



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

WRIT PETITION NO.704 OF 2020

1A. Abdul Rehman Abrar Shaikh,
Aged about 51 years, Residing at
Shop Nos. 1, 2, 3, 4 and 5,
Ground Floor, Salamat Bakery,
Salamat House, 8, Saifee Jubilee
Street, Mumbai-400 003

1B. Abdul Subhan Abrar Shaikh,
Aged about: 50 years,
Residing at Shop Nos. 1, 2, 3, 4
and 5, Ground Floor, Salamat Bakery,
Salamat House, 8, Saifee Jubilee
Street, Mumbai-400 003

1C. Arshad Hussain Abrar Shaikh,
Through C.A. Mr. Mohammed Ahmed Shaikh,
Aged about 24 years, Residing at
Shop Nos. 1, 2, 3, 4 and 5,
Ground Floor, Salamat Bakery,
Salamat House, 8, Saifee Jubilee
Street, Mumbai-400 003

1D. Akhtari Abrar Ahmed Shaikh,
Aged about 73 years,
Residing at Shop Nos. 1, 2, 3, 4 and 5,
Ground Floor, Salamat Bakery,
Salamat House, 8, Saifee Jubilee Street,
Mumbai-400 003

...PETITIONERS

VERSUS

1. Executive Engineer 'C-1' Division
M.B.R. & R. Board, A-66,)
Dadarkar Compound, Tardeo,
Mumbai-400 034

2. The Chief Officer, M.B.R. & R. Board
Grihanirman Bhavan 3rd Floor, Bandra
(E) Mumbai-400 051

3. The Municipal Corporation of Greater Mumbai)
having its registered head office of MCGM,
Mahapalika Marg, Mumbai 400 001.)

4. Saifee Burhani Upliftment Trust, Ezzi Hall,))
Ground Floor, 47/49 Raudat Tahera Street,))
Bhendi Bazar, Mumbai – 400003

...RESPONDENTS

WITH

WRIT PETITION NO.707 OF 2020

1. Shaikh Salma Abdul Rehman
Aged 43 years, Occ. Housewife
Room No. 6, 1st Floor, Salamat House,
8 Saifee Jubilee Street, Mumbai-400003.

...PETITIONER

VERSUS

1. Executive Engineer 'C-1' Division
M.B.R. & R. Board, A-66,)
Dadarkar Compound, Tardeo,
Mumbai-400 034

2. The Chief Officer, M.B.R. & R. Board
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4. Saifee Burhani Upliftment Trust, Ezzi Hall,))
Ground Floor, 47/49 Raudat Tahera Street,))
Bhendi Bazar, Mumbai – 400003

...RESPONDENTS

Mr. Rakesh Kumar a/w Ashok Giri, Aslam Shaikh, Vikash Giri
i/b Judicature of Law Asso. for the Petitioners.

Mr. P. G. Lad with Ms. Shreya Shah, Sayli Apte, for Respondent
Nos. 1 and 2- MHADA.

Mr. Sagar Patil, for the Respondent No. 3 - MCGM.

Mr. Gaurav Joshi, Senior Advocate, a/w Feroze Patel, Fatema
Kachwala, Ananya Verma and Hozefa Saifee, i/b J. Sagar Asso.,
for Respondent No.4.

CORAM:- N. J. JAMADAR, J.

RESERVED ON : 11th OCTOBER, 2023

PRONOUNCED ON:- 10th APRIL, 2024.

JUDGMENT:-

1) Rule. Rule made returnable forthwith and, with the
consent of the learned Counsel for the parties, heard finally.

2) These Petitions under Article 226 of the Constitution of
India raise identical issues in respect of one and the same
premises and, therefore, these petitions are decided by this
common judgment. The facts being identical, the facts in Writ

Petition No. 704 of 2020 are noted elaborately. The status and position of the petitioner in Writ Petition No. 707 of 2020 are thereafter mentioned to complete the narration of facts.

Facts in Writ Petition No. 704 of 2020:-

3) The petitioners claims to be the co-owner of Plot bearing No. CS-4170, situated at Saifi Jubli Street Bhendi Bazar, Mumbai (“the subject premises”). A structure stands on the said plot. On the ground floor of the said structure, the petitioners carry business under the name and style of “M/s. Salamat Bakery”. The respondent No. 1 is the Executive Engineer and Respondent No. 2 is the Chief Executive Officer of Mumbai Building Repair and Reconstruction Board (the Board), a statutory body. Respondent No. 3- is the Municipal Corporation of Greater Mumbai. Respondent No. 4 Saifee Burhani Upliftment Trust (SBUT) is a public trust, which has purportedly undertaken the development of the Bhendi Bazar redevelopment project.

4) The petitioners assail the notice dated 1st October, 2009 and order dated 23rd October, 2019 issued by respondent No. 1 purportedly in exercise of the power under Section 95-A of the Maharashtra Housing and Area Development Act, 1976 (MHAD Act, 1976). The challenge is premised on the following facts:

(A) The subject property is situated in Bhendi Bazar area, which is a part of a Cluster Development Scheme (CDS). Respondent No. 4 – SBUT is the developer of the said CDS. In the year 2011, the respondent No. 4 began addressing proforma letters to the petitioners and other occupants of the subject premises falsely claiming that the building standing on the subject premises was in a dilapidated condition and posed a risk to the lives of the occupants. Respondent No. 4 allegedly falsely claimed that the subject premises were included in the CDS despite not having negotiated with or entered into any understanding with the petitioners and the other co-owners of the subject premises. The petitioners assert since the petitioners are the co-owner of the subject premises, it was incumbent on the respondent No. 4 to have negotiated with the petitioners as a potential developer of the said building.

(B) The petitioners claimed that the petitioners initially had 20% share in the subject premises. Three daughters of another co-owner Mr. Sadiruddin Mohammed Shafi have executed an instrument to transfer their 12% share in the subject premises in favour of the petitioners. Thereby, the

petitioners have acquired, and are entitled to, 32% share in the subject premises.

(C) It is the further claim of the petitioners that the building, which has been extensively repaired prior to 15 years, is not at all in a dilapidated condition. The petitioners were thus not willing to submit the subject premises for re-development as it was structurally sound and in no need of redevelopment. Reliance is placed on the report of 'Z Consultants' dated 9th July, 2018.

(D) The principal grievance of the petitioners is that the respondent No. 4 in collusion with respondent Nos. 1 to 3, was bent upon evicting the petitioners from the subject premises by hook or crook. The respondent No. 4 did not make any disclosure despite repeated communication by the petitioners. Respondent No. 4 also falsely claimed that the respondent No. 4 is a co-owner of the subject premises. The respondent Nos. 1 to 3, according to the petitioners, supported the wholly high-handed and illegal approach of the respondent No. 4.

(E) As a part of the aforesaid design, the respondent No. 1 addressed a notice dated 1st October, 2019 calling upon the petitioners to show cause as to why summary proceeding

for eviction should not be not initiated against the petitioners in accordance with the provisions of Section 95-A of the MHAD Act, 1976. A farce of hearing was made by the respondent No. 1. Eventually, respondent No. 1 passed an order on 23rd October, 2019 purportedly under Section 95-A of the MHAD Act, 1976 directing the petitioners and other occupants to hand over vacant possession of the premises in their occupation within three days failing which summary eviction would be effected under Section 95A (2) of the MHAD Act, 1976.

(F) The petitioners asserted, the said order suffers from the vice of non-application of mind which is evident from the fact that the operative portion of the order refers to the Lakdawala building and not Salamat House, 8, Saifee Jubilee Street, Bhendi Bazar, Mumbai. The impugned order has been passed mechanically without recording a satisfaction that the conditions precedent for invoking the powers under Section 95A of the MHAD Act, 1976 for summary eviction of the occupants, have been fulfilled.

(G) The said order has also been passed in flagrant violation of the provisions of the MHAD Act, 1976 and DCR 33 (9).

(H) By filing an additional affidavit dated 22nd November, 2019, the petitioners have raised additional grounds. It was, inter alia, asserted that the impugned notice and order are contrary to the provisions contained in Regulation 33 (9) of the Development Control Regulations (DCR). Once the provisions of DCR 33 (9) are made applicable and the proposal is processed under Urban Renewal Scheme/Cluster Development Scheme (CDS), according to the petitioners, the provisions of Section 95A, of the MHAD Act, 1976, cannot be resorted to.

(I) Secondly, a reference is made to the fact that the process for acquisition of the subject premises had also been initiated. Thus, on the one hand, a Notification was issued on 27th September, 2019 for acquiring the subject premises under Section 126 of Maharashtra Regional and Town Planning Act, 1966 and, on the other hand, respondent No. 1 has invoked the provisions contained in Section 95A of the MHAD Act, 1976.

(J) The petitioners thus assert that all the authorities are acting malafide and hand in glove with respondent No. 4 to forcibly evict the occupants of the subject premises and other buildings under the subterfuge of cluster

development to the great prejudice of the petitioners and the other occupants. The contention that the subject building falls in the C2B category and does not require immediate eviction and demolition, has been reiterated.

5) The petitioner in WP No. 707 of 2020, claims to be in occupation of Room No. 6 on the first floor of subject premises. She claims to be a co-owner of the subject premises and have been residing in Room No. 6 since 1998, in the said capacity. Her challenge proceeds on identical lines.

6) An affidavit-in-reply is filed on behalf of respondent No. 4, to oppose the prayers in the Petitions. Respondent No. 4 contends it has undertaken a holistic redevelopment of the Bhendi Bazaar area with the avowed object of rehabilitating approximately 3200 residential families and 1200 commercial/retail businesses. Keeping this object in view, respondent No. 4 submitted a proposal to the Government of Maharashtra. Thereupon, the Government of Maharashtra has granted its in principle approval to the respondent No. 4 vide letter dated 22nd July, 2011 and, thereafter, respondent No. 3- MCGM has granted a Letter of Intent (LOI) on 10th August, 2011 to the respondent No. 4 with regard to the Cluster Development Scheme (CDS). The LOI has been re-validated from time to time.

Respondent No. 4 also claims to have obtained irrevocable consent of more than 70 % of the total tenants/occupants falling under the CDS under Regulation 33 (9) of the DCR. Respondent No. 4 claims to have become the owner of 64% occupancy share of the subject premises pursuant to the conveyances executed by the erstwhile co-owners of the subject premises.

7) With regard to the grounds raised in the Petition, respondent No. 4 contends that it has executed temporary alternate accommodation agreements with tenants/occupants; simultaneously the tenants/occupants handed over free and vacant possession of their premises. Likewise, within two months of issuance of the commencement certificate for sub-cluster 7 A, in which the subject premises falls, respondent No.4 took all necessary steps to execute and register the permanent alternate accommodation agreement with the tenants/occupants certified as eligible by the respondent No. 1. The permanent alternate accommodation agreement will record the location of the permanent premises to be allocated to the petitioners. Thus, the allegations that respondent No. 4 is making efforts to evict the petitioners and the other occupants of the subject premises in a high-handed manner are not

factually correct. The petitioner and other occupants of the subject premises will get the same dispensation as has been extended to similarly placed owners/tenants/occupants in the CDS.

8) Refuting the allegations of the petitioners that the provisions contained in Section 95A of the MHAD Act, 1976, have not been complied with, Respondent No. 4 contends that it has complied with all the conditions mandated under Section 95A of the MHAD Act, 1976, namely, it has obtained consent of 70% of all the occupants and tenants; obtained NOC for redevelopment from the planning authority and has undertaken to provide temporary alternate accommodation/rent in lieu of temporary alternate accommodation to the tenants/occupants. Respondent No. 1 has issued the impugned notice only after satisfying himself that the pre-requisites for invoking Section 95A of the MHAD Act, 1976, have been fulfilled. Respondent No. 4 contends that the impugned order has been passed in accordance with law and after giving an adequate opportunity of hearing to the petitioners.

9) Respondent No. 4 controverts the claim of the petitioners that the subject building falls under C2B category. It is contended that respondent No. 3- MCGM had already issued a

Notice on 30th January, 2015 under Section 354 of the Mumbai Municipal Corporation Act, 1888 ('the Act, 1888') as the building is in a dilapidated and dangerous condition warranting its immediate demolition. Respondent No. 1 has specifically adverted to the dilapidated and dangerous condition of the building in the impugned order dated 23rd October, 2019. Reliance placed by the petitioners on the structural audit report of 'Z' Consultants dated 9th July, 2018 is stated to be misplaced as the said structural audit has not been properly carried out and, in any event, the said report was valid for 12 months.

10) An affidavit-in-reply is also filed on behalf of the Board - Respondent No. 1. An endeavour is made to support the impugned Notice and order. It is contended that the order was passed as the criteria stipulated by Section 95A of the MHAD Act, 1976, has been fulfilled. Respondent No. 1 categorically asserts that the subject premises is in a dilapidated and dangerous condition. Apart from the Notice under Section 354 of the Act, 1888, issued by MCGM, respondent No. 1 has relied upon a report dated 15th July, 2020 by Assistant Commissioner 'C' Ward to the effect that the subject premises 'Salamat House' is a dangerous building and it falls in C-1 category and since cluster redevelopment project has been sanctioned, it is the

responsibility of MHADA to ensure its redevelopment.

11) The deponent has further stated that he has personally visited the building and found it to be tilted and thus it is required to be demolished immediately. Reliance is also placed on a letter dated 25th May, 2022 addressed by the Designated Officer executive Engineer 'C' ward to the tenant/occupier/developer of the said building to the effect that the building is in a ruinous condition and likely to fall. Therefore, necessary steps be taken to pull down/repair the said building.

12) The petitioner has filed an affidavit-in-rejoinder to the affidavit-in-reply filed on behalf of the respondent No. 4- Trust and respondent No. 1- Board.

13) In the wake of the aforesaid facts and pleadings, I have heard Mr. Rakesh Kumar, the learned Counsel for the petitioners, Mr. Lad, the learned Counsel for the respondent No. 1 and Mr. Gaurav Joshi, the learned Senior Advocate for the respondent No. 4 at some length. The learned Counsel took the Court through the pleadings and documents on record.

Submissions

14) Mr. Rakesh Kumar mounted a multi-pronged challenge to the impugned order purportedly passed under Section 95A of the MHAD Act, 1976. Firstly, a broad submission was canvassed

by Mr. Rakesh Kumar that the authorities cannot be permitted to resort to Regulation 33 (9) of DCR, acquisition under Section 127 of the MRTP Act, 1966 or Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (Act, 2013) and Section 95 A of the MHAD Act, 1976, simultaneously. In the case at hand, Mr. Kumar would urge the authorities have invoked the provisions in all three Acts at the same time with a motivated design to somehow deliver vacant possession of the subject premises to respondent No. 4 to the prejudice of the proprietary and possessory rights of the petitioner.

15) Secondly, Mr. Kumar would urge the foundational premise that the building is dilapidated and dangerous is demonstrably false. A strenuous effort was made by Mr. Kumar to draw home the point that the Notice under Section 354 of the Act, 1888, purportedly issued in the year 2015 is not at all forthcoming in the record of the Municipal Corporation as the very file is missing. Therefore, the fact as to whether such Notice under Section 354 of the Act, 1888 was issued is in itself shrouded in mystery. Even otherwise banking upon the report of 'Z Consultants' dated 9th July, 2018, Mr. Kumar submitted that the building has been categorised in the C2B category and is in

repairable condition. Since the petitioners are willing to carry out necessary repairs, the petitioners and the other occupants of the building cannot be evicted by an unjust order passed under Section 95A of the MHAD Act, 1976.

16) Thirdly, Mr. Kumar submitted that the conditions subject to which the in-principle approval has been granted by the State Government on 20th July, 2011 have not been fulfilled. Likewise, the conditions subject to which LOI dated 10th August, 2011 has been granted, have also not been fulfilled. Inter alia, there is no material to indicate that the irrevocable written consent by not less than 70% of eligible tenants/occupants of the subject premises has been submitted. Nor all the conditions mentioned in Annexure IIIA of DCR 33 (9) have been fulfilled.

17) Fourthly, Mr. Kumar submitted that the Board has been constituted to perform the duties under Chapter VII of the MHAD Act, 1976. Its power and functions are distinct from the High Power Committee (HPC) constituted under DCR 33 (9) read with Appendix IIIA. The remit of the power conferred on the Board under Section 95A of the MHAD Act, 1976, is restricted to the discharge of the functions under Chapter VIII. Therefore, the authorities cannot resort to the provisions contained in Section 95A of the MHAD Act, 1976 to evict the occupant/tenant from

the premises for the purpose of development under DCR 33 (9). Taking the Court through the provisions contained in Sections 88 and 95A of the MHAD Act, 1976, Mr. Kumar submitted that the provisions contained in Section 88 have not at all been adhered to by the authorities. In the case at hand, according to Mr. Kumar, neither a certificate under Section 88 (3) of the MHAD Act, 1976 nor a notice under Section 354 of Act, 1888, requiring the petitioners to pull down the building, has been issued.

18) Lastly, Mr. Kumar contends the pre-requisites to invoke the provisions contained in Section 95A of the MHAD Act, 1976 have also not been fulfilled.

19) To bolster up aforesaid submissions, Mr. Kumar placed reliance on the judgments in the cases of **Nazir Ahmad Vs. Emperor¹**, **Municipal Corporation of Greater Mumbai Vs. State of Maharashtra and Others²**, **Bharat Kanakia and Another Vs. Mumbai Building Repairs and Reconstruction Board (MHADA Unit) and Others³** and **Bhartiya Vidya Bhavan (Bavla Compound) Co-Op. Housing Society Mumbai and Others Vs. State of Maharashtra and Others⁴**.

1 (1936) 38 BOMLR 987

2 2014 (6) Bom. C.R. 860

3 2006 (1) Bom.C.R. 201

4 2015 (5) Mh.L.J.

20) Mr. Lad, the learned Counsel for the Board submitted that none of the grounds sought to be raised on behalf of the petitioners qua the impugned order deserve any consideration. Mr. Lad laid emphasis on the fact that all the conditions to invoke Section 95A of the MHAD Act, 1975, have been fulfilled. The petitioners were given an efficacious opportunity of hearing before the impugned order came to be passed. The competent authority has passed a reasoned order, especially adverting to the dilapidated and dangerous condition of the subject building. Therefore, this Court may not delve into the merits of the decision recorded by the competent authority in exercise of writ jurisdiction.

21) Mr. Lad laid emphasis on the fact that the Municipal Corporation has given a notice for demolishing the building under Section 354 of the Act, 1888 in the year 2015 and it has also been categorically mentioned in the report of the Assistant Municipal Commissioner that the subject premises falls in C-1 category and requires immediate demolition. Therefore, according to Mr. Lad, when the petitioners have separately challenged the said notice under Section 354 of the Act, 1888 before this Court in another writ petition, the said issue cannot be considered in this petition.

22) Mr. Gaurav Joshi, the learned Senior Advocate for the Respondent No. 4, submitted that the petitioners have made an endeavour to expand the scope of the Petitions infinitely. Mr. Joshi submitted that the impugned order under Section 95A of the MHADA Act, 1976 has been challenged on the grounds of non-application of mind, want of efficacious opportunity of hearing and alleged high-handed action on the part of the authorities. The scope of this petition, according to Mr. Joshi, is thus restricted to test the legality and validity of the order under Section 95A of the MHADA Act, 1976. It would be impermissible to delve into the aspect of the condition of the subject building and the legality of the acquisition proceedings, which are subject matters of independent petitions instituted by the petitioners.

23) Mr. Joshi thus submitted that the scope of consideration in a challenge to an Order under Section 95A of the MHAD Act, 1976, is extremely limited and the Court would be required to examine whether the conditions for invoking Section 95A of the MHAD Act, 1976 have been complied with or not.

24) With the aforesaid preface, Mr. Joshi submitted that there is no challenge to the in-principle approval issued by the State Government and LOI issued by the Municipal Corporation. Therefore, the submissions based on the alleged non-compliance

of the conditions in the in-principle approval and LOI do not deserve countenance. Mr. Joshi laid emphasis on the fact that the in-principle approval and the LOI had been challenged before this Court and, in a series of judgments, this Court has repelled the said challenges.

25) Adverting to the provisions contained in Section 95A of the MHADA Act, 1976, Mr. Joshi submitted that the scope of inquiry in a challenge to an order passed under Section 95A of the MHADA Act, 1976 is extremely limited. In the case at hand, according to Mr. Joshi, all the three pre-requisites to invoke Section 95A of the MHADA Act, 1976 have been fulfilled. By a catena of judgments, it has been held that once the three ingredients contained in Section 95A of the MHAD Act, 1976 are fulfilled, the Notice and order issued in exercise of the power under Section 95A of the MHAD Act, 1976 cannot be called in question.

26) Mr. Joshi placed strong reliance on the decisions of this Court in the cases of **Radhika George and Others Vs. Maharashtra Housing and Area Development Authority and Others⁵**, **Sugrabai Gulam Abas Tambawala Vs. Chief Officer, M.B.R. and R. Board and Others⁶**, **Rashid Ahmed s/o Gulam**

⁵ 2012 (5) Mh.LJ 229

⁶ 2019 SCC Online Bom 1420

Rasul Vs. Executive Engineer and Others⁷ and Vijay Shantaram Mandavkar and Others Vs. State of Maharashtra and Others⁸.

27) Mr. Joshi countered the submissions of Mr. Kumar that the provisions contained in the MHAD Act, 1976 cannot be made applicable to the CDS in pursuance of DCR 33 (9). Mr. Joshi submitted that the said submission is in teeth of a long line of decisions where this Court has repelled the challenge to the validity of notice and order under Section 95A of the MHAD Act, 1976 in the very same project.

28) Mr. Joshi vehemently controverted the submissions of Mr. Kumar that the building is not in a dilapidated condition. It was submitted that since the challenge to the notice under Section 354 of the Act, 1888 is not a subject matter of the present Petition, the said question cannot be raised and agitated in this Petition. Even otherwise, in the face of the material on record to show that the Municipal Corporation has been repetitively issuing notices for demolition of the subject building, and the precarious condition of the building, as borne out from the photographs, the submission on behalf of the petitioners that the subject building is not in dilapidated and dangerous condition is far from reality, urged Mr. Joshi. Criticizing the

7 2016 SCC OnLine Bombay 10279

8 2015 (3) Mh.L.J. 198

technical report of 'Z consultant' dated 9th July, 2018 (Exh. C to the Petition), Mr. Joshi submitted that the said report is unworthy of any credence. It seems to have been prepared on the basis of site and visual inspection only. The structural stability of the building was not at all examined in a scientific manner. Moreover, parts of the said report indicate that the condition of the building was ruinous. It was submitted that the categorization of the building as C2B is not borne out by the observations made in the said report itself.

29) Lastly, Mr. Joshi submitted that the court cannot lose sight of the larger picture. The endeavour of the petitioners seems to be to hold up the redevelopment. There is absolutely no equity and justice in favour of the petitioners. The respondent No. 4 has categorically asserted that it would give the same dispensation to the petitioners as it has extended to similarly circumstanced owner/ occupant/tenant. Thus, there is no ground to quash and set aside the impugned order.

30) Before adverting to deal with the rival contentions and decide the contentious issues, it is necessary to note the developments in the intervening period. First, an award has been passed on 30th December, 2019, to acquire the subject premises. Two, Writ Petition No. 3463 of 2021, which assailed

the legality and validity of the notice dated 30th January, 2015 issued under Section 354 of the Act, 1888, came to be dismissed by a Division Bench of this Court by judgment and order dated 3d January, 2024.

31) In view of the dismissal of the Writ Petition assailing the legality and validity of the notice under Section 354 of the Act, 1888, and SLP thereagainst also having been dismissed by the Supreme Court, the ground sought to be urged on behalf of the petitioners that despite the building being structurally sound the authorities were resorting to the statutory provisions to evict the petitioner and occupants of the building *malafide* can not be countenanced.

32) It would be apposite to note that while dismissing the said Petition, the Division Bench also adverted to the structural audit report of 'Z Consultants' and, in the face of the material on record before the Division Bench, observed that the purported classification of the building in the said report was only for structural repairs and was also contentious because the report itself noted that structural elements and members were damaged and corroded. Inconsistently, that same structural consultant then purported to issue a certificate showing that the building was structurally stable.

33) It would be contextually relevant to note that the Division bench also took note of the fact that a submission was made that a Writ Petition had been filed to challenge the entire acquisition proceedings and, at the same time, the petitioner had sought enhancement of the awarded compensation. In that context, the Division Bench observed as under:-

“...13. The difficulty with this approach is that the Petitioner seems to believe that notwithstanding the acquisition award, and notwithstanding the fact that the acquisition and the award have never been set aside, we must proceed on the assumption that the Petitioners claim to continued and continuing 20% ownership is undisputed and not contentious. That is a wholly unsafe basis given the fact that there is an award properly made under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (“Fair Compensation Act”). The mere filing of a Petition challenging the acquisition proceeding will not render the award non est, nugatory or of no legal effect.

14. The immediate consequence is that the fundamental basis of the Petition is lost, viz., that the Petitioner is demonstrably owner of the property in question. Matters may have been different if that ownership right as on the date of institution of the Petition or even as on today was confirmed in favour of the Petitioner. But that is not so. The Petitioner cannot today therefore seek to effectively nullify the entire acquisition and all development steps taken thereafter by challenging in a 2020 Petition notices of 2014 and 2015 in this fashion.... ”

34) In view of the aforesaid developments and the observations in writ petition No. 3463 of 2021, the petitioners

cannot be permitted in this Petition to re-agitate the issues based on the alleged *malafide* notice to demolish the subject building, issued under Section 354 of the Act, 1888, and the acquisition proceedings as well. The scope of consideration in this Petition is, thus, primarily and essentially restricted to the legality and justifiability of invoking the power under Section 95A of the MHAD Act, 1976.

35) DCR 33(9) contained an elaborate provision for the redevelopment of clusters. It may not be necessary to note all the provisions of DCR 33(9) to determine the controversy at hand. Suffice it to note, by a Government Notification 2 March 2009, DCR 33(9) was substituted and Appendix IIIA was added to the said revised DCR 33(9). By a further Notification dated 9 September 2014, DCR 33(9) and Appendix 3A were again amended. Development Control and Promotion Regulation 2034 (DCPR 2034) has made significant changes in DCR 33(9) under the caption 'Reconstruction or Redevelopment of Cluster of Buildings in Cluster Development Scheme (CDS)'.

36) DCPR 33(9), in effect, allows redevelopment of clusters, each of which has a minimum area of 4000 sq. meters in the island city of Mumbai and 1000 sq. meters in the Mumbai Suburbs and extended suburbs bounded by existing distinct

physical boundaries, such as roads, nallas, railway lines etc., and accessible by existing and proposed DP road which is at least 18 meters wide. Cluster development may consist a mix of structures of different characteristic, as provided in clause 1.2 of DCPR 2034.

37) DCR 33(9) envisaged constitution of High Power Committee (HPC) which would approve the schemes with the previous sanction of the Government under DCR 33(9). Thereupon, a proposal would be submitted to Municipal Corporation of Greater Mumbai for approval of the plan. The Government of Maharashtra accordingly constituted a High Power Committee in conformity with the provisions of Appendix IIIA to DCR 33(9).

38) As noted above, the Respondent No.4 had submitted a proposal on 7 April 2011 for in-principle approval in terms of DCR 33(9) read with Appendix IIIA. Vide letter dated 27 July 2011, the Government granted its in-principle approval. Letter of Intent came to be issued on 10 August 2011, whereby the Respondent No.4 was entrusted with the redevelopment project on the terms and conditions incorporated therein.

39) In the context of the controversy at hand, it may be apposite to note that Letter of Intent dated 10 August 2011 contained a condition that the Respondent No.4 shall submit

irrevocable written consents by not less than 70% of eligible tenants/occupants of each plot / building included in urban Renewal Scheme or as provided in MHADA Act, 1976. By a letter dated 7 October 2011, the aforesaid condition No.4 was modified as under :

“Modified Condition No.4 : The irrevocable written consents by not less an 70% of all eligible tenants / occupants included in Urban Renewal Scheme or as provided in MHADA Act, 1976 shall be submitted.”

40) In the backdrop of the aforesaid regulatory framework under which Respondent No.4 is redeveloping Bhendi Bazar, the controversy as to the applicability of the provisions contained in Section 95A of MHADA Act, 1976 is required to be determined. Section 95A of the MHAD Act, 1976 reads as under :

“95A. Summary eviction of occupiers in certain cases

(1) Where the owner of a building or the members of the proposed co-operative housing society of the occupiers of the said building, submits a proposal to the Board for reconstruction of the building, after obtaining the written consent of not less than 51 per cent of the total occupiers of that building and a No Objection Certificate for such reconstruction of the building is issued by the Board to the owner or to the proposed co-operative housing society of the occupiers, as the case may be, then it shall be binding on all the occupiers to vacate the premises;

Provided that, it shall be incumbent upon the holder of such No Objection Certificate to make available to all the occupants of such building alternate temporary accommodation or to pay

rent in lieu thereof.

(2) On refusal by any of the occupant to vacate the premises as provided in sub-section (1), on being approached by the holder of such No Objection Certificate for eviction of such occupiers, it would be competent for the Board, notwithstanding anything contained in Chapters VI and VII of this Act, to effect summary eviction of such occupiers.

(3) Any person occupying any premises, land, building or structure of the Board unauthorisely or without specific written premises of the Board in this behalf shall, notwithstanding anything contained in Chapters VI and VII of this Act, be liable for summary eviction or be shifted in Board Transit Camp wherever available.

(4) Any person who refuses to vacate such premises or obstructs such eviction shall, on conviction, be punishable with imprisonment for a term which may extend to one year or with fine which may extend to five thousand rupees, or with both.”

41) A plain reading of the text of Section 95A would indicate that it envisages three conditions : (i) a proposal by the owner of a building or the members of the proposed housing society of the occupiers to the Board for reconstruction of the building backed by written consent of not less than 70% of the total occupiers of the building; (ii) A NOC for such reconstruction by the Board, and (iii) The developer shall make available to all the occupiers of such building alternate temporary accommodation. If these three conditions are satisfied, then it is obligatory on the part of

the occupiers to vacate the premises for the purpose of redevelopment.

42) To address the contingency of one or more of the occupiers refusing to vacate the premises, despite all the three conditions having been fulfilled, the legislature considered it appropriate to vest authority in the Board to effect eviction of such dissenting members summarily. Sub-clause (2) of Section 95A, under which the impugned order has been passed, thus, provides that on refusal by any of the occupants to vacate the premises, on an application made by the project proponent to whom NOC has been issued by the Board, it will be competent for the Board, notwithstanding anything contained in Chapter VI and VII of the MHAD Act, 1976 to effect summary eviction of such occupiers. Legislative intent of promoting redevelopment and removing hindrances which might be placed by one or more occupiers of the building, is manifested in sub-section (4) of Section 95A, which creates an offence not to vacate the premises when requisite conditions of sub-section (1) are fulfilled, and provides for punishment with imprisonment for a term which may extend to one year or with fine which may extend to 5000 rupees or with both.

43) The provisions empowering the Board to summarily evict the dissenting member coupled with the provision for punishment of the dissenting member, who refuses to vacate the premises, underscores the anxiety of the legislature in expediting the pace of redevelopment of the cessed buildings, given the condition of the building and the congestion in the area where these buildings are located with high density of population.

Object of Section 95A

44) The object of the legislature in introducing Section 95A [and DCR 33(5) and (7)] came up for consideration before the Division Bench of this Court in the case of **Radhika George and Ors. V/s. Maharashtra Housing and Area Development Authority and Ors.**⁹ The following observations of the Division Bench succinctly postulate the legislative object :

“22. The object of the legislature by introducing the amendments was to give an opportunity to the occupants of old structures who were unable to develop them for lack of resources to move to better accommodation at the same time create additional housing for general consumption. The State Government revised the FSI and encouraged housing development schemes by MHADA either by itself or by the housing societies. Section 95A was enacted to enable speedy implementation of such redevelopment schemes. The provision is to ensure seamless implementation of the

9 2012(5) Mh.L.J. 229

project. When the housing societies decide to get their premises redeveloped, care should be taken that its members should have premises to stay when the original building is demolished and is being reconstructed. The members should not be left in lurch being out of shelter while the redevelopment goes at its own pace. Thus, what the authority needs to examine is whether its a collective decision i.e. whether 70% of members have consented, whether permissions like the NOC are in order and whether the developer has provided adequate transit accommodation. Once the authority under Section 95A finds that these requirements are fulfilled, all that it does is to direct the members to shift to the transit accommodation awaiting reconstruction.

23. Action under Section 95A does not result in determining rights of the parties per-se. The authority under Section 95A does not finally determine or terminate any ownership rights of the members of such societies. The provision is not intended to provide a forum to adjudicate the dispute inter se between the Society, members and the developers. Those disputes will have to be adjudicated in competent Courts of law. The proceedings under Section 95A of the Act, cannot be converted into a full fledged judicial proceedings as if the authority is trying a civil suit. It also needs to be noticed that the authority i.e. executive engineer which passes the order under Section 95A s not a judicial officer equipped to decide complicated question of law relating to dispute as to title etc.”
(emphasis supplied)

45) The Division Bench went on to examine the scope of inquiry in a Writ Petition challenging the order passed by the Board under Section 95A of the MHAD Act, 1976 also. By its very nature, the scope is limited. The Division Bench observed as under :

“25.The scope of Section 95 being thus understood, it needs to be emphasized that legislature has not provided any appeal from the order passed under Section 95A. The petitioners approached the learned Single Judge invoking Article 226 of the Constitution of India. The scope of the exercise of the writ jurisdiction is now well settled. The Court may decline to exercise writ jurisdiction if it finds that the substantial justice has been done by the order impugned before it. It is not necessary for each and every infraction of law that a writ must issue. The Court is required to keep in mind whether principles of natural justice were followed and whether the authority acted within its jurisdiction, and whether any failure of justice has occasioned. In the appeal, what we are required to examine is whether the exercise of the writ jurisdiction by the learned Single Judge is perverse and whether the action of the authority in requiring the appellants to move to transit accommodation can be termed as failure of justice. This being the scope of the Writ appeal before us, though the learned counsel for the appellants has argued numerous points in detail before us, which could be urged only if there was a statutory appeal from Section 95A we granted full opportunity to the appellants in order to satisfy ourselves whether any failure of justice has occasioned by the impugned orders.”

(emphasis supplied)

46) In the case of Rashid Ahmed s/o Gulam Rasul V/s. Executive Engineer and Ors.¹⁰ a learned Single Judge of this Court culled out the conditions which are required to be fulfilled before the order of summary eviction under Section 95A can be passed. The observations in paragraph No.6 read as under :

“6. If one has regard to Section 95A, it is quite apparent that the section itself has no requirement either that the construction work should have actually commenced or that the premises sought to be vacated should be immediately obstructing the construction programme scheduled by the proponent of the scheme. Section 95A has been enacted to enable speedy implementation of redevelopment schemes undertaken under the relevant provisions of the Development Control Regulations for Greater Mumbai. Where the conditions specified under Section 95A, namely, (i) consent of 70% of members, (ii) permissions such as no objection certificate for reconstruction referred to under Section 95A and (iii) provision of adequate transit accommodation, are satisfied, the Authority referred under Section 95A is required to direct the occupiers to vacate the premises summarily, so as to enable the redevelopment contemplated under the relevant DCR. Section 95A does not take into account any particular timeline for such eviction or relate it to the actual construction programme. It cannot possibly be disputed that the building in which the subject premises are situated is part of the redevelopment scheme under DCR 33(9) and that the premises are required to be vacated for implementation of the scheme. All jurisdictional requirements under Section 95A, namely, written consent of specified number of occupiers, no objection certificate/ permission for reconstruction and availability of transit accommodation, are satisfied in the present case and no fault can be found with the impugned orders passed by the Authority.”

(emphasis supplied)

47) Following the aforesaid pronouncements, in the case of Sugrabai Gulam Abas Tambawala V/s. Chief Officer, M.B.R. and R. Board and Ors.¹¹ another learned Single Judge of this Court

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reiterated the conditions that are required to be satisfied and the scope of interference in an order under Section 95A(2).

48) At this stage itself, it may be apposite to note that the phraseology of Section 95A, in terms, does not warrant that the building to be redeveloped must be in a dilapidated and dangerous condition. From the text of Section 95A, such requirement cannot be culled out. If the building is amenable to redevelopment, under the governing regulatory framework for redevelopment, the fact that the condition of the building is not precarious or its life can be extended by repairs, is not of material significance.

49) In the case of Sugrabai (supra), this Court has in terms ruled that a perusal of Section 95A of the Act, does not indicate that for issuance of notice to vacate under Section 95A of the said Act, the building is required to be in dilapidated condition. A plain reading of the said provision clearly indicates that a proposal to the Board for reconstruction of the building can be made by the owner of the building or members of the proposed housing society of the occupants of the said building for reconstruction of the building, after obtaining the written consent of not less than 70% of the total occupiers of the building.

50) This position in law appears to be a complete answer to the submissions assiduously canvassed by Mr. Rakesh Kumar that the authorities in connivance with the Respondent No.4, were bent upon declaring the building in question dilapidated and dangerous, though it is capable of repair. It is a different matter that, as noted above, the challenge to the notice under Section 354 of the MCGM Act, 1888 has also been repelled upto the Supreme Court.

51) This propels me to the consideration as to whether the satisfaction arrived at by the Respondent No.1 in passing the impugned order under Section 95A(2) of the Act, 1976 is based on objective material. To put in in other words, whether the three conditions adverted to above, were fulfilled.

Consent of 70% of the Occupants :

52) Mr. Rakesh Kumar, learned Counsel for the Petitioners, urged with tenacity that the proposal for reconstruction has to be submitted by the owner or proposed society of the occupants. In the case at hand, the Petitioners in WP No.704 of 2020 have acquired ownership to the extent of 32% interest in the subject premises. Neither the Petitioners had applied, nor Respondent No.4 solicited the consent of the Petitioners for making such proposal. Therefore, the proposal itself cannot be said to have

been submitted in conformity with the provisions of Section 95A. It was submitted that, at best, the Respondent No.4 claimed to have acquired 64% share in the said premises. Consequently, Respondent No.4 could not have submitted an application for an order under Section 95A(2) of the Act, 1976, since the pre-requisite of consent of 70% of the occupants was not satisfied.

53) Mr. Gaurav Joshi, learned Senior Advocate for Respondent No.4, joined the issue by canvassing a three fold submission. (i) Where the redevelopment includes multiple buildings or parcels of land, 70% consent requirement is qua the entire cluster / scheme. (ii) Under the LOI issued by the Competent Authority, the condition of consent of 70% of eligible tenants/occupants of each plot/building stood modified to 70% of all eligible tenants/occupants. The Respondent No.4 has consent of over 90% of the total tenants/occupants of the buildings, parcels of land forming part of CDS. Mr. Joshi would urge that the fact that the Respondent No.4 has consent of more than 70% of the occupants has also been judicially recognized. (iii) The Petitioners claim that they are the owners of 32% share in the subject premises is itself contentious as the rest of the interest in the subject premises (other than the one that vests with Respondent No.4) stood acquired under the provisions of the Act

2013 by an Award dated 30 December 2019. Therefore, the Petitioners claim that they are the co-owner, cannot be countenanced.

54) The aspect of computation of the consent of the occupants for the proposed redevelopment is required to be considered from two perspectives. One, the general law from the point of view of practicality and object of composite or cluster development. Two, the computation of consent under the governing regulatory framework.

55) In the context of the provisions contained in the MHAD Act, 1976, the question was considered by a learned Single Judge of this Court in the case of Fathima Michael Pillai V/s. Rajendra Rameshchandra Chaturvedi and Anr.¹² wherein sixteen buildings situated on three plots of land were under redevelopment. A submission was canvassed that consent of 70% of the tenants/occupants of the particular building in which the Plaintiffs were residing was not obtained and, therefore, the order under Section 95A could not have been passed. Repelling the contention, this Court observed that, as regards consent of 70% of the tenants, the Court was of the view that since the three plots of land had been amalgamated,

12 1998(6) LJ 1001

consent of 70% of all the tenants would satisfy the requirement of Section 95A(2) of the Act, 1976.

56) The aforesaid pronouncement was followed with approval by a Division Bench of this Court in the case of Sajid Abdul Sattar Urankar and Ors. V/s. State of Maharashtra and Ors.¹³.

In the said case, the properties comprised were being redeveloped under DCR 33(7) as a part of composite project. Amalgamation of two plots had been sanctioned. Out of 17 occupants of one plot, only 7 occupants have given consent and 10 occupants were the Petitioners before the Court. Out of 88 occupants of another plot, none had made any complaint. When a submission was sought to be canvassed that 10 out of 17 occupants of the plot in question had not given consent for redevelopment, and, therefore, the requirement of consent of 70% of the occupants was not satisfied, the Division Bench after referring to the decision in the case of Fathima Michael Pillai (supra), observed as under :

“5.....In a judgment of a Single Judge of this Court (Smt. Ranjana Desai,J.) in Fathima Michael Pillai (supra) the Court held that where three plots had been amalgamated the consent of seventy percent of all the tenants put together would have to be taken into consideration in order to satisfy the requirement of Section 95A(2) of the MHADA Act, 1976. Counsel for the Petitioners submits that for the purpose of DCR 33(7) each building must be considered separately and the

13 2011(5) Mh.L.J. 131

consents of seventy percent of the occupants of every building must be taken separately. The submission cannot be accepted. Once there is an amalgamation of two properties, as in this case, a composite scheme of redevelopment is envisaged. Seventy percent of the tenants/occupants taken in the scheme as a whole must indicate their consents. The scheme is to enure to the benefit of the entire body of them. To require consents be obtained individually for each building in a composite scheme will defeat the purpose of the scheme, besides being tardy. This will virtually amount to a veto being conferred on a small group of occupants to obstruct the scheme though the large body of them in excess of seventy percent has agreed. The island city of Mumbai has numerous congested areas where it is desirable in the interests of urban planning to execute composite redevelopment of adjoining properties. Where this is sought to be achieved, the requirement of seventy percent must apply to the occupants taken as a whole.”

57) Reverting to the regulatory framework under DCPR 33(9), on approval of a CDS, any land proposed/considered under CDS on various CS/CTS Nos. and/or FP Nos. shall be treated as natural amalgamation for the purpose of CDS for which no separate approval for amalgamation of land would be necessary. It is in this context, the modification in the condition No.4, of the LOI issued on 10 August 2011 is required to be read. LOI provided for written consent of not less than 70% of all eligible tenants / occupants, included in the urban renewal scheme (now CDS). The fact that the Respondent No.4 has obtained consent of more than 70% of the occupants could not be controverted, nay the said fact has been judicially recognized.

58) A profitable reference can be made to the judgment of the Division Bench in the case of Murtuza Shabbir Tinwala V/s. The State of Maharashtra and Ors.¹⁴ In the said case, an argument was canvassed on behalf of the Petitioners therein that the LOI dated 10 August 2011 could not have been issued unless written consent of 70% of the eligible tenants/occupants was obtained. The Division Bench declined to accede to the submission, observing that the said submission proceeded on an erroneous and misconceived notion that LOI can be granted only upon the project proponent receiving consent of 70% of the eligible tenants. The observations of the Division Bench in paras 11 and 12 are material and govern the facts of the case at hand with full force, as they were rendered in the matter of the very same project and LOI which is under consideration :

“11. On merits, the first contention raised by Mr Warunjikar was that the LOI dated 10th August, 2011 could not have been granted by the HPC unless written consent of 70% of the eligible tenants / occupiers was obtained. In this regard, Mr Warunjikar relied upon pages 75 to 78 of the paper-book which shows that certain tenants had not given their consent. We find this argument to proceed on an erroneous and misconceived notion that the LOI dated 10 th August, 2011 could be granted by the HPC only after Respondent No.6 had received consent of 70% of the eligible tenants. The Government of Maharashtra, through the Urban Development Department, has issued a Government Order dated 10th December, 2009 wherein two options VRD 11 of 16 WP13.15.doc have been specified for the purpose of

obtaining a LOI under DCR 33(9) for cluster re-development. Option II of the said Government Order clearly specifies that a developer can submit a proposal for cluster re-development by obtaining consents of 70% of the land owners in that particular cluster. After this is done, the proposal is submitted by the developer to the HPC who may give its in principle consent or reject the same with valid reasons. If in principle consent is given, the LOI is issued after following the due procedure. The LOI would be granted in respect of the proposals which are accepted in principle. Option II of the Government Order dated 10 th December, 2009 reads as under:-

"OPTION II

"3(3). For Development under the Urban Renewal Scheme, the Developer, MHADA or with BMC or implementing organization to include them as independent implementation organization shall submit proposal to the High Power Committee with consent by way of grant of development rights of minimum 70 % of the land owners in that particular cluster proposed to be developed as well as land owners owning 70 % of the cluster area with the layout plan including the matters mentioned in Serial Nos.1 and 2 above.

3(4). The proposal so submitted by the Developer / implementing organization shall be scrutinized by the High Power Committee who may give in principle consent with suggestions if any or shall reject the same by giving valid reasons. The Letter of Intent will be granted in respect of the proposals which are accepted in principle.

3(5). The concerned Developer / implementing organization within one year from the date of the Letter of Intent or before obtaining Commencement Certificate for construction shall submit eligibility of the residents certified by MHADA as well as non- transferable consent letter from minimum 70% of the tenants / residents and also grant of development rights from all the remaining land owners / development right holders within that particular cluster proposed to be developed to the High

Power Committee with the proposed layout plan for its final approval. Such proposals shall be scrutinized and the High Power Committee shall specify the time limit for implementing the scheme."

12. In the present case, Respondent No.6 has obtained the LOI on the basis of the aforesaid Option II and thereafter even proceeded to obtain valid consent of 77.67% of the total number of tenants / occupants in the Bhendi Bazar Area. In this view of the matter, we find that the argument canvassed by Mr Warunjikar that the LOI could not have been granted by the High Power Committee unless 70% of the eligible tenants consented to re-development is wholly misconceived. *No land owners are before us contending that they had not given their consent to the re-development or that their consent was obtained either by coercion, undue influence and/or misrepresentation. In this view of the matter, we have no hesitation in rejecting the aforesaid argument."*

59) Mr. Rakesh Kumar urged with a degree of vehemence that there is a significant difference in the facts in the case of **Murtuza Shabbir Tinwala (supra)** and the instant case. Banking upon the observations in the last two sentences in paragraph 12 (italicised), that no land owner was before the Court in the case of **Murtuza Shabbir Tinwala (Supra)**, Mr. Rakesh Kumar urged that in the case at hand, the Petitioners in WP No.704 of 2020 are the co-owner holding 32% share in the subject premises. Therefore, the aforesaid judgment is clearly distinguishable.

60) I am afraid, the aforesaid submission does not consider the correct import of the judgment in the case of **Murtuza Shabbir Tinwala (Supra)**. The judgment emphasised in clear and explicit terms that the condition of consent of 70% of the occupants is relatable to the occupants/holders of all the land in the particular cluster. The observations that no land owners were before the Court contending that they had not given their consent to the redevelopment or that their consent was obtained under duress, was in the context of the submission that certain tenants in the said case had not given their consent. Therefore, the ratio of the decision in the case of **Murtuza Shabbir Tinwala (Supra)**, that the consent of 70% occupants is qua that particular cluster and not individual building holds the field.

61) This leads me to the consequences that emanate from the acquisition of the interest of the persons in the subject premises pursuant to an Award dated 30 December 2019. I have already noted that while dealing with the challenge to the notice under Section 354 of the Mumbai Municipal Corporation Act, the Division Bench of this Court has adverted to the fact that the claim of the ownership in the backdrop of the acquisition of the interest in the subject premises becomes tenuous. The position in law is that after the acquisition of the land and passing of the

award, the land vests in the State free from all encumbrances. Vesting of land with the State is with possession. Any person retaining the possession thereafter, has to be treated as a trespasser.

62) In the case of Delhi Development Authority V/s. Amita Singh and Ors.¹⁵, the Supreme Court referred to the Constitution Bench Judgment of the Supreme Court in the case of Indore Development Authority V/s. Manoharlal and Ors.¹⁶ and enunciated the legal position as under :

“11. The issue as to what is meant by "possession of the land by the State after its acquisition" has also been considered in Indore Development Authority's case (supra). It is opined therein that after the acquisition of land and passing of award, the land vests in the State free from all encumbrances. The vesting of land with the State is with possession. Any person retaining the possession thereafter has to be treated trespasser. When large chunk of land is acquired, the State is not supposed to put some person or police force to retain the possession and start cultivating on the land till it is utilized. The Government is also not supposed to start residing or physically occupying the same once process of the acquisition is complete. If after the process of acquisition is complete and land vest in the State free from all encumbrances with possession, any person retaining the land or any re-entry made by any person is nothing else but trespass on the State land.

Relevant paragraphs 244, 245 and 256 are extracted below :

"244. Section 16 of the Act of 1894 provided that possession of land may be taken by the State Government after passing of an award and thereupon

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16 (2020) 8 SCC 129

land vest free from all encumbrances in the State Government. Similar are the provisions made in the case of urgency in Section 17(1). The word "possession" has been used in the Act of 1894, whereas in Section 24(2) of Act of 2013, the expression "physical possession" is used. It is submitted that drawing of panchnama for taking over the possession is not enough when the actual physical possession remained with the landowner and Section 24(2) requires actual physical possession to be taken, not the possession in any other form. When the State has acquired the land and award has been passed, land vests in the State Government free from all encumbrances. The act of vesting of the land in the State is with possession, any person retaining the possession, thereafter, has to be treated as trespasser and has no right to possess the land which vests in the State free from all encumbrances.

245. The question which arises whether there is any difference between taking possession under the Act of 1894 and the expression "physical possession" used in Section 24(2). As a matter of fact, what was contemplated under the Act of 1894, by taking the possession meant only physical possession of the land. Taking over the possession under the Act of 2013 always amounted to taking over physical possession of the land. When the State Government acquires land and draws up a memorandum of taking possession, that amounts to taking the physical possession of the land. On the large chunk of property or otherwise which is acquired, the Government is not supposed to put some other person or the police force in possession to retain it and start cultivating it till the land is used by it for the

purpose for which it has been acquired. The Government is not supposed to start residing or to physically occupy it once possession has been taken by drawing the inquest proceedings for obtaining possession thereof. Thereafter, if any further retaining of land or any re-entry is made on the land or someone starts cultivation on the open land or starts residing in the outhouse, etc., is deemed to be the trespasser on land which in possession of the State. The possession of trespasser always inures for the benefit of the real

owner that is the State Government in the case.

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256. Thus, it is apparent that vesting is with possession and the statute has provided under Sections 16 and 17 of the Act of 1894 that once possession is taken, absolute vesting occurred. It is an indefeasible right and vesting is with possession thereafter. The vesting specified under Section 16, takes place after various steps, such as, notification under Section 4, declaration under Section 6, notice under Section 9, award under Section 11 and then possession. The statutory provision of vesting of property absolutely free from all encumbrances has to be accorded full effect. Not only the possession vests in the State but all other encumbrances are also removed forthwith. The title of the landholder ceases and the state becomes the absolute owner and in possession of the property. Thereafter there is no control of the landowner over the property. He cannot have any animus to take the property and to control it. Even if he has retained the possession or otherwise trespassed upon it after possession has been taken by the State, he is a trespasser and such possession of trespasser enures for his benefit and on behalf of the owner."

(emphasis in original)

63) The situation which, thus, obtains is that looked at from any perspective, the condition of consent of 70% of the occupants seems to have been fulfilled. Firstly, under the provisions contained in Section 95A of the Act, where there is a composite development, it has been held that the consent is to be computed qua all the occupants of the properties under development. Secondly, under the DCPR 33(9), in the matter of cluster development, all the plots covered under the Scheme

stand automatically amalgamated and the condition of the consent then relates to occupants/holders of all the plots. Thirdly, condition No.4 in the LOI dated 10 August 2011 stood modified on 7 October 2011 itself, to the effect that the written consent of not less than 70% of all the eligible occupants, included in the urban renewal scheme, be submitted. Fourthly, under the DCPR 2034, clause 4(a) provides that redevelopment or reconstruction under CDS may be permitted in pursuance of an irrevocable registered written consent of not less than 51% of the each buildings or 70% overall of the scheme of the eligible tenants/occupiers of all the various buildings on each plots involved in the CDS or as provided in the MHADA Act, 1976. DCPR 2034 came into force with effect from 8 May 2018. Lastly, with the passing of the Award dated 30 December 2019 to acquire the interest in the subject premises, the very substratum of the contention forcefully canvassed by Mr. Rakesh Kumar based on the co-ownership of the Petitioners in WP No. 704 of 2020 is dismantled.

No Objection for Redevelopment by the Board :

64) Mr. Rakesh Kumar would urge that in the case at hand, the Board has not given 'no objection' for reconstruction as is mandated by Section 95A(1). Strenuous effort was made by Mr.

Rakesh Kumar to persuade the Court to hold that the functions of the Board under the MHAD Act, 1976 in relation to the grant of NOC are statutory and independent of the functions of the High Power Committee under the DCR 33(9). They operate in different spheres. In the absence of a specific no objection, as is envisaged by Section 95A(1) of the Act, 1976, after following the provisions contained in the said Act, in-principle approval granted by the State Government and the LOI cannot be construed as no objection for redevelopment. If a thing is required to be done in a particular manner, it must be done in that manner or not at all. In-principle approval and the consequent LOI cannot be a substitute for the NOC under Section 95A(1) of the Act, 1976. Reliance was placed on the decision in the case of Nazir Ahmad V/s. Emperor¹⁷.

65) Mr. Joshi, learned Senior Advocate submitted that the submission sought to be canvassed on behalf of the Petitioners does not merit any countenance. In fact, with the pronouncements of this Court the controversy sought to be raised on behalf of the Petitioners is no longer *res integra*. Such submission was canvassed and has been rejected repetitively. Attention of the Court was invited to the Division Bench

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judgment in the case of Rashida Shabbir Tinwala and Anr. V/s. Bombay Building Repairs and Reconstruction Board and Anr.¹⁸

In the said case, which arose out of the same project, a specific contention was raised on behalf of the Petitioners therein that the second condition of NOC for reconstruction from the Board had not been obtained, and, therefore, resort to Section 95A(2) was not justified. The Division Bench declined to agree with the said submission. The observations in paragraphs 9, 10, 11, 12 and 13 read as under :

“9. In the present case, the approval in the form of the LOI, has been granted by the HPC to Respondent No.3 - SBUT for cluster redevelopment of the Bhendi Bazaar Area. The HPC, consists of several high ranking officials as mentioned earlier, including the Chief Officer of the Mumbai Building Repair and Redevelopment Board (MBRRB) (Respondent No.1) which is the board that is required to give its No Objection as contemplated under Section 95A.

10. Since the HPC (comprising of high ranking officials from authorities like the MBRRB and MCGM) has issued the LOI in favour of Respondent No.3 - SBUT, we are clearly of the view that no separate or independent No Objection is required as contemplated Section 95A. The reason for coming to this conclusion is one which is quite simple. The NOC contemplated under section 95A is issued writ petitionl.1662.15 with 328.doc by the MBRRB under section 79 of the MHADA Act, 1976. The highest ranking officer of the MBRRB is a party to granting the LOI and it would be futile to suggest that this very officer whilst agreeing to grant the LOI in favour of Respondent No.3 - SBUT, would be in a position to take a contrary

stand whilst issuing a NOC as contemplated under section 95A of the MHAD Act, 1976. If this was indeed the case then the MBRRB would be effectively wearing two different hats in relation to the same re-development and could give two contrary decisions (one of granting the LOI and allowing re-development under DCR 33(9), and the other, withholding the NOC as contemplated under section 95A and not allowing the very same re-development). We do not think that either DCR 33(9) read with Appendix IIIA or sections 79 or 95A of the MHAD Act, 1976 contemplate such an absurd result. If the argument of Mr Warunjikar is to be accepted, it would mean that for every single building/structure in a cluster re-development / Urban Renewal Scheme, a separate and independent NOC would have to be obtained from the MBRRB. This would defeat the very purpose of DCR 33(9) which specifically deals with cluster re-development / Urban Renewal Schemes. We are therefore clearly of the view that once the HPC has issued the LOI for cluster re-development, there is no question of again seeking the NOC of the MBRRB as contemplated under Section 95A(1). The NOC as contemplated under section 95A(1) of the MHAD Act, 1976 is deemed to have been granted in view of the fact that the Chief Officer of the MBRRB is a member of the very same HPC that has granted the LOI.

11. We find support to this interpretation also from a Division Bench judgment of this Court in the case of Bhartiya Vidya Bhavan (Bavla Compound) Co-op. Housing Society (Proposed) v. State of Maharashtra¹⁹ to which one of us (V.M.Kanade, J.) was a party. Though the issue involved in the said Writ Petition was quite different than the one raised before us, the Division Bench construed the provisions of Section 79 of MHAD Act, 1976 and came to the conclusion that No objection Certificate granted under DCR 33(9) is in consonance with Section 79.....

12. In fact this interpretation has been correctly understood even by the Government of

Maharashtra as is clear from their letter dated 20th March, 2012 written to MHADA as well as to the Chief Officer, MBRRB. The subject of the said letter reflects initiating further action in connection with recognized re-development schemes under DCR 33(9). Paragraph 6 of the said letter clearly states that in the event the tenant opposes to vacate, to initiate necessary action by shifting the concerned tenant from the old building as per the provisions of the MHADA Act, 1976 while implementing the cluster re-development scheme.

13. In this view of the matter, we find no substance in the argument of Mr Warunjikar that since the NOC as contemplated under Section 95A(1) was not obtained for reconstruction of the said Sardharia building, the occupants thereof could not be summarily evicted under Section 95A(2)."

(emphasis supplied)

66) The Division Bench has in terms ruled that since the HPC comprising of high ranking officials from authorities like MBRRB and MCGM had issued LOI in favour of Respondent No.3, no separate or independent 'no objection' from the Board as contemplated under Section 95A of the Act was required. Such NOC under the MHAD Act, 1976 is deemed to have been granted in view of the fact that the Chief Officer of the Board is a member of the very same HPC that has granted the LOI.

67) A similar contention was repelled by a learned Single Judge in the case of Rashid Ahmed s/o Gulam Rasul V/s. Executive Engineer and Ors. (supra). In the said case, a two fold

(corrected Judgment as per Speaking to the Minutes of Order dated 15 April 2024) 50/59

submission was canvassed that Section 95A has no application to cluster development scheme coming within the DCR 33(9) and that for summary eviction of occupiers under Section 95A, a NOC for reconstruction of the building issued by the Board under the Act, 1976 was a pre-requisite and the LOI issued by the empowered committee did not amount to such NOC. Rejecting the contention, the learned Single Judge observed the said twin contentions had no merit as the issue stood concluded by Division Bench Judgment in the case of Rashida Shabbir Tinwala and Anr. V/s. Bombay Building Repairs and Reconstruction Board and Anr. (supra).

68) Mr. Rakesh Kumar, learned Counsel for the Petitioners tried his best to draw home the point that the Division Bench decision in the case of Rashida Shabbir Tinwala and Anr. V/s. Bombay Building Repairs and Reconstruction Board and Anr. (supra), proceeded to rely upon another Division Bench judgment in the case of Bhartiya Vidya Bhavan (Bavla Compound) Co-op. Hsg. Society (Prop.) V/s. State of Maharashtra (supra) (referred to in para 11 of the Rashida judgment – extracted above), without noticing a crucial distinctive factor, namely, in the case of Bhartiya Vidya Bhavan

(supra), NOC was granted by **Board** under the DCR 33(9) and not by the **HPC** under DCR 33(9).

69) An effort was made to urge that the precedential value of Rashida Shabbir Tinwala (supra) is substantially eroded as it fell in the exception of rule of *sub silentio*. To buttress this submission, reliance was placed on the decision of the Supreme Court in the case of State of U.P. and Ors. V/s. Synthetics and Chemicals Ltd. and Ors. (supra), as the Division Bench in the case of Rashida Shabbir Tinwala (Supra), did not examine the aspect of the specific provision made by the legislature for applicability of Section 95A under Regulation 33(5)(7)(a) and absence thereof in Regulation 33(9) of DCPR 2034. Reliance was also placed on the judgments in the cases of Sachida Nand Singh and Ors. V/s. State of U.P. and Ors.²⁰, Municipal Corporation of Delhi V/s. Gurnam Kaur²¹, Arnis Das V/s. State of Bihar²² and Tika Ram and Ors. V/s. State of U.P. and Ors.²³

70) Again the submission proceeds on an incorrect impression of the ratio in the case of Rashida Shabbir Tinwala (supra). The Division Bench in paragraph 10 of the decision in the case of Rashida Shabbir Tinwala (Supra), has ascribed reasons which

20 Special Appeal Nos.233, 235 and 263 of 1993 dt. 19.05.1993

21 (1989) 1 SCC 101

22 (2000) 5 SCC 488

23 (2009) 10 SCC 689

weighed with the Division Bench in holding that the NOC contemplated under Section 95A is deemed to have been granted in view of the fact that the Chief Officer of the Board is a member of the HPC that has granted the LOI. Incongruity that would creep in if the Chief Officer of the Board were to grant LOI in the capacity of the member of the HPC and reject the NOC in the capacity of the Chief Officer of the Board, qua a particular building, was highlighted. After arriving at a finding that no separate NOC under Section 95A was required where HPC has granted LOI, the Division Bench went on to draw support from the decision in the case of Bhartiya Vidya Bhavan (supra).

71) I find it rather difficult to accede to the submission of Mr. Rakesh Kumar that the decision in Rashida Shabbir Tinwala (Supra), entirely proceeds on the earlier decision in the case of Bhartiya Vidya Bhavan (supra).

72) Even otherwise, the very purpose of cluster development would be defeated if the requirement of separate NOC under Section 95A(1) of the Act, 1976 is insisted qua each building comprised under such cluster development. Cluster development may consist of a mix of structures of different characteristics i.e. Cessed buildings covered by MHAD Act, 1976, buildings and land owned by the Central, State Government,

local authorities, etc., buildings acquired by MHADA under the MHAD Act, 1976, and authorised buildings at least 30 years of age etc. If each of the authorities which exercise control over the structures of different characteristics were to act in silo, cluster development would not become a reality. It is for this purpose, the State Government has constituted HPC comprising high ranking officials of all the stake holders. Thus, the submission that even where the HPC grants LOI, the Board must grant NOC for reconstruction qua individual building, has the propensity to lead to anomalous result. Viewed through the prism of the avowed object of the cluster development, the submission on behalf of the Petitioners does not deserve acceptance.

73) In any event, the judgment of the Division Bench in the case of Rashida Shabbir Tinwala (supra), holds the field and binds this Court. The submission on behalf of the Petitioners that the absence of reference to Section 95A of the Act, 1976 in DCR 33(9) in contradistinction to DCR 35(5)(7), at the first blush appears alluring. However, when subjected to close scrutiny, the submission falls through. The fact that the cessed buildings are covered by MHAD Act, 1976, cannot be lost sight of. Once the cessed buildings are included in the cluster development and the HPC grants LOI, which implies that the Board has also granted

NOC for reconstruction qua the buildings governed by the MHAD Act, 1976, by necessary implication, the resort to the provisions contained in Section 95A(2) becomes indispensable, lest the authorities would be rendered powerless in remedying the situation where the dissenting members refuse to vacate the premises in their occupation. The ultimate casualty of such a situation would be the cluster development.

74) As noted above, the anxiety of the legislature in providing a mechanism for removing the hindrances in the redevelopment by vesting authority in the Board to summarily evict the dissenting occupants and also provide for the punishment in the event of refusal, must weigh in the interpretation of the provisions of the Act, 1976. The object of composite redevelopment and cluster development can only be achieved by ensuring that one or two dissenting members do not hold up the entire redevelopment project. I am, thus, not inclined to accede to the submission on behalf of the Petitioners that the decision in the case of Rashida Shabbir Tinwala (supra), is *per incuriam* as it did not note the distinct features of DCR 33 and 35 in the matter of resort to the power under Section 95A of the Act, 1976.

Provision of Adequate Transit Accommodation :

75) The aspect of compliance of this condition need not detain the Court. The Respondent No.4 claimed to have obtained consent of more than 90% of the occupants in the cluster development and even 71% of the occupants of the building in question have given consent for the redevelopment. There are categorical averments in the affidavit in reply that the Respondent No.4 will provide temporary alternate accommodation to the occupants of the building, execute temporary alternate accommodation agreements and pay rent in lieu of temporary alternate accommodation as per the preference of the occupants and within two months of the issuance of the commencement certificate, the Respondent No.4 will take all necessary steps to execute and register the permanent alternate accommodation agreements.

76) In any event, the Respondent No.4 is statutorily enjoined to give the same dispensation to the Petitioners as is given to the similarly circumstanced occupants/tenants. There can be no variation, much less, discrimination against the Petitioners. Having examined the matter, in the light of the governing provisions of law, to satisfy the conscience of the Court that the conditions envisaged by Section 95A of the Act, 1976 have been fulfilled, it has to be seen whether the impugned order suffers

from such procedural irregularity or perversity as to warrant interference in exercise of writ jurisdiction.

77) Evidently, the notice was issued on 1 October 2019. The Petitioners were given an opportunity of hearing. The Petitioners appeared before the Competent Authority through a legal practitioner. The Competent Authority after ascribing reasons recorded satisfaction that all the conditions for initiating action under Section 95A of the Act, 1976 were fulfilled.

78) In this view of the matter and in the light of the decision in the case of Radhika George and Ors. (supra), there is no such infirmity in the impugned order as to warrant interference by the writ Court. An incorrect reference in the operative order to Lakdawala building, instead of Salamat House, does not invalidate the order as all the concerned proceeded on the premise that the proceedings under Section 95A of the Act, were in respect of the subject premises. No irretrievable prejudice was caused to the Petitioners.

79) Even otherwise, no prejudice is likely to be caused to the Petitioners in the event the subject premises is redeveloped under the cluster development scheme. On the contrary, if the Petitioners are permitted to stall the project, there is a clear and present danger of the cluster development project itself being

retarded, if not jeopardised. The elements of equity and justice also operate against the Petitioners.

80) For the foregoing reasons, I do not find any justifiable reason to interfere with the impugned notice and order of eviction under Section 95A(2) of the Act, 1976.

81) Hence, the following order :

ORDER

- i) The Petitions stand dismissed.
- ii) Ad-interim orders stand vacated.
- iii) Rule discharged
- iv) In the circumstances of the case the parties shall bear their respective costs.

[N. J. JAMADAR, J.]

At this stage, the learned Counsel for the petitioners seeks continuation of the ad-interim relief granted by this Court.

In the light of the reasons which weighed with this Court in dismissing the Petitions and the developments which have occurred in the intervening period, the Court does not consider it appropriate to continue the ad-interim relief.

The oral Application for continuation of ad-interim relief,
stands rejected.

[N. J. JAMADAR, J.]