

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO. 950 OF 2012

M/s Aarts Module International Pvt. Ltd.

and Anr.

.. Petitioners

V/s.

Mumbai Building Repairs and Reconstruction

Board & Ors.

.. Respondents

...

Mr. Sanjay Kadam with Ms. Aieksha Sharma i/b. Kadam & Co. for the petitioners.

Ms. P. D. Ankalesaria, Senior Advocate with Ms. Aparna Murlidharan for the respondent – MHADA.

Ms. T.H. Puranik for the respondent – BMC.

Mr. G.W. Mattos, A.G.P for respondent no.4 – State.

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**CORAM: MOHIT S. SHAH, C.J. &
A.K MENON, J.**

DATE : 22 JUNE 2015.

ORAL JUDGMENT (Per Chief Justice)

Rule, returnable forthwith.

Learned counsel for the respective respondents waive service.

Heard finally by consent of parties.

This petition is one of the several petitions in a group of writ petitions which challenges clause 4 of Appendix III of Regulation 33(7) of the Development Control Regulations for Greater Mumbai, 1991.

2. All the contentions raised in this petition, except one, have been dealt with and rejected by this Court in the judgment dated 7 May 2015 in Writ Petition No.2359 of 2011 (M/s.J. Gala Builders and anr. v. Mumbai Building Repairs and Reconstruction Board & Ors.)

3. The only contention, which now remains, is the petitioners' alternative contention that even if clause 4 of Appendix III to the above DCR is valid, they are not liable to surrender 907.03 sq.mtrs. as per condition no.12 in the NOC dated 19 December 2003 of respondent no.1 Board and that the surplus to be surrendered would be 907.03 sq. mtrs. minus 636.37 sq. mtrs. of Municipal market area.

4. The land being C.S. no.1/104 of Dadar Naigaum Division, Ward no.FS-522(7), building no.91-91(D), admeasuring 1764 sq. yards i.e. 1474.92 sq. mtrs., situated at Naigaum Cross Road, Dadar (East), Mumbai—400 014, was reserved in the development plan for a Municipal market. There was an existing building on the said land.

5. It needs to be noted that the petitioners' land was under buildable reservation for a municipal market and as far back as in 1981 the petitioners obtained the permission dated 18 February 1981 of the Municipal Corporation for constructing a municipal market of 636.37 sq.mtrs. on the ground floor to be placed at the disposal of the Municipal Corporation free of cost and on rent free basis subject to the following conditions:

- “1) Adequate parking including loading, unloading for the Market is provided;*
- 2) Adequate number of water closets, urinals, wash basins and washing place 6'-0" x 6'-0" is provided for the Market;*
- 3) The upper floor may be allowed for Departmental Stores;*
- 4) The remaining area to be used for Housing only;*
- 5) The whole Market area except one side open space given to the Municipal Corporation;*
- (6) **The Market area on ground floor will be excluded from the F.S.I.** and will have to be placed at the disposal of the Corporation free of cost, on rent free basis, after executing the necessary agreement in respect thereof.”*

(Emphasis supplied)

6. The petitioners applied for building permission for construction of a building above the Municipal market. For this purpose, the petitioners applied to respondent no.1 Board for their NOC. Respondent no.1 Board issued NOC dated 1 September 1991 for construction with FSI of 2.0. Thereafter, upon revision of the permissible FSI under DCR 33(7), the petitioners applied to respondent no.1 for revised NOC. Accordingly, respondent no.1 issued revised NOC dated 19 December 2003 granting higher FSI of 2.5 (excluding the built-up area for the Municipal market) and with condition no.12, which reads as under:

“12) You will have to surrender a surplus built up area admeasuring 907.03 sq.mtrs. (approx.) as per IIIrd Schedule of MHADA Act, 1976. However the exact surplus built up area shall be communicated to you after you submit to this office the plans of proposed building with permissible FSI duly approved by MCGM. The said surplus area requires to be surrendered to the Board will have to be made available to the Board at an amount as may be decided by the Board.”

7. Particulars of the total permissible built-up area (excluding the market area of 636.37 sq. mtrs. on the ground floor) and the built-up area required for rehabilitation component and the resultant balance built-up area or surplus built-up area, the built-up area required to be surrendered to respondent no.1 Board under the aforesaid clause 4 of DCR 33(7) are as under:

Writ Petition Number / Date of NOC and FSI granted	Total Permissible Built up Area in sq.mt.	BUA required to rehabilitate existing tenants in sq.mt.	Surplus Built up Area Col.1-Col.2 (% of Col.1)	BUA Area required to be surrendered to MHADA in sq.mt.	Sale BUA available to Developer in sq.mt.
	1	2	3	4	5
Aarts Module International Pvt. Ltd. Writ petition no.950/2012 1. NOC issued on 01.09.1991 (with FSI 2.00) 2. Revised NOC issued on 19.12.2003 (with FSI 2.5)	3493.99 (100%)	470.56 (13.47%)	3023.43 (86.53%)	907.02 (30% of surplus)	2116.41 (70% of surplus)

8. These calculations are made on the basis of the then prevailing DCR 33(7) read with Third Schedule to the Maharashtra Housing and Area Development Act, 1976 (MHADA Act). The relevant clause of DCR 33(7) at the relevant time read as under:

“33(7) Reconstruction or redevelopment of cessed buildings in the Island City by Co-operative Housing Societies or of old buildings belonging to the Corporation or of old buildings belonging to the Police Department:-

For reconstruction/redevelopment to be undertaken by Co-operative Housing Societies of existing tenants or by Co-op. Housing Societies of Landlords and/or Occupiers of cessed buildings existing prior to 30th September 1969 in Island City which attracts the provisions of MHADA Act, 1976 and for reconstruction/redevelopment of the buildings of Corporation, the Floor Space Index shall be 2.50 on the gross plot area or the FSI required for rehabilitation of existing tenants plus incentive FSI as specified in Appendix-III whichever is more.”

Clause 4 of Appendix III to DCR 33(7) reads thus:

“4. The tenements in the reconstructed building shall be allotted by the landlord/occupants co-operative housing society to the occupiers as per the list certified by the Mumbai Repairs and Reconstruction Board.

The prescribed percentage of the surplus built-up area as provided in the Table in the Third Schedule of the Maharashtra Housing and Area development Act, 1976 shall be made available to the Mumbai Repairs and Reconstruction Board for accommodating the occupants in transit camps or cessed building which cannot be constructed, on payment of an amount as may be prescribed under MHADA Act, 1976.”

(Emphasis supplied)

Third Schedule to the MHADA Act reads thus:

THIRD SCHEDULE
[SEE SECTION 103-I(3)]
SCALE SHOWING THE PERCENTAGE OF BUILT-UP AREA TO BE RESERVED BY THE CO-OPERATIVE SOCIETY FOR ALLOTMENT BY THE BOARD

In building reconstructed for Mixed i.e. residential and commercial		In building reconstructed for residential use	
Surplus area (1)	Built-up Area to be Reserved (2)	Surplus area (3)	Built-up area to be reserved (4)
Upto 40 per cent.	Nil	Upto 50 per cent.	Nil
Upto 45 per cent.	5 per cent	Upto 55 per cent.	5 per cent.
Upto 55 per cent.	10 per cent.	Upto 65 per cent.	10 per cent.
Upto 60 per cent.	15 per cent.	Upto 70 per cent.	15 per cent.
Upto 65 per cent.	20 per cent.	Upto 75 per cent.	20 per cent.
Upto 70 per cent.	25 per cent.	Upto 80 per cent.	25 per cent.
Upto 80 per cent.	30 per cent.	Upto 90 per cent.	30 per cent.
Upto 85 per cent.	35 per cent.	Upto 95 per cent.	35 per cent.
Upto 90 per cent.	40 per cent.	Above 95 per cent.	40 per cent.
Above 90 per cent.	50 per cent.		

(Emphasis supplied)

9. Since the surplus built-up area as per the petitioners' plans for total built-up area above ground floor was 3493.99 (excluding the Municipal market area on the ground floor) and the built-up area required for rehabilitation component is 470.56 sq. mtrs. (13.47%), the surplus built-up area works out to 86.53% i.e. upto 90% and, therefore, as per the above formula contained in the Third Schedule to the MHADA Act, the

petitioners were subjected to condition no.12 in the NOC dated 19 December 2003 that the petitioners shall have to surrender 30% of the surplus area which works out to 907.02 sq. mtrs., leaving the balance of 70% surplus area i.e. 2116.41 sq. mtrs. available to the petitioners for free sale in the open market.

10. The learned counsel for the petitioners submits that requiring the petitioners to surrender such a large area to respondent no.1 Board would make the project very expensive and unaffordable.

11. To the above argument, Ms Ankalesaria, learned counsel for respondent no.1 Board submits that the petitioners' argument is misleading because the cost of construction may be Rs.2,500/- per sq. ft., but the price which the petitioners would fetch on sale in the open market would be Rs.25,000/- per sq. ft. Learned counsel submits that it was open to the petitioners not to take advantage of higher FSI of 2.5 and to avail of the ordinarily permissible FSI of 1.33 in which case the petitioners would not have been required to surrender any portion of the surplus area, but by availing the higher FSI of 2.5, the petitioners earned an advantage by selling 2116.41 sq. mtrs. of built-up area in the open market, which receipts are far in excess of the cost of the entire project.

12. The petitioners thus got the advantage of having land with buildable reservation released from reservation on agreeing to construct Municipal market with the built-up area of 636.37 sq. mtrs. on the ground

floor free of cost to the Municipal Corporation with a condition that the said market area will be excluded from the FSI. The petitioners also got the benefit of higher FSI of 2.5 under DCR 33(7) as against the ordinarily permissible FSI of 1.33. While calculating the 2.5 FSI built-up area under the NOC dated 19 December 2003 with FSI of 2.5, the market area on the ground floor has been excluded from FSI and, therefore, the petitioners have not suffered any detriment but have obtained the advantage of DCR 33(7) with full FSI of 2.5.

13. In the above factual background, particularly the petitioners having accepted the NOC dated 19 December 2003 with all its conditions including the above quoted condition No.12, without any demur, it is not open to the petitioners to challenge in the year 2012, the above condition in the NOC dated 19 December 2003 or to contend that the Municipal market area constructed under the Municipal permission of 1981 should be deducted from 903.03 sq.mts. of surplus built-up area, which is required to be surrendered under clause 4 of Appendix III to DCR 33(7).

14. Learned counsel for the petitioners submits that the Municipal market area constructed by the petitioners should be treated as the area constructed under clause 7 of Appendix III to DCR 33(7) and, therefore, the same should be adjusted against the surplus area required to be surrendered under clause 4 of Appendix III to DCR 33(7). The said clauses read as under:

“4. The tenements in the reconstructed building shall be allotted by the landlord/occupants co-operative housing society to the occupiers as per the list certified by the Mumbai Repairs and Reconstruction Board.

The prescribed percentage of the surplus built-up area as provided in the Table in the Third Schedule of the Maharashtra Housing and Area development Act, 1976 shall be made available to the Mumbai Repairs and Reconstruction Board for accommodating the occupants in transit camps or cessed building which cannot be constructed, on payment of an amount as may be prescribed under MHADA Act, 1976.”

(Emphasis supplied)

“7. Construction or reconstruction of old building falling under reservation/zones contemplated in the development plan shall be permitted in accordance with the provision of notification No.TPB 4392/4080/RDP/UD-11 dated 3 June 1992 issued under Section 31 of the MR & TP Act.

(a) to (c)

(d) For other buildable reservations on lands where guidelines approved by Government under Section 31 of the Maharashtra Regional and Town Planning Act are not available, built-up area equal to not more than 15 per cent area of the entire plot or 25 percent of the area under reservation in that plot, whichever is less, shall be made available free of cost for the municipal corporation or for any other appropriate Authority.

(e) and (f)”

15. In our view, the petitioners having obtained the Municipal permission in the year 1981, it cannot be said that the petitioners' case falls under clause 7 of Appendix III to DCR 33(7), which DCR first came into force in the year 1991, but assuming that it can be considered as falling under clause 7 of Appendix III to DCR 33(7), clauses 4 and 7 are independent clauses in Appendix III to DCR 33(7). As already discussed above, a person providing cost free construction on a plot with buildable reservation meets with the obligation of reservation without losing any part of permissible FSI and, therefore, does not suffer any detriment. That is how the petitioners also did not suffer any detriment as they got full FSI of 2.5, i.e. built-up area of 3493.99 sq.mtrs. over and above the Municipal market area of 636.37 sq.mtrs. constructed by the petitioners and handed over to the Corporation free of cost in the year 2007.

16. In view of the above, we do not find any merit in any of the contentions raised in the petition. The petition is, therefore, dismissed. Rule is discharged. The interim relief granted earlier is vacated.

17. At this stage, learned counsel for the petitioners prays for continuation of the interim relief which was granted on 3 September 2012 and 10 September 2012 and is continuing till today. The learned counsel for the petitioners also invites our attention to the averments made by the petitioners on oath in the affidavit dated 6 May 2015 that the petitioners continue to be in possession of the surplus area of 907.02 sq.mtrs. and that no third party rights have been created by the petitioners in respect of any of the alleged surplus tenements.

18. In the facts and circumstances of the case, the interim relief shall continue till 20 July 2015. We make it clear that we are continuing the interim relief in view of the above averments in the petitioners' affidavit dated 6 May 2015.

CHIEF JUSTICE

(A.K. MENON, J.)