SUPREME COURT OF INDIA

Laxminarayan R. Bhattad and Ors.

Versus

State of Maharashtra and Anr.

4.4.2003

(Brijesh Kumar and S.B. Sinha, JJ.)

Civil Appeal No. 6345 of 2001.

JUDGMENT

S.B. Sinha, J. - Writ Petitioners are the appellants herein. They are aggrieved by and dissatisfied with the judgment and order dated 31.07.2001 passed by the Bombay High Court in Writ Petition No. 1631 of 1995, dismissing their Writ Petition.

2. A plot of land being C.S. No. 820, Survey No. 115A admeasuring 5476.45 sq. metres originally belonged to one Gokuldas Jeevraj Dayal. By reason of a consent decree passed by the Bombay High Court on 30th March, 1982, the said land vested in the appellants herein. It formed a part of R-Ward wherefor a draft Development Plan was published by the Bombay Municipal Corporation (Corporation) on 18th September, 1958. A 100 feet wide Development Plan road was proposed to be constructed and admittedly the said land was shown to be affected in the draft Development Plan which came into force on or about 1st November, 1965 being sanctioned. A Town Planning Scheme being No. III of R-Ward came into being in the year 1961 upon a declaration made in this behalf of the Corporation. A draft Scheme was published on 17th July, 1976 wherein the plot as referred to hereinbefore was given a new number being original plot No. 433. With a view to give effect to the said Scheme and determining the rights and interests of the persons holding plots coming within the purview of the Scheme an Arbitrator in terms of Section 72 of the Maharashtra Regional and Town Planning Act, 1966 (hereinafter called and referred for the sake of brevity `the Act') was appointed. The Arbitrator in his award dated 30th October, 1987 while making a Town Planning Scheme allotted final plot No. 694 admeasuring 1240.90 sq. metres and final plot No. 713 admeasuring 2079 sq. metres aggregating to 3319.90 sq. metres in lieu of original plot No. 433. It is not in dispute that only 854 sq. metres of land out of original plot No. 433 belonging to the appellant did not form part of the road. For acquisition of the said land as also for the structures standing thereupon a compensation of Rs. 4,97,567.20 apart from allotment of the said two plots was awarded in favour of the appellant. An appeal against the said award questioning the quantum of compensation was preferred by the appellant in terms of Sub-section (1) of Section 74 of the Act which was dismissed.

3. It is not in dispute that as final plot Nos. 694 and 713 did not form part of the original plot, additional Floor Space Index (FSI) under Rule 10(2) of the Development Control Rules, 1967 was not awarded by the Arbitrator.

4. Allegedly, on or about 30th January, 1985 a Policy Resolution was passed by the Corporation

granting benefit of additional FSI in lieu of compensation in respect of plots covered by Town Planning Schemes which had been sanctioned prior to the Development Control Rules, 1967 came into force. Certain correspondences were exchanged between the appellants and the Corporation in terms of letters dated 8th December, 1989, 8th February, 1990, 6th June, 1991 and 26th June, 1991; pursuant whereto and in furtherance whereof the parties toyed with the idea of grant of additional FSI in lieu of compensation to the appellants. The Corporation imposed certain conditions in respect thereof but it appears that the appellants did not agree thereto. The matter ended there.

5. However, on 25th March, 1991 the Development Control Regulations for Greater Bombay, 1991 came into force replacing the Development Control Rules, 1967. Regulations 33, 34 read with appendix VII (5 and 6) postulated grant of FSI and additional Transferable Development Rights (TDR) in lieu of compensation. It is not in dispute that whereas in terms of the Rule 10(2) of the Development Control Rules, additional FSI could be granted only when the new plot formed part of the original plot but in terms of new regulations the same was available even in respect of a final plot.

6. The Scheme which was finalized on 30.11.1987 was notified on 8th October, 1991 and was made final by reason of a notification of the State of Maharashtra dated 26.7.1995 with effect from 3.10.1995.

7. In the Town Planning Scheme in question no provision exists for transfer of any development rights. Under the said Scheme provisions have been made to grant FSI for the area gone under road to the extent of 40% of the final plot area provided the original plot included in sanctioned scheme and the final plot allotted formed part of the original plot and not otherwise.

8. Allegedly, certain decisions were taken to give benefit of the new regulations in favour of the appellants which, however, were not communicated. The appellants herein made a claim for grant of TDR under the Development Control Regulations, 1991 for the first time on 20th January, 1994. However, as no decision thereupon was taken, the Writ Petition was filed by the appellant on 31.8.1995. The High Court by an order dated 5.9.1995 directed the second respondent to decide the claim of the appellant made in terms of their application dated 20th June, 1994 and in obedience thereof an order dated 15.9.1995 was passed rejecting the said application on the following grounds :

(a) Under the sanctioned Town Planning Scheme, the benefit of additional FSI under D.C. Rule No. 10(2) is not granted.

(b) There is no provision in the Town Planning Regulations for granting TDR on plots falling in Town Planning Scheme.

(c) The area going in Town Planning road and affected structures has been compensated by awarding compensation of Rs. 4,97,562.20 under the Town Planning Scheme.

9. An application for amendment of the Writ Petition challenging the legality of the said order dated 15th September, 1995 was filed which was allowed.

10. The High Court by reason of the impugned judgment dismissed the Writ Petition of the appellants.

11. Mr. H. Devarajan, the learned counsel appearing on behalf of the appellants took us through the

provisions of the 1966 Act and the 1991 Regulations and made the following submissions :

(i) Having regard to the provisions contained in the 1991 Regulations, the appellants herein derived an indefeasible right for grant of additional FSI and TDR in relation to final plot Nos. 694 and 713.

(ii) The Corporation, having regard to the decisions of the State directing grant of such benefits in favour of those who had not received compensation was bound to give effect thereto in terms of Section 126 of the Act.

(iii) The Corporation committed an illegality in not granting the said benefit to the appellants despite the fact that the same had been specifically asked for by the appellants in terms of their application dated 2.6.1994.

(iv) The respondents now, therefore, cannot take advantage of their own wrong taking umbrage under the consequences of grant of a final scheme in terms of notification dated 26.7.1995. Reliance in this connection has been placed on *Priyanka Overseas Pvt. Ltd. and Another v. Union of India and Others (1991 Supp (1) SCC 102)*.

(v) In any event having regard to the purport and object of the Act, plot No. 433 did not automatically vest in the Government as no care in this behalf was made by the appellants in terms of the 1966 Act and the Rules framed thereunder. Reliance in this behalf has been placed on *State of Gujarat v. Shantilal Mangaldas and Others [(1969) 1 SCC 509]*.

(vi) In terms of the 1991 Regulations as a new right in favour of the appellants had come into being the Arbitrator's award has become non-est in the eye of the law.

12. Mr. K.K. Singhvi, the learned senior counsel appearing on behalf of the respondent-Corporation, on the other hand, would submit :

(i) that the appellants having preferred an appeal against the award of the Arbitrator, the same became final and binding on the parties.

(ii) In terms of Section 88 of the Act plot No. 433 vested in the State and plot Nos. 694 and 713 vested in the appellants.

(iii) During pendency of this appeal the appellant has handed over possession of plot No. 433 to the Corporation whereafter, a 100 feet wide road in terms of the Scheme has been constructed and, thus, no relief can be granted to the appellants at this stage.

(iv) In view of the final Scheme, grant of TDR in favour of the appellants has lost relevance as the parties and bound by the final Scheme.

(v) The Government instructions whereupon reliance has been placed by the appellants are not applicable to the fact of the case.

13. Mr. U.U. Lalit, the learned counsel appearing on behalf of the State of (sic).

(a) that the concept of grant of TDR under the 1967 Regulations was absolutely different from the 1991 Regulations.

(b) As the Scheme referred to Rule 10(2) of the 1967 Regulations, the 1991 Regulations would not apply in the instant case.

(c) The plea of the appellant for grant of TDR and FSI although was at one point of time considered by the Corporation, as he did not agree to pay the betterment charges, and as admittedly no decision thereupon had been taken, the appellant did not derive any enforceable right in relation thereto.

14. The primal question which arises for consideration in this appeal is as to whether the appellant can claim the benefit of land potential in lieu of compensation awarded in his favour by the Arbitrator.

15. However, before embarking upon the said question, we may notice the Scheme of the Act and the Regulations.

16. The Act was enacted to make provisions for planning the development and use of land in Regions established for that purpose and for the constitution of Regional Planning Boards therefore; to make better provisions for the preparation of Development plans with a view to ensuring that town planning schemes are made in a proper manner and their execution is made effective, to provide for the creation of new towns by means of Development Authorities; to make provisions for the compulsory acquisition of land required for public purposes in respect of the plans; and for purposes connected with the matters aforesaid.

17. The relevant provisions of the Act read as under :

"2(9) "Development plan" means a plan for the development or re-development of the area within the jurisdiction of a Planning Authority and includes revision of a development plan and proposals of a special planning Authority for development of land within its jurisdictions.

2(9A) "development right" means right to carry out development or to develop the land or building or both and shall include the transferable development right in the form of right to utilise the Floor Space Index of land utilised either on the remainder of the land partially reserved for a public purpose of elsewhere, as the final Development Control Regulations in this behalf provide.

2(13) "final plot" means a plot allotted in a final town planning scheme.

2(13A) "Floor Space Index" means the quotient or the ratio of the combined gross floor area to the total area of the plot, viz :-

Floor Space Index -- Total covered area of all floors

Plot area

2(22) "reconstituted plot" means a plot which is altered in ownership or in any other way by making of a town planning scheme.

2(30) "scheme" includes a plan relating to a town planning scheme."

18. Chapter III of the Act deals with preparation, submission and sanction of the Development Plan

for the entire region. Section 22 provides for the contents of the Development Plan which would include `land' user and the percentage thereof. Section 31 provides for grant of sanction to draft Development Plan.

19. Before according sanction the State Government is required to take into consideration such objections and suggestions and the Report of the Officer appointed in terms of Sub-section (2) thereof. Sub-section (4) of Section 31 provides that in fixing the date on which the final Development Plan shall come into operation, the State Government shall grant at least one month's time. By reason of Sub-section (6) the Development Plan becomes final and the same is binding on the planning authority.

Section 39 of the Act reads thus :

"39. *Variation of town planning scheme by Development plan.* - Where a final Development plan contains proposals which are in variation, or modification of those made in a town planning scheme which has been sanctioned by the State Government before the commencement of this Act, the Planning Authority shall vary such scheme suitably under Section 92 to the extent necessary by the proposals made in the final Development Plan."

20. Chapter IV of the Act provides for control of development and use of land included in Development Plans. Section 43 contemplates restrictions on development of land. Section 46 enjoins upon the planning authority to give due regard to the provisions of any draft or final plan before an application for permission is considered. Section 49(1)(b) of the Act imposes an obligation upon the State to acquire land on refusal of permission or on grant of permission in certain cases. Sections 52 to 57 provides for the restrictions relating to carrying out the Development Works.

21. Chapter V of the Act provides for the Town Planning Scheme. The planning authority in terms of provisions of Section 60 is entitled to make and publish a draft Scheme. The mode and manner of such publication has been laid down in Section 61. Section 64 provides for the matters which would be the contents of the draft Scheme. Section 68 empowers the State Government to sanction draft Scheme. Section 69 provides for restrictions on use and development of land after declaration for town planning scheme. Section 72 provides for appointment of the Arbitrator for purposes of planning schemes received by the State Government for sanction. Sub-section (3) of Section 72 provides for the powers and functions of the Arbitrators. In includes the estimate of the amount of compensation payable to an owner of land.

22. Clauses (i), (ii), (iii) and (iv) of Sub-section (3) of Section 72 read thus :

"72. *Arbitrator; his powers and duties.* -

(3) In accordance with the prescribed procedure, every Arbitrator shall, --

(i) after notice given by him in the prescribed manner define, demarcate and decide the areas allotted to, or reserved, for the public purpose or purposes of the Planning Authority, and also the final plots;

(ii) after notice given by him in the prescribed manner, decide the person or persons to whom a final plot is to be allotted; when such plot is to be allotted; and when such plot is to be allotted to persons in ownership in common, decide the shares of such person;

(iii) estimate the value of and fix the difference between the values of the original plots and the values of the final plots included in the final scheme, in accordance with the provisions contained in clause (f) of Sub-section (1) of Section 97;

(iv) estimate the compensation payable for the loss of the area of the original plot in accordance with the provisions, contained in clause (f) of sub-section (1) of section 97 in respect of any original plot which is wholly acquired under the scheme."

23. Section 73 provides that in respect of the matters specified therein except clauses (iv) to (xi), (xiv), (xv) and (xvi) of Sub-section (3) of Section 72 all decisions of the Arbitrator shall be final and conclusive and binding on all parties including the planning authority.

24. The decision of the Arbitrator under clauses (iv) to (xi), (xiv), (xv) and (xvi) of Sub-section (3) of Section 72, however, shall be subject to an appeal before the Tribunal.

25. Sub-section (2) of Section 79 of the said Act provides that every decision of the Tribunal of Appeal shall be final and conclusive and binding on all persons and parties including the planning authority.

26. Section 86 empowers the State Government to grant sanction to final Scheme. Sub-section (2)(b) of Section 86 reads thus :

"86(2). If the State Government sanctions such scheme, it shall state in the notification --

(a) ......;

(b) a date (which shall not be earlier than one month after the date of the publication of the notification) on which all the liabilities created by the scheme shall take effect and the final scheme shall come into force."

Section 88 provides for the effect of final Scheme and reads as under :

"88. *Effect of final scheme.* - On and after the day on which a final scheme comes into force --

(a) all lands required by the Planning Authority shall, unless it is otherwise determined in such scheme, vest absolutely in the Planning Authority, free from all encumbrances;

(b) all rights in the original plots which have been reconstituted shall determine and the reconstituted plots shall become subject to the rights settled by Arbitrator;

(c) the Planning Authority shall hand over possession of the final plots to the owners to whom they are allotted in the final scheme."

Section 97 provides for the cost of the Scheme.

27. Chapter VII provides for compulsory acquisition of land needed for the purpose of regional plan, development plan or town planning etc. Such acquisition in terms of Section 126 of the Act was to be made for public purposes specified in the Plan and Scheme under the said Act.

28. Section 154 provides for the control by the State Government and reads as under :

"154. (1) Every Regional Board, Planning Authority and Development Authority shall carry out such directions or instructions as may be issued from time to time by the State Government for the efficient administration of this Act.

(2) If in, or in connection with, the exercise of its powers and discharge of its functions by any Regional Board, Planning Authority or Development Authority under this Act, any dispute arises between the Regional Board, Planning Authority or Development Authority, and the State Government, the decision of the State Government on such dispute shall be final."

29. Rule 10(2) of Development Control Rules, 1967 (then in force) provide as under :

"Rule 10(2) :

With the previous approval of Government the Floor Space Indices specified above, may be permitted to be exceeded in respect of buildings of Educational and Medical Relief Institutions and Government and Semi-Government offices and luxury Hotels and in respect of any building on the top of which any revolving structure is to be constructed as a place of Public entertainment or amusement.

The Municipal Commissioner shall permit additional floor-space index on 100% of the area required for road-widening or for constructing new roads proposed under the Development Plan or those proposed under any provision of the Bombay Municipal Corporation Act, if the owner (including a lessee) of such land is prepared to release such area for road widening or for constructing new roads without claiming any compensation thereof. Such 100% of the area going under such road-widening or road construction shall be limited 40% of the area of the plot measuring after release of the land required for such road widening or road construction."

30. The State Government in exercise of its power conferred upon it under Sub-section (3) of Section 31 of the Act upon taking into consideration the report of the officer made in terms of Sub-section (2) thereof made regulations known as Development Control Regulations for Greater Bombay, 1991. The said Regulations came into force with effect from 20th February, 1991. Sub-regulation (2) of Regulation 1 and the proviso appended thereto read thus :

"(2) Jurisdiction - These Regulations apply to building activity and development work in areas under the entire jurisdiction of the Municipal Corporation of Greater Bombay (hereinafter called "the Corporation"). If there is a conflict between the requirements of these Regulations and those of any other rules or bye-laws, these Regulations shall prevail :

Provided, however, that in respect of areas included in a finally sanctioned Town Planning Scheme, *the Scheme regulations shall prevail*, if there is a conflict between the requirements of these Regulations and the scheme regulations."

(Underlining is mine for emphasis)

Regulations 33, 34 and Appendix VII (1) which are relevant for the purpose of this case are as under :-

"Regulation 33(1) :- Additional Floor Space Index which may be allowed to certain categories :-

(1) Road widening and Construction of new Roads :-

The Commissioner may permit additional floor space index on 100 per cent of the area required for road widening or for construction of new roads proposed under the development plan or those proposed under the Bombay Municipal Corporation Act, 1888, excluding areas of internal means of access, if the owner (including the lessee) of such land surrenders such land for road widening or new road construction without claiming any compensation in lieu thereof and *hands over the same to the Corporation free of encumbrances to the satisfaction of the Commissioner*. Such 100 per cent of the F.S.I. on land so surrendered to the Corporation will be utilisable on the remainder of the land upto a limit of 40 per cent of the area of plot remaining after such surrender and the balance F.S.I. remaining thereafter shall be allowed to be utilized as a Development Right in accordance with regulations governing Transfer of Development Rights (TDRs) is Appendix VII, or the full FSI on the land is surrendered to the Corporation may be allowed to be used as a Development Right in accordance with the regulations governing Transfer Development Rights (TDRs) in Appendix VII. Thereafter the road land shall be transferred in the city survey records in the name of the Corporation and shall vest in it becoming part of a public street as defined in sub-section (3) of section 288 of the Bombay Municipal Corporation Act, 1888.

Regulation 34 : Transfer of Development Rights - *In certain circumstances, the development potential of a plot of land may be separated 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 - (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 entitled the owner of the land to FSI in the form of a Development Right Certificate (DRC) which he may use himself or transfer to any other person. (Emphasis Supplied)

2.............

3.............

4.............

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.

6. When an owner of 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 cost, he may be granted by the Commissioner a further DR in the form of FSI equivalent to the area of the construction/development done by him, utilization of which etc. will be subject to the Regulations contained in this Appendix."

31. Applicability of the 1991 Regulations is one of the primal questions which arises for consideration herein.

32. A bare perusal of Rule 10(2) of Development Control Rules, 1967 would clearly show that additional FSI in lieu of compensation was provided only in certain cases but the appellant herein was not entitled thereto inasmuch as the original plot belonging to them or any part thereof did not form part of the final plots which were allotted to them. From the map of the plots in question, which has been placed before us, it is evident that the final plots which were allotted to them were also not affected by the road.

33. The 1991 Regulations although had superseded the 1967 Rules and by reason of the former the latter was replaced, the proviso appended to Sub-regulation (2) of Regulation 1 in no uncertain terms provides that in the event of any conflict between the requirements of the 1991 Regulations and the Scheme Regulations, the latter shall prevail. Indisputably, by reason of the award of the Arbitrator the appellants herein, in lieu of original plot No. 433 the Appellants were allotted final plot Nos. 694 and 713 besides monetary compensation. The appellants were not satisfied with the amount of compensation awarded in their favour by the Arbitrator and preferred an appeal before the Tribunal. The said appeal was dismissed. The said award, therefore, became final and binding on the parties.

34. The 1991 Regulations or Section 2(9A) of the Act, could not, therefore, affect the draft Scheme, save and except for the matters, if any, as provided for therein.

35. Furtheremore Special Regulation No. 8 of the Town Planning Scheme Regulations reads thus :

"No F.S.I. benefits (T.D.R.) in lieu of compensation shall be given in respect of area of original plots affected fully/partly either under Scheme Reservation or under reconstitution as they are acquired in the final scheme under provisions of M.R.T.P. Act and prevailing on the date of declaration of intention to prepare the scheme."

36. The said provision as also the proviso appended to Sub-regulation (2) of Regulation 1 read with the aforementioned Town Planning Scheme, leave no manner of doubt whatsoever that the appellants were not entitled to grant of TDR thereunder.

37. The appellants herein claimed right to have additional TDR having regard to :

(a) the request made by them to the Bombay Municipal Corporation; and

(b) in terms of communication of the State dated 2nd March, 1983.

38. It is not in dispute that certain correspondences were exchanged by and between the appellant and respondent-Corporation as regard grant of additional FSI and TDR. From a perusal of the said correspondences, however, it would appear that the Corporation asked the petitioner to bear the betterment charges. A request was made by the architect of the appellant not to charge betterment charges on the additional FSI of the D.P. road land as the appellant was agreeing to forgo compensation in respect thereof and was further ready to bear the cost of construction of road and S.W. Drains and provisions of street lights etc. However, the Chief Engineer in his note-sheet dated 7.10.1991, whereupon the Director (Engineering Service & Projects) made an endorsement, observed :

"We should not consider the Architect's request not to charge betterment charges on the additional F.S.I. of the D.P. Road land as proposed by the Dy. Ch. E. (D.P.) vide Item No. 3 at P. 85.

In view of the above circumstances, the M.C's orders are please requested to negotiate with the architect to hand over the D.P. Road on the terms and conditions mentioned at P.1-2 (Portion sidelined `A' at P. 84). However, the Architect shall have to pay the betterment charges on the additional F.S.I. of the D.P. Road land.

Submitted for orders please."

39. The respondents in their affidavit, however, stated that the appellants also did not remove the encroachment from the said land and further did not agree to the Condition No. (3) of their letter dated 6.6.1991.

40. It is, therefore, evident that the correspondences exchanged between the parties did not fructify into a binding agreement.

41. The rights and obligations of the parties, therefore, despite those correspondences continued to be governed by the terms of the award of the Arbitrator as also the provisions of the Scheme.

42. It is true that the State Government in its letter dated 7/12 May, 1992 issued certain direction in the light of Regulations 33, the relevant portions whereof are as under :

"Subsequently, the matter was re-examined by government in this Department letter No. DCR-1091/3197/UD-11, dated 17th December, 1991, the Corporation has been addressed as under :

"(1) Regulation 33(1) (page 38) :

In the definition in regulation 2(3) (7) at page 2 "amenity" means roads, streets......." According to Appendix VII (regulation 6 on page 84), construction of "Amenity" on surrendered plot at owner's cost, etc. entitled the owner to further Development Rights in the form of FSI equivalent to area of construction of an "Amenity" and since "Amenity" covers roads, further Development Rights in lieu of road construction would be admissible according to Appendix VII, clause (6) (at page 83-84). The concurrence given earlier by this Department to the BMC's views should be corrected accordingly. However, this will not apply where the owner constructs the road on his own, for his own use. But, where through a land which is sought to be developed a D.P. Road as shown in the Development plan passes, construction thereof as a d.p. Road for its full width shall not be insisted upon by the Corporation initially while granting the development permission. It shall be sufficient if the internal road with local specifications as required as per normal D.C. Regulations is provided for in the lay-out plan and the Corporation shall not insist while approving the lay-out plan for construction of the whole of the D.P. Road with its full width. This regulation permitted further development rights in lieu of D.P. Road construction will apply only where on the prescription of the Commissioner, the entire road width shown in the Development Plan is required to be constructed or has been constructed in accordance with the stipulations prescribed by the Commissioner.

From this, it is clear that if an individual owner constructs the road and wants the FSI for the construction also, he has to construct it in accordance with the stipulations by the Municipal Commissioner and to his satisfaction. Such stipulations may cover the matters in relation to or incidental to the construction of such road, such as construction of storm water drain, if any, required for construction of such road, material to be used and width of the road as shown in the Development plan."

43. It is, therefore, evident that the offer made thereby by the State was subject to certain conditions and was not an absolute one. Such offers were circumscribed by conditions.

44. Yet again on or about 2nd March, 1993, the Government of Maharashtra in a letter addressed to the Municipal Commissioner of the Corporation stated :

"Sub :- Applicability of the sanctioned D.C. Regulations for Greater Bombay town Planning Schemes of Greater Bombay.

Sir,

Please refer to your letter No. Ch./E.OT/2093/TPS Gen. Dated 24th September, 1992 from the Director, Engineering Services & Projects and discussions he had with the Secretary in October 1992 wherein he has explained difficulties faced by him because of the conflicting provisions of some of the Town Planning Scheme Regulations and the provisions of the sanctioned D.C. Regulations for Greater Bombay, 1991. He feels that there are number of areas when D.C. Regulations for Greater Bombay provide for more satisfactory solutions and it would be desirable that the Town Planning Schemes Regulations are forthwith replaced by D.C. Regulations.

2. Government concurs with the view that effect be given to the D.C. Regulations for Greater Bombay, 1991 in the areas of the finally sanctioned Town Planning Schemes without waiting for compliance on the proceedings of variation of the Town Planning Scheme Regulations. I am therefore directed to convey directive under section 154 of the Maharashtra Regional & Town Planning Act, 1966 as follows :

(i) The development permissions shall be strictly scrutinized in accordance with the sanctioned D.C. Regulations of Greater Bombay, even in the area of the finally sanctioned Town Planning Schemes pending the procedure of variation of the scheme.

(ii) The Special Scheme Regulations which have been designed to given concessions in marginal open spaces, permitting increased height in smaller plots, ensure enjoyment of full development potential of the plots etc., and the special Town Planning Scheme Regulations pertaining to architectures control should, however, not get superseded due to making applicability of the D.C. Regulations in Town Planning Scheme areas.

Yours faithfully,

Sd/-

(N.S. Kulkarni)

Under Secretary to Government."

45. The power of the State to issue such directions is undisputed. But as has been found by the High Court, the said directive of the State was not applicable in the instant case.

46. The said instructions were issued keeping in view the new Regulations in respect of the areas where finally sanctioned Town Planning Scheme had come into effect without waiting for compliance in the proceedings of variation of the Town Planning Scheme Regulations. The directive of the State Government issued in terms of Section 154 of the 1966 Act clearly states that the

development permission shall be strictly scrutinized in accordance with the sanctioned Development Control Regulations of Greater Bombay even in the area where finally sanctioned Town Planning Schemes pending the procedure of variation of the Scheme.

47. The said Scheme does not refer to grant of any TDR and it will bear repetition to state that the development permission was required to be strictly scrutinized in accordance with the sanctioned Development Control Regulations. A direction of the State Government in terms of Section 154 of the Act cannot supersede the statutory provisions contained either in the main enactment or the statutory regulations. The State of Maharashtra had absolutely no jurisdiction to issue any directive contrary to the statute or the statutory regulations. Once the draft Scheme became final, the provisions thereof shall prevail over the provisions of the Regulations in terms of the proviso appended to Sub-Regulation (2) of Regulation 1 of the 1991 Regulations. In such event, the doctrine of `relating back' shall apply. As indicated herein before, in terms of the provisions of the said Act the Arbitrator's award became final. The directive of the State Government could have been enforced till the Scheme received sanction and made final but not thereafter. Furthermore, Regulations 33 and 34 of the 1991 Regulations provide for enabling provisions. No legal right to get additional TDS was created thereby. The appellants merely had a right to be considered. The said regulations confer wide discretionary power on the part of the authorities. Each case was required to be considered on its own merit.

48. The correspondences exchanged between the parties also do not show that the minutes drawn fructified in an order conferring any legal right upon the appellant. By reason of the endorsement in the note-sheet no policy decision had been taken. It is now well-known that a right created under an order of a statutory authority must be communicated so as to confer an enforceable right. (See *Bachhittar Singh v. State of Punjab and Another, reported in AIR 1963 SC 395)*.

49. Admittedly the appellant did not file any application in terms of the 1991 Regulations for a long time. Such an application came to be filed only on 20th June, 1994. It is true that the said application was not immediately attended to and the appellant had to file a Writ Petition. But the same was disposed of by the respondent Corporation in terms of the order of the High Court dated 5.9.1995.

50. Each of the reasons assigned by the Corporation is valid. In terms of the proviso appended to Sub-Regulation (2) of Regulation 1 of the 1991 Regulations, it will bear repetition to state, the Scheme Regulations shall prevail there over in case of any conflict. Submission of Mr. Devarajan to the effect that the Sub-Regulation (2) of Regulation 1 will apply and not the proviso appended thereto is misplaced.

51. A proviso, as is well-known, may serve different purpose :

(i) qualifying, or excepting certain provisions from the main enactment;

(ii) it may entirely change the very concept or the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;

(iii) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and

(iv) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision.

(See *S. Sundaram Pillai, etc. v. V.R. Pattabiraman, reported in AIR 1985 SC 582)*.

52. By reason of the proviso appended to Sub-regulation (2) of Regulation 1, certain provisions of the main enactment stood qualified. The proviso will, therefore, act as an exception to the main provision.

53. Furthermore, it is not the case of any party that a revised Development Plan had not been validly sanctioned by the State. Once it is held that the 1991 Regulations would not be applicable in the case of the appellants having regard to the sanction of the Scheme prepared by the Arbitrator the question of grant of any benefit thereunder in favour of the appellants herein would not arise. It is well-settled in view of principle of `Generalia specialiabus non derogant'; that the special provision shall prevail over the general provision of a statute.

54. Had the Scheme been not sanctioned, possibly the appellants could have claimed the TDR benefit in lieu of compensation. It is further incorrect to contend that Rule 10(2) of the 1967 Rules and T.P. Scheme Regulation are applicable by way of reference.

55. The question as to when an earlier Act or some of its provisions are incorporated by a reference into a latter Act is a legislative device adopted for the sake of convenience in order to avoid verbatim reproduction of the earlier Act into the latter but the same has to be distinguished from a referential legislation. (See *Nagpur Improvement Trust v. Vasantrao and others, reported in (2002) 7 SCC 657)*.

56. In this case the applicability of the rule of incorporation of a statute by reference has no relevance inasmuch as, as noticed hereinbefore, the 1991 Regulations themselves would not be applicable in case of the appellants. So far as the letter of the State of Maharashtra is concerned, the manner in which a statutory authority had understood the application of a statute would not confer any legal right upon a party unless the same finds favour with a court of law dealing with the matter. The Corporation or the State while seeking to justify application of the 1991 Regulations as regard the pending Scheme did not have any occasion to consider the applicability of Sub-Regulation (2) of Regulation 1 or the proviso thereof. The question required consideration only having regard to the sanction of final Scheme by the State and not prior thereto. It is, therefore, idle to contend that the Corporation entertained such belief and/or the State Government issued such direction is a matter of little or no consequence at this stage.

57. The State while granting sanction could have modified the Scheme prepared by the Arbitrator. While doing so it was permissible for the State to make any modification with the Arbitrator's Scheme stating that TDR in lieu of compensation would be granted. Having not said so it is not for the appellant to contend that the State would be bound by its purported directives despite statutory interdicts contained in Sections 86 and 88 of the Act.

58. In view of our findings aforementioned the third reason assigned by the Corporation must also be upheld. We may notice that the appellant herein has given up the question of applicability of Rule 10(2) before the High Court. The High Court in its impugned judgment recorded "we may add that under Rule 10(2) of the D.C. Rules of 1967, additional FSI is lieu of the compensation was provided in certain cases. There is, however, *no dispute* that petitioners were not eligible for grant of additional FSI under the said Rule 10(2) inasmuch as the original plot belonging to the petitioner or any part thereof did not form part of the final plots which were allotted to them nor were the plots allotted to the petitioners affected by the road."

59. A legal right to have an additional FSI or TDR can be claimed only in terms of a statute or statutory regulations and not otherwise.

60. By reason of the provisions contained in Section 88 of the Act, original plot No. 433 vested in the State whereas the final plot Nos. 694 and 713 became the property of the appellants. Title on the land having been conferred under a statute, it is idle to contend that there is no automatic vesting.

61. Reliance placed by Mr. Devarajan on State of Gujarat (supra) is misplaced. In that case the question which arose for consideration related to a draft Scheme sanctioned by the Government on 17th August, 1942 under the Bombay Town Planning Act, 1915. The Scheme which had commenced under the 1915 Act continued under the Bombay Town Planning Act, 27 of 1955. The Respondents' land was acquired under the Scheme where after the plot was reconstituted into two, one each reserved for the respondent and the local authority respectively. A compensation was awarded for reservation of the said land in the local authority on the basis of market value as on 18th April, 1927. The said order having been questioned, construction of Section 53 of the Bombay Town Planning Act came up for consideration. This Court held :

"27. The principal argument which found favour with the High Court in holding Section 53 ultra vires is that when a plot is reconstituted and out of that plot a smaller area is given to the owner and the remaining area is utilised for public purpose, the area so utilised vests in the local authority for a public purpose, and since the Act does not provide for giving compensation which is a just equivalent of the land expropriated at the date of extinction of interest, the guaranteed right under Article 31(2) is infringed. While adopting that reasoning counsel for the first respondent adopted another line of approach also. Counsel contended that under the scheme of the Act the *entire area of the land belonging to the owner vests in the local authority*, and when he final scheme is framed in lieu of the ownership of the original plot, the owner is given a reconstituted plot by the local authority, and compensation in money is determined in respect of the land appropriated to public purposes according to the rules contained in Sections 67 and 71 of the Act. Such a scheme for compensation is, it was urged, inconsistent with the guarantee under Article 31(2) for two reasons - (1) that compensation for the entire land is not provided and (2) that payment of compensation in money is not provided even in respect of land appropriated to public use. The second branch of the argument is not sustainable for reasons already set out, and the first branch of the argument is wholly without substance. Section 53 does not provide that the reconstituted plot is transferred or is to be deemed to be transferred from the local authority to the owner of the original plot. In terms Section 53 provides for statutory re-adjustment of the rights of the owners of the original plots of land. When the scheme comes into force all rights in the original plots are extinguished and simultaneously therewith ownership springs in the reconstituted plots. There is no vesting of the original plots in the local authority nor transfer of the rights of the local authority in the reconstituted plots. A part or even the whole plot the belonging to an owner may go to from a reconstituted plot which may be allotted to another person, or may be appropriated to public purposes under the scheme. The source of the power to appropriate the whole or a part of the original plot in forming a reconstituted plot is statutory. It does not predicate ownership of the plot in the local authority, and no process - actual or notional - of transfer is contemplated in that appropriation. *The lands covered by the scheme are subjected by the Act to the power of the local authority to re-adjust titles, but no reconstituted plot vests at any state in the local authority unless it is needed for a purpose of the authority*. Even under clause (a) of Section 53 the vesting in a local authority of land required by it is on the coming into force of the scheme. The concept than lands vest in the local authority when the intention to make a scheme is notified is against the plain intendment of the Act." (Emphasis supplied)

62. The observations of this Court to the effect that there was no vesting of the original plots in the local authority nor was there any question of transfer of the rights in the reconstituted plots, were made having regard to the arguments made therein that the entire original plot as such vested in the local authority. This Court held that right in the original plot extinguished and the ownership in the reconstituted plot stood transferred only with the coming into force the Scheme and not prior thereto. In that case, the Scheme was held to be intra vires Article 31 of the Constitution.

63. Furthermore in this case the original plot and the reconstituted plot is not the same as was the case in the State of Gujarat (supra).

64. In terms of the provisions of the Act, the statutory vesting took place only upon sanctioning of the Scheme in terms of Section 88 thereof and not prior thereto, wherefor the amount of compensation as determined by the Arbitrator would be payable to the appellants.

65. It may be true that when the appellant applied for grant of additional TDR and FSI in terms of the 1991 Regulations, the same was not promptly attended to by the Corporation. The question, however, is that whether equitable consideration can outweigh the statutory compulsion. Answer to the said question must be rendered in the negative. In Priyanka Overseas Pvt. Ltd. (supra) this Court was concerned with the applicability of the rate of duty and tariff evaluation on the imported goods which are changed from time to time and were applicable on actual removal of goods. As in that case, the concerned officer failed to discharge his duties by making illegal demand for deposit of redemption fine, it was held that the appellant herein could not be held liable to pay any duty stating :

"42. There is no dispute that the remaining goods were also stored in a private warehouse and the appellant had filed the bills of entry and complied with all the required formalities for debonding and clearance of the goods on January 28, 1988, therefore the appellant was entitled to an order cancelling the licence of the private warehouse enabling it to remove the goods. Had the customs authorities passed order in accordance with law the same result would have followed as had been done on December 17, 1987. The Central Manual published by the Director of Publications, Customs and Central Excise contains directions for determining the actual date of removal of goods from warehouse in terms of Section 15(1)(b) of the Act. The functioning of private warehousing has been elaborated therein. Clause 10 of the Manual prescribes the type of buildings which can be approved as private warehouses under Section 58 of the Act. Para 15 of the Manual provides for purposes of Section 15(1)(b) of the Act, that if the goods are in private warehouse the date of cancellation of the licence of the private warehouse should be taken as the actual removal of the goods for the purposes of Section 15(1)(b) of the Act. Para 15 as already stated was followed in the appellant's own case on December 17, 1987 in releasing the goods. There is no valid reason as to why the same procedure should not have been followed in respect of the remaining goods in respect of which the bills of entry were filed on January 28, 1988 for debonding and clearance of goods. Merely because the officer failed to discharge his duties by making illegal demand for deposit of redemption fine, the appellant could not be held liable to pay duty. The appellant is therefore entitled to the delivery of goods without paying any duty as on January 28, 1988 on duty was payable on the goods."

66. Therein, therefore, a finding of fact was arrived at that the order passed by the authority was illegal and only by reason thereof the appellant therein could not remove the goods.

67. The said decision, therefore, has no application in the facts of the present case.

68. Even if some order was passed by the Corporation, having regard to the action of the State in sanctioning the draft Scheme which was done upon taking into consideration objections raised in relation thereto, the benefits granted in favour of the appellant were required to be restituted.

69. It is now well settled that when there is a conflict between law and equity the former shall prevail. The legal right of the petitioners, if any, as on the day of filing of the Writ Petition having been lost in view of the subsequent event, namely, sanctioning of the Scheme by the State Government the award of the Arbitrator as also the order of the Tribunal became final and conclusive and binding on all parties including the planning authority in terms of Section 73 and Sub-Section (2) of Section 79. Once a Scheme is approved, no deviation therefrom can be made for purposes other than referred to in the Scheme itself unless the same is amended or modified by the State Government in accordance with law.

70. Only because the Corporation did not take any action on the appellants' application, the same by itself would not clothe the appellant with any legal right after the Scheme is sanctioned in terms of Section 86 of the Act. As noticed hereinbefore, in terms of clause (b) of Sub-section (2) of the Section 86 the State is required to specify a date in the notification on which date all the liabilities created by the Scheme shall come into force, and furthermore in terms of Sub-Section (3) of Section 86 a Town Planning Scheme shall have effect as if it were enacted in the said Act.

71. The contents of the Scheme, therefore, will prevail over any policy decision taken by the Corporation or by the State. Having regard to the aforementioned provisions; particularly having regard to the facts that it is not the contention of the appellant that the State lacked inherent jurisdiction in approving the Scheme in terms of the Section 86 of the Act, the Scheme became part of the Act.

72. For the aforementioned reasons, we do not find any merit in this appeal, and it is dismissed accordingly. However, in the facts and circumstances of this case there shall be no order as to costs.

Appeal dismissed.