Shephali

REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 3509 OF 2019
WITH
INTERIM APPLICATION (L) NO. 6378 OF 2022
IN
WRIT PETITION NO. 3509 OF 2019

Milind Dashrath Narvekar,
Aged 60 years, Occ: Retired,
Chief Promoter of Shri Ganesh Sai High Court Employees' Cooperative Housing Society (Proposed)
having his address at Kaveri, Flat No.2, Ground floor, AG Khan Road, Worli Sea face, Worli, Mumbai 400 030. **...Petitioner**

~ versus ~

1. **State of Maharashtra,**

   (i) Through Secretary Revenue Department, Having his office at Mantralaya, Madam Cama Road, Nariman Point, Mumbai 400 032.

(ii) The Principal Secretary/ Additional Chief Secretary, Government of Maharashtra, Mantralaya, Madam Cama Road, Nariman Point, Mumbai 400 032.

2. **The Collector, Mumbai Suburban,**
Having his office at Administrative Building, Bandra (East),
Mumbai 400 051.

3. **The City Survey Officer,**
Having office at, BEST Colony Officers Quarters, Dadasaheb Rupwate Road, Goregaon (West), Mumbai 400 104.

4. **Maharashtra Housing And Area Development authority,**
A statutory body constituted under the Provisions of MHADA Act, 1976, having its office at Grihanirman Bhavan, Kalanagar, Bandra (East), Mumbai 400 051.

5. **Executive Engineer,**
Building Proposals Department, Municipal Corporation of Greater Mumbai having his office at Government Offices Building, 90 feet Road, Asha Nagar, Kandivali (East), Mumbai 400 101.

...Respondents

APPEARANCES

FOR THE PETITIONER	**Mr Mayur Khandeparkar**, *with Vikramjit Garewal, i/b DA Sakhalkar.*
FOR RESPONDENTS NOS 1 TO 3 — STATE	**Dr Birendra Saraf, Advocate General**, *with Abhay L Patki, Addl. GP.*
FOR RESPONDENTS NOS 4 & 5 — MHADA	**Mr Vijaysinh Thorat, Senior Advocate**, *with Mr PG Lad, Prachi Tatake, Sayli Apte & Shreya Shah.*

CORAM : GS Patel &
Kamal Khata, JJ

DATED : 15th September 2023

ORAL JUDGMENT (*Per GS Patel J*):-

I

1. Since the Petition was first filed four years ago in 2019, many benches have indicated that it should be disposed of finally. Rule was never formally issued. Pleadings are perhaps more than complete having run well beyond 400 pages. We have heard Mr Khandeparkar for the Petitioners, Dr Saraf, learned Advocate General, for the State and Mr Thorat, learned Senior Advocate for the Maharashtra Housing and Area Development Authority ("**MHADA**"). This matter was specifically assigned to a Bench presided over by one of us (GS Patel J) and hence we have proceeded with the final disposal.

2. Consequently, Rule, returnable forthwith.

II

3. In the cold calculus of law, the aridity of facts, dates and events, and the dispassionate application of a statute or a regulation, it sometimes happens that the tragedy of an essential human condition is lost or missed. In this country, perhaps most especially, we are no strangers to stories of persons long in exile. This case is perhaps one such: the Petitioner is the promoter of a cooperative housing society of nearly 400 State Government employees, all working in the High Court. These people have spent years in a litigation and negotiation wilderness in quest of that one perhaps most fundamental and yet most ineffable human aspiration — a home to call one's own. As the following narrative will show, a group of employees came together and turned to the only persons they could, this High Court on its administrative side and the State Government and its instrumentalities, for this relief. They desired that an appropriate allotment be made within the framework of the law so that they could, not free of cost, but on payment of ready reckoner rates and costs of construction, legitimately and lawfully acquire residences. Many events intervened. There were times when they came close. Yet it was never close enough. There was opposition. As one hurdle was crossed, another came up. And so their aspirations, like the cup of Tantalus, remained always just out of reach. Today, that odyssey ends.

4. At the forefront, we state that we have always borne in mind that we are making no exception because the Petitioner before us, Mr Milind Dashrath Narvekar, the Chief Promoter of the Shree Ganesh Sai High Court Employees CHSL (proposed), represents a class of persons who are working in this Court. That is, as it must necessarily be, an entirely irrelevant consideration. To put it even more plainly: there are no exceptions to the law merely because the petitioner before the Court happens to be employed in the High Court.

5. There is opposition to the Petition, in our view appropriately subdued and restrained, yet firm. It comes from both the State Government and the MHADA represented by Mr Thorat. There is very little that is contentious about the facts as they unfolded. The controversy is about the imposition — we will not call it a demand — of two conditions that attach to the allotment of land to this Society. To get this portion out of the way, there is no serious contest about the allotment itself. The question is whether those conditions, which we will detail presently, should or should not be retained. To put it differently, as Mr Khandeparkar for the Petitioner puts it in his extremely capable navigation of delicately placed positions, can it fairly be said that those conditions are *reasonable*? As a matter of jurisprudence, we are not required to go quite the entire distance of holding that every such imposition of a condition for every allotment is facially arbitrary or violates Article 14. Mr Khandeparkar has strived long and hard to contain that submission to its context. For it is his case that the imposition of these conditions, especially when they come late in the day, is

without regard to the manner in which facts unfolded and, in particular, commitments made, is, therefore, unreasonable.

6. On behalf of the State Government and MHADA there is an expression of a very real anxiety or concern about matters and issues systemic or structural. We fully appreciate the contours of that apprehension. For Dr Saraf is completely correct when he says that a finding returned by a Constitutional Court that a condition — particularly of reserving certain portions for stated purposes in a legislation or one that has the effect of law — if struck down or held to be arbitrary would literally open the floodgates. The State Government and MHADA would be inundated with applications to dispense with such conditions in all cases. Fundamentally, Dr Saraf submits, the conditions are meant to subserve stated public welfare purposes. Dispense with the conditions, he says, and you dispense with the public welfare dimension; that, he says, is something that no Constitutional Court should lightly venture, let alone adventure.

7. Dr Saraf is supported in his submission by Mr Thorat who gently reminds us that there is really no wrongdoing properly so called even alleged against MHADA or the State Government. All that the Petition says is that the insistence on the fulfilment of the conditions is unjustified and therefore should not be given effect.

8. Before we proceed, we believe we must note another facet, albeit one entirely unrelated to the Petition at hand. As we go about our daily work, taking up one matter at a time, it is easy to miss very considerable ironies that present themselves. For also on our list

today, in a completely different litigation, there is a matter that involves an apparent policy of providing free of cost ownership flats and homes to trespassers and encroachers on public and municipal lands. Noticing this, we ask ourselves how there can possibly be so stark a contrast: one the one hand, a case of those who want to follow the law and are willing to pay for homes, and, on the other, State and Municipal policies that are said to assure ownership residences to those who illegally trespass on public lands. It seems to us utterly inconceivable, even bordering on the preposterous, that *public policy* should be cited in opposition to the demands of those complying with the law, and *public policy* should also reward those admittedly committing illegality. The administration of justice cannot be the theatre of the absurd.

III

9. The Petition has been amended. We are to consider prayer clauses (a), (b) and (b-1), reproduced below:

> "(a) That this Hon'ble Court be pleased to issue a writ of certiorari, and/or other appropriate writ, order or direction in the nature of certiorari under Article 226 of the Constitution of India calling for the records and proceedings in respect of Petitioners application for allotment of subject property which culminated into passing the impugned Government Orders dated 18th September 2019 issued by Respondent No. 1 (Exhibit M hereto) and after going through the legality, validity and propriety thereof, the same be pleased to quash and set aside the same.

(b) That this Hon'ble Court be pleased to issue writ of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India directing the Respondent no. 1 to consider the representation made on behalf of the said society i.e. Shri Ganesh Sai High Court Employee's Co-operative Housing Society Ltd (Proposed) and to allot the subject property i.e. Plot of land bearing S. No. 29 (part) corresponding to STS No. 50A (part) admeasuring 36,750 sq. mts. situated at Village Pahadi, Goregaon (W), Taluka Borivali, Mumbai Suburban District, in its entirety to the said society within such period as this Hon'ble Court may deem fit and proper.

(b-1) that this Hon'ble Court be pleased to issue a writ of certiorari or a writ in the nature of certiorari and/or any other appropriate writ, order or direction under Article 226 of the Constitution of India, 1950 calling for the records of the Housing Department, Government of Maharashtra with respect to the Application of the Petitioner dated march 30, 2022 for formulation of scheme under **Regulation 13(2) of the MHADA (Estate Management, Sale, Transfer and Exchange Of Tenements) Regulations 1981** culminating in issuance of the letter dated December 7, 2022 (at Exhibit P and P1) and after considering the legality, validity, propriety thereof, be please to quash and set aside the same."

10. Mr Khandeparkar focuses his attention now on the relief at prayer clause (b1) because events have quite considerably overtaken this Petition. As the emphasised portion above shows, we will be considering Regulation 13(2) of the MHADA (Estate Management, Sale, Transfer and Exchange of Tenements) Regulations, 1981 and the 7th December 2022 letter at Exhibit "P" to the Petition.

11. We move directly to Exhibits "P" and "P1" at pages 137-C to 137-K and 137-L to 137-S. These have to be read with Exhibit "O", also added by amendment at pages 137-A to 137-B. Exhibit "O" was a letter from Narvekar to the Principal Secretary of the Housing Department. He forwarded an application memorandum and a High Court order referenced in that letter (the details of which we will proceed to shortly). By his communication of 31st March 2022, Narvekar applied to the State Government seeking the framing and approval of what is called a 'scheme' under Regulation 32. The next few words are important and need to be quoted because they will inform much of the discussion that follows. Mr Narvekar said that this was—

> "for the purposes of treating the eligible members of the society as a distinguishable and identifiable group on terms and conditions similar if not identical to the one already approved for the Surabhi CHSL on an identified plot of land."

Then Mr Narvekar asked for a direction to MHADA to formulate and implement the scheme. A list of the eligible members was enclosed.

12. Exhibit "P" at page 137-C is a 7th December 2022 communication from the Desk Officer of State Government. A translation is at page 137-F and we will refer to this as nobody has really disputed it. It is a communication to the Vice President and CEO of MHADA. It references amongst other things a memorandum of the Revenue and Forest Department of 18th September 2019, a High Court "Order" of 17th March 2022 and a communication of 26th April 2022 from MHADA. It is here that we

find an identification of the land. That this plot is at village Pahadi, Goregaon is undisputed but what is of relevance here is the area or the dimensions of the plot with which we are now concerned. This is said to be 2769.75 sq mts of CS No. 50A (P), Survey No. 29 (P). There is a narrative in paragraph 1. Then there is a reference to Regulation 13(2). Following this there is a suggestion that the 'beneficiaries' are to be selected by advertisement as per a 2011 Government Resolution. Paragraph 4 quotes a judgment of the Bombay High Court. Then the observation is that this is public property, i.e., these are public lands, and they can be distributed only on the basis of a fair and transparent policy. Consequently, we find the following statements in paragraphs 5 and 6 at pages 137-J and 137-K::

> "5. In the backdrop of the above facts, if a separate housing scheme under regulation 13(2) is implemented for the pre-fixed 398 members of Shree Ganesh Sai High Court Employees C.H.S. (Prop.) without publishing an advertisement, it may amount to contempt of the order passed by the Hon. High Court in Writ Petition No. 882/2011. Therefore the request made by Shri Milind Narvekar, Chief Promoter, Shree Ganesh Sai High Court Employees C.H.S. (Prop.) vide its application dated 30.03.2022 for implementing a housing scheme for its pre-fixed 398 members under regulation 13(2) cannot be accepted.
>
> However as mentioned in the memorandum dated 18/09/2019 of the Revenue Department and as mentioned at Sr. NO. 5 in the Govt. Resolution dated 8/2/2007 under "any other special category as deemed fit by the State Govt." for implementing housing scheme for the employees/officers in service of the Bombay High Court, it is requested that procedure of publishing an

> advertisement, inviting applications and drawing a lottery as per the requirement be adopted and further necessary action be taken.
>
> 6. You are requested to contact the Govt. Pleader and to inform the aforesaid facts of the said case to the Hon. High Court."

13. This now tells us the two conditions with which we are concerned.

(i) The first condition is that even if this is a society, and even if the allotment is to be made, advertisements must be issued now inviting 'applications'.

(ii) The second condition is the requirement of adhering to the 50% reservations under Regulation 13(2).

IV

14. How did all this come to pass? The following narrative will show how events unfolded.

15. The society was formed in 2007. Narvekar was and is its Chief Promoter. Membership of the society was of Class-I to Class-IV employees of the High Court. Today, there are 398 members.

16. It is not in dispute that membership of the society was not by invitation to handpicked or selected persons. It was thrown open to all who interested in applying. Even at that time, the membership application form had some conditions: for instance, that the

applicant should not, at the time of allotment, have a house in Mumbai in her or his name or in that of an immediate family member.

17. High Court employees are governed by the Bombay High Court (Conduct) Rules, 1989. There is in these, an entirely salutary rule that deals with specifically movable, immovable and valuable property. For completeness, we quote Rules 8, 18 25:

> "**8. Joining of Associations by High Court Servants.** — No High Court Servant shall join or continue to be a member of an association the objects or activities of which are prejudicial to the interest of the sovereignty and integrity of India or public order or morality.
>
> **18. Movable, immovable and valuable property.—**
>
> **(1) Every High Court Servant shall on his first appointment to any Service or post and thereafter, at such intervals as may be specified by the Chief Justice, submit a return of his assets and liabilities, in such form as may be prescribed by the Chief Justice giving the full particulars regarding:**
>
> **(a) the immovable property inherited by him or owned or acquired by him or held by him on lease or mortgage, either in his own name or in the name of any member of his family or in the name of any other person;**
>
> (b) Shares, debentures and cash including bank deposits inherited by him or similarly owned, acquired or held by him;
>
> (c) Other movable property inherited by him or similarly owned acquired or held by him;

(d) Debts and other liabilities incurred by him directly or indirectly.

Note 1.—Sub-rule (1) shall not ordinarily apply to (Group D) servants but the Chief Justice may direct that it shall apply to any such High Court servants or class of such High Court Servants.

Note 2.—In all returns, the values of items of movable property worth less than two months basic pay of the High Court Servant's may be added and shown as a lump sum. The values of articles of daily use such as clothes, utensils, crockery, books, etc. need not be included in such return.

Note 3.—Every High Court Servant who is in service on the date of the commencement of these rules shall submit a return under this sub-rule on or before such date as may be specified by the Chief Justice, after such commencement.

(2) No High Court Servant shall, except with the previous written intimation to Chief Justice acquire or dispose of any immovable property by lease, mortgage, purchase, sale, gift or otherwise either in his own name or in the name of any member of his family:

Provided that, the previous sanction of the prescribed authority shall be obtained by the High Court Servant if any such transaction is—

(i) with a person having official dealings with the High Court Servant; or

(ii) otherwise than through a regular or reputed dealer.

(3) Every High Court Servant shall report to the Chief Justice every transaction entered into by him either in his own name or in the name of a member of his family in

respect of movable property if the value of such property exceeds two months basic pay of the High Court servant;

Provided that, the previous sanction of the prescribed authority shall be obtained if any such transaction is —

(i) with a person having official dealings with the High Court Servant; or

(ii) otherwise than through a regular or reputed dealer.

(4) The Prescribed Authority may be at any time, by general or special order, require a High Court Servant to furnish, within a period specified in the order, a full and complete statement of such movable or immovable property held or acquired by him or on his behalf or by any member of his family as may be specified in the order. Such statement shall, if so required by the prescribed authority, include the details of the means by which, or the source from which, such property was acquired, along with the evidence in support of such statement.

(5) Notwithstanding anything contained in sub-rule (1) to (4) the transactions entered into by the spouse or any other member of the family of High Court Servant out of his or her own funds (including Stridhan, gifts, inheritance etc.) as distinct from the funds of the High Court Servant himself in his or her name and in his or her own right, shall not be treated as a transaction entered into by the member of the family of the High Court Servant."

"**25. Recognition of Associations.—**

(1) The Chief Justice may, after such inquiry as it deems fit, grant recognition to an association of High Court Servants, if in the opinion of Chief Justice, such association has complied with the conditions specified in Appendix.

> (2) An Association to which recognition is granted under sub-rule (1) shall be recognized association.
>
> (3) The Chief Justice may cancel the recognition of an association to which recognition is granted under sub-rule (1):
>
> > (a) if the Chief Justice is satisfied that such recognition was granted under any mistake, misrepresentation or fraud; or
> >
> > (b) If after giving an opportunity to the association to be heard, the Chief Justice is of opinion that the association has committed a breach of any of the conditions specified in appendix."
>
> (*Emphasis added*)

18. As the emphasised portions show, High Court employees cannot simply set up associations on their own. They are governed by the conduct rules and that requires the involvement and approval or sanction on the administrative side of the High Court. Typically, that goes to what is called the Staff Welfare Committee.

19. On 5th March 2008, precisely such a Staff Welfare Committee allowed the society's application. It directed the Registrar General to forward the application of this proposed society to the State Government for allotment of a plot of land. The Registrar General did so on 18th March 2008.

20. We now come to an all-important fact, one that will have a distinct bearing on our finding. The members of the society identified Survey No. 29 (Part)/ 50A (Part) at village Pahadi,

Goregaon (West). This plot admeasured 36,750 sq mts. It was part of a much larger area of 1,01,828 sq mts.

21. Immediately, to provide instant context, we note that we are not dealing with this area of 36,750 sq mts at all now. We are now dealing with just 7.5% of that larger area, i.e., 2,769.75 sq mts.

22. The society then sought permission from the High Court Staff Welfare Committee to make an application to the State Government for allotment of the larger property of 36,750 sq mts. A formal application to that effect went out on 13th January 2010 to the State Government from the Registrar-General. We will have occasion to revisit this document for another purpose towards the end of this judgment.

23. It seems that on 3rd June 2011, the Hon'ble the then Chief Justice and the Hon'ble the then Chief Minister met. The decision was that the staff society's proposal would be considered. The officials concerned were asked to follow through. There was another meeting on 18th October 2012. This was between the Hon'ble the then Chief Minister, the Hon'ble the then Chief Justice, Judges who were members of the Administrative Committee, the then learned Advocate General and other officers of the Court. The matter of allotment of land to the society was one of the issues discussed.

24. Interestingly, at this time, there was a strange dispute between MHADA and the State Government about title to this land. We are perhaps fortunate that this dispute does not impede us today and it

has been said to have been resolved at that level as indeed is appropriate. It is the subject matter of a separate Writ Petition filed by MHADA, Writ Petition (L) No. 579 of 2020. We are not taking up that matter today.

25. No allotment had formally yet been made to the society. But the suggestion was that at least the land should be kept free from encroachment — and perhaps this will provide some sort of an anchor or a reference back to the observation that we made a little while earlier about the promise of free housing to encroachers on public land.

26. The better part of a year went by. MHADA's claim to title was still pending. An enquiry began under Section 20(2) of the Maharashtra Land Revenue Code, 1966 ("**MLRC 1966**"). This was being done by the Collector and the District Magistrate Mumbai Suburban. The Collector rejected MHADA's case. There was an appeal and then MHADA filed the Writ Petition referred to earlier.

27. The rest of 2013 passed. So did 2014. We bear in mind that the society had already been now formed eight years earlier. On 6th February 2015, there was another meeting between the Hon'ble the then Chief Minister and the Hon'ble the then Chief Justice for the same matter. Various options were discussed.

28. And another two years went by.

29. On 1st April 2017, at a joint meeting it was finally agreed that the land would be allotted to the society within two months, but MHADA would carry out the development.

30. Another two years went past. On 5th February 2019, the City Survey Officer submitted a report to the Collector after an inspection and said that an area of about 12,460 sq mts with reservations remained vacant from the 36,750 sq mts. The society immediately wrote to the Collector on 18th February 2019 requesting that it be allotted this encroachment-free open land of 12,460 sq mts.

31. The area for allotment had already begun to diminish: of the 36,750 sq. mts vacant land, as much as 66% had been encroached.

32. On 18th September 2019, there came a Notification from the State Government allotting vacant land admeasuring the present area, i.e., 2,769.75 sq mts. This was part of Survey No. 29(Pt) and CS No. 50A(Pt). The allotment was to MHADA. It was meant for the construction of residential units for employees/officers of the High Court on certain terms and conditions. Various reservations and encroachments were now excluded.

33. It is important, we believe at this stage to look at the translation of this document that is made available to us at page 127-A (a copy of the original is at Exhibit "M" at page 125). Again, there is no controversy about the translation. At page 127-C there begins a

list of terms and conditions. There are seven such. Condition No. 2 at pages 127-C and 127-D reads as follows:

> "2. MHADA will implement the scheme under Regulation 13(2) of Maharashtra Housing (Management, sale, transfer of the property and exchange of flats) Regulation 1981 by calculating sale price by prevailing policy of MHADA and then 50 percent flat will be reserved for employees/officers in the service of Hon'ble High Court. The number of employees/officers in the service of Hon'ble High Court who are demanding flats then the said flats will be allotted by draw by advertisement out of the employees/officers in the service of Hon'ble High Court. The remaining 50 percent flats can be sold by advertisement by constructing houses for HIG/MIG as per prevailing policy of MHADA.

34. Here we now have the heart of the challenge: (i) re-opening membership all over again; and (ii) reducing the available area by 50% to comply with the reservation requirement.

35. On 5th December 2019, the Petitioner, Narvekar came to Court in this Writ Petition. The original prayers were prayer clauses (a) and (b) as we have set out above. The case was, *firstly*, that the allotment was not made to the society but to MHADA, contrary to the assurance given, and, *secondly*, that although the application was for 24,609.74 sq mts, what was being allotted was just about 11% of what had been sought. This meant that out of the substantially reduced plot half would have to be ceded to MHADA.

36. On 16th December 2019, this Court made an order which we reproduce below:

> "1. Issue notice. Counsel as above accept notice for Respondent Nos.1 to 4.
>
> 2. Keeping in view prayer made in the Writ Petition, service at this stage need not be effected upon Respondent No.5.
>
> **3. Exhibit "J" would guide the Court that the State of Maharashtra has taken a decision to allot a suitable parcel of land where residential flats can be constructed and allotted to the members of Shri Ganesh Sai High Court Employees' Co-operative Housing Society (Proposed).**
>
> 4. Decision also appears to have been taken to allot the Society land bearing Survey No.29(Part), equivalent CTS No. 50A (Part) at village Pahadi, Goregaon, Taluka Borivali, Mumbai Suburban District. **Whereas according to the Petitioner at site the land measures 9 Acres out of which 3 Acres are under encroachment, the communications received by the Petitioner from the Collector are to the effect that at site area of the land is less.**
>
> 5. Being a matter of fact it would be advisable that a Commission is directed to be executed with a mandate to the officers of Respondent Nos.1 to 4 to be present at site when the Commissioner would execute the Commission. The mandate of the Commissioner would be to effect measurement at site and report the extent of land available.
>
> 6. We direct the City Survey Officer to intimate a date to learned counsel for the Petitioner on which date in the presence of the representatives of the Petitioner and the revenue staff demarcation of the subject land would be carried out and a map prepared. The area under encroachment would be identified on the map in question.

> The report along with the map could be filed by the Respondent No.3 in Court on the next date of hearing.
>
> 7. In the interregnum the Respondent Nos.1 to 4 would be free to call representatives of the Petitioner so that the issue could possibly be thrashed out and solved amicably.
>
> 8. Re-notified for 14th January, 2020."
>
> (*Emphasis added*)

37. On 30th February 2020, the City Survey Officer filed an Affidavit in this Petition which is at page 141 placing the report on file. That Affidavit had annexed to it a map. Paragraph 7 had a table and this showed that 7125 sq mts was an open space (shown in orange on the map that is at page 145).

38. On 20th February 2020, there came to be made another order of this Court directing the State Government and MHADA to ensure that the two land parcels shown in orange and yellow in the map annexed at page 145 to the City Survey Officer's Affidavit remained encroachment-free *and vacant*.

39. We come to 10th March 2022, a full two years after the previous order in the Petition that was filed in 2019. What is interesting about this order is not what the State Government or MHADA say but what the Petitioner said. The statement was that the Petitioner *now* agreed to MHADA developing the *7125 sq mts plot* (in orange colour in the map filed by the City Survey Officer on behalf of the State Government) for the Petitioner's housing society, i.e., that the development would be on the entirety or 100% of 7125 sq mts rather than making a separate allotment of only 50% to the

society. The Petitioner agreed to this to resolve the long-standing issue. This order is possibly critical and we reproduce it in full:

> ". We have sought assistance of the learned Advocate General in the above matter. The learned Advocate General in his usual fairness has informed us that he will do his best to resolve the impasse which is created since a very long time. He has requested us to keep the matter on 17.03.2022.
>
> **2. Mr. Milind Sathe, the learned Senior Advocate appearing for the Petitioner states that the Petitioner is now agreeable to MHADA developing the identified subject plot admeasuring 7125 square meters described as open area in paragraph No. 7 of the Affidavit-in-reply dated 10.02.2020 filed by the City Survey Officer, Goregaon on behalf of Respondent No. 1 - State of Maharashtra and Respondent No. 2 - Principal Secretary, Government of Maharashtra for housing the members of the Society on the entire 100% of the said open plot instead of allotting 50% of the said plot to the Society to resolve the long standing issue.**
>
> 3. In view of the above, stand over to 17th March, 2022. To be placed High on Board."
>
> (*Emphasis added*)

40. After this, parties attempted to resolve this impasse regarding the allotment of land. It seems there was then a meeting with the then learned Advocate General and members of the society. The substance of what was agreed at this meeting is not contentious and has not been the subject of any rival argumentation before us. It seems to have been agreed that MHADA would frame a scheme under Regulation 13(2) and would treat the eligible members of the

society as a specific and distinctly identifiable and identified category. Minutes of this meeting were drawn up and signed.

41. Pausing for a moment, this word 'eligible' is readily explained by Mr Khandeparkar to mean that mere membership is not 'eligibility'. MHADA regulations do require that for such allotments, there should be no profiteering at public expense. For instance, a person who has another residential unit in his or her name or in the spouse's name would not be eligible to a tenement under such a special scheme. It was seemed to have also been agreed that the society would formally apply to the State Government to frame the scheme, that this would be processed by the Housing Department in three weeks and that MHADA would then frame the scheme on terms similar and possibly identical to those applied to the Surabhi Cooperative Housing Society.

42. Most importantly, it was agreed that the scheme would be implemented on the *entire land of 2769.75 sq mts* and that *the full development potential* would be made available to the society. This is reflected, fortunately for us in an Annexure to a 17th March 2022 order, a copy of the minutes in question. These were taken on record.

43. This order has never been called into question. Nor have the minutes. We reproduce the order of 17th March 2022 and the Minutes:

"On 10.03.2022, this Court passed the following order:

> ". We have sought assistance of the learned Advocate General in the above matter. The learned Advocate General in his usual fairness has informed us that he will do his best to resolve the impasse which is created since a very long time. He has requested us to keep the matter on 17.03.2022.
>
> 2. Mr. Milind Sathe, the learned Senior Advocate appearing for the Petitioner states that the Petitioner is now agreeable to MHADA developing the identified subject plot admeasuring 7125 square meters described as open area in paragraph No. 7 of the Affidavit-in-reply dated 10.02.2020 filed by the City Survey Officer, Goregaon on behalf of Respondent No. 1 - State of Maharashtra and Respondent No. 2 - Principal Secretary, Government of Maharashtra for housing the members of the Society on the entire 100% of the said open plot instead of allotting 50% of the said plot to the Society to resolve the long standing issue.
>
> 3. In view of the above, stand over to 17th March, 2022. To be placed High on Board."

2. Pursuant to the above order, on 15.03.2022 a meeting between officials of MHADA, some of the office bearers of the Society and the learned Counsels representing the parties was held with the learned Advocate General which was attended by the following persons:

(a) Dr. Milind Sathe, Senior Advocate (appearing for the Petitioner.);

(b) Advocate Prakash Lad (Advocate for MHADA);

(c) Advocate Ravi Gadagkar (Advocate for the Petitioner.);

(d) Mr. Yogesh Mhase (Chief Officer, Mumbai Board);

(e) Mr. Prakash Veer (Legal Advisor MHADA);

(f) Mr. Sunil Bhadange (Executive Engineer Goregaon Division MHADA);

(g) Mr. Milind Narvekar (Petitioner / The Chief Promoter of the Society).

3. Today, the Advocates representing the parties have tendered Minutes of Meeting dated 15.03.2022 which are signed by the Advocates for the Petitioner and MHADA. The same are taken on record and marked "X" for identification.

4. **The undertakings given in the said Minutes are accepted. <u>The Petitioner and the Society shall make a formal application to the Housing Department of the Government of Maharashtra for framing the scheme to be implemented on the land ad-measuring 2769.75 square meters mentioned in the memorandum dated 18.09.2019 with full development potential for the Society and its members.</u>** This application shall be made within a period of two weeks along with the list of eligible members duly certified by the Society.

5. On receipt of the application, the same shall be processed by the Housing Department of the Government of Maharashtra expeditiously and in any event within a period of three weeks from the date of receipt of such application and an appropriate decision shall be taken for allotment and the same shall be communicated to the Society and this Hon'ble Court.

6. Learned Senior Advocate appearing for MHADA submits that on receipt of the approval from the Government of Maharashtra, the Housing Department shall formulate the scheme as per the Minutes of order and implement the said scheme as agreed in accordance with law.

7. Stand over to 22.04.2022 for compliance. To be placed High on Board."

"**Minutes of Meeting**

(15th March 2022)

"**1.** As agreed during the course of the hearing of the present matter, 10th March, 2022 a meeting of the officials of MHADA, some of the office bearers of the Applicant society and the Ld. Counsels representing them, was held at the Chambers of the Hon'ble Advocate General for Maharashtra, on 15th March 2022, in order to resolve this issues involved in the present matter and to explore all possibilities of providing housing accommodation to the eligible members of the society. At this meeting various options available to MHADA in order to meet the requirements of the society were discussed in detail.

2. During the said discussion, the Chief Officer MHADA principally accepted that the MHADA will frame the Scheme under Regulation 13(2) of the Maharashtra Housing and Area Development (Estate Management, Sale, Transfer and Exchange of Tenements) Regulations 1981 for the purposes of treating the eligible members of the society as a distinguishable and identifiable group. Various modalities for framing such Scheme were also discussed and following course of action, to be undertaken in that regard by all concerned, has been decided.

3. The Applicant/Petitioner and the society will make a formal application, within two weeks, to the Housing Department of the Government of Maharashtra for framing the Scheme in terms of the aforesaid Regulation 13 (2) along with the list of members who according to the Petitioner are eligible thereunder.

4. **The said application will be processed by the Housing Department of the State Government expeditiously and in any event within a period of three weeks from the date of receipt of such application appropriate decision in that regard will be taken as also communicated to the society and this Hon'ble Court.**

5. **After receiving the appropriate approval in this regard from the Housing Department, as aforesaid, the MHADA will frame the Scheme with the terms and conditions similar, if not identical to the one already approved for the Surabhi Co-operative Society, with modifications suitable for the members of the society, in accordance with the law holding the field on the date of approval of such scheme.**

6. **The said scheme will be implemented on the entire land admeasuring 2769.75 sq. mtr mentioned in the memorandum dated 18th September, 2019, with full development potential for the society**.

7. **As the layout is already approved and the contractor is already engaged for the development of entire land that includes the aforesaid land admeasuring 2976.79 sq. mtr, the same contractor will undertake the implementation of the aforesaid scheme on its appropriate approval by all concerned.**

8. It was further agreed to place these minutes of the aforesaid meeting, which was attended by the following persons, before the Hon'ble Court on 17th March, 2022:

(a) Dr. Milind Sathe, Senior Advocate (appearing for the Petitioner).

(b) Advocate Prakash Lad (Advocate for MHADA)

(c) Advocate Ravi Gadagkar (Advocate for the Petitioner)

(d) Mr. Yogesh Mhase (Chief Officer, Mumbai Board)

(e) Mr. Prakash Veer (Legal Advisor MHADA)

(f) Mr. Sunil Bhadange (Executive Engineer Goregaon Division MHADA)

(g) Mr. Milind Narvekar (Petitioner / The Chief Promoter)."

(*Emphasis added*)

44. Those minutes not only bear the stamp of the Bench and the signature of the Court Master but also the signatures of the Advocates on the last page.

45. Clauses 6 and 7 of the minutes put the matter beyond all controversy. Clause 6, as the emphasized portion above shows, indicates two things: *first*, that the area is now 2,769.75 sq mts, that is to say, only 7.5% of the original larger area, just over 11% of the 24,609.74 sq mts and less than 40% of the 7,125 sq mts. *Second*, Clause 6 also says, and we do not know how it is possible now to resile from this position, that the society would have the "*full development potential*".

46. Then Clause 7 tells us that the layout was already approved. A contractor had already been engaged for the entire land — and that is evidently a reference to the 7,125 sq mts — for that very Clause says that "*includes the aforesaid land admeasuring 2769.75 sq mts*" (there is a typographical error) and therefore the same contractor would undertake the implementation of the scheme.

47. Pausing for a moment, after all this struggle a few things had indeed finally crystallized into certainty. The area in question was now perfectly identified as 2769.75 sq mts. This was meant for the society. The scheme for the society was to be implemented on the entire land *with full development potential*. MHADA's contractor would undertake the implementation of "the aforesaid scheme".

48. At this stage, it is worth re-emphasizing what it is that the Division Bench said on 17th March 2022 when it was given these minutes. We find this in paragraphs 2, 4 and 5 quoted above but which, for emphasis and we will be forgiven the repetition, we reproduce once again below:

> **"2. During the said discussion, the Chief Officer MHADA principally accepted that the MHADA will frame the Scheme under Regulation 13(2) of the Maharashtra Housing and Area Development (Estate Management, Sale, Transfer and Exchange of Tenements) Regulations 1981 for the purposes of treating the eligible members of the society as a distinguishable and identifiable group**. Various modalities for framing such Scheme were also discussed

and following course of action, to be undertaken in that regard by all concerned, has been decided.

4. The said application will be processed by the Housing Department of the State Government expeditiously and in any event within a period of three weeks from the date of receipt of such application appropriate decision in that regard will be taken as also communicated to the society and this Hon'ble Court.

5. After receiving the appropriate approval in this regard from the Housing Department, as aforesaid, the MHADA will frame the Scheme with the terms and conditions similar, if not identical to the one already approved for the Surabhi Co-operative Society, with modifications suitable for the members of the society, in accordance with the law holding the field on the date of approval of such scheme."

(*Emphasis added*)

49. Every sentence of these paragraphs is crucial. There were undertakings. The Court accepted these. The Court noted the factual statement about 2769.75 sq mts. It accepted that this was the entire land for the Petitioner's society. It accepted that the full development potential was for the society and its members. It then noted that the society's application would be processed by the State Government no more than in three weeks after it was made, and that decision would then be communicated to the society and to Court.

50. This takes us to page 415 which is now the communication assailed in prayer (b1) and dated 7th December 2022 at page 137F,

and which we have already analysed at the beginning of this judgment. The factual narrative ends here.

V

51. There are statutory provisions that we will now come to immediately next because these are the foundations of the opposition from the State Government and MHADA.

52. Rule 13(2) of the MHADA (Disposal of Lands) Rules 1981 reads as follows:

> "**Rules framed under the Maharashtra Housing and Area Development Act, 1976.**
>
> **The Maharashtra Housing and Area Development (Disposal of Land) Rules, 1981**
>
> **PART IV**
>
> **MISCELLANEOUS**
>
> **13. Reservation of tenements**
>
> (i) **In respect of every groups of tenements, or plots of vacant land in a layout to be disposed of for residential use, the Authority shall reserve, for the following categories of persons, tenements/plots in the percentage shown against them:—**

Category			*Percentage*
(1)	Scheduled Castes including Neo-Buddhist	..	11%
(1-a)	Scheduled Tribes	..	6%
(1-b)	Nomadic Tribes	..	1-½%
(1-c)	Denotified Tribes	..	1-½%
(2)	Journalists	..	2.5%
(3)	Freedom Fighters	..	2.5%

Category			*Percentage*
(4)	Person having disability as defined in clause (I) of section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996)	..	3%
(5)	Families of Defence personnel and personnel of Border Security Force, who have been killed or disabled or declared missing in 1962 Sino-Indian Conflict, or in 1965 or 1971 Indo-Pak Conflict, in any combat thereafter	..	2%
(6)	Ex-servicemen and their dependents	..	5%
(7)	All sitting and ex-members of Parliament Assembly or Council representing constituencies in Maharashtra	..	2%
(8)	Employees of the Authority	..	2%
(9)	State Government servants and employees of the Statutory Boards, Corporations, etc (except the Maharashtra Housing and Area Development Authority) under the State Government including those who have already retired	..	5%
(10)	Central Government Servants occupying staff quarters and due for retirement within three years or those who have already retired	..	2%
(11)	Artists in Film, Television, Drama, Tamasha, or Radio and also all other persons engaged in performing arts, including painters, sculptors, craftsmen, musicians (both vocal and instrumental), dancers, poets, kawals or mimics.	..	

Provided that,—

(a) If sufficient number of applications are not received from the persons belonging to any of the categories (1), (1a), (1b) and (1c), the applications from persons

belonging to any of the other said four categories shall be considered for the reservations;

(b) If sufficient number of applications are not received from the persons belonging to category (5), the applications from person belonging to category (6) shall be considered for the said reservations;

(c) If sufficient number of applications are not received from the persons belonging to any of the reserved categories, other than those mentioned in clause (a) above, tenements or plots reserved for such categories remaining unallotted may be released for allotment to person belonging to the general category. The tenement or plots reserved for categories (1), (1a), (1b) and (1c) shall not however, be released for allotment to persons belonging to the general category subject to the provisions of clause (a) above to persons belonging to any other reserved category, without the approval of Government.

Provided further that, the reservation made for persons belonging to category (7) shall be subject to the following conditions, namely:—

(a) A person shall be entitled to get one tenement or plot at any place in the State.

(b) He shall not be in possession of a tenement or plot on ownership basis, hire-purchase basis or rental basis at a place where he desires to have a tenement constructed by the Authority, or a plot.

(c) If he already possesses from Government of Authority a tenement or a plot either on rental or on leave and license basis, he shall have to surrender the said tenement(s) to the Government or the Authority, as the case may be.

(d) He shall not be eligible to get accommodation in the M.L.As. Hostel either at Bombay or at Nagpur if he

secures a tenement from the Authority at that place or has already constructed a house on a plot secured at that place from the Authority:

Provided further that, the eligibility of a person for inclusion in category (11) shall be decided by the Cultural Affairs Department of the Government and the eligibility of persons for inclusion in any other category shall be decided in the manner laid down by the Authority.

(2) Notwithstanding anything contained in sub-rule (I), the Authority shall not be required to be reserve any tenements or plots for the categories of persons mentioned at serial numbers (2) to (11) in respect of tenements or plots to be disposed of in pursuance of any Urban Development Project assisted by the World Bank.

(3) In respect of every group of tenements or plots of vacant land in a layout to be disposed off for the commercial use, the authority shall reserve 20 per cent tenements of plots for the persons specified in categories (1), (1-a), (1-b) and (1-c) of sub-rule (1) in the percentage shown against them and the same shall be disposed off by inviting tenders from the categories of the said person:

Provided that, if sufficient number of applications are not received from the persons belonging to any of the categories, the same may, subject to approval of Government, be released for allotment for the person belonging to the general category."

(*Emphasis added*)

53. This will have to be seen with Section 40 of the Maharashtra Land Revenue Code, 1966. This is a saving provision and it reads as follows:

> "**40. Saving of powers of Government**
>
> Nothing contained in any provision of this Code shall derogate from the right of the State Government to dispose of any land, the property of Government, on such terms and conditions as it deems fit."

54. Regulation 13 of the Maharashtra Housing and Area Development (Estate Managements, Sale, Transfer and Exchange of Tenements) Regulations, 1981, repeatedly cited above, reads:

> **13. Allotment of tenements.—**
>
> (1) Allotment of tenements to the eligible applicants shall be floor wise commencing from the first floor of the building to be continued to other upper floors serially and the tenements on the ground floor shall be allotted after the allotment of all the tenements on the upper floors is completed. The tenements on each floor of the building as far as practicable be allotted to eligible applicants in the general category and in each of the reserved categories in proportion to their respective percentages specified in the notice displayed under Regulation 7 and in the order of their ranks entered in the Register maintained under Regulation 11.
>
> **(2) Housing Schemes for specific category or categories shall be prepared and implemented by Maharashtra Housing and Area Development Authority with the approval of Government.**
>
> (3) The names of persons to whom the tenements are so allotted and all the particulars of the tenements so allotted and any other such particulars as may be determined by the Chief Officer shall be entered in the Allotment Register to be kept for the purpose.

(*Emphasis added*)

55. Mr Khandeparkar tells us that 105 of the original members have retired. We note that fact.

VI

56. The question of law, and never forgetting that we are asked to exercise our powers under Article 226 of the Constitution of India, is what is it that the Petitioner, Narvekar invokes, i.e., what right, legal, enforceable or fundamental? What is it that he complains of when comes to Court with a case like this?

57. Mr Khandeparkar does not canvass the case that there is a fundamental right to allotment. Correctly so; we would have rejected that argument immediately had he ventured it. He also does not attempt any submission based strictly on a form of estoppel, legitimate expectations, or promissory estoppel. He positions his submission differently. He accepts that in law an allotment of public land must be given to a definable *class*. It is his submission that the members of this society form a distinct class. The society itself is only a vehicle or a vessel, a structure purely of convenience. No outsider can become a member of this society. Indeed, the society is defined by the class because the class is employees of the High Court in Class I to Class IV. They, and only they, can gain membership of the society. Mr Khandeparkar's submission, one that we are inclined to accept, is that merely by referring to the society *as a society*, the real and valid classification is being

unreasonably eclipsed or elided. That is impermissible. Indeed, it was the class that first sought permission to form the society to begin with. Once the society was formed, following established conduct rules, it is not permissible to argue, he submits, and we think very considerable justification, that the class is lost but the society remains.

58. The second submission that he makes is that the question of allotment of 2,769.75 sq mts. is not one that can be called into question any longer. Nobody has attempted even to do so. What is now being questioned under the 7th December 2022 impugned letter which is the subject matter of Exhibit "P1" is the imposition of two conditions, the first of which seeks to reopen the class as if to suggest that there is no class or that there is an invalid classification and second, to strip down by 50% an allotment that has already been diminished over the years despite the fact that this Court was persuaded to accept a statement to the contrary.

59. It is, therefore, a matter of the validity of the conditions and not of allotment.

60. It is roughly at this point in the discussion that Mr Khandeparkar shifts into a higher gear when he reminds us that on 17th March 2022, when the Minutes were tendered to the High Court, the conditions that are now being imposed (of December 2022) were not the conditions mentioned to the Bench at all. Those were not the matters agreed. Those were not the undertakings given to the Court. Those were not the statements or undertakings

accepted by the Court. How is it possible, Mr Khandeparkar asks, that in any system of administration of justice and leaving aside entirely the fact that the society's members are or were employees of the Court, that a party litigant can make a statement to the Court, have it taken on record and accepted and then do a complete about turn and demand that which was expressly not insisted on?

61. In the context of classification, he draws our attention to page 28 of the Petition. This is the communication from the Registrar General of 13th January 2010 to the Principal Secretary of the Government of Maharashtra, and to which we referred in the chronology above. It follows the Staff Welfare Committee decision to which we also referred, and it says that Narvekar, and at time, Mr VT Ambokar, a Section Officer, had taken the initiative to form a society for the welfare of *High Court Staff Members.* This was the beginnings of the application for the allotment of the plot. The society was mentioned on the next page by name and the last line of this communication clearly said that it was being made not for the society but for the High Court employees.

62. On the question of the 50% reservation, Mr Khandeparkar submits that viewed from any perspective, this opposition cannot be sustained. Numbers will not lie. The record itself shows the steady diminution of the allotment to the Petitioner from the originally canvassed 36,750 sq mts to 24,584 sq mts, then to 7,125 sq mts and finally to the present 2,769.75 sq mts. Look where we were, Mr Khandeparkar says, and look at what has been left to us; and even from this relatively minor portion, fully 50% is being sought to be

taken away. It cannot be, he argues, that every single allotment must necessarily partake of the full extent of the 50% reservation. There may be exceptions, and there are indeed exceptions including those that MHADA and the State Government have made in the past.

63. We have nothing to say about the rightness or wrongness of the exception that was made for the Surabhi society. Our concern also is not that having made one exception, the State Government or MHADA is bound to make an exception forever and in every case. True, those matters were indeed discussed and in the meeting before the then learned Advocate General that seems to have been in principle agreed, but a far more relevant question is that if the anxiety now expressed by the State Government and MHADA about floodgates opening and exception after exception being sought did not happen after the concessions were given to Surabhi, there is no inevitability of these consequences to the Petitioner society either. That would be a matter of the most complete speculation and is not an argument that we are willing to consider.

64. But more pertinently, a look at Regulation 13, with the history that we have discussed above will provide an answer. The formal agreement today may be for 2,769.75 sq mts. to be allotted to this society to 100% and with its full development potential, but the factual events of December 2019 to 10th March 2022 cannot be ignored. This is when the State Government said that 7,125 sq mts was available. This was precisely identified and located, and the society was persuaded to agree to MHADA developing the 7,125 sq

mts *for the members of the society as a class on the entirety of the 100%* to resolve the dispute.

65. This tells us immediately what the answer is to the objection because a 50% reservation on 7125 sq mts. was not being objected to by the society on 10th March 2022 at all. It is in this context that the Minutes of 15th March 2022 would have to be viewed because this then brought down the exclusivity claim of the society, i.e., *excluding all reservations*, to 2,769.75 sq mts *with full development potential*.

66. We note the submission by Mr Thorat that while MHADA stands by the minutes, there are other schemes that are yet to proceed. His submission, supported by Dr Saraf, is that even if this Court is, for distinct reasons, inclined not to insist on either of these conditions, then this should not be made to apply to the other schemes that are being processed on the larger land.

67. We have no hesitation in accepting this and we commend it for its fairness. We make it clear that it is not our intention to pronounce on a principle of general applicability that the requirements and conditions of Regulation 13(2) are to be dispensed with in every single case. That is not even what we are asked to consider and any such pronouncement by us would, we have every reason to believe, be vulnerable as being completely *obiter*. The only question before us is whether those conditions can, *in the peculiar and unique facts and circumstances of this case* be legitimately not insisted on for this particular class?

68. It is for this reason that we are not inclined to accept fully Dr Saraf's submission that even in this case, we would necessarily have to hold that the 50% reservation condition is 'arbitrary'. We have no reason to do anything of the kind. Indeed, we do not even suggest that the imposition of such a condition is *per se* arbitrary. To the contrary, we expressly recognise the manifest welfare and public purpose behind the reservation in Regulation 13(2) and in the Rules set out above. We have only been at some pains to deal with the facts to show how and why in the facts of this case, by a process of steady attrition over the years, this condition can no longer be made to apply to an ever-shrinking allotment of a plot of land.

69. For this reason, too, we find no quarrel with the generality of Dr Saraf's proposition that it is the State Government that decides the terms and unless they are illegal or found to be ultra vires the Court should not interfere. There is the simplest of all answers to this submission. The answer is that if the State Government did not want to make an allotment, it should have held its ground and said this was not possible and it then did not matter whether this was because of a class or because of the imposition of a restriction. It will also equally apply to this society and to every other society (including, possibly, Surabhi). That not having been done, it is difficult to see how such a condition can be reintroduced now after 17th March 2022 when the Court was persuaded to accept by signed and written undertakings and statements that there would not be a further reduction of the available land to the Petitioner.

70. Dr Saraf asks us to look at the Affidavit of one Ramesh Shivaji Chavan, Joint Secretary, Government of Maharashtra that runs from page 341. This is a very interesting Affidavit, though perhaps not for the reasons that Dr Saraf suggests. Paragraph 4 and its sub paragraphs deal with the history of this land at Pahadi, Goregaon. There is the question of the disputes with MHADA. Paragraph 8 accepts the 18th December 2012 joint meeting referred to above. But it is paragraph 15 at pages 352 and 353 that is most curious. This relates to the famous (or infamous) Adarsh Cooperative Housing Society and what was known as the *Adarsh Scam*. An enquiry committee was constituted. There were orders of this Court and of the Supreme Court. This led to a Government Resolution of 25th May 2007 and resulted, we are told, in an almost automatic cancellation of various allotments or applications made and the demand for fresh applications to be made to the Government. But the fact that the Government may have mis-stepped earlier is no reason to hold that every commitment that the Government made thereafter, especially to this Court, is necessarily also a default or misstep or is suspect. The signed Minutes that are appended to this order show to the contrary.

VII

71. Dr Saraf invites our attention to a series of judgments. Among these is the decision of this Court in *Chandrabhan Sukhadeo Sangle v Urban Development Department & Ors.*[1] This was a judgment of a Division Bench of this Court of AS Oka J (as the then was) and MS

1 2014 SCC OnLine Bom 383 : (2014) 3 Bom CR 692.

Sonak J. The Petitioners before the Court said that they had been allotted self-contained residential flats by the State Government from a discretionary quota available to the Chief Minister. Dr Saraf's fundamental point is that even such discretion has not found favour with this Court.

72. But that is entirely salutary. We are not required in the present case to hold that a certain discretion vested in an authority should be exercise in a particular manner. There is not even a case before us of having to assess that a particular discretion has been exercised. As we have pointed above, what we are required to assess, and all that we are acquired to assess, is whether the two conditions, namely of there being a valid class and of the continuance of reservation conditions are justified and reasonable.

73. Dr Saraf submits that the absence of a few considerations in a government decision, especially one that is of a commercial nature, is not fatal to the decision: *Sachidanand Pandey & Anr v State of West Bengal & Ors.*[2] The submission is not, we think, well-founded. Mr Khandeparkar's case is not based on the absence of conditions at the time of the Minutes or the resultant order, but quite the reverse: the recognition of the society *as a class* and the *express* assurance of and commitment to the allotment to the society of 100% of the area of 2,769.75 sq mts excluding all reservations and to the full extent of its development potential. To accept that some things were 'overlooked' would mean that these express assurances would have

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2 (1987) 2 SCC 295.

to be entirely reversed. That formulation is not supported by the decision in *Sachidanand Pandey*.

74. Dr Saraf is also correct in saying that the disposal of public property by the State and its instrumentalities is in the nature of a trust. The method must be fair and transparent. Dr Saraf cites *Meerut Development Authority v Association of Management Studies & Anr*,[3] for the proposition that as part of this doctrine of trust, all interested persons must have an opportunity to participate. Hence, he submits, the need for an advertisement and inviting applications. But *Meerut Development Authority* does not suggest that where such an opportunity has been shown to have been once given it is necessary to afford it all over again. As we have noted, the society was formed by application precisely for allotment. The actual allotment size did not affect the purpose, nature, origin or intent of the society, nor did it rob the society of constituting a valid *class*. For this reason, too, we do not believe that the allotment to this society can be held vulnerable on the basis of the ratio of the Supreme Court decision in *Akhil Bhartiya Upbhokta Congress v. State of Madhya Pradesh & Ors*.[4] That was a case where the Supreme Court found blatant favouritism to one particular trust, overlooking all norms. This is hardly the case here. Similarly, reliance on *Humanity & Anr v State of West Bengal & Ors* will not assist Dr Saraf, for the allotment there was for a private school.[5] As we have noted, the society in question before us was formed following publicly available rules of conduct applicable to a certain class of State Government

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3 (2009) 6 SCC 171.

4 (2011) 5 SCC 29.

5 (2011) 6 SCC 125.

employees. Its application for an allotment went through a process with the government and in which the High Court administration participated. All this is documented and part of a public record. Nothing was sought to be squirrelled away. Every stage was negotiated, and the matter was, in one form or the other, before this Court on its administrative and judicial sides more than once. Surely these processes cannot be relegated to nothingness, nor treated on parity with the more egregious instances of individual favouritism.[6] The public law principles stated and reaffirmed in *Natural Resources Allocation, In re*, Special Reference No. 1 of 2012 are, of course, firmly established in our jurisprudence.[7] But, for the reasons we have mentioned, it is impossible to hold that there was insufficient transparency in the decision-making in this case.

75. As we noted above, there is really no quarrel with these propositions or with the larger proposition that an arbitrary and uncanalised exercise of discretion by any functionary in the disposal of public lands will almost all always be struck down unless it is guided by a valid classification and can survive the usual tests of non-arbitrariness, fairness and a rational nexus with the object of the classification.

VIII

76. This is what brings us, at the close of the judgment, to the jurisprudential issue that is canvassed by Mr Khandeparkar. That

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6 Such as those in *City Industrial Development Corporation v Platinum Entertainment & Ors*, (2015) 1 SCC 558.

7 (2012) 10 SCC 1.

there is a valid classification, he submits, is not capable any longer of being disputed. In itself, the classification was valid because it dealt with employees, and a certain class of employees. Their work in the High Court only identified a sub-class of State Government employees, which is entirely permissible. It is pointless to contend that because it is a 'society' therefore it is not a class. The class, and the classification remains. The society is merely an artifice of convenience. The law recognises the possibility of a classification of one, i.e., of a solitary person being uniquely identified in a class of his or her own.

77. Once the question of classification is ended, the first condition sought to be imposed must go. The second condition is the requirement of continuing with the reservation for a public purpose. It is not Mr Khandeparkar's submission, as indeed it cannot be, that the moment there is a classification a condition must be waived. It is always not just open but incumbent upon MHADA and the State Government to insist without arbitrariness and discrimination on the condition being fulfilled. The facts of this case however show that in possible compliance with that very condition of reservation it was the Petitioners who agreed to scale down or step back from their original demand *thus releasing additional areas for the availability of the 50% reservation*.

78. It is at this point that Mr Khandeparkar enters the argument of unreasonableness in a practical sense. If the 50% reservation is to be applied to ever-diminishing areas, then one of two things must happen. Either individual flats must be reduced to an utterly

meaningless size or members who are otherwise eligible will be indiscriminately and without a valid justification excluded from the entire scheme. The second is legally impermissible and is jurisprudentially a nullity and cannot survive. The first is vulnerable simply for being irrational and unreasonable. We do not have actual measurements and calculations before us now but from a simple estimated computation, it appears to us that individual tenements of Class III and Class IV employees will be reduced to less than 200 sq ft and even those of Class I and Class II employees will be reduced to a level where they are altogether pointless.

79. In view of this discussion, we have no hesitation in making Rule absolute for the reasons stated above in terms of prayer clause (b1) set out above. Prayer clauses (a) and (b) in their original form will not survive.

80. What is undoubtedly required is the necessary direction following prayer clause (b1) and with which we will as a matter of moulding relief now direct, namely, that the allotment to the Shri Ganesh Sai High Court Employees CHSL (proposed) of which Narvekar is the Chief Promoter will proceed on 2769.75 sq mts. without (1) any insistence upon an advertisement or inviting applications from other employees of the High Court or (2) insisting upon a reservation for the purposes set out in Regulation 13(2) or Rule 13(2).

81. Mr Khandeparkar clarifies that the members of the society will have to satisfy the tests of eligibility (not having other premises

in their own names or in the names of their family members etc) and on which we have nothing to say. He also states that the Petitioners abide by their commitment to pay the ready reckoner rates and the costs of construction in respect of the development on this area of land.

82. Mr Khandeparkar is also instructed to make a statement that if of the 398 members any are found ineligible, the remaining those flats that are not allotted can be made available to existing Class I to Class IV employees, as the case may be. That will sufficiently meet the requirement as to classification, if there is any remaining doubt in that regard.

83. The order of 20th February 2020 said in paragraph 3 that the State Government and MHADA would ensure that the two land parcels shown in orange and yellow would not only not be encroached upon but would remain vacant. This means that they are not even available to MHADA for allotment to any other person. In view of the disposal of this Petition, that injunctive order will have to go to the extent of the requirement of keeping them vacant. Of course, the requirement of keeping them free of encroachments must continue. In other words, MHADA is at liberty to proceed with the allotment of lands provided this does not interfere with the possession, identification, formal allotment or demarcation of the 2769.5 sq mts. identified for the society.

84. The procedure from this point on would be that the society would first have to indicate, after a determination of eligibility, how

many flats are to be allotted to lower income, middle income and higher income persons. That will decide the configuration of the development. It may or may not affect the location of the land. We have nothing to say in that regard. Our order is clear that the total area in square meters is defined and that it is this the entire tract of land without reservations and to its full development potential as conveyed to the High Court already and that has to be maintained. The eligibility process is a matter of simple verification of declaration and supporting documents. We expect that process to be completed within six to eight weeks from today. Once that is done, in the next 12 weeks thereafter, a detailed proposal showing the number of flats and the distribution amongst income groups must be sent into MHADA with a proper development proposal showing the nature of construction, configuration, height, number of flats, number of floors etc. MHADA will process that application within a period of eight weeks thereafter. At a practical level, Mr Narvekar who is present in Court instructs his Attorney to state that the building proposal will be submitted to Executive Engineer, Goregaon Division.

85. Having dealt with now the single issue that seems to have held up progress, we expect the authorities at MHADA not to raise additional demands under Regulation 13(2) or Rule 13(2). This however does not mean that other statutory requirements are dispensed with. Undoubtedly, compliance is required with building and development regulations including as to height, permissible area, permissible floor space etc.

86. Mr Lad is correct in seeking a clarification that it is not the obligation of MHADA to allot individual flats within the building. Once the building is constructed by MHADA, it is only required to deliver the possession of the entire structure to the society. It is then for the society to manage its affairs including the allotment, distribution of flats to its various members.

87. Lastly, given the nature of this litigation how long it has been pending, we give liberty to the Petitioner as also to MHADA to apply, if any clarification is required or if there is any difficulty.

88. Interim Application (L) No. 6378 of 2022 shown on our list has already been disposed of and no orders are required in that regard.

89. We close this judgment by expressing our gratitude to Mr Khandeparkar, Dr Saraf, Mr Thorat, and Mr Lad for their assistance and, most of all, their commendable circumspection at all times. It has made our task that much easier.

90. The Petition is disposed of in these terms. There will be no order as to costs.

(Kamal Khata, J) **(G. S. Patel, J)**