

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.1966 OF 2018

1. Shivprasad s/o. Ramlal Agrawal,
Age: 43 years, Occu. : Business,
R/o. : House No.72, Agrawal Building,
Ganesh Chowk, Waluj,
Aurangabad.
2. Nandkishor s/o. Babulalji Agrawal,
Age: 38 years, Occu. Business,
R/o. : Ranjangaon, Tal.Gangapur,
District Aurangabad.
3. Yogesh s/o. Kalyanmalji Kasliwal,
Age: 38 years, Occup. Business,
R/o. RX-1/18, Block No.6,
Mahaveer Housing Society,
Bajaj Nagar, Waluj,
District Aurangabad.

.. PETITIONERS

VERSUS

1. The State of Maharashtra,
Through Department of Urban
Development, Mantralaya,
Mumbai.
2. City Industrial and Development
Corporation,
Through its Administrator,
[New Town], Uddyog Bhavan,
Town Centre, CIDCO,
Aurangabad.

.. RESPONDENTS

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Mr.D.P.Palodkar, Advocate for the Petitioners
Mr.S.B.Narwade, AGP for the Respondent/State
Mr.A.S.Bajaj, Advocate for respondent no.2.

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**CORAM: S.S.SHINDE &
K.K.SONAWANE, JJ.**

Reserved on : 28.11.2018
Pronounced on : 08.01.2019

JUDGMENT: [Per S.S.Shinde, J.]:

1] This Petition under Article 226 of the Constitution of India has been filed principally, taking exception to the impugned communications dated 27th June, 2017 and 16th October, 2017, bearing Nos.1132 and 1385, and the Board Resolution No.11223 dated 2nd December, 2014. The petitioner has also sought directions to restrain respondent no.2 from levying premium or any amount or fees on utilisation of 1.5 FSI in Growth Centers of Waluj Notified Area.

2] Briefly stated the case of the petitioner is that, plot No.519 in growth center No.1 of Nagar-1 of Waluj Notified Area came to be allotted to the petitioners on prevailing market rate. The said plot is

situated in Gat No.181 of village Tisgaon, Taluka and District Aurangabad. The lease agreement was registered on 20th September, 2010, by respondent no.2 in favour of the petitioners. It is the contention of the petitioners that, the basic FSI in growth centers of each town of the CIDCO is now 1.5. The basic FSI is the limit up to which the construction or development can be carried out on the plot without charging any amount/premium. Respondent no.2 has no authority and jurisdiction to charge or collect premium/fees or amount in lieu thereof while according to development permission towards FSI or additional FSI etc. The petitioners have applied for development permission on 5th September, 2013, but the said development permission was submitted considering the basic FSI as 1.0 for stipulation in the draft development plan. The said development permission was granted

in favour of the petitioners by respondent no.2 on 14th February, 2014. When the petitioners realized that, the basic FSI in the growth center is 1.5, the petitioners have submitted revised development permission on 14th November, 2014, considering 1.38 FSI. Respondent no.2 has carried out scrutiny, and after verification on 4th December, 2015, communicated the petitioners that, the petitioners are required to make some compliance. By way of said communication, the Planning Department of respondent no.2 has communicated the petitioners that, the revised proposal is submitted with 1.38 FSI and hence for grant of additional 0.5 FSI, permission of respondent no.2 would be necessary. Accordingly, the petitioners sought permission from respondent no.2 by requesting to grant said permission. On not receiving permission, the reminders were issued to respondent no.2.

3] It is the case of the petitioners that, meanwhile the petitioners submitted a proposal on 23rd May, 2016, for issuance of completion certificate in respect of commencement / building permission issued on 14th February, 2014. Respondent no.2 again raised certain queries vide letter dated 27th May, 2016. Therefore, the petitioners applied to respondent no.2 for approval of 1.5 FSI on 26th April, 2017. In response to the application of the petitioners, respondent no.2 issued impugned communication No.1132 on 27th June, 2017, informing the petitioners that, they are required to pay an amount of Rs.42,39,844/- towards alleged 0.5 additional FSI. It is contended by the petitioners that, on 19th July, 2017, the petitioners have made compliance of the queries made by respondent no.2, in its letter dated 27th May, 2016, and requested to issue part completion

certificate. Respondent no.2, on 14th August, 2017, communicated the petitioners that, the occupancy certificate cannot be granted as construction on the site is above 1.0 FSI and falls in 1.00 to 1.50 FSI category. On 11th September, 2017, the petitioners have submitted detailed representation to respondent no.2, and requested to grant permission as sought by Planning Department for occupancy certificate. According to the petitioners, there is no provision for charging any amount / premium on the basic FSI. On 16th October, 2017, respondent no.2 has issued impugned communication No.1385 to the petitioners, wherein it is mentioned that, as per the Board Resolution No.11223 dated 02.12.2014, the CIDCO has decided to levy premium on 0.5 as additional FSI, which is above 1.00 FSI, permissible in the growth centers of CIDCO. Therefore, the petitioners are required to pay the premium for 0.5 FSI.

Accordingly, the petitioners were asked to deposit the amount.

4] It is further the case of the petitioners that, similar contingency had already arose in the past in case of one of the property of the Waluj Notified Area, and more particularly, in respect of same growth center. One Shri Rajendrasing Dharamsing Rajpal has filed the representation to respondents for charging premium / amount for 'alleged additional FSI". On the said representation, respondent No.1 i.e. Government has called the report from CIDCO, and Director of Town Planning, Maharashtra State, Pune, vide letter dated 26th July, 2013. It is submitted that, the Director of Town Planning, Maharashtra State, Pune, is the Technical Authority in Planning and Valuation for the entire State. Hence, as per provisions of Section 31 of the Maharashtra Regional and Town Planning Act [for short

'MRTP Act'], consultation with the Director of Town Planning is necessary, and therefore, the Government i.e. respondent no.1 has sought the opinion of Director of Town Planning, Maharashtra State, Pune, on the said representation. Accordingly, the Director of Town Planning, Maharashtra State, Pune has submitted his technical remark, vide letter No.2697 dated 2nd April, 2014. In the said letter, the Director of Town Planning, Maharashtra State, Pune, has clearly mentioned that, as per the sanctioned Development Control Regulations of Waluj Notified Area, the basic permissible FSI in growth centre is 1.5, and there is no provision to levy premium / fees / any amount on 0.5 out of 1.5 FSI. In view of this, the act of CID to levy premium / charge amount on 0.5 out of 1.5 FSI seems to be contradictory to the provisions of Development Control Regulations, and hence the representation

made by the said applicant may be considered by respondent no.1. Considering the remarks of the Director of Town Planning, Maharashtra State, Pune, respondent no.1 held a meeting and conducted hearing in which the representatives of CIDCO were present, and after giving an opportunity of being heard, the Government i.e. respondent no.1, vide letter No. TPS-3014/164/CR-93/2014 dated 19th August, 2014, has directed the CIDCO Authorities that, as per the sanctioned Development Control Regulations of Waluj Notified Area, basic permissible FSI in Growth Centre is of 1.5 FSI, and therefore, the act of CIDCO to levy premium / any amount / fees for 0.5 out of 1.5 FSI is contradictory to the provisions of sanctioned Development Control Regulations.

5] Learned counsel appearing for the petitioners submits that, the Directives issued by the State Government to respondent

no.2 are binding and mandatory as per the provisions of the MRTP Act. It is submitted that, respondent no.2 is a subordinate authority to respondent no.1, and as per the provisions of Section 154 of the MRTP Act, respondent no.1 is having overall control over the Planning Authority or the Development Authority, and it shall be the duty of such Authorities to carry out such directions or instructions issued by the State Government. Learned counsel further submits that, the impugned communications and Board Resolution of respondent no.2 is contrary to the provisions of MRTP Act. There is no provision in the MRTP Act, and the Rules framed therein to charge any premium / any amount on the basic permissible F.S.I. The impugned communication and the Board Resolution of respondent no.2 are also against the sanctioned Developed Control Regulations. There is no provision in the

Development Control Regulations for charging any premium / any amount on the basic FSI. The impugned communication and the Board of Resolution of respondent no.2 is also contrary to the communications and Directives of respondent no.1, dated 19th August, 2014, in respect of the same growth centers. The action of charging premium / any amount on basic FSI, is nothing but unjust enrichment by the instrumentalities of the State. The Government Authorities should have considered that, permissible FSI in a particular zone and the issue of grant of additional FSI with or without payment of charges is the authority of State Government, and only State Government can issue directives in this regard. Till today, respondent no.1 has not made any provision in the sanctioned Development Control Regulations of Waluj Notified Area permitting CIDCO to levy any such charges / premium / any amount on the

basic FSI. In Waluj Notified Area all development permissions are regulated only on the basis of Development Control Regulations sanctioned by respondent no.1, and as per Regulation No.15.3.1 (a) of the said sanction Regulation, the basic permissible FSI is 1.5 in growth Center. Therefore, the basic rights which are conferred by the sanctioned Development Control Regulations, which are prepared and sanctioned under the provisions of MRTP Act, cannot be just abridged by CIDCO by resolving the board Resolution. The MRTP Act is a primary legislation for preparation of Development Plan and Development Control Regulation thereunder, and in the sanctioned Development Control Regulation, there is clear provision of 1.5 basic permissible FSI. In view of this, to levy the premium / any amount / fees on 0.5 out of 1.5 FSI by way of Board Resolution is not permissible in the Statute. In view of the specific provision of

Section 149 of the MRTP Act, the CIDCO cannot issue instructions contrary to the orders made by the State Government as finality is attached to the decisions of the State Government. In support of the aforesaid contentions, learned counsel appearing for the petitioners pressed into service exposition in the case of *Amit Maru & Anr. Vs. State of Maharashtra & Anr.*¹

6] Pursuant to the notices issued to the respondents, respondent no.2 has filed affidavit in reply. It is stated in the said affidavit in reply that, the Petition is liable to be dismissed for non-disclosure of the facts, which are necessary for adjudication of the matter, and also for making incorrect statements in the Petition. It is stated in the said affidavit in reply that, the petitioners have carried out construction in contravention of the

¹ [2010] 4 Bom.C.R. 568

permission granted by respondent no.2 on 14th February, 2014. Such unauthorized construction / development is illegal act, and offence in terms of the provisions of the MRTP Act, and the same is made punishable not only with fine, but also such contravention would also attract three years imprisonment. The petitioners though fully aware that, the permission is granted only to the extent of 1 FSI, has made construction up to 1.38 FSI, and thereby rendered themselves liable for imposing penalty and also punishment. In such circumstances, when the petitioners have not approached the High Court with clean hands, the petitioners are not entitled to invoke extra ordinary jurisdiction under Article 226 of the Constitution of India.

7] It is further stated in the said affidavit in reply that, the petitioners have suppressed the fact that, as per the terms of the allotment of plot on lease basis, the

petitioners were allotted land under the agreement to lease with the right to construct a building / structure on the said land only to the extent of 1 FSI, and lease premium for the said allotment was charged on the said basis. Respondent no.2 has placed on record copy of the agreement to lease and allotment letter dated 20th February, 2004. The said agreement to lease has not resulted in demise of the said land in favour of the petitioners. Even if respondent - Corporation has executed a lease deed in favour of the petitioners, the same is in furtherance of the agreement to lease dated 10th June, 2010, for the said land with FSI 1, and the petitioners are not entitled to claim any right for any additional constructions already carried out in excess of the stipulated area allotted to him by the respondent - Corporation. It is further stated in the affidavit in reply that, the

Planning Authority under the MRTP Act vide agreement to lease, the allottees are given license to enter upon the lands and to carry out the construction on the said land within permissible FSI limits stipulated in the agreement to lease. As the Planning Authority, the proposals for development permission only up to the said permissible FSI limits can be considered and any constructions in excess of the said permissible FSI limits are considered to be unauthorized. It is only on allotment / amount of additional FSI by CIDCO, if permissible, according to the Land Disposal Regulations and the Development Control Rules, that the excess construction can be regularized. The grant / allotment of additional FSI cannot be demanded by the allottee as a matter of right, and the same is completely within the discretionary powers of the respondent Corporation. The grant /

allotment of additional FSI, if considered by the respondent-Corporation, that within permissible regulations is permitted on payment of additional lease premium in accordance with the Land Disposal Regulations and the Land Disposal Pricing Policy. Since the CIDCO is a Company, and as such the policy matters are generally decided by way of passing Resolutions by the Board of Directors to that effect. The Development Control Rules as sanctioned by the Government, the Government was permitting the user from 1.00 FSI to 1.5 FSI. The CIDCO as lessor of the property can exercise its discretionary powers to allot additional FSI on charging of lease premium for the said additional FSI within the limits permissible in the Development Control Rules. Considering all the aforesaid aspects, the Board of Directors of Corporation passed a Resolution on 2nd December, 2014 to the effect of

allotment of additional FSI subject to payment of additional lease premium in accordance with the Land Disposal Regulations and the Land Disposal Pricing Policy.

8] It is further stated in the said affidavit in reply that, the reliance placed on and the opinion expressed by the Director of the Town Planning and the subsequent proceedings in the case of Rajpal, one of the property holder in Waluj Notified Area, is misplaced and ill-founded as the said opinion expressed is based only on the Constitution of the Development Control Regulations without considering the fact of the rights of the Corporation as owner and lessor of the land allotted on lease basis specific terms and conditions. It is stated in the said case, Mr.Rajpal had made representation to the State Government in respect of the charging of additional lease premium by respondent no.2 towards the grant of

additional FSI of 0.5 in addition to the original grant of FSI 1.0. The State Government, vide its letter dated 19th August, 2014, mentioned that, there is no provision of charging of premium for grant of additional FSI under the Development Control Regulations. The Development Control Regulations are framed under Section 159 of the MRTP Act, 1966, for the only purpose of ensuring planned development of lands. The said Regulations do not deal with the disposal of lands by the Government bodies. The reliance placed on the said expression is not at all relevant for the purpose of the challenge. Respondent no.2, in the capacity of the land owning authority / lessor, has the right under Section 118 [2] read with Section 159 of the MRTP Act, and the Land Disposal Regulations to dispose the lands in Waluj. On grant of the additional FSI, if the allottees have carried out unauthorized

constructions within the said additional FSI, the said construction can be regularized under the MRTTP Act on payment of penalty in accordance with the Development Control Regulations. The said penalty has nothing to do with the lease premium charged for the allotment of the said additional FSI. Regularization of the construction in excess of the area allotted under the agreement to lease can only be done, if the additional FSI is granted bringing the said construction within the permissible limits of the additional FSI.

9] It is further stated that, the grant of additional FSI cannot ipso facto be considered to be regularization of the unauthorized construction. It is stated in the said affidavit that, in case of Rajpal also, the authority of CIDCO of charging of additional lease premium in lieu of grant of additional FSI, Mr.Rajpal has not claimed any

refund and has also paid the difference amount for obtaining occupancy certificate. Therefore, the reliance placed by the petitioners in the case of Rajpal is totally misplaced in the facts of the present case. It is stated that, the amount of additional lease premium generated as a revenue is utilized for the purpose of development of the Waluj New Project. Respondent — Corporation is a self funding body, and does not get any grant from the Government for the development to be made within the notified area of Waluj. The revenue generated by the Corporation through allotment of lands is the only source of revenue, which is utilized for the purpose of development of Waluj. The said revenue is generated by levying lease premium and additional lease premium on the additional FSI. The said premium is leviable in accordance with the land disposal regulations of the Corporation which derive

their source from Section 159 of the MRTP Act, 1966, and have a statutory force. If the Corporation is deprived of such lease premium / additional lease premium, the Corporation will not be in a position to develop the City of Waluj as envisaged by the State Government, and the same would not be in the interest of the general public. The FSI is part of development plan, which is prepared for town planning, city and civic infrastructure, and the exigencies related therewith. The term "FSI" is included in the definition of Development Rights under the MRTP Act, which is reproduced as under:

Section 2 (9A) :- "Development right" means right to carry out development or to develop the land or building or both and shall include the transferable development right in the form of right to utilize the Floor Space Index of land utilisable either on the remainder of the land or

partially reserved for a public purpose or elsewhere, as the final Development Control Regulations in this behalf provide."

The FSI is an interest in the land allotted to the petitioners to develop the said land, within limits stipulated in the agreement to lease, and therefore, premium is charged towards grant of additional FSI.

10] Learned counsel appearing for respondent no.2 submits that, the petitioners in contravention of the permission granted for construction on 14th February, 2014, has carried out unauthorized development, which is illegal and unauthorized in terms of the MRTP Act, and as such, the petitioners are not entitled to the reliefs as claimed in the Petition. It is submitted that, the right of the petitioners springs only from the letter of allotment and the lease agreement. In

other words, the letter of allotment as well as the lease agreement is the source of contractual right created in favour of the lessee to enjoy the land allotted to it on lease. The lessee is obliged to comply with and adhere to the conditions of letter of allotment and lease agreement. In support of the aforesaid contentions, learned counsel pressed into service exposition in the case of M/s. Shakti Commercial Premises Society Ltd. Vs. State of Maharashtra & others in Writ Petition No.10976 of 2011, decided by the Division Bench of this Court [Coram : A.M.Khanwilkar & R.G.Ketkar, JJ.] on 11th June, 2012. Therefore, learned counsel appearing for respondent no.2 submits that, the Petition deserves to be dismissed.

11] We have given careful consideration to the submissions of the learned counsel appearing for the petitioners, learned AGP appearing for the respondent – State, and

learned counsel appearing for respondent no.2. We have carefully perused the pleadings in the Petition, grounds taken therein, annexures thereto, and the reply filed by respondent no.2 and also the annexures thereto, and in particular, the lease agreement executed by respondent no.2 in favour of the petitioners. Indisputably, the permission was granted to the petitioners for construction on the property mentioned in the lease agreement to the extent of 1.00 FSI. However, it appears that, the petitioners have constructed over and above the said 1.00 FSI, and construction has been made up to 1.38 FSI in contravention of the permission granted only to the extent of 1.00 FSI. As rightly submitted by the learned counsel appearing for respondent no.2, the right in favour of the petitioners as lessee is subject to the conditions specified in the lease agreement. The petitioners would have

restricted the construction to the permissible limit of 1.00 FSI in terms of the allotment letter, and the agreement executed by the CIDCO in their favour. No more and no less. Since the CIDCO is the Planning Authority as demonstrated in the affidavit in reply filed by respondent no.2, the CIDCO is entitled to invoke the relevant provisions of the MRTP Act, including imposition of penalty, and also launch the prosecution if the construction is in contravention of the permission granted and the same is unauthorized. In the facts of the present case, as it is brought on record by respondent no.2, the petitioners have made construction up to 1.38 FSI though the permission was granted for construction only to the extent of 1.00 FSI. The Division Bench of the Bombay High Court at Principal Seat [Coram : A.M.Khanwilkar & R.G.Ketkar, JJ.] in the case of M/s. Shakti Commercial

Premises Society Ltd. Vs. State of Maharashtra & others in Writ Petition No.10976/2011, decided on 11th June, 2012, in somewhat similar issues raised in para 13 to 15, held thus:

13. The foremost question that needs to be answered is : Whether the change of user permitted by the Planning Authority or modification of the Regulations by the State Government would create any higher right in favour of the lessee, other than the condition specified in the allotment of land by CIDCO? There is no dispute that the said land is vested in CIDCO. The petitioner-Society is only lessee of CIDCO. The petitioner - Society, therefore, can enjoy the land in question only in consonance with the lease conditions, in terms of the Allotment Letter and the Agreement executed by CIDCO in its favour. No more and no less.

The fact that the Planning Authority perceives that the land can be used for some other purpose cannot create any right in favour of the lessee of CIDCO, unless CIDCO also agrees to that change of user of the land by relaxing the lease conditions. Similarly, merely because the State Government decides to change the Regulation permitting charging premium amount for change of user of the land, that will be of no avail to the lessee of CIDCO – so long as the condition specified in the Allotment Letter and the Lease Agreement remains unchanged or modified. For, the right of the lessee springs only from the Letter of Allotment and the Lease Agreement. In other words, the Letter of Allotment as well as the Lease Agreement is the source of contractual right created in favour of the lessee to enjoy the land allotted to it on lease. The

lessee is obliged to comply with and adhere to the conditions of Letter of Allotment and Lease Agreement. The lessee cannot compel the lessor, i.e., CIDCO, to allow it to use the land for some other purpose than specified in the Letter of Allotment and Lease Agreement, as the case may be.

14. A priori, we are in agreement with the argument of CIDCO that the fact that the Planning Authority is inclined to allow the petitioner-Society to develop the plot for Information Technology or that the State Government has expressed its intention to charge premium for such change of user payable to the State Government, Planning Authority and CIDCO, that, per se, would not create any right in favour of the lessee of CIDCO. The lessee of CIDCO would, nevertheless, be bound by the

stipulations and conditions in the Letter of Allotment and Agreement of Lease.

15. Accordingly, the claim of the petitioner, which is essentially founded on the permission given by the Planning Authority or the direction issued by the State Government, is extraneous for answering the point in issue.

12] As already observed, the petitioners in contravention of the conditions in the lease agreement and the permission granted for construction, have illegally and unauthorizedly carried out the construction above 1.00 FSI up to 1.38 FSI. Keeping in view the peculiar facts of the present case, and the fact that the petitioners have carried out the constructions over and above the permissible limit of 1.00 FSI contrary to the permission granted, and lease agreement

executed in their favour by respondent no.2, are not entitled to invoke the extraordinary writ jurisdiction and pray for discretionary and equitable relief.

13] In that view of the matter, we are unable to persuade ourselves to grant relief as prayed by the petitioners in the Petition. Hence the Writ Petition stands rejected.

[K.K.SONAWANE]
JUDGE

[S.S.SHINDE]
JUDGE

DDC