

Shephali

REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 3283 OF 2019

- 1. VIJAY NAGAR APARTMENTS,**
A partnership firm having its
registered office at Royal Classic,
Near Laxmi Industrial Estate,
Link Road, Andheri (West),
Mumbai 400 058.
- 2. DHAVAL R AJMERA,**
Aged 39 years, Partner of
Petitioner No 1, having his office at
Royal Classic, Link Road,
Andheri (West), Mumbai 400 058.

... PETITIONERS

~ VERSUS ~

- 1. THE STATE OF MAHARASHTRA,**
Through the Principal Secretary,
Urban Development Department,
Mantralaya, Mumbai 400 032.
- 2. MUNICIPAL CORPORATION OF
GREATER MUMBAI,**
A statutory corporation having
its office at Mahapalika Marg,
Mumbai 400 001.

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3. **MUNICIPAL COMMISSIONER,**
Municipal Corporation of Greater
Mumbai, having its office at Mahapalika
Building, Opp CST, Mumbai 400 001.
4. **CHIEF ENGINEER
(DEVELOPMENT PLAN),**
Municipal Corporation of Greater
Mumbai, having his office at 4th Floor,
Annex Building, Municipal Head
Office, Mahapalika Marg,
Mumbai 400 001.

...RESPONDENTS

APPEARANCES

FOR THE PETITIONERS	Mr Janak Dwarkadas, Senior Advocate, with Shiraz Rustomjee, Senior Advocate, Ankita Singhania, Amit Mehta, Prateek Pai, Krishkumar Jain & Kalpesh Bendra, i/b Ritesh K Jain.
FOR RESPONDENT BMC	Mr J Reis, Senior Advocate, with Rupali Adhate.
FOR RESPONDENT - STATE	Mr Manish Upadhye, AGP.
PRESENT IN COURT	Ms Snehal Patange, Sub-Engineer (DP), present.

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

DATED : 3rd April 2024

ORAL JUDGMENT (Per GS Patel J):-

1. **Rule.** By consent. rule returnable forthwith and the Petition is taken up for final disposal at the stage of admission. We heard Mr Dwarkadas for the Petitioners and Mr Carlos for the Respondent at some length yesterday.

2. The 1st Petitioner is a partnership firm. The 2nd Petitioner is one of its partners. They own just over 98,000 sq mts of land spread over several CTS numbers at village Anik, Bhakti Park, Chembur. This is the subject matter of the present Petition.

3. The reliefs sought in the Petition are these:

“(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 of this Hon’ble Court under Article 226 of the Constitution of India, calling for the records and proceedings which culminated in issuance of impugned communication/letter dated 5 November 2019 (Exhibit ‘R’ hereto) by Respondent Nos. 3 and 4 and after going through the legality, validity and propriety thereof, the Petitioners be pleased to quash and 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 requiring Respondents grant additional amenity TDR in terms of letter dated 4 April 2019 (Exhibit ‘Q’ hereto) in respect of the lands bearing old CTS Nos. 1, 3B, 229-B, 233-B and having new CTS Nos. 1A/4, 1A/15, 1A/10 and 1A/14 (pt) admeasuring 98,369.1 square meters situated at Village Anik, Bhakti Park, Chembur for construction and development of Garden as per reservation, which is indicated in blue

boundary line on the map Exhibit 'C' hereto that is additional amenity TDR be granted for the portion indicated in blue boundary line and admeasuring 98,369.10 square metres to the Petitioner.”

4. The facts are largely undisputed and not contentious. A brief narrative will suffice. On 4th March 1994, the Urban Development Department of the Government of Maharashtra issued a Notification reserving the property as a garden in the Development Plan of 'N' ward. The reservation required that the land would be developed by the owners and then handed over to the Brihanmumbai Municipal Corporation (“**BMC**”) for maintenance and so forth.

5. On 13th December 2001, the BMC issued a Letter of Intent (“**LoI**”) to the Constituted Attorney of the Petitioners. This said that the Petitioners would be granted a Development Rights Certificate (“**DRC**”) for this property on it being developed as a garden, provided it was maintained by the Petitioners at their costs for 20 years without claiming “Amenity TDR”. A copy of this communication is at Exhibit “B” at page 51.

6. Both sides have made submissions to us on this basis. The relevant paragraphs of this letter are paragraphs 3, 7 and 12. Mr Dwarkadas emphasizes paragraph 3. They read thus:

“3. That you will develop the said Garden plots as per Municipal Specifications & you will submit registered undertaking that you will develop the said Garden as per the Specification laid down by the Corporation and maintain it for a further period of next 20 years, at your cost

and will not claim any amenity TDR towards Development of Garden.

7. That board showing that the land owned by the Municipal Corporation of Greater Mumbai shall be provided on site.

12. That necessary legal documents for transferring the land in favour of the MCGM shall be executed at your own cost.”

7. Pausing for a moment, TDR is obviously a reference to Transferable Development Rights. As is well known, this is a development right that is granted typically in lieu of additional buildability on a particular plot. The Floor Space Index or FSI is akin to the Floor Area Ratio, a proportion of the built up area (“**BUA**”) to the plot size. If there are certain restrictions on the amount of BUA (various factors may impede the exploitation of the full native development potential), the plot owner is granted TDR. This frequently happens when some land is under a reservation for a public purpose and the owner is given TDR (often in lieu of cash compensation). TDR is freely tradeable and has a market value. Physically it takes the form of a DRC which certifies the area in question, that is to say how much can be built against that TDR.

8. Between September 2001 and January 2002, correspondence ensued between various departments and authorities in regard to the completion of the development of the garden and the issuance of a no objection for obtaining a Completion Certificate (“**CC**”).

9. On 4th February 2002, the Petitioners transferred the property to the BMC and got it registered in the property cards. This was in respect of CTS No 1A/4 and the relevant documents in question are at Exhibit “D” and “D1” at pages 55 and 59 of the Petition paper book.

10. On 12th February 2002, the BMC issued DRCs for CTS Nos 1A/4, 1A/15 granting Floor Space Index (“FSI”) credit to the Petitioners for 39,554.60 sq mts and 2,222.9 sq mts respectively. Copies of these DRCs are at pages 65 and 66 of the Petition paper book.

11. On 27th November 2002, the BMC and the partnership firm entered into a Maintenance Agreement. A copy is at Exhibit “F” from page 68. At page 69, Clause 1 says specifically that the 1st Petitioner would be entitled to maintain the garden on an adoption basis renewable annually for a period not exceeding 20 years, i.e., until 2022 but this was subject to certain conditions. These conditions were that the garden would be maintained properly to municipal specifications at the Petitioners’ cost and the Petitioners would not claim any Amenity TDR/FSI or any compensation towards the development and maintenance of the garden.

12. Up to this time, possession of the garden remained with the Petitioners.

13. On 20th March 2002, the BMC issued a CC for the development of internal roads. Later that month, BMC’s name was

included in the property cards. Other correspondence in regard to the CC went on.

14. In April 2002, the BMC issued DRCs giving the Petitioners FSI credit for 16,27.50 sq mts. In October 2002, the BMC's name came to be included in respect of another CTS number and in December 2002 and February 2003 there followed DRCs for two other CTS numbers, thus making it in all five DRCs.

15. This position continued for the next several years until March 2016.

16. On 14th March 2016, the BMC demanded actual physical possession of the garden plot. A possession receipt came to be issued on 2nd June 2016 taking over the garden plot (CTS Nos 1A/4, 1A/10, 1A/14 and 1A/15). The Petitioners delivered possession on that date.

17. On 3rd May 2018, the earlier development regime, i.e., the Development Control Regulations, 1991 ("**DCR**") was superseded by the advent of the Development Control and Promotion Regulations, 2034 ("**DCPR**").

18. On 4th April 2019, the Petitioners' Advocates wrote to the BMC now demanding additional Amenity TDR to be computed against the development and construction of the garden. This demand was rejected by the BMC on 5th November 2019 (Exhibit "R" at page 109). This is challenged in the Petition.

19. The impugned letter says amongst other things that the claim was made after 17 years; that it was made under DCR 1991 which was no longer in force; that the demand was contrary to the terms and conditions of the LoI, the agreement for maintenance of garden and the undertakings given by the Petitioners in that regard.

20. Then there was some Advocates' correspondence and ultimately this Petition was filed on 27th November 2019.

21. As regards the undertaking, though not included in the Petition, Mr Carlos has given us a copy in a compilation. It is at page 1 of that compilation. The undertaking is of 10th January 2002 signed by the Constituted Attorney of the Petitioners saying that the garden would be developed according to BMC specifications and maintained for 20 years. The Petitioners would not claim Amenity TDR towards development of the garden. The compilation also has a copy of the LoI dated 13th December 2001 where precisely this condition is imposed, i.e., that the Petitioners would not claim Amenity TDR towards development of the garden.

22. The submission from Mr Dwarkadas is straightforward. He does not dispute that such a condition was in fact there or that it was in the LoI or that the Petitioners did give an undertaking. His case, however, is that while there was the advantage or benefit of maintenance of the garden, and presumably therefore access to the garden, the Petitioners saw no need to make any claim for the TDR. But he says once possession of garden was resumed there was a consequence that followed immediately in law because it necessarily

meant that the Petitioners were being deprived of property without compensation; or, in other words there was some expropriation or confiscation of property.

23. Mr Dwarkadas draws attention to a few provisions of the DCR 1991. Amenity is defined in Section 2(7) and it reads thus:

“2(7) “**Amenity**” means roads, streets, open spaces, parks recreational grounds, play grounds, gardens water supply, street lightings, sewerage, drainage, public works and other utilities, services and conveniences.”

24. It is also defined in the Maharashtra Regional and Town Planning Act, 1966 (“**MRTP Act**”) in Section 2(2) thus:

“2(2) “Amenity” means roads, streets, open spaces, parks, recreational grounds, play grounds, sports complex, parade grounds, gardens, markets, parking lots, primary and secondary schools and colleges, polytechnics, clinics, dispensaries and hospitals, water supply, electric supply, street lightings, sewerage, drainage, public works and includes other utilities, services and conveniences.”

25. Section 126(1)(b) of the MRTP Act deals with the grant of compensation *inter alia* in the form of TDR. Section 126(1)(b) says:

“126. (1) Where after the publication of a draft Regional plan, a Development or any other plan or town planning scheme, any land is required or reserved for any of the public purposes specified in any plan or scheme under this Act at any time, the Planning Authority, or as the case may be any Appropriate Authority may, except as otherwise provided in section 113A acquire the land,—

(a)

(b) **in lieu of any such amount**, by granting the land owner or the lessee, subject, however, to the lessee paying the lessor or depositing with the Planning Authority, Development Authority or Appropriate Authority as the case may be, for payment to the lessor, **an amount equivalent to the value of the lessor’s interest to be determined by any of the said Authorities concerned on the basis of the principles laid down in the Land Acquisition Act, 1894, Floor Space Index (FSI) or Transferable Development Rights (TDR) against the area of land surrendered free of cost and free from all encumbrances, and also further additional Floor Space Index or Transferable Development Rights against the development or construction of the amenity on the surrendered land at his cost**, as the Final Development Control Regulations prepared in this behalf provide.”

(Emphasis added)

26. At the relevant time, TDR was the subject of DCR 34 of the 1991 DCR. These reference Appendix VII, now renumbered as Appendix VII-A. The relevant portions of DCR 34 and Appendix VII-A are as follows:

34. Transfer of Development Rights

In certain circumstances the development potential of a plot of land may be separate from the land itself and may be made available to the owner of the land in the form of Transferable Development Rights (TDR). These Rights may be made available and be subject to the Regulations in Appendix VII hereto.

Appendix VII-A (Regulation 34)

1. The owner (or lessee) of a plot of land which is reserved for a public purpose in the development plan and for additional amenities deemed to be reservations provided in accordance with these Regulations, excepting in the case of an existing or retention user or any required compulsory or recreational open space, shall be eligible for the award of Transferable Development Rights (TDRs) in the form of Floor Space Index (FSI) to the extent and on the conditions set out below. Such award will entitle the owner of the land to FSI in the form of Development Rights Certificate (DRC) which he may use himself or transfer to any other person.

2.

3.

4. Development Rights Certificates (DRCs) will be issued the Commissioner himself. They will state, in figures and in words, the FSI credit in square meters of the built-up area to which the owner or lessee of the said reserved plot is entitled, the place and user zone in which the DRs are earned and the areas in which such credit may be utilised.

5. The built-up area for the purpose of FSI credit in the form of a DRC shall be equal to the gross area of the reserved plot to be surrendered and will proportionately

increase or decrease according to the permissible FSI of the zone where from the TDR has originated.

Provided that in specific cases considering the merits, where Development Plan Roads/reservations are proposed in No Development Zone, the Commissioner with prior approval of the Government shall grant FSI for such road land/ reserved land equivalent to that of the adjoining zone.

6. When an owner or lessee also develops or constructs the amenity on the surrendered plot at his cost subject to such stipulations as may be prescribed by the Commissioner or the appropriate authority, as the case may be and to their satisfaction and hands over the said developed/ constructed amenity to the Commissioner / appropriate authority, free of costs, he may be granted by the Commissioner of further DR in the form of FSI equivalent to the area of the construction/development done by him, utilisation of which etc., will be subject to the Regulations contained in this Appendix.”

(Emphasis added)

27. Mr Dwarkadas does not dispute that the Petitioners have received DRCs and TDR for the land itself. But two things stand out in Section 126(1)(b). First, that *in lieu of an agreement to pay a certain amount*, the Corporation may make payment to the lessor of ‘an amount equivalent to the value of the interest in the property as determined by the authorities concerned on the basis of principles laid down in the Land Acquisition Act, 1894,’ as FSI or TDR against the land surrendered free of cost and free from all encumbrances. But there is a further clause which says that in addition there would be a compensation in the form of further additional FSI or TDR

against the development or construction of the amenity on the surrendered land at the plot owner's cost.

28. Mr Dwarkadas's submission is that even if the right to property — and that includes the right to enjoy the benefits of the property — is no longer a fundamental right, it is nonetheless a Constitutional right. There may be some disagreement amongst scholars about what is the amount of compensation and how it is to be computed but nobody can deny that there is no possibility of exercising the police power of the State to take over property without providing for some form of recompense. This may be in cash, it may be in kind and it may also take the form of a certain species of rights such as TDR. The right to property includes the value of improvements to the property or the land.

29. To that the only argument from the BMC is that once having agreed not to claim any TDR for the cost of development of the amenities it is not open to the Petitioners at this distance in time after seventeen years to make this claim.

30. On its own this submission is difficult to accept because it literally means that by some executive action a substantive provision of the MRTP Act can be completely bypassed. It also necessarily means that the requirements of Article 300A of the Constitution are immaterial. So long as the BMC is able to get a party to sign an undertaking or to accept a condition in a LoI, the BMC can acquire a developed amenity at no cost and without paying any recompense or compensation.

31. We are unclear whether the submission before us is one of acquiescence, waiver or estoppel. It certainly cannot be estoppel because no estoppel is pleaded. That branch of the law is well settled. It seems to us, however, that the submission is entirely on the basis that once having agreed not to ever claim Amenity TDR, the Petitioners had forever forsaken their right to it.

32. There is also an argument that this claim is belated; indeed so belated that it can be defeated by delay and laches.

33. Further, Mr Carlos submits that the application for TDR for the development of the garden came to be made only after DCPR 2034 came into force. This has a completely different provision. This is covered by DCPR 32 and the relevant portion will be found after Table No 12A in Clause 4.2 captioned “*Transferable Development Rights (TDR) against Construction of Amenity*”. The relevant clause reads thus:

“4.2 Transferable Development Rights (TDR) against Construction of Amenity-

When an owner or lessee with prior approval of Municipal Commissioner, develops or constructs the amenity on the plot to be surrendered at his own cost subject to such stipulations as may be prescribed and to the satisfaction of the Municipal Commissioner and hands over the said developed/constructed amenity along with amenity plot free of cost to the Municipal Commissioner then in addition to land TDR he may be granted a Transferable Development Rights (TDR) **against construction of such amenity as per the following formula:-**

Construction of Amenity TDR in sq. m. = $A/B * 1.50 * BUA$

Where:

A = cost of construction of amenity in rupees as per the rates of construction mentioned in Annual Statement of Rates (ASR) prepared by the Inspector General of Registration for the year in which construction of amenity is commenced.

B = land rate per sq.m. as per the Annual Statement of Rates (ASR) prepared by the Inspector General of Registration for the year in which construction of amenity is commenced.

BUA = Built-up area of constructed/developed amenity.

Provided that in case Slum Redevelopment Scheme under clause 3.11 of Regulation 33(1) the Construction Amenity TDR shall be increased by 1.35 times the TDR generated as per above formula.”

(Emphasis added)

34. Mr Carlos relies on the decision dated 18th December 2018 of a Division Bench of this Court in a group of Writ Petitions: *Apurva Natvar Parikh & Co Private Limited v The State of Maharashtra & Ors.*¹

35. In these cases also a question of grant of TDR arose. The Division Bench held that all cases have to be decided on their individual facts. A gross and unexplained delay would be sufficient for a Writ Court to decline to exercise jurisdiction. If for a very long time the additional TDR was not claimed in respect of an amenity,

1 2018 SCC OnLine Bom 6436..

the Writ Court would be entitled not to grant relief. The High Court said that there would be no straight jacket formula. Paragraph 34 is an interesting illustration. It dealt with one particular Writ Petition where the surrender of the land was of 5th February 2007. A DRC was granted in that year. Within three years, the Petitioner asked an officer of the Maharashtra Housing and Area Development Authority to recommend to the BMC the issue of 100% TDR. This was done on 10th December 2010 to the extent of 25% of the amenity. There appears to have been no specific rejection of the balance 75%. But the Advocate's notice did not follow till 14th December 2011. A reminder came on 3rd August 2012 and the Petition was filed even a year later in October 2013. There was thus something of a delay at least between 2007 and 2013 or, in any event between 2010 and 2013. The Court allowed this Writ Petition and did not consider this delay to be significant.

36. This judgment relies on, as does Mr Dwarkadas before us, the decision of the Supreme Court in *Godrej & Boyce Manufacturing Co Ltd v State of Maharashtra & Ors.*² The issue in that case was also of TDR and the entitlement to it on a voluntary surrender of land.

37. The landowners claimed that for constructing certain roads, they were entitled TDR for the whole of the surface area of the roads. The municipal authorities granted them additional TDR only to the extent of 15% of the road area. The landowners contended that the contents of a governing circular were merely executive

2 (2009) 5 SCC 24.

instructions and could not supersede or override statutory regulations that were of necessity legislative nature.

38. The Court analysed Section 126(1)(b) of the MRTP Act. Paragraph 19 sets this out clearly. Paragraph 24 notes that Sub-clause (b) was inserted by an amendment which then provided for a third mode of land acquisition based on the concept of TDR.

39. The State Government and the BMC had succeeded before this Court. That brought the Petitioners up in appeal to the Supreme Court. The Supreme Court disagreed with the view of the Division Bench of this Court. In paragraphs 51 and 52, the Supreme Court noted:

“51. Section 126(1)(b) of the Act uses the word “against”: it speaks of granting FSI or TDR “against the area of land surrendered” and further additional FSI or TDR “against the development or construction of amenities on the surrendered land”. Now, one of the meanings of the word “against” is given as “in return of something” e.g. the exchange rate against Franc” (Chambers 21st Century Dictionary, 1st Published in India 1997, reprinted 1999). Webster’s Third New International Dictionary gives the meaning of the word “against” as “in exchange for: in return for”. Concise Oxford English Dictionary gives one of the meanings of the word as “in exchange for, in return for; as an equivalent or set-off for; in lieu of, instead of”.

52. Thus, on the basis of the language used in Section 126(1)(b) it could be legitimately argued that what is contemplated is to recompense the landowner proportionate to the *value* of the development or

construction of the amenity on the surrendered land. But the matter does not stop there. As seen above in Appendix VII to the Regulations Para 5 uses the words “equal to the gross area of reserved plot”. Therefore, insofar as the bare land is concerned there is no difficulty. Para 6 of the Appendix, however, uses the words “*equivalent* to the area of the construction/development” and much argument is made on the meaning of the word equivalent.”

(Emphasis added)

40. Then, on behalf of the BMC it was submitted that if Section 126(1)(b) was to be invoked then there could only be mutual agreement of the parties. Once that agreement resulted in a stated understanding, it was not open to one of the parties to then demand compensation. If the land owner did not agree to the conditions stipulated by the BMC, he would not have to surrender the land and then the acquisition would follow the normal course. Paragraphs 61 to 64 are important in this context. They read as follows:

“61. Mr. Shishodia submitted that the appellants in all the cases had agreed to construct the road as part of the condition to surrender the land and getting 100% TDR in lieu of the land. According to him, since the construction of the road was a condition for grant of 100% TDR for the bare land the appellants and the petitioners were not entitled to claim any further TDR at all for construction of the roads by them.

62. Mr Shishodia further submitted that it was only indulgence shown to the appellants and the petitioners that the municipal authorities agreed to give them additional TDR to the extent of 15% of the road area after the issuance of Circular dated 9-4-1996 and 25% of

the road area after the issuance of the Circular dated 5-4-2003.

63. The submission of Mr. Shishodia is completely unacceptable. The conditions, that is to say, the mutual rights and obligations subject to which the landowner may offer to surrender the designated plot of land to municipal authority and the latter may accept the offer are enumerated in detail in the statutory provisions. Beyond those conditions there can be no negotiations for surrender of the land, particularly in derogation to the landowner's statutory rights.

64. Having regard to the nature of the law the submission advanced on behalf of the municipal authority would lead to palpably unjust and inequitable results. The landowner whose land is designated in the development plan as reserved for any of the purposes enumerated in Section 22 of the Act or for any of the amenities as defined under section 2(2) of the Act or Regulation 2(7) [*sic* Regulation 3(7)] of the Regulations is not left with many options and he does not have the same bargaining position as the municipal authority. Therefore, surrender of the land in terms of clause (b) of Section 126(1) of the Act cannot be subjected to any further conditions than those already provided for in the statutory provisions. It is of course open to the legislature to add to the conditions provided for in the statute (or for that matter to do away with certain conditions that might be in existence). **But it certainly cannot be left in the hands of the executive to impose conditions in addition to those in the statutes for accepting the offer to surrender the designated land."**

(Emphasis added)

41. This judgment was followed by another Division Bench of this Court in *Cosmos Realtors Joint Venture v The Municipal Corporation for the City of Thane & Ors.*³ Paragraphs 14, 17 and 18 of the judgment in *Cosmos Realtors* are relevant for our purposes.

“14. The law clearly envisages grant of FSI or TDR under two separate heads i.e. one for the land and the other for construction of amenity for which land is designated in the development plan at the cost of the owner. Section 2(9A) defines development right, which includes Transferable Development Rights and Section 126(1)(b) of the M.R.T.P. Act provides for grant of FSI or TDR against the area of land surrendered free of cost and further additional FSI or TDR against development or construction of the amenity on the surrendered land at the owner’s cost. The Development Control Regulations are traceable to law in as much as they form part of Section 22(m) of the M.R.T.P. Act and therefore anything contrary thereto, whether provided or imposed as conditions while granting development permission under Section 45 of the M.R.T.P. Act are to be overlooked and such conditions provided and imposed would not bind the parties.

17. We have carefully perused condition no. 5 as incorporated in the Commencement Certificate dated 03.07.2006. Vide this condition, the petitioner was required to develop the amenity plot and hand over its possession free of costs to the Respondent-Corporation. This condition does not contemplate that the petitioner shall not be entitled to claim the additional Floor Space Index against the development or construction of amenity on the surrendered plot. That even otherwise, vide undertaking executed on 13.04.2009, the petitioner has agreed to develop the amenity and handed it over to

3 2019 SCC OnLine 1486.

Thane Municipal Corporation free of costs but lieu of TDR. The petitioner therefore has correctly understood that the condition no. 5 in the permission/ Commencement Certificate is independent of his right envisaged under Clause (b) of Section 126 (1) of the M.R.T.P. Act.

18. In the case of *Godrej & Boyce Manufacturing Company Ltd Vs. State of Maharashtra & Ors.* [(2009) 5 SCC 24] it was argued by the State that

[*paragraphs 60, 61, 63 and 64 of Godrej & Boyce were then set out*]

Thus, it is to be held that surrender of the amenity space by petitioner in terms of Section 126(1) (b) of M.R.T.P Act cannot be subjected to any further conditions than those already provided for in the statutory provision. Therefore, the condition imposed by the Respondent-Corporation i.e. Condition No. 5 while granting Commencement Certificate dated 03.07.2006 and clause no. 5 of agreement dated 05.12.2011 cannot come to the aid of the Respondent-Corporation to deny the statutory rights of the petitioner.”

(Emphasis added)

42. On the question of delay and specifically in the context of Article 300-A, Mr Dwarkadas relies, in our view correctly, on the decision of the Supreme Court in *Sukh Dutt Ratra & Anr v State of Himachal Pradesh & Ors.*⁴ There was a 38 year delay. The observations by S Ravindra Bhat and PS Narasimha JJ in *Sukh Dutt Ratra* must be noted:

4 (2022) 7 SCC 508.

“13. While the right to property is no longer a fundamental right [“Constitution (Forty-fourth Amendment) Act, 1978”], it is pertinent to note that at the time of dispossession of the subject land, this right was still included in Part III of the Constitution. The right against deprivation of property unless in accordance with procedure established by law, continues to be a *constitutional* right under Article 300-A.

14. It is the cardinal principle of the rule of law, that nobody can be deprived of liberty or property without due process, or authorization of law. The recognition of this dates back to the 1700s to the decision of the King’s Bench in *Entick v. Carrington*⁵ and by this court in *Wazir Chand v State of H.P.*⁶ Further, in several judgments, this court has repeatedly held that rather than enjoying a wider bandwidth of lenience, the State often has a higher responsibility in demonstrating that it has acted within the confines of legality, and therefore, not tarnished the basic principle of the rule of law.

15. When it comes to the subject of private property, this Court has upheld the high threshold of legality that must be met, to dispossess an individual of their property, and even more so when done by the State. In *Bishan Das v. State of Punjab*⁷ this Court rejected the contention that the petitioners in the case were trespassers and could be removed by an executive order, and instead concluded that the executive action taken by the State and its officers, was destructive of the basic principle of the rule of law. This Court, in another case — *State of Uttar Pradesh*

5 1765 EWHC (KB) J98 : 95 ER 807.

6 (1955) 1 SCR 408 : AIR 1954 SC 415.

7 (1962) 2 SCR 69 : AIR 1961 SC 1570.

& Ors v Dharmander Prasad Singh & Ors,⁸ held: (SCC p.516, para 30)

“30. A lessor, with the best of title, has no right to resume possession extra-judicially by use of force, from a lessee, even after the expiry or earlier termination of the lease by forfeiture or otherwise. The use of the expression “re-entry” in the lease-deed does not authorise extra-judicial methods to resume possession. Under law, the possession of a lessee, even after the expiry or its earlier termination is juridical possession and forcible dispossession is prohibited; a lessee cannot be dispossessed otherwise than in due course of law. In the present case, the fact that the lessor is the State does not place it in any higher or better position. On the contrary, it is under an additional inhibition stemming from the requirement that all actions of Government and Governmental authorities should have a “legal pedigree”.”

16. Given the important protection extended to an individual vis-à-vis their private property (embodied earlier in Article 31, and now as a constitutional right in Article 300-A), and the high threshold the State must meet while acquiring land, **the question remains — can the State, merely on the ground of delay and laches, evade its legal responsibility towards those from whom private property has been expropriated? In these facts and circumstances, we find this conclusion to be unacceptable, and warranting intervention on the grounds of equity and fairness.**

8 (1989) 2 SCC 505 : (1989) 1 SCR 176.

18. There is a welter of precedents on delay and laches which conclude either way — as contended by both sides in the present dispute — however, the specific factual matrix compels this court to weigh in favour of the appellant landowners. **The State cannot shield itself behind the ground of delay and laches in such a situation; there cannot be a “limitation” to doing justice.** This Court in a much earlier case — *Maharashtra SRTC v Balwant Regular Motor Service*,⁹ held: (AIR pp. 335-36, para 11)

“11. ... Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted in either of these cases, lapse of time and delay are most material.

But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval,

9 (1969) 1 SCR 808 : AIR 1969 SC 329

which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy’.”

23. This Court, in *Vidya Devi*¹⁰ facing an almost identical set of facts and circumstances — rejected the contention of “oral” consent to be baseless and outlined the responsibility of the State: (SCC p.574, para 12)

“12.9. In a democratic polity governed by the rule of law, the State could not have deprived a citizen of their property without the sanction of law. Reliance is placed on the judgment of this Court in *Tukaram Kana Joshi v. Maharashtra Industrial Development Corpn*,¹¹ wherein it was held that the State must comply with the procedure for acquisition, requisition, or any other permissible statutory mode. The State being a welfare State governed by the rule of law cannot arrogate to itself a status beyond what is provided by the Constitution.

12.10. This Court in *State of Haryana v Mukesh Kumar*¹² **held that the right to property is now considered to be not only a constitutional or statutory right, but also a human right. Human rights have been considered in the realm of individual rights such as right to shelter, livelihood, health, employment, etc. Human rights have gained a multi-faceted dimension.”**

10 (2020) 2 SCC 569.

11 (2013) 1 SCC 353 : (2013) 1 SCC (Civ) 491 : (2012) 13 SCR 29.

12 (2011) 10 SCC 404 : (2012) 3 SCC (Civ) 769.

24. And with regards to the contention of delay and laches, this court went on to hold: (*Vidya Devi case*, SCC pp. 574-75, para 12)

“12.12. The contention advanced by the State of delay and laches of the appellant in moving the Court is also liable to be rejected. Delay and laches cannot be raised in a case of a continuing cause of action, or if the circumstances shock the judicial conscience of the Court. Condonation of delay is a matter of judicial discretion, which must be exercised judiciously and reasonably in the facts and circumstances of a case. It will depend upon the breach of fundamental rights, and the remedy claimed, and when and how the delay arose. There is no period of limitation prescribed for the courts to exercise their constitutional jurisdiction to do substantial justice.

12.13. In a case where the demand for justice is so compelling, a constitutional court would exercise its jurisdiction with a view to promote justice, and not defeat it.”

25. Concluding that the forcible dispossession of a person of their private property without following due process of law, was violative of both their human right, and constitutional right under Article 300-A, this Court allowed the appeal. We find that the approach taken by this court in *Vidya Devi* is squarely applicable to the nearly identical facts before us in the present case.

(Emphasis added)

43. Apart from anything else, on the question of delay, paragraph 24 of *Sukh Dutt Ratra* makes it clear on the basis of the decision in *Vidya Devi v State of Himachal Pradesh & Ors*¹³ that no argument of delay and laches can succeed where there can fairly be said to be a continuing cause of action.

44. Let us consider what is being presented to us. This can be analysed at two levels: (i) we are told that by this process of agreement or the imposition of a condition in the LoI, Article 300A's mandate can be completely bypassed; (ii) we are told that by this form of executive action the provision of Section 126(1)(b) can be equally completely bypassed; and (iii) that there now exists a provision the effect of which would be to completely wipe out Section 126(1)(b) at least to the extent of the development or construction of the amenity on the surrendered land.

45. It is true that DCPR 2034 has a new provision for TDR or amenity space. But the entire argument of the BMC is predicated on one particular clause or expression that is being singled out and held against the Petitioners. Let us instead consider this completely. We look at three separate documents. The first is the Letter of Intent at page 51. This imposes a condition in Clause 3 which we have extracted above. It requires a registered undertaking, and it says, *as part of a composite clause*, that the Petitioners (1) will maintain the garden for a further period of 20 years at their costs and (2) will not claim any TDR towards development of the garden. This is the

13 (2020) 2 SCC 569.

same expression that we find in the undertaking that followed. Item (2) is tied root and branch to item (1).

46. What is now being suggested is that this latter clause (2), of not claiming any Amenity TDR towards development of the garden, can be completely divorced or separated from the rest of the condition and treated as a standalone condition. But properly read, the conjoint meaning is that so long as the Petitioners are allowed to maintain the garden for a certain period of time and to do so at their costs, they would not then claim Amenity TDR: they could not have both, the caretaker privilege (though at their own cost) *and* amenity development TDR. The second clause is a condition attached to the first, which is the benefit. If the benefit is taken away, the condition cannot continue in a stand-alone fashion.

47. There is simply no answer to this. There cannot be because if the submission is that by this clause the Petitioners gave up their right to claim Amenity TDR for the development costs of the garden in perpetuity, then that would clearly be an impermissible form of expropriation or confiscation of the property.

48. It is true that today Mr Dwarkadas does not claim any right to continue as the caretaker of the garden or to have it maintained. Quite rightly so; there can be no such enforceable fundamental right. But the agreement not to claim any Amenity TDR must surely be anchored to some other benefit in lieu of which alone this condition (not to claim amenity development TDR) could be said to

be set. As we have noted, if the clause is isolated as the BMC would have us do then it is unsustainable and cannot possibly be enforced.

49. In short, what seems to have happened is that the Petitioners now find themselves both without garden and without amenity development TDR. That cannot be. So long as they had the garden (and were maintaining it at their own costs) there was no question of them claiming any Amenity TDR towards the development of the garden; nor did they. But once that entitlement went, then surely it is fair to say that the condition went with it. The condition could not survive unattached to the entitlement. That would render it unconstitutional and *ultra vires* the MRTP Act.

50. This is exactly the conceptualisation of the Supreme Court in paragraphs 51 and 52 of *Godrej & Boyce* set out above because the emphasis there from Section 126(1)(b) is on the word “against”. Compensation is payable against the surrender and against the development construction.

51. All that this clause therefore means is that the claim for Amenity TDR would stand suspended or deferred so long as the garden was being maintained by the Petitioners at their costs. Otherwise, there was a complete failure to pay compensation and a result confiscation or expropriation of rights and an executive action directly contrary to the mandate of the statute and to Article 300A of the Constitution of India.

52. On the question of whether it is the later DCPR 2034 or the DCR 1991 that will apply, in our view, there is no question of applying DCPR 2034. The entire development, the LoI, the undertaking and the concept of this form of TDR was predicated on the applicability of DCR 1991. There was no question of anybody being subjected to the discipline of Regulation 32 (4.2) of DCPR 2034. Indeed, to read it like this would require a complete rewriting of the LoI and of the undertaking because the words used in DCPR 2034 (against 'construction' of such amenity) are not to be found in the LoI or the undertaking and they are also not to be found in this limited fashion in 126(1)(b) which speaks of TDR against the development or construction of the amenity (not just built up area).

53. In the result, the Petition succeeds. Rule is made absolute in terms of prayer clauses (a) and (b).

54. The necessary TDR computed on these terms is to be issued within a period of eight weeks from today.

55. Parties to bear their own costs.

(Kamal Khata, J)

(G. S. Patel, J)