

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

REVIEW PETITION NO. 114 OF 2015

IN

WRIT PETITION NO. 4172 OF 2010

WITH

CIVIL APPLICATION NO. 400 OF 2013

**Assistant Director, Town
Planning Authority & anr.**

..Petitioners

Vs.

Shrikant Hiralal Soni & anr.

..Respondents

Mr. R.S. Apte, Senior Counsel i/b. Mr. V.P. Patankar, for the Petitioners.

Mr. G.S. Godbole i/b. Mr. N.V. Kalantri, for the Respondent No. 1.

Mr. O.M. Kulkarni, AGP for State.

**CORAM :RANJIT MORE &
SMT.SADHANA S. JADHAV,JJ
DATE : AUGUST 10, 2017**

P.C.

1 Heard Shri Apte, learned Senior Counsel for the applicant, Shri Godbole, learned Counsel for the Respondent No. 1 and AGP for State.

2 By this Petition, the Petitioner is seeking review and recall of the order dated 20/7/2011 passed in the above Writ Petition No. 4172 of 2010.

3 The Writ Petition No. 4172 of 2010 was filed by the Respondent No. 1 for following reliefs :

“(b) By way of appropriate writ, be please to quash and set aside

the impugned order dated 23/4/2010 passed by the respondent No. 2 corporation bearing outward no./NRV/VS/Panchvati/-85/2010 and allow the representation filed by the petitioners for claiming additional further TDR.

(c) Be pleased to declare by way of any suitable writ order or direction that the petitioner is entitled for further additional 100% extra TDR to the extent of whole of the surface area of the road i.e. the amenity developed/constructed by the petitioner at his own cost and surrendered to the respondent corporation free of costs under the Development Control Regulations of the respondent Corporation r/w. Relevant provisions of the MRTP Act, 1966, especially in view of the judgment of the Hon. Supreme Court delivered in the case of *Godrej and boyce manufacturing co. ltd. V/s. State of Maharashtra* reported in *2009-SCC-5-24, 2009-BCR-3-187* and accordingly the respondents be directed to grant the same to the petitioner.”

4 The Respondent No. 1/original Petitioner while arguing the Writ Petition heavily relied on the decision in the case of **Godrej and Boyce Manufacturing Co. Ltd. v/s. State of Maharashtra** reported in **2009 SCC (5) 24** to contend that he is entitled for 100% amenity T.D.R. The Petitioner also relied upon the clause No. 6 of the D.C. Rule of Nashik Municipal Corporation, copy of which was annexed at Exh. E at page 61. The Division Bench considered the said D.C. Rule annexed to the Petition at Exh. E and the Judgment of the Apex Court in the case of **Godrej and Boyce(supra)** and

allowed the Petition in terms of prayer clauses (b) and (c).

5 The present Review Petition is filed pointing out that the copy of the D.C.Rule annexed with Petition and relied upon by this Court while disposing of the Writ Petition is from the private publication and not government notification. It is pointed out that the clause 6 of the D.C. Rule is incomplete in the private publication. In the Review Petition, correct copy of the said D.C. Rule is annexed at page 25.

6 Shri Apte, learned Senior Counsel for the Petitioner in Review Petition took us through clause 6 of the said D.C. Rule relied upon by the Respondent/original Petitioner and correct clause 6 of the said D.C. Rule and pointed out that the amenities T.D.R can be given as may be decided by the Government depending upon the type/category of the reservation or amenity. Mr. Apte, learned Senior Counsel also submitted that the wording in the D.C. Rule applicable to the Bombay Municipal Corporation is altogether different and therefore, the decision in the **Godrej and Boyce (Supra)** could not have been made applicable.

7 Shri Godbole, learned Counsel for the Respondent No. 1 does not dispute the copy of clause 6 of the D.C. Rule, annexed to the Petition is not correct. He however, submitted that in view of the subsequent notification of

the Government dated 28/1/2016 under section 37(1)(cc)(g) exercise in deciding the review petition would be futile, and therefore, no interference is required.

7 The order of the Division Bench is sought to be challenged by the Petitioner by filing Special Leave Petition before the Apex Court. However, SLP was withdrawn with permission to file Petition to review the said order and in pursuant to this order, present review petition is filed.

8 We have gone through the original prayers of the Respondent/original Petitioner as well as the order which is sought to be recalled. The prayer itself shows that respondent claimed amenities TDR as per the decision in the case of **Godrej and Boyce (supra)**. Perusal of the decision of this Court dated 20/7/2011 makes it abundantly clear that the same is based on the decision of the Apex Court in **Godrej and Boyce (Supra)**.

9 Admittedly, the Apex Court in **Godrej & Boyce** has considered the D.C. Rule as applicable to the Municipal Corporation of Greater Bombay in respect of the amenities T.D.R. Both the learned Counsel appearing for the respective parties does not dispute that the D.C. Rules regarding amenity T.D.R. are not identical so far as the Bombay Municipal Corporation and

Nashik Municipal Corporation is concerned.

10 Be that as it may. The rule as applicable to the Nashik Municipal Corporation initially relied upon by the Petitioner reads as follows :

“When the owner also develops/constructs the amenity on the surrendered plot at his cost, subjects to such stipulation as may be prescribed by the commissioner/Appropriate Authority, as the case may be, to their satisfaction and hands over the said developed/constructed amenity, to the Corporation/Appropriate Authority free cost, he may be granted further DR by the commissioner. This DR shall be in the form of F.S.I. As per the regulations given below. The owner who desires to use FSI credit of the constructed amenities, shall attach documents of valid permission and completion.”

As stated above, it is a incomplete clause and copy of correct clause No. 6 is annexed at page 26 which reads as follows :

“6. When the owner also develops/constructs the amenity on the surrendered plot at his cost, subject to such stipulations, as may be prescribed by the Commissioner/Appropriate Authority, as the case may be, to their satisfaction and hands over the said developed/constructed amenity, to the Corporation/Appropriate Authority free of cost, he may be granted further DR by the Commissioner. **This DR shall be in the form of F.S.I. as may be decided by Government depending upon the type/category of the reservation or amenity.** He shall use such F.S.I. as per the

regulations given below. The owner who desires to use FSI credit of the constructed amenities, shall attach documents of valid permission and completion.”

Reading of the above two clauses makes it clear that the words “as may be decided by Government depending upon the type/category of the reservation or amenity” are missing in the clause (6) of the D.C. Rule relied upon by the Respondent/original Petitioner.

11 If the correct D.C. Rule regarding amenities TDR is taken into consideration then, it is clear that the Respondent/original Petitioner is entitled to amenities TDR, as may be decided by the Government depending upon the type/category of the reservation or amenity. The Respondent/original Petitioner as a matter of right cannot claim 100% amenity T.D.R relying upon the decision of the Apex Court in the case of **Godrej and Boyce(Supra)**.

12 Shri Godbole has relied upon the notification dated 28/1/2016 issued by the Government under section 37(1CC)(g) to contend that this Court should not review the order dated 20/7/2011. We are unable to accept the submission made by Shri Godbole, learned Counsel for the Respondent/Original Petitioner. Firstly because the issue regarding applicability of the said notification requires to be decided and secondly even,

if it is held that it is applicable, entitlement of the Respondent/original Petitioner is required to be decided in accordance with the formula given in clause 4. In our considered opinion this exercise can be done by the regular court. The order dated 20/7/2011 is required to be recalled as much as, the same is based on the decision of the Apex Court in the case of **Gordrej and Boyce(Supra)** which is not applicable to the present facts and circumstances of the case. Thus, we find that the error apparent on the face of the record has occurred while passing the order dated 20/7/2011 and the same deserves to be recalled. Review Petition is accordingly allowed. The order dated 20/7/2011 is recalled. The Petition is restored to the file. The Registry is directed to place the Writ Petition No. 4172 of 2010 before the regular Court. All contentions are kept open.

14 In view of disposal of the Review Petition, nothing survives in the Civil Application. The same is disposed of accordingly.

[SMT.SADHANA S. JADHAV,J]

[RANJIT MORE, J]