

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.1353 OF 2016

Aarts Module International Private Limited and another... Petitioners

Vs.

Mumbai Building Repairs and Reconstruction Board
and others

... Respondents

Mr. Sanjay Kadam a/w. Ms Apeksha Sharma, Mr. Sanjeel Kadam and Ms Sayalee Rajurkar i/b. Kadam & Co. for Petitioners.

Mr. P. G. Lad a/w. Ms Aparna Murlidharan and Ms Sayli Apte for Respondents.

CORAM : R. G. KETKAR, J.

DATE : JULY 26, 2017

P.C. :

Heard Mr. Kadam, learned Counsel for petitioners and Mr. Lad, learned Counsel for respondents at length.

2. By this Petition under Article 226 of the Constitution of India, petitioners have challenged the - (i) letter dated 04.04.2016 at exhibit-G (pages 53-54) addressed by Chief Officer, Mumbai Building Repairs and Reconstruction Board (for short 'Board') to the petitioners; (ii) letter dated 22.04.2016 at exhibit-H (page 55) addressed by Executive Engineer of the Board to the petitioners; and (iii) letter dated 22.03.2017 at exhibit-K (page 59A) addressed by the Chief Officer of the Board to the petitioners. The petitioners have also prayed for writ of mandamus directing the respondents to compute surplus area to be surrendered by the petitioners to the respondents in accordance with the provisions of Section 103-I(3) of the Maharashtra Housing and Area Development Act, 1976 (for short 'Act').

3. In the year 2003, petitioner No.1 proposed to undertake redevelopment of the property bearing C.S. No.1/104 of Dadar Naigaon

Division situate at Naigaum Cross Road, Dadar (East), Mumbai (for short 'said land') under Regulation No.33(7) read with Appendix-III of the Development Control Regulations for Greater Mumbai (for short 'Regulations').

4. The said land was reserved in the development plan for a municipal market. There was an existing building on the said land. Board had issued NOC on 01.09.1991 for construction of FSI of 2.0. Upon revision of the permissible F.S.I under Regulation 33(7), Board had issued No Objection Certificate on 19.12.2003 for redevelopment of the said property with FSI 2.5 or the FSI required for rehabilitation of existing occupiers plus 50% incentive FSI, whichever is higher, in accordance with the modified Regulation 33(7) and Appendix-III subject to imposing terms and conditions. Condition No.12 required petitioners to surrender a surplus built up area admeasuring 907.03 sq.mtrs. (approx.) as per Third Schedule under Section 103-I(3) of the Act. It was further set out therein that the exact surplus built up area will be communicated to the petitioners after petitioners submit the plans of the proposed building with permissible FSI, duly approved by the Municipal Corporation of Greater Mumbai (for short 'Corporation'). The said surplus area is required to be surrendered to the Board at an amount as may be decided by the Board. In the year 2008, petitioners completed construction composite building "Sunshine Plaza" and earmarked tenements admeasuring 907.03 sq.mtrs on the second floor of the said building as surplus area tenements.

5. On 05.08.2008, Corporation issued Part Occupation Certificate for the entire second floor having tenements No.1 to 12 and 15 to 20 on the fourth floor being rehab and surplus area tenements. The petitioners had instituted Writ Petition No.950 of 2012 on the Original Side of this

Court. The matter was heard for 'admission' on 03.09.2012 and ad-interim order in terms of prayer clauses (c) and (e) was granted subject to the petitioners keeping the flats, referred in the statement filed and taken on record and marked "X" for identification and signed by the parties and their Advocates, vacant. The petitioners were also restrained from creating any rights whatsoever in respect of the said flats until further orders. On 06.05.2015, petitioners filed undertaking to the effect that they will not create third party rights in respect of the surplus area tenements until issue raised in the said Petition was decided. By order dated 22.06.2015, this Court (Coram: Mohit S. Shah, C.J. & A. K. Menon, J.) dismissed the Petition. The petitioners challenged that order by filing S.L.P. before the Apex Court. On 12.07.2016, the Apex Court dismissed the Petition and the Review Petition was also dismissed on 22.09.2016.

6. Board issued first impugned letter dated 04.04.2016 calling upon the petitioners to surrender 1209.38 sq.mtrs. surplus built up area instead of 907.02 sq.mtrs. This was followed by the second impugned letter dated 22.04.2016 issued by the Executive Engineer calling upon the petitioners to attend his office with all the necessary documents for surplus area and making the surplus area tenements in habitable conditions. The petitioners gave reply dated 27.04.2016 to the letter dated 04.04.2016 and also gave reply on 28.04.2016 to the second letter dated 22.04.2016. By letter dated 22.03.2017, Chief Officer of the Board has finally called upon the petitioners to surrender surplus built up area admeasuring 1209.38 sq.mtrs. to the Executive Engineer within 7 days, failing which action under relevant Section of Indian Penal Code, 1860 will be initiated against the petitioners. It was also mentioned in the said letter that no further correspondence in the matter will be entertained by his office. The petitioners have challenged these

communications in the present Petition. The petitioners have also prayed for directing the respondents to compute surplus area to be surrendered by them to the MHADA in accordance with Section 103-I(3) of the Act.

7. In support of this Petition, Mr. Kadam submitted that Section 103-I(3) lays down that the surplus area in a new building would be determined on the basis of FSI availed of while reconstructing the building and FSI that has been utilized in the construction of the old building. He submitted that the base / inherent FSI in the City of Mumbai is 1.33. The petitioners, as of right, are entitled to consume 1.33 FSI and while computing the surplus area, the base / inherent FSI of plot is required to be deducted from the total FSI availed for construction of a new building. The Board has however deducted only the FSI that is utilized for rehab purpose. The method adopted by Board while computing is not in conformity with Section 103-I(3) of the Act. He, therefore, submitted that if the formula laid down under Section 103-I(3) of the Act is correctly applied, petitioners will not be required to surrender any surplus area to MHADA. The petitioners will be liable to surrender 43.85% of surplus area, and in that case, petitioners will not be required to surrender any surplus area. He has given calculations of plot area, land under cessed structure, land under non-cessed structure, etc., which is to the following effect:

Sr. No.	Description	Area in Sq.Mtrs.
1	Plot Area Land under cessed structure: 1309.70 Land under non-cessesd structure: 165.22	1472.92
2	Base/Inherent FSI @ 1.33 (1472.92 x 1.33)	1961.64

3	FSI availed for redevelopment Land under cessed structure: $1309.70 \times 2.50 = 3274.25$ Land under non-cessed structure: $165.22 \times 1.33 = 219.74$	3493.99
4	Surplus area (3-2)	1532.35
5	% of surplus area	43.85%

8. Without prejudice to the above, he submitted that even if it is assumed that petitioners are liable to surrender surplus area, in any case, they were not liable to surrender 907.03 sq.mtrs as originally claimed or 1209.38 sq.mtrs as has been subsequently claimed. At the highest, assuming everything in favour of the respondents, petitioners are liable to surrender 841.11 sq.mtrs.

9. He submitted that perusal of the second impugned letter dated 04.04.2016 at exhibit-G (pages 53-54) shows that the Executive Engineer of MHADA inspected the site and prepared and submitted the site inspection report dated 14.04.2015. It was observed that the entire building has been converted by the petitioners for commercial use and no residential tenements were found to be allotted to the certified tenants / occupants by Board. In view thereof, petitioners were called upon to surrender 1209.38 sq.mtrs. surplus built up area instead of earlier communicated 907.02 sq.mtrs. He submitted that respondents were aware of mixed user by the petitioners, namely, commercial as also residential in April 2015 and still they did not make submission before this Court in Writ Petition No.950 of 2012 while deciding it on 22.06.2015 that petitioners are required to surrender 1209.38 sq.mtrs. instead of 907.02 sq.mtrs. He submitted that respondents, therefore, are now precluded from claiming surplus area to the extent of 1209.38 sq.mtrs. By conduct, principle of estoppel is applicable to the respondents. He, therefore, submitted that Petition requires

consideration.

10. On the other hand, Mr. Lad has supported the impugned letters. He has invited my attention to the affidavit dated 29.06.2017 of Sudhir Bhagwan Patil, Executive Engineer of Board. He submitted that earlier the petitioners were required to surrender surplus area of 907.03 sq.mtrs. on the premise that they will be using the building for residential purpose. Accordingly, as per IIIrd Schedule, under Section 103-I(3) as the surplus built up area was 3023.43 sq.mtrs. (86.53%), which was upto 90%, petitioners were called upon to reserve 30% of 3023.43 sq.mtrs., which worked out to 907.02 sq.mtrs. He submitted that admittedly, the building reconstructed by the petitioners is used for mixed user i.e. residential and commercial and in view thereof, petitioners are required to surrender 40% of surplus built up area of 3023.43 sq.mtrs., which now comes to 1209.38 sq.mtrs. He has invited my attention to the IIIrd Schedule under Section 103-I(3) of the Act. He submitted that the submission of the petitioners that respondents are precluded from claiming surplus area of 1209.38 and that they are estopped from claiming this area is wholly misconceived as no estoppel can operate against the Statute.

11. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the land bearing C.S. No.1/104 of Dadar Naigaum Division admeasuring 1764 square yards, which is equivalent to 1474.92 sq.mtrs. situate 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. The petitioners land was under buildable reservation for a municipal market, which is also known as accommodation reservation. The petitioners had obtained

permission dated 18.02.1981 from the Corporation for constructing the 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.”

12. The petitioners applied for building permission for construction of a building above the municipal market and for that purpose, applied to Board for the NOC. Board had issued NOC on 01.09.1991 for construction with FSI of 2.0. Upon revision of the permissible FSI under Regulation 33(7), Board had issued NOC on 19.12.2003 granting higher FSI of 2.5 (excluding the built up area for the municipal market) and imposing conditions. Condition No.12 is to the following effect:

- “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.”

13. Section 103-I deals with restriction of new building by co-operative society. Sub-section (3) thereof reads thus,

“(3) The co-operative society shall, notwithstanding anything contained in any other law, reserve and allot, in the new building such percentage as is specified in the Third Schedule to this Act of the surplus area in the new building determined on the basis of the difference between the floor space index availed of by it while reconstructing the building and the floor space index that had been utilised in the construction of the old building, for housing such dishoused occupier from other cessed demolished buildings as may be nominated by the Board and upon such nominations, the nominated occupiers shall be accepted by the cooperative society as its members in accordance with its bye-laws, and shall not dispose of tenements covered by such reserved surplus area to others. If any tenements are rendered surplus because of any of the occupiers in the old building not joining the co-operative society the percentage as is specified in the Third Schedule to this Act of the surplus area to be made available to the Board in the new building for allotment to other dishoused occupier shall be determined on the basis of the difference between the total floor area constructed in the new building and the area to be occupied therein by the participating occupiers in the old building. Such surplus tenement to be allotted to dishoused occupiers from the other cessed buildings which are demolished and who are nominated by the Board shall be allotted to them by the co-operative society after receiving from them such amount as may be determined by the State Government.”

14. A perusal of Section 103-I(3) shows that notwithstanding anything contained in any other law, the society has to reserve and allot, in the new building such percentage as is specified in the Third Schedule of the Act of the surplus area in the new building on the basis of determination specified therein. Third Schedule under Section 103-I(3) reads thus,

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

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

15. A perusal of Third Schedule, extracted hereinabove, shows that the percentage of surplus area to be surrendered to the Board depends upon the user of the building. Initially when the respondents called upon the petitioners to surrender 907.02 sq.mtrs., it was based on the premise that petitioners will be using the building for residential use. As the surplus built-up area was 86.53% (i.e. to say upto 90%) accordingly 30% of 3023.43 sq.mtrs. equal to 907.02 sq.mtrs. was required to be surrendered. It is not now in dispute that petitioners have put the building for mixed user i.e. residential and commercial. The petitioners will, therefore, have to surrender 40% of 3023.43 sq.mtrs. as the surplus built up area is 86.53% (which is upto 90%). That apart, Condition No. 12 in revised NOC dated 19th Deceased, 2003 provided that the petitioners will have to surrender surplus built up area admeasuring 907.03 square meters [approximately] as per IIIrd Schedule of MHADA Act, 1976. However, the exact surplus built up area shall be communicated to the petitioners after submission of the plans of the proposed building with permissible FSI duly approved by MCGM. The said surplus area will have to be surrendered to the Board and it will be

available to the Board at an amount as may be decided by the Board. In view thereof, I do not find that the Board committed any error in calling upon the petitioners to surrender 1209.38 sq.mtrs. surplus built up area instead of 907.02 sq.mtrs.

16. Mr. Kadam submitted that this point was available to the respondents when Writ Petition No.950 of 2012 was disposed of. I do not find any merit in this submission. The percentage of area required to be surrendered by the petitioners is regulated by Section 103-I(3) read with Third Schedule. Once it is not disputed that the building is used for mixed purpose i.e. commercial and residential, obviously, the percentage as applicable to the residential use cannot be made applicable and the same will be regulated by the percentage prescribed in respect of building constructed for mixed purpose i.e. commercial and residential. It is also not in dispute that the surplus built up area is 3023.43 sq.mtrs., which is 86.53% of the total permissible built up area of 3493.99 sq.mtrs. Accordingly, Board has called upon the petitioners to surrender 1209.38 sq.mtrs. Hence, no case is made out for interfering with the impugned letters. Petitions fails and the same is dismissed.

17. At this stage, Mr. Kadam orally applies for stay of this order for a period of four weeks from today. He assures that petitioners will not seek further extension of interim order.

18. In view thereof, notwithstanding dismissal of the Petition, this order shall remain stayed for a period of four weeks from today with express understanding that no further application for continuation of the ad-interim order shall be made and entertained by this Court. Order accordingly.

(R. G. KETKAR, J.)