

Anand

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

WRIT PETITION NO. 12409 OF 2022

T Bhimjyani Realty Pvt. Ltd. .Petitioner
A company incorporated and registered
under the provisions of the Companies
Act, 1956, having their registered office
at 301, 'A' Wing, Fortune 2000, Bandra(E),
Mumbai - 400 051.

Vs.

1. The State of Maharashtra .Respondents
represented by the Principal Secretary,
Ministry of Urban Development,
having office at Mantralaya,
Mumbai - 400 032.
2. The Thane Municipal Corporation
Mahanagarpalika Bhavan, Dr. Almeida
Road, Panchpakhadi,
Thane - 400 602.
3. The Commissioner, Thane
Municipal Corporation,
Mahanagarpalika Bhavan, Dr. Almeida
Road, Panchpakhadi,
Thane - 400 602.

Mr. Pravin Samdani, Senior Advocate a/w Mr. Amogh Singh and
Mr. Parth Jasani i/b. M/s. Purnanand & Co., for the Petitioner
Mr. A. A. Alaspurkar, AGP, for Respondent No. 1 - State
Mr. Ram S. Apte, Senior Advocate a/w Mr. Mandar V. Limaye and
Mr. Harshal P. Nahata, for Respondent Nos. 2 and 3 - Corporation

CORAM : **A. S. CHANDURKAR AND
M. W. CHANDWANI, JJ.**

RESERVED ON : **14 FEBRUARY 2023**

PRONOUNCED ON : **24 FEBRUARY 2023**

ORAL JUDGMENT (PER : M. W. CHANDWANI, J.)

. Heard learned Senior Advocate for the petitioner, learned AGP for respondent No. 1 - State and learned Senior Advocate for respondent Nos. 2 & 3 - Corporation.

2. Rule.

3. Rule is made returnable forthwith. With the consent of the parties, the Petition is taken up for final disposal.

4. The Writ Petition questions the orders dated 26.12.2017, 26.08.2019 as well 11.08.2022 passed by respondent No. 2 denying the grant of Floor Space Index (FSI) in the form of transfer of development rights (TDR) to the petitioner.

5. On 25.02.2002, the petitioner entered into an agreement for development with the owners of several pieces and parcels of the land ad measuring in agreeegate 1,75,506.24 Sq. Meter situated at village - Majiwada, District - Thane. The portion of the said property admeasuring area of 77,500 Sq. Meter was reserved under the development plan for a park,

amenity space and D. P. Road. Leaving the area reserved for the above said amenities, the petitioner intended to develop the said larger land to the fullest extent by utilizing the entire potential including TDR generated by development of the reserved plots.

6. Out of reserved area of 77,500 sq. meter, respondent No. 2 designated an area of 59,626 sq. meter for the development of a Nature Garden. The petitioner surrendered the land for the reserved for above amenity. In addition to, that, the petitioner decided to develop the Nature Garden for getting benefit of additional FSI in the form of Development Control Regulations, 1994 (hereinafter as 'DCR'). The petitioner by it's letter dated 25.02.2004 offered to respondent No. 2 to develop the same. Respondent No. 2 selected the design of Nature Garden submitted by one Sandeep Shirke & Associates. Respondent no. 3 orally assured of granting additional FSI in the form of TDR to the petitioner in accordance with the prevailing Scheme and also called upon the petitioner to commence the work by August, 2006. The petitioner completed the first phase of the Nature Garden admeasuring area of 30,000 sq. meter which was handed over to respondent No. 2. Though, the petitioner was granted transfer of development rights in lieu of area surrendered of the

reserved plot, the respondent No. 2 did not grant additional TDR in consideration of petitioner having developed and handed over the first phase of the Nature Garden to which he was entitled. The petitioner made various correspondence with respondent No. 2 and also held meeting with respondent No. 2. The petitioner by it's letters dated 09.10.2013 and 26.12.2014 made formal applications, but except assistance of respondent No. 2, nothing happened. The petitioner filed W. P. No. 6500 of 2015 which came to be disposed of by order dated 16.02.2016 directing respondent No. 2 to consider the case of the petitioner after giving an intimation to the petitioner of the documents, which they require for passing an appropriate order. Despite submitting the details sought, respondent No. 2, sought the document to show that respondent No. 2 has agreed to get the work of development of park through the petitioner, which respondent No. 2 never had given to the petitioner. On this count, the respondent rejected the Application. The appeal, preferred by the petitioner against the said decision before respondent No. 1 was relegated to respondent no. 2 for consideration. Respondent no. 2 again rejected the same for the reason that there is no formal work order/letter of LOI/work order issued by respondent No. 2 for development of the Nature Garden. Therefore, the petitioner has

challenged the rejection of his entitlement to the TDR in the form of FSI in lieu of development of park by the petitioner.

7. Respondent Nos. 2 & 3 in affidavit-in-reply have contended that the petitioner in response to the letters dated 07.04.2016 and 26.12.2017 did not file the documents referred in the letter. It is also contended that the respondent No. 2 has never permitted the petitioner to construct the Nature Garden. The petitioner failed to submit the documents, by which the Corporation has allowed the petitioner to commence the work of development of Nature Garden. Therefore, demand of the petitioner cannot be accepted.

8. We have heard learned Senior Counsel appearing on behalf of the petitioner and counsels for the respondents. We have also perused the record.

9. Indisputably, the petitioner has surrendered the portion of property admeasuring 77,500 sq. meter reserved under the development plan for the purposes of the park, amenity space and D. P. Road. Accordingly, the petitioner got the FSI in respect of surrender of the said land. As per Clause 6 of

Appendix - W of DCR, if the owner of the plot, in addition to surrender of land, also develops construction of the amenity on the surrendered plot at his costs, subject to such stipulation as may be prescribed by the Commissioner or appropriate authority to their satisfaction and handover the said developed or constructed amenity to the Commissioner free of costs, he may be granted further development rights in the form of FSI equivalent to the area of the construction/development done by him.

10. Resolution of respondent No. 2 shows that Sandeep Shirke & Associates had been selected as an Architect for preparing design for the Nature Garden. This takes us to the letter of Sandeep Shirke & Associates, who prepared the design for development of Nature Garden which is addressed to the City Engineer of respondent No. 2 mentioning the briefing given by the officers of respondent No. 2 regarding development of Nature Garden.

11. Evidently, Nature Garden has been developed and the site was inspected by the Mayor of the respondent no. 2. The Nature Garden was inaugurated by the politicians including

ex Chief Minister in the presence of Mayor and Corporator of respondent no. 2. The said inauguration was hosted by respondent No. 2 by publishing the invitation cards. After the inauguration, the Nature Park is put to public use. Thus, existence of developed Nature Garden is not in dispute.

12. It is not the case of respondent No. 2 that the said Nature Garden has been developed by some other developer. Having found the proposal of the petitioner to develop the Nature Garden; existence of Nature Garden; participation of respondent No. 2 in development of Nature Garden and in inauguration as well; and the detail work submitted by the petitioner with respondent No. 2; we now turn to the reply dated 12.01.2023 of respondent No. 2 under the Right to Information Act. In reply to query under the Right to Information Act, an information has been given by respondent No. 2 that it has not undertaken execution of construction work of Nature Garden and no entry found on the budget book of development regarding expenditure of construction of Nature Garden. This clearly shows that respondent No. 2 has not spent a penny on the construction of Nature Garden.

13. Notably, the possession of the land reserved for the Nature Garden was with the respondent No. 2. A huge Garden and landscape is developed coupled with the fact that inauguration of the same was hosted by respondent no. 2. This cannot be possible without the involvement and consent, rather direction of the respondent No. 2. Just because respondent No. 2 did not issue formal order of construction/ development of Nature Garden, the petitioner, who spent huge amount in developing Nature Park in year 2006 cannot be thrown out on the ground of non-issuance of the Commencement Certificate or formal order to develop the Nature Garden.

14. This takes us to Clause 6 of the Appendix - W of DCR provides that such development done by the owner on the surrendered plot should be subject to such stipulation, as may be prescribed by the Commissioner and to his satisfaction. Nowhere, it is the case of respondent No. 2 that any stipulation has not been complied by the petitioner nor there is any dis-satisfaction of the Commissioner of respondent No. 2. Therefore, absence of written authority, which is not prescribed in Clause 6 of Appendix - W of DCR particularly, when

respondent No. 2 has not come up with the case of non-compliance of any stipulation prescribed by respondent No. 2 will not dis-entitle the petitioner to get benefit of Clause 6 having spent the huge amount on the development of Nature Garden. In view of the fact discussed above, it is sufficient to hold that development/construction of Nature Garden was done with the consent, rather, under direction of respondent No. 2. Therefore, respondent No. 2 cannot deprive the petitioner from the benefit of Clause 6 of Appendix - W of the DCR. The orders dated 26.12.2017, 26.08.2019 and 11.08.2022 of respondent Nos. 1 & 2 do not stand and therefore, are set aside.

15. Accordingly, the Writ Petition is allowed in the following terms.

O R D E R

- (i) The orders dated 26.12.2017, 26.08.2019 as well 11.08.2022 passed by respondent No. 2 are hereby set aside;
- (ii) The petitioner is entitled to FSI in the form of TDR in lieu of the development of Nature Garden;
- (iii) Subject to other compliances by the petitioner, respondent No. 2 shall grant FSI in the form of TDR to the petitioner in lieu of development of the Nature Garden without insisting formal order/Commencement Certificate of respondent No. 2 for the area which he is entitled.

(M. W. CHANDWANI, J.)

(A. S. CHANDURKAR, J.)