Wadhwa

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 971 of 2023

Bhartu Estates (P) Ltd …Petitioner

Versus

Municipal Corporation of Greater Mumbai & Anr …Respondents

Dr VG Bhartu, *with Shahzad M Panday & MH Ansari, for the Petitioner.*

Ms Geeta Shastri, *with Ms Pooja Yadav, i/b Sunil Sonawane, for the Respondent-MCGM.*

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

DATED: **30th January 2024**

PC:-

1. Heard. The Petition seeks the following reliefs.

> "(a) This Hon'ble Court be pleased to issue Writ under Article No. 226 of the Constitution of India, the Writ of Mandamus or any other appropriate Writ and call for records and proceedings pertaining to the said property from the Respondents;
>
> (b) This Hon'ble Court be pleased to pass the order under writ of mandamus or any other appropriate writ directing the Respondents to grant 10% incentive/additional TDR to the Petitioner."

SANDHYA BHAGU WADHWA Digitally signed by SANDHYA BHAGU WADHWA Date: 2024.01.31 18:02:31 +0530

2. The facts are not in controversy. The Petitioner owns the property CTS No. 264/B of Village Bandivali, Taluka Andheri, Mumbai Suburban District. The Petitioner applied on 18th October 2022 for 10% additional incentive Transferable Development Rights (**TDR**). This was refused by the Municipal Corporation on 15th December 2022.

3. The Petitioner says that part of the property owned by the Petitioner was earmarked for an existing road. Possession of this property was only taken out on 8th December 2021. The refusal is on the basis that under the applicable DCR 32 (4.1.1) of the DCPR 2034, the 13.4 meter wide existing road would not attract 10% incentive DCR since possession had to have been surrendered no more than 36 months after the DCPR 2034 came into force. Since possession was not surrendered within that time, the additional relaxation granting 10% incentive TDR could not be permitted. That this area was affected as shown as existing road is not in dispute. Obviously, the Petitioner was entitled to compensation which could take the form of Transferable Development Rights for any property affected by any public reservation. The question is only about the additional incentive FSI. It is not in dispute that TDR has in fact been granted. It is only the additional incentive TDR that has been declined at this stage.

4. The application by the Petitioner was of 19th October 2022. Even prior to that the Petitioner had filed a Writ Petition and on 8th October 2022 in Interim Application (L) No. 20607 of 2021 in Writ

Petition No. 3325 of 2019 a Division Bench ordered that the application should be considered.

5. Reference is made to an Urban Development Department Circular dated 3rd September 2022. But that clearly says in the context of another application that no further clarification was required and that the matter was fact -dependent.

6. DCPR 32 is in part V of the DCPR 2034 that deals with Floor Space Indices. DCPR 32 deals specifically with Transferable Development Rights of TDR. Clause 4.1 is captioned Transferable Development Rights (TDR) against surrender of land. Clause 4.1.1 reads thus :

> "4.1.1 **For surrender of the gross area of the land which is subjected to acquisition, free of cost and free from all encumbrances, the owner shall be entitled for TDR or DR irrespective of the FSI permissible or development potential of the very said land to be surrender and also that of land surrounding to such land at the rate as given below:- ………**

(*Emphasis added*)

7. As the emphasized portion shows, TDR is available against surrender. Then there is a table and sub-clause entry 1(d) deals with set back due to subsequent road widening of proposed DP road and where this is in progress at the time of handing over of such area to the MCGM. But what is material is the second proviso which reads thus:

> "**Provided also** that Additional/incentive Transferable

> Development Rights (TDR) to the extent of 10% and 5% of the surrendered land area shall also be allowed to the land owners who submit the proposal for grant of Transferable Development Rights (TDR) and **<u>if land is surrendered to MCGM within 24 months and 36 months respectively from the date of coming into force of these Regulations.</u>** The owner may opt for the said entitlement in the form of FSI on the balance plot or in the same layout as permissible under these Regulations."

(*Emphasis added*)

8. This is the only provision for additional/incentive TDR. Now this must be read completely. It is not possible to read the proviso as making a reference to an *application* or an *offer* for surrender. There has to be an actual surrender and that surrender must happen within the time stipulated within the proviso. Otherwise, it would mean that an offer could be made at any time, even decades later and TDR would then be sought and would have to be granted at very inflated rates.

9. As we have noted, the surrender was not within 36 months period from when the DCPR came into force. The DCPR was sanctioned on 8th May 2018 with effect from 1st September 2018. Possession of the land was obtained on 8th December 2021, outside the time frame provided by the statute.

10. We cannot enter into a factual dispute about the date of possession nor consider the submission that actual possession was taken earlier. As Ms Shastri points out annexed to the Affidavit-in-

Reply is a copy of the document showing the date of possession as 8th December 2021.

11. Having regard to these circumstances it is not possible for us to grant the relief sought. That would amount to making an exception in favour of the Petitioner although there is no right for this showing as the Petitioner.

12. The Petition is rejected.

13. No orders as to costs.

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