

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION (L) NO.4155 OF 2020**

Upendra Lallubhai Shah & Ors. ... Petitioners
V/s.
The State of Maharashtra & Ors. ... Respondents

**WITH
WRIT PETITION (L) NO.4330 OF 2020**

Kamlesh Jayant Acharya ... Petitioner
V/s.
The State of Maharashtra & Ors. ... Respondents

Mr.Y.S.Jahagirdar, Senior Advocate with Ms.Jai Kanade i/b Sanjukta Dey for the Petitioners in W.P. (L) No.4155/2020.

Mr.Pradeep Thorat with Mr.Prayag Joshi i/b Joshi Law Associates for the Petitioner in W.P. (L) No.4330/2020.

Mr.Hemant Haryan AGP for the Respondent-State in both Petitions.

Mr.Milind Sathe, Senior Advocate with Mr.kamlesh Ghamre for the Respondent-MHADA.

Ms.Anita Castellino i/b Bruno Castellino for Respondent Nos.5 and 6.

**CORAM : A. A. SAYED AND
MADHAV JAMDAR, JJ.**

DATED : 14TH JANUARY, 2021

P.C:-

1. Rule. Respective Counsel waives service.
2. In these Petitions, the Petitioners have challenged order dated 10/09/2020 passed by the Respondent No.1 - Chief Secretary, Housing Department, State of Maharashtra as also the order dated 4/01/2020 passed by the Respondent No.3 - Chief Officer of Mumbai Housing and Area Development Board (Mumbai Board).

3. The Respondent No.2-Maharashtra Housing and Area Development Authority (MHADA) by separate allotment letters dated 11.07.1997 allotted in favour of the respective Petitioners, Tit-Bit Plots of very small area which are adjacent to the respective tenements of the respective Petitioners. The Tit-Bit Plots allotted in favour of the respective 3 Petitioners in Writ Petition (Stamp) No. 4155 of 2020 admeasure 44.28 sq. mtrs. (adjacent to Tenement No.182) , 31.16 sq. mtrs. (adjacent to Tenement No.184) and 25.33 sq. mtrs. (adjacent to Tenement No.185) respectively. The Tit-Bit Plot allotted in favour of the Petitioner in Writ Petition No. 4330 of 2020 admeasures 37.72 sq. mtrs. (adjacent to Tenement No.183). The said plots are hereinafter collectively referred to as the said "Tit Bit Plots". The terms and conditions of the allotment letter dated 11.07.1997 in favour of all the Petitioners are almost identical. The respective allottees were required to pay premium of Rs.2000/- per sqmt. and lease rent of 2.5% of premium amount per annum. As per the condition No.2(1) of the respective allotment letters, the tit-bit area are to be held only alongwith the tenement and not separately. It is provided that in case of transfer of tenement the tit-bit area will automatically stand transferred.

4. The Respondent No.3 - Chief Officer of M.H.A.D.A. (Mumbai Board) without cancelling the allotment made in favour of the respective Petitioners and without issuing any notice to the Petitioners by letter dated 1-10-2010 offered to allot the said Tit -Bit Plots to the Respondent No.5-Society. The "said Tit Bit Plots" allotted to the Petitioners were subsequently allotted by Respondent No.3 by letter/order dated 28/04/2011 to the Respondent No.5 – Society. It is an admitted position that the said exercise was done without cancelling the allotment in favour of the Petitioners. It is the contention of the Petitioners that the same was done by the authorities at the instance of the Respondent No.6 – Developer, who is

carrying on development on behalf of the Respondent No.5 – Society.

5. The Petitioners filed suits in the Bombay City Civil Court at Mumbai inter alia challenging the legality and validity of above referred actions of the Respondent Nos.2 to 4 and the learned Judge, City Civil Court at Mumbai by order dated 2/03/2012, restrained the Respondent Nos.2 to 4 from disturbing possession of the Petitioners and creating third party rights in respect of “the said Tit Bit Plots”. However, by order dated 5/10/2015 the Notices of Motion in the suits were dismissed and therefore the Petitioners preferred Appeal from Order in this Court. The learned Single Judge of this Court by order dated 25/08/2016 allowed the said Appeals and restrained the Respondent Nos.2 to 6 from taking forcible possession of the “said Tit Bit Plots” and creating third party rights in respect of the same till final disposal of the Suit. The learned Single Judge prima facie found that Petitioners’ possession cannot be termed as illegal or unauthorized. So also, their allotment cannot be cancelled unilaterally, without giving notice or opportunity to them and further directly re-allotting the same to Respondent No.5.

6. The Respondent No.4 – Executive Engineer, Housing, Kurla Division, Mumbai Board issued notice dated 30/11/2016 to the Petitioners fixing the hearing before the Respondent No.3 – Chief Officer. The Respondent No.3 – Chief Officer passed an order dated 4/09/2017 holding that there is deemed cancellation of allotment in favour of the Petitioners in the year 2011 and hence concluded that the allotment in favour of the Respondent No.5 is valid. The said order was challenged by the Petitioners by filing Writ Petition No.2711 of 2018 and by order dated 12/02/2018 the said Writ Petition was allowed and matter was remanded back for hearing afresh.

7. After remand of the matter the Respondent No.3 issued fresh show cause notice dated 27/02/2019 alleging breach of terms and conditions of allotment. In addition it is mentioned in the show cause notice that decision was taken to cancel the allotment made in favour of the Petitioners and allot the same in favour of the Respondent No.5. By impugned order dated 4/01/2020 passed by the Respondent No.3 – Chief Officer allotment of “said Tit Bit Plots” situated adjoining residential House Plots of the respective Petitioners was cancelled, the said Plots were allotted in favour of the Respondent No.5 and the Petitioners were directed to handover the possession of “said Tit Bit Plots” to the Respondent No.4 within a period of 10 days.

8. The Petitioners challenged said order dated 4/01/2020 by filing Writ Petition (L) No.119 of 2020. However, preliminary objection was raised by MHADA as to maintainability of the Writ Petition in view of availability of alternate remedy of Appeal under section 70 of the MHADA Act. Therefore the said Writ Petition was disposed of by order dated 11/02/2020 by keeping all the contentions open.

9. The Petitioners filed Appeal under section 70 of MHADA Act before the Respondent No.1 – Chief Secretary, Housing Department, State of Maharashtra. The said Appeal was dismissed by impugned order dated 10/09/2020 thereby confirming the order dated 04.01.2020 passed by the Chief Officer, Mumbai Housing & Area Development Board cancelling the allotment of the said Tit-Bit Plots. By the said order the Chief Officer, Mumbai Housing & Area Development Board was directed inter alia to complete the procedure of cancellation of allotment and to take appropriate action for allotment of the said Tit-Bit Plots in favour of Respondent No.5-Society.

10. It is main contention of learned Senior Counsel appearing for the Petitioners that the impugned order dated 4/1/2020 passed by Respondent No.3 is without jurisdiction. He submits that the impugned order is in the nature of eviction order, and, therefore, it is only Competent Authority, who can pass such order under section 66 of the Maharashtra Housing and Area Development Act, 1976 (said Act). Mr.Sathe, learned Senior Counsel appearing on behalf of Respondent-MHADA submitted that the impugned orders are not eviction orders. He submitted that by the impugned orders, the allotment made in favour of the Petitioners is cancelled and that power vests with the Authority under section 64 of the said Act. Shri Pradeep Thorat, learned Counsel appearing for the Petitioners in Writ Petition (L) No.4330 of 2020 pointed out the order dated 11th February, 2020 passed in Writ Petition (L) No.119 of 2020 by this Court and particularly paragraph 9 of the said order wherein submissions of the Respondents were referred and it is recorded as follows :

“9...The respondents submit that the power to pass the order impugned in the petition is derived from sections 65 and 66 of the MHADA Act. Once this is the power invoked and to which the order impugned in the petition is traceable, then, it is capable of being challenged by filing an appeal under section 70 of the Act. Therefore, this court should not entertain and try the petition, particularly when it involves disputed factual issues.”

11. Thus, it is clear that when the Petitioners filed said Writ Petition (L) No.4330 of 2020 in this Court challenging the impugned order dated 4/1/2020 passed by the Respondent No.3, the Respondents have raised contention that the said order is passed by exercising powers under sections

65 and 66 of the said Act and therefore, the Writ Petition is not maintainable as the Appeal is provided under section 70 of the said Act to challenge the said order. However, now when faced with the submission that only Competent Authority has power to pass order of eviction and, therefore, the impugned order dated 4/1/2020 is passed without jurisdiction, it is tried to be contended that the said order is not of eviction and only of cancellation of allotment and the same is passed by exercising power under section 64 of the said Act. It is significant to note that by the said order dated 4/1/2020 passed by the Respondent No.3, the Petitioners were directed to handover possession of the "said Tit Bit Plots" within 10 days to the Chief Engineer, Kurla Division, Mumbai Board. Thus, it is clear that eviction order has been passed by Respondent No.3 and prima facie Respondent No.3 has no jurisdiction to pass the eviction order.

12. Although it is tried to be contended by Mr.Sathe, learned Senior Counsel that action is taken only for cancellation of allotment and, therefore, Respondent No.3 has jurisdiction to take such action by exercising power under section 64 of the said Act, however, the show cause notice specifically mentions that the allotment in favour of the Petitioners is sought to be terminated as it was decided to make allotment in favour of Respondent No.5. It is clear that termination of allotment of said "Tit Bit Plots" in favour of the Petitioners and allotment of the same in favour of Respondent No.5 prima facie contemplates eviction of the Petitioners. Thus, arguable questions are raised regarding jurisdiction of Respondent No.3 to pass the impugned order dated 4/1/2020.

13. It appears that respective Petitioners have only paid initial premium but have failed to pay rent per year. However, from 1997 till issuance of show cause notice dated 27/02/2019 alleging breach of terms and conditions

of allotment, MHADA at no point of time taken any action for cancellation/termination of allotment on the ground of non payment of rent. In the meanwhile, the Petitioners vide letter dated 14/10/2011 forwarded cheques towards arrears of lease rent, however, MHADA returned the said cheques alongwith their letter dated 31/12/2011. It is the contention of the Petitioners that from time to time arrears of rent were tried to be paid to MHADA, however, MHADA refused to accept the same. Thus, there is serious dispute whether the Petitioners can be termed as defaulters and arguable questions are raised in that behalf.

14. As far as the contention of the Petitioners that action is taken at the instance of Respondent No.6 – Developer, who is developing adjoining property for the Respondent No.5 – Society, the factual position on the record shows that by respective letters dated 11/7/1997 the “Tit Bit Plots” were allotted to respective Petitioners and without cancelling the said allotment in favour of the Petitioners, the said plots were allotted to Respondent No.5 on 28/04/2011. It is also to be noted that in the show cause notice also it is specifically mentioned that the cancellation of allotment in favour of the Petitioners is being made as decision was already taken to allot the same to the Respondent No.5. Thus there is prima facie substance in the contention of the learned Senior Counsel of the Petitioners that the decision was already taken to allot the said Tit Bit area to the Respondent No.5 and procedure of issuing show cause notice etc. is being followed to make show of adherence to the principles of natural justice.

15. It is contended by the learned Senior Counsel appearing for MHADA and learned Counsel appearing for the Respondent No.5 – Society and Respondent No.6 – Developer that the members of the Respondent No.5 are suffering and they are in transit accommodation since 2011. However, area

of “said Tit Bit Plots” i.e. 138.09 sq. mtrs. is very small area and it cannot be said that the redevelopment cannot be undertaken to accommodate the members of the Respondent No.5 in the absence of the benefit of the FSI of the said tit bit area. The learned Senior Counsel appearing for the petitioners pointed out photographs of two multi-storied buildings which are being constructed by the Respondent No.6 and states that more than 100 flats are being constructed. The members of Respondent No.5 are only 48 and therefore there is no substance in the said contention. The Petitioners are in possession of the Tit Bit plots since 1997.

16. The Petitioners have made out a case for grant of interim relief. We therefore direct that pending the hearing and final disposal of the Writ Petitions the operation and implementation of impugned order dated 10/09/2020 passed by the Respondent No.1 - Chief Secretary, Housing Department, State of Maharashtra as also the order dated 4/01/2020 passed by the Respondent No.3 - Chief Officer of Mumbai Housing and Area Development Board (Mumbai Board), shall stand stayed.

17. Liberty to apply for early date of hearing.

[MADHAV JAMDAR, J.]

[A. A. SAYED, J.]