

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.**

WRIT PETITION NO.2531 OF 2009

Starwing Developers Private Limited ... Petitioner

Vs

State of Maharashtra & others ... Respondents

Dr.Milind Sathe, Senior Advocate with Mr.Bhushan Deshmukh,
Mr.Phiroze Merchant i/b Kanga & Co. for the Petitioner

Mr.S.B. Gore, AGP, for Respondent Nos.1 & 2

Mr.A.Y. Sakhare, Senior Advocate with Ms.Sheetal Metkari for
Respondent – Corporation

**CORAM: AKIL KURESHI &
S.J. KATHAWALLA, JJ.**

**JUDGEMENT RESERVED ON: OCTOBER 3, 2019
JUDGEMENT DELIVERED ON: OCTOBER 18, 2019**

JUDGMENT (Per Akil Kureshi, J.):

1. The petitioner has challenged a communication dated 15.7.2008 issued by the Additional Secretary, Government of Maharashtra, by which the petitioner's request for grant of Transferable Development Rights (for short, 'TDR') amenity (road) came to be rejected.

2. Brief facts are as under:

The petitioner is a private limited company and is engaged in the business of real estate development. Under an agreement dated 2.2.2006, the petitioner acquired the TDR from the owners of several parcels of lands aggregating to 25341.10 sq.mtrs (hereinafter to be referred to as the said land). The said land was affected by a proposed development road of 13.40 mtrs width passing vertically through the property. Consequently, several plots forming the said land were sub-divided and assigned new CTS numbers.

3. The petitioner in order to develop the said land submitted proposal for such development to the Municipal authority. Through the letter of Intimation of Disapproval ('IOD' for short) dated 31.1.2016 and subsequent commencement certificate and sanctioned plan, construction of building over the said land was sanctioned. The plan provided for 13.40 mtrs wide DP road to be constructed.

4. Case of the petitioner is that the petitioner had surrendered the land for construction of such road without claiming compensation and in lieu thereof, the petitioner would be entitled

to Floor Space Index (FSI) to the extent of 1.0 of the area of land in the same layout. According to the petitioner, since the petitioner had also undertaken construction of the road with supporting systems such as drainage, etc. at its cost, the petitioner would be entitled to additional FSI (referred to as Amenity FSI/TDR). Originally, the petitioner was expecting such additional FSI @ 0.25. However, subsequently, by virtue of the decision of the Supreme Court in the case of **Godrej & Boyce Manufacturing Company Limited vs. State of Maharashtra & others**¹, the petitioner revised its expectation of additional FSI to the extent of 1.0. According to the petitioner, these benefits flow from relevant Development and Control Regulations, 1991 (for short, 'DCR, 1991') and various circulars issued by the State of Maharashtra under such DCR as interpreted by this Court and the Supreme Court.

5. The petitioner would point out that it had carried out the construction of the said DP road alongwith the provision for storm water drains, footpaths, dividers, streetlights, sewerage line, etc. Satisfactory completion of such construction was duly certified by the authorities.

1 (2009) 5 SCC 24

6. The petitioner consumed FSI to the extent of 1.0 in the same layout as per the policy of the government. However, the petitioner had claimed additional TDR to the tune of 0.25 towards construction of the said amenity which was not granted by the authorities. Under protest, in order not to delay the project, the petitioner has already carried out the construction on the land keeping the right to receive additional TDR for construction of amenity alive. The petitioner contends that the petitioner was compelled to file an undertaking before the office of Respondent No.3 i.e., Municipal Corporation of Greater Mumbai dated 5.9.2007 to the effect that -

“I say that out of the aforesaid property a portion is reserved affected by sanctioned Development Plan of K-East Ward for 13.40 Meters wide development Plan Road.

I hereby undertake that the FSI in lieu of the aforesaid D.P.Road, land shall be used by me on the same plot/holding and that after availing aforesaid F.S.I. there will be no balance F.S.I. for Claiming T.D.R. I will not come forward to take the T.D.R. advantage in lieu of the aforesaid D.P.Road.”

7. The petitioner would however point out that in the same undertaking, the petitioner had also clarified as under:

“I say that we have already represented to the Additional chief Secretary, Urban Development Department, Government of Maharashtra Mantralaya for granting of additional TDR i.e., 0.25 as per clause 6 of appendix VII (A) D.C. Regulation no.34, for construction of 13.40 Mtrs. Wide D.P.Road on the above mentioned plot a copy of the said representation dated 30.7.2007 is annexed hereto.

I further state that in case if the Urban Development Department, Government of Maharashtra, grant the additional TDR i.e. 0.25 as per clause 6 of Appendix VII(A) of D.C. Regulation no.34, for construction of 13.40 Mtrs. Wide D.P.Road, than I am entitled to claim the same.”

8. The petitioner continued to make representations to the authorities for grant of additional TDR for construction of amenity. As noted, initially, the petitioner had represented for grant of such TDR @ 0.25. However, subsequently, the Supreme Court rendered its decision in **Godrej and Boyce Manufacturing Company Limited** (supra). According to the petitioner, this clarified the position that construction of road would also amount to construction of amenity which would make the developer eligible for additional TDR @ 1.0. The petitioner, therefore, made further representations to the authorities. It is not necessary to take note of all such representations. Eventually, the request of the petitioner came to be rejected by the impugned communication dated

15.7.2008. In such communication, it was conveyed that as per the decision of the Bombay High Court dated 17.1.2003 in **Writ Petition No.2293 of 2003** after constructing development scheme road and handing over the same to the Corporation, the land owner has two alternatives, either the FSI benefit can be taken in the same layout or the developer can avail of TDR alongwith amenities TDR. However, both these alternatives are independent. It was, therefore, concluded that -

“In the present case I am directed to inform you that as applicant has used the FSI of the land beneath development scheme road in the same lay out the request of granting TDR along with amenity TDR of the road is rejected.”

9. The respondents have appeared and filed replies. In one such affidavit dated 15.4.2010 filed by one Satish S. Joshi, Sub-Engineer (D.P.) W.S., Municipal Corporation of Greater Mumbai, it is stated that the petitioner had submitted the development plans which suggested the petitioner desired to take benefit of FSI for the land in the same layout. The developer would have a choice to be governed by either DCR 33(1) or DCR 34. It is further stated that -

“I say that as per D.C. Reg. 33 (1) if the owner of land affected by proposed road surrenders, such land for road

widening and new road construction without claiming any compensation in lieu thereof and hands over the same to the Corporation free of encumbrances to the satisfaction of the Commissioner, such 100% of the FSI on land so surrendered to the Corporation will be utilisable on the remainder of the land upto limit of 40% in respect of plot situated in Mumbai City and 80% in respect of plot situated in suburbs and extended suburbs.

I say that clause (2) Appendix VII-A of Regulation 34 clearly stipulates that the owner will be eligible for Development Right (D Rs) to the extent stipulated in Clause 5 & 6 in this appendix after the said land is surrendered as stipulated in Clause 5 in this appendix and after completion of the development or construction as in Regulation in this appendix if he undertakes the same. Therefore, benefits under Clause (6) can be claimed only if the said land is surrendered as stipulated in Clause (5) of the said appendix (i.e. Appendix-VI) i.e. Land surrendered under any regulation other than Clause (5) of appendix-VII A is not eligible for benefit under Clause (6) of the said Appendix

I say that the petitioner herein has surrendered the land affected by 13.40 mts. Wide D.P. Road in lieu of FSI utilisable on the remainder of the land within the said layout i.e. the owner has opted for benefits under Regulation 33(1) of D.C. Regulation in lieu of land surrendered. Therefore, when an owner opts for benefit under Regulation 33(1) of D.C. Regulation in lieu of land surrendered from proposed D.P.Road affecting his land as a part of proposed layout submitted by him for development, the development of amenity on the said reserved land is governed by the terms & conditions accepted and agreed through Registered undertaking by the owner."

10. In the said affidavit, the respondents have also relied on the undertaking dated 5.9.2007 given by the petitioner to contend that as per such undertaking, the developer had availed the FSI in the

same layout and forgone the right to claim balance FSI or the TDR. It is, therefore, contended that the petitioner is estopped from raising any such claim in the present petition. Attention is also drawn to the amendments made in Appendix VII under Regulation 34 of DCR, 1991 which now provides for 25% additional FSI or 25% TDR for construction of amenity. It is reiterated that the petitioner had applied for grant of FSI under DCR 33(1) which has been granted and consumed by the petitioner in the same layout.

11. In background of such facts, learned Counsel for the petitioner Mr.Sathe, raised the following contentions:

(i) The petitioner having duly constructed the development road at its cost is entitled to amenity FSI/TDR which has been wrongly denied by the respondents. He pointed out that with respect to satisfactory completion of the construction of road and related facilities, there is no dispute.

(ii) The Counsel submitted that such amenity FSI would be 1.0 as held by the Supreme Court in the case of **Godrej Boyce Manufacturing Company Limited (supra)**. The petitioner, therefore, even though previously had requested

for grant of such FSI @ 0.25, in view of the law laid down by the Supreme Court, the increased FSI should be made available.

(iii) The stand of the respondents that the case falls within DCR 33(1) and not DCR 34 is completely incorrect. In this context, the Counsel drew our attention to the subsequent amendments in the relevant DCR to argue that prior to the said amendments of the year 2009, the case was covered only under DCR 34. The Counsel placed heavy reliance on Division Bench decision of this Court in the case of **Apurva Natvar Parikh & Co. Private Limited vs. The State of Maharashtra & others** dated 18.1.2018 rendered in **Writ Petition No.203 of 2014** and connected petitions. Reliance was also placed on the Division Bench judgment of this Court in the case of **Cosmos Realtors Joint Venture through Authorized Signatory Suraj Parmar vs. Municipal Corporation for the City of Thane through the Commissioner and another**².

² 2019 SCC Online 14867

(iv) He lastly contended that the petitioner had never given up the right to receive amenity FSI. The undertaking dated 5.9.2007 referred by the respondents was qualified. In such undertaking, the petitioner had referred to its representations made to the State Government in this respect and kept the right to receive additional FSI open subject to outcome of such representations.

12. On the other hand, the learned Counsel Mr.Sakhare, for the Corporation, opposed the petition contending that -

(i) The petitioner had given an undertaking not to claim any additional FSI based upon which the development permission and occupation certificates were issued. Petitioner now cannot raise such an issue. In short, the petitioner is estopped from claiming any additional benefits.

(ii) DCR 33 and DCR 34 operate in entirely different fields. The petitioner having opted for use of additional FSI flowing from the surrender of land used for road construction in the same layout, had by necessary implication forgone the right to claim amenity FSI. In other words, according to the

Counsel, the case of the petitioner was covered under DCR 33(1) and no benefit under DCR 34 could, therefore, be claimed.

13. Having thus heard the learned Counsel for the parties and having perused the documents on record, we may summarise the relevant established facts. The petitioner had acquired the right to develop a plot of land. Subsequently, the development road was proposed which would pass through the said land. The petitioner surrendered the land required for construction of the road without claiming compensation. The petitioner also constructed the road and all other peripheral amenities such as rain water drain, sewerage line, streetlights, road dividers, etc. at its cost. For surrender of the land for the road, the petitioner was granted FSI @ 1.0 which FSI the petitioner has already utilised in the same layout. The construction of the buildings as per the plans approved by the authorities has been carried out. Respondents however refuse to grant additional FSI/TDR for development of said amenity.

14. In light of such facts, the question is are the respondents correct in refusing to grant amenity FSI/TDR to the petitioner. In

the context, we shall also examine the effect of the petitioner's so called undertaking contained in the letter dated 5.9.2007.

15. Section 2(2) of the Maharashtra Regional and Town Planning Act, 1966 (for short, 'MRTP Act') defines the term 'amenity' as to mean, besides others, roads, streets, open spaces, parks, recreational grounds, etc. Section 126 of the MRTP Act pertains to acquisition of lands required for public purposes as specified in the development plans. As per sub-section (1), the land required or reserved for any of the public purposes, specified in a plan would be acquired either by (a) agreement by paying an agreed amount or (b) in lieu of such payment granting the benefit of additional FSI or TDR including providing for additional benefits for construction of the amenity at the cost of land owner or (c) by acquiring the land through the state government.

16. In the context of such provisions, we may refer to the decision of the Supreme Court in the case of **Godrej Boyce and Manufacturing Co. Ltd. (supra)**. In the said case, the issue involved was with respect to the extent of FSI or TDR available to the developer for construction of road at its own cost. The land owners had contended that for constructing the road, they would

be entitled to FSI or TDR for the whole of the surface area of the road. On the other hand, the authorities had contended that the additional development rights for construction of the said amenities in terms of FSI would be *qua* 15% of the area (which was subsequently by issuance of circular increased to 25%) of the road surface. In this context, the Supreme Court held that the construction of the road would also amount to construction of amenity on the surrendered land.

17. We may now come to the relevant DCRs. DCR 33 and DCR 34 are relevant for our purpose. These DCRs have been amended in the year 2010. However, we are concerned with the position prior to these amendments. DCR 34, as it stood at the relevant time, provided that in certain circumstances, the development potential of a plot of land may be separated from the land itself and may be made available to the owner of the land in the form of TDR which may be made available and be subjected to the regulations in Appendix VII. Appendix VII contains a title “Regulations for the grant of Transferable Development Rights (TDRs) to owners/developers and conditions for grant of such rights.” Clause 1 of the Appendix provides that the owner of the plot of land which

is reserved for public purpose and for additional amenities shall be eligible for the award of TDR in the form of FSI to the extent of conditions set out below. Such award would entitle the owner of the land to FSI in the form of Development Rights Certificate (DRC) which, he may use for himself or transfer to any other person. Clause 5 of the Appendix provides that the built up area for the purposes of FSI credited in the form of DRC shall be equal to gross area of the reserved plot to be surrendered and will proportionately increase or decrease according to the permissible FSI of the zone where the TDR has originated. Clause 6, which is important for us, provides that when an owner or a lessee also develops or constructs amenity on the surrendered plot at his cost subject to such stipulations which may be prescribed and to satisfaction thereof, hands over the developed or constructed amenity to the Commissioner or the appropriate authority free of cost, he may be granted further DR in the form of FSI equivalent to the area of construction/development done by him, utilisation of which will be subject to the regulations contained in the said Appendix.

18. Regulation 33 on the other hand, pertains to additional Floor Space Index which may be allowed to certain categories. Sub-regulation (1) as it stood at the relevant time, provided that the Commissioner may permit the additional FSI on 100% of the area required for road widening or for construction of new roads under the development plan. Such FSI on the land so surrendered will be utilisable on the remainder of the land upto a limit of 40% in respect of the plots situated in Mumbai city and 80% in respect of the plots situated in suburbs and extended suburbs. The balance FSI remaining thereafter shall be allowed to be utilised as a development right in accordance with the regulations governing TDRs.

19. It was in this context, the Counsel for the Corporation had vehemently contended that the petitioner having utilised 100% FSI for surrender of land without cost on the same layout, which will be governed by Regulation 33 and, therefore, cannot claim any additional FSI/TDR for having constructed the amenities. It is not necessary for us to dilate into these contentions since the issues are squarely covered by the Division Bench judgment of this Court in the case of **Apurva Natvar Parikh & Co. Private Limited Vs**

The State of Maharashtra & others³. In the said case, several developers had filed petitions primarily seeking the benefit of additional amenity FSI for construction of road by virtue of judgment of the Supreme Court in the case of **Godrej & Boyce Manufacturing Co. Ltd.** (supra). One of the points urged by the Counsel for the petitioners was that till the amendment of 17.6.2010, there was no provision in the Regulation 33 for claiming FSI for construction of amenities and the same could be claimed only in terms of Regulation 34 read with clause 6 of Appendix VII. On the other hand, the Counsel for the Municipal Corporation had argued that the provisions of Regulation 33 were not brought to the notice of the Supreme Court in **Godrej & Boyce Manufacturing Co. Ltd.** (supra) and that by notification dated 16.11.2016, the Regulation was amended to restrict the benefit of additional TDR for development of amenities which was to cure a defect in the legislation.

20. The Division Bench referred to the amendment in Regulation 33 w.e.f. 17.6.2010 by which the following clause was added to sub-regulation (1):

³ Writ Petition No.203 of 2014 and others

“23. ...

When an owner or lessee or Power of Attorney holder/ Authority holder also develops or constructs the road on the surrendered land at his cost subject to such stipulations as may be prescribed by the Commissioner to his satisfaction, and hands over the said developed/constructed road to the Commissioner free of cost, he may be granted by the Commissioner additional FSI equal to 25% of the area of this construction/development done by him (***This modification will not apply in cases where road FSI is utilized and also full occupation certificate is granted.***)”

21. The Court in this context observed as under:

“23.

Prior to this amendment, Regulation 33(1) did not deal with FSI/TDR on in lieu of construction of roads. It dealt with only the FSI/TDR against the surrender of the land reserved for road. This amendment is applicable only when the owner or lessee or a power of attorney holder develops the land reserved for road by constructing a road thereon as per the stipulation of the Commissioner and hands over the constructed road to the Commissioner free of cost. In such case, and additional FSI equivalent to 25% of the area of the construction of road can be granted to him. A part of such FSI can be consumed on the remaining land and the remaining part of FSI will be provided in the form of TDR. Thus, this amendment to Regulation 33(1) is applicable to reservation for road and not for any other amenity. Moreover, this portion of amendment will not apply where the FSI granted in lieu of road is utilized and full occupation certificate is granted prior to 17th June 2010. therefore, from 17th June 2010, in case of a land reserved for road or road widening which is surrendered, if the amenity of road is constructed by the owner on the land surrendered, the additional FSI as provided in clause (b) of sub-section (1) of section 126 will be 25% of the area of the construction of road. Therefore, for such amenity, in terms of clause (6) of Appendix-VII, the owner or lessee will not get TDR equivalent to entire area of the road constructed by him. It

will remain confined to 25% of the area. We may note that Regulation 33(1) as amended on 17th June 2010 is not modified by the impugned notification dated 16th November 2016.

33. An additional FSI or TDR in term of clause (6) of Appendix-VII as well as in terms of clause (1)n of Regulation 33 becomes available on surrender of the land reserved with or without amenity as the case may be. After 17th June 2010, if there is a surrender of land reserved for road or road widening on which road is constructed by the owner or lessee, the FSI or TDR will be available in respect of amenity of road as per Regulation 33(1) as amended. Therefore, the right to get FSI/TDR accrues at the time of surrender. But on the ground of delay and laches, a Writ Court can refuse to enforce the right. We have already held that the decision of the Apex Court in the case of **Howrah Municipal Corporation v. Ganges Rope Co. Ltd.** (supra) will have no application to the case of grant of TDR. The reason being is that the provision in DCR for grant of TDR against surrender of reserved land or surrender of reserved land after developing the amenity thereon will have a direct nexus with clause (b) of sub-section (1) of section 126 of the MRTP Act. In a sense, the additional FSI or TDR is payable by way of compensation under clause (b) of sub-section (1) of section 126. Therefore, the argument that the notification dated 16th November 2016 will have retroactive operation in the sense that it will apply to all pending applications for grant of TDR cannot be accepted as the right accrues on the surrender of the land. Therefore, now we turn to the facts of individual cases.”

22. The legal position thus, having been clarified by this Court in **Apurva Natvar Parikh & Co. Private Limited** (supra), the main contention of the Counsel for the Corporation must fail.

23. We may now advert to the undertaking of the petitioner. In the undertaking dated 5.9.2007, the petitioner did agree that the FSI in lieu of the DP road will be used on the same plot and after availing the said FSI, he will claim no TDR on the balance FSI. However, in the same undertaking, it was also added that the petitioner has already represented to the Additional Chief Secretary of Urban Development Department for granting additional TDR of 0.25 as per clause 6 of Appendix VII under DCR 34 for construction of 13.40 metres wide road. In case, the Urban Development Department considers the said request, the petitioner would be entitled to claim the same. This undertaking, thus, was qualified, namely, keeping the representation of the petitioner to the Urban Development Department alive and to avail the benefit of the outcome of such representation. The representation referred to in the said undertaking happens to be one dated 30.7.2007 made to the Additional Chief Secretary, Urban Development Department, in which the architect of the petitioner pointed out that his client has already constructed 13.40 metres wide DP road at his cost alongwith all services and he is, therefore, eligible for grant of TDR to the extent of 1.25 times the area of the road. It is proposed that the said TDR would be used

on the land in the same layout. However, as per the Circular dated 5.5.2004, the Corporation may not grant additional construction TDR to the extent of 25% of the area of the DP road if the FSI relatable to the road is claimed on the same layout. It was pointed out that in the existing circulars, in the following two clauses, there is ambiguity:

“(i) The owner is not eligible for the grant of additional T.D.R. to the extent of 25% if the F.S.I. the said D.P.Road, is utilized on land in same layout i.e. owner is allowed to used F.S.I of 1.00 only.

(ii) The owner is granted T.D.R. to the extent of 1.25 times the area of D.P. Road if it is constructed as per the requirement of MCGM (25% TDR for constructed Road area) subject to condition that same area is allowed to be used else where receiving area and not on land in same layout.”

24. It was represented that this ambiguity needs to be cleared and the circular should be suitably amended.

25. Thus, the petitioner had kept open the right to receive the benefit of amenity FSI upon clarification of the seemingly irreconcilable clauses in the government circular. The petitioner had not given up the right to claim such FSI. The undertaking, therefore, cannot be a ground to reject the petition.

26. In the result, the impugned communication dated 15.7.2008 is set aside. It is held that the petitioner is entitled to additional amenity FSI/TDR of 1.0 of the area of constructed road. It is however clarified that utilisation of such TDR would be as per the existing building rules and regulations.

27. Petition is disposed of accordingly.

(S.J. KATHAWALLA, J.)

(AKIL KURESHI, J.)

**Vishwanath
S. Sherla**

Digitally signed by
Vishwanath S.
Sherla

Date: 2019.10.19
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