



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

APPEAL (L) No.359 of 2012

1. Mrs.Radhika George,  
Age 45 yrs, Occ.Service, residing at  
Tenement No.7/25
2. Mr.Niteen Bhaskar Prabhu  
Age 62 yrs, Occ.Service, residing  
at Tenement No.8/29
3. David Moses,  
Age 54 yrs, Occ.Services  
Residing at Tenement No.6/24
4. Champak P. Poladia  
Age 63 yrs, Occ.Service, residing  
at Tenement No. 5/20.
5. Kanti D. Mahida  
Age 55 yrs, Occ.Service,  
residing at Tenement No.5/18
6. Pandurang G. Mayadeo  
Age 77 yrs, Occ.retired  
Residing at Tenement No.1/2
7. Mrs.Keena Desai  
Age 33 yrs, Occ.housewife,  
Residing at 8/31.
8. Mrs.Hemlata D. Sawant,  
Age 72 yrs, Occ.housewife,  
Residing at 7/27.

The Petitioner nos.1 to 8 having  
their tenements at CTS No.1269,  
Chittaranjan Nagar Vidya Co-op.  
Housing Society Ltd, Rajawadi,  
Ghatkopar (East)Mumbai-77.

... Appellants  
(Orig.Petitioners)

VERSUS

1. Maharashtra Housing and Area  
Development Authority; Grih  
Nirman Bhavan, Kalanagar,  
Bandra (East),Mumbai – 51  
Through it's Chairman
2. The Executive Engineer,  
Ghatkopar Division, (MHADA)  
Griha Nirman Bhavan,  
Kalanagar, Bandra (East)  
Mumbai 400 051.
3. Deputy Chief Engineer,  
(BP) ES, Municipal Corporation  
of Greater Mumbai. Near Raj  
Legacy Building, Paper Mill  
Compound, LBS Marg,  
Vikhroli(W), Mumbai 400083.
4. The Chairman, Chittaranjan Nagar  
Vidya Co-op. Housing Society, officer  
at Chittaranjan Nagar,Rajawadi,  
Ghatkopar(E), Mumbai 400077.
5. The Secretary, Chittaranjan Nagar  
Vidya Co-op. Housing Society, officer  
at Chittaranjan Nagar,Rajawadi,  
Ghatkopar(E), Mumbai 400077.



6. Tanishq Builders,  
Through it's Partner  
Paresh Shah, Office at A/103,104,  
Haveli Apts, Navneet Prabhu,  
Haveli Compound, M.G.Road,  
Ghatkopar (E), Mumbai – 77.

... Respondents  
(Orig.Respondents)

...

Mr. Rajiv Kumar, Senior Advovate with Sheetal Kumar, Amit Karkhanis and Priyanka Davka i/b Kay Legal and Associates for the appellants.

Mr.P.G. Lad, learned AGP for respondent nos.1 and 2.

Mr.Aspi Chinoy, Senior Advocate with Mr.Ranjit Thorat i/b Prabhanjan Gujar for respondent no.4.

Mr.P.K. Samdani, Senior Advocate i/b Prabhanjan Gujar for respondent no.5.

Mr.Soli Cooper, Senior Advocate with Mr.R.D. Soni i/b Mr.Bipin Joshi for respondent no.6.

**CORAM : MOHIT S. SHAH, C.J. &  
N.M. JAMDAR J.**

**JUDGMENT RESERVED ON : 20 JUNE 2012  
JUDGMENT PRONOUNCED ON : 4 JULY 2012**

JUDGMENT :- (Per - N.M.Jamdar J.)

1. The appellants who are the original petitioners in Writ Petition (Lodging) No.2529 of 2011 have filed the present appeal challenging the order passed by the learned Single Judge dated 24<sup>th</sup> April 2012 disposing of the Writ Petition with certain directions. The appellants,

in the Writ Petition had challenged the order of the Executive Engineer of MHADA - respondent no. 2 in the proceedings under section 95A of Maharashtra Housing and Area Development Authority Act, (for short ‘The Act’) directing the appellants to vacate the premises in their occupation. The appellants are aggrieved by the order of the learned Single Judge inasmuch as it does not grant protection to the appellants in respect of their possession over the structures in question.

2. The subject matter of dispute is redevelopment of the property bearing CTS No.1269 at Rajawadi, Ghatkopar (East). The petitioners are owners of tenements situated therein and members of Chittaranjan Nagar, Vidya Co-operative Housing Society (the Society) Limited. The Chairman and Secretary of the Society are respondent No.4 and 5 in this Petition. The Society had initiated redevelopment of the structures and had resolved to get the same done through respondent no.6 who is a developer. The appellants have opposed the redevelopment.

3. The events leading upto the filing of the Writ Petition have been enumerated in detail by the learned Single Judge in the impugned judgment from paragraph no.4 to 67 and the said events need not be reproduced in this judgment in detail again. Following important dates may be noticed for the purpose of disposal of this appeal.

4. Initially, 32 tenements were allotted to the employees of Bharat Petroleum, erstwhile Burmah Shell by the then Commissioner for Housing on the land bearing CTS No.1269 Village Kirol at Taluka Ghatkopar in and around the year 1954. On 18<sup>th</sup> May 1987, the Government of Maharashtra came out with a policy permitting conversion of such tenement holders as owners. The appellants took benefit of the scheme and converted their occupation over the said tenements to ownership basis. The 32 allottees came together and formed Chittaranjan Nagar Vidya Co-operative Housing Society on 7<sup>th</sup> February 2000. On 26<sup>th</sup> May 2005, MHADA executed a lease deed in favour of the Society and also entered into a deed of sale. On 12<sup>th</sup> March 2006, the Society passed a resolution for redevelopment of the Society and appointed the respondent no.6 as the developer. Pursuant to the resolution, on 19 March 2006, a Memorandum of Understanding was entered into for redevelopment of the Society in favour of respondent no.6. The appellants opposed the said resolution and did not agree for redevelopment through respondent no.6 and asserted that they would redevelop the premises in their occupation on their own and sought for tit-bit land for that purpose. On 7<sup>th</sup> April 2006, the Estate Manager of the Board issued a letter to the Society that neither tit bit nor independently buildable land could be allotted to the individual members and can only be allotted to the Society. On 18<sup>th</sup> June 2006, pursuant to the resolution and Memorandum of Understanding, development agreement was entered into between the Society and respondent no.6 which was signed by 19 members of the Society. The appellants filed a suit in

City Civil Court bearing No.2080 of 2006 challenging the letter dated 7<sup>th</sup> April 2006. The resolution dated 12 March 2006 appointing the respondent no.6 as developer was challenged by the appellant in the Co-operative Court, Bombay by case bearing No.CC/1115 of 2006. The appellants also filed a suit No.5556 of 2006 challenging the Memorandum of Understanding dated 19<sup>th</sup> March 2006 in favour of respondent no.6. The appellants did not get any interim order in all these proceedings. On 19<sup>th</sup> September 2006, the Society submitted a proposal to the Chief Officer of MHADA for redevelopment. On 17<sup>th</sup> April 2008, an offer letter was issued by MHADA to the Society and the Society was called upon to pay a sum of Rs.9,21,10,875/-. On 19 July 2008, NOC for redevelopment under Development Control Rules of Bombay (DCR) was issued by MHADA in favour of the Society. Thereafter, on 6<sup>th</sup> December 2008, the Development Control Regulation 33(5) was amended and the FSI available to such projects was increased from to 2.00 to 2.5. It was also provided that consent of 70% of the members will be necessary for redevelopment and provision should be made by holder of the NOC in respect of the transit accommodation of the occupants. Section 95A of the Act of 1976 was made applicable for getting the tenements vacated from members of societies who were in minority and opposed to redevelopment.

5. Since some portion of the land in occupation of the members of the Society was demolished and since the appellants were resisting redevelopment of the property and inspite of instituting proceedings

in Civil Court and Co-operative Court had not obtained any interim order, the Society filed an application before the Executive Engineer of MHADA for taking action under section 95A of the Act of 1976. Show cause notices were issued to the appellants on 16<sup>th</sup> May 2011. An order was passed under section 95A on 12<sup>th</sup> August 2011 and by virtue of order dated 21<sup>st</sup> September 2011 of this court, fresh hearing was to be given to the appellants. Accordingly, on 1<sup>st</sup> October 2011, notices were again issued by the Executive Engineer to the appellants for preliminary date of hearing. On 12<sup>th</sup> October 2011, schedule for filing replies and rejoinder was given to the appellant. On 3<sup>rd</sup> November 2011, advocates appeared on behalf of the Society, developers and the appellants and addressed the Executive Engineer on various issues.

6. The appellants contended before the Executive Engineer that they have filed a suit in the City Civil Court as well as a dispute in the Co-operative Court and during the pendency of the said proceedings, the Society has executed documents in favour of the developer. It was contended that since the challenge raised by the appellants is pending in City Civil Court and Co-operative Court, proceedings under section 95A of the Act of 1976 should not continue. It was also argued by the appellants that the proposed development includes a piece of land which is already acquired by the Railways and therefore, lease deed could not have been executed by the MHADA in favour of the Society in respect of the acquired land. The appellants also urged that since 9 tenements out of 32 are

located on the land acquired by Railways such 9 members cannot participate in the redevelopment. Since their vote cannot be counted 70 % members cannot be considered have not given their consent. The appellants contended that section 95-A cannot operate retrospectively. The Society and the Developer countered the submissions. The Executive Engineer found that 70% members have given their consent to redevelopment scheme as the occupants on the acquired land continue to be members. The Executive Engineer also held that the acquisition was not complete as physical possession was not handed over by the Collector to the Railways and compensation was also not paid. The Executive Engineer held that in any case the redevelopment was being sought in respect of area of 5532 sq.metres and not in respect of the entire property. The executive engineer was satisfied that premises were in order and transit camp accommodation is provided for. The Executive Engineer thus by order dated 11 November 2011 proceeded to direct the appellants to vacate the premises and shift to the transit camp accommodation.

7. The operative portion of the order dated 11<sup>th</sup> November 2011 reads thus:

“The Non-Cooperative Members No.1 to 8 are hereby directed to vacate the tenements in their use, occupation and possession and to shift to the Transit Camp accommodation as described in the Show Cause Notices dated 16.5.2010, within a period of 7 days from the date

of receipt of this Order, failing which action for their summary eviction under Section 95A of the MHADA Act, 1976 be taken against them.

Since the tenement of Non Cooperative Member No.9 is demolished on 25.8.2008, the above proceedings under Section 95A of the MHADA Act, 1976 cannot proceed against him and the same are accordingly disposed.”

8. Thereafter, the appellants filed Writ Petition (L) No.2529 of 2011 challenging the order passed by the Executive Engineer dated 11<sup>th</sup> September 2011. The appellants initially sought three substantive reliefs viz. that the NOC dated 19<sup>th</sup> July 2008 be declared as illegal, scheme of redevelopment be declared as illegal and the order dated 11<sup>th</sup> November 2011 be quashed and set aside. Thereafter, by way of a chamber summons, the prayer regarding challenge to NOC was deleted.

9. Before the learned Single Judge, the appellants raised broadly the same contentions which were raised before the Executive Engineer. The learned Single Judge found that the Executive Engineer had followed basic principles of natural justice and adequate hearing was given to the appellants. The learned Single Judge held that though the appellants have approached the Civil Court and Co-operative Court, no interim orders were obtained by the appellants against proceeding with the project. The learned

Single Judge took note of an affidavit dated 9 January 2012 filed by the Deputy Engineer in which the Deputy Engineer clarified that out of total area of 7806.72 sq.metres allotted to the Society, an area admeasuring 1618.56 sq.metres area was affected by the acquisition of the Railways and thus balance plot available was 6186.16 and NOC is being granted only to develop 5532.49 sq.metres and therefore, the contention of the appellants regarding acquisition is baseless. It was also pointed out in the affidavit that the reference in the NOC dated 19 July 2008, to the plot No.1268(part) and 1269(Part) is due to inadvertence and redevelopment will take place on plot CTS No.1269(Part) only. The learned Judge found 22 out of 32 members have already vacated the premises and no case for interference under Article 226 was made out. The learned Judge however held that the effect of the acquisition by Railways needs to be ascertained and boundaries need to be demarcated, but the redevelopment need not be held up for that purpose.

10. The learned Single Judge by a detailed judgment dated 24<sup>th</sup> April 2012 disposed of the writ petition. The learned Single Judge summarized his conclusions and proceeded to pass an order in paragraph no.103 of the judgment which reads as follows.

“CONCLUSIONS:

- a) The proceeding under Section 95-A of MHADA Act as initiated is valid and maintainable.
- b) The action and authority to decide the issues/

controversy is well within the scope and jurisdiction of Section 95-A read with the Regulations.

c) The sanctioned scheme based upon then existing 70% strength is correct and valid. All the parties and members are bound by the approved scheme and to be implemented in accordance with law.

(d) The NOC is valid and binding and also all the subsequent actions based upon the same.

(e) The scheme is valid and binding. Certain corrections will not affect the scheme based upon the sanctioned/approved NOC. However, it is subject to following order:

#### O R D E R

- i) The order dated 11 November 2011 is quashed and set aside only for deciding the effect of acquisition of part of the property of the Central Railway; and also the actual area available for the project and the scheme and its effect on the area of the occupants and/or to the Society members and the saleable area for the developer. The rest of the order is maintained.
- ii) The concerned Respondents are at liberty to proceed with the project phase-wise or part-wise in accordance with law, subject to certain and/or

necessary corrections of area/plot/map and plan of the scheme, if any.

- iii) Respondent No.2 i.e the Executive Engineer, Ghatkopar Division, Mumbai Housing and Area Development Board, to decide the above issued within a period of 6 weeks after giving an opportunity of being heard to all the parties.
- iv) Petition is partly allowed.
- v) There shall be no order as to costs.”

11. Since the Executive Engineer was directed by the learned Single Judge by order dated 21 April 2012 to decide the effect of acquisition of the part of the property, he proceeded to do so and passed an order on 5 June 2012. This order has been placed on record by the appellants in Notice of Motion filed in the present appeal. The Executive Engineer gave hearing to the appellants and the private respondents and came to the conclusion that gross area allotted under NOC is 7806.72 sq.meters and physical area available is 6188.16 sq.meters and out of this, permission is granted in respect of only 5532.49 sq.mts. Thus the acquisition of the part of the property by the Central Railway on the redevelopment project. The Executive Engineer came to the conclusion that the only correction that is required to be carried out is in the NOC dated 19 July 2008 where CTS 1268 (Part) and 1269 (Part) are mentioned out of which reference to 1268 (Part) should be deleted.

12. Being aggrieved, the appellants are before us in the present appeal.

13. We have heard learned counsel appearing for the parties at considerable length. Shri Rajiv Kumar, Senior advocate for the appellants firstly submitted that the directions passed by the learned Single Judge are self contradictory. Once the learned Single Judge came to the conclusion that ascertaining the exact area and measurements of the plot was mandatory and the requirement of the clear description of the plot with clearly defined boundaries goes to the root and needs to be considered before going further with the project, the learned judge ought to have protected the possession of the appellants. The learned counsel for the appellants submitted that this observation regarding description of the plot is in favour of the appellants and it has not been challenged by the respondents by filing an independent appeal. The learned counsel for the appellants contended that since a part of the land was acquired by the Railways, it should have been treated as a different plot and the boundaries thus ought to have been drawn. The primary contention of the appellants against the order passed under section 95A is that the Executive Engineer did not consider the effect of the acquisition of part of the property in proper perspective. According to the learned counsel for the appellants, the FSI of the land acquired by the Railways could not have been utilised and furthermore, the 9 tenements which stood on the acquired land could not have been counted for the purpose of ascertaining the consent 70% of members. The learned counsel also

submitted that the NOC granted on 19 July 2008 on the face of it is not valid as it pertains to plot no.1268(Part) and 1269(Part) and the explanation that it was due to inadvertence is purely an after-thought. The learned counsel submitted that the speed at which the authorities moved for demolition of some part of the property as well as the changing stands of the officers of the authorities clearly show a collusion on their part with the developer and the society. According to the learned counsel, the action of the authorities amounts to distribution of State largesse without justification. Reliance is placed on the judgment of this Court in the case of M/s Lokhandwala Infrastructure Pvt. Ltd. Vs Municipal Corporation of Mumbai & others reported in 2008(5) ALL MR 743 and the judgment in the case of Shree Oswal Builders Vs State of Maharashtra 2008(3) ALL MR 529.

14. The learned counsel submitted that in fact, the FSI of the acquired land was consumed by the developer and the Society and the developer got the plan sanctioned showing the acquired area as part of the proposal which is clear from the subject matter of the NOC which was granted. Learned counsel further submitted that when the NOC was granted only 19 members had signed which is not a compliance to the requirement u/sec.95-A of the Act of 1976. The position as on the date of NOC should be seen as the section 95A is not retrospective. The learned counsel by relying on judgments of Apex Court in the cases of (I) Union of India and others vs Mohammad Ramzan Khan -1991 (1) SCC 588; (ii) Prakash

Ratan Sinha Vs State of Bihar and others -2009 (14) SCC 690; Hindustan Petroleum Corporation Ltd vs Darius Shapur Chenai and others -2005 (7) SCC 627, contended that the Executive Engineer while deciding an application u/sec.95A of the Act of 1976, has a duty to act judicially and if he fails to do so this Court can set aside the said decision in its power of judicial review. The learned counsel also submitted several documents which were relied upon by the Executive Engineer in his order were not supplied to the appellants and thus there was a serious breach of principles of natural justice and consequently, the order of the Executive Engineer is void. A list of the documents which were not made available to the appellants is enumerated by the appellants in paragraph no.34 of their appeal memo. The learned counsel also urged that a tenement which was in the name of one Harminder Singh ought to have been considered while arriving at the figure of 70% as even though the occupant had expired, his estate had survived. It was also urged by the appellants that their case is not equivalent to a slum redevelopment scheme and reliance placed by the learned Single Judge on his own judgment in Shiv Krupa Builders and Ors vs. State of Maharashtra, 2011 (5) BCR 434 was misplaced. The learned counsel submitted that the appellants desired to develop their own property by themselves and not through any developer and by collusion and fraud on the part of the authorities, the appellants are being deprived of their fundamental rights.

15. The learned counsel further relied on an order passed by

Division Bench of this Court in Writ Petition No.160 of 2008 in respect of acquisition of the property by the Railways that the acquisition is complete and thus, the Executive Engineer could not have come to the conclusion that the acquisition was not complete and only paper possession was taken. The learned counsel as relied upon the letter issued by the Municipal Corporation dated 10 October 2008 which according to the learned counsel protects the possession of the appellants. The learned counsel finally submitted that the argument of prejudice to the 22 tenement holders cannot be held against the appellants as those tenement holders have decided to vacate the premises on their own accord. The appellants in short, reiterated their submissions made before the Executive Engineer and the learned Single Judge.

16. On the other hand, Mr.Aspi Chinoy, Senior Advocate appearing for the Chairman of the Society submitted as under :

The scope of section 95 should be kept in mind before deciding the grievance of the petitioner. The scope of section 95-A of the Act is limited and moment it is demonstrated to the authorities that 70% members have given their consent and there is a valid NOC to the project and the developer has made suitable arrangement for shifting the occupants to a transit accommodation, no further enquiry is necessary. In the present case, all the ingredients were satisfied and there was no reason to stall the redevelopment any further. Any further delay in implementation of the project will be highly inequitable as 22 out of 32 members have already shifted to the

transit accommodation in the year 2006 and are awaiting allotment of their new house. The redevelopment was in the interest of the members of the Society as the developer had promised to give newly constructed houses admeasuring 1800 sq.ft. As against 450 sq.ft. previously occupied in addition a sum of Rs.17 lakhs to each occupant. This being a collective decision for the benefit of the Society, it must be honored by all the members. Out of balance area of 6188 sq.m what was allowed to be used was only 5532 sq.meters, thus, even if the land acquired by the Railway is kept aside, the FSI which was available was still sufficient. The said position has been placed on record by the affidavit filed by the Deputy Engineer in the Writ Petition.

17. Mr.Chinoy also made a categorical statement that no part of the land which was acquired by Railways be utilised for the purpose of construction in the redevelopment project. It was also urged that the mentioning of land [1269(Part) and 1268(Part)] in the subject matter of NOC was a clear clerical error as the IOC mentions only 1269(Part) and same position was re-iterated in the order passed under section 95-A of the Act. Thus, according to the learned counsel, this was not an after-thought but a genuine error. As far as consent of 70% members is concerned, the learned counsel submitted that the members who had occupied structures acquired by Railways continued to be members and their membership does cease automatically. According to the learned counsel, when the action under section 95-A is to be taken, that is the time the authority has to

access whether 70% members have given their consent or not and in present case 22 out of 31 have given their consent. As far as one member i.e who had expired, the dispute between his heirs was still pending and there was a status quo order restraining both the heirs from dealing with the property and thus, the said member for the purpose of ascertaining the majority under section 95A did not exist and since 22 out of 31 members had given consent, it was a compliance under section 95-A of the Act. The learned counsel further submitted that the letter of the Municipal Corporation relied upon by the petitioners to show that their premises are not to be demolished was not the way it was construed by the petitioners. The said letter according to the learned counsel only stated that the approval will be given by the Municipal Corporation only after steps as per the DCR 1991 are taken are , which means as per section 95-A of the Act of 1976. The learned counsel also urged that untold hardship is being caused to the 22 members who have vacated their homes by the adamant attitude of the petitioners and he urged that the Society be permitted to resume the redevelopment activity forthwith.

18. Mr.Samdani, Senior advocate appearing on behalf of the Secretary of the Society adopted the arguments made by Mr.Chinoy and in addition submitted that the appellants in Writ Petition had deleted the challenge to the NOC and once the challenge to the NOC was deleted from the purview of the writ petition, only the action under section 95A remained to be tested as the prayer is regarding to

challenge to a redevelopment scheme cannot be examined in vacuum. According to the learned counsel that the prayer was deleted because it was subject matter of a suit and the petitioner had failed to obtain any interim orders in the said suit and also in the dispute filed in the co-operative court. The learned counsel also placed reliance on the judgment of this court in case of Paygonda Surgonda Patil and others v. Jingonda Surgonda Patil and others reported in AIR 1968 Bom 198 to contend that, even if there are minor infringements of legal provisions, writ petition need not be entertained if substantial justice is done.

19. Mr.Cooper, Senior Advocate along with Mr.Soni, appearing for the developers submitted that the developer had done nothing wrong and had acted diligently. They have obtained all the permissions as required, has provided for transit accommodation, has shifted the 22 occupants to the transit accommodation and is paying a monthly rent which is amounting to Five lakh rupees a month. It was also pointed the cost incurred by the developer so far is in excess of Rs.20 crores upon which they have to pay interest. The learned counsel also urged that the developers being a business venture has invested money, time and effort and the delay in the project from the year 2006 onwards at the behest of the appellants is causing huge loss to them.

20. Before we examine the rival contentions what needs to be kept in mind is that the proceedings before the learned Single Judge arose

from an order passed under section 95-A of the Act. What was filed before the learned Single Judge was a Writ Petition challenging the order passed under section 95-A of the Act and it is the exercise of the writ jurisdiction of the learned Single Judge in respect of order passed under Section 95-A that is in question before us.

21. Section 95-A is enacted in respect of redevelopment of old tenements. Provisions of the Development Control Rules also came to be amended. Section 95A and DCR 33(5)(7) reads as under -

“95-A 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 70 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 occupier, 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.

(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 unauthorisedly or without specific written permission of the Board in this behalf shall, notwithstanding anything contained in Chapters VI and VII of

this Act, be liable for summary eviction”.

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“DCR 33(5)(7) -In any Redevelopment scheme where the Co-operative Housing Society / Developer appointed by the Co-operative Housing Society has obtained No Objection Certificate from the MHADA / Mumbai Board thereby sanctioning additional balance FSI with a consent of 70% of its members and where such NOC holder has made provision for alternative accommodation in the proposed building (including transit accommodation) then it shall be obligatory for all the occupiers / members to participate in the Redevelopment Scheme and vacate the existing tenement for the purpose of redevelopment. In case of failure to vacate the existing tenements, the provisions of section 95A of the MHADA Act mutatis mutandis shall apply for the purpose of getting the tenements vacated from the non co-operative members”.

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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 95-A was enacted to enable speedy implementation of such redevelopment schemes. The provision is to ensure seamless implementation of the 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 95-A 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 95-A 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 95-A 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 95-A is not a judicial officer equipped to decide complicated question of law relating to dispute as to title etc.

24. The proceedings under section 95-A cannot be converted into a civil trial as is sought to be done by the petitioners. If the members

of the Society obtain any judicial orders restraining the Society or the developer from acting in furtherance of their intention to redevelop, then obviously the authority under section 95-A will be bound by such judicial orders. In the present case, even though the appellants approached the Civil Court as well as the Co-operative Court in the year 2006 challenging the decisions of the Society to redevelop the property, they did not secure any interim orders for last six years. The Executive Engineer under 95-A thus is not expected to arrogate himself the jurisdiction vested in Civil Court and Co-operative Court and decide the issue raised by the appellants in those proceedings. Once the jurisdictional facts before the Executive Engineer were satisfied and that there was no restraint order, the authority under section 95-A had no other option, rather was under obligation to direct the appellants to move to transit accommodation to facilitate the redevelopment.

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 95-A. 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 95-A we granted full opportunity to the appellants in order to satisfy ourselves whether any failure of justice has occasioned by the impugned orders.

26. The first point that is whether 70% members had given their written consent to the present redevelopment proposal as required u/sec.95A of the Act. The Executive Engineer considered this issue at length as it is one of the criteria that need to be considered u/sec. 95A of the Act. It is an admitted position that the Society had 32 members and out of the 32 members, one member has expired. 22 members have given their consent in writing. It is the contention of the appellants that 9 members were located on the land which was affected by Central Railway Expansion Project. These members according to the appellants, cannot be considered for the purpose of counting the 70 per cent requirement as they ceased to have any right. It was pointed out by the Society to the Executive Engineer that 8 out of 9 members, after signing the development agreement

had shifted to the transit camp provided to them. One member out of the nine was a member who had opposed the redevelopment. The Executive Engineer and the learned Single Judge have both held that the said members whose structures were effected by Railways Expansion Programme cannot be considered to have ceased to be members of the Society. As long as the members of the Society continue to be on the register of membership of the Society either they will have to be removed from membership by action taken by the Society or by an order of the competent authority. The Maharashtra Co-operative Societies Act, lays down the procedure for removal of a member from the Society. Admittedly, no such action has been taken. In fact, the appellants even though approaching the Co-operative Court have failed to obtain any order in that regard. The members of the Co-operative Society will lose their membership only as per the provisions of the Maharashtra Co-operative Societies Act. Therefore, for all practical purposes while counting the 70% of members, u/sec.95A, said members will have to be counted. The Executive Engineer has thus correctly held that, since 22 members have accepted the redevelopment proposal, the requirement as regard section 95A of the Act, stands satisfied. No perversity can be found with the finding of the Executive Engineer and the Single Judge in this regard.

27. It was urged that membership of Harminder Singh who had expired was not counted while considering, whether 70% members have agreed for redevelopment or not. It was urged before the

Executive Engineer and the learned single Judge and also before us that the estate of said Harminder Singh continues to be present and thus, if his tenement is counted then only 22 out of 31 members have given their consent, which would be less than 70%. The Executive Engineer has noted that the heirs of this Harminder Singh have been restrained by an order of the Court from dealing with the property in any manner. If that be so there is no person who could, in law, give or withhold permission for redevelopment of the property on behalf of the said member. This contention is rightly rejected by the learned Single Judge.

28. Much capital has been made by the appellants regarding the mention of two lands, 1269(Part) and 1268 (Part) in the subject matter of the NOC. It has been clarified by the MHADA by filing an affidavit before the learned Single Judge that mentioning 1268(Part) in the subject matter of the NOC was a clerical mistake. Though as contended by the appellants such stand was taken belatedly, it cannot be brushed aside on that ground alone, if the examination of other relevant documents shows that it was indeed a clerical mistake. The Intimation of Disapproval (IOD) clearly shows that it was issued in respect of the CTS No.1269(Part) only. Thus, it is very clear that the mentioning of 1268 (Part) in the NOC was clearly a clerical error.

29. The contention regarding the land under acquisition of the Railways being counted towards redevelopment project when it

cannot be done so, is without any substance. The Executive Engineer in his order has noted that the perusal of plans submitted to the Corporation shows that the redevelopment is sought only of 5532 sq. metres. The MHADA in its affidavit has placed on record that out of 7806.72 sq.metres land, 168.56 metres was affected by Railways Expansion Programme, thus leaving 6,188.16 metres were available for the Society for redevelopment and FSI available on such land. The NOC was only in respect of 5532.9 sq.metres and thus, even otherwise if the land acquired by Railways is taken into consideration the redevelopment is taking place for an area lesser than balance area left after deducting the acquired land. Condition 20 of the NOC dated 19 July 2008 directs the Society to submit an undertaking that no construction will be done on the land affected by Railways and the said land will be handed over to the Railways as and when demanded. Condition 20 reads as under -

“An undertaking should be obtained from the society mentioning that no construction will be allowed on the land affected by Railways proposed acquisition and this land will be handed over to Railways as and when it will be demanded from Railway Authority.”

30. The learned counsel for the respondents No.5 and 6 have reiterated their assurance that no part of the land which is effected by Railways Expansion Programme will be taken into consideration in respect of the re-development and have contended even after the land which is subject matter of Railways Expansion Programme is kept aside, enough area as FSI is available to the Society as well as the

developer to carry out the redevelopment project. The appellants have simply tried to build their case on few errors in the document here and there to stall the redevelopment project.

31. The appellants had challenged the Resolution of the Society and the memorandum of understanding entered into with the developer by filing a suit and proceedings in the Co-operative Court. In both these proceedings which are pending since 2006 the issues raised by the appellants could have been agitated and an order in favour of the appellants could have been obtained. In spite of lengthy argument on behalf of the appellants, no explanation is coming forth why in spite of approaching the Civil and Co-operative Courts, the appellants did not secure any interim relief. Instead of pursuing the grievance in the competent Courts of law, the appellants have tried to convert the proceedings before the Executive Engineer into a suit and a co-operative dispute.

32. As far as the grievance regarding non-supply of documents is concerned, we may notice that such documents were referred by the Executive Engineer while giving a background of the matter. None of these documents would be termed as documents which were used against the appellants. It is only when a document is used against the party without disclosing that such document will be used against it and a copy of which not given, then a grievance could be made. In the present case, the documents in question were merely mentioned in the narration of facts and not, in that sense, used against the

appellant. The Executive Engineer has given adequate notice to the appellants of the proceedings. The appellants engaged an advocate, submitted documents and were given full hearing. The grievance regarding breach of principles of natural justice is made merely to create a ground to challenge the impugned order.

33. As far as the reliance of the appellants on the order of the Division Bench dated 10 March 2011 is concerned, we find that the issue whether the acquisition by the Railways is complete or not was not an issue that was under active consideration of this Court. The observations made in respect of claim made by an individual member which will have to be read in facts and circumstances of the case. Even otherwise, as we have already held that the issue of acquisition by the Railways need not detain the redevelopment project as there is sufficient area available even otherwise. This ground taken by the appellants thus has no merit.

34. The reliance of the learned Counsel for the appellants on the letter of the Municipal Corporation dated 10 October 2008 is of no avail as the letter merely states that the action will be taken after the action, contemplated in D.C.R of 1991 is taken. The proceeding will no doubt include the proceeding under section 95A of the Act of 1976 and thus, this letter dated 10 March 2011 will be of no avail to the appellants.

35. After the order of the learned single Judge, as per the direction

of the learned single Judge, the Executive Engineer has held that the only correction that needs to be done is in the NOC to delete the reference to CTS 1268(Part) and no other correction is required. The Executive Engineer is right in coming to this conclusion as the area which is available to the Society for redevelopment in fact, need not be changed and as the acquisition by Railways does not affect the redevelopment.

36. We may also note the arguments made on behalf of the respondents that once a challenge to the NOC was deleted from the petition filed before the learned Single Judge, there could not have been general omnibus inquiry into the legality of the scheme except to find out whether order u/sec.95A of the Act was validly passed. It appears that the challenge to the NOC was deleted from the prayers in the petition. If that be so, there is no challenge before the learned Single Judge in that regard. Once the NOC, IOD and all other requisite documents are in place and have not been set aside by any Court of law, the Executive Engineer u/sec.95A cannot assume jurisdiction to examine legality of these permissions. The entire thrust of the appellants arguments is that the Executive Engineer u/sec.95A of the Act should have either waited till the proceedings in Court of law were over, or the Executive Engineer must examine those issues on his own. The appellants having failed to obtain any interim relief in either of suit and or in the Cooperative Court cannot demand that an Executive Engineer or a Writ Court should grant them such indulgence. The conduct of the appellant indicates that

the appellants are more interested in creating hurdles in the redevelopment than getting their rights adjudicated in the competent Court of law.

37. The question before us is thus, whether the Executive Engineer was right in asking the appellants to vacate the premises and move to the transit accommodation. As we have already pointed out in the preceding paragraphs, the object of section 95A is not to determine rights of the parties but speed up the work of redevelopment while ensuring a shelter for the members / occupants. In the present case the permissions have been granted in the year 2006, demolition in part has been carried out, 22 members have already vacated the premises, the developer has invested more than 22 crores in the project. No grievance has been made before us, that the transit accommodation is not available. The members whose houses are demolished are waiting in transit accommodation since the year 2006. The members whose houses were on the Railway project land were demolished and the compensation will be given to the Society. If the appellants arguments is accepted that they should not be treated as members then those members will neither get compensation nor get a newly constructed place. The developer has pointed that as per the agreement the members will get permission of 1800 sq.ft. as against 440 sq.ft. and in addition, an amount of Rs.17 lakhs each. The developer and the Society has reiterated that suitable transit accommodation is ready and available for the appellants If this be the position, we find that the order of the Executive Engineer

and the learned Single Judge to facilitate recommencement of the redevelopment project by asking the appellants to shift to transit accommodation is in furtherance of interest of justice.

38. Once we find that the Executive Engineer was right in holding that 70% members had in fact consented for redevelopment, the developer and the Society had taken all the requisite permissions, the provision for transit camp was made and that majority of members have already shifted to the transit camp, then to delay the project which has been stalled for last six years any further would be travesty of justice. The appellants cannot be permitted to hold the developer and other members at ransom and must follow the majority decision.

In view of this above discussion, we are satisfied that the order passed by the learned Single Judge requires no interference and the Appeal and Notice of Motion are accordingly dismissed.

**CHIEF JUSTICE**

**N.M.JAMDAR, J**

*Mns*