

Amol

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 1037 OF 2024

SIRIUS LAND HOLDING LLP,
A Limited Liability Partnership Registered
under the Limited Liability Partnership Act,
2008, having its address at 101-B Mittal
Court, Nariman Point, Mumbai 400021.

... PETITIONER

~ VERSUS ~

- 1. STATE OF MAHARASHTRA,**
Through Urban Development
Department, Mantralaya, Mumbai,
400001.
- 2. MUNICIPAL COMMISSIONER,**
Municipal Corporation of Greater
Mumbai, Fort, Mumbai 400001.
- 3. JOINT MUNICIPAL
COMMISSIONER
(IMPROVEMENT),**
Municipal Corporation of Greater
Mumbai, Fort, Mumbai, 400001.
- 4. ASSISTANT COMMISSIONER
(ESTATE),**
Municipal Corporation of Greater
Mumbai, Fort, Mumbai 400004.

... RESPONDENTS

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JADHAV

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APPEARANCES

FOR THE PETITIONER	Mr Sharan Jagtiani, Senior Advocate, with Rohit Bandekar, & Shettal Shah, i/b Mehta & Girdharlal.
FOR RESPONDENT- BMC	Mr RS Apte, Senior Advocate, with Pooja Yadav.
FOR RESPONDENT- STATE	Mr Abhay Patki, Addl GP, with Uma Palsuledesai, AGP.

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

DATED : 19th April 2024

ORAL JUDGMENT (Per GS Patel J):-

1. Rule. There is an Affidavit in Reply. Rule returnable forthwith. Respondents waive service. Petition is taken up for final disposal.

2. The reliefs in the Petition are in paragraphs (a) and (b) at pages 15 and 16 of the Petition which 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 or direction under Article 226 of the Constitution of India calling for the records and proceedings in respect of the proceedings which culminated into the Impugned rejection Letter dated 01.12.2023 (Exhibit H) land after going through the legality, validity and propriety thereof the same be quashed and set aside.

(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 or direction under Article 226 of the Constitution of India direct the Respondents to refund the amount of Rs. 4,89,66,900/- (Rupees Four Crore Eighty Nine Lakhs Sixty Six Thousand Nine Hundred only) or issue a credit voucher of Rs. 4,89,66,900/- (Rupees Four Crore Eighty Nine Lakhs Sixty Six Thousand Nine Hundred Only) redeemable for future payments;”

3. The facts are really not in controversy. The Petitioner is redeveloping a commercial building on a plot at Worli. This is a redevelopment under Regulation 33(7)(A) of Development Control and Promotion Regulations, 2034 (“**DCPR**”). On 3rd August 2020, there was a policy of the Brihanmumbai Municipal Corporation (“**BMC**”) to compute a lump-sum premium for additional built-up area under DCPR 33(7) or DCPR 33(7)(A).

4. This is the usual mechanism where the DCPR specifies a buildable area but then, for a fee, the Planning Authority, namely the BMC, permits additional buildable area. There was an existing formula for computing which was revised and instalments were also graciously allowed because, after all, as everyone knows the building industry requires exceptionally gentle treatment. This was also in Covid-19 when, as the Petition does not fail to remind us in ground (d), the entire building industry was under particularly severe stress.

5. On 29th December 2021, there came to be a formulation of what is called as 50% policy, possibly in deference to this hardship and trauma suffered by the real estate sector. The Municipal Commissioner said this required approval of the Urban

Development Department (“**UDD**”) but the Petitioner made an application under this 50% policy.

6. On 23rd March 2022, the Petitioner wrote to the BMC saying that its payment under the 50% tentative policy was on the condition that it would keep its stake for refund pending if the policy was sanctioned. It sought a full No Objection Certificate (“**NOC**”) except for the top floor.

7. On 24th March 2022, there was a BMC scrutiny report regarding the Petitioner’s proposal for the NOC for a part Occupation Certificate (“**OC**”). This scrutiny report specifically said that the benefit sought by the Petitioner under the 50% policy was on hold pending the decision of the UDD. It also stated that if UDD granted clearance, then any excess amount recovered will be adjusted in any payment payable to the Estate Department by the Petitioner in present or other projects on MCGM land.

8. On 29th March 2022, the Petitioner was issued a full NOC for all except the ninth floor. Ultimately, on 2nd December 2022, the Amnesty Scheme came to be approved which reduced the One Time Premium (“**OTP**”) from 50% to 30%. This was also applicable to projects that were ongoing where a full OC had not been granted. The OTP payable for 30% was Rs 1,27,48,000/-. Under the 50% policy the Petitioner had paid Rs 6,17,14,900/-. There is some quarrel about an excess recovery but that is not even not pressed by Mr Jagtiani today because, as he readily accepts, there is a limit

beyond which the hardship argument for the developer can be pushed.

9. That the 30% policy is applicable is not contentious. The building received a full OC and a Completion Certificate (“CC”) on 3rd May 2023.

10. Now the Petitioner sought a credit voucher for Rs 4,89,66,900/-, since it had paid Rs 6,17,14,900/- as stated earlier. This request was on 26th May 2023. The BMC went into a huddle on this request. After all, it was now facing this incredible situation where the flow of money would have to be reversed and the BMC would actually be paying out money rather than simply collecting it. For the BMC, this is simply unthinkable. There was no dispute that the 30% policy was applicable. The OTP charges under the revised policy were Rs 1,27,48,000/-. But this 30% policy did not say or provide expressly for an adjustment or a refund of any excess OTP paid.

11. That is very much like saying that unless the Division Bench says that all contentions are kept open, all of them are closed.

12. Under the 30% policy the excess therefore due and claimed by the Petitioner is Rs 4,89,66,900/-. This has been subsequently revised downwards to Rs 4,71,82,900/-. The latest view of the BMC officers as of 1st November 2023 and which is what brings the Petitioner to Court is that ‘there is no specific provision for adjustment of excess OTP’. Not one single such case has been

considered, the BMC says, after the 30% policy is formulated. If an adjustment is allowed, then the Biblical flood gates will open and the BMC will have to make one adjustment after the other.

13. The Affidavit in Reply really does not convince us. It says this in paragraph 16 at pages 15 and 16. Now this we cannot accept. There is no dispute on the record that there is an excess payment to the BMC of the OTP policy. That amount is exactly known. All that the BMC says is that without a specific provision in some Government Resolution or Circular, common sense will not operate. Practical considerations are irrelevant, but it is perfectly all right for the BMC to stand accused of unjust enrichment and a straightforward Article 14 violation.

14. The BMC is a public body. It cannot hold more money than it is entitled to in law. That is all there is to it. That this would otherwise be a question of unjust enrichment can hardly be disputed (see *Hongkong and Shanghai Banking Corporation Ltd through authorized representative Mr Amit Patwardhan v Union of India, through the Secretary, Ministry of Finance Department of Revenue and Anr*).¹ In *HSBC*, GS Kulkarni J writing for the Bench noted in paragraphs 32, 33, 34 and 35 that there could be no retention by the department without lawful authority and the claim for refund could not be denied. The authority, Kulkarni J wrote in paragraph 33, had no authority to retain that amount. Any such retention would amount to unjust enrichment.

1 2023 SCC online Bom 2535.

15. In the facts of our case, we have no manner of doubt that that statement of the law applies exactly. Apart from the fact that we are bound by that decision of a Bench of coordinate strength, we are entirely in agreement with it. It is a simple question. If the amount is not to be refunded, nor adjusted, then the BMC must surely be able to tell us what is to be done about the excess. We would indeed be very curious to know how this amount is going to be shown in BMC's accounts and conveyed to audit. If the BMC proposes that this be treated as a donation or as a gift by a developer to the BMC, then that would undoubtedly be breaking all kinds of records and setting all kinds of new and very dangerous precedents. We have absolutely no desire to push the BMC down by the slope and to presume neither does Mr Apte. He states on behalf of the BMC, that operationally the BMC has this problem.. Without a specific provision, a question will undoubtedly be raised from some quarter as to "how did you refund or adjust?"

16. If Mr Apte is in quest of an answer, we will provide it. We state clearly that irrespective of whether there is an explicit provision or not, wherever there is an excess amount in the hands of the BMC, it is the obligation of the BMC to either make a refund of that amount or to provide an appropriate adjustment. Under no circumstances can excess amounts simply be retained. Any retention without refund or adjustments/credits would be without lawful authority, it would be facially arbitrary, *ultra vires* Article 14 and firmly on the wrong side of Wednesbury Unreasonableness.

17. The Petition succeeds. Rule is made absolute in terms of prayer clauses (a) and (b) which are extracted above.

18. We note that the amounts in prayer clause (b) will not read Rs 4,89,66,900/- but will read Rs 4,71,82,900/-.

19. The submission by Mr Jagtiani is that the credit will be allowed either to the Petitioner or to a sister concern. That is too general and it will make it impossible for the BMC to keep a track of the record. Instead, if the Petitioner is entitled to an adjustment and the BMC is not making a refund, it will be open to the Petitioner to treat the adjustment as a credit and it may at any time seek that this credit be applied to an amount payable by a sister concern, provided there is no trafficking or commercial activity in any such sister concern adjustment and it is established by appropriate documentation that the intended beneficiary is indeed a sister concern of the Petitioner as understood in law.

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

(Kamal Khata, J)

(G. S. Patel, J)