

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

WRIT PETITION NO. 1482 OF 2015

Atul Hasmukhrai Doshi .. Petitioner
vs
Mumbai Building Repairs & Reconstruction Board
and Ors. .. Respondents

WITH

WRIT PETITION NO. 186 OF 2014

Kumar Pratap Ashar & Ors. .. Petitioners
vs
Maharashtra Housing & Area Development Authority
and Ors. .. Respondents

Mr. Pravin Samdani, Senior Advocate with Mr. Kishore Thakordas i/b
Kishore Thakordas & Co. for the petitioner in WP No. 1482/2015.

Mr. Chirag Balsara with Mr. Yadunath Chaudhari, Ms. Renuka M.
Lele and Ms. Reena Salunkhe for the petitioners in WP No.
186/2014.

Mr. Chetan Kapadia i/b Mr. S. Saha for respondent no.4.
Mr. V.M. Parshurami for respondent nos.1 and 2 – MHADA.
Mr. H.S. Venegaonkar, A.G.P for respondent no.3 State.

**CORAM: MOHIT S. SHAH, C.J. &
A.K MENON, J.**

DATE : 7 JULY 2015

ORAL JUDGMENT (Per Chief Justice):

Rule, returnable forthwith.

With consent of learned counsel for the parties, both the petitions are taken up for final disposal forthwith.

2. By these petitions under Article 226 of the Constitution of India, the petitioners have challenged the action of respondent no.1 – Mumbai Building Repairs & Reconstruction Board, a unit of Maharashtra Housing & Area Development Authority, imposing a condition in the No Objection Certificate, the relevant portion of which reads as under:

“(4) After issue of this NOC & till giving possession of tenements to the original occupiers in the new building, sale/transfer of tenancy rights by any of the original occupiers to any one shall not be allowed under any circumstances. Rehab tenements shall not be transferred for a period of Ten years from the date of occupation.”

3. Since the petitions raise the same controversy, we may refer to the facts of Writ Petition No. 1482 of 2015.

The petitioner is a tenant in occupation of a flat admeasuring approximately 376 sq.ft. carpet area in Kishore Mansion, Matunga, Mumbai. The building in question is a cessed

building which was constructed 80 years ago. The occupants of the building decided to go for a scheme of redevelopment under the provisions of DCR 33(7) of the Development Control Regulations for Greater Mumbai, 1991. For that purpose, the developer engaged by the occupants applied for NOC of respondent no.1 Board.

While granting NOC dated 11 April 2012, as a part of NOC respondent no.1 Board imposed the following condition:

“(4) After issue of this NOC & till giving possession of tenements to the original occupiers in the new building, sale/transfer of tenancy rights by any of the original occupiers to any one shall not be allowed under any circumstances. Rehab tenements shall not be transferred for a period of Ten years from the date of occupation. Restriction on transfer of tenements shall be governed by provision of Rent Control Act till Coop. Society is formed and after that the same shall be governed by the provision of Maharashtra Co-op. Society's Act.”

(emphasis supplied)

The petitioner has challenged the underlined portion of the above condition in so far as respondent no.1 has placed a prohibition on transfer of tenancy rights and on transfer of rehab tenements for a period 10 years from the date of occupation.

4. Mr. Parshurami, learned counsel for respondent no.1 Board has submitted that the above condition has been imposed in view of the Circular dated 1 June 2005 issued by Government of Maharashtra in the Housing Department wherein clause 11 provides as under:-

“11. On redevelopment / reconstruction of cessed buildings, tenants / occupants are rehabilitated there. As the rehabilitation flats are allotted on ownership basis, beneficiary tenant will not be entitled to sell the same for 10 years.”

(emphasis supplied)

5. Learned counsel for the petitioners and learned counsel for respondent no.4 have challenged the above stand of respondent no.1 Board by raising the following two principal contentions:-

(A) The above Circular dated 1 June 2005 does not apply to redevelopment schemes under DCR 33(7), but is only applicable to the schemes covered by Chapter VIII-A of the Maharashtra Housing and Area Development Act, 1976 (MHADA Act). It is submitted that in a case covered by Chapter VIII-A of MHADA Act, the land on which the building was constructed belongs to a private party who is not ready for redevelopment, and in order to enable the tenants/occupants of the building to demolish the old building to construct new building, MHADA has been empowered to acquire the land belonging to a private party and to allot such land to a cooperative society of tenants. It is in such circumstances that the question of acquisition arises and the Circular dated 1 June 2005 of the State Government in the Housing Department only covers the proceedings under Chapter VIII-A of the MHADA Act.

It is submitted that on the other hand, the land in question on which the buildings in which the petitioners have flats belong to private owner who is ready for redevelopment and after

redevelopment also, the land would continue to belong to the private owner till it is transferred to the cooperative society of owners of flats without any intervention of the State Government or respondent no.1 Board. The role of respondent no.1 is only to ensure that the occupants of the flats in old building are allotted flats in the new building in accordance with the provisions of Appendix III to DCR 33(7), but there is no question of acquisition of land by respondent no.1 Board or by the State Government.

(B) In the alternative, it is submitted that in any view of the matter, even assuming that the Circular dated 1 June 2005 applies to redevelopment schemes under DCR 33(7), in view of provisions of Appendix III to DCR 33(7) governing the redevelopment schemes under DCR 33(7), there is no restriction on transfer of rehab tenements in the new building.

Clause 18 of Appendix III to DCR 33(7) reads as under:

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

It is submitted that while the provisions of sections 26 and 56 of the Maharashtra Rent Control Act permit transfer of tenancies as far as Maharashtra Cooperative Societies Act is concerned, section 29 thereof is the only provision providing for restriction on transfer of

membership. It is, therefore, submitted that respondent no.1 Board could not have relied upon the Government Circular dated 1 June 2005 which is inconsistent with clause 18 in Appendix III which is the relevant regulation applicable to redevelopment scheme under DCR 33(7) and which clause 18 was inserted in Appendix III to DCR, 1991 by Government Notification dated 21 May 2011.

6. We have also heard the learned AGP Mr. Venegaonkar for the State and Mr. Parshurami for respondent no.1 Board.

7. In our view, it is not necessary to express any opinion on the first contention as the petition deserves to be allowed by accepting the second contention.

8. Clause 18 of Appendix III quoted hereinabove clearly provides that restriction on transfer of tenements shall be governed by provisions of the Maharashtra Rent Control Act till the cooperative society is formed. Sections 26 and 56 of the Maharashtra Rent Control Act read as under:

“26. In absence of contract tenant not to sub-let or transfer or to give on licence.- Notwithstanding anything contained in any law for the time being in force, but subject to any contract to the contrary, it shall not be lawful for any tenant to sub-let or give on licence the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein:

Provided that, the State Government may by notification in the Official Gazette, permit in any area the transfer of interest in premises held under such leases or class of leases any premises or class of premises other than those let for business, trade or storage to such extent as may be specified in the notification.

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.”

9. After the cooperative society is formed by allottees of flats in the new building, restriction on transfer of tenements shall be governed by the provisions of the Maharashtra Cooperative Societies Act. Section 29 thereof reads as under:-

“29. Restrictions on transfer or charge of share or interest .- (1) Subject to the provisions the last preceding section as to the maximum holding of shares and to any rules made in this behalf, a transfer of, or charge on, the share or interest of a member in the share capital of a society shall be subject to such conditions as may be prescribed.

(2) A member shall not transfer any share held by him or his interest in the capital or property of any society, or any part thereof, unless-

(a) *he has held such share or interest for not less than one year;*

(b) *the transfer is made to a member of the society or to a person whose application for membership has been accepted by the society, or to a person whose appeal under section 23 of the Act has been allowed by the Registrar; or to a person who is deemed to be a member under sub-section (1A) of-section 23.*

(3) *Notwithstanding anything contained in sub-sections (1) and (2), where a member is allowed to resign, or is expelled, or ceases to be a member on account of his being disqualified by this Act or by the rules made thereunder or by the by-laws of the society, the society may acquire the share or interest of such member in the share capital by paying for it at the value determined in the manner prescribed provided that the total payment of share capital of a society in any financial year for such purposes does not exceed ten per cent of the paid-up share capital of the society on the last day of the financial year immediately preceding.*

[Explanation- (I) The right to forfeit the share or interest of any expelled member in the share capital by virtue of any by-laws of the society, shall not be affected by the aforesaid provision.

(II) Definition of “financial year”.]

(4)”

10. In view of the above statutory provisions, it is clear that the restrictions on transfer of tenements imposed in the impugned condition are not to be found in any of the above statutory provisions. In fact, this intent becomes very apparent when we compare and contrast the provisions of clause 18 in Appendix III

applicable to DCR 33(7) with the provisions of clause 15 in Appendix III applicable to DCR 33(9) and the provisions of clause 1.18 in Appendix IV applicable to DCR 33(10). The said clauses are set out hereunder for easy comparison and contrast:

Clause 18 in Appendix III applicable to DCR 33(7)	Clause 15 in Appendix III applicable to DCR 33(9)	Clause 1.18 in Appendix IV applicable to 33(10)
<i>Restriction on transfer of tenements shall be governed by provision of Rent Control Act till Co-operative Society is formed and after that the same shall be governed by the provisions of the Maharashtra Co-operative Societies Act.</i>	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. <u>However, tenements constructed for slum rehabilitation shall not be transferred for the period of 10 years.</u>	<u>The tenement obtained under this Scheme cannot be sold/leased/assigned or transferred in any manner for a period of ten years from the date of allotment/possession of the tenement.</u> In case of breach of conditions, except transfer to legal heir, the tenement will be taken over by Slum Rehabilitation Authority.

(emphasis supplied)

The very fact that the State Government while drafting the Development Control Regulations has specifically placed an embargo on transfer of tenements constructed for slum rehabilitation for a period of 10 years in Appendix IIIA and IV, and there is absence of such a provision in clause 18 in Appendix III to DCR 33(7) places the issue beyond any doubt.

11. We, therefore, find considerable substance in the submissions made on behalf of the petitioners that the underlined portion in the impugned condition no.(4) in the NOC dated 11 April 2012 is inconsistent with the above statutory provisions and also inconsistent with the second part of condition no. (4) which incorporates clause 18 in Appendix III to DCR 33(7).

12. In view of the above discussion, the writ petitions are allowed. It is declared that the clause (11) of the State Government Circular dated 1 June 2005 is inconsistent with the provisions of clause 18 in Appendix III to DCR 33(7) which clause was inserted by Government Notification dated 21 May 2011 and, therefore, the matter of transfer of tenements in redevelopment schemes under DCR 33(7) shall be governed by clause 18 in Appendix III to DCR, 1991 and not by clause (11) of the State Government Circular dated 1 June 2005.

13. In the result, the following portion of the condition in the NOC issued by respondent no.1 Board on and after 21 May 2011 for the redevelopment scheme is quashed and set aside as illegal in each of these petitions:-

“(4) After issue of this NOC & till giving possession of tenements to the original occupiers in the new building, sale/transfer of tenancy rights by any of the original occupiers to any one shall not be allowed under any circumstances. Rehab tenements shall not be transferred for a period of Ten years from the date of occupation.”

14. Rule is made absolute to the above extent with no order as to costs.

CHIEF JUSTICE

(A.K. MENON, J.)

