

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

WRIT PETITION NO. 586 OF 2018

- | | | |
|--|---|----------------|
| 1. Raghuleela Builders Private Limited. |] | |
| A company incorporated under the |] | |
| Companies Act, 1956 and having its |] | |
| registered office at 1401, 14 th floor, |] | |
| ONE BKC, Plot C-66, G-Block, Bandra |] | |
| Kurla Complex, Bandra (East) |] | |
| |] | |
| 2. Reliance Industries Limited, |] | |
| incorporated under the Companies Act, |] | |
| 1956 and having its registered office at |] | |
| Maker Chamber IV, 3 rd Floor, Nariman |] | |
| Point, Mumbai – 400 021. |] | ..Petitioners. |

Versus

- | | | |
|--|---|--|
| 1. The Mumbai Metropolitan Region |] | |
| Development Authority (MMRDA), |] | |
| an authority established under the |] | |
| Mumbai Metropolitan Region |] | |
| Development Authority Act, 1974 and |] | |
| having its head office at Plot C-14 & C- |] | |
| 15, 'E' Bandra Kurla Complex, Bandra |] | |
| (East), Mumbai 400 051. |] | |
| |] | |
| 2. The Chairman, |] | |
| Mumbai Metropolitan Region |] | |
| Development Authority, having office at |] | |
| Plot C-14 & C-15, 'E' Bandra Kurla |] | |
| Complex, Bandra (East), |] | |
| Mumbai 400 051. |] | |
| |] | |
| 3. The Metropolitan Commissioner, |] | |
| Mumbai Metropolitan Region |] | |
| Development Authority, having office at |] | |
| Plot C-14 & C-15, 'E' Bandra Kurla |] | |

- Complex, Bandra (East),]
Mumbai 400 051.]
]
4. The Land and Estate Manager,]
Mumbai Metropolitan Region]
Development Authority, having office at]
Plot C-14 & C-15, 'E' Bandra Kurla]
Complex, Bandra (East),]
Mumbai 400 051.]
]
5. The Deputy Metropolitan Commissioner,]
Mumbai Metropolitan Region]
Development Authority, having office at]
Plot C-14 & C-15, 'E' Bandra Kurla]
Complex, Bandra (East),]
Mumbai 400 051.] ..Respondents.

Mr. Aspi Chinoy, Senior Advocate with Mr. Vaibhav Krishna, Mayuresh Botrkar, Veeral Vakhari, Ahtesham Khatri, Devang Lakhotia, Tahir Prande i/b Juris Consillis for the Petitioner.

Mr. P. K. Dhakephalkar, Senior Advocate with Mr. Nivit Srivastav, Mrs. Sneha Patil i/b Manier Srivastav & Associates for the Respondents.

Coram : RANJIT MORE & SMT. BHARATI H. DANGRE, JJ.
Arguments concluded on : August 9, 2019.
Judgment pronounced on : **November 20, 2019.**

Judgment [Per Ranjit More, J.]

1. In the instant petition, the Petitioners being aggrieved with the actions of Mumbai Metropolitan Regional Development Authority (MMRDA)-Respondent No.1, have impugned the following-

- (i) letter/orders dated 11th February 2014 and 23rd December 2014 issued by the MMRDA demanding payment of penalty premium @ 10% per year on account of alleged delay in completion of construction of 30,550 sq.mtrs built up area (BUA) of the building known as “ONE BKC” at Plot No.C-55, Bandra Kurla Complex, Bandra (E), Mumbai, and
- (ii) demand notice dated 12th September 2017 issued by the MMRDA, demanding recovery of penalty in the form of additional premium and interest thereon aggregating Rs.432 crore i.e. Rs.273 crore as penalty upto August 2015, and interest thereon of Rs.159 crore in respect of the same building “One BKC”.

2. By way of interim orders, Respondent No.1 was restrained from taking any coercive steps against the Petitioners. Respondent No.1 is the owner of land admeasuring 10183 sq.mtrs bearing plot No.C-66, situated at G-Block, Bandra Kurla Complex, Village Kole Kalyan, Taluka Andheri, and is the planning authority in respect of Bandra Kurla Complex notified area region. Any construction thereon must conform to Bandra Kurla Complex notified area Development Control Regulations 1979. The

Bombay Metropolitan Region Development Authority (Disposal land) Regulations 1977 were framed under Section 50 of the MMRD Act.

3. The brief factual matrix of the case is as under :

[A] On 1st November 2007, MMRDA-Respondent No.1 issued a tender inviting bids for the lease of land admeasuring 10,183.18 square meters being Plot No.C-66 situate at 'G' Block, Bandra Kurla Complex, for the construction of a commercial complex of 30,550 sq.mtrs and a public car parking of 20,366 sq.mtrs. This tender was issued pursuant to the MMRDA (Disposal of Land) Regulations, 1977. These Regulations were in fact included as Volume-II of the Bid Booklet. The lease to be executed was to be in accordance with the statutory Form D annexed to the Regulations.

[B] At the pre-bid meetings, in response to queries as to the responsibility for demarcating boundaries and handing over the demarcated land, Respondent No.1 had confirmed that "the MMRDA will hand over the demarcated land to the successful bidder."

[C] On 26.11.2007, Petitioner No.2 had submitted its bid of Rs.918.03 crore for the plot. Respondent No.1 had accepted the offer and had issued a letter of allotment dated 28th December, 2007 to Petitioner No.2. Petitioner No.2 had paid the entire premium amount of Rs.918.03 crores.

[D] On 15th July 2008, lease-deed was executed for public car parking of 20,266 sq.ft. and commercial complex of 30,655 sq. ft. BUA. A lease-deed (in accordance with the statutory Form D) was executed between Respondent No.1 and Petitioner No.2. The lease-deed recorded that the said land admeasuring 10183.18 sq.mtrs and delineated on the plan annexed thereto by a red colored boundary line, had been demised to Petitioner No.2 for a term of 80 years for construction of public car parking admeasuring 20,366 built up area and a commercial complex of 30,655 built-up area. Clause 2(a) required plans for the building/ construction to be submitted to the Town and Country Planning Division of the MMRDA, within 3 months of the date of the lease. Clause 2(d) of the said lease-deed provided that - “The lessee shall, within 3 months from the receipt of approval of its plans and specifications of the said Buildings intended to be erected on the said land, commence and **within a period of four years from the date of this lease....build and completely finish, fit for occupation a multi storeyed car parking and commercial complex....** Clause 2(e)(i) of the said lease-deed provided that if the lessee did not perform and observe the time limit mentioned in Clause 2(d), the Metropolitan Commissioner may permit extension of time upon payment of additional premium as stated therein.

[E] On 1st August 2008, the possession receipt was executed by Respondent No.1 and Petitioner No.2 along with plan.

[F] on 28th August 2008, a joint demarcation of the plot was conducted by Respondent No.1 and Petitioner No.2. However, the said plot could not be fully demarcated and handed over, as the boundary wall of the adjoining sewage pumping station of the Municipal Corporation of Greater Mumbai was found to be lying within the said land plot. A joint declaration was signed by Respondent No.1 and Petitioner No.2 inter alia stating “as shown in the accompanying plan, the plot boundary of adjacent sewage pumping plot is encroaching upon C-66 by 0.91 meters, 2.68 meters, 2.86 meters at A, B, C respectively. Thus area of C-66 is overlapping with that of pumping station (Physical area of Plot C-66 available is less than allotted to RIL) the same may be rectified and area of Plot C-66 actually allotted to us may be handed over”.

[G] During the period between 2008 and 2011, Petitioner No.2 had sent reminders to Respondent No.1 that the boundary delineation issue remains unresolved for 24 months till October 2010. In these circumstances, Petitioner No.2 was unable to submit plans and commence the construction of the building on the said land. As MMRDA was fully aware of this situation, it made no grievance regarding non submission of the plans within three months as required by the lease-deed. Finally, in December 2010 MMRDA accepted that in view of this issue remaining unresolved plans for construction could be submitted with open spaces being computed from the plot boundary, without taking into account the encroachment by MCGM Sewage

Pumping Station. The same was recorded by Petitioner No.2's letter dated 22.12.2010. Plans submitted on this basis were approved by the MMRDA and the commencement certificate for the building was issued on 7th June 2011. Pursuant to applications under the RTI Act, Respondent No.1 has given copies of its office notes, which confirm that the wall of MCGM Sewage pumping station was found to be within the area of the said land/plot; that despite MMRDA's requests the MCGM had failed to relocate their boundary wall; that this had resulted in the plot area being reduced by 111 sq. mtrs.

[H] During 2010-11, the Petitioner applied for excavation and shore filing work. Petitioner No. 2 addressed a letter to Respondent No. 1 with request to develop the subject plot by reckoning the open space from plot boundary without considering the encroachment of pumping station. The Petitioners applied for environmental clearance for construction. The Petitioner obtained commencement certification for construction of the plinth of the building.

[I] On 8th September 2011, Respondent No. 1 offered additional built up area to Petitioner No. 2 for use on the said plot. The Petitioner no.2 made an application to Respondent No. 1 for allotment of additional built up area of 67,000 sq. meters on the said plot / building.

[J] By the letter dated 8th November 2011, Respondent No. 1 informed the Petitioner that there would be no time limit

for construction of additional built up area. By letter dated 20th March 2012, Respondent No. 1 allotted an additional built up area of 67,000 sq.mtrs against payment of additional premium of Rs.984 crore. This resulted in requirement of additional construction of 11 floors to the existing building. The MMRDA allotted the Petitioners additional built up area of 67,000 sq.mtrs to be consumed on the same plot building.

[K] On 28th August 2012, the Petitioners applied to the MMRDA to compute the four year period from the date of the commencement certificate, i.e., June 2011. The MMRDA did not respond to this letter.

[L] By February 2013, building was constructed upto the original 9th floor level, however, it was not fit for occupation and no part occupation certificate was applied.

[M] Again on 10th April 2013, the Petitioners requested the MMRDA that the period of 4 years be computed from the date of issuance of commencement certificate, i.e, from June 2011.

[N] On 23rd October 2013, the MMRDA executed the supplementary lease-deed which stipulated in clause 2(c) that there shall be no time limit as contained in Article 2(d) of the said deed of lease, for completion of construction of the building by using the said additional built up area.

[O] By the letter dated 23rd January 2014, Respondent No.

2 responded to the Petitioner's letter dated 10th April 2013 and informed the Petitioner that its request for extension of time without charging additional premium was not acceptable.

[P] By its letter dated 11th February 2014, the Respondent no. 1 purported to grant extension of time for completion of construction of the said building for a period of two years and required payment of penalty / additional premium on the entire initial allotted built up area of 30,550 sq.mtrs.

[Q] On 22nd August 2014, Respondent No. 4 issued a demand notice calling upon the Petitioner to make a payment of the amount with interest, failing which the commencement certificate would be revoked and the lease would be determined and the penalty amount would be recovered as arrears of land revenue.

[R] The Petitioners by their letter dated 3rd September 2014 requested the MMRDA to review the demand made for penalty. By its letter dated 23rd December 2014, however, the MMRDA rejected the said request of the Petitioner and called upon the Petitioner to make payment of the amount with interest.

[S] On 12th September 2017, Respondent No. 1 MMRDA issued the notice demanding payment of Rs.432 crore, stating that the Petitioner's representations had been rejected and called upon the Petitioner to pay the penalty, failing which Respondent No.1 threatened to determine the lease and enter upon the

demised premise and proceed to recover the amount due as arrears of land revenue.

4. Mr. Aspi Chinoy, learned Senior Counsel appearing on behalf of the Petitioner submitted that the first respondent's reliance on time limit of 4 years in Clause 2(d) of the lease-deed for completion/occupation of basic BUA of 30,550 sq.mtrs of commercial built-up area to require payment of penalty/ additional premium from the Petitioner notwithstanding that the first respondent had subsequently within the time limit of four years provided in the lease-deed, allotted an additional BUA of 67,000 sq.mtrs for use in the same building, whilst expressly stipulating that there was no time period/limit for constructing such additional BUA, is *ex-facie* ultra vires, arbitrary and illegal.

5. Mr. Chinoy submitted that the petitioners by the lease-deed dated 15th July 2008, and in particular Clause 2(d) thereof, were required to "build & completely finish fit for occupation" Public Car parking admeasuring 20,366 built up area and Commercial complex of 30,550 square meters Built Up Area within a period of four years from the date of the lease. However, in September 2011, the 1st Respondent had offered additional

built up area and expressly stipulated that “There is no time limit for construction of the additional built up area”. Respondent No.1 had by letter dated 20th March 2012 allotted an additional built up area of 67,000 square meters for use in constructing additional floor Nos.10 to 20 in the existing building as part of the same composite construction/ building, it was therefore no longer possible to separately “finish fit for occupation” the basic commercial complex built up area of 30,550 square meters, inasmuch as the services including lift rooms, cooling tower, air cool chillers, exhaust fans for toilet exhaust, DG exhaust pipes, fresh air fans for AHU, pressurization fan for staircases were now to be located on the top of the 20 storey building, and could be undertaken only after the entire 20 floors building was completed. An application for part occupation certificate would have required the Petitioners to apply for and obtain (i) Fire NoC (ii) Storm water drainage completion certificate and (iii) Service Lift/fire lift approval and all these approvals could not be applied for and obtained without completing the construction of entire 20 storey building. The 1st Respondent has therefore arbitrarily and irrationally contended that the Petitioners were still obliged to complete the building upto the basic built up area of 30,550

square meters i.e. upto 9th Floor level and apply for and obtain completion and occupation certificates for the same within the period of four years. Mr. Chinoy submitted that the Respondents have by order dated 24th December 2014 wrongly contended that completion of 30,550 square meters construction, i.e. the 9th Floor construction/slab by March 2013 was irrelevant as the Petitioners had not applied for or obtained completion and occupation certificate for the same. Mr. Chinoy submitted that press reports published indicated a one-man committee was constituted by the MMRDA comprising of a Supreme Court judge, who had opined that levy of penalty based on time limits in the basic lease-deed, would be illegal once MMRDA had allotted additional built up area to be used in constructing additional floors on the same building and had stipulated that there was no time limit for constructing such additional area.

6. Mr. Chinoy submitted that the impugned demand and recovery notice dated 12th September 2017 is *per se* illegal, arbitrary, unreasonable, discriminatory and violative of Article 14 of the Constitution of India. He submitted that the record establishes that MMRDA had since 2012 been considering

extension of the period for completion of construction from the existing four to six years, in view of the delays involved in securing permissions from the Ministry of Environment & Forest (MoEF), the High Rise Committee and other departments. The MMRDA's minutes of 131st Meeting held in 2012 establish that the Metropolitan Commissioner had in fact expressed the view that it was not possible to complete the construction within 4 years and finally in August 2015 MMRDA extended the time limit stipulated in Clause 2(d) of the lease, from four years to six years, but only in respect of leases executed thereafter. He submitted that such distinction purported to be made by MMRDA between leases granted by it before August 2015 and leases granted by it after August 2015, is *ex facie* arbitrary, irrational and discriminatory and has no basis. All the leases have been granted by MMRDA for carrying out development and construction of building in the MMRDA's BKC complex area. All the lessees have had to encounter similar delays while applying for MoEFs clearance, or permission from the High-Rise Committee, or other diverse permissions and there is no warrant or rational justification for providing that leases granted before August 2015 would have to complete the construction within 4 years or pay penalty /

additional premium of 10% for each year of delay, while leases granted after August 2015 will be granted an additional two years i.e. 6 years instead of 4 years to complete the construction. Mr. Chinoy submitted that MMRDA, the planning authority is seeking to claim and recover hundreds of crore from the Petitioners as penalty/additional premium for alleged non-completion of construction within 4 years and for having completed the same within two years thereafter, whilst at the same time providing that all leases after August 2015 with an additional two years i.e. 6 years to complete the construction without payment of any penalty or additional premium, is *ex facie* arbitrary, discriminatory and unconstitutional.

7. Mr. Chinoy submitted that the petitioners have challenged the levy of Rs.273 crore as penalty and additional 10% premium for the period July 2012-2013 and July 2013 to July 2014 and the interest thereon aggregating to Rs. 159 crore as *ex facie* illegal & *ultra vires* inasmuch as the record establishes that the basic built up area of 30,550 square meter was consumed by constructing the 9th floor slab and that this was done by February 2013 i.e. within 7 months of the scheduled date of July 2012.

Respondent No.1 has not disputed the fact that the 9th floor slab had been cast by February 2013, but has falsely contended that it was not relevant as the Petitioners had not applied for and obtained the Completion and occupation certificate for the same. Mr. Chinoy urged that once the additional built up area of 67,000 square meters was allotted for construction of additional 11 floors on the same building, it became impossible to obtain Completion or Occupation Certificates for the building upto 9 floors.

8. Mr. Chinoy submitted that the demand for penalty/ additional premium by Respondent No.1 is *ex facie* arbitrary and illegal. It is undisputed that Respondent No.1 despite its pre-bid assurances and the terms of lease-deed, failed to properly demarcate the plot boundary adjoining the municipal sewage pumping station and put the Petitioners in possession of the entire plot of 10183.18 square meters. The boundary wall of the Municipal Sewage Pumping Station, overlaps and intrudes approx 10 feet into the plot boundary of the said land, resulting in Petitioner being deprived of more than 1100 square feet area of the plot area. Moreover, the encroachment necessarily affects the compulsory open spaces & distances required to be

maintained for construction, which also leads to delay in finalising the plans. The Respondents failed to resolve the issue, properly demarcate the boundary and put the Petitioners into possession of the entire plot of the land for which reasons, the Petitioners were constrained, after waiting for two years, to initiate construction on the basis of the open spaces being computed from the plot boundary, without taking into account the encroachment / actual occupation of almost 1110 square feet area of the said land by the MCGM Sewage Station. The Respondents did not dispute this position and have wrongly contended that in their internal notes obtained under the RTI Act that no prejudice was caused to the Petitioners, as the Petitioners had been able to consume the full buildable FSI/area stipulated in the lease-deed on the said plot/ land, notwithstanding that the demarcation / boundary issue remained unresolved by MMRDA. Respondent No.1 failed to appreciate that the proper demarcation of plot boundary was essential for properly laying out of the open areas/ compulsory open spaces and that as the MMRDA failed to properly demarcate the boundary / remove the encroachment of almost 1100 square feet area from 2008-2010, finally in 2010 the plans were submitted by the Petitioners and

approved by MMRDA on the basis of open spaces being computed from the plot boundary, without taking into account the encroachment / actual occupation of almost 1110 square feet of the plot area by the MCGM Sewage Station.

9. Mr. Chinoy submitted that the levy of 14% interest from July 2012 onwards is *ex facie* irrational, arbitrary and illegal. He submitted that the demand for penalty/additional premium was made by the Respondents for the first time by their letter dated 11th February, 2014 and the reasons for the same were furnished only by the order/letter dated 23rd December 2014.

10. Mr. Chinoy submitted that notice dated 12th September 2017 and the penalty / additional premium and interest thereon, sought to be recovered, is *ex facie* arbitrary, unreasonable and unjustified. The Respondents had by letter dated 6th September 2017 informed the Petitioner that they were still considering the issue of recovery of penalty/ additional premium for non completion within 4 years and had not taken final decision. He, therefore, argued that purported levy / recovery of penalty / additional premium of 180 crore and interest thereon at 14% per annum from July 2012, is *ex facie* arbitrary, irrational,

discriminatory and illegal.

11. Mr. Dhakephalkar, learned senior counsel appearing on behalf on the Respondents has raised preliminary objections on the maintainability of petition. He submitted that the petition raises several disputed questions of fact which are complex in character and are incapable of being determined in a summary manner in writ jurisdiction. He placed reliance on judgment of Hon'ble Supreme Court in State of Kerala Vs Mk Jose [(2015) 9 SCC 433]. The petition is a mere contractual *lis* between the parties and does not involve any serious constitutional or legal challenges. He stated that the to resolve the disputes raised in the petition, the Petitioners have an alternative remedy under the MMRD Act, for which he relied on judgment in Joshi Technologies vs Union of India [(2015) 7 SCC 728]. He submitted that the claims are time barred, the first demand notice was sent on 11th February 2014 and first rejection by respondents of petitioners request for withdrawal of levy of delay premium was on 23rd January 2014. He further submitted that the petitioners have suppressed material facts and documents such as various undertakings, affidavits, commencement certificates etc wherein

the Petitioners have assured and undertaken to pay premium for delay under clause 2(d) of the lease-deed. He relied on Judgments of Hon'ble Supreme Court in Dalip Singh vs State of UP [(2010) 2 SCC 144] and Amar Singh vs Union of India [(2011) 7 SCC 69].

12. Mr. Dhakephalkar, the learned Senior Counsel appearing on behalf of the Respondents submitted that MMRDA is a statutory authority under the MMRD Act 1974. The land disposal regulation, a statutory regulation stipulates the condition of lease which is statutory in character, being framed by the State under the MMRD Act 1974 and is binding. Clause 2(d) of the lease-deed gave petitioners period of 4 years to complete construction of BUA and public car parking, which is a public amenity. The occupation of the public car parking ought to precede that of commercial complex. Clause 2(e) which is in statutory form does not confer any power to grant unconditional extension without payment of premium. All extensions are subject to imposition of additional premium for delay. Clause 2(c) of supplementary lease-deed is required to be read and interpreted in the context of offer letter dated 8th November 2011

containing offer for purchase of additional BUA upon payment of premium and sanction letter dated 20th March 2012 allotting additional BUA. The letter dated 8th November 2011 restricts the absence of time limit to construction of additional BUA only and does not extend to the entire building. Clause 2(c), (d) and (e) of the supplementary lease-deed cannot override Regulations 11 and 10 read with Form D of Land Disposal Regulation. He placed reliance on Jayant Vegoils and Chemicals (P) Ltd. v. The City and Industrial Development Corporation of Maharashtra Ltd. [1997 (2) MHLJ 617], Bank of Baroda Vs. MMRDA [2010 (3) MHLJ 819], Assistant Excise Commissioner v. Issac Peter [1994 (4) SCC 104] and State of Rajasthan v. J L Synthetics [(2011) 12 SCC 518].

13. Mr. Dhakephalkar submitted that the original lease-deed dated 15th July 2008 is a statutory lease and statutory dues cannot be waived or discounted by the authorities. He relied on judgment in Goetze Vs esic (2008) 8 SCC 705. He submitted that the Petitioners' conduct in seeking extension of time for construction from 2012-14 and furnishing undertakings and comfort letters and assuring respondent that they would pay additional premium militates against argument that

supplementary lease-deed or allotment of additional BUA would exempt them from rigors of clause 2(d) and (e) of lease-deed. The Petitioners cannot be permitted to go back on their own interpretation at this belated stage. He relied on the judgment of Hon'ble Supreme Court in Godhra Electricity Company Vs. State of Gujarat (1975) 1 SCC 199 and Transmission Corporation Vs. GMR (2018) 3 SCC 716. He submitted that the Petitioners have accepted benefit under the orders of extension of time for completion, which was granted on the basis of undertakings to pay the additional premium in construction; the Petitioners have given several undertakings and assurances to make payments. Therefore, the Petitioners cannot resile from their promises. He relied upon the decision of the apex Court in State of Punjab v. Dhanjit Singh [(2014) 15 SCC 144] and Chief Administrator v. Shabnam Virk [(2006) 4 SCC 74].

14. Mr. Dhakephalkar submitted that the writ petition pertains to a patently time barred claim, barred by limitation and if a suit were to be filed by the petitioners to challenge the cause of action, the same would be barred by law of limitation. He submitted that the petition seeks to challenge the policy decision of MMRDA on the basis of regulation 10 and 11 read with form D

of the MMRDA (Disposal of Land) Regulation 1977 and the decision to alter the time limit from 4 to 6 years only for new leases. The lease dated 15th July 2008 is a policy decision. The writ remedy including challenge under Article 14 of the Constitution of India cannot be invoked to interfere with the policy decisions of the State which are otherwise *bona fide*.

15. Mr. Dhakephalkar, learned Senior Counsel challenged the Petitioners' contention that the petitioners completed the construction of basic built up area as required by Clause 2(c) of the Original lease-deed dated 15th July 2008 in February 2013 itself but were unable to apply for occupation certificate on account of common amenities being located on the higher floors. He submitted that Clause 2(c) restricts the absence of time limit to construction of additional built up area only and not the entire building including the basic BUA under 2008 lease-deed. The Petitioner sought extension of time for completion of construction of basic BUA even after execution of supplementary lease-deed, i.e., letter dated 27th August 2014. The Petitioners have suppressed the undertakings, assurances and comfort letters given by them from time to time assuring the respondents that

they would pay the additional premium for delay. The petitioners have falsely submitted that these undertakings, assurances and comfort letters were extracted by coercion. The petitioner has relied upon letter dated 10th March 2018 that construction of building upto 9th floor is completed however no inspection was carried out and the inspection can be done only when party applies for Occupation Certificate (full or in part). The completion of construction is to be certified only by grant of occupation certificate or part occupation certificate. Mr. Dhakephalkar submitted that the petitioners' contention of delay in construction or inability to apply for part occupation certificate on the ground that certain features such as water tanks, lift amenities are purely design issues which could have been easily tackled. There are provisions for grant of part occupation certificate / occupation certificate without lift upto certain floors which could have been availed by the Petitioner if they had completed construction on time. The petitioners have used basements for installation of amenities like tanks and lift rooms.

16. Mr. Dhakephalkar, the learned senior counsel for Respondents submitted that 74 purchasers in the BKC area have

carried out and completed their respective constructions within the prescribed period of 4 years without any delay and further 30 purchasers have completed the project but paid the entire premium on account of delay. Petitioner No.1 has completed construction of another plot bearing No.C-70 in BKC region by using the additional BUA and within its tender period. The said plot was also affected by boundary issue materially identical to the present case. He submitted that the Petitioners' application along with plan submitted by an architect seeks staggered distribution of basic built up area across 20 floors, therefore even the top most 20th floor has a component of basic built up area. The application for grant of occupation certificate is on the basis of staggered distribution. He submitted that occupation certificates have been granted to the petitioner from time to time as per applications made and the Petitioners never raised objection to grant of occupation certificate on floors beyond 9th floor. He further submitted that the letter of one Spaceage Consultant stating that 9th floor slab is complete, is an internal communication and has not been sent to Respondents. He submitted that the lease does not permit self declaration and clause 2(d) of the lease mandates that construction must be to

the satisfaction of Respondent No.1. Clause 2(g) lays down that construction must conform to Bandra Kurla Complex notified area Development Control Regulation 1979. The petitioner never applied for such certificate nor called for inspection of basic BUA.

17. Mr. Dhakephalkar has opposed the Petitioners' contention that they were unable to carry out construction during the period 2008-2010 on account of boundary demarcation issues. He submitted that there was no issue with purported boundary demarcation impacting the Petitioners' ability to construct under the 2008 lease-deed. The Petitioners' case is based on misleading English translation of the statement given by Petitioners' representative on 28th August 2008 is false. The record shows that petitioners were fully capable of constructing since taking over possession on 1st August 2008 and jointly executed a possession receipt and not a single letter stating otherwise has been produced. On 28th August 2008, the boundaries of the subject plot were sufficiently demarcated by the parties. Post demarcation, petitioner No.2 submitted a statement that a small strip of land admeasuring 100/134 sq mtrs was encroached by MCGM sewage pumping station. This

was a unilateral statement, deliberate suppression of original document and attempt to mislead the court. The Petitioners' contention that the issue remained unresolved till October 2010 is belied by noting that columns were marked for excavation on 28th October 2009 and plans submitted for excavation permission on 11th August 2010 without their being any change in site position. The boundary issue that pumping station encroachment is on 130 sq. mtrs odd strip of plot land remains even till today and yet the petitioners have been able to construct thereupon without any hindrance. He submitted that the contention that over 24 months i.e. from July 2008 till October / December 2010, came to be wasted on account of delineation/demarcation of the boundaries of the plot and construction could not be commenced uptill October 2010, is a frivolous contention disregarding and discounting from the reckoning of the 4 years terms prescribed for construction under the lease. He submitted that on 1st August 2008 the head surveyor of MMRDA and representative of Petitioner No.2 had jointly executed a possession receipt confirming that the Petitioner had taken over the possession of subject plot and on 28th August 2008 the boundaries of the subject plot were properly demarcated. Post demarcation,

Petitioner No.2's representative submitted to MMRDA that small strip of land touching one of the boundaries admeasuring approximately 134 sq. mtrs was encroached by the MCGM pumping station. This statement is not a joint statement and the original document in Marathi has not been produced. This statement has nothing to do with demarcation of the boundary. The position of boundary encroachment by pumping station has always remained the same and continues to be so even today. The Petitioners knew the plot and its site condition, the BUA to be constructed and the margin/open spaces from the plot boundaries to be left for the said construction. There has never been any planning or construction constraint on account of this boundary encroachment. The demarcation/delineation difference was absolutely marginal and was within the permitted variation of 1% to 2% in plot area to the extent permitted under the tender notice. The shore piling permission by letter dated 11th August 2010 represents the crystalisation of plans of construction well before August 2010. Clause 8.3 of the Request for Proposal (RFP) had given full opportunity to visit and examine the site and gather technical data and information necessary to submit their bid. Clause 8.5 provides that all bidders are deemed to have full

knowledge of the site and the petitioner as the bidder was fully aware of the tender notice and the documents. Even with the boundary being encroached by pumping station, there is no open space deficiency on the plot. The report dated 17th April 2012 shows calculation of open space deficiency. The development cum assignment deed dated 23rd October 2013 provides the effective date to initiate development on the plot from 1st August 2010 which shows that petitioner No.2 was not carrying out any development of the plot.

18. Mr. Dhakephalkar submitted that various undertakings, assurances and comfort letters given by the Petitioners from time to time assuring the Respondents that they would pay additional premium for delay were extracted by coercion, is a false and bogus contention devoid of any pleading and has been urged by the Petitioner in oral submissions. They have submitted that there is no pleading in that regard and that this has been urged by the Petitioners' counsel in his oral submissions for the first time and the assurances, undertakings, affidavits and comfort letters were brought on record by Respondents to demonstrate suppression by Petitioner and to show that the submissions were

contrary to record.

19. We have considered the rival submissions of the respective senior counsel and gone through the petition, annexures thereto and affidavits-in-reply.

20. Respondent No. 1 is admittedly a statutory body and is governed by the MMRD Act, 1974 and Mumbai Metropolitan Region Development (Disposal of land) Regulations, 1977. The first respondent has submitted that the lease dated 15th July 2008 is a statutory lease and has claimed the demand for payment as statutory dues and has threatened to determine the lease and enter upon the demised premises and proceed to recover the amount due as arrears of land revenue. It is an admitted position that Respondent No.1 is an instrumentality of State under Article 12 of the Constitution of India. It is settled law that in an appropriate petition against the State or against the instrumentality of State, arising out of contractual obligation is maintainable. This position is well supported by ratio laid down in the decision of the Apex Court in ABL International v. Export Credit Guarantee Corporation [(2004) 3 SCC 553] and Gunwant Kaur v. Municipal Commissioner Bhatinda [AIR-1970 SC 892]

21. The MMRDA being “State” within the meaning of Article 12 of the Constitution of India, is required to act in a just, fair and reasonable manner in all spheres of its activities including the contractual matters and its dealings with the citizens and has to be informed by the reasons, failing which the such action or decision are liable to be treated as arbitrary and unreasonable. The MMRDA’s actions must be founded on sound, transparent, discernible and well-defined policy which should not be discriminatory or arbitrary. The same is the settled position of law as held in numerous judgments, namely, R. D. Shetty v. International Airport Authority of India [(1979) 3 SCC 489], M/s. Dwarkadas Marfataia & Sons v. Board of Trustees of the port of Bombay [(1989) 3 SCC 293] and Jamshed Hasmukhji Wadia v. Board of Trustees, Port of Bombay [(2004) 3 SCC 214].

22. The tender by MMRDA was issued pursuant to the MMRD (Disposal of Land) Regulations 1977. These regulations were in fact included in Volume-II of the bid booklet. The lease-deed to be executed was to be in accordance with the statutory form-“D”, annexed to the regulation. At a pre-bid meeting,

Respondent No.1 had confirmed that MMRDA will hand over demarcated land to the successful bidder. Petitioner No.2 had paid the entire premium of Rs.918 crore approximately, and lease deed dated 15th July 2008 was executed in accordance with the statutory form D.

23. The dispute pertains to clause 2 of the lease-deed and the allotment of additional built up area under letter of allotment of Respondent No.1 dated 20th March 2012 and the clauses of supplementary lease-deed.

24. The petition is being decided on the basis of unique facts, circumstances and record of the case and is not an adjudication on the basis of clauses of contract and bargain and payments by other lessees in Bandra Kurla notified area. In the instant case, the action of the officers of MMRDA are manifestly arbitrary. Such arbitrary actions and inactions do not help the development and growth but would have adverse impact on the same.

25. The record depicts that the MMRDA failed to hand over

fully demarcated plot to the Petitioner who was successful bidder, as boundary wall of the adjoining sewage pumping station of the MCGM was found to be lying within the promised land and that position has remained as it is till date. The Petitioner has shown this fact from the information obtained under the Right to Information Act, and office notes of Respondent No.1 has confirmed that the wall of MCGM sewage pumping station was found to be within the plot area and despite the MMRDA's request, the MCGM has failed to re-locate their boundary wall and this has resulted in reduction of the plot area by 111 sq. meters.

26. The lease deed dated 15th July 2018 has provided the completion of built up area of 30,550 sq. meters and car parking area of 20,366 sq. meters in four years, comprising of 9 floors. By the letter dated 8th September 2011, Respondent No.1 itself offered the additional built up area to Petitioner No.1 for use on the very same plot and by the letter dated 20th March 2012, Respondent No. 1 allotted the additional built up area of 67,000 sq. meters against the payment of additional premium of Rs.984 crore. This allotment resulted into raising additional 11 floors on the earlier proposed building of 9 floors. Consequently, it is

obvious that it was no longer possible to separate complete and get Occupation Certificate for original built up area of 9 floors. Clause 2(3) of the supplementary lease deed therefore provided as follows :

“There shall be no time limit as contained in clause 2(d) of the said lease deed for completion of the construction of the building by using the said additional built up area.”

27. Therefore, the letter dated 20th March 2012 allotting additional built up area referred to the completion of construction of building and the reference was to the completing the construction of built up area or additional built up area. The supplementary lease deed dated 29th October 2013 had stipulated that the additional built up area shall be deemed to be an integral part of the demised premises and there shall be no time limit for completion of construction of the said building using additional built up area allotted to be utilised for constructing the additional 11 floors.

28. This would obviously result in building-height being increased from initial 9 floors to 20 floors, the services including the lift route, cooling towers, air cool chillers, exhaust fans for

toilet exhaust, DG exhaust pipes, fresh air fans for AHU, pressurization fans for staircases were now to be located on the top of the building. Obviously this could not have been installed till the entire 20 floor building has been constructed.

29. Thus, it was not possible for the Petitioner to separately complete the original 9 floor building, fit for occupation with OC. Diverse NoCs/ approvals which were required for the Petitioner to apply for OC / part OC, i.e., the Fire NOC from Chief Fire Officer, Mumbai Fire Brigade, MCGM, the storm water drainage completion certificate from the Executive Engineer, MCGM, service lift / fire lift approval from the Executive Engineer, MCGM; and all these approvals could not be applied for and obtained without completing the construction of building of entire 20 floors.

30. The additional built up area allotted under the supplementary lease deed was to be utilised on the same plot and on the same building and in the composite structure. There was no time limit specified for construction of building by utilising additional built up area. This additional built up area to be

utilised in a composite manner for composite development would obviously required the lessees to alter or amend the plan to consume additional built up area in a composite manner. The development and completion of the building cannot be completed till utilisation of the additional built up area in the composite manner is finalised or another round of approvals. The built up area under the lease deed and additional built up area under the supplementary lease deed could not be severed from each other and could not be subjected to different timeline for completion of the construction of the building. Since built up area and additional built up area was to be consumed on the same plot and same composite building, the MMRDA has no justification to enforce the time limit for construction of initial built up area of 30,550 sq. meters.

31. It is wholly unreasonable and arbitrary action on the part of the officers of MMRDA to insist on the completion of construction of built up area within the period stipulated under the lease deed dated 15th July 2008 and to penalise the Petitioner on that count. Therefore, in view of specifying “no time limit for construction of the entire building by utilising additional built up

area” while allotment of additional built up area, the same would prevail over the previously stipulated time limit for construction under the lease deed dated 15th July 2008 and the condition of the time limit for construction of initial built up area would no longer be enforced or acted upon.

32. The MMRDA has itself granted and allotted additional built up area for further monetary consideration during the period of four years under the lease deed dated 15th July 2008. Therefore, MMRDA has itself waived the condition of completion of construction of original built up area within the stipulated period of lease deed.

33. The Petitioner pointed out that the orders dated 23rd January 2014 and 11th February 2014 and notice dated 22nd August 2014 demanding additional premium were in complete derogation of the provisions of supplementary lease deed and are thus illegal and arbitrary. The Petitioner had pointed out that the supplementary lease deed clearly stipulated that “there is no time limit for construction of the said building by using additional built up area” and that as a result thereof the time limit of 4

years stipulated in the original lease deed ceased to operate vis-a-vis construction of the said building to be undertaken on the said land.

34. The Petitioner pointed out that while there had been no response to their applications dated 28th August 2012 and 10th April 2013, the MMRDA had in October 2013 executed supplementary lease deed, pursuant to which the time limit of 4 years has ceased to operate vis-a-vis construction of the said building. Accordingly, the said first application dated 28th August 2012 and second application dated 10th April 2013 made by the Petitioner to the MMRDA became infructuous, since as per the provisions of supplementary lease deed, there was no time limit for completion of the construction of building. Thus, there was no power vested with the MMRDA to grant an extension of time for completion of the construction and to charge any premium for grant of such extension of time. The said orders dated 23rd January 2014 and 11th February 2014 and the said notice dated 22nd August 2014 demanding the additional premium for extension with applicable interest thereon issued by the MMRDA are contrary to and contravene the provisions of supplementary

lease deed and as such without authority of law. The Petitioner re-iterated that pursuant to the purchase of additional built up area and the terms of supplementary lease deed, there was no time line prescribed for the construction of said building. Therefore, in the circumstances, the order dated 11th February 2014 is completely unwarranted, arbitrary and there was no justification for levying penalty on the Petitioner, as is sought to be done.

35. It is shown from the record that construction of entire 20 floor building, including the additional built up area of 67,000 sq. meters was completed in January 2015, however, the Respondents refused to give occupation certificate unless the Petitioner gives undertaking to pay penalty levied subject to the decision on their representation. In these circumstances, the Petitioners were compelled to give assurances / undertakings. Without prejudice to their rights and contentions, the Petitioner had requested the MMRDA to extend the time limit till 31st March 2015. The same would not alter the terms of supplementary lease deed and cannot be construed in favour of the MMRDA.

36. Moreover, it is also seen that the MMRDA had, at its 131st meeting held on 22nd October 2010, itself noted that it was not possible for the leaseholders to complete the construction within the specified time of 4 years in view of the diverse permissions that were required to be obtained from the different governmental departments and had decided / resolved that the time for completion as per the clause 2(d) of the lease deed to be executed, be extended from 4 years to 6 years including for existing leaseholders provided the period of 6 years had not expired till then. However, the Government stayed this resolution and matter of extension of time for construction remained under the consideration of MMRDA till 2015.

37. The MMRDA had at its 138th meeting held on 26th August 2015 noted that CBRE (South Asia) has been approached and they have recommended that 6 to 7 years be given to secure all permissions and complete construction. The MMRDA passed the resolution dated 1347 to amend clause D of the statutory form of the lease to provide for period of 6 years for construction but stipulated that this condition would only apply to the plot leased after the period of resolution.

38. The MMRDA constituted a single member committee of retired Judge of the Supreme Court to decide whether the MMRDA should give concession in recovery of premium considering the time required for plot owner to obtain permissions from various authorities for construction of building thereon. It is contended that one member committee has concluded that the charging of premium for extension of time for completing construction in Bandra-Kurla Complex area, specifically in case where additional built up area has been allotted by the MMRDA, was illegal. In its 138th meeting held on 26th August 2015, the MMRDA had acknowledged the difficulties faced by the lessees and that the condition of completion of construction within 4 years of the execution of the lease was adversely affecting the tendering process. The MMRDA had appointed an expert one man committee of retired Supreme Court Judge in that regard. The single member committee has advised that the period of 6 to 7 years be granted for completion of construction.

39. The lease deed entered into by the MMRDA with the lessees are as per form D, prescribed under the MMRDA (Disposal

of Lands) Regulations 1977. Clause 2(a) of the lease deed provides that for building plans to be submitted to country and town planning division for approval within 3 months from the date of lease. Clause 2(c) of the lease deed provides that no work is to be carried out until all plans, elevations, specifications are approved by the concerned authorities. Clause 2(d) provides that within 3 months of the approval of plans, the lessee is to commence construction which is to be completed within four years of the lease. Clause 2(e) provided for extension of time. Clause 2(e) contemplates a situation when the time for completion of construction can be extended, parties to the contract contemplated that certain uncertainties or situations may arise which may require more time for completion of the construction. In view of this, time is not essence of the contract between the parties and rightly so since construction of any building in Bandra Kurla Complex, several permissions are required from the various authorities and not only from the MMRDA who is planning authority for the Bandra Kurla area, namely,

- (1) The environmental clearance under the Environmental Impact Notification from the Ministry of Environment and Forest.
- (2) Building height clearance from the Ministry of Civil

- Aviation because of the close proximity to Airport.
- (3) Clearance from the high rise committee.
- (4) Permission from the the MCGM.
- (5) Permission from the traffic police.

. Each of these authorities is required to be approached separately since there is no single window clearance / nodal agency which would co-ordinate with the aforesaid authorities for granting of all necessary permissions. In view of the delay in obtaining permissions which are beyond the control of lessee, no work could be carried out as per clause 2(d) of the lease deed.

40. The MMRDA had issued a letter of allotment dated 20th March 2012 allotting additional 67,000 sq. meters at consideration of 984 crore. Part payment of Rs.196 crore was received on 20th March 2012. The supplementary lease deed was executed for additional built up area of 67,000 sq. meters. The letter of allotment dated 20th March 2012, the acceptance of part payment of consideration for additional built up area allotted, diluted the time period of four years and there was no question of application of condition of occupation certificate for built up area within 4 years when additional built up area was allotted for raising additional 11 floors on the same building.

41. The resolution passed by MMRDA for extending the time period for completing construction from 4 years to 6 years only for leases executed after 26th August 2015 also appears to be arbitrary, discriminatory, without basis and justification. The said set of circumstances are prevailing for the construction being carried out under the leases executed prior to 26th August 2015. Therefore, not extending this benefit of this extension of time from 4 years to 6 years to the prior leases in respect of other plots in the BKC, is completely arbitrary, discriminatory, capricious and violative of Article 14 of the Constitution of India. There is no reasonable basis or justification for this decision. The classification sought to be made between the leases prior and subsequent to 26th August 2015 is not founded on intelligible differentia and neither does this differentia has any logic, rational, nexus to the object sought to be achieved. The MMRDA has sought to treat equals as unequal. The lessees of plots are being discriminated on the basis of their date of execution of their leases. The lessees who are placed in similar circumstances prevailing for construction in Bandra Kurla area are entitled to equal treatment guaranteed under Article 14

of the Constitution of India.

42. The Petitioner's representation / explanation dated 3rd September 2014 had been rejected by the MMRDA vide letter dated 23rd December 2014 and demand of payment of Rs.432 crore, i.e., penalty of Rs.273 crore upto August 2015 and interest thereon of Rs.159 crore was made vide impugned demand notice dated 12th September 2017, failing which Respondent No. 1 threatened to determine the lease, enter upon the demised premise and proceed to recover the amount of dues as arrears of land revenue. This is *ex-facie* unreasonable, unjustified, discriminatory, without jurisdiction and in violation of fundamental rights guaranteed under the Constitution of India.

43. We find that the judgments relied upon on behalf of the Respondents are distinguishable in the light of the peculiar facts situation. We are not persuaded to decline to entertain the instant writ petition as suggested on behalf of the MMRDA on any of the grounds pressed into service / urged before us in view of the peculiar situation of the case.

44. In view of the above, we find sufficient merit in the submissions advanced on behalf of the Petitioners. The impugned demand of penalty in the form of premium and interest thereon is untenable, without jurisdiction and non-est. The same are thus quashed and set aside as *void ab initio*.

45. In the light of above discussion, writ petition is allowed with no order as to cost.

[SMT. BHARATI H. DANGRE, J.]

[RANJIT MORE, J.]