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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 10146 of 2017

Krishna Gopal Palande]
Age 46 years, Occup.business,]
having address at 204, ManojKunj,]
Kharigaon, Near Satyanarayan Mandir,]
Bhayander (East), Taluka and District]
Thane-401 105.]**PETITIONER.**

Versus.

Mira Bhayandar Municipal Corporation,]
having its office at Chhatrapati Shivaji]
Maharaj Road, Bhayandar (West),]
Thane-401 101.]**RESPONDENT.**

Mr. Vijay D. Patil a/with Sandeep A. Kocharekar I/by Nikhil Chavan for the Petitioner.
Mr. N.R. Bubna for the Respondent.

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

RESERVED ON : 20th MARCH, 2019.

PRONOUNCED ON : 4th APRIL, 2019.

JUDGMENT [PER: B. P. COLABAWALLA, J.]

1. Rule. Respondent waives service. By consent of parties, rule made returnable forthwith and heard finally.

2. This writ petition has been filed seeking a direction against the Mira Bhayandar Municipal Corporation (the respondent herein) to grant "Transferable Development Rights" (**TDR**) or a "Development Rights Certificate" (**DRC**) in respect of an area admeasuring 5349 square meters. This TDR/DRC is claimed by the petitioner on the basis that the petitioner, on the instructions and directions of the respondent-Corporation constructed a separate parking lot building admeasuring 3873.87 square meters (for convenience called the **"said constructed amenity"** or **"constructed amenity"**) and handed over possession of the same to the respondent-Corporation on 12th January, 2016. According to the petitioner, as per the Deed of Assignment entered into between the petitioner and the respondent-Corporation dated 4th September, 2015 as well as Regulation 33 (6) of the Appendix IV of the Development Control Regulations of the respondent-Corporation,

the petitioner was entitled to TDR for the said constructed amenity, namely, the parking lot building.

3. Before we advert to the legal submissions canvassed by both the parties, it would be apposite to set out a few facts. According to the petitioner, the land bearing old Survey No. 387, new Survey No.158, Hissa No. 2, 5,7 and old Survey No.388, new Survey No. 156, Hissa No. 13 are reserved for a parking lot bearing Reservation No. 264-A as stipulated in the Development Plan of the respondent-Corporation (hereinafter referred to as "**the said land**").

4. In Paragraph Nos. 3 and 4 of the petition, the petitioner has set out as to how the petitioner acquired development rights of old Survey No.388, new Survey No. 156, Hissa No.13, admeasuring 1190 square meters; old Survey No. 387, new Survey No.158, Hissa No.7 admeasuring 4270 square meters; Hissa No. 2 admeasuring 2340 square meters; and Hissa No.5 admeasuring 250 square meters situated at village Navghar, Bhayandar and within the local limits of the respondent-Corporation. It is thereafter averred in the petition that the petitioner entered into a Development Agreement

dated 14th July, 2006 with the registered owners who had assigned development rights in respect of the above-mentioned properties to the petitioner on the terms and conditions, more particularly set out in the Development Agreement. The original owners also executed an Irrevocable Power of Attorney in favour of the petitioner. The Development Agreement as well as the Irrevocable Power of Attorney are duly registered on 14th July, 2006 with the office of the Sub-Registrar of Assurances, Thane-4. It is therefore the contention of the petitioner that by virtue of the rights conferred under the said Development Agreement read with the Irrevocable Power of Attorney, the petitioner is absolutely seized and possessed of and well sufficiently entitled to the said properties.

5. According to the petitioner this is fortified by the fact that for development of the aforesaid properties, the respondent also, vide their letter bearing No. MBMC/TP/3346/2007-08, granted a Commencement Certificate for construction of buildings on the above mentioned properties. Thereafter, the respondent-Corporation issued a Letter of Intent (LOI) vide order bearing No. MBMC/ TP/3781/09-10 dated 25th January, 2010 wherein the

petitioner was informed that instead of providing a parking lot on the ground floor, the petitioner should provide a separate building for a parking lot (constructed amenity) to the respondent-Corporation as per the Development Control Regulations. Accordingly, as per the Revised Building Plan dated 5th August, 2010 approved by the respondent-Corporation, an area admeasuring 3740 square meters was reserved for parking reservation No. 264-A [i.e. building for parking lot of Ground Floor to 2nd Floor] admeasuring 3873.87 square meters. This was to be surrendered by the petitioner to the respondent-Corporation for amenities purpose. In furtherance of this arrangement, the petitioner started construction of the said parking lot building (constructed amenity) admeasuring 3873.87 square meters. Thereafter, the petitioner and the respondent entered into a Deed of Assignment dated 4th September, 2015 (for short **"DOA"**) which was duly registered. Under this DOA, the petitioner was styled as the "Assignor" and the respondent-Corporation was styled as the "Assignee". The relevant clauses of this DOA read as under:-

> "1) All the recitals made herein above shall form and become a part and parcel of these presents as if same are incorporated specifically and expressly in the body of

these presents.

2) The Assignors do hereby handover the vacant and unencumbered possession of said “Parking Lot Building” i.e.

Sr No.	Building Type.	Area in square meters.
1.	Building for Parking Lot (Ground Fl to 2^{nd} Floor.)	3873.87 square meters.

in favour of the Assignee free of cost, charges and expenses however subject to what is mentioned in clause (5) herein below. Both the parties herein agree and accept that total built up area of the said buildings on the said Parking Lot reservation is 3873.87 square meters as per plan approved plan and the same is measured jointly by GIRISH PRADHAN, M/S ARCHISUM, Architect of Assignors and the concerned officer of the Assignee and copy of the plan prepared and signed by them is annexed hereto.

3) The Assignors do hereby assign, transfer and assure free of cost unto the Assignee their all rights, title and interest in the said constructed area admeasuring 3873.87 square meters.

Sr. No.	Building Type.	Area in square meters.
	Building for Parking Lot (Ground Fl to 2^{nd} Floor.	3873.87 square meters.

of Revenue village Navghar and District Thane within the limits of Mira Bhayander Municipal Corporation and within the Registration Sub-District and District Thane, which is delineated in pink ink in the map annexed hereto.

4) The Assignors, his successors, agent or any person claiming through them are not entitled to claim any further consideration, claim, damages or compensation towards the transfer of all rights, title and interest in the said constructed area of said building. Save and except any further compensation available under the Policy/Circular/Rules and Regulation of MBMC or otherwise.

5) Assignee shall in lieu of the said Buildings handed over and transferred free of cost in favour of Assignee by the Assignors by way of compensation, grant/granted certificate of TDR/FSI credit of the Assignors, his successors, agent or any person claiming through 3873.87 square meters in the said layout in any of the building constructed / to be constructed in the said layout imposing any condition in that; any condition in that behalf and such the Assignors shall fully entitled to utilize the FSI credit in addition to other FSI on the said layout. The Assignors shall be entitled to all FSI credit as may be permissible and/or permitted by the policy / guide the / order / judgment or any court of law in lieu of the said Amenity open Space handed over free of cost and further in lieu of constructions i.e. said building carried out on behalf of the said Amenity open Space on behalf of the Assignee and handover free of cost."

6. As can be seen from the aforesaid Clauses, the DOA records that the petitioner was to hand over vacant and unencumbered possession of the said parking lot building (constructed amenity) admeasuring 3873.87 square meters to the respondent free of cost, charges and expenses, but subject to what

was mentioned in Clause (5) of the DOA. Clause (5) of the DOA clearly records that the respondent-Corporation, shall, in lieu of the said constructed amenity being handed over and transferred free of cost in favour of the respondent-Corporation, by way of compensation, grant certificate of TDR/FSI credit to the petitioner of 3873.87 square meters entitling the petitioner to fully utilize the said TDR/FSI credit in addition to the other FSI on the said layout.

7. It is not in dispute that this parking lot building (constructed amenity), comprising of ground plus two upper floors admeasuring 3873.87 square meters, was constructed by the petitioner and the respondent-Corporation has also issued an occupation certificate dated 16th October, 2015 in respect of the said building. It is also not in dispute that the petitioner has handed over/assigned the physical possession of the parking lot building (constructed amenity) to the respondent-Corporation vide its letter dated 12th January, 2016 and the Corporation has received and accepted the physical possession of the same from the petitioner. In fact, the electricity meter and the bills in respect thereof are also transferred in the name of the respondent-Corporation and the said

constructed amenity is exclusively possessed, occupied and used by the respondent-Corporation.

8. It is the case of the petitioner that thereafter time and again, the petitioner visited the office of the respondent-Corporation and requested them to grant necessary TDR/DRC, without any success. It is in these circumstances that the petitioner, vide his Advocate's notice dated 30th June, 2016, called upon the respondent-Corporation to grant TDR/DRC for an area admeasuring 5349.00 square meters to the petitioner within 15 days from the date of receipt of the said notice. Despite this notice, no TDR/DRC was given to the petitioner and it is in these circumstances that the petitioner has approached this Court under Article 226 of the Constitution of India for issuance of an appropriate writ, order or direction against the respondent-Corporation to grant the TDR/DRC for an area admeasuring 5349.00 square meters.

9. For the sake of completeness, we must also mention that the Government, vide their Notification dated 29th January, 2016, came out with Regulations for Grant of Transferable Development

Rights and the cases which were eligible for the same. Clause 2 (iv) of these Regulations clearly states that cases eligible for compensation in terms of Transferable Development Rights shall be permissible for development or construction of the amenity on the reserved land. Clause 4.2 deals with how the calculation has to be done for granting the aforesaid TDR. It is relying upon the DOA entered into with the respondent-Corporation (dated 4th September, 2015) read with the aforesaid Notification dated 29th January, 2016 that the petitioner has claimed TDR/DRC for an area admeasuring 5349 square meters for constructing the said parking lot building (constructed amenity).

10. In this factual backdrop, the learned Advocate appearing on behalf of the petitioner submitted that it is not in dispute that the petitioner had constructed a separate parking lot building admeasuring 3873.87 square meters and handed over possession of the said building to the respondent-Corporation on 12th January, 2016. The fact that this parking lot building was to be constructed by the petitioner is also clearly recorded in the DOA entered into between the petitioner and the respondent-Corporation on 4th

September, 2015. The learned Advocate submitted that for construction of this parking lot building, the petitioner was entitled to TDR for construction of the said amenity over and above the FSI granted by the respondent-Corporation for taking over the land which formed the portion of the parking lot reservation under Reservation No. 264-A. The learned Advocate submitted that as far as the FSI for the land is concerned, the same has duly been given to the petitioner and which was admeasuring 3310 square meters. However, for construction of the parking lot building (constructed amenity) no TDR/DRC has been issued to the petitioner though he was entitled to the same not only under the DOA dated 4th September, 2015 but also under the Development Control Regulations of the respondent-Corporation. He submitted therefore that there was no justification in refusing to grant the aforesaid TDR and hence the respondent-Corporation be directed to grant the TDR/DRC to the petitioner, as more particularly set out in the petition.

11. On the other hand, the learned Advocate appearing on behalf of the respondent-Corporation, submitted that the petitioner

had given a proposal for development on 23rd July, 2010. Pursuant thereto, the petitioner was granted a Commencement Certificate dated 5th August, 2010. As per condition No. 36 of the aforesaid Commencement Certificate, the petitioner was to complete the work of the parking lot building and transfer the same free of cost to the respondent-Corporation. The learned Advocate submitted that pursuant to this proposal for development, the petitioner has completed the work of the residential building and now after considerable lapse of time has made a claim for TDR towards construction of the parking lot building.

12. The learned Advocate for the respondent-Corporation further submitted that under the Development Control Regulations, the land under reservation can be acquired by the Corporation by payment of consideration in the form of money and/or TDR. Alternatively, if reservation is transferred to the Corporation by the concerned person free of cost, potential of the entire amount is considered for calculation of the buildable area irrespective of development of parking as per the provisions of Table No. 3 (IV) F of Rule 9 of the Development Control Regulations. The learned

Advocate submitted that as per condition No.36 in the commencement certificate, the parking lot had been transferred free of cost and the benefit of calculation of the entire area had already been granted to the petitioner and therefore there was no case for granting any further TDR to the petitioner. In these circumstances, the learned Advocate submitted that there was no merit in the petition and the same ought to be dismissed.

13. We have heard the learned Counsel for the parties at length and have perused the papers and proceedings in the writ petition. The narrow dispute in the present writ petition is whether the petitioner is entitled for any TDR/DRC for constructing the parking lot building (constructed amenity) and handing over the same to the respondent-Corporation. It cannot be disputed that this parking lot building is an amenity constructed by the petitioner free of cost and handed over to the respondent-Corporation. As mentioned earlier, out of the total areas that were given for development by the original owners to the petitioner, a certain portion was reserved for a parking lot. This reserved portion (admeasuring 3310 square meters) was surrendered to the

respondent-Corporation and compensation for the same was also given to the petitioner by granting FSI admeasuring 3310 square meters. The question that arises here is whether thereafter the petitioner is entitled to TDR/DRC for constructing a parking lot building on the said reserved land for the benefit of the respondent-Corporation and handing over the same to them. In this regard, Regulation 33 (6) and (7) of Appendix IV clearly stipulates that when the owner or lessee also develops or constructs the amenity on the surrendered plot at the cost and subject to such stipulations as may be prescribed by the Chief Officer or the Appropriate Authority, as the case may be, and to their satisfaction, and thereafter hands over the said developed/constructed amenity to the Chief Officer/ appropriate authority, free of cost, he may be granted a further TDR in the form of FSI equivalent to the area of the construction/development done by him, utilization of which will be subject to the Regulations contained in this Appendix. A DRC will be issued on the satisfactory compliance of the conditions prescribed in this Appendix. Regulation 33 (6) and 33 (7) read as under:-

> "6. When the owner or lessee also develops or constructs the amenity on the surrendered plot at the cost subject to such stipulations as may prescribed by the Chief Officer or

> the appropriate authority, as the case may be and to their satisfaction and hands over the said developed / constructed amenity to the Chief Officer/ appropriate authority, free of cost, he may be granted by the Chief Officer a further DR in the form of FSI equivalent to the area of the construction/development done by him, utilization 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 conditions prescribed in this Appendix."

14. What this Regulation clearly stipulates is that over and above receiving the FSI for the surrendered land, if the owner of the said land develops or constructs the amenity on the said surrendered land and hands over the same to the respondent-Corporation and to their satisfaction, he can be granted a further DRC in the form of FSI, equivalent to the area of the construction/development done by him. As mentioned earlier, this would be in addition to the FSI that was granted to the owner for surrendering the land itself. Looking at these Regulations, we are unable to accept the submission on behalf of the respondent-Corporation that the petitioner is not entitled to any TDR/DRC for constructing the parking lot building (constructed amenity). This is also borne out by the DOA dated 4th September, 2015 entered into

between the petitioner and the respondent-Corporation. Clause 5 (and which is reproduced above) also clearly states that for constructing and handing over the parking lot building, the petitioner would be entitled to claim TDR/FSI credit. This being the position, we are unable to accept the submission on behalf of the respondent-Corporation that the petitioner is not entitled to TDR for construction of the parking lot building and which was handed over free of cost to the respondent-Corporation. This is more so when one takes into consideration that physical possession of the parking lot building (constructed amenity) was taken over by the respondent-Corporation without raising any issue or dispute about the development or construction of the said constructed amenity. In other words, or to put it differently, the construction and development of the parking lot building (constructed amenity) was to the satisfaction of the respondent-Corporation. We are, therefore, all the more of the view that the argument canvassed by the respondent-Corporation that the petitioner is not entitled to TDR for constructing the parking lot building (constructed amenity) to be without any merit.

15. Equally we find that the reliance placed by the respondent-Corporation on condition No.36 in the Commencement Certificate is wholly misplaced. Firstly, such a condition cannot displace the statutory provisions which are contained in the Development Control Regulations and more particularly Regulations 33 (6) and (7) of the Appendix (IV). This is also correctly understood by the respondent-Corporation in view of the fact that despite this condition being inserted way back as on 5th August, 2010, the respondent Corporation itself entered into a DOA dated 4th September, 2015 with the petitioner which clearly records that for construction of the parking lot building, the petitioner would be entitled to TDR/FSI credit. This being the case, we find that placing reliance on condition No.36 in the Commencement Certificate dated 5th August, 2010 does not carry the case of the respondent-Corporation any further.

16. Having said this, what we have to now determine is whether the petitioner can take advantage of the Notification dated 29th January, 2016 which relates to Regulations for grant of Transferable Development Rights. It is not in dispute that till date,

no TDR/DRC has been granted to the petitioner. This Notification came into force with effect from 29th January, 2016 and is annexed as Exhibit "**RJ-6**" (pages 91 to 101 of the paper book). Annexure – B to this Notification are the *"Regulations for Grant of Transferable Development Rights"*. This Notification, along with its annexures, admittedly, applies to the respondent-Corporation. Clause 2(iv) of these Regulations clearly stipulates that compensation in terms of TDR shall be permissible for development or construction of the amenity on the reserved land. How much TDR has to granted is to be worked out or calculated as per Clause 4.2 of these Regulations and reads thus :-

> "**4.2. Transferable Development Rights (TDR) against Construction of Amenity:-**
>
> When an owner or lessee with prior approval of Chief Officer, may develop or construct the amenity on the surrendered plot or on the land which is already vested in the Planning Authority, at his own cost subject to such stipulations as may be prescribed and to the satisfaction of the Chief Officer and hands over the said developed/constructed amenity free of cost to the Chief Officer then he may be granted a Transferable Development Rights (TDR) in the form of FSI as per the following formula:-
>
> **Construction Amenity TDR in sq.m. = A/B * 1.25**
>
> Where,

> A = cost of construction of amenity in rupees as per the rate of construction mentioned in Annual Statement of Rates (ASR) prepared by the Inspector General of Registration for the year in which construction of amenity is commenced.
>
> B = land rate per sq.m. as per the Annual Statement of Rates (ASR) prepared by the Inspector General of Registration for the year in which construction of amenity is commenced."

17. Clause 8 deals with the effect of these Regulations and clearly stipulates that the provision of Generation of TDR from these Regulations shall not be applicable where the DRC has been issued prior to the publication of these Regulations. However, utilization of such TDR shall be allowed as per these Regulations only. In other words, what clause 8 stipulates is that where a DRC has already been issued then inter alia the calculation for granting TDR cannot be done under these Regulations but utilization of such TDR shall be allowed as per what is stated in the said Regulations only. What follows from this is that if a DRC has not been issued prior to coming into force of the said Regulations, then the calculation of TDR would have to be done as per the said Regulations and which form part of the Notification dated 29th January, 2016.

18. In the facts of the present case, admittedly, no DRC has

been issued in favour of the petitioner. It is for this reason that the petitioner is before us, seeking a writ of mandamus against the respondent-Corporation for a direction to issue TDR/DRC in favour of the petitioner. This being the factual scenario before us, we are clearly of the view that the petitioner would be entitled to TDR/DRC as per the formula set out in clause 4.2, and which is reproduced by us earlier.

19. In view of the aforesaid discussion, we direct the respondent-Corporation to grant TDR/DRC to the petitioner for construction of the parking lot building. This TDR/DRC shall be granted as per the formula as set out in clause 4.2 of the Regulations and which forms part of the Notification dated 29th January, 2016. We further direct that the respondent-Corporation shall carry out the exercise of calculating the entitlement of the petitioner for TDR against construction of amenity (as per clause 4.2) within a period of four weeks from today and thereafter grant the TDR/DRC to the petitioner within a period of two weeks thereafter.

20. Rule is made absolute in the aforesaid terms. The Writ

Petition is accordingly disposed of. However, in the facts and circumstances of the case, there shall be no order as to costs.

(B. P. COLABAWALLA, J) (S. C. DHARMADHIKARI, J)