Amol

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 11473 OF 2016

Hemant Prabhakar Kulkarni & Anr …Petitioners
Versus
The Kolhapur Municipal Corporation & Ors …Respondents

Dr Milind Sathe, Senior Advocate, *with Yuvraj Narvankar & Mayur Mohite, for the Petitioners.*
Mr AM Adagul, *with Khush M Lahankar, i/b AM Adagul, for Respondent Nos 1 to 4-KMC.*
Ms MP Thakur, AGP, *for the Respondent-State.*

CORAM G.S. Patel &
Kamal Khata, JJ.
DATED: 10th January 2024

PC:-

1. Rule was issued on 11th September 2018.

2. The two reliefs sought in the Petition at page 51 are prayer clauses (a) and (b). They read as follows:-

> "(a.) for the declaration that Regulation No. 8(a) of addendum dtd. 02.05.2016 to the Notification dtd. 28.01.2016 in so far as and to the extent to 'such utilization shall be allowed for one year only' is illegal, bad in law, arbitrary and be declared as unconstitutional;

> (b.) writ of mandamus or writ in the nature of mandamus or any other appropriate writ, direction or order thereby directing the respondent Nos. 1 to 3 to issue Development Right Certificate w.r.t. land having Gat No. 104/1/1 admeasuring 4,200 Sq. Meter and Gat No. 105/1/1 admeasuring 3,400 Sq. Meter situated at Mouje Uchgaon, 'E' ward, District Kolhapur upon compliance with necessary requirements such as payment of money, execution of agreements with respondent Nos. 1 to 4 and with such other requirements/formalities per Rule 85 of Development Control Rules 1999 and permit petitioners to utilize Development Right Certificate as per Development Control Rules of respondent Kolhapur Municipal Corporation prior to Notification dtd. 28.01.2016 without any restriction on utilization only for one (01) year."

3. On the face of it, the framing of prayer clause (b) must result in a dismissal of the Petition and a discharge of the Rule because effectively what is being sought is that the Petitioner must be allowed to develop in accordance with a no longer extant Development Control Rule of the Kolhapur Municipal Corporation ("**KMC**"). This lends context to prayer clause (a) because the revised applicable Development Control Regulations provided for an indexation and allowed utilization of what is known as a Development Rights Certificate ("**DRC**") (transferable development rights) for a year.

4. As a question of public law, this is no longer contentious. The issue is settled entirely by at least three decisions of the Supreme Court, *Howrah Municipal Corporation & Ors v Ganges Rope Co. Ltd &*

Ors.[1] This considered, reaffirmed, and followed two previous decisions of the Supreme Court in *Usman Gani J Khatri v Cantonment Board*[2] and *State of West Bengal v Terra Firma Investment and Trading (P) Ltd.*[3]

5. The following brief statement of facts will be sufficient. The Petitioners own Gat No 104/1/1 and 105/1/1. These form part of a larger parcel of land that was reserved for the Kachra Depot under Reservation No 157 of a sanctioned development plan for Kolhapur City. On 12th January 2015, the Petitioners applied for a grant of Transferable Development Rights ("**TDR**") in lieu of surrender of land reserved for the Kachra Depot in the development plan.

6. Pausing briefly for a moment, we believe it is necessary to set out at least a broad understanding of the concept of TDR and the accompanying DRC. As a matter of general applicability, all lands can be developed. The right to develop is considered a part of the right to exploit the full potential of the land and to enjoy the fruits of the development. This development right is part of the right to property. Although no longer a fundamental right, it is nonetheless a constitutional right. But the extent of development is always subject to and controlled by applicable development planning norms. Those are of much wider import and in a zoned or otherwise demarcated area, applicable Development Control Rules or Regulations provide for what is called the Floor Space Index ("**FSI**") or a Floor Area Ratio ("**FAR**"). This speaks of the amount of built-up space as a

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1 (2004) 1 SCC 663.

2 (1992) 3 SCC 455.

3 (1995) 1 SCC 125.

ratio of the total plot area. In Mumbai, for instance, there is a flat FSI for the Island City of 1.33, that is to say, an owner or other rights holder may construct 1.33 times the plot area. Some portions may be excluded from built up area ("**BUA**") computation. In the suburbs, the FSI is 1.00. Outside Mumbai, there is the concept of FAR and depending on where the land is located and the nature of use of the land (agricultural or non-agricultural) the FAR varies. It can be as low as 0.4. This is true of other cities as well, irrespective of the nomenclature. The consequence of this is that the total buildability or the built potential of a piece of land is frequently restricted by Development Control Rules or Regulations. There are in development planning norms provisions for exemptions. These allow additional FSI or additional FAR. But FSI/FAR are not the only form that restrictions take. The same development regulations frequently provide other limitations. For instance, buildings that are certified as heritage have a considerable, if not entire, limitation on buildability. Some portions of land may be subjected to reservations for public purposes. These reservations need not be built reservations (for example recreation grounds, playgrounds, etc). The lands under these reservations are therefore not buildable either.

7. But the consequence of such a restriction by reservation or other regulations (not an FSI/FAR limitation) is that the owner of the property must be entitled to some form of recompense for the buildability that is rendered unavailable to him. This recompense takes the form of what is called TDR. A pro rata buildability, in proportion to the portion of the land affected and said to be non-buildable, is allowed to the developer and the developer is given a

DRC. That TDR can then be utilised by the developer elsewhere. However, even the target place where a TDR can be used or loaded is prescribed by law. The advantage of TDR and a DRC is that the DRC is almost like currency. It can be traded. It has a market value. It can be transferred. It therefore has a very real rupee value attached to it.

8. Since a portion of the land was affected by the Kachra Depot reservation, therefore, the Petitioners sought TDR. On 21st April 2015, the Petitioners made a similar application for TDR for some other land and both applications were on the basis that the land on the reservation would be surrendered to the KMC under Section 126B of the Maharashtra Regional Town Planning Act, 1966 ("**MRTP Act**") read with the then current Development Control Rules of 1999. On 16th May 2015, the Commissioner of the KMC issued a Letter of Intent ("**LoI**"). This in principle approved the grant of TDR in lieu of the surrender of the reserved portion.

9. The Petitioners state that by May 2015, the Petitioners had complied with the conditions and requirements of the LoI. The lands were surveyed and measured in the presence of the surveyor. On 28th July 2015, the Commissioner of the KMC issued a LoI for another tract of land. By November 2015, the KMC had estimated that the development costs of the surrendered land would be in excess of Rs 10.59 crores. The Petitioners believed that this was a mistake, both in terms of arithmetical calculations and the area calculations, and therefore sought for a rectification. A reminder followed on 7th December 2015. The estimates were ultimately corrected by the KMC on 22nd December 2015 and the estimated amount was reduced by as much as 50%. Now the TDR rules came to be revised and the revised rules were notified in the Government Gazette on 28th January 2016. A copy of this is at Exhibit J to the Petition at page 96. Some addendums to the Government Resolution ("**GR**") followed on 2nd May 2016. It is also to be noted that no DRC has yet actually been issued at all.

10. The Notification in question (the English translation is from page 97) has several annexures to it. This is because Annexure A mentions the various municipal corporations to which these revised rules are applicable. Item 4 at page 99 is Kolhapur. At Annexure B are the revised regulations for TDR. At page 106 is Clause 8, captioned "*Effect of this Regulation*". It reads thus:

> "**8.0) EFFECT OF THIS REGULATION:-**
>
> a) Provisions of Generation of TDR from these regulations shall not be applicable where DRC has been issued prior to publication of these regulations However Utilization of such TDR shall be allowed as per these regulations only.
>
> b) These Regulations shall come into effect from publication of this Notification in Official Gazette."

11. Sub-Clause (a) is in two parts. The first part deals with generating TDR and it says that the new Rules are not applicable where the DRC had been issued prior to these revised Regulations. The second portion says that in all cases the utilization of the TDR would be strictly in accordance with the revised Regulations.

12. This will have to be read with the addendum that followed on 2nd May 2016. The relevant portion of the addendum is at page 110 and it modified the original Regulation 8(a). The revised portion from the table is quoted below:

"Regulation No	**Addendum issued under Section 154 of the M.R. And T. P. Act 1966 to the TDR Regulation (Annexure-B) sanctioned vide Government Notification No. TPS -1813/3067/CR 122/MCORP/12UD 13, dated 28/01/2016**
8 (a)	In the **Regulation no. 8(a), the sentence** "However Utilization of such TDR shall be allowed as per these regulations only "is replaced with— "**However, DRCs issued under the old Regulations shall be allowed to be utilised as per TDR zones of old Regulations without indexation but subject to all other conditions of these Regulations. Such utilizations shall be allowed for one year only.** **Provided also that old TDR purchased for utilisation on a specific plot with registered documents of sale and/or specific proposal for utilisation of such TDR pending in the ULBs prior to these regulations shall be allowed completely as per the old regulations."**

13. This is where the concept of indexation was introduced, as also the condition of utilization for one year only. The modification speaks first of TDR zones in the old Regulations. It says that the previously issued DRCs (issued before the revised Regulations) could be used without indexation but had to be used within one year.

The proviso allows complete utilization of TDR without indexation but within one year.

14. This is what leads us to believe that prayer clause (b) of the Petition is more than somewhat ambitious because it seeks that the entire discipline of the revised TDR Rules/Regulations should not apply to the Petitioners. They should, even the prayer itself suggests, be governed by the previous or historical regulations.

15. The challenge in prayer clause (a) is not one that can succeed for a simple reason. The imposition of either indexation or a time limit for utilization cannot be said to be manifestly arbitrary. After all, if a person obtains TDR as an entitlement in law, the statutory intent cannot be to permit the hoarding of TDR like gold, so that it can be monetized when real estate values go up.

16. Paragraph 30 of the Supreme Court decision in *Howrah Municipal Corporation* dealt with precisely such a submission. In paragraph 29, the Supreme Court considered its earlier decision in *Usman Gani J Khatri* and quoted the relevant portion from paragraph 24. Of immediate relevance to us are paragraphs 29 to 33 of *Howrah Municipal Corporation*. They read thus:

> "29. It has been urged very forcefully that the sanction has to be granted on the basis of the Building Rules prevailing at the time of submission of the application for sanction. In the case of *Usman Gani* the High Court negatived a similar contention and this Court affirmed the same by observing thus: (SCC p. 469, para 24)

> "In any case, the High Court is right in taking the view that the building plans can only be sanctioned according *to the building regulations prevailing at the time of sanctioning of such building plans*. At present the statutory bye-laws published on 30-4-1988 are in force and the fresh building plans to be submitted by the petitioners, if any, shall now be governed by these bye-laws and not by any other bye-laws or schemes which are no longer in force now. If we consider a reverse case where building regulations are amended more favourably to the builders before sanctioning of building plans already submitted, the builders would certainly claim and get the *advantage of the regulations amended to their benefit*."

(underlining to add emphasis)

30. **This Court, thus, has taken a view that the Building Rules or Regulations prevailing at the time of sanction would govern the subject of sanction and not the Rules and Regulations existing on the date of application for sanction. This Court has envisaged a reverse situation that if subsequent to the making of the application for sanction, the Building Rules, on the date of sanction, have been amended more favourably in favour of the person or party seeking sanction, would it then be possible for the Corporation to say that because the more favourable Rules containing conditions came into force subsequent to the submission of application for sanction, it would not be available to the person or party applying.**

31. The decision in *Gani J Khatri* was followed by this Court in the case of *State of W.B v. Terra Firma Investment and Trading (P) Ltd.* That case arose as a result of

amendment introduced in the Act in the year 1990 restricting building heights within the limits of Calcutta Municipal Corporation to 13.5 metres. Applications for sanction pending for construction with height above 13.5 metres were rejected because of the above restriction. In that case also the applicants claimed a vested right to get their plans passed and sanctioned as they were submitted prior to the amendment made to the Calcutta Municipal Corporation Act in 1990. **This Court on examining the object in restricting height of buildings in the city of Calcutta due to limited resources for civic amenities upheld the Amendment Act and negatived the claim of vested right set up by the applicants on the basis of unamended provisions and building regulations.** Relying on the decision of *Usman Gani J Khatri*, this court observed: (SCC pp. 131-32, para 14)

> "**How can the respondent claim an absolute or vested right to get his plan passed by writ of a court, merely on the ground that such plan had been submitted by him prior to 18-12-1989? By mere submission of a plan for construction of a building which has not been passed by the competent authority, no right accrues.** The learned Single Judge of the High Court should have examined this aspect of the matter as to what right the respondent had acquired by submission of the plan for construction of the high-rise building its application was rejected by a statutory provisions."

This Court further observed: (SCC p. 132, para 15)

> "*15.* It is well settled that no malice can be imputed to the legislature. Any legislative provisions can be held to be invalid only on

> grounds like legislative incompetence or being violative of any of the constitutional provisions."
>
> 32. Relying on *Usman Gani case* this Court reiterated that "**builders do not acquire any legal right in respect of the plans until sanctioned in their favour**".
>
> 33. Learned counsel appearing for the respondent Company tried to distinguish the decisions in the cases of *Usman Gani* and *Terra Firma* stating that in the present case the vested right arose because of a time-bound order of the Court. It is argued that the time-bound orders of the Court were not only disregarded but, as has been found by the High Court, deliberately flouted for extraneous reasons. It is submitted that the claim of sanction for additional three floors available to the Company on the date of submission of application of sanction with plans could not have been frustrated by the Corporation by deliberate delay in processing the application and raising pleas and objections to the plan."

(*Emphasis added*)

17. Now there is not the slightest ambiguity about this pronouncement of the law. There is also no doubt that no DRC has been issued to the Petitioners. There is an in-principle no-objection to the grant of TDR. The important aspect emphasized above is that the date of the application is not material and it is the date of the sanction (or the grant of the application) and the rules prevailing on that date which is to be taken into account.

18. The reliefs in the Petition are directly contrary to the decision of the Supreme Court. We are unable to see how this case can in any manner be distinguished or we set to stand on a different footing in law from the considerations that were before the Supreme Court in all three of these cited cases.

19. In the *Usman Gani J Khatri* case that dealt with the Pune Cantonment Board, in fact the argument before the Supreme Court was specifically that the applicants should be allowed to be governed by a no longer extant set of building regulations, i.e., that which was in force at the time of their application. This was expressly negatived in paragraph 24 of *Usman Gani J Khatri*.

20. But if there was any doubt about this, it is surely put to rest by the words of the Supreme Court in *Terra Firma* and the pronouncement that the mere submission of a plan causes no right to accrue. Even if there is an in principle approval until there is an actual sanction, no right accrues.

21. This law was applied by the Division Bench of this Court (AS Oak J, as he then was, and Riyaz I Chagla J) in *Apurva Natvar Parekh and Co. Pvt Ltd v State of Maharashtra & Ors.*[4] In paragraph 29, the Division Bench repelled the argument, relying on the decision of *Howrah Municipal Corporation*, that the issuance of an LoI creates a vested right in favour of the Petitioners. It is only when a surrender has been accepted by the Municipal Corporation that a right to get compensation (in the form of TDR or under Section 126 of the MRTP Act) could be said to accrue.

4 2018 SCC OnLine Bom 6436 : 2018:BHC-OS:19849-DB.

22. The result is that the Petition must necessarily fail. Rule is accordingly discharged.

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