

**SUPREME COURT OF INDIA**

Chanda C. Kadam

Vs.

Add. Collector and Competent Auth.

S.L.P.(Civil.)No.16786 of 2013

(Gyan Sudha Misra and Pinaki Chandra Ghose, JJ.)

01.11.2013

**JUDGMENT**

**Gyan Sudha Misra, J.**

1. The petitioners herein have challenged the judgment and order of the High Court of Judicature at Bombay dated 11.2.2013 whereby the writ petition No. 1299/2012 filed by the petitioners herein was dismissed by the Division Bench of the High Court since it refused to set aside the 'No Objection Certificate' granted in favour of the contesting respondents by the Competent Authority under the Urban Land Ceiling Act, Greater Mumbai and further refused to set aside the orders dated 17 th December, 2008 and 2nd November, 2010 passed by the respondent No.2-Municipal Corporation of Greater Mumbai restoring the 'Occupation Certificate' granted earlier in favour of respondent No.3 M/s. Well worth Developers. The High Court vide its impugned judgment and order was pleased to hold that the petitioners indulged in multiple and vexatious proceedings for challenging the order granting occupancy certificate to the respondent No.3 but the same did not deter them from filing a writ petition in the High Court which lacked merit and also suffered from delay and laches which led to the dismissal of the writ petition filed by the petitioners herein.

2. The substantial question, therefore, which requires determination in this Special Leave petition in order to avoid gross miscarriage of justice affecting valuable rights of the contesting parties lies in a narrow compass which may be formulated as follows:-

“Whether approval of the High Court to the grant of Occupancy Certificate by the Competent Authority contrary to the express terms and conditions in the Memorandum of Understanding affecting the valuable rights of all the stakeholders in the disputed property should not be treated as a perversity so as to invoke the jurisdiction under Article 136 of the Constitution?”

As also:

“Whether the competent authority was not duty bound to examine the terms and conditions of the Memorandum of Understanding before granting Occupancy Certificate to the claimant-respondent giving rise to a protracted litigation.”

3. The factual background of the matter in so far as it is relevant for appreciating the controversy involved herein discloses that the petitioner’s predecessor i.e. the deceased (father of the petitioner) Chandrarao Ganpatrao Kadam (referred to as Mr. CG Kadam) entered into a Memorandum of Understanding (for short ‘MOU’) dated 7.10.1992 with the respondent Nos. 4, 5 and 6 who constituted partnership firm M/s Wellworth Developers being respondent No. 3 hereto. The deceased predecessor of the petitioner Late Mr. CG Kadam admittedly owned a large tract of land comprising an area admeasuring 42,669.40 sq. mtrs. bearing CTS No. 47 and 47/1 to 47/20 of village Chandivali, Mumbai and CTS Nos. 17 and 18 of village Saki, Mumbai. As per the terms of MOU, the deceased Mr. CG Kadam (predecessor of the petitioners herein) and respondent Nos. 4, 5 and 6 as already stated formed a partnership firm subject to certain terms and conditions in view of which the deceased was to bring in the said plot of land for a total consideration of Rs. 2.40 crores which the deceased Mr. CG Kadam was to receive in installments. Pursuant of the MOU, the respondent No.3 to 6 were entitled to development and construction on a part of the plot of land measuring 21766 sq. mtrs. described in the second schedule to the MOU and another part of the said plot of land admeasuring 20903 sq. mtrs. which the petitioners referred as their retained portion was to be leased for a period of 999 years constituting lease in perpetuity by respondent No. 3 in favour of the deceased Mr. Kadam with the Floor Space Index (FSI) measuring 37,865 sq. feet specified on the said portion for the use of the deceased Mr. Kadam. The structures existing on the retained portion continued to exist even today as per the petitioners’ case who are the legal heirs of late CG Kadam and are running a film studio for shooting purposes on the retained portion but have wrongly and illegally been shown as demolished by the respondent No.3 - developer while obtaining occupancy certificate for the plot.

4. On 9.10.1992, the deceased, predecessor of the petitioners Mr. Kadam and the contesting respondents 4, 5 and 6 signed the deed of partnership - M.O.U. and as per the MOU, the deceased Mr. CG Kadam decided to enter into an arrangement in respect of the entire property in the manner provided in the MOU which laid down that the party of the first party i.e. deceased CG Kadam agreed to bring ‘the entire property’ into partnership on terms and conditions incorporated in the MOU whereby the developers referred to as the second, third and fourth parties in the MOU were entitled to use and exploit the Floor

Space Index (FSI) of the entire property subject to the terms and conditions stated in the MOU which further laid down that the development and construction will take place on the portion which is specifically referred to in the second schedule to the MOU and the garden area/amenity, open spaces and compulsory open spaces in order to enable such development and construction on the portion described in the second schedule shall be made available out of the remaining area being retained by the party of the 1st part i.e. the petitioner's predecessor Mr. Kadam.

5. The MOU further enumerated that the deceased Mr. CG Kadam referred to as "party of the 1st part" in the MOU will have exclusive and uninterrupted right to use/occupy and enjoy the balance area (approximately 25,000 sq. yards equivalent to 20903 sq. metres) which is marked by black colour boundary line and shaded in green colour wash on the plan annexed with the MOU. The rights reserved in favour of the respondent - developers to the land were thus subject to the right of use, enjoyment and occupation of the 1st party i.e. deceased CG Kadam, which consists of structures comprising of a stream and other installations and is being used as a film set. The MOU still further lays down that the parties and their assigns/developers undertake not to disturb or otherwise do any act to prevent the said use, enjoyment and occupation of the party of the 1st part/deceased CG Kadam to the said structures on the marked property being used for film shooting. More specifically, the parties of the second, third and fourth parts/developers will not do any act to interfere with the totally reserved net Floor Space Index to the extent of 37,865 sq. ft. inclusive of the Floor Spece Index consumed by the existing structures in the said marked property to be used by the party of the first part i.e. the predecessor of the petitioners. In this regard, it may be important to highlight at this stage that one of the specific clauses in the MOU clearly stipulates as follows:-

"The parties of the second, third and fourth party will not do any act to interfere with the totally reserve net Floor Space Index to the extent of 37,865 sq. feet (inclusive of the Floor Space Index consumed by the existing structures in the said marked property) to be used by the party of the first part."

The MOU further incorporates as under:

"The party of the first part shall be at liberty (subject to what is stated hereinabove) to use and develop the said marked property without any objection from the parties of the second, third and fourth parts and the party of the first part shall have a net Floor Space Index of 37,865 sq. ft. reserved for his exclusive use in future in the said marked property (which includes the Floor Space Index already consumed by the existing structures on the said marked property)".

The MOU further adds a clause as follows:-

“The said Floor Space Index of 37,865 Sq. ft. shall not be used by the parties of the second, third and fourth parts for any purpose whatsoever and the party of the first part undertake not to use any further FSI in excess of 37,865 Sq. ft.”

6. Based on the above clear stipulation in the MOU, the deceased predecessor of the petitioners was to bring in a partnership firm of the entire plot of land for development and the partnership firm was held entitled to enjoy the Floor Space Index of the entire property subject to the terms and conditions in the MOU with a specific clause for reservation of 37,865 sq. ft. of Floor Space Index for the exclusive use of the party of the first part i.e. deceased CG Kadam referred to in the MOU. In accordance with the terms of the MOU, the deceased Mr. Kadam and the respondent partners signed the deed of partnership. Respondent Nos. 4 to 6 thereafter on 14.10.1992 also took Power of Attorney from the deceased Mr. Kadam to act in the name of the deceased in respect of the said plot of land under the MOU and a supplementary deed of partnership was also signed by the deceased Mr. Kadam. In the MOU, specific details for development of the property and its marketing were incorporated adding clause 21 to the effect “that the Party of the First Part (Mr. C.G. Kadam) shall give a Power of Attorney to the Parties of the Second, Third and Fourth Parts to do several acts relating to the development of the said property. It stated that “this power shall include authorities to get the plans sanctioned from the Bombay Municipal Corporation, construct buildings, sell flats, shops and other premises and organize schemes under provisions of the Maharashtra Ownership Flats Act, Maharashtra Apartment Ownership Act and the Maharashtra Cooperative Societies Act, in respect of the said property.” The MOU further incorporated clause 22 which laid down as follows:

“22. The Parties of the Second, Third and Fourth Parts shall incorporate the term in respect of the rights of the Party of the First Part as stated in Clause 1 above in the individual agreements with the respective purchasers of the Flat/Premises and shall also obtain declaration in writing to that effect, a copy of which shall be delivered to the Party of the First Part.”

7. In pursuance to the MOU, the respondent No.6 using the Power of Attorney obtained Commencement Certificate on 28.9.1993 and 12.11.1993 and he also secured an order under Section 8(4) of the Urban Land Ceiling Act for giving effect to the MOU. The predecessor of the petitioners CG Kadam thereafter died on or about 23.8.1995 and was survived by late Smt. Krishnabai Kadam who executed her last will and testament in favour of the petitioners/legal representatives.

8. It appears that after expiry of almost 8 years from the date of MOU, the petitioners who are legal representatives of the deceased CG Kadam filed a suit on 27.1.2000 bearing suit No. 441/2000 in the High Court of Judicature at Bombay and challenged the MOU/Deed of Partnership dated 9.10.1992 alleging fraud at the instance of respondent Nos. 4, 5 and 6

and the said suit is still pending trial before the High Court of Judicature at Bombay. It is also borne out from the record that an interim order was also passed in this suit on 7.2.2000 by which respondent Nos. 3 to 6 were prevented from disturbing the petitioners' possession in respect of the retained portion on the said plot of land which the deceased CG Kadam as per the MOU was entitled to hold.

9. The respondent - developers thereafter through respondent No.3 in view of the MOU and the Power of Attorney proceeded in the matter and sought formal permission from the respondent No.1 - Additional Collector vide letter dated 21.3.2000 under Section 22 of the Urban Land Ceiling Act in order to enable them to approach respondent No. 2 Municipal Corporation of Greater of Mumbai for getting the occupation certificate in respect of the building which the respondent - developers had constructed in pursuance to the MOU in between 1992 and the year 2000. As per the case of the petitioners a false statement is alleged to have been made therein by the respondent-Developer that the old structures on the land which was given out to them by way of perpetual lease for a period of 999 years had been demolished and that the building was ready for occupation.

10. At this juncture, we deem it appropriate to observe and highlight that although an administrative authority including Municipal Corporation while granting Occupancy Certificate after completion of the project discharges administrative function and may not be duty bound to examine the title of the contesting parties, it is certainly expected to examine the documents of title or MOU while granting such certificate specially when the matter is remitted to them for examining the correctness and validity of such occupancy certificate. In the process, it is surely not expected to adjudicate and determine the question of title of the contesting parties but is certainly obliged to form an opinion prima facie as to whether the Occupancy Certificate is being granted to the rightful owner. This, in our view, is essential which can cut short and minimize the litigation in regard to the grant of Occupancy Certificate which on several occasions gives rise to a cesspool and labyrinth of litigation as it has happened in the instant matter where the respondent No.3 succeeded in getting the Occupancy Certificate from the Municipal Corporation and the grant of Occupation Certificate to the respondents triggered a long drawn litigation reaching to this Court. The petitioners cause of action initially was to challenge the 'no objection certificate' granted by the respondent No.1 under Section 22 of the Urban Land Ceiling Act stating therein that the entire plot of land is disputed wherein in some portion a film studio was set up for shooting purposes by Chandivali firm which is managed by the petitioners herein. However, on 30.3.2000, the respondent - developers 3 to 6 had approached respondent No.2 - Municipal Corporation of Greater Mumbai for issuance of occupation certificate which was issued by the respondent No. 2 vide its letter dated 30.3.2000 in spite of a protracted litigation and pursuance of endless remedies out of Court wherein the petitioner had even approached the Chief Minister of the State who had intervened and directed the competent authorities to examine the grievance regarding grant of occupancy certificate and no objection from the Urban Land Ceiling Authority. Unfortunately, the Competent Authority never cared to examine the MOU even prima facie while granting Occupancy Certificate to the Respondent No.3 which led to litigations doing several rounds.

11. Having failed to seek redressed of their grievance and the petitioners feeling seriously aggrieved of the grant of occupation certificate, filed a writ petition No.2832/2001 and assailed the grant of occupation certificate alleging that the respondent - developers had exercised the power of attorney after the death of their father-deceased Mr. CG Kadam and the development of the said plot of land was bad without any authority, jurisdiction and contrary to law. Subsequently, they also had filed another writ petition bearing No. 34/2002 challenging the permission granted by the respondent No.1 under the Urban Land Ceiling Act on the ground that the same was vitiated by fraud. The Division Bench of the High Court of Bombay vide its order dated 26.2.2002 directed the State Government to treat writ petition No.34/2002 as a complaint and to consider whether any action or revision is required in respect of the permission granted under Section 22 of the Urban Land Ceiling Act. In pursuance to this direction, a meeting was convened by respondent No.7- State of Maharashtra through its Chief Secretary wherein the parties informed the State Government that the matter was likely to be settled which did not come through and the petitioners therefore pursued the matter further before the Chief Minister who directed the respondent No. 2 - Municipal Corporation for cancellation of the occupation certificate granted to the construction of the said plot of land. It appears that in view of all these developments, the occupation certificate granted in favour of the respondent - developers was also initially cancelled. Further development however took place in the matter when on 29.11.2007 the Urban Land Ceiling Act was repealed by the Maharashtra Government due to which the no objection certificate which was granted under the Urban Land Ceiling Act was inessential since all proceedings pending under the Urban Land Ceiling Act stood abated in view of its repeal.

12. The respondent- developers, therefore, pursued the matter for restoration of the occupation certificate which had been earlier granted to them. In response to the same, the Additional Collector - respondent No.1 vide its letter dated 16.6.2008 addressed to the respondent No. 3 - developer issued no objection certificate to the grant of occupation certificate for the building constructed on the vacant plot of land for which MOU had been entered.

13. The petitioners felt aggrieved with the restoration of the occupation certificate in favour of the developers and challenged the same before the Government as also by filing a writ petition bearing No. 1299/2012 in which the impugned judgment and order was passed by the High Court on 11th February, 2013 which is under challenge in this special leave petition and as already stated, the writ petition filed by the petitioners was dismissed as the petitioners were held to have indulged in vexatious and the multiple proceedings challenging the restoration of Occupation Certificate and the No Objection Certificate granted to the respondent - developer under the Urban Land Ceiling Act.

14. Learned senior counsel Dr. A.M. Singhvi representing the petitioners, while assailing the judgment and order passed by the High Court inter alia submitted that the unilateral

restoration of the occupation certificate by the Municipal Corporation of Greater Mumbai vide its impugned orders dated 17.12.2008 and 2.11.2010 is illegal, arbitrary and unsustainable as the respondent - developer indulged in serious illegalities and fraud while constructing the building in question on the said plot of land as the petitioners' 18 legal and valid structures which are in existence for over 60 years and used for outdoor shooting purposes are shown as demolished though the petitioners continued to pay property tax which calls for interference by this Hon'ble Court for quashing and setting aside the occupancy certificate granted in favour of the respondent No.3- Developer.

15. It may be relevant at this stage to note that the petitioners have challenged the grant of occupation certificate for the entire plot of land which were duly granted to the respondent - developers for development of the plot of land in pursuance to the MOU entered into between the petitioner's deceased father CG Kadam and the respondent 3, 4, 5 and 6 comprising an area of 20903 sq. mtrs. by obtaining long lease of 999 years which they claim to be the 'retained portion' with exclusive right to use FSI of 37,865 sq. ft. on the said plot of land on which 18 structures are claimed to be existing which is used for the film shooting purposes. The petitioners alleged that those structures were falsely, illegally and fraudulently shown by the developers as demolished and thus succeeded in obtaining occupancy certificate for the entire plot contrary to the terms and conditions of the MOU.

16. However, the counsel for the petitioners having been confronted with the fact as to how the petitioners could challenge the grant of occupation certificate in regard to the entire plot of land which was given to the developers for developing and raising construction by their deceased father by a written instrument in the form of MOU and also executing Power of Attorney permitting the respondents to develop the land for which occupancy certificate was granted, the counsel for the petitioners had to resort to an alternative argument by submitting that even under the alleged MOU dated 7.10.1992 between the owner CG Kadam and the developers it was agreed that out of an area of 20903 sq. mtrs. for which a long lease of 999 years was granted to the respondent-developers, they had an exclusive right to own and use FSI of 37865 sq. ft. on the said plot of land wherein the existing 18 structures used for shooting purposes were existing. It was, therefore, submitted that even as per the MOU it was agreed that out of total area of the entire plot admeasuring 42,669.40 sq. mtrs, an area of 21,766 sq. mtrs. was to be developed by the respondent - developer and an area of 20903 sq. mtrs. was to be retained by the owner by obtaining long lease of 999 years including the retained portion with exclusive right to the owner to use FSI of 37865 sq. ft. on the said plot of land and even if it were to be held that the MOU is valid and binding on the petitioners, the petitioners entitlement at least to FSI of 37865 sq. ft. remains undisputed and the developers cannot interfere with the petitioners structures nor use its FSI for any reason whatsoever. For this purpose, the relevant portion of the MOU which is already quoted earlier in the foregoing paragraphs have been relied upon.

17. Placing reliance on the aforesaid clauses in the MOU, it was submitted that the MOU

expressly reserves the rights of the petitioners to at least an FSI of 37,865 sq. ft. if not the entire plot of land and the same could not be demolished or shown as demolished by the developers. It was further submitted that as per the Bombay Municipal Corporation admittedly the respondent Nos. 3 to 6 have consumed higher FSI than what they are entitled and in view of the same any recourse that the Municipal Corporation of Greater Mumbai may have for the extra consumption of the FSI can only be from the developer's portion and not from the FSI reserved for the benefit of the petitioners in the MOU.

18. While considering this aspect of the matter in the light of the arguments advanced relating thereto, it clearly emerges that if the petitioners had taken this stand right from the beginning, perhaps they might have been spared of this protracted litigation doing several rounds and finally reaching to this Court. But it appears that the petitioners all through had been contesting the grant of occupancy certificate in regard to the entire plot of land which admittedly had been given on perpetual lease by the respondent - developers to the deceased Mr. CG Kadam/petitioner's father who had already executed a MOU and Power of Attorney. If the petitioners had taken this stand which they have now taken and had urged that the reserved area as per the MOU bearing 37865 sq. ft. was the only area which had been reserved in their favour along with the structures as FSI in terms of the MOU, the petitioners plea for rejection of occupancy certificate for the entire area perhaps could have been accepted and they would have been allowed to retain this portion by modifying the occupancy certificate partially but the petitioners themselves appear to have created problems for themselves by litigating as they challenged the grant of occupancy certificate for the entire plot of land comprising an area of 20,903 sq. mtrs completely overlooking that this part of the land had also been given out to the respondent - developers in terms of the MOU by their deceased father and exclusive right to the owner was confined to the use of FSI 37865 sq. ft. only on the said plot of land which includes the existing 18 structures used for shooting purposes. Even at the risk of repetition, it will have to be stated that the stand of the petitioners in regard to the entire plot of land comprising an area of 20903 sq. mtrs could not have been assailed by them in view of the MOU and the Power of Attorney unless they finally succeed by obtaining a decree in their favour in the civil suit by getting the MOU cancelled, which is still pending trial. As long as the validity of the MOU is not set aside by the decree of a Court of competent jurisdiction, the petitioners contention that the entire plot of land bearing 20903 sq. mtrs. which was given for development on which constructions were raised, the petitioners could not have been permitted to challenge the grant of occupancy certificate for the entire plot of land. It is only at the far end of the litigation in the highest court before us that the wisdom seems to have prevailed upon the petitioners to submit that in any view they are entitled to 37865 sq. ft. out of the plot in question as there is a specific clause in regard to this area in the MOU and this portion alone could be treated by the petitioners as the 'retained portion' for themselves through their deceased father. But under the garb of this 'retained portion' they raised the dispute in regard to the entire area of the plot which was given for development to the respondents on which they have already raised construction and is in occupation of the buyers which prima facie is in consonance with the MOU at least until the MOU is set aside by granting a decree in favour of the petitioners in the civil suit which is pending trial.

19. However, the stand of the respondents on the other hand is also far from reasonable or fair at least in so far as their claim for this 37865 sq. ft. is concerned, as they have shown the structures on this piece of land as demolished while claiming occupancy certificate from the respondent No.2 Municipal Corporation for the plot for which MOU had been arrived at. This they appear to have done completely overlooking the specific clause in the MOU itself which clearly lays down that the said portion covering FSI for 37865 sq. ft. on which structures comprising a stream and other installations stand and is being used as a film set, were to be retained by the owner of the property. However, when the respondent - developers filed an application for releasing the land from the coverage of the Urban Land Ceiling Act there could have been no reason for the petitioners to object to the same as in any view if this land had been seized as surplus land under the Urban Land Ceiling Act, neither the petitioners/owner nor the developers/respondents would have benefited as the land would have vested in the State. Fortunately, for the contesting parties, the Urban Land Ceiling Act was repealed and as the physical possession of the land had not been taken by the State, the land was rightly released from the ambit of the Urban Land Ceiling Act as the Act was repealed. But, when the respondents applied for occupancy certificate of the building on the plot in question, had the petitioners taken a reasonable stand by submitting that the occupancy certificate could be granted subject to retention of the portion comprising 37865 sq. ft. which as per the MOU, the owner was entitled to retain, perhaps the dispute between the parties could have been resolved but the petitioners had all through contested that the occupancy certificate for the entire plot of land was fit to be quashed and set aside overlooking that as per the MOU it was not open for the petitioners to assail the occupancy certificate in regard to the entire plot of land by using the expression 'retained land' for the entire plot comprising 20903 sq. mtrs. since the entire plot could not have been treated as 'retained portion' by the petitioners as out of this plot of land only 37865 sq. ft. alone could be treated as the retained portion in view of the specific clause under the MOU.

20. Ultimately, in course of the argument, the petitioners could be pinned down that they cannot claim the entire plot of 20903 sq. mtrs. as their retained land since the retained portion out of this plot could be only an area of 37865 sq. ft.. But the petitioners all through had been contesting that the entire plot of land is their retained land overlooking that the entire plot could not be treated as their retained land in the wake of the MOU executed by their deceased father CG Kadam.

21. When the matter reached at this juncture, learned senior counsel, Mr. R.F. Nariman, appearing for the respondents - developers, fairly made a statement before the Court that if the dispute is confined to this portion of the land, the respondents would agree to file an affidavit that they would not claim this portion of the land, on which the respondents - developer were directed to file an affidavit to that effect. But to our amazement and to the surprise of the petitioners also, the respondents appear to have resoled from their statement made on their behalf as it has been stated in their affidavit that the petitioners will be entitled to this area covering FSI of 37,865 sq. ft. only if they are able to establish their right on the basis of the MOU in the suit which is pending trial. But even if the respondents have failed to do so, we are not prepared to accept their plea in view of

the analysis made hereinabove at least in so far as 37865 sq. ft. is concerned as that would be clearly contrary to the express and specific clause in the MOU which had been executed by both the parties.

22. We are therefore pleased to hold that the petitioners are clearly entitled to retain an area of 37865 sq. ft. of land from the plot in question and the occupancy certificate which has been granted to the respondents - developers shall not affect the petitioner's right to retain this portion of the land. We also find substance in the plea of the petitioners to the extent that if the respondent No.2 - Bombay Municipal Corporation may have any reason to claim land alleging extra consumption of the FSI on the plot in question comprising 20903 sq. mtrs, the same shall be claimed only from the balance area of the disputed plot and shall not be claimed from the FSI comprising an area of 37865 sq. ft. reserved for the occupation of the petitioners under the MOU. The occupancy certificate and the no objection certificate which have been granted in favour of the respondent No.3 - developer therefore shall be valid for the plot in question except for an area of 37865 sq. ft. to which the petitioners are clearly entitled as per the unambiguous clause in the MOU until the petitioners succeed in getting the MOU set aside in the suit which is pending trial.

23. Thus, we although uphold the judgment and order of the High Court and approve of the occupancy certificate as also the 'no objection certificate' granted in favour of the respondent No.3 M/s Well worth Developers, we are further pleased to hold that the same shall not be valid or operative for an area of 37865 sq. ft., the description of which is given in the MOU and is in occupation of the Petitioners.

24. The special leave petition thus is partly allowed limited to the extent indicated hereinbefore.