

(1979) 08 BOM CK 0041

Bombay High Court

Case No: Special Civil Application No. 3091 of 1976

Rajendralal Shadilal and Co. Pvt.
Ltd. and Another

APPELLANT

Vs

The State of Maharashtra and
Another

RESPONDENT

Date of Decision: Aug. 29, 1979

Acts Referred:

- Bombay Land Requisition (Exemption) Rules, 1948 - Rule 4
- Bombay Land Requisition Act, 1948 - Section 4(1), 5, 5(1), 5(2), 6
- Constitution of India, 1950 - Article 19(1), 226, 227, 32
- Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 - Section 10, 2

Citation: AIR 1980 Bom 261

Hon'ble Judges: V.S. Deshpande, J; Lentin, J

Bench: Division Bench

Advocate: R.C. Dalal and J.D. Gangal, for the Appellant; V.H. Gumaste and W.S. Devnani, Asstt. Govt. Pleaders, for the Respondent

Judgement

Deshpande, J.

This petition under Arts. 226 and 227 of the Constitution of India is directed against an order of requisition dated 20th May, 1976 passed under Bombay Land Requisition Act, 1948 (hereinafter referred to as the Act), The petitioner is a limited concern registered under the Companies Act. Constructing building and selling the flats therein is its business. For this purpose, the Company purchase plots, raise construction thereon consisting of several flats, and then sell the same to the needy purchasers for profit and then get a society of such purchasers formed under the Cooperative Societies Act of 1960 as required under the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (hereinafter referred to as the Ownership Flats Act), in whose favour the

Company executes the conveyance. The petitioner purchased a plot No. B/359 at Mount Pleasant Road and constructed a building thereon known as Rajat Apartments consisting of ground floor and six upper floors up to 43" from the Bench mark, comprising of 56 flats and 44 garages. A Co-operative Society of the purchasers of the flats was formed on 5th Feb., 1968 petitioners themselves having become member in respect of the unsold flats in terms of Section 10 of the Ownership Flats Act. On 13th June, 1969, the petitioners executed a conveyance in favour of the said society named as "Rajat Apartments Co-operative Housing Society" Under the terms of the said conveyance deed, the petitioners reserved rights to raise two more floors, sell the flats therein for their benefit on condition of the said purchasers of the flats, agreeing to become members of the said society according to their bye-laws. The two floors were accordingly constructed by 1972 after the settlement of the dispute with a neighbouring society under a consent decree in Suit No. 58 of 1965 on the Original Side of this Court. All the flats excepting No. 82 on the 8th floor are now sold. Though the occupation certificate was obtained during the process of construction itself by 13-10-1970, the completion certificate was not obtained till 19th Apr., 1977 long after this writ petition was filed. According to the petitioners, flat No. 82 remained unsold due to their certain dispute with the society.

2. In response to the representations, the Government decided in 1957 not to exercise its power of requisition of residential quarters under the Act and made a statement to that effect on the floor of the Assembly. The Government, was, however, driven to withdraw the said commitment in 1975 and gave wide publicity to the same in the Newspapers. As flat No. 82 had remained unsold even by that time, and not occupied by any one, an intimation of vacancy was lodged by the petitioners on 25th July, 1975 u/s 6 (2) of the Act under the,, impression of its applicability to the same. The Controller of Accommodation in reply called for certain details on 20th Apr., 1976 which were given immediately. The Respondent No. 3, however, passed the impugned order on 10th May, 1976, u/s 5 of the Act requisitioning the said flat. The validity of this requisition is challenged in this petition.

3. The respondents have filed two affidavits. It is unnecessary to refer to the same as the facts, relevant to the disposal of the points raised before us, are not in dispute.

4. Mr. R.C. Dalai, the learned Advocate for the Appellant challenges the validity of the order on the ground of want of notice and an opportunity, to show cause against the proposed requisition before the order was passed. It is not in dispute that, beyond asking details under its letter dated 20-4-1976 as to the name of the Society, the date of its registration and the name of the person in possession of the flat, the petitioner was never informed of the proposal as to requisition, nor was he ever called upon to show cause against the proposed requisition. Mr. Gumaste, the Learned Advocate appearing for the Respondents, relied in defence, entirely on the

absence of any provisions in the Act or the Rules, making it obligatory to give such notice or hearing. This defence is wholly untenable in the circumstances of this case. The order, has the effect, of depriving petitioner of the possession of the flat, as also affects adversely its sale ability in the market for which it was avowedly constructed, as part of their business activities as averred in the petition and not disputed by the Respondents. It is difficult to conceive of any purchaser of such a flat once it is found to be under requisition and occupied by the allottee thereof. The impugned order directly affects petitioner's fundamental rights to hold property and carry on business, guaranteed under Article 19(1) (f) and (g) of the Constitution.

5. Secondly, the power of requisition under the Act is conditional, on (a) continued non-residence in the building by the owner or his tenant for six months under the proviso to Section 5 (1), if Section 5 is invoked and (b) existence of vacancy u/s 6 (1) of the Act if Section 6 is invoked. Section 5 (2) and Section 6 (4) require the authority concerned to hold "enquiry" and make a "declaration" as to the existence of the said situations. Even in the absence of any provision for notice and hearing, the principles of natural justice require that persons liable to be so adversely affected, should be given an opportunity to have their say before any action is actually taken. This is what the Supreme Court has held in the case of [Madan Gopal Agarwal Vs. District Magistrate, Allahabad and Others](#). Failure of the respondent to afford such Opportunity is fatal indeed.

6. It is true, compliance with principles of natural justice is not a question of mere formality and when no rules to that effect exist and no particular form is prescribed, substantial compliance therewith, may satisfy the requirements. Mr. Gumaste relied on the two letters of the petitioners and one from the respondents, adverted to earlier, to show how the petitioners did have an opportunity to have their say. This contention is devoid of any merit. The intimation of vacancy itself was given by the petitioners on 28-7-1975 under the wrong impression as to the application of Section 6 of the Act, though the flat was neither "let nor intended to be let" in terms thereof, but was intended for sale. The query from the Government in its letter dated 20-4-1976 was based on the same impression. That the impugned order is passed u/s 5 demonstrates how the correspondence proceeded on the wrong premises. Far from complying with the principles of natural justice, the correspondence does not serve any purpose whatsoever. The respondent did not care to contact the petitioner and hear then say even for the purpose of "enquiry" required to be made by it u/s 5 (2) to ascertain if it was a case of continuous non-residence for six months as contemplated under the proviso to Section 5 (1). It is difficult to appreciate how any such enquiry could be said to be complete and effective without any attempt even to contact the petitioners at-least for ascertaining the facts, if not for bearing objections. The impugned order, in our opinion, is liable to be struck down on this ground itself.

7. It is true that the declaration u/s 5 (2) of the Act is indicated to be conclusive. This, however, does not make it immune from interference of this Court, in exercise of its powers under Article 226 of the Constitution. Judgment of the Supreme Court in the case of [Lilavati Bai Vs. The State of Bombay](#), is directly in point. Apart from the same having been made without any opportunity to the petitioners to have their say, recitals in the order demonstrate how the declaration is based entirely on unfounded assumptions. On the facts averred in the petition and not disputed by the respondents it shall have to be held that the building was constructed by the petitioners, as part of their business activities, to sell the flats therein and earn profit. The building now belongs to Co-operative Housing Society though the flat in dispute is at the disposal of the petitioner for sale, under the terms of conveyance between them and the Society. The purchaser member and not the petitioner is "entitled" to reside in the flat under the bye-laws of the society. The contrary recitals in the first two paras of the impugned order therefore, are not factually correct and only show how the order is based on unfounded and misconceived assumption.

8. Mr. Dalai then contends that flats held by the builders like the petitioners in Housing Co-operative Society formed in compliance with the Ownership Flats Act in the process of construction and sale continue to be exempted from requisition under the proviso to Sub-section (1) of Section 5 of the Act and question of their ceasing to be so exempted on account of the non-residence cannot arise till the same is sold, and the purchaser, for whose residence it is constructed, fails to reside therein of his volition. The contention appears to us to have been well founded.

9. Section 5 (1) reads as follows :

"If in the opinion of the (State) Government it is necessary or expedient so to do, the (State) Government may by order in writing requisition any land for (any public purpose);"

The proviso thereto reads as follows :

"Provided that, no building or part thereof wherein the owner, the landlord or the tenant, as the case may be, has actually resided for a continuous period of six months immediately preceding the date of the order shall be requisitioned under this Section."

Sub-section (1) enables the Government to requisition any land. The building is only one specie of the wider concept of the land, under its definition in Section 4 (1). Exemption from requisition under the proviso is confined to the buildings used for residence and is conditional on their being used for such actual residence. It is the actual non-residence therein continuously for six months, that excludes it from exemption and exposes it to the liability of requisition.

10. It is, however, necessary to note I that what exempts the building from requisition is the continued residence of the owner, landlord or the tenant. This

proviso and another substantive provision of Section 6; of the Act, contemplating requisition of building "let or intended to be let" only if and when Vacancy"" therein occurs, appears to have been based on the legislative recognition of the actual occupants greater need of the building, than that of those houseless persons for whom requisition powers are sought to be invoked. In other words, possession of the actually needy occupants is not intended to be disturbed presumably on the hypothesis, that dishousing the one set of needy resident occupants, for housing another set of the needy claimants would not serve any purpose. The words of the proviso "as the case may be" appear to have been intended to emphasis how, such actual occupants subsequent non-residence, and not that of anybody else, is relevant, for the proviso.

11. But, this necessarily assumes that the building is ready, fit, and available for such residence on the date from which the period of six months fatal non-residence is to be calculated. Building under construction, (or reconstruction, or overall repair) cannot be said to be so fit, habitable or capable of being occupied for actual residence notwithstanding there being the "building" none the less. Building can remain so under construction, and, so inhabitable, for more than six months for variety of reasons. This process of construction may thus result in the involuntary non-user and non-residence of the owner or his tenant, for whose residence it is constructed, for a fairly long time. The question is: can such involuntary and forced non-residence result in the in application of the proviso and the exemption engrafted "therein? According to Mr. Dalai, it does not, because non-residence is involuntary and inevitable; such process of construction at the hands of the builders like the petitioners can take longer time, continuing as it does not only till actual construction is complete, but also till the flats in the building are sold to the purchasers for residence of whom the same are constructed.

12. Mr. Gumaste on the other hand contends that when exemption under proviso is confined to the building actually under residential occupation, it cannot be extended to the building under construction hot so occupied. Now, it must be conceded that, the wording of the proviso does not give any express indication on this point, for want of clear wording. There are, however, two factors which militate against excluding the residential building under construction from the exemption even when unoccupied. Firstly, where the building under construction is unfit for the residence of the owner or his tenant, the same must be deemed to be equally unfit for the residence of any one else for whose benefit the same is intended to be requisitioned, and no public purpose can be served by the requisition of such unfinished and defective building. Existence of public purpose is the condition precedent for acquisition of any land or building u/s 5 (1) of the Act. Such defective buildings thus not being liable to requisition, their exemption is implicit and express indication in the proviso was unnecessary.

13. Secondly, obvious incapability, of any building under construction being used for residence by itself, was enough to warrant omission of any reference in the proviso to the effect of such non-residence therein, by anyone. The negative language of this proviso against this background, suggests legislative intent to prevent requisition of the residential building, or any part thereof, such as the flat, as long as owner, or his tenant, for whose residence the same is constructed, continuously resided, therein after such construction, and such residence continued for six months before the proposed order. The question of calculating the period of six months of non-residence, is not contemplated to arise until the construction is completed. Period consumed by the process of construction is liable to be excluded from consideration under the wording of this proviso for the above obvious reasons. It would indeed be odd if the proviso were to exclude the building under construction from exemption, when the same was being constructed for the residence of those whose residence is intended to be protected by exemption thereunder.

14. The proviso requires calculating the six months period of non-residence, backwards from the date of the proposed order. The question of fixing starting point of such non-residence is equally important. Fixation of the starting of this six months period in respect of any building once occupied, and left thereafter, may not present any difficulty. Six months period would begin from the date of such vacating of the building. In places, afflicted by the scarcity of the accommodation, tendency of the needy is to occupy the quarters even before the construction is completed. The date of the first occupation for actual residence in a newly constructed building may not thus ordinarily present any difficulty. Contemplated enquiry u/s 5 (2) to ascertain the period of non-residence is adequate safeguard against the possible abuses or deliberately postponing actual occupation. In all such cases, the authority concerned has still to find in the course of "enquiry" when the owner or his tenant could have started his residence after the building is completed, to determine his fatal period of non-residence of six months.

15. Such fixation of starting point is exposed to a few uncertain factors when, rather than carry on construction on one's own supervision the same is entrusted to any professional building contractor or is undertaken by the builders themselves on their own initiative, as in the present case, by investing their own monies in purchasing plots, raising buildings, of flats, and garages thereon, for sale on profit, as part of their business activity. The process of sale by them to the purchaser for whose residence it is constructed, also becomes the integral part of the process of construction in such cases. Readiness and availability of any building for residence has to be determined by reference to the person for whose residence it is constructed, without regard to whether building is constructed by the owner under his supervision, or got constructed through a building contractor or is constructed for his benefit by the builders on their own initiative as part of their business. This entire period consumed in this process of construction and sale, resulting in the

involuntary non-residence of the person concerned i.e. the owner or his tenant for whom it is undertaken, shall have to be excluded while determining such starting point of fatal non-residence. Where construction is undertaken by the builders on their initiative and with their own money, the period of six months shall necessarily have to be calculated from the date of delivery of possession to the purchaser on which date the flat or building can be deemed to have been ready, fit and available for his residence therein. The Government or the officer authorised to requisition and make enquiries, can ill afford to lose sight of these exigencies inherent in the process of construction and availability of the flat to the owner or the tenant for whose actual residence the construction is raised.

16. The building in "dispute is sold by the builder to the Housing Co-operative Society in 1969 before the construction of the 7th or the 8th floor. Under the sale deed, the petitioners reserved their right to raise two more stories and sell the flats therein for their benefit on the condition of such purchasers agreeing to join the Society as its members. The two stories and the flat in dispute appear to have been constructed by 1972. The flat is claimed to have remained unoccupied. None has resided therein for years. The flat is still unsold. This delay is apparently abnormal. But, petitioners attribute this to their bona fide dispute with the society. This claim is supported by the extracts of minutes of the Society's annual meetings from year to year and is not disputed by the respondent. Mr. Gumaste contends at the Bar that, the builder has not sold it deliberately in an anxiety to fetch still higher price, is not borne out by any material and appears to be highly improbable and far-fetched. Though the right to sell the flat vests in the builders under the sale deed with the Society, they do not claim any right to reside, it having been constructed for the purchasers. It may not even be suitable for their residence. As discussed earlier, non-residence by the builder thus is not relevant for the proviso. As the situation stands today, none can be said "not to have resided therein continuously for six months" to exclude the application of the proviso and the exemption thereof. Mr. Dalai, therefore, appears to us to be right in contending that the question of calculating the period of six months non-residence in a flat constructed by a builder cannot arise till he finds his purchaser, and consequential in application of exemption does not arise, in the present case.

17. Our above interpretation of Section 5 (1), however, extends the period of exemption in respect of flats constructed by the builders on their own initiative, even after the completion of the construction and make them immune from requisition till the same are sold to the purchasers for residence. Requisition power will not be exercisable in respect thereof in spite of the urgency of the public purpose and the flats remaining vacant without any actual residence. Fault, in our opinion, is not with OUT interpretation but with the text of the proviso itself. Construction of building containing flats and garages, by the builders with their own capital is a recent innovation in the construction activities and peculiar problems raised by the processes involved may not have been present to the mind of the

legislature when the Act was passed in 1948. Surprisingly enough, notwithstanding the builders being statutorily required under the Ownership Flats Act of 1963, to get a Co-operative Society (or a Limited Company) formed of the purchasers of the flats, the Co-operative Societies Act of 1960, the rules or the model bye-laws thereunder are not suitably amended to accord with the requirements of the said Ownership Flats Act. Thus the definition of a "member" u/s 2 (19) of the Co-operative Societies Act, does not deal in any of its Clauses (a) to (d) with the statutory membership of the builder, nor does Rule 10 (5) expressly cover the category of society contemplated by the Ownership Flats Act, nor the model bye-laws, take notice of the fact that the Housing Society formed in terms of the Ownership Flats Act consists of members who purchase the flats before becoming its member, and does not contemplate allotment of flats to them afresh. It is indeed time that the authorities pay attention to these anomalies.

18. However, the question whether the Act can be validly amended to authorise requisition of the unsold flats, held by the builders like the petitioners for sale, requires close scrutiny. Any such provision is likely to have adverse effect on the business activity of such builders and their contention of Section 5 (1) in that event, being unreasonably restrictive and as such violative of their fundamental rights under Article 19(1)(f)(g) of the Constitution cannot be dismissed as being wholly without substance. No purchaser would purchase flats under requisition, and the capital of the builders involved therein would get locked for uncertain period during requisition. It may also affect the functioning of the co-operative society or the company, formation of which in terms of the Ownership Flats Act is so obligatory. Any proposal for amendment must take notice of this as also the inevitable time required for finding purchasers, and settlement of bona fide disputes that may inevitably crop up in this contemplated process. Suffice it to note at this stage that the exemption from requisition engrafted in the proviso to Section 5 (1) does not cease to operate in respect of any flat, in a newly constructed building governed by the Ownership Flats Act till the process of construction including the one of sale to the purchaser for his residence is complete.

19. Mr. Gumaste drew our attention to the Rules "The Bombay Land Requisition (Exemption) Rules, 1948" framed by the Government in exercise of its powers under Clause (iv) of Sub-section (2) of Section 19 of the Act. "Buildings owned by a Housing Cooperative Society or the members thereof, under the bye laws of the society" are exempted under Rule 4 from requisition contemplated u/s 5 or 6 of the Act, under item at serial No. (1) Col. (1) of the Schedule attached to the rules.. The terms and conditions of such exemption are enumerated in column No. 3 of the Schedule. Mr. Gumaste contends that any such exemption presupposes application of the Act to the buildings owned by the society or to the flats owned by its members and their exclusion from the exemption under the proviso to Section 5 (1) of the Act, This was relied on by Mr. Gumaste to reinforce his contention against our above interpretation of the proviso, under which exemption thereunder continues to apply

to the unsold flats in a society formed in compliance with the Ownership Flats Act. The contention is equally plausible. It is plain that no question of exemption under Rule can arise if any Housing Society building or flat therein is exempt under the proviso to Section 5 (1) itself.

20- Now, as a result of the conveyance of 1969, the title of the entire building including that of 7th or 8th floor constructed subsequently by the builders in terms of covenant therein, stand vested in the society. Even so, such title and ownership of the society cannot be said to be exclusive in that the right of sale, of the flats therein including that of flat No. 82 in dispute, under the terms of the same conveyance still stands vested in the builder and is liable to be transferred to the purchaser after its purchase by him subject to his becoming a member of the society. Thus exemption intended for the building of the Housing Society under first part of the column 1 may not cover a building subject to such dual ownership of the member and the society, and must be limited to the instances when building or a portion thereof exclusively belongs to the society.

21. It is however the second part of this exemption clause in this column that will be attracted where part of it, such as a flat is held by a member. Terms and conditions for the contemplated exemption are also to be complied with by the members and not by the society. Exemption is made conditional on (1) the ownership of the member of such flat flowing from the bye-laws of the society; (2) the member being entitled to use or occupy the flat (3) his making an application for permission to occupy, to the Officer designated in this behalf and (4) getting such permission (5) his not letting it to anybody else or otherwise not parting with possession thereof (6) not keeping it vacant for more than a month and (7) reporting the vacancy of more than a month within the" time prescribed therefor.

22. It must be noted that no occasion to comply with these conditions can arise in respect of any unsold flat in a society formed in compliance with the Ownership Flats Act till it is sold by the builders to any purchaser for residence. It is no doubt true that the builders are also members of the society and nothing can prevent them from residing in the flat if they chose, which in turn obviously would depend on their need and its suitability for their residence, as also the permissibility under the bye-laws and compliance with the relevant Municipal Laws. What, however, is relevant under column (3) is such "member"s entitlement" to use and occupy under the bye-laws of the society, and not the absence of any impediment in the using or occupying it. As seen earlier, the builders have to promote a Co-operative Society as soon as they get minimum number of purchasers required for the formation thereof and have to become its members in respect of the unsold flats. In other words, they become members of such housing society under statutory compulsion as such builder, and have to continue to be such member till all the flats constructed by them are sold. They do not become member for securing any flat for their residence. Housing Society is defined in Section 2(16) of the Co-operative Societies

Act to mean a society formed for securing houses for its members. Any builder member having become member under the statutory compulsion, for sale of Ids other unsold flats, is certainly not such member. Section 2 (9) enables every society to have some other nominal, associated or sympathiser, members who are not contemplated to be beneficiaries of its Such objects. Builder member is only another species of such non-beneficiary members, being entirely a creature of the Ownership Flats Act, meant for its own requirements, with liberty to hold all the unsold flats for sale for the contemplated limited purpose in spite of the contrary provision of the bye-laws of any society and the conception of any such society u/s 2 (16). The bye-laws do not permit holding of more than one flat or selling thereof (vide model Bye-laws 9 (b) and 71A to 71D). Builder member thus is not entitled to hold any flat in terms of the bye-laws of the Society nor is he entitled to use or occupy the flat under the Co-operative Societies Act, Rules or Bye-laws of the Society. He is also not consequently entitled to make any application for permission in terms of col. 3 of the Schedule of the Rule, since application for permission can be made only when a purchaser purchases it for his residence and becomes member of the society in terms of his obligations under the terms of the purchase from the builder who in turn is under an obligation to sell only on such purchaser agreeing to be member of such society. Such purchaser on being a member alone, can be said to be entitled to use and occupy the flat.

23. The occasion to make application and comply with the other conditions can only arise after such purchaser becomes a member. The exemption under Rule 4 r.w. schedule may be attracted at this stage and result in the loss of exemption under the proviso to Section 5 (1). Sub-clause (2) in Col. (3) indicates how vacancy caused on non-compliance or breach of the terms entails the loss of exemption.

24. The contention of Mr. Gumaste that no building of any Housing Society or no flat therein can claim exemption till the member is entitled to use and occupy gets permission in terms of the requirement of column 3 of the schedule, appears to us to be wholly untenable. Rule itself does not contemplate first application of the Act and subsequent exemption. Allowance shall have to be made to the period consumed not only by the process of construction of such building as also allotment of flats therein to the members and their making application, getting permission for the same reason as the proviso to Section 5 (1) was found by us to be applicable to the building till the involuntary non-residence is found to have actually occurred. Rules do not contemplate, suspension of or exclusion from such exemption during this indispensable formative initial process. These contemplate exclusion from exemption only after non-residence thereof. This way alone statute seeking to deprive the citizens of their property can be construed. We have already discussed how the flats in a building of a Co-operative Housing Society formed in terms of the Ownership Flats Act, is firstly exempt under the proviso to Section 5 (1) of the Act and how the exemption under Rule 4 is attracted as soon as the same is sold to any purchaser and he becomes member of the said society. Though the exemption

contemplated under the rule is conditional on compliance with the terms of third column of the schedule, there is no basis for assumption that the said exemption stands suspended till the terms are complied with.

25. Close examination of the proviso to Section 5 (1) and the R. 4 and the Schedule, does indicate intention to treat the Cooperative Societies' buildings and flats therein, differently in the matter of exemption from other buildings and their parts. The proviso itself contemplates conditional exemption to the building and the rule contemplates extending the conditional limited exemption on slightly different basis to the buildings of any housing society and flats held by its members. It is not relevant, here to consider the propriety and basis of this different treatment or its constitutional validity. Underlying intent, not to disturb the possession of anybody in actual possession or intended immediate possession on the construction, is common to the proviso of Section 5 (1) and Rule 4 read with the Schedule. The wording of the said proviso and Rules concerned thereunder, however, suffers from the same singular defect in that it does not take notice of the peculiar features of the Co-operative Housing Society buildings, and the flats regulated by the Ownership Flats Act under the scheme of which the person for whose residence the flat is constructed, does not come into picture till the flat is sold to him. This discussion also further demonstrates how the "enquiry" in this case was wholly misdirected and misconceived. The Order is thus liable to be quashed.

26. Rule is thus made absolute with costs.

27. Rule made absolute.