2022 SCC OnLine Bom 140

In the High Court of Bombay

(BEFORE G.S. PATEL AND MADHAV J. JAMDAR, JJ.)

Alice Realties Pvt. Ltd. … Petitioner;

Versus

State of Maharashtra, Through Government Pleader and Others … Respondents.

Writ Petition (L) No. 19891 of 2021

Decided on January 3, 2022

Advocates who appeared in this case :

For the Petitioner Mr. Nikhil V. Adkine.

For State/Respondents Nos. 1 to 3: Mr. MA Sayed, Agp. for Respondent No. 4 Mr. PG Lad, with Aparna Kalathil, Sayli Apte and Prerana Dhoke.

The Judgment of the Court was delivered by

G.S. PATEL, J.:— Rule. Respondents waive service. By consent, Rule is made returnable forthwith, and the petition is taken up for hearing and final disposal.

2. There is an Affidavit in Reply dated 31st December 2021 of one Nilesh B Suryawanshi, Resident Executive Engineer of the 5th Respondent for himself and on behalf of Respondents Nos. 4 to 7. The Affidavit in Reply is taken on record.

3. The Petitioner is a private limited company. In this Petition under Article 226 of the Constitution of India, it seeks a direction to the 7th Respondent, the Chief Officer of the Repair Board, to delete Clause 25 of the No Objection Certificate ("**NOC**") dated 28th February 2011 and Clause 28 of a revised NOC dated 4th June 2015. Specifically, the prayer is to direct MHADA to de-club the combined premises and to treat the Petitioner as a separate tenant.

4. The NOC of 28th February 2011 is at Exhibit "C" to the Petition at page 126. Clause 25 of this NOC says that the 22 different private limited companies shown as "newly inducted tenants/occupants" are to be treated as a single occupier in possession of the owner. Accordingly, their occupied areas are clubbed together. All are considered as residential and owner-occupied. A similar condition is in Clause 28 of the revised NOC of 4th June 2015, a copy of which is at Exhibit "M" at page 205.

5. The narrow controversy is, therefore, whether the 22 tenants should be clubbed together.

6. The Petitioner claims a tenancy in respect of Room No. 5 in a building called Saraswati Vinayak Pandurang building. The Pathare Prabhu Charities Trust, a public charitable trust, holds the freehold land on which the building stands. This is located at Pandita Ramabai Road, CS No. 409 of the Malabar and Cumballa Hill Division in "D" Ward in Mumbai. There are three structures on the building known as Pathare Prabhu Dnyati Bhuvan No. 1, Saraswati Vinayak Pandurang building, and an outhouse. These were occupied by various tenants or occupants. Two structures were constructed prior to 1940 and are, or were, certified as Category-A cessed structures under Section 84 of the MHADA Act. One structure in the property was not cessed.

7. The re-development of the two cessed structures would be regulated by Development Control Regulation or DCR 33(7) read with Appendix-III to the Development Control Regulations, 1991. This, inter alia, allows existing tenants or occupants whose names are certified by MHADA to be given permanent alternate accommodation in the redeveloped building.

8. The two cessed structures are very old, and being constructed prior to 1940, are in a dilapidated condition.

9. The Trust appointed the 8th Respondent developer to undertake redevelopment work and executed a Development Agreement on 22nd May 2007. There followed a Deed of Confirmation on 10th August 2010.

10. In 2010, one of the original tenants, Lalita Umakant Dharadhar, assigned her tenancy rights in respect of Room No. 5 in favour of the Petitioner. The Petitioner approached the Trust and the developers and, after some negotiations, an Agreement was executed on 12th August 2010 by which the Petitioner acquired Dharadhar's tenancy rights in respect of Room No. 5 (about 410 sq ft carpet area). This Agreement was duly registered and stamped.

11. On 2nd November 2010, the Deputy Engineer of the Repair Board and the Executive Engineer of the Repair Board, after inspection, prepared an office note specifically stating that the tenancies were considered eligible as they conformed to the criteria mentioned in Sr. No. 21 of Annexure "B" of a Government Resolution dated 16th August 2010.

12. On 25th November 2010, the Deputy Chief Engineer Zone II of the Repair Board posed a question as to whether a tenancy can be transferred from a tenant to a private limited company and referred the matter to the Chief Officer of the Repairs Board.

13. The 8th Respondent developer had already obtained a NOC on 28th February 2011 for redevelopment of the property. The Petitioner consented to this redevelopment.

14. A list of eligible tenants/occupants was certified by the 5th

Respondent Repair Board showing the entities or persons entitled to permanent alternate accommodation. Room No. 5 is shown in the MCGM's extracts of 1995-1996. According to the Petitioner, there is no impediment to eligibility.

15. However, after the names were certified, the Repair Board's Chief Officer concluded that the developer had purchased the 22 tenancies or occupancies from the old tenants and inducted 22 newly inducted companies. He, therefore, held that these tenants could not be accepted. He took the view that DCR 33(7) contemplates the rehabilitation only of old tenants/occupants. Therefore, he opined, all these 22 tenancies would be treated as a single occupier. Their tenancies would be clubbed. They would be treated as residential and owner-occupied. This was the order passed by the Chief Officer on 28th February 2011, and this is the first NOC that is under challenge.

16. According to the Petitioner, the decision is contrary to the Government Resolution dated 16th August 2010.

17. Aggrieved by the Chief Officer's decision, the Petitioner filed an appeal to the Vice President of the 4th Respondent, MHADA. It is alleged that without giving a sufficient opportunity of being heard, the Vice-President passed an order on 13th May 2011 directing the Trust, the Petitioner and the developer to seek prior permission from the Charity Commissioner. The Trust applied for permission. But the Charity Commissioner held that there was no need to obtain prior permission for giving any space, rooms or flats on rental basis or for exchanging tenancies. The Petitioner informed this to the Vice President and CEO of MHADA by an application of 29th March 2012. Ultimately, the Vice President dismissed the Appeal on 17th December 2013, and confirmed the order of the Chief Officer. The grounds cited were that the tenancies had changed, that the companies were interrelated, there was a commonality of directors and that the new tenants/occupants fell outside the scope of DCR 33(7). It was also held that all the 22 companies were really one group and that the entire proposal was contrary to DCR 33(7). The Petitioner challenged the order of 17th December 2013 before this Court in Writ Petition (L) No. 1789 of 2014. This Court allowed the Petitioner to file an appeal. The Petitioner did so, challenging both orders i.e. of 28th February 2011 and 17th December 2013.

18. It is thereafter that the developer received a further revised NOC on 4th June 2015 reiterating in Clause 28 the same conditions or stipulations as were found in the first NOC of 28th February 2011.

19. The argument in the Petition is that there is no prohibition in DCR 33(7) or Appendix-III against the transfer or exchange of tenancies. The prohibition is on the creation of *new* tenancies. It is argued that there were initially 22 tenants. This is not contested at all.

All the old tenants transferred their tenancies with the consent of the landlord to 22 new tenants. The number of tenancies has not increased. No original tenancies have been sub-divided. No "new tenancies" have been created.

20. It is further submitted that in any case DCR 33(7) is specifically made subject to the provisions to the Maharashtra Rent Control Act, 1999. Indeed, Clause 13 of Appendix-III says that since the permissible FSI under the DCR 33(7) scheme or regime depends on the number of occupiers and actual area occupied by each, no "new tenancies" created after 13th June 1996 shall be considered. Clause 13 reads:

> 13. Since the permissible FSI in clause 5 of this Appendix is dependent upon the number of occupiers and the actual area occupied by them, no new tenancy created after 13-6-1996 shall be considered. Further unauthorised constructions made in the cessed buildings shall not be considered while computation of existing FSI. However, the occupier may be allotted to declared whether the tenement is residential or non residential.

21. It is immediately apparent that "a new tenancy" is not the same as a transfer of an old tenancy. The two cannot be equated.

22. Further, Clause 18 of Appendix-III says that a restriction on transfer of tenants is governed by the Rent Control Act until a cooperative society is formed. Once the society is formed, the provisions of the Maharashtra Cooperative Societies Act will apply. Clause 18 says:

> 18. Restriction on transfer of tenements shall be governed by provision of Rent Control Act till Co-op Society is formed and after that the same shall be governed by the provision of Maharashtra Co-op. Societies Act.

23. The Affidavit in Reply reiterates the view that the purpose of DCR 33(7) is to rehabilitate old tenants and therefore these transfers must be treated as new tenancies. We are unable to accept this submission in view of the specific clauses of Appendix-III referred to above, read with the provisions of the Maharashtra Rent Control Act.

24. Further it seems to us that MHADA's concern is in regard to the protection or reconstruction of cessed (that is to say tenanted) structures. The Housing Board and the MHADA Act are concerned with the condition of the housing structure. Tenancies cannot be created, surrendered or transferred under the MHADA Act. This is possible only under the Maharashtra Rent Control Act.

25. Moreover, the definition of 'tenant' in the Maharashtra Rent Control Act, 1999 includes a person who has derived title under the tenant. Under the earlier Rent Control statute of 1947, transfers of

tenancies were illegal. Now, under Sections 55 and 56 in Chapter IX of the Maharashtra Rent Control Act, 1999, transfers of tenancy are permitted with the requirement that these must be registered (which has been done in this case) and that the tenant and the landlord have the right to receive lawful charges. This is specifically contemplated by Clause 18 of a Appendix-III referred to above. We reproduce the relevant provisions from the Rent Act:

(15) "tenant" means any person by whom or on whose account rent is payable for any premises and includes,

(a) such person,—

(i) who is a tenant, or

(ii) who is a deemed tenant, or

(iii) who is a sub-tenant as permitted under a contract or by the permission or consent of the landlord, or

(iv) **who has derived title under a tenant**, or

(v) to whom interest in premises has been assigned or transferred as permitted, by virtue of, or under the provisions of, any of the repealed Acts;

(b) a person who is deemed to be a tenant under section 25;

(c) a person to whom interest in premises has been assigned or transferred as permitted under section 26;

(d) in relation to any premises, when the tenant dies, whether the death occurred before or after the commencement of this Act, any member of the tenant's family, who,—

(i) where they are let for residence, is residing, or

(ii) where they are let for education, business, trade or storage, is using the premises for any such purpose,

With the tenant at the time of his death, or in the absence of such member, any heir of the deceased tenant, as may be decided, in the absence of agreement, by the Court.

Explanation: The provisions of this clause for transmission of tenancy shall not be restricted to the death of the original tenant, but shall apply even on the death of any subsequent tenant, who becomes tenant under these provisions on the death of the last preceding tenant."

55. Tenancy agreement to be compulsorily registered:

(1) Notwithstanding anything contained in this Act or any other law for the time being in force, any agreement for leave and license or letting of any premises, entered into between the landlord and the tenant or the licensee, as the the case may be, after the commencement of this Act, shall be in writing and shall be registered under the Registration Act, 1908 (XVI of 1908).

(2) The responsibility of getting such agreement registered shall be on the landlord and in the absence of the written registered agreement, the contention of the tenant about the terms and conditions subject to which a premises have been given to him by the landlord on leave and licence or have been let to him, shall prevail, unless proved otherwise.

(3) Any landlord who contravenes the provisions of this section shall, on conviction, be punished with imprisonment which may extend to three months or with fine not exceeding rupees five thousand or with both.

56. Right of Tenant and Landlord to receive lawful charges:

Notwithstanding anything contained in this Act, it shall be lawful for,—

(i) the tenant or any person acting or purporting to act on behalf of the tenant to claim or receive any sum or any consideration, as a condition of the relinquishment, transfer or assignment of his tenancy of any premises;

(ii) the landlord or any person acting or purporting to act on behalf of the landlord to receive any fine, premium or other like sum or deposit or any consideration in respect of the grant, or renewal of a lease of any premises, or for giving his consent to the transfer of a lease to any other person."

26. The contention in the Affidavit in Reply that the corporate veil should be pierced or that these companies should be treated as the group of companies does not appeal to us. The concern is not about whether the entities are connected to each other but whether there is an attempt to create a 'new tenancy' or whether something impermissible has been done contrary to the provisions of the Rent Act and the DC Regulations. On the other hand, if there is a mere transfer of a tenancy—that is to say not the creation of a new tenancy—then the prohibition in DCR 33(7) and Appendix-III cannot apply.

27. Having regard to these facts and the legal position set out above, we are satisfied that there is no real defence to this Writ Petition, which therefore deserves to be allowed. Clause 25 of the NOC dated 28th February 2011 and Clause 28 of the revised NOC dated 4th June 2015 cannot be sustained. Those two Clauses are quashed and set aside. Further, the condition of clubbing the tenancies and treating all of them as a single residential unit and owner-occupied consequently cannot be sustained. MHADA is directed to issue a revised NOC if required in keeping with these directions.

28. The Petition is disposed of in these terms. There will be no order as to costs.

29. All concerned will act on production of a digitally signed copy of

this order.

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