

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

WRIT PETITION NO.729 OF 2015
WITH
NOTICE OF MOTION NO.65 OF 2017

Zenith Tins Private Limited)
having their address at "Zenith)
House", 2nd Floor, Keshavrao)
Khade Marg, Opposite Race)
Course, Mahalaxmi,)
Mumbai - 400 034, India) Petitioner

versus

1. The State of Maharashtra)
Through the Ministry of Urban)
Development and the Ministry of)
Housing Corporation, having its)
address at Mantralaya,)
Mumbai - 400 032, India)
)
2. The Municipal Corporation of)
Greater Mumbai,)
a statutory body constituted)
under the provisions of Mumbai)
Municipal Corporation Act, 1888,)
having its office at Mahapalika)
Marg, Mumbai - 400 001, India)
)
3. The Municipal Commissioner)
of the Municipal Corporation of)
Greater Mumbai, having his)
office at Mahapalika Marg,)
Opp.C.S.T. Railway Station)
Mumbai - 400 001, India)
)
4. The Assistant Municipal)
Commissioner (Estate),)
Brihanmumbai Mahanagarpalika)
having his office at Mahapalika)
Marg, Opposite C.S.T. Railway)
Station, Mumbai - 400 001, India)

5. The Assistant Engineer,)
 Office of the Deputy Chief)
 Engineer, Building Proposals)
 (City), 'E' Ward Municipal Office,)
 10, Shaikh Hafizzudin Marg,)
 Byculla, Mumbai 400 008, India) Respondents

Mr.S.U.Kamdar, Senior Counsel, Mr.Chirag G. Kamdar, Mr.Nishit Dhurva, Mr.Prakash Shinde, Ms.Khushbu Chajjed, Ms.Niyati Merchant I/b MDP & Partners for the Petitioner.

Mr.S.B.Gore, AGP for Respondent No.1 (State).

Mr.Rajiv Chavan, Senior Counsel a/w Mr.J.Reis, Senior Counsel, Ms.Rupali Adhate for MCGM.

Mr.Sachin Beldar, Assistant Engineer, Improvement-I, MCGM present.

Mr.Kiran Badgujar, Sub-Engineer (Estates), MCGM present.

CORAM :- S. C. DHARMADHIKARI & G.S.PATEL, JJ.

DATE :- SEPTEMBER 17, 2019

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

1. By this petition under Article 226 of the Constitution of India the petitioner is challenging a demand notice of the Mumbai Municipal Corporation (“**MMC**”), a body incorporated under the Mumbai Municipal Corporation Act, 1888 (“**the MMC Act**”). It seeks a writ of mandamus or any other appropriate writ, order or direction, directing respondent Nos.2 and 4 not to enforce the said demand or to claim any amount thereunder.

2. Since the petition involves a question of interpretation of the clause in a Lease Deed and extensive arguments have been canvassed, we proceed to admit this petition.

3. **Rule.** Respondents waive service. Since all affidavits are filed and respondents have waived service, by consent, rule is made returnable forthwith, and the matter is taken up for hearing and final disposal.

4. Apart from the State of Maharashtra, respondent Nos.2 to 5 are the Municipal Corporation, its Commissioner, the Assistant Municipal Commissioner (Estate) and the Assistant Engineer.

5. The facts are few and simple. The petitioner relies upon an Indenture of Lease dated 20th November, 1968 between the Municipal Corporation of Greater Mumbai, Municipal Commissioner, one Mahomedhosein Shaikhali Barodawalla, Sultanali Barodawalla and the petitioner executed for a term of 72 years 10 months and 17 days. The petitioner before us is a company incorporated under the Companies Act, 1956 and styled as a lessee. The Lease Deed recites that by an Indenture of Lease, the Municipal Corporation had granted a lease of the immovable property and which immovable property later on came to vest in

the petitioner as a lessee. The petitioner had been described as a lessee and the said Mahomedhosein Shaikhali Barodawalla and Sultanali Shikhali Barodawalla are the confirming parties. The Lease Deed recites that the land admeasuring 15678 square yards or thereabout situate on Plot No.1-C (part), Plot No.2 of the Mahalaxmi Flats Estate of the Corporation was, by a Deed of Assignment dated 22nd September, 1953, registered with the Sub-Registrar of Assurances on 15th April, 1954 and out of which, an area of 6500 square yards was assigned to the confirming parties. The confirming parties became entitled to lease in respect of this area. The lessees requested the Corporation to sub-divide the said Plot No.1-C (part), Plot No.2 into three different plots and to apportion the area and to grant three separate leases. In terms of this agreement, the Corporation has granted absolute assignment of the area 6500 square yards in favour of the confirming parties. The confirming parties requested to the Corporation to grant a lease to the petitioner-lessee and that is how the Lease Deed proceeds to assign the rights in the immovable property in favour of the petitioner.

6. The covenants under the Lease Deed, *inter alia*, are that the buildings and the lands/plots for the time being demised shall be used only for offices, godowns and such industries as may be

permitted by the Corporation. Clause No.12 of this Lease Deed reads as under :-

“12. To use the buildings for the time being on the demised land only for offices, godowns and such Industries as may be permitted by the Corporation AND not to use the said premises or any part thereof or permit the same to be used for any business trade occupation or purpose whatsoever other than as aforesaid without the previous consent in writing of the Commissioner AND in particular not to use the demised premises or any part thereof as a refreshment room booth or shop for sale for consumption either on or off the demised premises of intoxicating liquor or toddy or (except by any holder of a chemist's or dispensary license from the Excise Department) of opium ganja bhang or other intoxicating drugs whether such liquor toddy opium ganja bhang or other drugs be country or foreign and whether the sale be by retail or wholesale AND not to do or suffer to be done on the said premises anything which may be or become noisome injurious or offensive to the Corporation or the owners or occupiers of this or any other property in the neighbourhood.”

(emphasis supplied)

7. The petitioner then states in the petition that the Lease Deed envisaged that the buildings constructed on the land may be used by the lessee or its nominee for offices, godowns and such industries as may be permitted by respondent No.2. There is reliance placed by the petitioner on some other clauses of the Lease Deed, but it is undisputed that the lease was subsisting. It was not terminated and during its subsistence, the petitioner, by virtue of Memorandum of Understanding dated 28th February, 1991, gave a lease to the Industrial Credit and Investment Corporation of India Limited (now ICICI Bank Limited), of an area

admeasuring 40,983 sq.ft. on the ground floor; 1st floor admeasuring 41,084 sq.ft.; and part of the second floor admeasuring 29,516 sq.ft., i.e. in all 1,11,583 sq.ft. The bank appointed its Architect to carry out interior work and consequently procured an Intimation of Disapproval (IOD) and Commencement Certificate. The bank, thereafter, entered the premises/building and used it as its office. The petitioner in paragraph 4(x) has set out as to how, upon obtaining the permission, the bank commenced the user. The petitioner says, relying upon clause 12 reproduced above, that this arrangement was entered into and implemented. The petitioner says that the report, which was relied upon by the Corporation would not enable it to raise any demand in terms of the money to be paid under the Lease Deed. It is in these circumstances that the petitioner has entered into this arrangement and there was no question of raising any demand on the petitioner.

8. The writ petition has been extensively amended possibly to include everything in relation to the arrangement and the impugned demand.

9. Be that as it may, the amendments refer to another notice issued by the fifth respondent to the bank and the petitioner. A

copy of that notice dated 10th December, 2013 is annexed as Exhibit "C-1". The petitioner was called upon to pay a premium. The petitioner was informed by the Corporation that this premium has been demanded so as to regularise the user of the premises by the bank. The foundation for this notice is that without seeking any permission from the Corporation, a lease was executed by the petitioner in favour of the ICICI Bank Limited. By a letter dated 17th June, 1997, the Corporation was informed about the appointment of an Architect-M/s. Raja Aederi. The Architect submitted the proposal on behalf of the lessee for additions, alterations and change of user from industry to ICICI Bank and its Data Processing Offices with computers. This submission of the proposal itself is an admission that there is a change of user of the building from industrial to commercial. It is in these circumstances that condition No.(A) 10 of IOD that extra ground rent/penalty/ premium for breaches in lease, if any, will not be paid to Ward Officer (Estate) and receipt thereof shall not be submitted to these respondents would contain a positive element. That positive element is that this is a breach of the lease conditions. If that entails any payment of extra ground rent/penalty/premium for breaches in lease, then, that would be paid to the Ward Officer (Estate) and receipt of payment would be submitted. It is contended that the bank appointed the Architect

and was therefore solely responsible for any such payment, if at all capable of being demanded by the Corporation.

10. However, the Corporation maintains that the land was leased to the petitioner for office, godown and industrial use and by necessary implication, it means an office and/or godown that goes with industrial use. The Lease Deed specifically excludes commercial use by the petitioner. Therefore it could not have executed a sub-lease in favour of the bank and induct the bank in the premises without prior permission of the Corporation. If the amounts for change of user as demanded are paid then alone the user of the premises by the ICICI bank will be regularised and not otherwise is the stand taken.

11. Now, consistent with this stand, a total sum of Rs.11,64,08,845/- as the balance amount of the one-time premium against change of user is being demanded. Hence the present petition has been filed to assail this demand.

12. On this petition, we have heard Mr.Kamdar, learned senior counsel appearing for the petitioner and Mr.Rajiv Chavan, learned senior counsel appearing on behalf of respondent Nos.2 to 5. Mr.Kamdar would submit that a reading of clause 12 of the

Lease Deed would indicate that the lease expressly permits user of the premises for offices, godowns 'and/or' permitted industries. The clause cannot be read in the manner suggested by the Corporation. The first part of the clause refers to the use of the buildings on the demised land and they could be used only for offices, godowns and such industries as may be permitted by the Corporation. The second part enacts a prohibition and, therefore, the clause says that the buildings on the land demised cannot be used in their entirety or any part nor the permission can be given to use the whole or part for any business, trade or occupation or purposes whatsoever other than as aforesaid without the previous consent in writing of the Commissioner. Mr.Kamdar would submit that this denotes that with previous consent in writing of the Commissioner, the premises can be used either in whole or part for any business, trade or occupation. The clause further states that the premises shall not be used as a refreshment room, booth or shop for sale for consumption either on or off the demised premises for intoxicating liquor or toddy or (except by any holder of a chemist's or dispensary license from the Excise Department) of opium, ganja, bhang or other intoxicating drugs and finally the premises should not be used for anything that is obnoxious or offensive to the Corporation or the owners or occupiers or any other property of the neighbourhood.

13. Then reliance is placed on another clause to urge that the petitioner applied for change of user. Once it applied for change of user that presupposes that there was a violation or breach of this clause. In that regard, Mr.Kamdar would submit that the rest of the covenants and particularly, covenant No.2 applies to all cases where the consent of the Commissioner or the City Engineer is required to any alteration or addition to the buildings or other erections on or projecting from the demised land or to any variation of user of any portion thereof and such consent may be given upon the terms of payment by lessee of any fine or premium or otherwise as may be agreed between the parties. Mr.Kamdar would submit that this presupposes that if any alterations or additions are required to be made in the building and wherever consent for the same is needed or necessary, that consent may be given in terms of payment by the lessee or otherwise as may be agreed between the parties. Mr.Kamdar would submit that this covenant has no application, for in this case, nothing contrary or in breach or violation of the lease has been done at the site. In the circumstances, there is no question of the petitioner being called upon to pay a sum and as huge as Rs.11,64,08,845/-. Therefore, the demand be set aside.

14. On the other hand, Mr.Chavan would argue that it is not open for the petitioner to contend that there is no breach or violation of the clause in question. Mr.Chavan, in addition to the affidavit-in-reply, relied upon a compilation of documents containing copies of the correspondence carried out by the Architect of the bank to urge that it is the petitioner who sought all the permissions. If it is the petitioner who has sought the permissions for change of user, then it is an inherent admission of breach. The breach is thus implicit for the petitioner itself sought permission for change of user. This would enable the Corporation to demand the premium. That is how the demand for premium is sought to be justified. Mr.Chavan would submit that therefore the writ petition be dismissed.

15. For properly appreciating this controversy, it would be advantageous to refer the demand itself. It is on the subject of Plot No.1-C and 2-B, Mahalaxmi Flats Estates and a proposal for additions/alterations and change of user from Industry to ICICI Bank with Data Processing Office. The Architect applied for Completion Certificate by letter dated 29th December, 1999 and gave the details of the works originally proposed and carried out and the amount chargeable therefor. The contents are that there is a change of user for area approved by the Executive Engineer,

Building Proposal, for change of user for area occupied by ICICI, but not approved by the said Executive Engineer, cabin near Pumproom, Pumproom, Cooling Tower and security deposit for breach.

16. Once this was the nature of the communication from the Architect, the Corporation presumed that there is or was a breach. It, therefore, informed the Architect that the whole application made by him, to be processed and granted, would require payment of money and that would be a payment made for regularisation of the breaches. We have, therefore, to note whether there was any breach at all justifying this demand.

17. It is well settled and requires no reference to any judgments that covenants and clauses of the Deeds in writing and particularly Lease Deeds have to be interpreted so as to give meaning to the words and expressions therein in tune with the intent of the parties. If the words are plain, unambiguous and clear, then, there is no room for applying any principle of interpretation at all. One must look at the clause in question, read it as a whole together with other clauses harmoniously so as to arrive at a conclusion with regard to its interpretation. There is no question of the correspondence or any other materials acting

as a guide in such case. It may be that the Architect understood the document in particular manner and, therefore, while corresponding with the Corporation sought a permission, but even that permission must be seen for the purpose of determining whether there was a breach at all. The permission sought by the Architect was to carry out additions and alterations. That was to enable the use of the building as an office of the ICICI Bank Limited. That was not an admission of a breach of the terms and conditions of the Lease Deed. That the Corporation presumes this, and reads it as an admission is, therefore, no ground or justification for upholding the demand.

18. We have to see whether the demand could have been raised in the light of the clear wording of clause 12. In that regard, a careful perusal of the Lease Deed would denote that the parties to the same are the Municipal Corporation of Greater Mumbai. The Lease Deed is of 20th November, 1968. The Corporation acted through the Commissioner for there is power vested in the Corporation and also the Commissioner to execute such contracts. Maybe the Commissioner would require the permission of the General Body. Be that as it may, one Mahomedhoosein Shaikhali Barodawalla and Sultanali Shikhali Barodawalla were named as the confirming parties and the petitioner as a lessee.

There is a reference to Indenture of 4th March, 1948 in the opening recitals and thereafter, how there was a request made by the lessee, agreed to by the confirming parties and accepted by the Corporation is mentioned. Thereafter, the Deed refers to an agreement and in consideration of an absolute assignment of an area of 6500 square yards in favour of the confirming parties, the confirming parties were capable of executing a lease in perpetuity in respect of these plots. They requested the Corporation to grant such a lease to the lessee, namely, the petitioner before us. That request was accepted by the Corporation. That is how the comprehensive document came into existence. While this comprehensive arrangement was referred to in the recital and opening clauses 1 to 4, it is pertinent that a perusal thereof would indicate that there is a permission granted to use the buildings and the plots. There is also a permission to use a portion of the land demised as well. However, there is a prohibition not to pull down, add to or alter any buildings or other erections at any time on or projecting from the land thereby demised nor to erect any other erection or building on or projecting from the said land without the previous consent in writing of the Commissioner or the City Engineer. There is an agreement to maintain and keep in repair all drains, sewers and gutters on and leading from the demised premises to the satisfaction of the Commissioner. There

is a prohibition against excavation and not to remove stones and sands from the land itself. There is also a prohibition against dealing with intoxicating drugs. There is an agreement between the parties to repair and maintain the structures/buildings on the land. If clauses 8 and 9 of the said Lease Deed are perused, it is clear that the Commissioner can cause an inspection to be carried out and from time to time with previous notice. That there is no nuisance which will be allowed to be caused to those residing in the neighbourhood by cause of repairs or by such other works which may be carried out in the buildings.

19. In the backdrop of this, in clause 12, the agreement is to use the building on the demised land only for offices, godowns and such industries as may be permitted by the Corporation. Thus, the buildings can be used for the offices OR godowns OR such industries as may be permitted by the Corporation, or some combination. The premises could be used for an industry without a godown or office, or only for a godown with no industry, or only for an office with neither godown nor industry. What was prohibited without prior permission was use for any business, trade or occupation. For instance, it could not have been used as a retail outlet for shopping of any kind. There was no prohibition against user of the buildings for offices.

20. When such was the understanding of the petitioner, we do not think that the petitioner, in executing a lease or sub-lease in favour of the ICICI Bank Limited, has committed a breach of the terms and conditions of the Lease Deed and particularly, clause No.12. The ICICI Bank Limited was to enter in the buildings and use them as their offices. Clause 12 expressly permits that. It is not possible to read this clause as read and interpreted by Mr.Chavan. He would read the clause to mean that the buildings can be used only for such industries as may be permitted by the Corporation and the user of the buildings for offices and godowns goes along with such industries and not independently. To our mind, this is not how this clause can be read. Its plain reading suggests that the buildings on the demised land can be used only for offices, godowns and such industries as may be permitted by the Corporation. That the user could be for offices, godowns and such industries as may be permitted by the Corporation is absolute in terms. That the premises could be used as per the later part of Clause 12 but not absolutely and could be only with the previous consent in writing of the Commissioner, i.e. for any business, trade, occupation or purpose whatsoever other than as aforesaid. The words “other than as aforesaid” would denote that in the first part of this clause, the agreement is to allow user of the buildings on the land for offices, godowns and such industries

as may be permitted by the Corporation. The other part requires a previous consent in writing. The separation of the above words and which we have specifically underlined and brought out in emphasis above would indicate that there was no question of previous consent in writing.

21. Now, the latter part of the clause does not require any interpretation in the facts and circumstances of this case. This is not a case of prohibited user. This is a case of permissive and permissible user. However, that user to be made complete and meaningful requires additions and alterations in the buildings. That is how the Architect made the application for carrying out such additions and alterations. The application may have been loosely referred to change of user, but that itself is not determinative and conclusive. There is no question of change of user for the user is as office and which is an independent activity other than godown and such industries as may be permitted by the Corporation. That user is covered by the first part of the clause 12 of the Lease Deed. Therefore, the Architect making application is irrelevant and not germane for our purpose. At best, he would be moving for seeking permissions to carry out additions and alternations, but that would not enable the Corporation to insist on payment of money. We have seen that the

basis for the payment is the Deputy Municipal Commissioner's sanction for change of user for ground, first and second floors pursuant to the permissions sought by the Architect so as to enable the ICICI Bank Limited to use the building or portions thereof as are referred in the Architect's letter, as its office. The first part of the communication between the officers, copy of which is at page 73-A of the paper-book, says that the user permitted as per the office record are offices, godown and such industries as may be permitted by the Corporation. The Deputy Municipal Commissioner's sanction for No-objection certificate to commence a change of user of ground, first and second floors appears to be the basis on which the demand is raised. The reliance is placed on the Architect's letter. On that alone, the office calculated premium for change of user and other dues as per prevailing policies of Estate Department and then Joint Municipal Commissioner by letter dated 30th April, 2001 to issue the No-objection certificate. After administrative sanction, demand was issued.

22. It is evident that this demand is founded on the understanding of the Corporation and its Deputy Municipal Commissioner and Joint Municipal Commissioner of a breach or violation of the terms and conditions of the Lease Deed. That itself

is faulty and erroneous. It is not an understanding in accord with the terms and conditions of the Lease Deed. This understanding ignores the plain and clear words of clause 12 itself. It is contrary thereto. We cannot, therefore, allow a demand to be sustained on the basis of faulty and erroneous reading of the said clause.

23. When there is a perversity alleged in the demand and it cannot be sustained in law, then, no amount of reliance on the Architect's letter would enable us to uphold the communication and notice impugned in the petition.

24. As a result of the above discussion, this writ petition succeeds. Rule is made absolute. The demand on the petitioner is quashed and set aside. The Municipal Corporation is prohibited from recovering any amounts under its notice from the petitioner or the ICICI Bank Limited. However, this does not prohibit the Corporation to raise the demand for payment of other charges in respect of the additions and alterations carried out at site. If they require payment of any amounts in the form of premium etc., they can be recovered. The demand of Rs.11,64,08,845/- to the extent it seeks to recover anything for regularising the alleged breach therefore is unsustainable and is quashed and set aside by us.

25. If the petitioner/ICICI Bank Limited makes payment of the amounts other than the one excluded above, then, the Corporation and its officials shall issue the Completion Certificate. In the event the amounts are paid, the Completion Certificate shall be issued within four weeks from the date of payment.

26. We clarify that this judgment and order is passed in the peculiar facts and circumstances of this case. This order and judgment shall not be treated as a precedent in other cases or particularly leases granted by the Corporation.

27. In view of the disposal of the petition, the Notice of Motion does not survive and stands disposed of accordingly.

(S.C.DHARMADHIKARI, J.)

(G.S.PATEL, J.)