Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2820 OF 2016

1. **REAL GEM BUILDTECH PRIVATE LIMITED,** a company incorporated under the provisions of the Companies Act of 1956, having its registered office at DB House, General A.K. Vaidya Marg, Goregaon (East), Mumbai – 400 063.]

2. **Jay Vinod Goenka**, of Mumbai adult Indian Inhabitant, Director of the Petitioner No.1 having his office at DB House, General A.K. Vaidya Marg, Goregaon (East), Mumbai – 400 063.] Petitioners

Versus

1. **STATE OF MAHARASHTRA** Through its Urban Development Department, Mantralaya, Mumbai.]

2. **MUNICIPAL CORPORATION OF GREATER MUMBAI**, through the Municipal Commissioner Head Office, Opp. Azad Maidan Mumbai – 400 001.] Respondents

Dr. Veerendra Tulzapurkar, Senior Counsel a/w Ms. Niyathi Kalra, Ms. Rujuta Patil i/b M/s. Negandhi Shah & Himayatullah for petitioner.
Mr. A.L. Patki, Addl. Govt. Pleader-State for respondent No.1.
Mr. J. Reis, Senior Counsel a/w Mr. Sagar Patil & Mr. Abhijit Joshi, for respondent No.2-M.C.G.M.

CORAM : B.R. GAVAI &
SANDEEP K. SHINDE, J.J.

DATE : 15TH NOVEMBER, 2017.

ORAL JUDGMENT: [Per B.R. Gavai, Judge]:

Rule. Rule made returnable forthwith. Heard by consent.

2. The petitioners have approached this Court for a declaration that imposition of development charges u/s 124A of the Maharashtra Regional & Town Planning Act, 1966 [hereinafter referred to as 'the said Act'.] from the petitioners in respect of additional Floor Space Index [for short "F.S.I"] availed under Regulation 33(24) and fungible F.S.I under Regulation 35(4) of the Development Control Regulations for Greater Mumbai, 1991 [hereinafter referred to as 'D.C.R'] on the same property is illegal and *ultra vires* of the said Act and the Constitution of India.

3. Facts in the present case which are not in dispute are as under:

Petitioners who are developers are developing freehold and leasehold plot admeasuring 24,809.76 square meters. The petitioners are also developing public parking lot as provided under Regulation 33(24) of D.C.R. In return of providing the said facility, petitioners are entitled to additional F.S.I under Regulation 33(24) of the D.C.R. Apart from that, the petitioners would be entitled to additional F.S.I called as fungible F.S.I under Regulation 35(4) of the said D.C.R. The petitioners are required to pay the development charges under the provisions of Section 124A of M.R.T.P Act. The petitioners are required to pay the development charges for the entire development that would be carried out by them. In addition, the petitioners are also required to pay premium on the additional F.S.I which is made available to them under D.C.R. 33(24) for the multi storied parking facility provided by them and for the fungible F.S.I which would be available to them under D.C.R. 35(4).

4. Dr. Tulzapurkar, learned Senior Counsel appearing on behalf of the petitioner submits that the purpose for which the levy is made u/s 124A, so also under regulation 33(24) and 35(4) r/w clause (m) of section 22 is the same. Dr. Tulzapurkar, learned senior Counsel submits that section 124A was brought into the Statute book by Maharashtra Act XVI of 1992, which came into effect from 10th August, 1992. He submits that, the Statement of Objects and Reasons of the said amending Act shows that legislative intent for bringing the said provision in the statute book was to levy development charge on the institution of use or change of use of any land, so that the funds are made available for the purpose of acquisition and development of any land reserved for any of the public purpose specified in any plan or scheme and for providing public amenities, in the area under the jurisdiction of the said Authority and maintenance thereof. He further submitted that clause (m) was added to section 22 of the said Act by way of amendment in the year 2010 so as to enable the Planning Authority to impose fees, charges and premium for grant of additional floor space index or for the special permissions. He

submits that the Statement of Objects and Reasons of the amending Act would reveal that a legislative intent of providing such a levy is also for collecting funds to be utilized for providing infrastructural facilities. Learned Counsel, therefore, submitted that since both these levies are levied for the same purpose, the same would amount to double taxation.

5. Dr. Tulzapurkar learned Senior Counsel submits that both the levies will have to be deposited in the development fund as provided u/s 124J of the said Act. Dr. Tulzapurkar learned Senior Counsel further submits that, both the levies are imposed by the same Authority i.e Planning Authority. Learned Senior Counsel would submit that when the levy is for the same purpose, by the same Authority and it goes in the same fund, it would amount to double taxation which is not permissible under the Constitutional Scheme. Dr. Tulzapurkar, learned Senior Counsel, therefore, submitted that the Petition deserves to be allowed and it is required to be held that levy of development charges u/s 124A, which is in addition to the levy of premium under Regulation 33(24) and 35(4) r/w Section 22(m) is not sustainable in law.

6. Dr. Tulzapurkar, learned Senior Counsel also relies on the judgment of the Hon'ble Apex Court in the cases of **Sri Krishna Das Vs. Town Area Committee, Chirgaon, reported in (1990) 3 Supreme Court Cases, 645** and **Shaktikumar M. Sancheti and another Vs. State of Maharashtra and others, (1995) 1 Supreme Court Cases 351**. Learned Senior Counsel fairly states that though in both the cases, levy is held to be not amounting to

double taxation, but it was so found, since the Authorities which were levying tax/fee were two different Authorities and not the same Authority. He, however, submits that principle of law as deduced in both the cases would clearly show that when the levy is by the same Authority for the same purpose and forms part of the same fund, such a levy would not be permissible in law. Learned Senior Counsel, therefore, submitted that since levy u/s 124A is for the same purpose for which levy under Regulation 33(24) and Regulation 35(4) r/w Section 22 (m) is provided, it would amount to double taxation and as such levy would be invalid in law.

7. Mr. Reis, learned Senior Counsel for respondent No.2 on the contrary submits that, levy u/s 124A is for the purpose of carrying out development activities. He further submits that levy under Regulation 33(24) r/w Section 22(m) of the said Act is on account of additional F.S.I that would be available to a person carrying out development on account of providing public parking facility. He further submits that, the premium which is required to be paid under regulation 35(4) r/w section 22(m) of the said Act, is on account of additional F.S.I that a developer would be entitled to use in addition to the regular F.S.I that he would be entitled to utilize. It is, therefore, submitted that all the levies are for different purposes and, therefore, cannot be construed to be a levy for the same purpose.

8. For appreciating rival submissions, it would be relevant to refer to the following provisions of the said Act;

“124A. Levy of Development Charge

> “(1)Subject to the provisions of this Act, the Planning Authority or the Development Authority (hereinafter in this Chapter collectively referred as “the Authority”), shall levy within the area of its jurisdiction development charge on the institution of use or change of use of any land or building or development of any land or building, for which permission is required under this Act, at the rates specified by or under the provisions of this Chapter:
>
> Provided that, where land appurtenant to a building is used for the purpose independent of the building, development charge may be levied separately for the building and the land”.

“124J. Development Fund

> (1) There shall be established and set apart a separate fund to be called “the Development fund” and an Authority shall separately show the same in its budget.
> (2)All moneys received by the authority as development charge together with interest thereon, if any, under this Chapter shall be credited to the Development Fund.
> (3)The money credited from time to time, to the said Fund, shall be utilized only for the purposes of acquisition and development of any land reserved for any of the public purposes specified in any plan or scheme under this Act and for providing public amenities in the area under the jurisdiction of the said Authority and maintenance and improvement thereof”.

9. It could thus be seen that Section 124A provides that on the institution of use or change of use of any land or building or development of any land or building for which permission is required under the said Act, the Development Authority is mandated to levy development charges at the rates specified by or

under the provisions of the said chapter. Section 124J would reveal that every Planning Authority is mandated to set apart a separate fund to be called as 'the Development Fund", required to be separately shown in its budget. All moneys received by the Authority as development charges together with interest throughout, are required to be credited to the development fund. As submitted by Dr. Tulzapurkar, the said amount is required to be spent only for the purpose of acquisition and development of any land reserved for any public purposes specified in the plan and for providing the public amenities in the area under the jurisdiction of the said authority and maintenance and improvement thereof.

10. It will not be out of place to mention that levy which was earlier charged under Regulation 33(24) and 35(4), came to be challenged before this Court by way of PIL No. 94 of 2008 and other Writ Petitions, wherein it was held that there was no provision under the said Act to charge such levy or premium. As such, to overcome the said difficulty an Ordinance was promulgated as Maharashtra Ordinance No. XIIII of 2010 to add clause (m) to section 22 authorizing such a levy. Subsequently clause (m) was added to section 22 of the said Act by way of amendment to Section 22 in 2010. It will therefore, be relevant to refer to clause (m) of Section 22 which reads thus;

22. Contents of Development Plan:

> (a) to (l)...
>
> (m)provisions for permission to be granted for controlling and regulating the use and development of land within the jurisdiction of a local authority [including imposition of fees, charges and premium, at

such rate as may be fixed, by the State Government or the Planning Authority, from time to time, for grant of an additional Floor Space Index or for the special permissions or for the use of discretionary powers under the relevant Development Control Regulations, and also for imposition of] conditions and restrictions in regard to the open space to be maintained about buildings, the percentage of building area for a plot, the location, number, size, height, number of storeys and character of buildings and density of population allowed in a specified area, the use and purposes to which buildings or specified areas of land may or may not be appropriated, the sub-division of plots the discontinuance of objectionable users of land in any area in reasonable periods, parking space and loading and unloading space for any building and the sizes of projections and advertisement signs and boardings and other matters as may be considered necessary for carrying out the objects of this Act".

11. It will be also relevant to refer to clause 24 of Regulation 33 which reads thus:

[24] [Development of Multi Storey Public Parking Lots (PPL)._ With the previous approval of the Government, for development of Multi Storey Public Parking Lots on any plot abutting a road and/or a stretch of road, additional FSI (hereinafter referred to as "Incentive FSI") as specified below on built-up parking area, created and handed over to the MCGM free of cost, shall be allowed, on the land belonging to a private owner, which is not reserved for any public purpose, subject to the following conditions contained herein below:._

(i) The minimum are of plot shall be 1000 sq.mt. in Island city and 200 sq.mt. in suburb and extended suburbs of Greater Mumbai. The minimum number of Motor Vehicle public parking spaces provided shall not be less than 50 subject to minimum parking space of 700 sq.mt. The location of parking space can be basement, ground floor or upper floors, with access through ramps/lift or combination of both subject to clearance from Chief Fire Officer with special emphasis on fire hazard.

(ii) A Committee under the Chairmanship of Municipal Commissioner, MCGM shall earmark/select the plots for public parking, on the basis of their suitability and seek Government's approval for it. The Committee shall comprise of (i) Joint Commissioner of Police (Traffic) or it's representative, (ii) Metropolitan Commissioner, Mumbai Metropolitan Region Development Authority or it's representative, (iii) Deputy Director of Town Planning Greater Mumbai, (iv) Chief Engineer (Road) Municipal Corporation of Greater Mumbai (Member, Member Secretary).

(iii) The incentive FSI given on this account will be over and above the FSI permissible under any other provisions of DCR. This incentive FSI shall be allowed to be used on the same plot in conformity with DCR/DP, within the overall cap/limit of total maximum permissible FSI as given (vii) below.

(iv) The proposed development shall be further subject to such conditions as mentioned/prescribed by the Municipal Commissioner.

(v) Concerned land owner/developer/society/company shall not be allowed to operate the public parking.

(vi) Area covered under parking shall be counted towards FSI consumption.

(vii) The Incentive FSI permissible under this Regulation against the built-up area of the public parking lot, shall be 50% of the built-up aea of the public parking lot, such that the total permissible FSI including the incentive FSI under this Regulation does not exceed 4.0 in the Island City and 3.0 in the Suburbs Extended Suburbs.]

(viii) Public Parking shall be limited to G+4 and three basements.

(ix) The maximum cap on the built-up area per parking space shall be 50.00 sq.mtr. for LMVs, 65.00 sq. mtr. For LCVs and 120.00 sq.mtr. for HMV's Buses. The Incentive FSI shall be calculated as per the built-up area of the PPL, based on these norms or the actual built-up area of the PPL, whichever is less.

(x) The developer of the public parking lot (PPL), shall pay 'premium' worked out as per the following formula:_

Premium = 40% of [Value of the additional built-up area corresponding to the incentive FSI admissible under this Regulation, as per the A.S.R prepared by the I.G.R. Maharashtra State – (Cost of construction of PPL + cost of any extra amenities/facilities provided + cost of construction of built-up area corresponding to the incentive F.S.I admissible under this Regulation)].

For the purpose of calculating premium as above, the cost of construction of PPL including amenities/facilities and the cost of construction of built-up area corresponding to the incentive FSI admissible under this Regulation for the financial year 2011-2012 shall be taken as Rs. 15,000 per sq. mtr. And Rs. 25,000 per sq. mtr. Respectively. Revised construction costs shall be notified by the Municipal Commissioner of Municipal Corporation of Greater Mumbai every year in April, based on the average, increase in Material Price Index of RBI (70% weightage) and Labour Index (CPI) (30% weightage) during the previous financial year, over the year preceding that:

Provided that all the development of public parking lots for which letter of Intent has been issued by the Corporation as per the DC Regulations 33(24), published *vide* Notification dated October, 20, 2008, excepting those which have progressed substantially, shall have to follow the provisions of the Regulations 33(24) as amended *vide* this Notification and shall have to pay the premium at the rate of 50% of what they would have otherwise been required to pay as per the amended provisions.

(xi) The premium shall be paid in two stages – 50%

before the issuance of I.O.D for the PPL and 50% before issuance of C.C for the Incentive FSI admissible under this Regulation.

Upon Payment of 100% premium as aforesaid, C.C shall be issued in respect of 50% of the Incentive FSI.

In no case shall the remaining 50% Incentive FSI be released without the handing over of the public parking lot, complete in all respects, to the Corporation.

The year in which 50% premium is paid before issuance of I.O.D for the PPL shall be taken as the year for determination of construction cost as well as ASR for calculation of the premium. Out of the total premium payable, 50% shall be paid to the State Government and the remaining 50% to the Corporation.

(xii) The public parking lots, for which letter of intent has been issued by the Corporation as per the Development Control Regulation 33 (24) published *vide* Notification dated October, 20, 2008, but which have not been handed over to the Corporation, may be allowed to retain FSI as approved prior to the coming into force of this amended Regulation, with prior approval of the State Government, provided they pay premium as per provisions of this amended Regulation for the entire incentive FSI.]

12. It will be also relevant to refer to clause 4 of Regulation 35.

(4)Compensatory Floor Space Index (FSI)._

Notwithstanding anything contained in the D.C. Regulations 32, 33 & 34, the Commissioner may, by special permission, permit fungible compensatory Floor Space Index, not exceeding 35% for residential development and 20% for Industrial/Commercial Development, over and above admissible Floor Space Index, by charging a premium at the rate of 60%, 80%

> and 100% of the Stamp Duty Ready Reckoner rate, for Residential, Industrial and Commercial development respectively:
>
> Provided in case of redevelopment under Regulations 33(7), 33(9) & 33 (10) excluding clause No. 3.11 of Appendix-IV of Development Control Regulation 1991, the fungible compensatory F.S.I admissible on rehabilitation component shall be granted without charging premium:
>
> Provided further that redevelopment under D.C. Regulation No. 35 (5) and redevelopment proposal of existing buildings in suburbs and extended suburbs by avoiding TDR, the fungible compensatory F.S.I admissible of F.S.I consumed in existing structure shall be granted without charging premium.
>
> Provided further that such fungible compensatory FSI for rehabilitation component shall not be used for free sale component and shall be used to give additional area over and above eligible area to the existing tenants/occupants;
>
> Provided, that this regulation shall be applicable in respect of the buildings to be constructed or reconstructed only.

13. A perusal of the Statement of Objects and Reasons of the Amendment by which Section 124A was brought into the Statute book would show that the Legislature found that plans and schemes undertaken by the Planing Authorities are capital intensive and that it has not been possible for these Authorities to achieve the desired results, mainly on account of lack of funds for effective implementation of such development plans or town Planning Schemes. It had, therefore, become imperative to mobilise additional resources for being placed at the disposal of Planning or Special Planning or the Development Authority constituted under the said Act, for effective implementation of the provisions of the

said Act and to provide proper amenities and facilities for the healthy growth of these cities and towns.

14. Whereas, the Statement of Objects and Reasons of amendment by which clause (m) was added to section 22 of the said Act would reveal that the said amendment was brought primarily to overcome difficulty on account of judgment of this Court which held that there was no authority in law to charge the premium on additional F.S.I. In view of the judgment, levy of premium was hampered and resulted in loss of revenue to local Authorities which was primarily meant to be used for providing infrastructural facilities. Another difficulty that was found by the legislature was that the instrument of premium was found to be incapable of being used to control the rates of Transfer of Development rights and which resulted in uncontrolled escalations in a near monopolistic regime.

15. A perusal of clause (m) of Section 22 would reveal that it authorizes Local authority to impose fees, charges and premium at such rates as fixed either by it or by State Government for grant of additional Floor Space Index or for special permissions or for the use of discretionary powers under the relevant D.C.Rs etc. A perusal of Section 124A would reveal that, on the contrary, duty is cast upon the Planning Authority to levy within the area of its jurisdiction development charges by such authority on institution of use or change of use of any land or building, or development of any land or building for which permission is required under the said Act.It would thus be seen that under section 124A wherever

any permission is required for carrying out any development, from the planning authority, the planning authority is bound to levy development charges as provided under the said provision. Per contra, it is to be seen that a discretion is given to the Planning Authority under clause (m) of section 22 to levy fees, charges and premium at such rates as may be prescribed for various purposes including grant of an additional F.S.I.

16. Perusal of Regulation 35(4) r/w section 22(m) would reveal that a Commissioner is empowered or rather given discretionary power to permit fungible compensatory Floor Space Index, not exceeding 35% for residential development. In so far as Industrial/Commercial Development is concerned, maximum limit is 20% of the admissible F.S.I. It also provides for charging a premium at the rate of 60%, 80% and 100% of the Stamp Duty Ready Reckoner Rate, for Residential, Industrial and Commercial development.

17. A perusal of Regulation 33(24) would reveal that for development of Multi Storied Public Parking Lots for any plot abutting a road and/or stretch of road, additional F.S.I which is also referred to as "Incentive FSI" for built-up parking area, created and handed over to the MCGM free of cost, shall be allowed on the conditions stipulated therein. Under clause (x) of Regulation 33(24), formula is prescribed for levying a premium under the said provision.

18. It could thus be seen that event of levy u/s 124A is

when developmental activity is carried out within the area falling into the jurisdiction of a Planning Authority and it is mandatory for a Planning Authority to levy such development charge whenever its permission is required by the said Act. Per contra, levy under Regulation 35(4) r/w Section 22(m) is in the event of Commissioner exercising his discretionary power and granting additional fungible F.S.I subject to maximum 35% limit for residential development land 20% for Industrial/Commercial development. In so far as levy under Regulation 33(24) is concerned, levy is on account of additional F.S.I which would be available to a developer on he providing a Multi Storied Public Parking Lots and handing it over to the Corporation free of cost.

19. It could thus be seen that though the levy is by the same Planning Authority and though the levy may go to the same fund of the same Planning Authority, taxing events in so far as the development charge u/s 124A and the premium to be charged under Regulation 33(24) and 35(4) r/w Section 22(m) of the said Act are totally different. Whereas levy u/s 124A is mandatorily to be levied by a Planning authority on any development carried out in area of its jurisdiction for which permission is required under the said Act; levy under Regulation 33(24) and 35(4) r/w section 22(m) is discretionary. Levy u/s 35(4) is on the discretion to be exercised by the Commissioner for granting additional fungible F.S.I in addition to the regular F.S.I, that would be available to the developer. Premium under Regulation 33(24) would be required to be paid only when a developer provides a facility of built-up parking area for public and in lieu of which, he would be entitled

to additional F.S.I.

20. We are, therefore, of the considered view that levy u/s 124A is on account of development that would be carried out by a developer, whereas levy under Regulation 33(24) and 35(4) r/w Section 22(m) would be on account of additional F.S.I that a developer would be entitled either as fungible F.S.I or additional F.SI for providing parking facility.

21. In so far as the judgment of the Apex Court in the case of **Sri Krishna Das Vs. Town Area Committee, Chirgaon** [supra] is concerned, the subject matter of challenge was a levy towards weighing dues which the sellers and purchasers of commodities mentioned under the bye-laws framed under United Provinces Town Areas Act was required to pay. It was contended that a similar tax was already imposed by the State Legislature under the provisions of the U.P. Sales Tax and as such levy under the said Notification amounted to double taxation. It would be relevant to refer to observations of their Lordships in paragraph 28 which read thus;

> "28.We do not find any merit in the appellant's submission that there was double taxation in this case. The expression "double taxation" is often used in different senses, namely, in its strict legal sense of direct double taxation and in its popular sense of indirect double taxation. Double taxation in the strict legal sense means taxing the same property or subject matter twice, for the same purpose, for the same period and in the same territory. To constitute double taxation, the two or more taxes must have been (1) levied on the same property or subject matter, (2) by the same government or authority, (3) during the same taxing

> period, and (4) for the same purpose. "There is no double taxation, strictly speaking" says Cooley, "where (a) the taxes are imposed by different States, (b) one of the impositions is not a tax, (c)one tax is against property and the other is not a property tax, or (d) the double taxation is indirect rather than direct".

22. It thus could be seen that their Lordships held that double taxation in the strict legal sense means taxing the same property or subject matter twice, for the same purpose, for the same period and within the same territory. Their Lordships carved out four factors, which would be necessary for a levy to come within the ambit of double taxation. Considering the scheme, their Lordships negated the contention that levy was amounting to double taxation.

23. It would be apposite to refer to the observations of His Lordship Krishna Iyer, J in the case **of Avinder Singh Vs. State of Punjab, (1979) 1 SCC 137** which have been reproduced in the case of **Shri Krishna Das** which read thus;

> "There is nothing in Article 265 of the Constitution from which one can spin out the Constitutional vice called double taxation (Bad economic may be good law and vice versa). Dealing with a somewhat similar argument, the Bombay High Court gave short shrift to it in Western India Theaters. Some undeserving contentions die hard, rather survive after death. The only epitaph we may inscribe is: Rest in peace and don't be re-born! If on the same subject matter the legislature chooses to levy tax twice over there is no inherent invalidity in the fiscal adventure save where other prohibitions exist".

24. In the case of **Shantikumar M. Sancheti and another**

[supra], provisions of Maharashtra Tax on entry of Motor Vehicles into Local Area Act, 1987 which permitted a levy on entry of vehicle in the local area was challenged on the ground that the said levy was in addition to octroi and as such amounts to double taxation. It would be relevant to refer to the following observations of their Lordships in paragraph 5 which reads thus;

> "Feeble attempt was made to submit that the tax being in addition to octroi realised by the local body it amounted to double taxation. Tax levied under different legislations enacted in exercise of constitutional power are not rendered bad on assumption that it amounts to double taxation. The taxable event for entry tax is not same as for octroi. Nor it is by the same authority for the same purpose and for same period".

25. As discussed hereinabove, applying parameters laid down by their Lordships of the Apex Court in the case of **Shri Krishna Das** [supra] and upon interpretation of the provisions of the said Act, we have come to a considered conclusion that purpose of levy under all the aforesaid three provisions is totally different. It is not for the same purpose. We have also held that taxing events in respect of all the aforesaid three levies are different. In that view of the matter, the contention that levy u/s 124A which is in addition to levy under Regulation 33(24) and Regulation 35(4) r/w clause (m) of Section 22 of the said Act and as such amounts to double taxation needs to be rejected. Upon interpretation of the Scheme of the Statute, we have come to a conclusion that the taxing event as provided u/s 124A is totally different than the taxing event as provided under Regulation 33(24) and 35(4) r/w

section 22(m) of the said Act.

26. In that view of the matter, we are of the considered view that Petition is without merits and is liable to be dismissed. Rule is discharged.

[SANDEEP K. SHINDE, J.] **[B.R. GAVAI, J.]**