

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 7204 OF 2016

M/s. Siddhi Real Estate Developers } through its partner, a partnership } firm having office at Principal Office } at - 4A-9, 4th floor, Lake City } Mall - A, Kapurbawadi Junction, } Majaiwade, Thane (West) 400 607 } and its site office at Highland } Gardens, Opp. Highland Residency, } Dhokali, Thane (West) - 400 608. }	}	Petitioner
versus		
1. The State of Maharashtra } Represented by the Principal } Secretary, Ministry of Urban } Development, Having office at } Mahtralaya, Mumbai 400 032 }	}	
2. Thane Municipal Corporation } Mahanagarpalika Bhavan, } Dr.Almeida Road, Panchpakhadi, } Thane 400 602 }	}	
3. The Asstt. Director of Town } Planning, Thane Municipal } Corporation, Mahanagarpalika } Bhavan, Dr.Almeida Road, } Panchpakhari, Thane 400 602 }	}	
4. The Municipal Commissioner } Thane Municipal Corporation } Mahanagarpalika Bhavan } Dr.Almeida Road, Panchpakhadi, } Thane 400 602 }	}	Respondents

Mr.P.K.Dhakephalkar-Senior Advocate
 with Mr.Aseem Naphade with Mr.Pratik
 Kothari I/b. Mr.Saurabh Oka for the
 petitioner.

Ms.M.P.Thakur-AGP for State.

Mr.Ram S. Apte-Senior Advocate I/b.
Mr.Ajit Ram Pitale for respondent nos. 2
to 4.

**CORAM :- S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.**

DATE :- MARCH 15, 2019

ORAL JUDGMENT :- (Per S.C.Dharmadhikari, J.)

1. Rule. Respondents waive service. By consent, Rule is made returnable forthwith.

2. By this writ petition under Article 226 of the Constitution of India, the petitioner is seeking a writ of mandamus or writ, order or direction in the nature thereof directing the respondents to grant a TDR in the form of FSI against development or construction by the petitioner, at its own cost, of an amenity styled as development plan road. A writ of certiorari is also claimed calling for the records and proceedings in relation to two orders. The prayers in the writ petition read as under:-

“a) Writ of certiorari or Writ in the nature of certiorari or any other order, writ or direction directing calling for the record and proceedings from the office of Respondent No.3 pursuant to which Order dated 30th May, 2014 & 8th March, 2016 were passed by Respondent No.3 and after examining legality, validity and propriety thereof the Orders dated 30th May, 2014 & 8th March, 2016 passed by Respondent No.3 so far as they refuse to grant of TDR in the form of FSI against development or construction by the petitioner at his own cost amenity i.e. Road reserved under DP covered by V.P.No.2005/138 and V.P.No.2003/05 be quashed and set aside and the Respondent Nos.2 to 4 be directed to grant TDR equivalent to the area of the constructed DP Road (i.e. 15,870 sq mtrs) under the provisions of section 126(1)(b) of MRTP Act read with Rule 6 of Appendix

‘W’ of development control rules as they existed at the time of handing over possession of the land with constructed amenity (i.e. DP Road) to Respondent No.2 against developing and/or constructing by the petitioner at his own cost amenity i.e. Road reserved under DP covered by V.P.No.2005/138 and V.P.No.2003/05;

b) Writ of mandamus or writ in the nature of mandamus or any other appropriate writ, order or direction directing Respondent Nos.2 to 4 to consider grant of TDR equivalent to the area of the constructed DP Road (i.e. 15,870 sq mtrs.) under the provisions of section 126(1)(b) of MRTP Act read with Rule 6 of Appendix ‘W’ of development control rules as they existed at the time of handing over possession of the land with constructed amenity (i.e. DP Road) to Respondent No.2. against developing and/or constructing by the petitioner at his own cost amenity i.e. Road reserved under DP covered by V.P.No.2005/138 and V.P.No.2003/05 without assigning the reasons of condition No.12 contained in commencement certificate dated 7th June 2009 at Exhibit “B” hereto and as per the provisions of section 126(1)(b) of the MRTP Act read with rule/regulation 6 of Appendix “W” of the Development Control Regulations, 1994 as they existed at the time of handing over possession of the land with constructed amenity to Respondent No.2.”

3. For appreciating the rival contentions, we would be required to refer to some basic facts.

4. A partnership firm engaged in the business of real-estate development is the petitioner before us and it has impleaded the State of Maharashtra, Thane Municipal Corporation and the Assistant Director of Town Planning, an officer appointed by the State as also the Commissioner of Thane Municipal Corporation, as party respondents.

5. The petitioner claims that it is well and sufficiently entitled to a land, more particularly described in Exhibit 'A'. The petitioner was desirous of developing the said property and therefore, made applications seeking development permissions under section 44 of the Maharashtra Regional and Town Planning Act, 1966 (hereinafter referred to as "the MRTP Act"). In para 2 of the writ petition, the details of the proposals for development are set out and then, it is stated that the development proposals pertaining to V.P.No.2005/138 and V.P.No.2003/05 were approved by the Thane Municipal Corporation. A commencement certificate was issued on 12th May, 2009, which is the development permission within the meaning of the above statutory provision. The development permission was conditional and in that, one of the conditions is to the effect that the asphaltting of the road should be done without any compensation in any manner before applying for the first occupation certificate of the layout or three months after monsoon. Exhibit 'B' is the copy of the commencement certificate and thereafter, the petitioner claims that it complied with one of the condition imposed, inasmuch as, that envisaged handing over of a portion of the property admeasuring 15,870 square meters for the purpose of the development plan road. The petitioner claims that as far as the reservation and surrender or handing over of

the land, there is no dispute and the TDR as against handing over of this amenity or surrendering it is granted. The petitioner claims that there is a stipulation in the Development Control Regulations (DCR) which permits grant of Transferable Development Right (TDR) in the event the amenity is developed or constructed at his own cost by the applicant. In that regard, the petitioner has stated that the said Floor Space Index (FSI) has been refused.

6. The petitioner has pointed out from the list of dates and events that subsequent commencement certificates have been granted on 27th July, 2009, 5th September, 2009 and 7th June, 2009 on the condition that the petitioner will construct, at its own cost, a road on the reserved portion of the land and handover the same to the second respondent. In that regard, Condition Nos. 11 and 12 are relied upon. On 10th August, 2009, at its own cost, the petitioner laid and constructed the road and handed it over to respondent no.2. It also completed the further formalities of mutating the name of the Thane Municipal Corporation in the land records.

7. The petitioner thereafter relied upon Appendix “W” of the DCR and claimed that it is entitled to TDR equivalent to the area of development. The petitioner laid emphasis on the said

Appendix and urged that this TDR is distinct from that which has been granted on surrender of the portion of the land to the Municipal Corporation so as to make a development plan road. The additional incentive comes in the form of a TDR in the event the construction or development of the handed over portion, as a road is carried out by the petitioner. That having been done, there was no reason to reject this request.

8. Mr.Dhakephalkar learned senior counsel appearing for the petitioner would submit that the impugned order proceeds firstly to completely deny this relief and on untenable grounds. Inviting our attention to that order (Exhibit 'G' at page 52), Mr.Dhakephalkar would submit that this communication/order says that the request cannot be granted as the petitioner did not comply with the terms and conditions and in fact, sought a relief or an advantage contrary to it. According to respondent nos. 2 and 4, the petitioner, by Condition No.12 of the terms and conditions of the commencement certificate, undertaken that it will not claim any relief even in the form of such TDR. Further, the words "compensation in cash" or "in kind" would, therefore, include this advantage. This is, therefore, contrary to the condition and the undertaking, which is voluntarily imposed and imposition of which has not been challenged, is their stand.

Mr.Dhakephalkar submits that any condition in the commencement certificate cannot override the DCRs or any stipulation therein. He would submit that the DCRs are traceable to the law, inasmuch as, they form part of section 22(m) of the MRTP Act. They have a statutory force. Once such is the character and status, then, Condition No. 12 cannot be relied upon to deny the relief.

9. It is then urged by Mr.Dhakephalkar that when the petitioner requested the authorities to consider the matter in the light of the applicable DCRs, the Municipal Corporation communicated that it will not be possible to grant that request and in that regard, our attention is invited to the communication at page 54 of the paper book. It is submitted that this is nothing but a reiteration of the earlier stand and for the same reasons, this communication is also vitiated and in law.

10. On the other hand, Mr.Apte learned senior counsel appearing on behalf of the contesting respondent no.2 would submit that the petitioner's request is denied in the peculiar facts and circumstances. Mr.Apte would submit that the attention of this court has already been invited to the circumstances in which the development permission has been granted. The request for grant of TDR has not been completely refused. It has been refused

only to a limited extent. If it had been refused in toto, possibly the argument, as raised by the petitioner's counsel can be accepted. However, a substantial relief or benefit has been granted in the form of TDR on surrender of the portion of the land reserved for the development plan road. Now, the petitioner says and contrary to what was agreed and way back when the commencement certificate was granted, that because the construction and development of this road has been carried out by it, it must be granted the additional TDR. Mr.Apte would submit that once the TDR against the land under development plan road has been granted and the Municipal Corporation has never permitted the developer to construct the road, which is supposed to be constructed as per the specifications provided by the Municipal Corporation, then, all the more this writ petition should be rejected.

11. Alternatively and without prejudice, it is urged by Mr.Apte that the Municipal Corporation has given approvals to the petitioner's development proposals being No.2005/138 and 2003/05 and other proposals were not approved at all. Hence, the question of handing over of the land does not arise in respect of other development proposals. The Municipal Corporation has neither called upon the petitioner to construct the development

plan road nor has the Municipal Corporation provided any specifications. The Municipal Corporation is now not obliged, therefore, to grant this TDR. Reliance is also placed on Rule 47 of the DCRs in that regard.

12. Both, Mr.Dhakephalkar and Mr.Apte, in addition to their oral arguments, handed over a brief note containing list of dates, events and points of arguments.

13. The request that is made by the petitioner should be considered in the light of the DCRs. On 28th April, 1995, a notification was published by the Urban Development Department, Government of Maharashtra. After referring to the prior steps and actions, the notification says that on making necessary inquiries and after consulting the Director of Town Planning and after carefully examining the provisions of the DCRs, the State Government has decided to sanction them. They are sanctioned in terms of this notification. These sanctioned DCRs have several parts. Part II of the same deals with permission for development, procedure for obtaining such permission and requirements to be fulfilled for such permission. Prior thereto, in Part I, there are preliminary provisions, including definitions. The definition which is relevant for our purpose is that of the word “permission” appearing in Regulation

2(90). It means, a permission or authorisation in writing by the Commissioner to carry out any building activity or development work to which these regulations apply. The word 'road' or 'street' is defined in Regulation 2(96). Then, the other provisions which come into play are to be found in Part II. What is relied upon before us is Part IV. That contains Regulations 64 onwards and Regulation 68 says that where the use of a site is specifically defined in the development plan, it shall be used only for the purpose so designated. Then, there is combination of public purpose uses in reserved sites.

14. What we have before us is Table No.13 which enables grant of FSI/marginal distances for industrial buildings. Then, we have Note 1.5. That is to be found at page 188 and it reads thus:-

“N.1.5 Additional Floor space Index which may be allowed in certain categories :

a) Transfer of Development Rights - In certain circumstances, the development potential of a plot of land may be separated from the land itself and may be made available to the owner of the land in the form of Transferable Development Rights (TDR). These Rights may be made available and be subject to the Regulation in Appendix W.

b) Road widening and construction of new roads- The Commissioner may permit additional floor space Index on 100 percent of the area required for road widening or for construction of new roads proposed under the development plan or those proposed under the Bombay Provincial Municipal Corporation Act, 1949, excluding areas of internal means of access, if the owner (including the lessee) of such land surrenders such land for road widening or new road construction without claiming any compensation in lieu thereof

and hand over the same to the Corporation free of encumbrances to the satisfaction of the Commissioner. Such 100 percent of the F.S.I. on land so surrendered to the corporation may be utilised on the remainder of the land upto a limit of 40 per cent of the area of the plot remaining after surrender and the balance F.S.I. remaining thereafter shall be allowed to be utilised as a Development Rights (TDR) in Appendix-W or the full FSI on the land surrendered to the Corporation may be allowed to be used as Development Right in accordance with the regulations governing Transfer of Development Rights (TDR) in Appendix-W. Thereafter the road land shall be transferred in the city survey records in the name of the corporation and shall vest in it becoming part of a public street defined in sub-section (3) of Sec.288 of the Bombay Provincial Municipal Corporation Act, 1949.

Provided in case from "Congested Area" 100 percent area of the F.S.I. on land so surrendered shall be permissible on the reminder of the plot.

In cases, where F.S.I. is already consumed and if thereafter any area is acquired for road widening, then the owner is entitled for the area under road widening as additional F.S.I. to the extent of 40% of the net plot area and the balance F.S.I. If any can be availed through T.D.R.

c) Educational, medical and institutional buildings and starred category hotels-

With the previous approval of the Commissioner and subject to payment of premium. If any as may be fixed by Commissioner and such other terms and conditions as he may specify, floor space indices specified above may be permitted to be exceeded in respect of educational, medical and Institutional buildings of Government and semi-Government offices, starred category hotels (approved by the Department of Tourism) built on independent plots and under one establishment, and used exclusively for that purpose.

Provided the maximum additional F.S.I. which may be granted under this sub-rule shall not exceed.

100 percent in the case of educational medical, institutional buildings and Govt and semi-Government buildings.

"With the previous approval of Commissioner and subject to payment of such premium as may be fixed by Government & paid (out of which 50% shall be payable to the Corporation), & subject to such other terms and conditions as it may specify the

Floor Space Index may be permitted to be exceeded in the case of buildings of all such category residential hotels in independent and under one establishment as approved by the Department of Maximum of 100% of the normal permissible FSI in outside congested area. No condonation in the required open spaces, parking & other requirements as in these regulations shall be allowed in the case of grant of such additional FSI”.

d) No condonation in the required open space, parking and other requirements as in these Regulations shall be allowed in the case of grant of such additional floor space index.

e) Buildings of Information Technology Establishment (pertaining to software only)

The Commissioner may permit the floor spaces indices specified above to be exceeded in respect of buildings in independent plots of information technology establishment set up by Public Bodies like MHADA, SEEPZ, MIDC, SICOM, STP or their joint venture companies having more than 51% stake of these bodies. By 100% or lessees of these Public Bodies having plot exclusively used for ITS subject to terms and conditions as he may specify; Provided in case of additional floor space index allowed in rest of Information Technology Establishment, as aforesaid, premium as may be determined by Government shall be paid to the Government out of which 50% shall be payable to the Corporation.”

15. It is this note which is expressly referring to Appendix “W”.

Once clause (a) is expressly referring to Appendix “W”, then, we must also note that Appendix “W” refers to regulations for grant of TDR to owners/developers and conditions for grant of such rights. We are concerned in this case with Appendix “W”,

Regulation 6. That reads as under:-

“6. When an owner or lessee also develop or construct 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.”

16. A bare perusal of Regulation 6 would indicate that where an owner or lessee develops 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 development right in the form of FSI equivalent to the area of the construction/development done by him, utilisation of which will be subject to the regulations contained in Appendix “W”.

17. Now, in the written arguments, what is sought to be canvassed before us is the fact that the petitioner was informed that this TDR cannot be claimed by it and that order, initially passed, refers to Condition No. 12. It is stated that the commencement certificate was issued with the condition that once the construction is carried out at the cost of the developer, it will not claim any TDR, which is also nothing but a compensation, may not be in cash. However, we find an improvement on this version and that says, contrary to what is expressly stated in the impugned communication/orders of 30th May, 2014 and 8th March,

2016, that the Municipal Corporation had not granted any permission to the petitioner nor has it issued any stipulation for construction of the road. What the petitioner has done is to construct a road, which is nothing but an access road to its own layout. Thus, it is an access or road provided for beneficial enjoyment of the petitioner's property. This is certainly not envisaged by Appendix 'W'. Then, it is urged that as far as the construction of the road is concerned, the TDR for that to be granted, the petitioner should comply with the conditions in Appendix 'W', Regulation No. 6. It is stated that the stipulations, as may be prescribed by the Commissioner or an appropriate authority, have to be adhered to or abided by and if the construction of the road is in accordance therewith, then alone the TDR can be claimed. The construction/development must be to the satisfaction of the Commissioner or the appropriate authority. In the instant case, the petitioner may claim that it has constructed or developed the road at its own cost, but the permission for the same was never granted. The road is supposed to be constructed as per the specifications and details provided by the Corporation. The construction or development may be at the own cost of the petitioner, but once it is without permission and sanction of Thane Municipal Corporation, then, the Regulation does not come into play.

18. Without prejudice, it is stated that the petitioner has not relied upon any specification or stipulation for the alleged construction of the road. In these circumstances, this benefit and as claimed is inadmissible.

19. We are of the opinion that wherever an order is passed by an administrative or a quasi judicial authority assigning reasons, then, when a challenge is raised to the same, in defence, the administrative authority or a public body cannot urge that if the order is unsustainable on the reasons assigned, then, it should be sustained on the materials that are now relied upon. In other words, while defending the challenge in a court of law, an affidavit is filed, in which, additional reasons are assigned and this attempt has always been frowned upon by the Hon'ble Supreme Court.

20. We are of the clear opinion that the reasons now supplied or the submissions that are now canvased are a clear afterthought. None of the reasons now assigned, are to be found in the impugned order. A faint attempt is made to deny the benefit by urging that the petitioner has, on its own, given up its right to claim such a benefit and it never disputed or questioned the condition that is imposed in the commencement certificate. The condition imposed in the commencement certificate, according to the respondent-Municipal Corporation, is clear. This condition

binds the petitioner. If the condition that is imposed and particularly Condition No. 12 is perused carefully, it says that asphaltting of the road should be done free of cost without any compensation in any manner before applying for first occupation certificate of this layout or three months after monsoon.

21. Now, this condition, if juxtaposed with Appendix “W” and Regulation No.6, it will be apparent that the regulation refers to a situation where an owner or lessee also develops or constructs an amenity on the surrendered plot, at its cost, subject to such stipulations as may be prescribed by the authority, as the case may be, and to their satisfaction and hands over the said developed or constructed amenity to the Commissioner/appropriate authority, free of cost, he may be granted, by the Commissioner, further development rights in the form of FSI equivalent to the area of construction/development done by him, utilisation of which will be subject to the regulations contained in this Appendix. Thus, the development and construction of the amenity and which may include a road, at the cost of the owner or lessee, entitles him to claim this further development right. However, it is subject to such stipulations as may be prescribed by the Commissioner or the appropriate authority, as the case may be. No stipulation prescribed by the Commissioner or appropriate

authority has been referred in the impugned order/ communication nor is it brought to our notice. Similarly, we have nothing on record which would indicate that the Commissioner/ appropriate authority was dissatisfied with the development or construction of the amenity. In fact, this is not a matter of dispute between the parties. It is undisputed that the amenity was surrendered and on surrendering that amenity, the development right certificate was issued. After that, the claim is for further development right in terms this regulation and that can be claimed upon development or construction of the amenity on the surrendered plot at the cost of the owner or lessee. How this right, as claimed, can be denied on the touchstone of Condition No. 12 is not clear to us at all. Condition No.12 deals with asphaltting of road. A development or construction of a road and surrendering a road is a distinct matter altogether. The cost of asphaltting can never be claimed by the petitioner/ builder/ Developer in terms of this Condition No.12. When this asphaltting is done at the cost of the owner/ lessee, then, no compensation is payable and that is what Condition No.12 says. The asphaltting should be done at the cost of the owner or lessee before applying for first commencement certificate of the layout or three months after monsoon is the condition. Properly understood, that has no connection with Regulation No.6. That is an independent right,

which can be claimed. Merely because such a condition is imposed and which is accepted cannot, therefore, be a justification to deny this right.

22. It is evident from all the conditions contained in the sanction of development permission/ commencement certificate dated 7th June, 2010 that the development is permitted on certain conditions and that the permission will remain valid for a period of one year from the date of its issue. The permission does not entitle the petitioner to develop the land which does not vest in it. Then, the petitioner has to submit a certificate of structural engineer regarding design of structure and necessary stability certificate. It is obliged to display at site the information regarding obtaining occupation certificate. Before such a certificate is issued, no-objection certificates from several authorities should be obtained and the petitioner must provide for storm water drain and rainwater harvesting facility before applying for plinth certificate. All these conditions and seen in a proper perspective so also in the backdrop of the development permission, which is sought, would denote that the petitioners are entitled to develop the property provided they adhere to these conditions. Importantly, Condition No.11 says that the ownership of land under the development plan road and school reservation should be endorsed on record of rights of 7X12 extract before

applying for plinth certificate. Thus, consistent with the prior condition, Condition No. 12 is inserted and in order to ensure that the developer/ builder develops the plot by providing basic amenities and facilities. He/she should also adhere to the requirement of providing storm water drain, water harvesting, the other safeguards and which would ensure that the structure is stable. Once the structure/ the building that is to come up to be termed as authorised or legal, these conditions have to be complied with. So long as these conditions are complied with, the development will be in terms of the law. These conditions, therefore, are traceable to the power conferred in the Planning Authority in terms of sections 44 and 45 of the MRTP Act. As far as the DCRs are concerned, they are traceable to the development plan itself and once a regulated development is the aim and object of the plan as also the enactment, then, consistent therewith, the DCRs contain these provisions. Thus, a balancing act is performed and so long as the land or a portion thereof, reserved or designated for a public purpose in a development plan, is voluntarily surrendered, then, a benefit accrues for such surrendering of the land. The further benefit accrues if the amenity is developed by the developer at his own cost. This is how the right to develop one's own property vesting in the owner or other right claimed by the lessee is balanced with the

requirement of the Planning Authority. It subserves larger public interest and we achieve a balanced and regulated so also controlled development.

23. Once we have understood the matter in this manner, then, we have no hesitation in agreeing with Mr.Dhakephalkar that the impugned communications, which seek to deny the further right, cannot be sustained. We agree with him that these communications go beyond what is permissible in law. He is also right in his contention that what is guaranteed by the DCRs cannot be taken away by relying on a condition contained in the commencement certificate. That is not a reason, valid and legal enough, to deny the further development rights.

24. In these circumstances, we are of the opinion that the writ petition must succeed. Rule is made absolute by quashing the two communications of 30th May, 2014 and 8th March, 2016. All consequences of such a writ issued by us will then follow. This necessarily means that the petitioner can avail of a benefit conferred and assured by Rule 6 of Appendix "W" of the DCRs. The development right certificate contemplated and envisaged by this regulation shall now be issued and as expeditiously as possible. The needful be done within a period of two months from the date of communication of this order.

25. While we allow this writ petition in the above terms, we clarify that the attempt of Mr.Apte, in relying upon the stand in the Municipal Corporation's affidavit, to justify the impugned action, cannot be accepted. The attempt is that, by acceptance of Condition No.12, the right to claim a further development right in terms of Condition No.6 of Appendix "W" is waived by the petitioner. A waiver cannot be assumed so lightly. A waiver has to be intentional and a voluntary act. For all such contentions and pleas, a proper foundation has to be laid. We have found that the reasons assigned in the affidavit are not assigned in the impugned order. Therefore, a 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. Secondly, there is no dissatisfaction expressed about the quality of the construction or development of the amenity. Hence, if these grounds and which are traceable to the regulations are indeed available and assigned to deny the further development rights, our judgment and order in this writ petition shall not be treated as a precedent for such cases. All such cases will be then considered on their own merits and in accordance with law.

(B.P.COLABAWALLA, J.)

(S.C.DHARMADHIKARI, J.)