 2014

WITH

SHOW CAUSE NOTICE NO. 2 OF 2020

IN

CONTEMPT PETITION (L) NO. 131 OF 2019

IN

CONTEMPT PETITION NO. 30 OF 2017

IN

WRIT PETITION NO. 1071 OF 2014

WITH

SHOW CAUSE NOTICE NO. 2 OF 2023

IN

CONTEMPT PETITION (L) NO .131 OF 2019

WITH

INTERIM APPLICATION (L) NO. 6998 OF 2022

IN

CONTEMPT PETITION (L) NO. 131 OF 2019

WITH

CONTEMPT PETITION (L) NO. 126 OF 2019

IN

ARBITRATION PETITION NO. 342 OF 2019

Joginder Singh Salariya & Ors ...Petitioners
Versus
Rajendra Wani & Ors ...Respondents

Dr Abhinav Chandrachud, *i/b Samir Suryawanshi, for the Petitioner in CONPWL/131/2019.*
Mr Sanjeev Sawant, *with Ruchita Kadam, i/b Samir Suryawanshi, for the Petitioner in CONPWL/126/2019.*
Mr Mandar Limaye, *with Kunal Waghmare, i/b Sunil Sonawane, for the Respondent-MCGM in all matters.*
Mrs Jyoti Chavan, Addl. GP, *for the Respondent-State.*
Ms Akansha Kadam, *i/b Kranti Anand, for Respondents Nos 3 to 5.*
Mr Nigel Quraishy, *i/b Mona Vyas, for Respondent No 6 in all Petitions (Developer).*
Mr Adil Patel, *Respondent No 6 present-in-person.*
Mr Aziz Shaikh, *Secretary, is present.*
Mr Vivek Ambekar, *Chairman of Society, is present.*

CORAM G.S. Patel &
Kamal Khata, JJ.
DATED: 10th January 2024

PC:-

1. There was some discussion in Court on 5th January 2024 and we therefore kept the matter today. Our two orders of 6th October 2023 and 20th October 2023 will be relevant in this context. The order of 6th October 2023 is reproduced below without its annexures.

> "1. Mr Quraishy for the developer NDZ Infrastructure says that unless certain encroachments on the public access road are removed by the Municipal Corporation of Greater Mumbai ("MCGM"), further development as originally proposed of a 16-floor structure will not be possible. At the relevant time, in exercise of discretion, the original developer was allowed to maintain a 6-meter-wide access and to construct 16 floors, sufficient for the reaccommodation of all Society members. The present requirement is that a 16-floor structure will need a 9 meter width road. If the road width is only 6 meters, then the structure cannot go above 7 floors.
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> 2. On the basis of a coloured map, a copy of which we take on record and marked "**X**" for identification and a scan of which is annexed to this order, he points out that the encroachments are at the northern end of the access road.
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> 3. Mr Quraishy's submission is that the resultant situation is an incongruity that can be resolved only by the MCGM. On the one hand, with the encroachment remaining, the road width is insufficient to permit even the height originally sanctioned. If these are removed, the building can be constructed to its originally proposed height. The incongruity lies in the MCGM insisting on an increased road width but without removing the encroachments & the only method of widening the road. The developer cannot on its own widen the road either in law or on facts. Prima facie, this submission commends itself to us. We also do not see how or why, if the road width concession was originally granted, presumably keeping in mind the fact of these encroachments, that concession should be reversed or now not granted by the MCGM while not clearing the encroachments, which is the responsibility

of the MCGM itself. Resultantly, the MCGM seems to be demanding an impossibility — and the consequence of this is inequitable and unfair not to the developer but to the members of the Society.

4. A copy of the sketch plan is given to Mr Waghmare for the MCGM. We will need him to file an Affidavit stating the position of the MCGM in regard to these encroachments. The Affidavit must set out the number of structures, whether any steps have been taken to assess eligibility for a rehabilitation policy and whether the MCGM has any programme for removal of these encroachments and if so, by when. That Affidavit is to be filed and served by 16th October 2023.

5. From Dr Chandrachud, Mr Sawant and Mr Quraishy we have also sought certain further information with a view to facilitating parties in progressing with the construction and resolving pending disputes.

6. List the matter on 18th October 2023."

2. The 20th October 2023 order is a detailed one. Since it is a 23-page order, we will not burden the record today with reproducing it in full. The relevant paragraphs of that order are paragraphs 19 to 24, 28 to 36 and 45.

"19. Broadly stated, the concerns are these:

i. Payment of arrears of transit rent in an amount accepted by NDZ Infrastructure.

ii. Ensuring that the Society and its members have adequate remedies preserved to them for any other amount of transit rent and other dues that they may claim.

iii. Ensuring that NDZ Infrastructure obtains the necessary assignment deed from the Society so that it is able to make the necessary applications to the MCGM and proceed with the construction.

iv. Ensuring that NDZ Infrastructure has the necessary municipal building permissions to complete the construction for the Society's members to the full extent and without impediment (and about which an explanation will shortly follow).

20. The development proposed is of four wings or towers. Wings A and B are for what is called the re-accommodation component meant to provide redeveloped flats to the members of the Society. Each of these wings is to be of 16 floors. Wings C and D are entirely the free sale component.

21. NDZ Infrastructure has run into twin problems — as Mr Quraishy says, it is being squeezed from both sides. The issue of transit rent means that the society has so far not formally executed an assignment deed in favour of NDZ Infrastructure. This means that NDZ Infrastructure does not have the requisite standing vis-à-vis the MCGM, which will not recognise it as a developer for the project. On the other hand, MCGM now insists, as our previous order shows, that the width of the road be 9 mts to permit a 16 floor structure, although there was an earlier concession allowing the road width to only be 6.3 mts. But the widening of that road is not in NDZ Infrastructure's hands. It is narrowed because of encroachments, and as we all now well know, the removal or continuance of encroachments is entirely a Municipal Corporation matter.

22. This is a peculiar situation: the Municipal Corporation has not removed encroachments resulting in a narrowing of the road. Yet it insists on a wider road, something that cannot be achieved without removing the

encroachments, and which can only be done by the Municipal Corporation itself.

23. This is where the instructions by Mr Waghmare come into play. He is not making a new concession. He has only noted that there was previously a concession permissibly granted and wholly unchallenged by anyone, that the road width could be maintained at 6.8 mts to allow for a construction of 16 floors. His present instructions in the communication at Exhibit "W-1" accepted on the last occasion are that this concession can for the present continue.

24. We formally accept that statement today. In any case, we exercise our discretion and direction that the Municipal Corporation is not to insist on a road width of 9 mts unless and until these encroachments are removed. It will be open to NDZ Infrastructure, the Society and the MCGM to make an appropriate application for variation or modification at any stage if so required. This means, in the background noted above, that the MCGM will be able to process all applications being made by NDZ Infrastructure for completion of towers of Wings A, B, C and D on the basis of a road width of 6.3 mts and without requiring a road width of 9 mts as a pre-condition for the grant of those permissions. We reject the submission by Mr Waghmare that the DCPR 2034 demands a road width of 9 mts. The narrowing of that road width is not the doing of either the Society or NDZ Infrastructure (or even the previous developer). It is entirely the responsibility of the Municipal Corporation. We do not see how a default by the Municipal Corporation is performing its duties to clear encroachments can be invoked to the very considerable prejudice of the hapless members of the Society who are without transit rent and re-accommodation already for far too long. The MCGM can offer no form of redress or recompense to the Society members (and we are not even discussing or

considering the equal prejudice to NDZ Infrastructure). All we are told is that removal of these encroachments 'will take some time'. We are forced to ask: *in the meantime, what about the Society and its members*? To this, there is simply no answer. Hence our direction above. To be clear, we have not dispensed with the 9 mtr road width requirement in perpetuity. We have only directed that it is not to be cited as an impediment or a pre-condition to further development permissions in the situation outlined above, and most of all because the widening of that road is solely the responsibility of the MCGM itself. In other words, providing a 9-metre wide road is for the MCGM to achieve and ensure, and it is to do so in accordance with law. Any other view would be patently unjust and inequitable to the members of the Society. Indeed, it might even mean that third party encroachers on a public road are being given some level of preference over the entirely legal and legitimate rights of members of the Society.

28. We come now to the other matters covered by the Consent Terms. Paragraphs 9 and 10 of Adil Patel's Affidavit dated 20th October 2023 sets out some of the details of the built-up area, the costing of the project, the free sale component and so on. We are concerned really with the Affidavit from paragraph 16 at page 6. It is divided into separate parts. Part 1 deals with arrears of transit 'rent paid'. Section B has particulars of the 'past outstanding rent' and carries this computation from February 2019 to April 2023 and all inherited rent arrears in accordance with the consent terms. The amount computed by NDZ is Rs. 5,67,97,077/-.

29. Dr Chandrachud has checked and says that this is not the entire amount payable. The Society claims that there is an additional amount of roughly Rs 2.5 to Rs 3 crores more that is payable. We will not delay either the project or this order on that basis. We reserve specifically

the rights of the Society and to each of its members to adopt appropriate proceedings in regard to this claimed differential. All contentions between the parties are left open irrespective of the nature of the proceedings adopted for this differential claim for transit rent.

30. As to the rent payable from May to September 2023, the amount is Rs 86,08,120/-. This is accepted by the Society before us today.

31. The Part C of Part 1 of this Affidavit at page 11 makes a provision to secure the outstanding rent by earmarking an additional area in the free sale Wings C and D. Individual flats are identified and are to be retained as security until all outstanding transit rent is paid. These identified flats, offered as security for the arrears, are unencumbered. That statement is accepted. The total amount of value estimated as security is Rs 9,64,80,000/-. We have no hesitation in accepting this statement as an undertaking to the Court.

32. As far as the accumulated arrears are concerned i.e., Rs 5,67,97,077/-, the payment is not only secured by these flats, but a statement is made on Affidavit that this amount will be paid immediately on obtaining a Completion Certificate for Wings A and B. We accept that statement as well. This will enable NDZ Infrastructure to complete the construction with a reasonable management of its immediate cash flows.

33. As regards the rent from May to September 2023, the proposal on Affidavit is to defer payment of this amount against security of another 1000 sq ft carpet area. As Dr Chandrachud points out, this is likely to cause greater hardship because Society members out on transit rent have to meet monthly outflows to their existing landlords. Mr Quraishy readily appreciates this. What has been arrived at in Court after discussion is that the amount for May to

September 2023 shown as Rs 86,08,120/- will be paid over four quarters along with the quarterly advance rent that is provisioned immediately hereafter commencing from the quarterly payment that is due in January 2024.

34. From October 2023, we have insisted that transit rent must be paid quarterly in advance. For the quarter October to December 2023, since this order comes to be made late in October 2023, we had suggested — and Mr Quraishy has accepted — that the amount of rent will be paid on or before 19th December 2023.

35. With regard to the quarterly payment from 2024 i.e., January to March, April to June, July to September and October to December, the scheduled dates, amounts of payment and construction levels are set out in the table at pages 15 to 16 of the Affidavit which we accept. The time estimated to completion is also set out at pages 16 and 17.

36. As to the quarterly payments, while we accept the schedule, we exercise our discretion and allow NDZ Infrastructure an additional four banking days' grace or cure period if there is a default in any payment. We do this because, we insist that all payments must be made to the Society by online transfer and not by cheques or demand drafts.

45. Therefore, and given the manner in which NDZ Infrastructure has approached this litigation and the statements it has fairly made plus its compliance with previous orders, we take the liberty of deviating slightly from our usual standard of prescribing a consequence for a single event of default and prescribe it instead for any two defaults by clarifying that if there are any two defaults (not two consecutive defaults) by NDZ Infrastructure, then all permissions granted by the Society to NDZ Infrastructure shall stand automatically cancelled and revoked. Any agreement that may have been signed shall instantly stand

revoked and the Society will be at liberty to write to the MCGM for an order cancelling any and all permissions granted in favour of NDZ Infrastructure. At the same time, there will immediately be an order of this Court enforceable and executable as such for the full amount of transit rent including all accumulated arrears with interest at 9% per annum from the date of the default. This necessarily means that any benefit associated with the development such as the right to additional premium of fungible FSI will revert to and become the property and entitlement only of the Society. In that event, the Society will be entitled to apply to the MCGM for the grant of all necessary permissions in its own name or in the name of such other developer as it chooses to appoint."

3. Today the undisputed position is as follows:

(i) There has been no payment since that date by NDZ Infrastructure to the society;

(ii) the lease assignment has not been executed;

(iii) NDZ Infrastructure now tells us that it requires at least a composite development with the adjacent society so as to be able to load additional TDR on this project. Without this, Mr Quraishy clarifies on instructions, the project is financially unviable, i.e., if it is restricted to redevelopment of the society itself.

4. Mr Quraishy maintains that this question of a composite development has been previously discussed with the society and contends that it has been at least in principle accepted. Dr Chandrachud's instructions are to the contrary. Certainly, on 20th

October 2023, at no point were we told about such proposal for a composite development. There is little point now, therefore, showing us correspondence in emails of prior dates in this regard. Dr Chandrachud's instructions are clear that the society members are no longer interested in continuing with NDZ Infrastructure. Office bearers of the society (Mr Aziz Shaikh, Secretary and Mr Vivek Ambekar, Chairman of the Society) are personally present in Court.

5. In this view of the matter, obviously the society is now entirely at liberty to take such steps as it thinks fit for the appointment of a new developer for the society redevelopment.

6. At the same, this order is not to be read as modifying, recalling, varying or setting aside any portion of our previous orders including importantly the order of 20th October 2023. To the extent that that order directed payment by NDZ Infrastructure, that order is now executable and enforceable as an order of the Court.

7. In addition, the society is at liberty to pursue any other remedies that it may have for any remaining or larger claim not covered by our order of 20th October 2023.

8. We have made these orders in a Contempt Petition. We see little purpose in pursuing the Contempt Petition. This is not to suggest that the conduct of NDZ Infrastructure is unblemished or has necessarily inspired judicial confidence. It has not. But in itself this is not a reason to proceed in contempt against NDZ Infrastructure.

9. As an officer of the Court, Mr Quraishy has always been scrupulously candid with the Court. In regard to arrears and commitments to make payment, we believe the ends of justice are satisfied by allowing our order of 20th October 2023 to be made executable as an order of the Court. This will far better serve the purposes of the society than an order of sentencing and of jail (which might well have the opposite effect).

10. Accordingly, the Contempt Petitions and the Writ Petition are disposed of in these terms.

11. There remains an issue about road widening which may well affect even a future developer. We covered some part of this in our 20th October 2023 order.

12. Mr Limaye for the Municipal Corporation of Greater Mumbai ("**MCGM**") tells us that this process has begun. We note this because it seems to us to be inconsistent for the MCGM to insist that the road width be 9 mts and at the same time not to take any action to maintain that road width. Presently the road width is 6 mts on account of structures on it which need to be removed. MCGM has permitted these structures or not acted against the removal of the structures resulting in a narrowing the road width to less than 9 mts.

13. Mr Limaye has instructions to state that the structures in question are not technically encroachments. They are authorised. From the planning permission point of view this only makes matter worse. If the structures are authorised and are therefore not required to be removed, thus resulting in a narrowing of the width of the road to less than 9 mts, we do not see how the same planning authority can insist that the road must be 9 mts when the MCGM is doing nothing to make available that width of public road. The MCGM cannot hold both positions simultaneously, i.e., insist on a road width of 9 mtrs and also maintain that the only available road width is less than 9 mtrs. Developers cannot conjure up public roads.

14. This only means that the MCGM must do whatever it needs to do whether by means of acquisition or otherwise to maintain the road at 9 mts or will be required, if necessarily by an order of the Court, to dispense with the condition of a 9 mts width of the road. Mr Limaye states on instructions that the MCGM has already begun to take steps in accordance with law to remove the structures. Going forward the society may bear these observations in mind.

15. The Show Cause Notice is discharged.

(Kamal Khata, J) **(G. S. Patel, J)**