

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3632 OF 2016

M/s. Mayuresh Real Estate &
Management Pvt. Ltd Another.

..Petitioners.

Versus

CIDCO and Others.

..Respondents.

Mr. Atul Rajadhyaksha, Senior Advocate with Mr. Nishant Tripathi i/b
M. Tripathi & Co., for the Petitioner.

Mr. A. M. Kulkarni with Mr. Akshay Shinde for Respondent No. 1 and 2.

Mr. S. V. Marne for Respondent No. 3 and 4.

Mrs. S. V. Deshmukh for Respondent No. 6.

Coram : RANJIT MORE &
SMT. ANUJA PRABHUDESSAI, JJ.

Date : **October 20, 2016.**

P. C. :

1. Heard Mr. Rajadhyaksha, the learned Senior Counsel appearing for the Petitioner, Mr. Kulkarni, the learned Counsel appearing for the Respondent-CIDCO, Mr. Marne, the learned Counsel appearing for the Respondent-Navi Mumbai Municipal Corporation [for short "NMMC"] and Mrs. Deshmukh, the learned Counsel appearing for the Respondent-Maharashtra Coastal Zone Management Authority [for short "MCZMA"].

2. By this petition filed under Article 226 of the Constitution of India, the Petitioner is seeking following reliefs :

- a) That this Hon'ble Court may be pleased to declare that :
 - (i) as inordinate period of a decade has lapsed since the 1st Respondents allotted the said plots and yet CRZ clearance has remained only a pipe dream, they (the Petitioners) are now entitled to and the 1st Respondents are liable to swap Plot Nos. 75 and 76 for any other vacant plots of approximately the same area (especially Plot Nos. 12, 13 and 14) lying, being and situate at Sector – 15, CBD Belapur, Navi Mumbai.
 - (ii) being the owners and developers of the new town of Navi Mumbai, the 1st Respondents are legally obligated to obtain CRZ clearance vis-a-vis plot Nos. 75 and 76, Sector – 15, CBD Belapur, Navi Mumbai; and
 - (iii) the 1st Respondents are liable to grant and the Petitioners are entitled to get a period of five (5) years for carrying out constructions on plot Nos. 75 & 76, Sector 15, CBD Belapur, Navi Mumbai from the date of the issuance of CRZ clearance without charging any additional premium or penalty.
- b) This Hon'ble Court may be pleased to issue writ of mandamus or a writ in the nature of mandamus or any other writ, order, or direction, directing the 1st Respondents to :
 - (i) swap plot Nos. 75 & 76 with some other plots of approximately identical area (preferably plot Nos. 12, 13 and 14) located in Sector – 15 of CBD-Belapur Node of Navi Mumbai.
 - (ii) In the alternative immediately obtain the CRZ clearance as mandated by Para 4(i.d) read with Para-8 of the CRZ Notification, 2011 vis-a-vis plot Nos. 75 & 76 located in Sector -15, CBD-Belapur, Navi Mumbai; and
 - (iii) grant the Petitioners a period of five (5) years from the date of the execution of agreement to lease from the plots allotted to the Petitioner in the swapping in

terms of prayer clause (b-i) supra; alternatively from the date of the CRZ clearance (as and when issued) for carrying out the construction on Plot Nos.75 & 76, Sector-15 CBD-Belapur, Navi Mumbai without charging any additional lease premium.

- (iv) abstain from exercising the power of the termination of the agreement to lease in exercise of the powers under cl. (4) and (5)(b) thereof (i.e., of the agreement to lease) and from resuming plot Nos. 75 & 76, Sector-15, CBD-Belapur, Navi Mumbai, and/or from taking any coercive action/s against the Petitioners.
- (v) to issue such NOCs, certificates, letters, documents etc as might be required by the 3rd Respondents for granting the development permission, approving the plans and/or modified/amended plans, issuing commencement certificate and issuing occupancy certificate without charging any penalty or premium."

3. The petition was heard from time to time and during the pendency of the writ petition, pursuant to our query, the Respondent – CIDCO has placed on record minutes of the decision of the CIDCO dated 17th October 2016. In view of the said decision, Mr. Rajadhyaksha, the learned Senior Counsel appearing for the Petitioner restricts this writ petition to prayer clause (b)(iii), i.e., relief regarding the extension of period for completion of construction on the plot in question.

4. The brief facts which gave rise to the filing of present writ petition are as under :

. Through the process of public tender, the Respondent

CIDCO allotted on 20th April 2006 two plots of lands, namely, Plot Nos. 75 and 76, Sector -15, CBD-Belapur, Navi Mumbai to the Petitioner on payment of lease premium of Rs.26,44,25,110/-. On 17th August 2007, agreement to lease was executed by the CIDCO in favour of the Petitioner, leasing the aforesaid two plots. In terms of this agreement to lease, the Petitioners were required to complete construction on the said plots within 5 years from the date of said agreement to lease.

. On 5th March 2011, the Petitioner applied to the CIDCO to condone the delay for obtaining the development permission from NMMC as required under clause 3(d) of the said agreement to lease. CIDCO granted delay condonation subject to charges of Rs.5,000/- per plot vide their letter dated 12th May 2011. The Petitioner was initially told by NMMC that the said plots are affected by the CRZ-II notification and therefore unless and until they obtain clearance from MCZMA, application for development permission cannot be processed. The Petitioner thereafter approached MCZMA, however, he was told that the proposal should be mooted through NMMC. At one stage, it was the stand of the NMMC that the proposal should be mooted through CIDCO. The fact remains that the Petitioner's proposal for development permission is not processed by the NMMC for want of clearance from MCZMA and these circumstances constrained the

Petitioner to approach this Court for the reliefs mentioned hereinabove.

5. As stated above, during the pendency of the writ petition, the CIDCO has taken a decision dated 17th October 2016 and copy of which is placed on record. By this decision, the CIDCO has decided to condone and exclude the period between 5th March 2011 and 28th May 2017, i.e., from the date of application till the date on which MCZMA would grant permission, from the construction period of 5 years. Thus, CIDCO acknowledged that the Petitioner was made to run from pillar to post during the period between 5th March 2011 till date, for the purpose of obtaining clearance from MCZMA. CIDCO also acknowledged that even if on the date of said decision, the Petitioner applies to the MCZMA, it will take 6 months period for MCZMA to consider the Petitioner's application for clearance and therefore this period is excluded from the period of 5 years in which the Petitioner was obliged to complete the construction.

6. Mr. Rajadhyaksha, the learned Senior Counsel appearing for the Petitioner submitted that the plots were indeed affected by the CRZ notification and the CIDCO was very much aware about it and yet

no mention of the same was made in the scheme booklet that subject plots are falling under CRZ-II area. He submitted that the Petitioner could not have commenced construction even in the year 2007 in the absence of clearance from MCZMA and construction undertaken without clearance would have been illegal. He submitted that in these facts and circumstances, the period of 5 years to complete construction must be reckoned from the date of grant of permission by the MCZMA and accordingly suitable orders may be passed.

7. Mr. Kulkarni, the learned Counsel appearing for the CIDCO submitted that though the agreement to lease was executed in Petitioner's favour on 17th August 2007, the Petitioner did not apply for the development permission till 5th March 2011. He submitted that it was not the case of the Petitioner that he could not apply for want of clearance from MCZMA, on the contrary the stand of the Petitioner was that because of financial constraints, he did not apply for the building permission. Mr. Kulkarni further submitted that had the Petitioner applied for development permission in the year 2007, his application would have been processed and development permission would have been granted by the MCZMA because at that time NMMC was not aware that the said plots were affected by CRZ. Mr. Kulkarni

states that CIDCO considered case of the Petitioner sympathetically and excluded the period of 16 months, i.e., between 5th March 2011 and 16th August 2012 from the construction period of 5 years that was granted to the Petitioner to complete construction. He submitted that if the Petitioner wants extension of time to complete construction, he has to pay additional lease premium @5% for the first year, @10% for the second year, @15% for the third year and so on. Mr. Kulkarni lastly submitted that there being contractual obligation between the Petitioner and the Respondent-CIDCO, this Court is not expected to entertain the writ petition in exercise of jurisdiction under Article 226 of the Constitution of India. To substantiate his argument, he lastly relied upon decision of the Apex Court in Gujarat Maritime Board v. L&T Infrastructure [2016 SCC Online SC 1005].

8. Having heard learned Counsel appearing for the Petitioner and the learned Counsel appearing for the Respondent-CIDCO as well as the Respondent-MCZMA and having considered the rival submissions and having gone through copy of the writ petition as well as decision taken by the CIDCO on 17th October 2016, we are of the considered opinion that the period for completion of construction is required to be extended by at least three years from the date of

clearance from MCZMA, without payment of any additional lease premium for the reasons stated hereinbelow.

9. It is not in dispute that as per agreement of lease, the Petitioner was required to complete construction on the subject plots within the period 5 years from 17th August 2007. It is also not in dispute that the subject plots were affected by the CRZ-II notification and CIDCO was very much aware about the same. And further it is not in dispute that CIDCO did not mention this fact in the scheme booklet or tender documents. Had the Petitioner been informed by CIDCO that subject plots were affected by CRZ-II notification, the Petitioner probably would not have participated in the tender process of the said plots. The correspondence made by NMMC with the Ministry of Environment and Forest, Government of India also shows that the CIDCO was aware that the said plots are affected by CRZ notification. As stated above, in the year 2011, the Petitioner applied for the development permission however at that time since NMMC was aware about the fact that said plots were affected by the CRZ-II notification, the Petitioner's application to process the development permission was not processed and the Petitioner was made to run from pillar to post.

10. It is worth to mention at this stage that along with the Petitioner, one M/s. N. G. Group was also allotted Plot No.77 for lease premium of Rs.8,44,44,000/- and agreement to lease was executed on 22nd November 2006. The said N.G. Group obtained development permission from NMMC on 12th October 2007 and completed the construction within the stipulated time. However, the fact remains that the said N.G.Group has not got any occupation certificate for building constructed on plot No. 77.

11. These facts shows that even if the Petitioner had obtained development permission from NMMC in the year 2007 and completed construction in the stipulated time, in the absence of clearance from MCZMA, the occupation certificate could not have been granted by the NMMC. At this stage, it is also pertinent to note that the stand of the Ministry of Environment and Forest that clearance from MCZMA in respect of plots affected by CRZ is required to be taken prior to commencement of development permission and the said clearance cannot be given ex-post facto.

12. As stated earlier, the CIDCO has shown willingness to

condone and exclude the period of 16 months [i.e., from 5th March 2011 to 17th August 2012] from the construction period of 5 years, the CIDCO however is not willing to condone and exclude the period of three years 6 months and 17 days, i.e., period between the date of execution of agreement to lease and the date of application for development permission. The stand of the CIDCO is that the Petitioner has allowed to lapse this period and therefore cannot be condoned and excluded from the total construction period of 5 years. The stand of the Petitioner is that CIDCO is equally responsible as they have not disclosed that the said plots are affected by CRZ-II notification. Thus, we find that the Petitioner as well as CIDCO is responsible for the lapse of this period. In the circumstances, we are inclined to give benefit of 50% of the period for the purpose of condonation and exclusion from the construction period of 5 years over and above the period which has already been condoned and excluded by the CIDCO. Thus, the Petitioner is entitled for the extension of the period 37 months for completion of construction from the date of grant of clearance by MCZMA. Mrs. Deshmukh, the learned Counsel appearing for MCZMA at this stage submitted that the Petitioner's application would be processed and appropriate decision would be taken within the period of 6 months from the date of receipt

of the same. Statement is accepted.

. In view of our conclusion, the decision relied upon by Mr. Kulkarni in the *Gujarat Maritime Board (supra)* is not applicable to the facts and circumstances of the present case.

13. It is made clear that the aforesaid period is extended in the peculiar facts and circumstances of the case and this order shall not be treated as precedent. In above circumstances, the petition is disposed of by passing following order

∴ ORDER ∴

[1] Petition is partly allowed.

[2] We direct CIDCO to grant extension of 37 months to the Petitioner for completion of construction on the subject plots from the date of communication of grant of clearance by MCZMA, without charging additional lease premium.

14. Mr. Kulkarni, at this stage seeks stay of this order. Request is opposed by the learned Senior Counsel appearing for the Petitioner. Since by this order we have only extended the period to

complete construction, we do not find any justification in the request and the same is rejected.

[SMT. ANUJA PRABHUDESSAI, J.]

[RANJIT MORE, J.]