

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

WRIT PETITION NO.2291 OF 2022

1. Bhupendra Villa Premises
Co- operative Society Limited
A Co-operative Housing Society registered
under provisions of the Maharashtra
Co-operative Societies Act, 1960 having
Registration No. BOM/HSG/2035 of 1969,
having its registered address at 546, Jame
Jamshed Road, Matunga (C.R.),
Mumbai-400 019.
2. M/s. Ramesh Builders
A Partnership Firm registered under the
provisions of the Indian Partnership Act,
1932; having its office at 9 Dhiraj
Chambers, Hazarimal Somani Marg,
Mumbai-400 001.
Represented by its Partner:
Mr. Ramesh Nanji Thakkar
3. Rajen Harshadlal Sanghvi
An adult Indian Citizen, member and
Hon. Secretary of the Petitioner No.1
having his address at 546/16,
Bhupendra Villa, Jame Jamshed Road,
Matunga (C.R.), Mumbai-400 019. ... Petitioner

Versus

1. The Union of India
Through General Manager, Central Railway,
having his office at Chhatrapati Shivaji
Maharaj Terminus, Central Railways,
Mumbai -400 001.
2. The Divisional Engineer (LM)
/Earlier Known As:
The Divisional Railway Manager (LM)

3. The Senior Divisional Railway Manager (Estate)
Annex Building, 3rd Floor, Engineering Department, Chhatrapati Shivaji Maharaj Terminus. Central Railways,
4. The Senior Divisional Railway Manager (Co-Ordination)
Annex Building, 3rd Floor, Engineering Department, Chhatrapati Shivaji Maharaj Terminus. Central Railways, Mumbai-400 001.
5. The Deputy Chief Engineer (G)
3rd Floor, GM Building, Chhatrapati Shivaji Maharaj Terminus. Central Railways, Mumbai-400 001.

Mr. Vineet B. Naik, Senior Advocate a/w. Adv. Amod Eklaspur, Adv. Ayaz Bilawala and Adv. Yogesh A. Gaikwad i/b. M/s. Bilawala & Co., for the Petitioners.

**CORAM : A. S. CHANDURKAR &
FIRDOSH P. POONTIWALLA, JJ.**

RESERVED ON : 4th DECEMBER 2023

PRONOUNCED ON : 2ND JANUARY 2024

1. **Rule.** Rule made returnable forthwith. Heard finally by consent of the parties.

2. The present Petition seeks the following final reliefs:

“a. This Hon'ble Court be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate Writ, Order, or direction thereby calling for the records & proceedings in respect of the Impugned Letter i.e., Letter dated 01/02/2022 issued by Respondent No. 2; and after perusal of the records & proceedings be pleased to quash and set aside the Impugned Letter dated 01/02/2022 being Exhibit 'A' hereto;

b. 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 thereby directing the Respondent Nos. 1 to 5 to issue a No Objection Certificate for the redevelopment of subject land situated at Jame Jamshed Road, F/North Ward, Matunga (C.R.), Mumbai - 400 019;

c) This Hon'ble Court be pleased to issue a Writ of Prohibition thereby restraining the Respondent Nos. 1 to 5 or any person claiming through them; from interfering or obstructing or hindering the redevelopment of subject land situated at Jame Jamshed Road, F/North Ward, Matunga (C.R.), Mumbai - 400 019.”

3. The land, which is the subject matter of the present Writ Petition, is land admeasuring 935.62 sq. mtrs. or thereabouts, bearing C.S. No.748/10 of Matunga Division, and Plot No.546 situated at Jame Jamshed Road, F/North Ward, Matunga (C.R.), Mumbai – 400019 (“the said land”).

4. By an Indenture of Conveyance dated 7th December 1926, executed by the Trustees of Improvement of City of Bombay, the said land was vested in the Secretary of the State for India in Council (the predecessors of Respondent no.1).

5. By an Indenture of Lease dated 14th November 1940 (“the said

Indenture of Lease”) , the said land was leased by the Governor-General of India in Council to Bai Champa for a term of 999 years commencing from 16th June 1939.

6. In about 1940, a ground plus two-storey building, with 12 flats and a garage, was constructed by the original lessee on the said land.

7. On 9th August 1955, by a Deed of Transfer, the said land was assigned by Bai Champa to her three sons, Bhai Harshadlal Doongersey, Bhai Bhupendra Doongersey and Bhai Suryakant alias Suresh Doongersey. The said assignment was consented to by Respondent no.5 on behalf of the President of India.

8. In about 1967/1968, an additional storey comprising of 4 flats and 2 garages was constructed on the existing structure and the building came to be known as ‘Bhupendra Villa’. The Petitioner no.1 Society was formed by occupants of the building and the former co-owners of the building. At present, Petitioner no.1 Society comprises of 19 members and houses 38 individuals, including 20 Senior Citizens and 3 children.

9. The construction activity undertaken in 1967/1968 was consented to by the General Manager (W) on behalf of the Chief Engineer, Central Railway, vide letter dated 2nd May 1968.

10. By a Deed of Assignment dated 7th March 1973, the said land was assigned by Bhai Harshadlal Doongersey, Bhai Bhupendra Doongersey and Bhai Suryakant alias Suresh Doongersey in favour of the Petitioner no.1

Society. The Assignment of the said Indenture of Lease was consented to by Respondent no.5 for and on behalf of the President of India on 17th February 1973.

11. In 2014, having regard to the age and unsafe state of the building standing on the said land, the Petitioner no.1 Society executed a registered Development Agreement and Power of Attorney dated 20th August 2014 in favour of Petitioner no.2 for the redevelopment of the said land.

12. The Petitioner no.1 Society thereafter applied for, and obtained, a Structural Audit Report from Vora and Associates, Structural Consultants, which opined that the building should be demolished and reconstructed to enable it to cater to present-day earthquake codes and durability parameters as required by I.S. codes.

13. Thereafter, Municipal Corporation of Greater Mumbai issued a Notice dated 16th June 2015, under section 354 of the Mumbai Municipal Corporation Act, 1988, to the Petitioner Society wherein the said building was labelled as a ruinous and unsafe structure.

14. In furtherance of the Development Agreement and Power of Attorney, the Structural Audit Report and the Section 354 Notice issued by the Municipal Corporation of Greater Mumbai, a NOC dated 8th October 2015 was obtained from MHADA for the purpose of carrying out redevelopment on the said land. The said NOC of MHADA is valid for one

year and requires annual renewals. The said NOC of MHADA also requires obtaining necessary permissions from the Department of Railways before commencement of work of redevelopment on the said land.

15. Petitioner No.2 authorized M/s.Anil Doshi & Associates, Architects, to correspond with Respondent nos.1 to 5 for the purpose of obtaining the NOC for redevelopment on the said land on behalf of the Petitioners. An Application dated 25th January 2016 was made by the said Architect, on behalf of the Petitioners, to Respondent no.2 for issuance of a NOC for the purpose of carrying out redevelopment on the said land.

16. Simultaneously, NOCs were obtained from the Executive Engineer (Traffic Planning) on 9th February 2016 and Chief Fire Officer on 15th February 2016.

17. By letters dated 18th February 2016 and 7th March 2016, the Architect of the Petitioners forwarded further documents to Respondent no.2.

18. Owing to the inaction on the part of the Respondent no.2 in processing the Application of the Petitioners for a NOC, multiple reminder letters were sent on behalf of the Petitioners to Respondent no.2 calling upon him to issue the said NOC.

19. Thereafter, Respondent no.5 addressed a letter dated 8th November 2018 to Respondent no.4 advising Respondent no.4 to examine the Petitioner no.1 Society's Application for NOC and to take necessary

action. In furtherance of the said letter dated 8th November 2018 issued by Respondent no.1, the Architect of the Petitioners addressed a detailed letter dated 29th November 2018 to Respondent no.5 outlining the clauses of the said Indenture of Lease which enables Petitioner no.1 Society to develop the said land and further apprised Respondent no.5 about the prevailing circumstances.

20. Respondent no.3, by a letter dated 14th December 2018, declined to issue a NOC to the Petitioner no.1 Society for redevelopment of the said land. The said letter did not give any reasons for declining the issuance of a NOC. It merely stated that the issuance of a NOC was not in consonance with the original lease agreement.

21. Being aggrieved by the non-issuance of a NOC, representations were made by Petitioner nos.1 and 2 respectively to the Minister of Railways on 21st January 2019 and 2nd December 2019.

22. Further, being aggrieved by the refusal to grant a NOC, and the lack of intervention by the Minister of Railways, the Petitioners filed a Writ Petition in this Court, being Writ Petition No.1578 of 2021, questioning the legality, validity and propriety of the said letter dated 14th December 2018. By an Order dated 27th September 2021 passed by this Court, the said letter dated 14th December 2018 was quashed and set aside as being in violation of the principles of natural justice and Respondent nos.2 and 3 were directed to take a fresh decision regarding the grant of NOC after

giving an opportunity of hearing to Petitioner nos.1 and 2.

23. Pursuant to the said Order dated 27th September 2021, an opportunity of hearing was given to the Petitioner nos.1 and 2 on 13th January 2021 and 15th November 2021. Petitioner no.1 also filed written submissions. By a letter dated 1st February 2022, (“the impugned letter”) Respondent no.2 rejected the Application of the Petitioners for the reasons mentioned in the said letter.

24. Being aggrieved by the said impugned letter, the Petitioner filed the present Writ Petition.

25. Heard the learned counsel for the parties and perused the documents on record.

26. In the impugned letter, Respondent no.2 has given various reasons for rejecting the NOC sought by the Petitioners. We will have to examine each of these reasons in order to consider the legality and validity of the impugned letter.

27. The first reason given by Respondent no.2 is in paragraph 2 (A)(i) of the impugned letter. The said reason will be considered by us subsequently in this judgement.

28. The second reason is given in paragraph 2(A)(ii) of the impugned letter, which reads as under:

“2A(ii) Apart from the above, clause 2 (I) the said Principal lease stipulates that “whenever during the said term any building on the said land or any part thereof should be

destroyed or damaged whether by fire or hurricane OR OTHERWISE, the lessee will “REINSTATE” the same under the direction and to the approval of the Several Sanctioning Authorities & will continue to” From which it is significant to note that the word “REINSTATE” implies “To return something to its previous position or status” which necessarily mean that in the event the building is damaged/destroyed or dilapidated, it has to be reinstated to its' original position and certainly not the G+17 Floor new Building as is proposed to be constructed for which now NOC is sought, and thus, the proposed development is in deviation of the Original/ Lease.”

29. Clause 2(l) of the said Indenture of Lease, on which Respondent no.2 has placed reliance, only provides that, if a building on the said land is destroyed or damaged by fire or hurricane or otherwise, the lessee is under an obligation to reinstate the same. In our view, nowhere does Clause 2(l) of the said Indenture of Lease state that, if a building on the said land is dilapidated due to the age of the building, the same cannot be demolished and reconstructed. There is no such embargo in Clause 2(l) as sought to be read by Respondent no.2.

30. Further, there are various clauses in the said Indenture of Lease which permit the lessees of the said land to construct a new building on the said land or redevelop a building. Clause 2(d) of the said Indenture of Lease provides that, in the completion of any building in the course of erection and in the erection of any new building and in the alteration of any building in the future, the lessee would not only observe the conditions as are contained in Clause 2(c) but would also observe all the other conditions and restrictions relating to the building as contained in the said

Indenture of Lease. This clause clearly contemplates the construction of a new building or demolition of an old building and redevelopment thereof. Clause 2(j) of the said Indenture of Lease provides that the lessee would not, without the previous consent in writing of the Several Sanctioning Authorities (which are defined in the said Indenture of Lease), use or permit the said premises or any part thereof to be used for any purpose, whatsoever, other than for residential buildings for the upper and middle classes only. This clause clearly shows that the lease of the said land was mainly for providing for residential buildings for upper and middle class persons. That being the purpose of the said lease, it cannot, by any stretch of imagination, be stated that the same would not include construction of a new building or redevelopment of an old building.

31. Further, clause 3 of the said Indenture of Lease also provides the covenants which the lessee is bound to follow, in compliance with Clause 2(d), for completion of a building in the course of erection, for erection of any new building and for the alteration of any building. The same also clearly demonstrates that the said Indenture of Lease clearly contemplated construction of new buildings and redevelopment of old buildings. For all the aforesaid reasons, we are unable to accept the reasons given by Respondent no.2 in paragraph 2(A)(ii) for refusing to grant NOC to the Petitioners.

32. The next reason given by Respondent no.2 for refusing the NOC is

found in paragraph 2(A)(iii) of the impugned letter, which reads as under:

*“2A(iii) It is apparent from the tenor of the Lease that the Lease is not only of the Land but also of the Buildings thereon and by reason of the same, the ownership of the land alongwith the buildings thereon vested on the Railways and as is the intention of the parties as can be gathered from clause (1) of the Lease Deed read with clause 2(m) & clause 7 which inter-alia asserts that the Lease is of the Land & buildings standing thereon, the delivery of demised premises together with buildings standing thereon expiry/termination of lease and thereafter, vesting the rights in the Governor General to collect rents.. etc from the tenants. Further, Clause 2(n) of the Original Lease stipulates that the Lessee shall not mortgage by way of under lease and shall not assign the hereby demised premises, charge or in any manner part with the possession thereof without the consent in writing of Governor General first obtained. Particular reference is drawn to para 7 of the Agreement of Development executed between you and the proposed Developers dated 20.08.2014 which reads that **"2028 sqft of carpet area will be allotted to the original 19 Members of the Society and the Developers shall be entitled to the balance surplus carpet area in lieu of the Fungible FSI for free sale on OWNERSHIP BASIS"**. Also para 28 of the said Agreement inter-alia reads that **"this agreement is executed to record the terms agreed between the parties and pursuant thereto make necessary application to the appropriate Authorities for the redevelopment on the terms and conditions mentioned in these Agreement which includes Developers right to sale the Flats in the open market"**.*

33. A perusal of the aforesaid reason given by Respondent no.2 shows that, primarily, it is the contention of Respondent no.2 that, under the said Indenture of Lease, it is not only the ownership of the said land that vested in the Respondents but also the ownership of the building on the said land vested in the Respondents. It is also the contention of Respondent no.2 that certain terms of the Development Agreement dated 20th August 2014 entered into between Petitioner no.1 and Petitioner no.2 militated against the said ownership of the Respondents of the said land and

building thereupon.

34. The contents of paragraph 2(A)(iii) show that Respondent no.2 has relied upon Clauses 1, 2(m), 2(n) and 7 to hold that the Respondents are the owners of the building constructed on the said land. In our view, none of these clauses show that the Respondents are the owners of the building constructed on the said land. Clause 1 of the said Indenture of Lease describes the land that is being leased and only provides that what was being leased to the Petitioners was the said land together with any building thereon. However, the Schedule to the said Indenture of Lease refers only to the said land and does not refer to any building standing on the said land. This shows that what was leased in 1940 was only the said land and no building.

35. Clause 2(m) of the said Indenture of Lease only provides that, at the expiration or sooner determination of the said lease, the lessee would have to deliver up the demised premises together with all buildings standing thereon. In our view, this Clause also does not indicate that the Respondents are the owners of the building on the said land. Clause 2(n) only provides that the lessee cannot assign the leased premises without the consent in writing of the Respondents. Again, this clause does not show that the ownership of the building on the said land vests in the Respondents. Further, clause 7 of the said Indenture of Lease provides that, in the event of determination of the said Lease by efflux of time or

otherwise, the sub-tenants on the leased premises would become the tenants of the lessor and would attorn their tenancy to the lessor. Again, the said clause does not indicate that the Respondents are the owners of the building on the said land.

36. Further, in India, dual ownership of land and building is recognized. In the present case, as is demonstrated by the Schedule to the said Indenture of Lease, the said land was leased and not any building standing thereupon. The building on the said land has been constructed by the lessees of the said land from their own funds. In these circumstances, if it was intended that the said buildings constructed by the lessee with its own funds, would be owned by the lessor, then the said Indenture of Lease should have specifically provided for the same. However, there is no such specific provision in the said Indenture of Lease which makes the lessor the owner of the building constructed on the said land. It is obvious that, if there was such a provision, it would provide for compensation being paid by the lessor to the lessee for getting ownership of the said building, which is also missing from the terms of the said Indenture of Lease. In our view, for the aforesaid reasons, the terms of the said Indenture of Lease do not show that the lessors, i.e. the Respondents, are the owners of the building on the said land.

37. The aforesaid will apply with even greater force to the said Indenture of Lease as, by the said Indenture of Lease, a lease has been

granted for a period of 999 years, which, as held by the following judgements, is permissible, and virtually amounts to sale of the said land:

a. ***Lavasa Corporation Limited vs. Jitendra Jagdish Tulsiani and***

Anr.¹ Paragraph Nos. 47 to 51 of the said judgement are relevant and read as under:

“47. Thus, if the entire ‘Agreement’ is perused as such, then it becomes apparent on the face of it also, that it cannot be termed or treated as an ‘Agreement of Lease’, but, in its real purport, it is an ‘Agreement of Sale’. The very fact that more than 80% of the entire consideration amount is already paid by the Respondents to the Appellant and the lease premium agreed is only of Rs.1/- per annum, including the clause relating to the period of lease of 999 years, are self-speaking to prove that, in reality, the transaction entered into by the parties is an ‘Agreement of Sale’ and not an ‘Agreement of Lease’; though it is titled as such. The law is well settled that the nomenclature of the document cannot be a true test of its real intent and the document has to be read as a whole to ascertain the intention of the parties.

48. Needless to state that, in an ‘Agreement of Lease’, the ‘Lessee’ does not pay more than 80% of the consideration amount towards the price of the said apartment. In an ‘Agreement of Lease’, the rent cannot be Rs.1/- per annum only, for such an apartment, market rate of which is more than Rs.40 lakhs. In an ‘Agreement of Lease’, parties do not pay the registration charges and stamp duty on the market value of the said apartment. The ‘Agreement of Lease’ also cannot be for such a long term for ‘999 years’. This long period of lease in itself is sufficient to hold that, it is not an ‘Agreement of Lease’, but, in reality, an ‘Agreement of Sale’.

49. In this context, learned counsel for the Appellant has rightly placed reliance on the Judgment of the Madras High Court in the case of Commissioner of Income Tax, Tamil Nadu-III Vs. Rane Brake Linings Ltd., Chennai, in Tax Case (Appeal) No.1031 of 2007; decided on 7th April 2014), wherein, reliance was placed on the Judgment of the Hon'ble Apex Court in the case of R.K. Palshikar (HUF) Vs. CIT, M.P., Nagpur and Bhandara, 1988 (172) ITR 311, holding that, "Having regard to

1 (2018) SCC OnLine Bom 274

the lease of plot for 99 years, it is clear that, under the lease in question, the Assessee has parted with an asset of an enduring nature, namely, the rights to possession and enjoyment of the properties leased for a period of 99 years, such transaction amounts to transfer of capital assets, as contemplated under Section 12B of the Income Tax Act, 1922."

50. Relying on this decision of the Apex Court in this Judgment, the Madras High Court has also held that, "Having regard to the fact that the period of lease was of 99 years, it was as good as a lease in perpetuity or a permanent lease in as much as an alienation as a sale". It was further held that, "the mere use of the word 'lease' or the fact that a long term is fixed would not by itself make the document in lease. The payment of lumpsum amount also does not make it a permanent lease any the less an alienation than a sale".

51. Here in the case, the period of lease being of '999 years'; it is as good as the transaction in perpetuity. The payment of entire consideration amount and the lease premium @ Rs.1/- per annum only, further make the intention clear that, it was not an 'Agreement of Lease', but, clearly an alienation, which can be called as 'sale'.

b. *R.K.Palshikar (HUF) vs. Commissioner of Income Tax.*²

Paragraph Nos. 3 and 8 of the said judgement are relevant and read as under:

"3. The first contention urged by the assessee before the High Court was that no capital gains tax could be levied on the said transactions for the lease of the land as the land was agricultural land, and the second contention was that Section 12-B of the said Act did not come into play as only the lease hold rights in the said lands had been conveyed. As far as the first contention is concerned, it was conceded before the High Court that as the land was diverted to non- agricultural purposes several years ago, that contention could not be pressed and it was not disputed that the lands in question constituted a capital assets within the meaning of Section 2(4-A) of the said Act. In support of the second contention of the assessee, it was urged on behalf of the assessee that the word "transfer" under Section 12-B of the said Act must be interpreted in a limited and restricted sense and the principle of ejusdem generis should be applied in construing the said word as used in Section 12-B. This contention was rejected by the High Court which took the view

² (1988) 3 SCC 594

that, as the lease was for a long period of 99 years, the agreement of lease would amount to a transfer of a capital asset within the meaning of Section 12-B of the said Act read with Section 2(4-A) thereof. The High Court answered both the questions referred in the affirmative and against the assessee. On an application made by the assessee, leave was granted by the High Court, as aforesaid, to appeal to this Court but only in respect of second question.

8. The next question which we have to consider is whether the provisions of Section 12-B of the said Act can be brought into play, although, what was transferred was only lease hold interests in the lands in question. In this connection, it is significant that the leases are for a long period of 99 years and in all the transactions of lease premium has been charged by the assessee for the grant of the lease concerned. In *Traders and Miners Ltd. v. CIT*, a case decided by a Division Bench of the Patna High Court, the assessee let on lease for 99 years a portion of a Zamindari acquired by it. The lease related to the surface right together with nine mica mines located in that area. The consideration for the lease was the payment of a 'salami' and a reserve rent per year. The Income-tax Officer determined the cost to the assessee of the mineral rights and after deducting this amount from the salami, he assessed the balance to tax as capital gains under Section 12-B of the said Act. It was held by the Patna High Court that the gains arising from the said transaction were rightly taxed. This decision has been cited without comment by Kanga and Palkhivala in their commentary on the Law of Income Tax (7th Edn.) at page 550 and no contrary case has been cited in the said text book or has been brought to our attention. It is true that the decision of the Patna High Court, relates to a case of mining lease, but to our mind, the principle laid down in that case can well be applied to the case before us. In the first place, the lease is for a long period, namely, 99 years, hence it would appear held that under the leases in question the assessee has parted with an asset of an enduring nature, namely, the rights to possession and enjoyment to the properties leased for a period of 99 years subject to certain conditions on which the respective leases could be terminated. A premium has been charged by the assessee in all the leases. In these circumstances, we fail to see how it could be said that the provisions of Section 12-B of the said Act cannot be brought into play. The grant of the leases in question, in our view, amounts to a transfer of capital assets as contemplated under Section 12-B of the said Act.”

c. *Commissioner of Income Tax, Tamil Nadu-III vs. M/s.Rane Brake*

Linings Ltd.³ Paragraph No.19 of the said judgement is relevant and reads as under:

*“19. The Hon'ble Supreme Court in the case of **Palshikar (HUF) vs. CIT (S.C.)**, reported in 172 ITR 311, considered the question regarding a lease of plot for 99 years on payment of a premium and as to whether capital gain tax levyable in respect of the said transaction. After analyzing the scope of the transaction in question, the Hon'ble Supreme Court pointed out that the lease is for a long period namely 99 years and hence, it would appear that under the lease in question, the assessee has parted with an asset of an enduring nature, namely, the rights to possession and enjoyment of the properties leased for a period of 99 years subject to certain conditions on which the respective lease could be terminated. Further, a premium has been charged by the assessee in all the leases. In such circumstances, the Hon'ble Supreme Court held that the grant of leases in question amounts to a transfer of capital assets as contemplated under **section 12B** of the Income Tax Act, 1922. The said decision would squarely apply to the facts of the case on hand and we have no hesitation to hold that the nature of transaction amounts to a transfer of a capital assets.”*

38. For all the aforesaid reasons, we are of the view that the terms of the said Indenture of Lease do not show that the Respondents are the owners of the building constructed on the said land.

39. Further, apart from the same, the past conduct of the Respondents also shows that they did not consider themselves as the owners of the building on the said land.

40. From 1940 to 1973, when the said building with 16 flats was built and the said flats were sold to third parties, who later on became members of the Petitioner no.1 Society, despite being aware of the same, no objection was taken by the Respondents contending that the same was not

3 (2014) SCC OnLine Mad 872

in consonance with the terms of the said Indenture of Lease. This past conduct of the Respondents also shows that they did not consider themselves as being the owners of the building on the said land.

41. For all the aforesaid reasons, we are unable to accept the reasons given by Respondent no.2 in paragraph 2(A) (iii) of the impugned letter for refusing an NOC to the Petitioners.

42. The third reason given by Respondent no.1 is found in paragraph 2(A)(iv) of the impugned letter, which reads as under:

*“2A (iv) Thus there is no term in the Lease Deed either implied or express permitting **transfer of any premises on ownership basis**. It is also to be noted that the Subsequent Assignments of License and consent executed between President of India and BHAI HARSHADLAL DOONGERSEY & OTHERS on dated 17.03.1973 were specifically on the stipulation mentioned in first para states that,*

"PROVIDED that this License is restricted to the particular assignments hereby authorized and save as aforesaid the covenant in the said Lease contained against the assignment, under-letting, or parting with the possession, shall remain in full force and effect"

*whereas the Redevelopment is proposed for construction of a building comprising of 17 Floors by way of transferring the FSI benefits available on the demised premises to the Developer as a consideration for the construction of a New Building, and by this transfer of FSI benefits, **a vested right is created in favour of the Developer to sell the surplus Flats in the Open Market on absolute ownership basis** which is not in consonance with the terms of Original Lease nor does the Development agreement is within the bounds of the Original Lease Agreement and also **injurious to the rights of the Owners i.e. Railway Administration, particularly considering the fact that the consideration & the premium as originally fixed in the lease deed was with reference to the various factors such as the extent projection of the building and the limited rights of the Lessees and the assignees thereof.**"*

43. To summarize, the reasons given in the aforesaid paragraph state that there is no term in the said Indenture of Lease permitting transfer of any premises on ownership basis. Further, they state that the terms of the Development Agreement between Petitioner no.1 and Petitioner no.2, whereby FSI benefits are transferred to Petitioner no.2 and right to sell flats in the open market is created in favour of Petitioner no.2, are not in consonance with the terms of the said Indenture of Lease, and are injurious to the rights of the Respondents considering the fact that the consideration and the premium as originally fixed in the said Indenture of Lease was with reference to various factors such as the extent projection of the building and the limited rights of the lessees and the assignees thereof.

44. Again, we are unable to accept the reasons given in the said paragraph 2(A)(iv) of the impugned letter for refusing the NOC. In our view, the question, of there being any such term in the said Indenture of Lease permitting transfer of any premises on ownership basis, does not arise. For all the reasons given above, the Petitioner no.1 is the owner of the building. Further, in the past, when the ownership of the said building was transferred to Petitioner no.1 by the erstwhile owners of the building, there was no objection from the Respondents. The Respondents had accepted the erstwhile owners as owners and did not object to Petitioner no.1 Society becoming the owners. In these circumstances, the

Respondents cannot have any such objection to Petitioner no.1, as the owner of the building, redeveloping the same.

45. Further, there is nothing on record to show that the consideration originally fixed in the said Indenture of Lease was not at the market rate due to the reasons mentioned in paragraph 2(A)(iv). For this reason alone, the said objection cannot be accepted. Further, in the context of the said objection, it is important to note that, as held above, a lease for a duration of 999 years is like a sale, and, therefore, the lessee would have the right to get redeveloped the building standing on the said land in respect of which the said lease is given. In any case, the alleged low consideration and premium cannot be a ground for refusing the NOC. At the highest, the Respondents would be entitled, while granting the NOC, to levy such charges as they have levied on other lessees in the vicinity of the said land to whom they have granted an NOC for redevelopment of their building on the land leased by the Respondents.

46. Further, Respondent No.2 has given reasons in paragraphs 2(A)(v) and (vi), which are a repetition of the earlier reasons given by Respondent No.2, and, therefore, they are not being set out herein. These reasons are again based on the premise that the Respondents are the owners of the building standing on the said land and, therefore, the Petitioners are not entitled to redevelop the said land, especially by constructing a building of ground plus 17 floors. As held by us hereinabove, Petitioner No.1 is the

owner of the said building standing on the said land and, therefore, is entitled to get the said redeveloped. Petitioner no.1 is required under the terms of the said Indenture of Lease to seek permission of the Respondents as lessor for the said redevelopment but it is settled law that such permission cannot be unreasonably withheld by the Respondents. This is especially so, as, in the present case, the said Indenture of Lease grants a lease for a period of 999 years, which is akin to a sale.

47. Further paragraph 2(A)(vi) states that an Opinion of a Retired Judge of this Court is of no relevance. Since, we have not based our findings in this judgement on the said Opinion, we are not dealing with the said Opinion and the conclusions of Respondent no.2 in respect of the said Opinion.

48. The reasons in Paragraph 2(A) (vii) of the impugned letter refer to the judgement of this Hon'ble Court in ***Vinobha Bhave Nagar Godavari Adhyapak Co-operative Housing Society Ltd. & Anr. vs. Central Railway & Ors.***⁴ In paragraph 2A (vii), Respondent No.2 has held that the said judgement is not of any relevance as the facts in the said case are different from the facts of the present case. Again, since we have not referred to the said judgement in ***Vinobha Bhave Nagar Godavari Adhyapak Co-operative Housing Society Ltd. & Anr.*** (Supra) whilst arriving at our findings in this judgement, we do not feel the need to deal with the same

⁴ (2021) 1 BOM C.R. 257

in this judgement.

49. This leaves us to deal with the reason given by Respondent No.2 in paragraph 2(A)(i) of the impugned letter, which reads as under:

“2A(i) 2 (e): that “She will not during the continuance of this lease make or allow any projection beyond the building line originally sanctioned for any building” which necessarily mean basic projection line as per the sketch attached therewith has to be maintained. To further elaborate, the drawing/Building plan/sketch which is part of the Indenture of Lease indicated the alignment of the building and or projection line of the building as per which the extant of offset available between the Building Line and the Railway Land Boundary as follows viz:

*6.10 m on the West Side
6.10 m on the North Side
3.05 m on the East Side &
6.10 m on the South Side*

Whereas, examination/scrutiny of the Building Plan/layout Plan submitted by you alongwith your Application reveals that the extent of offset that would be available between the Building Line and the Railway Land Boundary as follows viz:

*1.50 m on the West Side
6.0 m on the North Side
1.50 m on the East Side &
2.65 m on the South Side*

This would clearly show that the proposed building line as depicted in the building plan, the building projection line is beyond the originally approved existing building line and as such the same would be in violation of the terms of the Original Indenture of Lease dated 14-11-1940.”

50. In the aforesaid paragraph, it is the contention of Respondent no.2 that, as per the building plans submitted by the Petitioners, the projection is beyond the originally approved existing building line and, therefore, the same would be in violation of Clause 2(e) of the said Indenture of Lease. Whilst challenging this finding of Respondent No.2, the Petitioners have

submitted that Respondent No.2 has misconstrued Clause 2(e) of the said Indenture of Lease and the building line sanctioned in 1940 is sought to be labelled as sacrosanct. It is the submission of the Petitioners that such an interpretation would tantamount to substituting the expression "the building line originally sanctioned for any building" with the expression "the building line as shown in the plan annexed to the Indenture of Lease". The Petitioners submitted that Clause 2(e) restricts the projection of a structure beyond the building line originally sanctioned for any building that may be constructed during the subsistence of the lease in compliance with Clause 2(c) read with Clause 3(c) and (d). The Petitioners further submitted that Respondent no.2 had not considered that Clause 2(d) contemplates the erection of any new building and alteration of any building in future.

51. We are unable to accept the submission of the Petitioner. Clause 2(e) of the said Indenture of Lease reads as under: -

“2(e) That she will not during the continuance of this Lease make or allow any projection beyond the building line originally sanctioned for any building.”

52. If the Petitioners' arguments are accepted, the same would render otiose the word "originally" in Clause 2(e). What Clause 2(e) requires is that, during the continuance of the lease, the lessee would not make or allow any projection beyond the building line originally sanctioned for any

building i.e. the building line as shown in the plan annexed to the said Indenture of Lease. In these circumstances, we agree with Respondent no.2 that the building plans, as proposed, would violate Clause 2(e) of the said Indenture of Lease. However, in our opinion, the same cannot be a ground to refuse an NOC to the Petitioners for redevelopment of the said land. In our view, the Respondents would have to grant an NOC to the Petitioners to redevelop the said building on the said land subject to the condition i.e. that, whilst redeveloping the building, there can be no projection beyond the building line as shown in the plan annexed to the said Indenture of Lease.

53. Finally, before concluding, we will also have to deal with the objection of the Respondents that the present Writ Petition ought not to be entertained as it involves interpretation of terms of a contract. The Respondents submit that the interpretation and implementation of clauses in a contract cannot be the subject matter of a Writ Petition filed under Article 226 of the Constitution of India. Since the present Writ Petition involves interpreting the terms of the said Indenture of Lease, the same should not be entertained and the Petitioner should be relegated to the remedy of filing a Civil Suit. In support of the said submission, the Respondents have relied upon paragraph nos.8 and 10 of the judgment of the Hon'ble Supreme Court in *Kerala State Electricity Board and Another*

vs. Kurien E. Kalathil and Others,⁵ which read as under:

“8. Elaborating the first submission, learned counsel for the appellant submits that the dispute relating to interpretation of a clause in a contract and implementation of such clause cannot be made subject matter of a writ petition and remedy of the aggrieved person lies in approaching the Civil Court or some other appropriate forum. It was further contended that all contracts entered into by a body whose existence may be governed by the provisions of a statute are not statutory contracts.

10. We find that there is a merit in the first contention of Mr. Rawal. Learned Counsel has rightly questioned the maintainability of the writ petition. The interpretation and implementation of a clause in a contract cannot be the subject matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract. If a term of a contract is violated, ordinarily the remedy is not the writ petition under [Article 226](#). We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. We are also unable to agree with the observation of the High Court that since the obligations imposed by the contract on the contracting parties come within the purview of the [Contract Act](#), that would not make the contract statutory. Clearly, the High Court fell into an error in coming to the conclusion that the contract in question was statutory in nature.”

54. In response to this submission, the Petitioners have relied on paragraphs 16 to 19, 27 and 51 to 53 of the judgement of the Hon'ble Supreme Court in ***ABL International Ltd. and Anr. vs. Export Credit Guarantee Corporation of India Ltd. and Others***⁶ which read as under:

“16. A perusal of this judgment though shows that a writ petition involving serious disputed questions of facts which requires consideration of evidence which is not on record, will not normally be entertained by a court in the exercise of its

5 (2000) 6 SCC 293

6 (2004) 3 SCC 553

jurisdiction under Article 226 of the Constitution of India. This decision again, in our opinion, does not lay down an absolute rule that in all cases involving disputed questions of fact the parties should be relegated to a civil suit. In this view of ours, we are supported by a judgment of this Court in the case of Smt.Gunwant Kaur & Ors. vs. Municipal Committee, Bhatinda and Ors. where dealing with such a situation of disputed questions of fact in a writ petition this Court held : (SCC p.774, paras 14-16)

"14. The High Court observed that they will not determine disputed question of fact in a writ petition. But what facts were in dispute and what were admitted could only be determined after an affidavit in reply was filed by the State. The High Court, however, proceeded to dismiss the petition in limine. The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition.

Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons.

15. From the averments made in the petition filed by the appellants it is clear that in proof of a large number of allegations the appellants relied upon documentary evidence and the only matter in respect of which conflict of facts may possibly arise related to the due publication of the notification under Section 4 by the Collector.

16. In the present case, in our judgment, the High Court was not justified in dismissing the petition on the ground that it will not determine disputed question of fact. The High Court has jurisdiction to determine questions of fact, even if they are in dispute and the present, in our

judgment, is a case in which in the interests of both the parties the High Court should have entertained the petition and called for an affidavit in reply from the respondents, and should have proceeded to try the petition instead of relegating the appellants to a separate suit."

17. The above judgment of Smt. Gunwant Kaur (supra) finds support from another judgment of this Court in the case of Century Spg. and Mfg. Co. Ltd. vs. Ulhasnagar Municipal Council wherein this Court held : SCC p.587, para 13.

"Merely because a question of fact is raised, the High Court will not be justified in requiring the party to seek relief by the somewhat lengthy, dilatory and expensive process by a civil suit against a public body. The questions of fact raised by the petition in this case are elementary."

18. This observation of the Court was made while negating a contention advanced on behalf of the respondent-Municipality which contended that the petition filed by the appellant-company therein apparently raised questions of fact which argument of the Municipality was accepted by the High Court holding that such disputed question of fact cannot be tried in the exercise of the extraordinary jurisdiction under Article 226 of the Constitution. But this Court held otherwise.

19. Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of Smt. Gunwant Kaur, this Court even went to the extent of holding that in a writ petition, if facts required, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and or involves some disputed questions of fact.

27. From the above discussion of ours, following legal principles emerge as to the maintainability of a writ petition :-

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of facts arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.

51. From the terms of the contract, we have noticed in Clause (6) as amended by the addendum, consideration by way of barter of goods is not the sole mode of payment of consideration. The said clause contemplates alternate modes of payment of consideration, one of them being by barter of goods and the other by cash payment in US \$. The terms of the insurance contract which was agreed between the parties were after the terms of the contract between the exporter and the importer were executed which included the addendum, therefore, without hesitation we must proceed on the basis that the first respondent issued the insurance policy knowing very well that there was more than one mode of payment of consideration and it had insured failure of all the modes of payment of consideration. From the correspondence as well as from the terms of the policy, it is noticed that existence of only two conditions have been made as a condition precedent for making the first respondent Corporation liable to pay for the insured risk, that is: (i) there should be a default on the part of the Kazak Corporation to pay for the goods received; and (ii) there should be a failure on the part of the Kazakhstan Government to fulfil their guarantee. This is clear from the terms of the insurance contract read with the letter of the first respondent dated 8-9-1993 wherein at Clause 3A, it is stated : "Our liability will arise only after default has been established on the guarantee of the Ministry." From the above, it is clear both the grounds as put forth by the learned counsel for the respondent before us as well as in the two letters of repudiation issued by the first respondent are unsustainable. In our opinion, the first respondent insured the export risk of the appellants in regard to the non payment of the consideration for the tea exported whether it arose from the non fulfillment of the barter clause or for the non fulfillment of the cash payment clause. The argument advanced on behalf of the respondent that the appellants refused to accept the barter by goods offered by the Kazak Corporation which amounted to a default under the contract on the part of the appellants has no legs to stand in view of the clear language of the amended Clause 6 of the agreement which as noted above states that the obligation of the buyer, namely, Kazak Corporation to pay for the goods received by it in US \$ arises when payment by barter fails for "any reason whatever". The use of the words "any reason whatever" in the said amended clause includes the reasons of refusal by the appellants to accept the goods offered in barter. On the face of the said language of amended clause, there could be no room for two opinions at all in regard to the liability of the first respondent to pay for the loss suffered by the appellants even in cases where payment by barter fails at the instance of the appellant. The learned counsel for the respondent contended that for a correct interpretation of this amended clause and the other clauses of the contracts i.e. the contract of export and the contract of insurance, between the parties there is need for oral evidence being led without which a proper interpretation of this clause is not possible, therefore, it is fit case in which the appellants should be directed to approach the Civil Court to establish their claim. We find no force in this argument. We have come to the conclusion that the amended Clause 6 of the agreement between the exporter and the importer on the face of it does not give room for a second or another construction than the one already accepted by us. We have also noted that reliance placed on sub-clause (d) of

the proviso to the insurance contract by the Appellate Bench is also misplaced which is clear from the language of the said clause itself. Therefore, in our opinion, it does not require any external aid much less any oral evidence to interpret the above clause. Merely because the first respondent wants to dispute this fact, in our opinion, it does not become a disputed fact. If such objection as to disputed questions or interpretations is raised in a writ petition, in our opinion, the courts can very well go into the same and decide that objection if facts permit the same as in this case. We have already noted the decisions of this court which in clear terms have laid down that mere existence of disputed questions of fact ipso facto does not prevent a writ court from determining the disputed questions of fact. (See: Gunwant Kaur).

52. *On the basis of the above conclusion of ours, the question still remains why should we grant the reliefs sought for by the appellant in a writ petition when a suitable efficacious alternate remedy is available by way of a suit. The answer to this question in our opinion, lies squarely in the decision of this Court in the case of ShriLekha Vidyardhi wherein this court held : (SCC pp.236-237), paras 20-22 & 24*

"The requirement of Article 14 should extend even in the sphere of contractual matters for regulating the conduct of the State activity. Applicability of Article 14 to all executive actions of the State being settled and for the same reason its applicability at the threshold to the making of a contract in exercise of the executive power being beyond dispute, the State cannot thereafter cast off its personality and exercise unbridled power unfettered by the requirements of Article 14 in the sphere of contractual matters and claim to be governed therein only by private law principles applicable to private individuals whose rights flow only from the terms of the contract without anything more. The personality of the State, requiring regulation of its conduct in all spheres by requirement of Article 14, does not undergo such a radical change after the making of a contract merely because some contractual rights accrue to the other party in addition. It is not as if the requirement of Article 14 and contractual obligations are alien concepts, which cannot coexist. The Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the Preamble. Therefore, total exclusion of Article 14 - non-arbitrariness which is basic to rule of law - from State actions in contractual field is not justified. This is more so when the modern trend is also to examine the unreasonableness of a term in such contracts where the bargaining power is unequal so that these are not negotiated contracts but standard form contracts between unequals.

Unlike the private parties the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions.

53. From the above, it is clear that when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution. Thus if we apply the above principle of applicability of Article 14 to the facts of this case, then we notice that the first respondent being an instrumentality of State and a monopoly body had to be approached by the appellants by compulsion to cover its export risk. The policy of insurance covering the risk of the appellants was issued by the first respondent after seeking all required information and after receiving huge sums of money as premium exceeding Rs.16 lacs. On facts we have found that the terms of the policy do not give room to any ambiguity as to the risk covered by the first respondent. We are also of the considered opinion that the liability of the first respondent under the policy arose when the default of the exporter occurred and thereafter when Kazakhstan Government failed to fulfil its guarantee. There is no allegation that the contracts in question were

obtained either by fraud or by misrepresentation. In such factual situation, we are of the opinion, the facts of this case do not and should not inhibit the High Court or this Court from granting the relief sought for by the petitioner.”

55. The legal position which emerges from the aforesaid judgements is as follows:

- (i) If a contract is violated, ordinarily, the remedy is not a Writ Petition under Article 226 of the Constitution of India.
- (ii) In a given case, a Writ Court can consider disputed questions of fact, and there is no bar for entertaining a Writ Petition under Article 226 of the Constitution of India even if the same arises out of contractual obligations and involves some disputed questions of fact.
- (iii) If a question of interpretation of contract is raised in a Writ Petition, and the same does not require any external aid or internal aid or oral evidence for interpretation, the Writ Court can decide the same if the facts of the case permit the same.
- (iv) Further, when an instrumentality of the State acts contrary to the public good and public interest, unfairly, unjustly and unreasonably in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution. In such a situation, neither the High Court or the Hon'ble Supreme Court is inhibited from

granting the relief sought for by the Petitioner.

56. Although the present case involves a question of interpretation of the terms of the said Indenture of Lease, in our view, this is not a case where the Petitioners should be relegated to a Civil Suit. As can be seen from the discussion above, no external aid or internal aid or oral evidence is required to interpret the terms of the said Indenture of Lease.

57. Further, in our view, the refusal by the Respondents of the NOC to the Petitioners for redeveloping the building standing on the said land is unfair, unjust and unreasonable. The aforesaid findings given by us show that the Respondents have acted in an arbitrary manner while refusing the said NOC, and, therefore, have violated the rights guaranteed to the Petitioners under Article 14 of the Constitution of India. Therefore, in our view, this is not a case where the Petitioner should be relegated to a Civil Suit. In our view, this is a case where the Writ Court, in exercise of its jurisdiction under Article 226 of the Constitution of India, is entitled to grant reliefs to the Petitioner.

58. In the aforesaid circumstances, and for the aforesaid reasons, we pass the following Orders:

- a. The impugned letter dated 1st February 2022 issued by Respondent No.2 is hereby quashed and set aside, except for the reasons given in paragraph 2(A)(i) thereto.

b. The Respondents are ordered and directed to issue an NOC for the redevelopment of the building on the said land subject to the condition that there shall not be any projection beyond the building line originally sanctioned for any building i.e. the building line shown in the plan annexed to the said Indenture of Lease.

c. Whilst granting NOC to the Petitioner, the Respondents are at liberty to levy such charges as charged to other lessees in the vicinity of the said land whilst granting them NOC for redevelopment of the buildings standing on the lands leased to them by the Respondents.

d. Rule is made absolute in the aforesaid terms.

e. In the facts and circumstances of the case, there will be no order as to costs.

(FIRDOSH P. POONIWALLA, J.)

(A.S.CHANDURKAR, J.)

59 At this stage, learned counsel appearing for the Respondents seek stay of operation of the Judgment for a period of four weeks. This request is opposed by the learned counsel for the Petitioners. In the facts of the case, the Judgment shall operate after a period of four weeks from today.

(FIRDOSH P. POONIWALLA, J.)

(A.S.CHANDURKAR, J.)