Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 954 OF 2013

SAMARTHA DEVELOPMENT CORPORATION,
a partnership firm having its registered office at 11/A, Suyash, Near Amar Hind Mandal, Gokhale Road(N), Dadar (West), Mumbai 400 028. ...**PETITIONER**

~ **VERSUS** ~

SHEPHALI SANJAY MORMARE

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Date: 2023.11.08 14:17:09 +0530

1. **MUNICIPAL CORPORATION OF GREATER MUMBAI,**
a Statutory Corporation constituted under the Mumbai Municipal Corporation Act, 1888 having its office at Mahapalika Bhavan, Mahapalika Marg, Mumbai 400 001.

2. **EXECUTIVE ENGINEER,**
Building Proposal Department, (H-K/W) (WS), RK Patkar Marg, Bandra (West), Mumbai 400 050.

3. **DEPUTY CHIEF ACCOUNTANT, REVENUE III**
Municipal Corporation of Greater Mumbai, Mahapalika Marg, Mumbai 400 001.

4. **ASSISTANT ENGINEER,**
Building Proposal, (H-K/W) (WS), RK Patkar Marg, Bandra (West),

Mumbai 400 050.

5. **Samartha Aishwarya Cooperative Housing Society Ltd,**
a Society registered under the Maharashtra Cooperative Societies Act, 1960 under Registration No. BOM / WKW / HSG /[TC] / 12848 / 2004-2005 having its address at Plot No. 2B, Survey No. 41 (part), CTS No.1/222A, 1/223A, Oshiwara, Off KL Walawalkar Marg, Andheri (W),
Mumbai 400 053. **...Respondents**

Appearances

FOR THE PETITIONER	**Mr Vineet Naik, Senior Advocate,** *Atul Daga, Amit Mehta & Hitesh Mishra, i/b Mahimtura & Co.*
FOR RESPONDENT - MCGM	**Mr AY Sakhare, Senior Advocate,** *with Kunal Waghmare, i/b Sunil K Sonawane.*
FOR RESPONDENT NO 5	**Mr Kunal Bhanage**

CORAM : G.S.Patel &
Kamal Khata, JJ.

RESERVED ON : 10th October 2023

PRONOUNCED ON : 7th November 2023

JUDGMENT (*Per GS Patel J*):-

1. Filed under Article 226 of the Constitution of India, this Writ Petition pertains to a dispute between the Petitioner and

Respondent No 1, the Municipal Corporation of Greater Mumbai ("**MCGM**") in regard to a levy of development charges based on an amendment made to the Maharashtra Regional and Town Planning Act, 1966 ("**MRTP Act**") in 2010. A brief look at the facts is necessary.

2. The Petitioner applied to the MCGM for permission to develop a Maternity Home/Dispensary (Wing 'A') and Commercial Building (Wing 'B') on plot CTS No. 1/223A and 1/220A, Survey No. 41 of Village Oshiwara, Andheri (W).The MCGM issued its Intimation of Disapproval ("**IoD**") on 4th April 2007. Pursuant to the IoD and the approval of the plans, the Petitioner paid the development charges of Rs 19,60,500/- demanded by the MCGM.

3. Subsequently, Commencement Certificates ("**CC**") were issued and revalidated periodically. The preliminary amendment to the plans was sanctioned on 8th February 2008 whereby 1185.4 sq mts of additional area was added to the existing sanctioned development plan. The Petitioner paid an additional development charge of Rs 2,96,500/-.

4. In December 2012, the Petitioner submitted another amendment to the plans, this time for an additional area of 8,227 sq mts. The CC to this amended plan was granted on 12th January 2010. This was the final CC granted. A copy is at Exhibit 'D' to the Petition. Here, the Petitioner submits, the development charge or revalidation charge was said to be not applicable.

5. On 27th December 2010, Chapter VI-A and the Second Schedule to the MRTP Act were amended. This amendment changed the method of calculating the development charges from the previous fixed per square meter rate to one based on Ready Reckoner rates.

6. In May 2012, the Petitioner sought a Building Completion Certificate ("**BCC**"). By its letter of 19th October 2012 to the Petitioner's architect, the MCGM refused this BCC, demanding compliance with certain conditions.

7. It is at this stage that the MCGM for the first issued the demand notice at Exhibit 'F' ("**the impugned demand notice**") that has been assailed in this Petition. A short-recovery statement of development charges formed part of this notice. It claimed inter alia that an amount of Rs 2,66,22,900/- was payable as the 'development charge' for the project. This was divided into two parts, A and B (for Wings A and B of the project respectively). The Petitioner was called upon to pay an amount of Rs 2,96,500/- as the 'deficit development charge' for Wing A on the ground that by virtue of an MCGM error, the earlier amount paid by the Petitioner was calculated at the rate of Rs 250 per sq mt instead of Rs 500 per sq mt, the prevailing rate for commercial constructions prior to the amendment.

8. The remainder of the amount demanded was for the second amendment to the building plans for which the final CC was issued. This amount, however, was calculated as per the Ready Reckoner Rate for 2012 as opposed to the fixed rate of Rs 500 per sq mt.

9. The Petitioner accepted the demand for Wing A. But the Petitioner opposed the levy of the development charge for Wing B based on the Ready Reckoner Rate. The Petitioner sought a reassessment. The MCGM rejected this request. It assigned no reasons. The OC was withheld until the demand was met.

10. The Petitioner's architect submitted a letter on 22nd May 2012 requesting the issuance of the OC and BCC. The request was denied on the ground that the Petitioner had not yet paid a part of the development charges amounting to Rs 2,66,22,900.

11. Respondent No 2 in response to the Petitioner's application for issuance of OC issued a short recovery notice dated 19th October 2012 requiring the Petitioner to pay the impugned amount as a condition precedent to issuance of an OC for Wing 'B'. This demand, the Petitioner contends, was misplaced. The Petitioner explained its position to the MCGM through its architect's letter dated 3rd December 2012.

12. In the interest of acquiring the OC, without prejudice and under protest, the Petitioner made the payment on 29th December 2012. The OC and BCC were issued on 12th March 2013.

13. Thus, the Petitioner paid in full the amount demanded even for Wing B, albeit under prejudice and on a without prejudice basis. It was only then that the OC for full development of the commercial building (Wing B) was issued on 12th March 2013. The BCC was issued subsequently on 23rd January 2013.

14. Mr Naik for the Petitioner submits that the amendments of 27th December 2010 to Chapter VI-A and the Second Schedule of the MRTP Act do not apply to the present development. The MCGM, he further submits, has erroneously applied the charging provisions of the amended Section 124B(2) of the MRTP Act retrospectively to Wing B of the project and, therefore, the Petitioner is not liable to pay the development charges as demanded.

15. The question of law is narrow: can amended Section 124B(2) of the MRTP Act and Second Schedule be retrospectively applied?

16. When the initial IoD was issued, amongst the conditions contained in the IoD dated 4th April 2007 was a requirement that the Petitioner will pay development charges as per the MRTP (Amendment) Act, 1992. Mr Naik contends that the development charges that could be levied by the MCGM had to be on the basis of the law as it stood on 12th January 2010 and not on the basis of some later law. Under Section 124A of the MRTP Act, development charges are levied at the stage of institution of the use or change of use of any land or building.

17. The scrutiny reports to which our attention is drawn indicate details of the FSI and quantified development charges. The Petitioner paid these charges including a short fall of Rs 2,96,500/- which was on account of an error on the part of the MCGM. A full CC dated 12th January 2010 for Wing A was issued by the Respondent Municipal Corporation. Until this point in time, the

December 2010 amendments to the MRTP Act had obviously not come into force.

18. No further amendments were made to the sanctioned plans in respect of the building project 'Samartha Aishwarya.' Mr Naik submits that the 2010 amendment to the MRTP Act is prospective in nature from 27th December 2010, a date much later than the one when the final permissions were obtained for the said project.

19. The Respondent Corporation, in its Affidavit in Reply, submits that there was a short recovery in the development charges, amounting to Rs 2,66,22,900, for development of the project. The Respondents claim that the Petitioner did not pay the development charges in the year in which the area plan was amended for the building project. The Developer is to pay the development charges on the amended plan as per the rate or policy applicable on the day under the relevant provisions of the MRTP Act.

20. It is the case of the Respondents that, the Petitioner continued the development work till 2012, which is much later than the amendment to the Act in 2010, and therefore, the said development charges are applicable. Internal modifications made to the first, second, and ground floors attract the amended Section 124B(2) of the MRTP Act. Development of the building went on till 24th February 2012, the date on which the Structural Engineer and Site Supervisor had issued the Work Completion Certificate. Further, Mr Sakhare for the MCGM states that there is no retrospective application of development charge as the development work continued till the year 2012 and the OC was issued only 12th March 2013.

21. Having issued Rule in this matter over eight years ago now, it is not possible to accede to Mr Sakhare's submission that we should drive the Petitioner to the alternate remedy said to be available under Section 124G of the MRTP Act.

22. Mr Naik's submission is that the impugned demand notice seeks to apply the provisions under Chapter VI-A, including in particular Section 124B, retrospectively to the present development. Section 124B reads thus:

> "**124B. Classification of user of lands and buildings, rates of development charge and procedure for levy thereof.—**
>
> (1)(a) For the purposes of assessing the development charge, the user of land and building shall be classified under the following categories, namely:—
>
> (i) Industrial;
>
> (ii) Commercial;
>
> (iii) Residential;
>
> (iv) Institutional.
>
> (b) In classifying the user of land and building under any of the categories mentioned in clause (a), the predominant purpose for which such land and building is used shall be the basis for such classification.
>
> (2) ***On and from*** **the date of commencement of the Maharashtra Regional and Town Planning**

> **(Amendment)Act, 2010, development charge shall be levied and collected by the Authority at the rates specified in column (4) of the Second Schedule**; and the Authority may, subject to the other provisions of this Chapter, enhance, from time to time, the rate specified in column (4) of the Second Schedule and levy the development charge at such enhanced rate:
>
> Provided that, the Authority may, subject to the other provisions of this Chapter, reduce, from time to time, the enhanced rate and levy development charge at such reduced rate, so however that in no case the rate shall be reduced below the rate specified in column (4) of the Second Schedule."

(*Emphasis added*)

23. A bare reading of the provision makes it amply clear that the amendment, i.e., the quantification of development charges based on the Ready Reckoner Rate under the Second Schedule would begin to operate only 'on and from' the date of commencement of the 2010 Amendment, i.e., 27th December 2010.

24. Nearly 11 months after the Petitioner had received a final CC from the MCGM following approval of its amended plans, the Amendment came into force. Mr Naik's argument that the MCGM does not have the power to retrospectively apply the new amended rate or method of quantification of development charge to a project for which the final CC was obtained well before the date of the Amendment, is one that we must accept. The MCGM's stand it applied the new rates because the work was not yet complete when the amendment came into effect is unpersuasive. As Mr Naik points out, there was no additional FSI being loaded. Minor construction was being carried out pursuant to the issue of the final CC. It is therefore of no relevance when such construction ended. The only relevant date, he submits, and we think correctly, is the date of issue of the CC.

25. Reliance is placed, in our view correctly, on a judgment of this Court in *Serum Institute of India Ltd v The State of Maharashtra & Ors*.[1] Paragraph 7 of this judgment highlights the irrelevance of the date of commencement of construction. To the contrary, it states in fact that the development charge becomes payable immediately after permission is sought from the planning authority. The Court held:

> "**7.** A developer intending to institute or change the use of any land or intending to carry out development on land is required to apply for the grant of permission the Planning Authority under the Act. **By and as a result of the provisions of section 124A, a development charge is leviable on the institution of use or charge of use of any land or building or the development of any land or building for which permission is required under the Act.** A developer who seeks to carry out development on land falling within the municipal limits is hence required by law to move the Planning Authority for its permission which is granted in the form of a commencement certificate. **Development charges are recovered upon the sanction granted by the Municipal Corporation to the Building plan. The commencement certificate is an authority for the developer to commence the work of development. If, at the time when the commencement certificate is granted, the land in respect of which development**

1 2003 SCC OnLine Bom 613 : (2004) 1 Mah LJ 573 : (2004) 1 Bom CR 173 : (2003) 105 (4) Bom LR 524.

permission is sought falls within Municipal limits, the developer is obliged under the law to pay the development charges. <u>The date when the actual work of construction commences, is not material because the commencement certificate authorises the developer to commence construction forthwith.</u> The period, initially of one year during which is commencement certificate is to remain alive and the provision for an extension of the time prescribed by the Commencement Certificate does not postpone the levy of the development charge. **The development charge becomes leviable immediately after the permission which is sought by the developer is granted by the Municipal Corporation.**"

(*Emphasis added*)

26. On the question of refund, Mr Naik cites the decision of the Supreme Court in *Godavari Sugar Mills Limited v State of Maharashtra & Ors*.[2] The Supreme Court distinguished cases where the prayer is merely for a refund from those where a notice is assailed on the ground that it is bad in law or that the assessment by the statutory authority was incorrectly conducted and a refund is sought as a consequential relief. Prayer clauses (a) and (b) of the Petition are similarly worded, with a refund as a consequential relief. They read thus:

"(a) that this Hon'ble Court be pleased to issue a writ of Certiorari or a writ in the nature of Certiorari, or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the papers and proceedings relating to Impugned Demand Notice (Exhibit 'F' hereto) passed by Respondent No. 2 and after ascertaining the

2 (2011) 2 SCC 439.

> legality thereof to quash and/or set aside the same;
>
> (b) that this Hon'ble Court be pleased to issue a writ of Mandamus or a writ in the nature of Mandamus, or any other appropriate writ, order or direction under Article 226 of the Constitution of India against the Respondents, directing them to refund to the Petitioner the excess amount of Rs 2,63,26,400 illegally collected as development charges and interest thereon at the rate of 18% p.a. from the date of payment till the date of recovery as per the Petitioner's letter dated 16 January 2013 (Exhibit 'L' hereto) and letter dated 29 December 2012 (Exhibit 'J' hereto);"

27. Thus, if the demand for the additional development charges (or short-charges) is held to be liable to be quashed, the consequential order for a refund must follow. The Petitioner is entitled to a refund.

28. The question that arises is about the amount to be refunded. Mr Sakhare submits that assuming that the development charge is not payable at the Ready Reckoner Rate, the Petitioner is still liable to pay the development charges at the then prevailing rate, i.e., at Rs 500 per sq mt. Admittedly, the Petitioner accepted its liability with respect to the charge computed at that rate for Wing A. The application of the Ready Reckoner Rate to Wing B cannot be sustained, for the reasons we have indicated. The rate to be applied is the rate of development charges prevailing in January 2010, when the final CC came to be issued, i.e., Rs 500 per sq mt.

29. In view of this, we think it necessary to issue directions for a refund of the excess in favour of the Petitioner after the development charge at the then prevailing rate of Rs 500 per sq mt are deducted from the amount already paid by the Petitioner to the MCGM under protest for issuance of the OC.

30. The levy for Wing A in the amount of Rs 2,96,500/- is undisturbed.

31. For Wing B, the MCGM is entitled to levy the development charge only at the rate of Rs 500 per sq mt. The amount in excess of this rate (computed as per the Ready Reckoner) and paid without prejudice by the Petitioner is to be refunded to the Petitioner within eight weeks from today.

32. As to interest, since there was a demand for interest on 16th January 2013 (for interest at 18% per annum), and since we have found that the amount was entirely unlawfully demanded (for Wing B), we direct that the refund will carry simple interest at 9% per annum from the date of the without prejudice deposit made by the Petitioner, i.e., 29th December 2012.

33. The Petition is disposed of in these terms. There will be no order as to costs.

(Kamal Khata, J) **(G. S. Patel, J)**