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

WRIT PETITION NO. 187 OF 2016

Wadhwa Estate & Developers (I) Pvt.Limited …Petitioner

Versus

The Municipal Corporation of Greater Mumbai & Ors. …Respondents

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Mr. Milind Sathe, Senior Counsel, a/w Ms. Asha Nair, i/by Diamondwala & Co., for the Petitioner.

Mr. Anil Singh, Senior Counsel, a/w Ms. K.H. Mastakar, for the Respondents-MCGM.

Mr. U.S. Upadhyay, AGP for the Respondent-State.

CORAM : SMT. VASANTI A NAIK AND RIYAZ I. CHAGLA, JJ.

DATE : 14 November 2017

ORDER :

Rule. Rule made returnable forthwith.

The writ petition is heard finally at the stage of admission with the consent of the learned counsel for the parties.

2. By this writ petition, the petitioner-Wadhwa Estate & Developers (I) Pvt. Limited seeks a declaration that the respondents-corporation and

its authorities do not have the authority to charge premium at the rate of 100 percent for the development under Regulation 33(5) of the Development Control Regulations for Greater Mumbai, 1991 (hereinafter referred to as "***the regulations***" for the sake of brevity) for the open space deficiency. The petitioners challenge the demand notice dated 20th August 2014 by which they were required to pay 100 percent premium for the open space deficiency.

3. The Maharashtra Housing and Area Development Authority (hereinafter referred to as "MHADA") is the owner of plot of land admeasuring 791.79 sq.meter in survey No. 287. The said land was leased to a co-operative housing society for 99 years in January 1967. "Om Niwas" building was constructed on the land and since the building was found to be in a dilapidated condition, the petitioner-developer had entered into an agreement for re-development with the co-operative housing society on 10th September 2010. In pursuance of the re-development agreement a proposal was submitted by the petitioner to MHADA for construction of a residential building. The proposal was sanctioned on 9th June 2011. The sanction was revised on 30th April 2013 and the total built-up area of 1979.48 meters was allowed. The application of the petitioner for condoning the deficiency in open space was granted. Pursuant to the minor modifications and changes in the plan further deficiency in open space was created and the corporation revised the plans and condoned the

open space deficiency. A notice was served by the corporation on the petitioner, dated 28th August 2014 demanding the sum of Rs. 4,93,48,800/- towards the premium for condoning the open space deficiency. By the communication dated 9th September 2014 the petitioner informed the executive engineer of the respondent-corporation that the payment for open space deficiency could be charged at 10 percent of the premium in view of Regulation 33(10) of the regulations that are applicable for EWS/LIG and MIG tenements. It was conveyed by the petitioner to the respondents that the petitioner was making the payment under protest without prejudice to the rights of the petitioner to take up the matter before the appropriate authority to secure the refund of the excess payment. By filing the writ petition, the petitioner has challenged the action of the respondent-corporation of charging 100 percent premium for the open space deficiency, though according to the petitioner, the open space deficiency could have been charged at 10 percent of the normal premium.

4. Mr. Sathe, the learned senior counsel appearing for the petitioner submitted that the demand of premium, as raised by the respondent-authorities for open space deficiency at Rs. 4,93,48,800/- is arbitrary and without authority of law. It is submitted that the project of the petitioner is sanctioned under Regulation 33(5) of the regulations and on a combined reading of Regulations 33(5), 33(10) and Appendix IV appended

thereto and specifically clause 6.23 of Annexure - A thereof, it is apparent that since the redevelopment of the project is undertaken by the petitioner under Regulation 33(5), the petitioner would be entitled to the relaxation under Annexure A of Appendix IV on payment of 10 percent of the premium. It is submitted by taking this Court through the relevant part of Regulation 33 that the open space deficiency could be charged at 10 percent of the premium. It is submitted that though the corporation had, by the impugned demand notice asked the petitioner to pay 100 percent premium for the open space deficiency, to certain other developers the relaxations provided in Annexure A to Appendix IV were granted on payment of 10 percent of the premium. It is submitted that in the same set of facts, the corporation authorities had charged 10 percent of the premium for the relaxation granted to Nasa ACPM, A N Patel & Associates and Shree Sai Sagar Consultant. It is stated that the action on the part of the corporation of granting the benefit to certain developers on payment of 10 percent premium and demanding 100 percent premium from some others like the petitioner for the same relaxation would be discriminatory and violative of the provisions of the Constitution of India. It is submitted that on a reading of the relevant regulations, it would be necessary to hold that the action on the part of the respondent-authorities of charging 100 percent premium for the open space deficiency in the case of the petitioner, is bad in law being contrary to the regulations.

5. Mr. Anil Singh, the learned senior counsel appearing for the corporation has supported the action of the corporation authorities. It is submitted that the corporation had issued policy circular No. CHE/9343/DP/GEN dated 26th December 2013 that the open space deficiency was chargeable at 100 percent premium due to the utilization of the fungible FSI. It is submitted that the concept of fungible FSI was introduced in the year 2012 and hence, by the circular dated 26th December 2013, the corporation had decided to charge 100 percent premium for the open space deficiency. It is submitted that the corporation has modified its policy by the second circular dated 16th January 2016 and has decided to charge only 10 percent premium in respect of the open space deficiency. It is submitted that the circular dated 16th January 2016 however mentions that it would be applied prospectively and hence, the petitioner would not be entitled to the benefit of the second circular, dated 16th January 2016. It is submitted that in view of the provisions of Section 22(m) of the Maharashtra Regional and Town Planning Act, 1966 (hereinafter referred to as ***"the Act"***), the development plan should provide so far as may be necessary, for the matters, including the provisions regarding permission for controlling and regulating the use and development of the land. It is submitted that by taking recourse to the provisions of Section 22(m) of the Act, the Commissioner had provided by the first circular dated 26th December 2013 that the relaxation pertaining to the open space

deficiency could be granted on payment of 100 percent premium. It is submitted that it would be within the domain of the Commissioner to make provisions pertaining to the imposition of fees, charges and premium and in view of the provisions of Section 22(m) of the Act, the circular dated 26th December 2013 was issued. It is submitted that no doubt the corporation has modified the policy for payment of 100 percent premium in respect of the relaxation pertaining to open space deficiency, but the circular dated 16th January 2016 is prospective in operation and the petitioner would not be entitled to secure any benefit on the basis of the same. It is submitted by referring to Regulation 64(b) of the regulations that in special cases, the Commissioner may, for the reasons to be recorded in writing, grant special permission, provided that the relaxation will not affect the health, safety, fire safety, structural safety and public safety of the inhabitants of the building and the neighbourhood. It is stated that wide powers are granted to the Commissioner to provide relaxation subject to imposition of certain conditions. It is stated that the Commissioner had by the circular dated 26th December 2013 decided to grant relaxation only on payment of 100 percent premium. In the circumstances of the case, the learned senior counsel sought for the dismissal of the writ petition.

6. For deciding the questions involved in this writ petition, it would be necessary to

consider the relevant development control regulations. It would be necessary to refer to regulation 33 of the regulations. Regulation 33 refers to the additional floor space index that may be allowed to certain categories that are mentioned in regulation 33. We are concerned with category 5 of regulation 33 which pertains to development/ redevelopment of housing schemes of MHADA. It is not disputed that the redevelopment of the project in this case pertains to housing scheme of MHADA. It would now be necessary to turn to regulation 33(5) (3) (c) of the regulations. It is provided in sub-clause (3) (c) of regulation 33(5) that notwithstanding anything contained in the regulations, the relaxations provided in regulation 33(10) of the regulations would apply to housing schemes for construction of tenements under EWS/LIG and MIG categories. The relevant clause of the regulations reads thus :-

> *"Regulation 33(5) 3(c) Notwithstanding anything contained in these regulations, the relaxations incorporated in Regulations No. 33(10) of these regulations shall apply for Housing schemes under this regulation for tenements under EWS/LIG and MIG categories.*

After the amendment of the Regulations on 8th October 2013, clause 3(c) of regulation 33 (5) was substituted by clause 6 of the amended regulation 33(5). Since in view of the unamended and amended regulation 33 (5), the relaxations provided in regulation No. 33(10) of the regulations applied to housing schemes like the one in this case, it would be necessary to consider regulation 33(10). For considering the relaxations that are permissible to such schemes like that of the petitioner, it would be necessary to turn to Appendix IV. Appendix IV and clause 6 of Annexure A thereof provides for the relaxations in buildings and also the other relaxations. It is not in dispute that the petitioner was granted relaxation under clause 6 of Appendix IV to regulation 33(10) that was published in the Maharashtra government gazette dated 28th August 1996. Though some of the sub-clauses in clause 6 of Annexure A of Appendix IV would be relevant, the most relevant clause on which the petitioner has relied on is clause 6.23 of Annexure A of Appendix IV that relates to the relaxation for the freesale components. It is provided in clause 6.23 in Annexure A of Appendix IV that the relaxations contained in some of the clauses mentioned in clause 6.23 as well as the other necessary relaxation shall be given to the freesale components on payment of 10 percent of the normal premium, both in the Island city and also in the suburbs and extended suburbs. It would be necessary to reproduce clause 6.23 in Annexure A of Appendix IV for reference :-

> *"**Relaxations for the freesale component.**-- Relaxation contained in sub-regulation No. 6.12, 6.13, 6.18, 6.19, 6.20 above as well as other*

> *necessary relaxation shall be given to the freesale components, on payment of 10 percent of the normal premium, both in the Island City, and also in the suburbs and extended suburbs."*

On a combined reading of regulations 33(5), 33(5)(3)(c), 33(5)(6) (as amended on 8th October 2013), 33(10) clause 6.23 in Anexure A of Appendix IV, it is clear that the relaxations provided in Annexure A of Appendix IV to regulation 33(10) of the regulations could be granted to the development/redevelopment of housing schemes of MHADA on payment of 10 percent of the premium.

7. It would then be necessary to consider whether in view of the clear terms of the aforesaid regulations, it was within the ambit of the authority of the Commissioner/corporation to demand 100 percent premium in respect of open space deficiency relaxation by relying on the circular, dated 26th December 2013. We do not find that the so called circular dated 26th December 2013 is issued by the Commissioner of the municipal corporation. It appears from a reading of the said document that after preparing the note in the matter of levy of premium for open space deficiency at 100 percent, the same was forwarded to MCHI and Hon'ble MLC Vijay Sawant for approval and issuance. We do not see anything in the document that shows that the said submission-note prepared by the chief engineer (DP) was indeed approved by the Commissioner or the corporation.

Be that as it may, even if it had been so approved, we find that the Commissioner did not have any authority to do so.

8. Reliance has been placed on behalf of the corporation to the provisions of Section 22(m) of the Act for taking the policy decision pertaining to the charging of 100 percent premium in respect of the open space deficiency relaxation, by the first circular of 2013. In our considered view, the provisions of Section 22(m) would not give any authority to the Commissioner, as contended on behalf of the corporation to charge 100 percent premium when the relevant part of regulation 33 clearly provides for grant of relaxation to the redevelopment projects of MHADA on payment of 10 percent premium. It would be necessary to refer to the provisions of Section 22(m) of the Act which read thus:-

> *"Section 22- A Development plan shall generally indicate the manner in which the use of land in the area of a Planning Authority shall be regulated, and also indicate the manner in which the development of land therein shall be carried out. In particular, it shall provide so far as may be necessary for all or any of the following matters, that is to say,*
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(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 hoardings and other matters as may be considered necessary for carrying out the objects of this Act."

On a reading of the aforesaid provisions, it would be necessary to reject the submission made on behalf of the corporation and its authorities that the said provision could be invoked for issuing the circular dated 26th December 2013 and charging 100 percent premium for the relaxation pertaining to open space deficiency, more so, in view of Regulation 33(5), 33(5)3C, 33(10) and clause 6.23 in Annexure A of Appendix IV of the Regulations. Section 22(m) provides that the development plan shall also provide for the matters pertaining to imposition of fees, charges and premium at such rates as are fixed by the State Government or planning authority from time to time. It appears from the said provisions that the same would not authorize the planning authority to issue the circular dated 26th December 2013.

9. The other provision on which the respondent-authorities have relied on for supporting their action is regulation 64(b) of the Regulations. It would be necessary to refer to the relevant regulation that reads thus:-

> *"64(b) In specific cases where a clearly demonstrable hardship is caused, the Commissioner may for reasons to be recorded in writing, by special permission permit any of the dimensions prescribed by these Regulations to be modified, except those relating to floor space indices unless otherwise permitted under these*

> *Regulations, provided that the relaxation will not affect the health, safety, fire safety, structural safety and public safety of the inhabitants of the building and the neighbourhood."*

From a reading of regulation 64(b), it cannot be said by any stretch of imagination that it would permit the Commissioner to ask the developer to pay 100 percent premium for the relaxation pertaining to the open space deficiency, specially when the relaxation pertaining to the same was granted to the petitioner by the respondents-authorities in view of regulations 33(5), 33(5)(3)(c), 33(5)(6) as amended, 33(10) and clause 6.23 of Annexure A of Appendix IV and the other sub-clauses of clause 6 thereof. In view of regulation 33 of the regulations, the corporation authorities cannot be heard to say that the Commissioner would be entitled to grant the relaxation only on payment of 100 percent premium by taking recourse to regulation 64(b) of the regulations.

10. In our view, the corporation could not have issued the first circular, dated 26th December 2013 in view of the clear and unambiguous provisions of regulation 33. After all, by regulation 33 of the Regulations the planning authority had decided to grant certain relaxations to slum development schemes and schemes of MHADA that were meant for EWS / LIG and MIG tenements at concessional premium and the very object of regulation 33(5) and 33(10) stood frustrated by

the issuance of the so called circular dated 26th December 2013. After having realized the mistake that was made by the corporation by issuance of the first circular dated 26th December 2013, the corporation appears to have made amends by issuing the second circular dated 16th January 2016 in pursuance of the remarks of the Deputy Law Officer and the advice of TAC on the issue in the meeting held on 10th August 2015, by referring to regulations 33(5), 33(10), clauses 6.21, 6.22 and 6.23 in Annexure A of Appendix IV. Probably taking a note of the financial implications that would follow by the substitution of the circular dated 26th December 2013 by the circular dated 16thJanuary 2016, the circular dated 16th January 2016 provided that the decision of charging the premium at 10 percent shall be applied prospectively.

11. It is also conspicuous to note that though the petitioner and some other developers were required to pay 100 percent premium for availing the relaxation, specially the open space deficiency relaxation like the one in this case, some other developers like Nasa ACPM, A N Patel & Association and Shree Sai Sagar Consultant were required to pay only 10 percent premium for availing the benefit of the relaxation. It would therefore, be necessary to hold in the circumstances of the case that the action of the corporation and its authorities of directing the petitioner to pay 100 percent premium is not only illegal and arbitrary but is also discriminatory.

12. Hence, for the reasons aforesaid, the writ petition is allowed. It is hereby declared that the respondents would not be entitled to charge 100 percent premium for the relaxation pertaining to open space deficiency under the sub-clauses of clause 6 in Annexure A of Appendix IV of regulation 33(10) of the regulations and the impugned demand notice, demanding the same is bad in law. As a consequence of the said declaration, we direct the respondents to compute the amount payable by the petitioner towards 10 percent of the premium for availing the relaxation pertaining to open space deficiency and after retaining the said amount, refund the remaining/balance amount to the petitioner within eight weeks.

Rule is made absolute in the aforesaid terms with no order as to costs.

[RIYAZ I. CHAGLA J.] **[SMT. VASANTI A NAIK, J.]**