

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 3991 OF 2014**

M/s. Cosmos Realtors
Joint Venture
Through Authorized Signatory
Shri. Suraj Parmar.
Having office at 201,
Arihant Building, Above
Sam Electronics,
Agyari Lane, Tembhi Naka,
Thane (West)

... Petitioner

Vs.

1) The Municipal Corporation for
the City of Thane through the Commissioner
Having office at Almeida Road,
Panchpakhadi, Thane (West)

2) The State of Maharashtra
Through Urban Development Department,
Mantralaya, Mumbai.

... Respondents

Ms. Gauri Godse, Advocate for the Petitioner.
Mr. Ajit Ram Pitale, Advocate for Respondent No. 1
Ms. R.A. Salunkhe, AGP for Respondent No. 2 / State.

**CORAM : S.C.DHARMADHIKARI &
SANDEEP K. SHINDE JJ.**

RESERVED ON : 22nd JULY, 2019.

PRONOUNCED ON : 6th AUGUST, 2019

JUDGMENT (Per : Sandeep K. Shinde, J)

1. Rule. Rule made returnable forthwith. With consent of the parties, petition is taken up for final hearing.
2. The short question in the present writ petition is, whether the petitioner is entitled to Transferable Development Rights (TDR) in form of Floor Space Index for development of the Amenity Space in terms of Clause 6 of Appendix 'W' of Development Regulation of Thane Municipal Corporation.

Clause 5 and 6 of the Appendix 'W' relates to grant of Transferable Development Rights (TDRs) to owners or lessee and condition for grant of such rights. Clause 5, 6 and 7 of the Appendix 'W' reads as under :-

“5. The built up area for the purpose of FSI credit in the form of DRC shall be equal to the gross area of the reserved plot to be surrendered and will proportionately increase or decrease according to the permissible FSI of the zone where from the TDR has originated.

6. When an owner or lessee also develop or constructs the amenity on the surrendered plot at his cost subject to such stipulations as may be prescribed by the Commissioner or the appropriate authority, as the case may be and to their

satisfaction and hands over the said developed/constructed amenity to the Commissioner/appropriate authority, free of cost he may be granted by the Commissioner a further DR in the form of FSI equivalent to the area of the construction / development done by him, utilisation of which etc. will be subject to the Regulations contained in this Appendix.

7. A DRC will be issued only on the satisfactory compliance with the conditions prescribed in the Appendix.”

3. The petitioner has acquired development rights under the joint venture agreement of the property land bearing Gat No. 59A/20 and 59/28(part) aggregating to 12648.87 square meters at village Chitalsar Manpada, Thane (West). Respondent No. 1 (hereinafter referred to as Respondent-Corporation) is the Municipal Corporation for the city of Thane constituted under the provisions of Bombay Municipal Corporation Act now known as Maharashtra Municipal Corporation Act, 1949. Petitioner is challenging the order dated 27.01.2014 passed by the Corporation, by which the petitioner's application for grant of Transferable Development Rights (TDR), in the form of Floor Space Index (FSI) has been rejected. Thus, Respondent-Corporation is refusing to issue Development Rights

Certificate (hereinafter referred to as “DRC”) under the sanctioned Development Control Regulation 1994 for the city of Thane (hereinafter referred to as “DC Rules”), in respect of the development of amenity space on the plot bearing Gat No. 59, Hissa No. 28 D/2 at Chitalsar Manpada, Thane (West).

4. In para no. 4 of the petition, petitioner states that on 20.03.2003 development permission under Section 45 of the Maharashtra Regional and Town Planning Act, 1966 (for short, M.R.T.P. Act) was granted by the Respondent-Corporation (V.P. No. 2003/37) upon certain terms and conditions. Condition No. (5) which is relevant in this case reads as under :-

“Developer shall hand over amenity plot to the Corporation and amenity shall be developed free of costs.”
(emphasis supplied)

5. That in terms of the development permission and in pursuant to the aforesaid condition, petitioner has sworn an affidavit/ declaration and declared that in view of surrendering the property i.e. Gat No. 59/28 (Part) and Gat No. 59/20 (part), owner shall have no right and title therein. They further declared that the said

property absolutely vests in Municipal Corporation of Thane, in terms of provisions of Section 126 of the M.R.T.P. Act. Thus, the Municipal Corporation has become absolute owner of the said property. This declaration has been registered with the Sub-Registrar on 25.03.2003, which is at page no. 31 of the paper book.

It is further stated in para 9 that on 15.12.2004, the petitioner handed over the possession of the amenity space to the Municipal Corporation of Thane, the possession receipt/ note of which is at page no. 57 of the petition. Petitioner has stated that the name of the Respondent-Corporation has been entered in the revenue records in respect of the said amenity space and copy of 7/12 extract is at page no. 58 of the petition.

6. It is stated in para no. 7 that the Respondent-Corporation granted a Commencement Certificate on 03.07.2006 to construct building nos. 1 to 8 and club house upon certain terms and conditions. Condition no. 5 reads as under;

“that developer shall develop the amenity on the amenity space, as directed by the Corporation, free of cost and shall hand it to the Corporation.”
(emphasis supplied).

It is petitioner's case that as per the instructions received from the Respondent-Corporation an undertaking dated 13.04.2009 was submitted and undertook to develop the said amenity space area by constructing, Senior Citizen's Club, as per plan submitted by the petitioner's Architect. An undertaking is at page no. 61, which reads as under :-

“Plans on the above-referred property were sanctioned by the Thane Municipal Corporation vide V.P. 2003/37 TMC/TDD/3932 dtd. 3/7/2006 (Amended). As per Condition No. 5 of the C.C., I am required to develop the Amenity Space as per the orders of Hon. Commissioner of Thane Municipal Corporation.

I hereby undertake to develop the amenity as Senior Citizen's Club and Park as per the plans submitted by our Architect, and hand it over to Thane Municipal Corporation, free of cost but in lieu of T.D.R.”
(emphasis supplied)

7. The petitioner in para no. 9 would state that vide application dated 06.06.2009 petitioner requested for grant of additional FSI/ TDR against the construction of the amenity space on the surrendered plot in terms of provisions of Section 126(1)(b) of the

M.R.T.P. Act r/w. Clause 5,6 and 7 of Appendix 'W' of the Development Control Regulations. Petitioner further states that vide communication dated 14.07.2010 it informed A.D.T.P., Thane Municipal Corporation, that the amenity plot has been developed in accordance with the permission and it is ready in all respects along with Nana Nani Park and sought to hand over the same to the Thane Municipal Corporation in lieu of additional FSI/TDR. Para no. 1 of the said letter reads as under :-

“The construction has been completed in the above-mentioned development in accordance with your permission and under my supervision. The said Senior Citizen's Club is ready in all respects along with the Nana Nani Park. My Client's wish to hand over the building to Thane Municipal Corporation in lieu of TDR but the said TDR is yet to be granted.” (emphasis supplied)

8. The petitioner by next communication dated 01.08.2011 addressed to the Executing Engineer, Town Planning Department informed that the amenity space, has been fully developed and expressed its desire to hand over the same and requested for additional FSI/TDR against the development of the amenity space.

Again on 05.02.2013, the petitioner requested the Executive Engineer to grant the TDR, since the developed amenity had been handed over to the Corporation. Paragraph no. 3 of the letter dated 05.02.2013 reads as under :-

“We state that as per the said approval we have developed an amenity open space on the said property and have constructed a Senior Citizen's Club and have handed over the possession of the same to TMC. But even after handing over the amenity to the Corporation and inspite of several applications and reminders to the Corporation, it has failed to comply its obligation and have till date failed to grant the TDR to us. Under the provisions of Sec. 126 of Maharashtra Regional and Town Planning Act, 1966 we are entitled to get TDR.”

9. Thus, it appears from the aforesaid correspondence that the petitioner, after developing the amenity space in accordance with the plan sanctioned by the Respondent-Corporation, requested for grant of TDR as per Appendix 'W' and the DC Rules. However, the petitioner's request was not considered and therefore in those circumstances, the petitioner approached this Court in the Writ Petition No. 2420 of 2013, seeking direction to the Respondent-

Corporation to grant TDR as per petitioner's application dated 06.06.2009, 14.07.2010 and 01.08.2011. The Writ Petition was disposed of and the Respondent-Corporation was directed to dispose of the application dated 06.06.2009, 14.07.2010 and 01.08.2011 within six weeks from the receipt of the order. In paragraph no. 18, petitioner state that pursuant to the order of this Court, Commissioner was requested to comply with the direction and as such on 27.01.2014, the Respondent-Corporation rejected the request for grant of TDR, which is impugned in this petition.

10. The Respondent-Corporation vide affidavit-in-reply on 27.02.2015 denied the claim of the petitioner on the following grounds :-

(a) The development proposal no. 2003/37 submitted by the petitioner was approved while converting Industrial Zone into Residential Zone on 03.07.2006 and while granting the said permission, condition no. (5) was imposed that on Public Amenity Plot, the developer shall construct and hand over the Public amenity of Senior

Citizen Club free of costs to Thane Municipal Corporation.

It is therefore contended that since the developer has categorically agreed to construct the amenity free of cost, the petitioner is not entitled to claim the TDR much less the DRC.

b) Considering Clause No. 5 of the registered agreement executed by the Petitioner on 05.12.2011, petitioner is not entitled to claim Additional Floor Space Index; Clause 5 reads as under :-

“The construction of the building on the said area shall be completed together with the amenities in the steady in “Annexure 'B', without any consideration of any kind, the construction of Senior Citizen's Club after satisfactory completion of the building as per the specifications and handing over of free of cost to the Corporation (Owner) and transferring the same in the name of Corporation vide registered purchase/ sale deed.”

11. The Respondent-Corporation thereafter filed additional affidavit sworn by Pramod Nimbalkar, Officer working with Town Planning Department and denied the claim for additional TDR on the ground that the development proposal no. 2003/37 submitted by the petitioner was approved for converting Industrial Zone into

Residential Zone on 03.07.2006. This conversion was as per the provisions of Appendix 'M' -6.2 and not Appendix 'W' of the D.C. Regulations and thus stated in paragraph no. 5 of the additional affidavit, as under :-

“I say that thus the powers of Commissioner as per Appendix -M, as well as entitlement of the owner who develop or constructs public amenity on D.P. reserve plot, surrendered by him as contemplated under Appendix -W is totally different than the powers of Commissioner as well as any entitlement of owner who developed or construct any public amenity as contemplated under provisions of Appendix -M of Regulation 65 of Chapter -IV.”

12. Thus, it is the Respondent-Corporation's stand that as per the mutual agreement between the parties, the Developer is bound by the contractual obligations in terms of registered agreement executed with Respondent-Corporation on 05.12.2011 wherein clause no. 5 then incorporated is in tune with the condition of approval for conversion of industrial land to residential use.

13. The question is whether petitioner is entitled to Additional Floor Space / Transferable Development Rights in terms of the provisions of Section 126(1)(b) r/w. Clause 5,6 and 7 of Appendix

'W' of the Development Control Regulations and whether Corporation is justified in denying petitioner's right to Additional Floor Space/TDR?

14. The law clearly envisages grant of FSI or TDR under two separate heads i.e. one for the land and the other for construction of amenity for which land is designated in the development plan at the cost of the owner. Section 2(9A) defines development right, which includes Transferable Development Rights and Section 126(1)(b) of the M.R.T.P. Act provides for grant of FSI or TDR against the area of land surrendered free of cost and further additional FSI or TDR against development or construction of the amenity on the surrendered land at the owner's cost. The Development Control Regulations are traceable to law in as much as they form part of Section 22(m) of the M.R.T.P. Act and therefore anything contrary thereto, whether provided or imposed as conditions while granting development permission under Section 45 of the M.R.T.P. Act are to be overlooked and such conditions provided and imposed would not bind the parties.

15. In terms of provisions of Section 126 of the M.R.T.P. Act, 1966 the planning authority is empowered to acquire any land, reserved for any public purposes, specified in development plan or scheme of this Act at any time, either by agreement by paying an amount agreed to, or in lieu of any such amount, by granting the land owner or the lessee, value of an amount equivalent to the value of lessor's interest as determined by the Authorities concerned or Floor Space Index against the area of land surrendered free of cost and free from encumbrances. Clause (b) of sub-section (1) of Section 126 further empowers and facilitates the planning authority to grant, “further additional Floor Space Index or Transferable Development Rights, against development or construction of the amenity on the surrendered land at his cost.”

The State of Maharashtra in exercise of powers conferred by Section 31(2) of the M.R.T.P. Act sanctioned draft of Development Control Regulation 1994 with certain modifications and changes and fixed 01.06.1995 to be a date on which the regulations came into force. These regulations are framed for controlling and regulating

the use of development of land within the jurisdiction of the local authority, for grant of additional Floor Space Index, condition and restrictions in regard to open space to be maintained for building and for such other matters in relation thereof, for carrying out the object of this Act. Therefore, these regulations are in aid and are supplementing the provisions of M.R.T.P. Act for carrying out its object. Therefore, though the regulations have a statutory force as it traces its origin to clause (m) of Section 22 of the M.R.T.P. Act, nevertheless the regulations cannot override the provisions of the said Act. Therefore, it is to be held that anything contrary to the provisions of the Town Planning Act, resolved or brought in the force, by executive order in the form of imposing the condition and/or by a contract, cannot dilute the provisions of the Act.

16. In this case, it is not in dispute that the petitioner has surrendered the amenity plot to the Respondent-Corporation and the petitioner has been compensated by granting the Floor Space Index. It is not in dispute that the petitioner has developed the amenity and handed over to the Respondent-Corporation to its satisfaction. Thus,

once the amenity is developed to the satisfaction of the Respondent-Corporation, the right accrued to the petitioner for the additional Floor Space Index or Transferable Development Rights against the development or construction of amenity cannot be snatched away by taking recourse the condition no. 5, imposed by the Respondent-Corporation while granting the Commencement Certificate. Equally, the Respondent-Corporation cannot deny the petitioner's right to claim additional Floor Space Index on the basis of clause no. 5 of the agreement date 05.12.2011. That even otherwise, the right to claim the additional Floor Space Index or Transferable Development Rights in terms of Section 126(1)(b) of M.R.T.P. Act is a distinct right and it cannot be defeated merely by imposing conditions while granting Commencement Certificate or by an agreement.

17. We have carefully perused condition no. 5 as incorporated in the Commencement Certificate dated 03.07.2006. Vide this condition, the petitioner was required to develop the amenity plot and hand over its possession free of costs to the Respondent-Corporation. This condition does not contemplate that the petitioner

shall not be entitled to claim the additional Floor Space Index against the development or construction of amenity on the surrendered plot. That even otherwise, vide undertaking executed on 13.04.2009, the petitioner has agreed to develop the amenity and handed it over to Thane Municipal Corporation free of costs but lieu of TDR. The petitioner therefore has correctly understood that the condition no. 5 in the permission/ Commencement Certificate is independent of his right envisaged under Clause (b) of Section 126 (1) of the M.R.T.P. Act.

18. In the case of **Godrej & Boyce Manufacturing Company Ltd. Vs. State of Maharashtra & Ors. [(2009) 5 SCC 24]** it was argued by the State that,

“60.for acquisition of the designated plot of land recourse to clause (b) of sub-section (1) of Section 126 of the Act could only be taken by mutual agreement of the parties concerned. It was equally open to the municipal authorities not to accept the surrender of the land under clause (b) as it was open to the landowner to make the offer. Therefore, it followed according to him, that the municipal authorities could accept acquisition of the land in terms of clause (b) on certain conditions to which the landowner might or might not agree. In case the landowner did not agree to the condition(s) put by

the municipal authority he would not surrender the land and then the acquisition of the land could take place either in terms of clause (a) or clause (c) of Section 126(1).

61. Mr. Shishodia submitted that the appellants in all the cases had agreed to construct the road as part of the condition to surrender the land and getting 100% TDR in lieu of the land. According to him, since the construction of the road was a condition for grant of 100% TDR for the bare land the appellants and the petitioners were not entitled to claim any further TDR at all for construction of the roads by them.”

The Apex Court dealt with the argument in para nos. 63 and

64 as under :-

“63. The submission of Mr. Shishodia is completely unacceptable. The conditions, that is to say, the mutual rights and obligations subject to which the landowner may offer to surrender the designated plot of land to municipal authority and the latter may accept the offer are enumerated in detail in the statutory provisions. Beyond those conditions there can be no negotiations for surrender of the land, particularly in derogation to the landowner's statutory rights.

64. Having regard to the nature of the law the submission advanced on behalf of the municipal authority would lead to palpably unjust and inequitable results. The landowner whose land is designated in the development plan as reserved for any of the purposes enumerated in Section 22 of the Act or for any of the amenities as defined under Section 2(2) of the Act or Regulation 2(7) [sic

Regulation 3(7)] of the Regulations is not left with many options and he does not have the same bargaining position as the municipal authority. Therefore, surrender of the land in terms of clause (b) of Section 126(1) of the Act cannot be subjected to any further conditions than those already provided for in the statutory provisions. It is of course open to the legislature to add to the conditions provided for in the statute (or for that matter to do away with certain conditions that might be in existence). But it certainly cannot be left in the hands of the executive to impose conditions in addition to those in the statutes for accepting the offer to surrender the designated land”.

Thus, it is to be held that surrender of the amenity space by petitioner in terms of Section 126(1)(b) of M.R.T.P Act cannot be subjected to any further conditions than those already provided for in the statutory provision. Therefore, the condition imposed by the Respondent-Corporation i.e. Condition No. 5 while granting Commencement Certificate dated 03.07.2006 and clause no. 5 of agreement dated 05.12.2011 cannot come to the aid of the Respondent-Corporation to deny the statutory rights of the petitioner.

19. In the case of *M/s. Siddhi Real Estate Developers & Ors. Vs. The State of Maharashtra & Ors. in Writ Petition No. 7204 of*

2016 decided on 15.03.2019, the Thane Municipal Corporation refused to grant TDR in the form of FSI to the petitioner therein, against development or construction of amenity made at his own costs. The Division Bench of this Court after examining the facts of the case, the provisions of the M.R.T.P. Act and the Development Control Regulations, has held that acceptance of condition to hand over the development amenity to the Corporation 'free of costs', does not amount to waiver of this right to claim additional TDR since the waiver has to be intentional and a voluntary act and for all such contentions and pleas, a proper foundation has to be laid. It is therefore held that,

“waiver cannot be inferred nor can it be said that the petitioner has dis-entitled itself to the further development rights because it did not adhere to such stipulations as were prescribed by the commissioner/ appropriate authority.”

20. In the case in hand, the Respondent-Corporation denied the additional Floor Space Index or Transferable Development Rights of the petitioner also on the ground that development proposal no. 2003/37 submitted by the petitioner was approved by converting the

Industrial Zone into Residential Zone on 03.07.2006. It is therefore contended that this conversion was in terms of Appendix 'M-6.2' and not Appendix 'W' and therefore condition no. 5 was imposed that the developer shall construct and hand over public amenities i.e. the Senior Citizen's Club, free of cost to the Thane Municipal Corporation. We are unable to accept this contention for the reasons stated herein after.

21. Part (IV) of the Development Regulation regulates the land use classification and uses permitted. Regulation 64 contemplates land use classification i.e. residential, commercial, industrial, green and special reservations. Residential Zone is further classified into purely residential (R1) and residential with shop lines at ground floor (R2). Regulation 68 says where the use of a site is specifically designated in the Development Plan, it shall be used only for the purpose so designated. Regulation 65 classifies use of land in different zones in terms of Appendix 'M'. Appendix 'W' contains the regulations for grant of Transferable Development Rights to owners/ developers and conditions for grant of such rights. To appreciate the contention

of the respondent, we are reproducing the Appendix 'W'.

“Regulations for the grant of Transferable Development Rights (TDRs) to owners/ developers and conditions for grant of such rights.

1. The owner (or lessee) of a plot of land which is reserved for a public purpose in the development plan and to be developed by Corporation and for additional amenities deemed to be reservations provided in accordance with these Regulations, excepting in the case of an existing or retention user or to any required compulsory or recreational open space, shall be eligible for the award of Transferable Development Rights (TDRs) in the form of Floor Space Index (F.S.I.) to the extent and on the condition set out below. Such award will entitle the owner of the land to FSI in the form of a Development Right, Certificate (DRC) which he may use himself or transfer to any other person.

2. Subject to the Regulations 1 above, where a plot of land is reserved for any purpose specified in section 22 of Maharashtra Regional and Town Planning Act, 1966, the Owner will be eligible for Development Rights (DR's) to the extent stipulated in Regulations 5 & 6 in this Appendix had the land been not so reserved, after the said land is surrendered free of cost as stipulated in regulation 5 in this Appendix, and after completion of the development or construction as in Regulation in this Appendix if be undertakes the same.

3. Development Rights (DR's) will be granted to an owner or a lessee only for reserved lands which are retainable/ non-retainable under the Urban land (ceiling & regulations) Act, 1976, and in respect of all other reserved land to which the provisions of the

aforesaid Act do not apply, and on production of a certificate to this effect from the Competent Authority under that Act before a Development Right is granted. In the case of non-retainable lands, the grant of Development Rights shall be to such extent and subject to such conditions as Government may specify. Development Rights (DR's) are available only in cases where development of a reservation has not been implemented i.e. TDRs will be available only for prospective development or reservations.

4. Development Rights Certificates (DRCs) will be issued by the Commissioner himself. They will state, in figures and in words, the FSI credit in square meters of the built up area to which the owner or lessee of the said reserved plot is entitled, the place and user zone in which the DRS are earned and the areas in which such credit may be utilized.

5. The built up area for the purpose of FSI credit in the form of DRC shall be equal to the gross area of the reserved plot to be surrendered and will proportionately increase or decrease according to the permissible FSI of the zone where from the TDR has originated.

6. When an owner or lessee also develop or constructs the amenity on the surrendered plot at his cost subject to such stipulations as may be prescribed by the Commissioner or the appropriate authority, as the case may be and to their satisfaction and hands over the said developed/ constructed amenity to the Commissioner/ appropriate authority, free of cost he may be granted by the Commissioner a further DR in the form of FSI equivalent to the area of the construction/ development done by him, utilisation of which etc. will be subject to the Regulations contained

in this Appendix.

7. A DCR will be issued only on the satisfactory compliance with the conditions prescribed in the Appendix.”

22. In the present case, it is not in dispute that the petitioner has developed the amenity at his own cost in the surrendered plot and handed it over to the Respondent-Corporation and thereby fully complied with the provision of Clause 6 of Appendix 'W'. Though it is contended by the Respondent-Corporation that the provision of Appendix 'W' are not applicable to the facts of the case, however, learned counsel for the Respondent-Corporation could not point out from records or from provision of the law and /or regulations that amenity developed on the surrendered plot is converted from industrial zone to residential zone or that the developer is not entitled to claim the additional FSI in terms of Clause (b) of Section 126(1) of the M.R.T.P. Act. It may also be stated that except of Respondent-Corporation's statement in additional affidavit-in-reply, that the subject plot was in the industrial zone and the development proposal of the petitioner was approved for converting industrial

zone into residential zone, nothing has been placed on record in support of this contention. That even otherwise, the permission/ Commencement Certificate (revised) dated 03.07.2006 concerning and relating to amenity plot does not even suggest that there was a conversion from industrial zone to residential zone. That even assuming, the Respondent-Corporation converted the plot from industrial zone to residential zone but that itself cannot be a valid ground / reason for denying the petitioner of his statutory right to claim additional TDR after he complies with Clause No. 6 of Appendix 'W' of the Development Control Regulation.

23. For the reasons stated herein above, the impugned order dated 27.01.2014 passed by the Respondent-Corporation is quashed and set aside and the Respondent-Corporation is directed to grant additional TDR/ DRC to the petitioner as claimed vide applications dated 06.06.2009, 14.07.2010 and 01.08.2011 in accordance with law.

24. The petition is therefore allowed in the aforesaid terms with no order as to costs.

(SANDEEP K. SHINDE, J.)

(S.C.DHARMADHIKARI, J.)