SUPREME COURT OF INDIA

Avinash Gaikwad

Vs.

State of Maharashtra

C.A.No.4890 of 2010

(R.V.Raveendran and P.Sathasivam JJ.)

05.07.2010

JUDGEMENT

R.V.Raveendran, J.

1. Leave granted. Heard the parties.

2. The appellants challenge the order dated 5.5.2005 by which W.P.No.649/2005 filed by them was dismissed by the Bombay High Court.

3. A property known as Pimpalwadi at CS No.370 Tatya Gharpure Marg, Girgaon Division, Mumbai, originally belonged to Sir Harkishandas Trust. The said property consisting of several Chawls, Godowns and Sheds was acquired by the State of Maharashtra under section 41 of the Maharashtra Housing & Area Development Act, 1976 in the year 1988.

> "Thereafter, the State Government delivered possession of the said property to the Maharashtra Housing & Area Development Authority (`MHADA' for short) on 31.1.1989 for redevelopment under Urban Renewal Scheme.
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> However, due to certain protracted litigation between the owners of the property and Pimpalwadi Bhadekaru Sangh formed by the occupants of the said property, MHADA could not take up the reconstruction. At that stage, the said Pimpalwadi Bhadekaru Sangh, gave a proposal to MHADA to permit development of the property through M/s. Shreepati Towers - a private developer (an AOP of respondents 5 to 12 described also as "R.R. Chaturvedi & Others of M/s. Shreepati Group"). The said property had 312 residential tenements and 23 non-residential tenements. MHADA considered the proposal and granted a no objection certificate dated 27.2.2001 for redevelopment of the said property in favour of the developer, under Regulation No. 33(7) of Development Control Regulations for Greater Mumbai, 1991 (for short `DC Regulations')."

4. The said NOC was challenged by some occupants/tenants by filing WP No.1299/2001 in the Bombay High Court. The said petition was allowed by order dated 30.4.2002 and the NOC dated 27.2.2001 granted by MHADA to the developer was set aside with a direction to MHADA to itself develop the property. The said decision was challenged by MHADA in C.A.Nos.2046-47/2003 before this Court. The developers and some tenants also filed appeals. In those appeals, this Court by interim order dated 23.9.2002 called upon the State Government and MHADA to state whether the State Government would direct MHADA to take up and proceed with the construction. In pursuance of it, the State Government and MHADA held deliberations and MHADA prepared a scheme in consonance with the guidelines issued under the Urban Renewal Scheme by the Government read with DC Regulation 33(9). Thereafter, the State Government filed an affidavit dated 15.2.2003 wherein they set out the terms of a scheme as follows:

> "Under the scheme, the property can be developed by MHADA utilizing up to 4 FSI. The contractor/developer involved in the scheme shall construct 335 tenements for the existing tenements free of cost to MHADA. He shall get some areas for free sale which will be equivalent to
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> 2.5 FSI minus the FSI required for construction of tenements for the tenants. He shall also construct additional tenements free of cost for MHADA to accommodate tenants in the Master List using part of the balance 1.5 FSI out the total 4 FSI available under the scheme. The said scheme can be implemented by MHADA involving contractor/developer who has consent of atleast 70% of the occupants of the property in question.
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> In nutshell since MHADA does not have adequate funds to construct the houses for tenants, Government proposes after due consultations with MHADA, to execute the project through developer, who within 2.5 F.S.I.
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> will construct free flats for 335 tenants. Remaining FSI out of 2.5 can be utilized by developer for his free sale flats.
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> MHADA gets 4.00 F.S.I. Therefore, within remaining 1.5 F.S.I, it is proposed to construct 134 in the same premises, flats for those who are in the transit camp for which separate negotiations will be made with the developer.
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> In view of the resources crunch faced both by Government and MHADA, they both after discussion with each other have together decided the above course of action, for which Government requests the approval of the Supreme Court.
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> xxxxx If the above scheme is approved by the Hon'ble Supreme Court, State Government shall issue appropriate guidelines for the purpose of the implementation of the reconstruction scheme by availing FSI in accordance with the provisions of DC Regulations 33(9) of the DC Regulation 1991. The guidelines shall prescribe

transparent purpose of the implementation of the reconstruction scheme by availing FSI in accordance with the provisions of DC Regulations 33(9) of the DC Regulation 1991. The guidelines shall prescribe transparent procedure such as explaining the plans of the new building, municipal & other taxes likely to be incurred by the occupants, formation and registration of the Co-operative Housing Society, area to be utilized for the purpose of rehabilitation and free sale etc. as directed by the Hon. High Court in its judgment MHADA would be directed to complete the reconstruction scheme within the four corners of the administrative guidelines issued by the Government."

This Court considered the said scheme and by order dated 7.3.2003, recorded the acceptance thereto by MHADA and others also, barring some tenants, and accepted the said Scheme and disposed of the matter in terms of it."

5. In pursuance of the order of this Court, the State Government issued guidelines on 24.3.2003. The Mumbai Building Repair & Reconstruction Board (`MBRRB' for short, the third respondent herein), issued an NOC dated 23.5.2003 to the Developer for redevelopment of the said property jointly by MHADA and the developer in pursuance of DC Regulation 33(9) read with Regulation 33(7). Thereafter, MHADA entered into an agreement dated 30.6.2003 with the developers (respondents 5 to 12) in regard to the development of the said property. In pursuance of it, the developer, after securing possession, has re-developed the property.

6. During the course of the execution of the development project, five tenants filed Writ Petition Nos.108/2003 and 3096/2003 challenging the subsequent NOC dated 23.5.2003 issued by third respondent in accordance with the order of this Court, approving the Scheme. The Bombay High Court by its judgment dated 16.2.2004 dismissed the said petitions and in the course of the said judgment, observed as under :- "The NOC dated 23.5.2003 granted by MHADA pursuant to the directions given by the Supreme Court is now sought to be challenged primarily on the ground that the DC Regulation 33(7) has no application to the said property as DC Regulation 33(7) is applicable to cessed properties whereas the said property is acquired property, and therefore the state has committed an error in applying DC Regulation 33(7) and the NOC is invalid.....DC Regulation 33(9) is applicable to properties acquired by the State/MHADA whereas DC Regulation 33(7) apply to cessed properties. However, there is nothing in the provisions of DC Regulations 33(9) and 33(7) cannot be invoked simultaneously so that MHADA can get additional tenements in order to house dishoused persons as per the Master List. In fact both provisions were incorporated in the scheme submitted before the Supreme Court. The scheme approved by the Supreme Court specifically contemplate that the land, though vested in MHADA/State would be developed through the builder by invoking the provisions of DC Regulation 33(9) read with D C Regulation 33(7) of the D C Regulations."

7. Thereafter, the present appellants along with two others (all previous occupants of the property) filed Writ Petition No.649/2005 seeking the following, among others, reliefs : (a)

declaration that the re-development of Pimpalwadi property was not being done in accordance with law and the DC Regulations, and for a direction to respondents to carry out the re- development by removing the defects pointed out in the writ petition; (b) a direction to the developers to demolish the rehabilitation tenements constructed so far as they were not conforming to the DC Regulations; (c) for a direction to MHADA and MBRRB to construct the rehabilitation tenements at their own cost as per DC Regulations. However, when the said petition came up for hearing before the High Court, only two contentions were urged, presumably because the other contentions were covered by the decision of this Court and subsequent High Court order dated 16.2.2004.

> "The first contention was that the area of each tenement to be constructed and delivered to the previous occupants should have, in addition to a carpet area of 225 sq. ft. in respect of the tenement, a balcony measuring 10% of the tenement area. The second contention was that the height of the tenements (height between roof and floor) should not be less than 2.9 M, instead of 2.7 M adopted by the developer. The High Court by its order dated 5.5.2005 disposed of the said writ petition. It held that the first contention could not be accepted as the Scheme was under DC Regulations and it did not require construction of a balcony in addition to the tenement measuring 225 sq. ft.
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> In regard to the second contention, the High Court recorded the submission of the developer that the height of the units will be increased to 2.9 M in the buildings which were yet to be constructed."

8. The said judgment is challenged in this appeal by special leave by the appellants who were occupants. In the special leave petition, several contentions have been raised. When it was pointed out by the court that only two contentions were urged before the High Court (out of which one was conceded by the developer before the High Court, leaving one issue for decision), the learned counsel for the appellants submitted that the appellants were pressing only one contention regarding the area of the tenements to be delivered to the previous occupants. It was contended that they should be delivered tenements of minimum carpet area of 225 sq.ft. as permanent alternative accommodation with a balcony in addition, which is of a minimum area of 22.5 sq.ft. (10% of the tenement area). Thus, the only question that arises for our consideration is whether the developer is bound to construct and deliver to the previous occupants, tenements with a balcony measuring a balcony area of a minimum area of 22.5 sq.ft. in addition to the minimum carpet area of 225 sq.ft.

9. The NOC dated 23.5.2003 issued by MBRRB and the Agreement dated 30.6.2003 between MHADA and the developer, require the developer to deliver to each occupant of the old building, a tenement with a carpet area equal to area occupied by him for residential purpose subject to minimum carpet area of 225 sq.ft. They do not require delivery of any additional balcony area. We extract below Clause (3) of the operative portion of the agreement dated 30.6.2003:

"The second party shall out of the 2.5 FSI, construct and hand over to the first party, 312 tenements for the residential tenants and 23 tenements for the non residential tenants of the said property and free sale tenements for the second party as per provisions under Appendix III of DCR 33(7)."

10. Not finding any support from the agreement dated 30.6.2003, the appellants attempted to seek support for their claim for balcony (with an area of 10% of the area of the tenement) with reference to DC Regulation No. 33(9) read with Regulation 35(2)(k) and Regulation 38(22). It is submitted that the development being a reconstruction under the Urban Renewal Scheme, it was governed by DC Regulation 33(9); that in regard to the developments of cessed buildings under DC Regulation 33(7) and development of slums under DC Regulation 33(10), the area of 225 sq.ft. would include the area of balcony also, having regard to Clause(2) of Appendix III and Clause 1.2 of Appendix IV; that in regard to the development under DC Regulation 33(9) under the Urban Development Scheme, the balcony of an area of 10% of the tenement area) has to be provided in addition to the area of the tenement.

11. To find out whether there is any merit in the contention, we may now refer to the relevant Regulations:

"33(7) Reconstruction or redevelopment of cessed buildings in the Island City by Cooperative Housing Societies or of old buildings belonging to the Corporation or of old buildings belonging to the Police Department :- For reconstruction/redevelopment to be under taken by Cooperative Housing Societies of existing tenants or by Co-op. Housing Societies of landlords and/or occupiers of a cessed buildings of `A' category in Island City, which attracts the provisions of MHADA Act, 1976 and for reconstruction/redevelopment of the buildings of Corporation and Department of Police, Police Housing Corporation, Jail and Home Guard of Government of Maharashtra, constructed prior to 1940, the Floor Space Index shall be 2.5 on the gross plot area or the FSI required for rehabilitation of existing tenants plus incentive FSI as specified in Appendix-III whichever is more.

33(9) Repairs and reconstruction of cessed buildings and Urban Renewal Scheme:- For repairs & reconstruction of cessed buildings and Urban Renewal Scheme undertaken by the Maharashtra Housing and Area Development Authority or the Mumbai Housing and area Development Board or Corporation in the Island City, the FSI shall be 4.00 or the FSI required for rehabilitation of existing tenants / occupiers, whichever is more.

33(10) Rehabilitation of slum dwellers through owners/developers/co-operative housing societies:- For redevelopment of restructuring of censused slums or such slums whose structures and inhabitants whose names appear in the Legislative Assembly voters' list of 1985 by the owners/developers of the land on which such slums are located or by Cooperative Housing Societies of such slum dwellers a total floor space index of upto 2.5 may be granted in accordance with schemes to be

approved by special permission of the Commissioner in each case. Each scheme shall provide inter-alia the size of tenements to be provided to the slum dwellers, the cost at which they are to be provided on the plot and additional tenements which the owner/developer can provide to accommodate/rehabilitate slum dwellers/project affected persons from other areas etc. in accordance with the guidelines laid down in the Regulations in Appendix IV."

35. Floor Space Index Computation - (1) Floor Space Index/Built-up calculations - The total area of a plot shall be reckoned in floor space index/built-up area calculations applicable only to new development to be undertaken hereafter as under:- xxx xxx xxx (2) Exclusion from FSI computation - The following shall not be counted towards FSI:- xxx xxx xxx (k) Area of balconies as provided in sub-regulation (22) of Regulation 38.

xxx xxx xxx Sub-regulation (22) of Regulation 38 referred to in Regulation 35(2) is extracted below:

38(22) -- Balcony - In any residential zone (R-1) and residential zone with shop line (R-2), or in a purely residential building in any other zone, balconies may be permitted free of FSI at each floor, excluding the ground and terrace floors, of an area not more than 10 per cent of the area of the floor from which such balcony projects subject to the following conditions:
x x x"

The relevant portions of Appendix III and Appendix IV which are referred in Regulation 33(7) and 33(10) are as under:

APPENDIX III Regulation for the reconstruction or redevelopment of cessed buildings in the Island City by the Landlord and/or Co-operative Housing Societies.
[D.C. Regulation No. 33(7)]

1. (a) The new building may be permitted to be constructed in pursuance of an irrevocable written consent by not less than 70 per cent of the occupiers of the old building.

(b) All the occupants of the old building shall be re- accommodated in the redeveloped building.

2. Each occupant shall be rehabilitated and given the carpet area occupied by him for residential purpose in the old building subject to the minimum carpet area of 20.90 sq.mt. (225 sq.ft.) and/or maximum carpet area upto 70 sq.mt. (753 sq.ft.) as provided in the MHAD Act, 1976. In case of non-residential occupier the area to be given in the reconstructed building will be equivalent to the area occupied in the old building.

xxxxx 1 APPENDIX IV [Regulation No.33(10)]

1. Applicability of the provisions of this Appendix : The following provisions will apply for redevelopment/construction of accommodation for hutment/pavement-dwellers through owners/developers/co-operative housing societies of hutment/pavementdwellers/public authorities such as MHADA, MIDC, MMRDA etc./Non-Governmental Organisations anywhere within the limits of Brihan Mumbai. .....

1. Right of the hutment dwellers:

1.1 Hutment-dwellers, in the slum or on the pavement, eligible in accordance with the provisions of Development Control Regulation 33(10) shall, in exchange for their structure, be given free of cost a residential tenement having a carpet area of 20.90 sq. m. (225 sq.ft.) including balcony, bath and water closet, but excluding common areas.

1.2 Even those structures having residential areas more than 20.90 sq.m will be eligible only for 20.90 sq.m of carpet area.

Carpet area shall mean exclusive of all areas under walls including partition walls if any in the tenement. Only 20.90 sq.mt. carpet area shall be given and if proposal contains more area, it shall not be taken up for consideration."
xxxxx"

12. The grievance of the appellants in the writ petition was that tenements constructed were of an area less than the required carpet area of 225 sq.ft, and that was a violation of the DC Regulations. The writ petition did not raise any contention about any requirement of providing a balcony of 10% of the area of the tenement. When the agreement between MHADA and developer did not require construction of a balcony and when the appellants had not even alleged in the petition that balcony was required to be constructed, we fail to understand that how the appellants could raise a contention during arguments before the High Court that they were entitled to a balcony in the tenement whose measurement should be of 10% of the area of the tenement. It is not disputed that the inspection report showed that the extent of tenement was not less than 225 sq.ft. and the appellants had agreed to take the tenements subject to the result of the case.

13. Let us consider whether Regulation 35(2)(k) and 38(22) are of any assistance to appellants. Regulation 38(22) relates to `Balconies' and provides that in any residential zone, balconies may be permitted free of FSI at each floor (excluding ground and terrace floors) of an area not more than 10% of the area of the floor from which such balcony projects. Regulation 35 deals with Floor Space Index computation and Note (ii) thereof relates to exclusion from FSI computation. One of the items to be excluded from the FSI computation vide entry (k) is the area of balconies which are provided under Regulation 38(22). The effect of Regulation 35 (2)(k) read with Regulation 38(22) is that if a balcony is constructed

as per Regulation 38(22) it will be excluded for the purpose of calculating FSI. These Regulations by no stretch of imagination can be construed as casting a liability upon the developer reconstructing/developing a property under the Urban Renewal Scheme to construct a balcony (whose extent is 10% of the area of the tenement) when constructing and delivering tenements to the previous occupants of the demolished building. The area to be given to such occupants is clearly specified in Regulation 33(7) read with Appendix III (Clause 2), the NOC and the agreement. An old occupant is entitled to a tenement only under Regulation 33(7) and not Regulation 33(9). Regulation 33(9) was invoked only to get additional FSI of 1.5 by MHADA. We may at this juncture note that the question whether Regulation 33(9) will apply as contended by the appellant or Regulation 33(7) read with Regulation 33(9) will apply, as contended by the respondents, is academic and not relevant for the purpose of ascertaining whether the appellants as old occupants are entitled to any additional balcony area.

14. Under the Scheme approved by this Court, MHADA which did not have adequate funds for constructing tenements, proposed to execute the project through a developer. The arrangement as per the Scheme was that the benefit of Regulation 33(9) was to be taken only for utilizing the higher FSI floor and the development by the developer will be governed by DC Regulation 33(7) read with Appendix III. Appendix III requires that each occupant to be rehabilitated should be given a minimum carpet area of 225 sq.ft. As per the Scheme approved, the contractor had to construct 335 tenements for the rehabilitation of the existing occupants free of cost and each tenement was to be of an area of 225 sq.ft. The Scheme did not contemplate construction and delivery of any balcony in addition to the 225 sq.ft. carpet area. In so far as the area to be delivered to the previous occupants, the extent is clear, that is 225 sq.ft. without any balcony. Further, the assumption of the appellants that if the matter had been governed by Regulation 33(9), the tenement measurement would have been 225 sq.ft. plus a balcony of a minimum measurement of 10% of the 22.5 sq.ft., is baseless as Regulation 33(9) does not require it. Be that as it may.

15. We therefore find no merit in this appeal and the same is dismissed.