

DATTATRAYA BABURAO WALAWALKAR AND OTHERS A

v.

SIDDHIVINAYAK CONSTRUCTION PRIVATE LIMITED AND
OTHERS

Civil Appeal No. 2981 of 2016 B

MARCH 15, 2016

[KURIAN JOSEPH AND ROHINTON FALI NARIMAN, JJ.]

Trust & Charities:

Bombay Public Trust Act, 1950 – Development Control Regulations for Greater Mumbai, 1991 – Reg 33(7) – Trust property – Sale of, by trustees – Sale-cum-development agreement – Conditions to be fulfilled – Trust property largely tenanted and on very meagre rents – Order by Charity Commissioner permitting to sell the trust property in favour of ‘R’ Corpn-developer for a monetary consideration of Rs.6 crores – Order passed by the Commissioner set aside by the courts below – In appeal before this Court, the Trust directed to issue a fresh advertisement regarding the re-development of the properties – Initially 9 persons came forward, but ultimately offers received from ‘R’ Construction Co. and the developer – Held: Condition of containing a minimum of 70% irrevocable written consent of the occupiers of the old structure was to be fulfilled – Out of 105 tenancies of the trust, 65 consents were obtained – Another 11 consents were obtained which were subsequently revoked – On addition of 11 to 65 as consents once given are irrevocable, it would yield to around 74% of the occupiers of the old building – Initial offer itself was a fair offer – Developer is willing to up the offer from Rs.8 crores to 8.25 crores and the same has been accepted by the Trust – Thus, the order of the Division Bench of the High Court set aside. C
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Disposing of the appeals, the Court

HELD: 1.1 Having regard to the fact that 9 persons initially came forward but they all petered out and ultimately left only R Corpn. and R Constructions Pvt. Ltd. in the fray, the fact that R Constructions Pvt. Ltd. was the only other bidder which offered a sum of Rs.7 crores about 5 years after the said offer of R Corpn. of Rs.6 crores (which improved its offer to Rs.7 crores before H

A the Division Bench of the High Court) shows that the offer made
 by R Corpn. appears to be a reasonable one. The sale-cum-
 development agreement has been entered into under Regulation
 33(7) of the Development Control Regulations for Greater
 B Mumbai, 1991, and has necessarily to fulfil one condition without
 at all-it has to contain a minimum of 70% irrevocable written
 consent of the occupiers of the old structure. Out of 105 tenancies
 of the Trust, 65 consents have been obtained, and another 11
 consents have also been obtained which, however, have
 subsequently been revoked. If these 11 to 65 were added as
 C consents once given are irrevocable, the mathematics of the
 situation would yield a figure of roughly 74% of the occupiers of
 the old building. [Para 12] [912-H; 913-A]

1.2 The initial offer itself was a fair offer in the facts and
 circumstances. The statement made by the counsel is recorded
 D that his client was willing to up that offer from Rs.8 crores that
 had been offered by him before this Court to Rs. 8.25 crores, all
 other conditions of the report of the trustees remaining the same.
 In the facts and circumstances of these cases, it would be for the
 benefit of the Trust if the said offer is accepted by the Trustees
 and the same has been accepted. Therefore, the order of the
 E Division Bench of the High Court is set aside. [Para 13] [913-B-
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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2981
 of 2016.

WITH

F C. A. Nos. 2983, 2984, 2985 & 2986 of 2016

From the Judgment and Order dated 18.10.2012 in Letters Patent
 Appeal No. 103 of 2012 in Writ Petition No. 11070 of 2011 passed by
 the High Court of Judicature at Bombay.

G C. U Singh, C.A. Sundaram, Sanjiv Sen, Sr. Advs., Ms. Abha R.
 Sharma, Santosh Paul, Arvind Gupta, Vishwas M. Kulkarni, Raghav
 Shekhar, Ms. Arti Singh, Mahesh Agarwal, Ankur Saigal, Rishab Parikh,
 E.C. Agrawala, Gaurav Agrawal, Shivaji M. Jadhav, Prashant G. Karande,
 Anshuman Animesh, Rajshri Ashutosh Dubey, Nishant R.
 Katneshwarkar, Sumit Goel, Ms. Sanjana Rama Chandran, Ms.
 H Akaanksha Mehra, Advs. for the appearing parties.

The Judgment of the Court was delivered by

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R. F. NARIMAN, J. 1. We have heard learned counsel for the parties.

2. These appeals are against a final judgment of the High Court of Judicature at Bombay dated 18th October, 2012 by which the Division Bench of the Bombay High Court dismissed the letters patent appeal being LPA No. 103 of 2012 in Writ Petition No. 11070 of 2011.

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3. We are concerned here with Trust property admeasuring 3343.53 sq.meters in the Girgaun area of Mumbai. Under the Bombay Public Trust Act, 1950, the Charity Commissioner's sanction has first to be obtained before the trust property can be sold and for reasons given under the statute. The present Trustees of the Late Rao Bahadur Anant Shivaji Desai Topiwalla Charity had resolved to sell the aforesaid property inasmuch as they found that it was largely tenanted and very meager rents were obtained. The protection afforded to the tenants under the Bombay Rent Act and the consequent rent that was being paid therefore, formed the necessity that was felt by the trustees to sell the aforesaid property. The said sale was mooted by the trustees under the Development Control Regulation 33(7) under which re-development of cessed buildings in the Island City of Bombay can be undertaken, provided they are constructed prior to 1940, at F.S.I. i.e. Floor Space Index at 3 being given as incentive to rehabilitate the existing tenants on the gross plot area. Appendix III, which has to be read with Regulation 33(7), specifically stipulates in paragraph 1(a), that the new building may be permitted to be constructed in pursuance of an irrevocable written consent by not less than 70% of the occupiers of the old building.

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4. The said trustees, after obtaining a valuation report, which they produced before the Charity Commissioner, therefore resolved to sell the aforesaid property to M/s. Raunak Corporation.

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5. The Charity Commissioner, by his order dated 2nd September, 2011, granted permission to sell the aforesaid trust property in favour of Raunak Corporation for a monetary consideration of Rs.6 crores along with developed area of 4000 sq.ft. built up to be given to the trust, free of cost, and a minimum of 460 sq.ft. usable carpet area to each occupier including flower beds etc., free of cost, in terms of the Memorandum of understanding dated 23rd May, 2011. The ultimate order of the Charity Commissioner reads thus :-

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- A “1. Application is allowed.
2. Sanction is hereby accorded to the trustees of “The Late Rao Bahadur Anand Shivaji Desai Topiwalla Charity, Mumbai”, P.T.R. No. A/751/Mumbai for development cum sale of the trust property, viz. CTS No. 145A, 1A, 145-4, 145B, C, D, E, F, G, bearing C.S. No. 1443 admeasuring 3999 sq. yards equivalent to 3343.57 meters. Or thereabout together with structures known as ‘Kudaldeshkar Brahmin Niwas’, in favour of M/s Raunak Corporation, a registered partnership firm at Laxmi Narayan Residency, Unnathi Garadens III, Opp. Ma Niketan, Pokhran Road, No. 2, Thane (West) – 400 610 for the monetary consideration of Rs.6,00,00,000/ - (rupees six crores only) along with developed area of 4000 sq.ft. Built up to be given to the trust, free of cost. and minimum 460 sq. ft. useable carpet area including flower beds, niches and service ducts to the tenants, free of cost, in terms of the Memorandum of Understanding dated 23.5.2011 and on the following additional terms and conditions :-
- D a. The deed for development cum sale of the trust property is to be executed within a period of six months from the date of this order.
- E b. All expenses for stamp duty and registration charges and other incidental expenses shall be borne by the developer.
- F c. The amount of monetary consideration of Rs.6.00 crores shall form part of the corpus of trust, which shall remain invested in any of the Nationalized Banks/Approved Securities in long term deposits and should not be withdrawn without prior permission of this Authority. Trustees shall be at liberty to use only the interest amount, which will be accrued on a sum invested towards accomplishment of the objects of the trust.
- G d. This permission shall be subject to all the relevant laws and rules applicable to the development cum sale transaction and property all well.
- H e. Trustees of the trust to report the change under section 22 after completion of the development cum sale transaction to the concerned Assistant/Deputy Charity Commissioner, Greater Mumbai Region.”

6. In a writ petition filed by Sidhivinayak Construction Private Limited and others, inter alia, against the trust/trustees and the said Raunak Corporation, the learned single Judge of the Bombay High Court set aside the Charity Commissioner's order and ultimately moulded the reliefs by stating as under:

"33. The need for alienation by redevelopment and ultimate sale of the properties of the trust is established. I am therefore inclined to set aside the impugned order partly to the extent it grants sanction to alienate the property in favour of the Respondent No.9 and remand the application back. The Charity Commissioner shall thereafter direct the trustees to publish an advertisement in reputed newspapers like Times of India, Maharashtra Times, Indian Express and Loksatta and invite bids from the developers for the redevelopment and sale of the property of the trust. The bid submitted by the Respondent No.9 which has been accepted by the Charity Commissioner should form the reserve price. Thus, the advertisement will indicate that any bidder who desires to bid must fulfil the following minimum criteria :

- a. Monetary consideration of Rs.6 crores to the trust;
- b. Developed area of 4000 sq. ft. built up (3418 sq. ft. carpet area) to be given free of costs to the trust;
- c. usable carpet area of 460 sq. ft. to individual tenants including flower bed, niches and service ducts.
- d. Corpus fund for the tenant society of such sum, as may be determined by the Charity Commissioner.
- e. 24 Bank Guarantees of Rs.50 lakhs each as offered by Respondent No.9.
- f. Additional consideration of Rs.one crore to the trust in case FSI is enhanced from 2.5 to 3."

The learned Single Judge then directed that sanction for alienation of the trust property shall be granted in favour of the highest bidder."

7. A letters patent appeal filed before the Division Bench of the Bombay High Court led to the impugned judgment dated 18th October, 2012 by which the judgment and order of the learned single Judge was upheld. That is how the present special leave petitions are before this Court.

A 8. Leave granted.

- 9. After hearing learned counsel for the parties for some time, this Court by its order dated 5th February, 2016 stated as under :-

B “Without prejudice to the contentions available to the parties, Shivaji Desai Topiwala, Charity, Bombay-Trust is directed to issue a fresh advertisement regarding the re-development of the properties as directed by the learned Single Judge at paragraph 33 of the judgment dated 29th March, 2012 in Writ Petition No. 11070 of 2011 with the required modifications that sub para (a) will be read as “7 crores”, sub para (e) will be read as “24 Bank Guarantees” and sub para (f) will stand deleted.

C The advertisement shall be issued within a period of one week from today indicating time of two weeks. After processing the applications, report shall be filed within one week thereafter.

Post on 08.03.2016.”

D 10. Pursuant to the said order of this Court, an advertisement was issued on 12th February, 2016 in four daily Newspapers. In response thereto, initially 9 persons came forward, but ultimately, on or before the time stipulated in the advertisement, only two offers were received by the Trust – one from Ramee Construction Private Limited and the other from the same developer - M/s Raunak Corporation. In a report of the
E Trustees of the said Trust given to this Court, paragraph 9 set out the relevant merits of the aforesaid two offers/bids as follows :

S.No	DESCRIPTION	RAMEE CONSTRUCTIONS PRIVATE LIMITED	MESSRS RAUNAK CORPORATION
F 1.	Monetary consideration payable to the Trust	Rs.7 crores	Rs. 8 crores and one
2.	Constructed area to be allotted to the Trust, free of cost	4,921.3 sq.ft.	5,040 sq.ft.
G 3.	Constructed/Rehabilitated area to be offered to the tenants/ occupants, free of cost	67,332.16 sq.ft. (Excluding parking area)	69,166.53 sq.ft. (Parking will be made available to the tenants as per D.C. Regulations)

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4.	Monthly rent per sq.foot offered to tenants/occupants for availing of transit accommodation during the period of redevelopment	Rs.55/- per sq. foot of carpet area computed @ 460 sq.ft. For residential tenants Rs.155/- per sq. foot of carpet area for non-residential tenants	Rentals offered at rates ranging from Rs.17,500/- per tenement to Rs.25,000/- per tenement based on the areas of the existing tenements. Rs.100/- per sq.foot of carpet area for non-residential tenants Also offered to pay higher rentals if the prevailing rates at the relevant time are higher; alternatively, have also offered to provide transit accommodation.
5.	Frequency of increases in monthly rent together with the percentage of such increase	10% annually	10% every 11 months
6.	Brokerage	1 month's rent	1 month's rent
7.	Transportation/ Shifting Charges	Rs.15,000/-	Rs.20,000/-
8.	Corpus fund to be paid to the tenants/occupants	Rs.7 crores and 90 lacs	Rs. 8 crores and one
9.	Amount of Bank Guarantee offered	Rs.12 crores	Rs.12 crores
10.	Schedule for release of Bank Guarantee	No schedule furnished Bank Guarantee to be furnished within 11 months from Development Agreement	Schedule depicting phase wise release of Bank Guarantees furnished. Bank Guarantee to be furnished upon receipt of IOD i.e. municipal sanctions

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11.	Period of validity of Bank Guarantee	Renewable upto completion	Initially for 3 years and renewable upto possession
12.	Background Projects of 2 lakh sq. feet or more completed in the last 5 (five) years together with copies of Occupation certificates.	Copies of Occupation Certificates furnished in respect of 2 commercial buildings in Mumbai and 1 Hotel Building in Pune	Copies of Occupation Certificates furnished in respect of 51 residential buildings in Thane, Kandivli and Kalyan aggregating to approx. 21.93 lacs sq.ft.

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11. We have been informed today by learned senior counsel, Mr. Sanjiv Sen appearing on behalf of Ramee Constructions Private Limited, that his clients have been instructed to go up to Rs.8.20 crores in place of the Rs.7 crore offer made by it. He, however, has, on instructions, increased the offer of Rs.7 crores to Rs.10 crores today.

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12. The reason that this Court passed its order dated 5th February, 2016 was only to ascertain as to whether the offer of Rs.6 crores made by M/s Raunak Corporation was indeed a fair offer at the time it was made. Having regard to the fact that 9 persons initially came forward but they all petered out and ultimately left only Raunak Corporation and Ramee Constructions Private Limited in the fray, the fact that Ramee Constructions Private Limited was the only other bidder which offered a sum of Rs.7 crores about 5 years after the said offer of Raunak Corporation of Rs.6 crores (which improved its offer to Rs.7 crores before the Division Bench of the Bombay High Court) shows that the offer made by Raunak Corporation appears to be a reasonable one. We must also remember that the sale-cum-development agreement has been entered into under Regulation 33(7) of the Development Control Regulations for Greater Mumbai, 1991, and has necessarily to fulfil one condition without which the sale-cum-development agreement cannot go forward at all – it has to contain a minimum of 70% irrevocable written consent of the occupiers of the old structure. We have been informed that out of 105 tenancies of the Trust, 65 consents have been obtained, and another 11 consents have also been obtained which, however, have subsequently been revoked. If we were to add these 11 to 65, as

consents once given are irrevocable, the mathematics of the situation would yield a figure of roughly 74% of the occupiers of the old building. A

13. We find that the initial offer itself was a fair offer in the facts and circumstances stated above. However, we record the statement made by Mr. C.U.Singh, learned senior counsel, that his client was willing to up that offer from Rs.8 crores that had been offered by him before this Court to 8.25 crores, all other conditions mentioned in paragraph 9 of the report of the Trustees remaining the same. In the facts and circumstances of these cases, we find that it would be for the benefit of the Trust if the said offer is accepted by the Trustees, which acceptance has, on instructions, been given by Shri C.A. Sundaram, learned senior counsel appearing on their behalf. We, therefore, deem it fit to allow the present appeals in the aforesaid terms and set aside the order of the Division Bench of the Bombay High Court. B C

14. The appeals are, accordingly, disposed of as above with no orders as to costs. D

15. The application for impleadment is allowed.

16. Pending applications, if any, stand disposed of.

Nidhi Jain

Appeals disposed of