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Welcome to this issue of Prop Digest

We welcome you all to the second issue of Prop Digest. We hope that the insights we provide on the real estate sector is helpful to all our readers.

This issue sheds light on some key judicial pronouncements of the apex court and High Courts, while also focusing on some key State (Maharashtra)-level legislative updates, such as notification allowing financial institutions to be recorded as joint developer/ lender in slum rehabilitation scheme. We have also analysed MahaRERA orders, permitting extension of project registration even in the absence of consent from majority allottees, mandating inclusion of non-negotiable clauses in the agreement for sale and disclosure of promoter interest in real estate organisations.

Please feel free to send us your valuable feedback and suggestions on cam.publications@cyrilshroff.com. It will help us immensely in improving Prop Digest and ensuring its continued success among readers.

Regards,

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JUDICIAL UPDATES

I. Supreme Court (SC)

A. Continuation of temporary acquisition for number of years would be arbitrary and can be said to be infringing the right to use the property guaranteed under Article 300A of the Constitution of India: Supreme Court

In *Manubhai Sendhabhai Bharwad and Another (Appellant) vs Oil and Natural Gas Corporation Ltd. & Others (Respondent)*¹, the Appellant's land was under temporary acquisition by the Respondent since 1996 for oil exploration. Further, despite land price escalation (manifold) and development of surrounding lands, the Appellant was being paid Rs. 24/- per square meter per annum rent by the Respondent for this temporary acquisition. Aggrieved by the Respondent's reluctance to acquire the land permanently, the Appellant approached the Gujarat High Court seeking direction, that the Respondent should either acquire the land on a permanent basis or release the land from temporary acquisition. The High Court disposed the said writ petition after granting the Appellant an enhanced rent of Rs. 30/- per square meter per annum, and basis the undertaking of the Respondent that it would conclude the process of acquiring the land permanently within 12 (twelve) months. Dissatisfied with the Order passed by the Gujarat High Court to not quash the temporary acquisition proceedings, the Appellant preferred an appeal in the Supreme Court.

After looking into the facts of the matter, Supreme Court observed that *"If the land is continued to be under temporary acquisition for number of years, meaning and purpose of temporary acquisition would lose its significance. Temporary acquisition cannot be continued for approximately 20 to 25 years. It cannot be disputed that once the land is under temporary acquisition and the same is being used by the ONGC for oil exploration, it may not be possible for the landowners to use the*

land; to cultivate the same and/or to deal with the same in any manner. To continue with the temporary acquisition for number of years would be arbitrary and can be said to be infringing the right to use the property guaranteed under Article 300A of the Constitution of India. Even to continue with the temporary acquisition for a longer period can be said to be unreasonable, infringing the rights of the landowners to deal with and/or use the land". Dismissing the appeal to quash the temporary acquisition proceedings, the Supreme Court directed the Respondent to act as per the impugned judgement and order passed by the Gujarat High Court and complete the acquisition proceedings on or before April 26, 2023.

B. A decree of possession cannot be passed in favour of the plaintiff on the ground that defendants have not been able to fully establish their right, title, and interest in the property: Supreme Court

In *Smriti Debbarma through legal representative (Appellant) vs Prabha Ranjan Debbarma and others (Respondent)*², in 1986, the Appellant had filed a suit, *inter-alia*, praying for a declaration that Maharani Chandratara Devi is the owner of the property known as 'Khosh Mahal'. In 1996, the Trial Court decreed the suit holding that the Appellant had right, title and interest in the said property. Allowing appeals filed by the Respondent, the Gauhati High Court reversed the judgement of the Trial Court and *inter-alia*, held that on the basis of evidence and documents placed on record, the Appellant has not been able to discharge the burden of proof to establish her legal ownership and title to the said property. Aggrieved, the Appellant preferred an appeal in the Supreme Court.

Dismissing the appeal and upholding the judgement of the Gauhati High Court, the Supreme Court observed that, *"In the above factual background, for the plaintiff*

¹ S.L.P. (Civil) No. 13885/2022

² Civil Appeal No. 878 of 2009

to succeed, she has to establish that she has a legal title to the Schedule 'A' property and consequently, is entitled to a decree of possession. The defendants cannot be dispossessed unless the plaintiff has established a better title and rights over the Schedule 'A' property. A person in possession of land in the assumed character as the owner, and exercising peaceably the ordinary rights of ownership, has a legal right against the entire world except the rightful owner. A decree of possession cannot be passed in favour of the plaintiff on the ground that defendants have not been able to fully establish their right, title, and interest in the Schedule 'A' property. The defendants, being in possession, would be entitled to protect and save their possession, unless the person who seeks to dispossess them has a better legal right in the form of ownership or entitlement to possession. The burden of proof to establish a title lies upon the plaintiff as this burden lies on the party who asserts the existence of a particular state of things on the basis of which she claims relief."



instructions to the Sub-Registrar of Pollachi, to register the sale certificate executed by the Bank with respect to an auctioned property. The Bank had auctioned the mortgage property of a borrower who had defaulted under the SARFAESI Act⁶. When the sale certificate issued in favour of the highest bidder was presented for registration, the Sub-Registrar refused to register the same, stating that the property was provisionally attached under Section 83 of the GST Act. The MHC held that Rule 55A(i) Proviso being a sub-ordinate legislation, is *ex facie in conflict* with the intent of Sections 48 and 56 of the Transfer of Property Act, 1882, which permits property owners to deal with mortgaged or leased properties as they deem fit. Further, the MHC observed that the mortgage was created in 2017, whereas the provisional attachment by the GST authorities was made only in 2021 and that the provisional attachment had lapsed within a year. Owing to this and considering the various precedents passed by the Supreme Court of India, the MHC held that Rule 55A(i) Proviso as invalid and *ultra vires*. The MHC, thus, directed the sub-registrar to register the sale certificate within fifteen days from the date of the order.

II. Madras High Court

A. Registration of Property Transfer Documents cannot be arbitrarily rejected: Madras High Court

In the case of Federal Bank vs. the Sub Registrar and others³, the Madras High Court ("MHC") examined the constitutional validity of the *proviso* to Rule 55A(i) of the Tamil Nadu Registration Rules, 1983 ("Rule 55A(i) Proviso"). Rule 55A(i) Proviso *inter-alia* allowed Sub-Registrars to refuse registration of sale deeds or any other document of an immovable property, which is mortgaged, attached and/ or agreed to be sold or leased, until the lapse of limitation⁴ for filing a suit, or NOC⁵ granted by appropriate authority or after the attachment is lifted.

In the instant case, Federal Bank ("Bank") filed a Writ of Certiorari Mandamus before the MHC seeking

³ 2023 LiveLaw (Mad) 52- Judgment

⁴ Limitation period prescribed under the limitation act, 1963

⁵ No Objection Certificate

⁶ Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002

LEGISLATIVE UPDATES

I. Key State (Maharashtra) Legislative Updates

A. Government resolution disapproving redevelopment of single buildings falling under specified MHADA sub-ordinate boards cancelled: Housing Department

In order to enable development of planned infrastructure facilities and proper planning of areas under MHADA sub-ordinate boards of Mumbai, Konkan, Nashik and Pune, the Government of Maharashtra (Housing Department) *vide* a Government Resolution dated April 28, 2022⁷, had ordered that redevelopment proposal of a single building should not be approved and only under exceptional circumstances, if redevelopment of single buildings is necessary, a self-explanatory proposal should be submitted for prior government approval. However, in case of joint redevelopment, (i) it was not possible to give consent for redevelopment of more than one building/ organisation together; (ii) the internal disputes among the organisations of attached buildings resulted in delays in group redevelopment; and (iii) since the delay in redevelopment of dangerous buildings could increase the possibility of loss of property and life, the aforementioned Government Resolution, dated April 28, 2022, was cancelled *vide* Government Resolution dated December 6, 2022⁸.

B. Financial Institutions which have funded the implementation of slum rehabilitation schemes to be recorded as joint developers (co-developer)/ lenders in Slum Rehabilitation Scheme: Housing Department

The weakening of the financial position of private developers due to the Covid-19 pandemic and the consequent stalling of many slum rehabilitation schemes in Mumbai has created an atmosphere of dissatisfaction among the slum dwellers. To mitigate the situation and to ensure completion of the stalled projects, the Department of Housing, Government of Maharashtra, had *vide* Government Resolution dated

May 25, 2022⁹, allowed co-operative housing societies to appoint a new developer within a period of three months. If a new developer cannot be appointed for some reason, then a new developer would be appointed by the Slum Rehabilitation Authority under a tender process. The said Resolution further states that financial institutions (RBI, SEBI, NHB approved) that have provided funds for the implementation of the scheme and are willing and have financial capacity to complete the scheme, will be noted as co-developers in the memorandum (table of contents) and will be allowed to implement the stalled scheme. Following the above order, some financial institutions have shown their inability to act as joint developers in the scheme and have requested that they be allowed to appoint a competent body for the actual implementation of the scheme by recoding them as lender. Pursuant to the above request, the Department of Housing, *vide* a Government Resolution dated December 9, 2022¹⁰, issued a Corrigendum to the aforesaid Resolution of May 25, 2022, and allowed Financial Institutions to be recorded as co-developers/ lenders in the table of contents (memorandum) of the concerned Slum Rehabilitation Scheme. This Corrigendum further granted approval for implementation of the scheme through the competent body appointed/ authorised by these financial institutions.

C. Extension of validity of project registration by Promoters permissible in the absence of consent from majority of Allottees: MahaRERA

To protect the interests of allottees by ensuring the completion of a real estate project, MahaRERA has extended the validity of project registration *vide* its Order dated December 27, 2022¹¹. According to the said Order, for the extension of validity of project registration, promoters should comply with the directions issued under Order No. 7 of 2019, dated February 8, 2019, which states that, concerned association of allottees

⁷ Government Decision No. Allotment

⁸ Government Decision No. Miscellaneous-2022/P.No.113/Grinibhu

⁹ Government Decision No. Narrow-2021/P.No. 135/JOPSU-1

¹⁰ Government Circular No. Miscellaneous-2021/P.No.135/Zhopsu-1

¹¹ MahaRERA/Secy/File No.27/853/2022

(i.e. association or society or co-operative society or federation or any other body) in majority should permit the existing promoter to complete the project in a specific time period and the promoter should pay the same fees as prescribed under the rules of extension. If the promoters are unable to comply with Order No. 7 of 2019, promoters should submit the consents as obtained from the allottees, irrespective of the number of such consents, while clearly stating the reason why the required percentage of consents from the allottees could not be obtained and why the application for extension should be considered without the required 51% consent. Along with this, promoters should submit an explanatory note, setting out the grounds and reasons for the delay in completion of the real estate project, as well as setting out the need for grant of extension, along with documents supporting such grounds and reasons. The promoters should state the steps that would be taken to complete the project within the extended time sought. All the applications for the extension of validity should be made in the required forms as prescribed in the Order.

D. Non-agricultural permission, sanad and receipt of intimation from Tahsildar to be considered as Commencement Certificate and Occupation Certificate/ Completion Certificate for Plotted Development Projects: MahaRERA

Previously, for plotted development projects, the concerned Competent Authority did not issue the Commencement Certificate or Occupation Certificate/ Completion Certificate. In the case of plotted development projects, wherever Intimation of Disapproval/ Building Plan approval was not provided as per the local rules, just a Non-Agricultural (“NA”) Order from a Competent Authority was sufficient. Similarly, wherever Occupation Certificate/ Completion Certificate was not provided as per local rules, submission of duly filled required form signed by the Architect was considered for completion of project. In light of the same, MahaRERA has issued clarifications regarding what constitutes commencement and what denotes completion of plotted development projects vide its Order dated December 13, 2022¹². According to the present Order, grant of NA permission, along with



sanad (the conversion process of agricultural land into a non-agricultural one) issued in the required form as prescribed under the rules of the Maharashtra Land Revenue (Conversion of Use of Land and Non-Agricultural Assessment) Rules, 1969 (“**Rules**”), by the concerned Competent Authority shall be considered as Commencement Certificate for plotted development projects. Receipt of the intimation of the Tahsildar, given as an acknowledgment of having received the intimation of the date of the commencement of NA use after completion and execution of all conditions, as may have been imposed by the Competent Authority (Tahsildar), in compliance with Rules along with required form signed by the project Architect, shall denote Occupation Certificate/ Completion for plotted development projects.

E. Non-negotiable clauses in the agreement for sale to be executed with the allottees: MahaRERA

Along with the application for registration of a real estate project, promoters have to upload a proforma of the agreement for sale proposed to be signed with the allottees. It was found that promoters are modifying certain clauses in the agreement for sale, which are mandated as per the provisions of the Real Estate (Regulation and Development) Act, 2016 (“**Act**”), Maharashtra Real Estate (Regulation and Development) (Registration of Real Estate Projects, Registration of

¹² MahaRERA/Secy/File No.27/743/2022

Real Estate Agents, Rates of Interest and Disclosures of Website) Rules, 2017 (“**Rules**”), and the Maharashtra Real Estate Regulatory Authority (General) Regulations, 2017 (“**Regulations**”). In order to restrict the above modifications by the promoters, MahaRERA, *vide* Order dated December 13, 2022¹³, has issued directions, stating that certain clauses relating to (i) force majeure; (ii) time period for the formation of association of allottees; (iii) time period for execution of registered conveyance deed with the association of allottees; (iv) defect liability period; (v) final carpet area; (vi) default of payment by allottees, are non-negotiable clauses, irrespective of what is agreed upon between the promoters and the allottees in the registered agreement for sale executed between the said parties and all such clauses in the registered agreement for sale shall be considered as void from the beginning and not binding upon the allottees. All applications of registration where there is violation of the above-mentioned clauses shall be liable to summary rejection.

F. Disclosure of interest in other real estate organisations and submission of self-declaration at the time of registration of a real estate project by the Promoter mandatory: MahaRERA

In order to ensure that homebuyers make an informed decision while purchasing unit(s) in real estate projects, MahaRERA, *vide* Order dated December 27, 2022¹⁴, issued directions requiring the promoters to upload a Self-Declaration in the prescribed format (while applying for registration of a real estate project) on the letter head of the promoter, disclosing whether the promoter as an individual or as a Proprietor, as a Director/ Designated Partner/ Partners of the promoter Organisation, has/ have any interests in other real estate organisations whose real estate projects are registered with any Real Estate Regulatory Authority across the country, along with the said Organisations performance/ status in completing such real estate projects.

¹³ MahaRERA/Secy/File No.27/744/2022

¹⁴ MahaRERA/ Secy/File no.27/852/2022

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