SUPREME COURT OF INDIA

Suresh Estates Pvt. Ltd.

Vs.

Municipal Corp. of Greater Mumbai

(CJI K.G. Balakrishnan, Lokeshwar Singh Panta and J.M. Panchal JJ.)

14.12.2007

JUDGMENT:

J.M. PANCHAL, J.

1. Leave granted.

2. The instant appeal is directed against judgment dated August 13, 2007 rendered by the Division Bench of High Court of Judicature at Bombay in Writ Petition No. 1627/2007 by which the prayers made by the appellants, (1) to declare that application submitted by them on December 26, 2005 to the Municipal Corporation of Greater Mumbai to give permission to develop land bearing CTS No. 2193 (P) of Bhuleshwar Division at Dr. Babasaheb Jaykar Marg stands granted in view of Section 45(5) of the Maharashtra Regional and Town Planning Act, 1966, (2) in the alternative to direct the respondents to grant forthwith their application for permission to develop land referred to above with additional FSI of 3.73 times the FSI permissible under Rule 10(2) of DC Rules, 1967, and, (3) to direct the respondents to allow them to proceed with the development of their plot mentioned above for construction of luxury hotel by utilization of additional FSI of 3.73 times the FSI permissible on the said plot as per DC Rules, 1967, are refused.

3. The appellants No.1 and 2 are the Companies incorporated under the provisions of the Companies Act, 1956. The petitioner No. 2 holds/owns a plot of land bearing CTS No. 2193 (P) of Bhuleshwar Division at Dr. Babasaheb Jaykar Marg, Thakurdwar. The plot admeasures approximately 8983 square meters. The respondent No. 1 is the Municipal Corporation for Greater Mumbai, and the Planning Authority under the provisions of Mumbai Municipal Corporation Act, 1888 as well as Maharashtra Regional and Town Planning Act, 1966 (The M.R.T.P. Act, for short). The appellant No. 1, obtained requisite rights in respect of plot referred to above. The plot was reserved for play ground of Municipal Primary School and Secondary School as well as for D.P. Road. The appellant No. 1 caused a purchase notice to be served to the Municipal Authorities on June 16, 2005. The Municipal Corporation found that the land was encumbered with residential as well as commercial structures and the cost of purchase would be roughly about Rs. 13.6 crores which was very high. The Municipal Corporation, therefore, decided not to purchase the said plot of land, as a result of which the reservations on the plot lapsed on December 16, 2005 under the relevant provisions of the M.R.T.P. Act. The appellants thereupon desired to develop the plot for construction of a luxury hotel. It may be mentioned that in exercise of rule- making power conferred by the M.R.T.P. Act, the State Government had earlier framed Development Control Rules, 1967. According to the appellants, the Ministry of Environment and Forests issued Notification I on February 19, 1991 under Section 3(1) and 3(2)(v) of the Environment (Protection) Act, 1986 and Rule 5(3)(d) of the

Environment (Protection) Rules, 1986 declaring coastal stretches as Coastal Regulation Zone (CRZ) and regulating activities in the CRZ, as result of which the plot belonging to them falls within CRZ II. What is claimed by the appellants is that the buildings permitted in CRZ II on the landward side of the existing and proposed road would be subject to the existing local Town Planning Regulations and therefore, the luxury hotel will have to be constructed as per D.C. Rules of 1967 which were existing local Town Planning Regulations. The appellant, therefore, submitted the plans to develop the land in question by constructing a luxury hotel in terms of Rules of 1967 on December 26, 2005. The case of the appellants is that they are entitled to additional FSI of 3.73 times the FSI in addition to 1.33 FSI allowable on the said plot as per the provisions of Rule 10(2) of DC Rules, 1967. The appellants did not receive any communication from the Municipal Authorities about their application by which permission to develop the plot was sought. On December 31, 2005 the Municipal Corporation submitted a proposal to the Principal Secretary, Urban Development Department, Government of Maharashtra recommending inter alia that in view of the provisions of CRZ Notification and DC Rules, 1967, additional FSI as applied for by the appellants be granted under Rule 10(2) of DC Rules, 1967. On August 2, 2006 a letter was addressed by the State Government to the Ministry of Environment and Forest, Union of India requesting to examine the proposal of the appellants and communicate to Government of Maharshtra whether the stand taken by the appellants for additional FSI was correct. On August 18, 2006 a communication was addressed by the Ministry of Environment and Forest to Principal Secretary, Urban Development Department, Government of Maharashtra clarifying that in view of earlier clarification issued on September 8, 1998, the DC Rules as existed on February 19, 1991 would apply to the areas falling within the CRZ Notification and further mentioning that The word existing has been interpreted by the Ministry vide a letter dated 8th September, 1998 to mean the Rules which prevailed on 19th February, 1991. It was also stated in the said communication that the DCR Regulations which were in force on December 19, 1991 i.e. the approved DC Rules of 1967 shall be considered and not the draft Regulations of 1989 which came into force on February 20, 1991 as the Draft Development Plan of 1989 was still at a draft stage on February 19, 1991. On February 20, 2007 a letter was addressed by the Government of Maharashtra to Municipal Corporation of Greater Mumbai in which reference was invited to the application submitted by the appellants for development permission and remarks from the Municipal Corporation were called for. The Municipal Commissioner convened a meeting of the personnel belonging to different Departments and at the said meeting the matter was considered. The Committee decided to recommend the proposal for consideration of Government in terms of the provisions of DC Rule 52(8)(vii). On March 1, 2007 the Municipal Corporation recommended for grant of additional FSI in terms of the DC Rules, 1967 as demanded by the appellants. On February 21, 2007 the Ministry of Environment and Forest granted environmental clearance to the appellants for construction of a residential hotel and commercial project subject to the terms and conditions set out therein. The appellant No. 2, on April 30, 2007 created a registered mortgage of the land in favour of IL and FS Trust Company Ltd. & Ors. for securing loan facilities amounting to Rs. 550 crores for construction of the luxury hotel. The appellants did not receive any further communication from the respondents. The case of the appellants was that the Planning Authority did not communicate its decision to them as to whether the permission sought for was granted or refused, within 60 days from the date of the receipt of application and therefore they were entitled to a declaration that the permission was deemed to have been granted to them in terms of Section 45 (5) of the M.R.T.P. Act. In the alternative it was their case that in terms of the amended DC Rules of 1967 the competent authority, with the previous approval of the Government, has authority to permit the person who has applied for permission to exceed floor space indices in respect of buildings of educational and medical relief institution as well as Government and semi Government offices and luxury hotels and as the Taj Mahal, Oberoi,

Sea Rock, President, Ambassdor amongst other hotels, were granted benefit of additional FSI under Rule 10 (2) of DC Rules, 1967, they were also entitled to additional FSI 3.73 times permissible FSI of 1.33 available under the relevant Rule. What was asserted by the appellants was that in view of Division Bench decision of the Bombay High Court in Overseas Chinese Cuisines India Pvt. Ltd. Vs. Municipal Corporation of Greater Mumbai 2001 (1) BCR 341, the provisions of DC Rules of 1967 would be applicable and therefore the appellants were entitled to additional FSI. Under the circumstances the appellants invoked extra ordinary jurisdiction of the High Court of Judicature of Bombay under Article 226 of the Constitution by filing Writ Petition No. 1627/2007 and claimed the reliefs referred to earlier.

4. On service of notice a reply was filed by the Corporation and State Government controverting the averments made in the petition. The Division Bench of Bombay High Court did not go into the merits of the contentions raised by the Learned Counsel for the parties. The High Court noticed that the main grievance of the appellants was that the Government had not disposed of their application till the date of hearing of the petition which was causing serious loss to them. The Learned Advocate General, appearing for the State submitted that the Government would deal with the matter expeditiously and pass appropriate orders which would be communicated to the petitioners. In view of this state of affairs, the Division Bench by Judgment dated 13th August, 2007, directed the Government to take a decision on the application filed by the appellants within 6 weeks from the date of the order and communicate the order so passed to them, which has given rise to the instant appeal.

5. The matter was placed for preliminary hearing before the Court on 17th August, 2007 and after hearing the Learned Counsel for the appellants, the Court issued notice to the respondents. On service of notice the respondents have filed the reply. According to the State Government, Development Control Regulations for Greater Bombay, 1991 are applicable, which do not provide for higher FSI to the proposed hotel project of the appellants located in C ward. What is pointed out in the alternative by the State is that under Section 46 of the M.R.T.P. Act, the Planning Authority has to give due regard to draft Regulations of 1989, which do not permit grant of additional FSI to the appellants. It is further stated in the reply that CRZ Notification of 1991 provides that in CRZ area, the construction shall be subject to existing Local Town and Country Planning Regulations including existing norms of FSI and as existing norm is to give FSI of only 1.33 the appellants are not entitled to additional FSI claimed by them. According to the State Government, even if it is assumed that the appellants are entitled to higher FSI, they cannot use the property for construction of a hotel as the land was reserved for public purpose on the date when the CRZ Notification was issued. What is asserted in the reply is that since it is prerogative of State to grant discretionary additional FSI under Rule 10(2) of DC Rules of 1967, the prayers made by the appellants to grant additional FSI should be refused.

6. This Court has heard the Learned Counsel for the parties at length and in great detail. This Court has also considered the documents forming part of the appeal.

7. The contention advanced by the Learned Counsel for the respondents that the DC Rules, 1967 would not apply to the development permission sought for by the appellants, but the Development Control Regulations of 1991 would apply, cannot be accepted. It is not in dispute that on February 19, 1991 the Ministry of Environment and Forest issued a notification under the provisions of the Environment Protection Act, 1986 regulating building activities in Coastal Zones which is known as Coastal Regulation Zone Notification. The said Notification classifies the areas within 500 meters of

high tide land, into CRZ I, CRZ II, CRZ III and CRZ IV categories. It is also not in dispute that the plot belonging to the appellants falls within CRZ II category. The Notification inter alia provides that buildings shall be permitted only on the landward side of the existing road and buildings permitted at landward side of the existing and proposed roads shall be subject to the existing local Town and Country Planning Regulations including the existing norms of floor space index/floor area ration. It is true that DC Regulations for Greater Bombay, 1991 were notified on February 20, 1991 and came into force with effect from March 25, 1991. However, a doubt was raised whether the existing DC Regulations for Coastal Regulation Zone II (CRZ II) would mean the DC Rules, 1967 or Draft Development Control Regulations, 1989 which ultimately culminated into D.C. Regulations, 1991 and, therefore, the Ministry of Environment and Forest was consulted. The Ministry of Environment and Forest issued a clarification on September 8, 1998 stating that the DC Regulations as existing on February 19, 1991 would apply for all developmental activities in Coastal Regulation Zone including CRZ II. The Ministry of Environment and Forest also issued clarification on August 18, 2006 reiterating that the existing DC Regulations applicable to CRZ II areas in Mumbai would mean the DC Rules, 1967. Even the Municipal Corporation in its letter dated December 31, 2005 addressed to the Principal Secretary, Urban Development Department, Government of Maharashtra, had expressed the view that the application made by the appellants for construction of a luxury hotel with additional FSI under DC Rules, 1967 be granted under Rule 10(2) of the Rules. As observed earlier a letter dated February 20, 2007 was addressed by the Government of Maharashtra to the Municipal Commissioner of Greater Mumbai in which reference was invited to the application submitted by the appellants for development permission and remarks from the Municipal Corporation were called for. The Municipal Commissioner had convened a meeting of Officials belonging to different Departments of the State Government and the Committee after discussion had decided to recommend to grant the application made by the appellants pursuant to which on March 1, 2007 the Municipal Corporation submitted its Report to the State Government and recommended for grant of additional FSI in terms of DC Rules, 1967. The word existing as employed in the CRZ Notification means Town and Country Planning Regulations in force as on February 19, 1991. If it had been the intention that Town and Country Planning Regulations as in force on the date of the grant of permission for building would apply to the building activity, it would have been so specified. It is well to remember that CRZ Notification refers also to structures which were in existence on the date of the notification. What is stressed by the notification is that irrespective of what Local Town and Country Planning Regulations may provide in future the building activity permitted under the notification shall be frozen to the laws and norms existing on the date of the notification. On February 2, 1991 when the CRZ Notification was issued, the only building Regulations that were existing in city of Mumbai, were the DC Rules, 1967. In view of the contents of CRZ II Notification issued under the provisions of Environment Protection Act which has the effect of prevailing over the provisions of other Acts, the application submitted by the appellants to develop the plot belonging to them would be governed by the provisions of DC Rules, 1967 and not by the Draft Development Rules of 1989 which came into force on February 20, 1991 in the form of Development Control Regulations for Greater Bombay 1991.

8. The argument that in view of the provisions of Section 46 of the Town Planning Act, 1966, the Planning Authority has to take into consideration the Draft Regulations of 1989 and, therefore, the appellants would not be entitled to additional FSI is devoid of merits.

9. Section 3 of the Environment (Protection) Act, 1986 inter alia provides that the provisions of the Act and any Order or Notification issued under the said Act will prevail over the provisions of any

other law.

The phrase any other law will also include the M.R.T.P. Act, 1966. As noticed earlier the Notification dated February 19, 1991 issued under the provisions of Environment (Protection) Act, 1986 freezes the building activity in an area falling within CRZ- II to the law which was prevalent and in force as on February 19, 1991. The Draft Rules of 1989 would not therefore apply as they were not existing law in force and prevalent as on February 19, 1991. In view of the peculiar circumstances obtaining in the instant case, the Court is of the opinion that Section 46 of the M.R.T.P Act, 1966 would not apply to the facts of the instant case. Further, when the sanctioned D.C. Regulations for Greater Bombay, 1991 do not apply to areas covered within CRZ-II, since those regulations came into force with effect from March 20, 1991, its previous draft also cannot apply. The draft published is to be taken into consideration so that the development plan is advanced and not thwarted. The draft development plan was capable of being sanctioned, but when the final development plan is not applicable, its draft would equally not apply as there is no question of that plan being thwarted at all. As far as development in the area covered by CRZ-II is concerned one will have to proceed on the footing that the draft plan after CRZ Notification never existed. Even otherwise what is envisaged under Section 46 of the M.R.T.P. Act is due regard to draft plan only if there is no final plan. The DC Rules of 1967 were in existence as on February 19, 1991 and therefore the plan prepared thereunder would govern the case. It is relevant to the notice at this stage that the State Government had sought a clarification from Ministry of Environment and Forest on August 2, 2006 as to whether DC Rules, 1967 or the DC Regulations 1991 will apply to the areas covered by CRZ-II. The Ministry of Environment and Forest on August 18, 2006 clarified that the Development Control Rules of 1967 would apply. The assertion made by the appellants that the clarification issued by the Ministry of Environment and Forest is binding on the State Government in view of the salutary provisions of Section 3, 5 and 24 of the Environment (Protection) Act, 1986 deserves consideration. The clarification issued by the Central Government in respect of the CRZ Notification on September 8, 1998 states that the existing rules would be those, which were in force as on February 19, 1991. The Draft Regulations of 1989 were not in force as on February 19, 1991 and, therefore, would not apply to the plot in question. What is emphasized in Section 46 of the M.R.T.P. Act, 1966 is that the Planning Authority should have due regard to the Draft Rules. The legislature has not used the phrase must have regard or shall have regard. The Municipal Corporation of Greater Mumbai which is the Planning Authority had given due regard to the draft DC Regulations of 1989 in the light of CRZ Notification and recommended to the Government to grant additional FSI of 3.73 times permissible as per Development Control Rules, 1967 over and above 1.33 permissible, to the appellants. Having regard to the facts of the case this Court is of the opinion that the contention that the Planning Authority has to take into consideration the Draft Regulations of 1989 and, therefore, the appellants would not be entitled to additional FSI, cannot be accepted and is hereby rejected.

10. The argument that even if it is assumed that the provisions of DC Rules, 1967 would be applicable to the application submitted by the appellants seeking permission to develop their plot, they would be entitled to FSI of only 1.33 which is the existing norm set out in the Rules and would not be entitled to additional FSI, has no substance at all. It is true that in DC Rules, 1967 the norm of permissible FSI is laid down to be 1.33. However, there is no manner of doubt that under Rule 10 (2) Rules of 1967, the floor space indices specified may be permitted to be exceeded in respect of buildings of educational and medical relief institution as well as Government and semi-Government offices and luxury hotels with the previous approval of the Government. The respondents could not lay factual data before the Court to indicate that there was no norm of giving higher FSI over and

above 1.33 to hotels to the buildings contemplated under Rule 10(2) of DC Rules, 1967. On the contrary the appellants have placed material on record of the appeal which would indicate that the norm adopted by the Government in case of Taj Hotel and Hotel Oberoi was to grant FSI of 5.32. The norm of FSI specified in Rule 10(1) of the Rules of 1967 would be subject to the discretion to be exercised by the Government under Rule 10(2) of the Rules. The norm as set out regarding FSI in DC rules on 1967 will have to be construed to mean also the norm of FSI which can be granted by the Government in exercise of discretion vested in it under Rule 10(2) of the Rules of 1967. The case of the appellants is that normally all luxury hotels which had applied for additional FSI under rule 10(2) of DC Rules, 1967 were allowed additional FSI. Having regard to the intention of the legislature the prevalent norm of FSI under Rule 10(1) of the Rules, 1967 will have to be construed to mean also the norm of FSI which can be granted in exercise of discretion under Rule 10(2) of the Rules. Therefore, the stand taken by the respondents that the appellants would not be entitled to more than 1.33 FSI in view of norm set out in DC Rules of 1967 cannot be upheld and it is held that the question of grant of FSI would be subject to the discretion to be exercised by the Competent Authority under Rule 10(2) of the Rules on analysis of objective facts placed before it.

11. The contention that even if it is assumed that the appellants are entitled to higher FSI, they cannot use the plot in question for construction of a hotel as the land was reserved for public purpose on the date when CRZ Notification was issued, cannot be accepted. As noticed earlier the plot was reserved as play ground for secondary school as well as for primary school and also for DP road. The appellants had caused the purchase notice dated June 16, 2005 served to the Competent Authority under Section 127 of the M.R.T.P. Act, 1966. After following the procedure the State Government decided not to acquire the plot which is quite evident from the contents of letter dated July 18, 2006, addressed by the Government of Maharashtra to Municipal Corporation of Greater Mumbai. By the said letter the Municipal Corporation of Greater Mumbai was informed that the procedure for acquisition of the land in question had not been commenced within the prescribed period by the Municipal Corporation and therefore there was no objection for presuming that the reservation had lapsed. The CRZ Notification has only frozen the FSI/FAR norms but not the operation of Section 127 of the Act. In terms of the provisions of Section 127 of the M.R.T.P. Act, 1966, the reservations lapsed. If the argument of the respondent is accepted, it is likely to result into a piquant situation not contemplated by the Act, because the respondents do not want to acquire land whereas the appellants would not be entitled to use the land for any purpose for all time to come. The argument advanced by the respondent is misconceived in as much as the State Government in one breath asserts that the appellants are entitled to FSI of 1.33 for construction of hotel whereas in the same breath it asserts that the property is reserved and cannot be used for hotel project. The underlying principle envisaged by Section 127 of the M.R.T.P. Act, 1966 is either to utilize the land for the purpose it is reserved in the plan or let the owner utilize the land for the purpose it is permissible under the Town Planning Scheme. Therefore, the plea that the appellants would not be entitled to use the plot in question for hotel project in view of the reservations which were earlier prevalent cannot be accepted.

12. Similarly, the assertion made by the respondents in the reply that since it is prerogative of the State Government to exercise discretion for grant of additional FSI, the prayer made by the appellants to direct the State Government to grant additional FSI should be turned down, cannot be accepted. It is true that under Rule 10(2) of the DC Rules, 1967 a discretion is vested in the Government to grant additional FSI in respect of the buildings of education and medical relief as well as Government and semi-Government offices and luxury hotels. However, it is well-settled by catena on reported decisions that the discretion vested in an Authority has to be exercised

judiciously. The discretion vested under Rule 10(2) of the DC Rules, 1967 cannot be exercised arbitrarily of capriciously or as per the whims of the Authority concerned. The exercise of the discretion must be in consonance with the principles incorporated in Article 14 of the Constitution so that it does not suffer from the vice of the arbitrariness. Therefore, the assertion made by the State Government that it is prerogative of the State Government to grant additional FSI and, therefore, the reliefs claimed in the appeal should be refused, cannot be accepted.

13. The contention of the appellants that in view of the provisions of sub-Section 5 of Section 45 of the M.R.T.P. Act, 1966, the application submitted by them for seeking permission to develop their plot should be deemed to have been granted to them as the Planning Authority had failed to communicate its decision whether to grant or refuse permission within 60 days from the date of receipt of their application, cannot be upheld. The facts of the case would indicate that the matter of grant of permission was under active consideration of different authorities. The question whether the appellants were entitled to additional FSI as claimed by them was considered and contested by the respondents. Further, the proviso to Section 45(5) of the M.R.T.P. Act, 1966 makes it clear that the deeming provision would apply only if the permission applied for is strictly in conformity with relevant DC Regulations. The competent authority had no occasion to consider whether the plans submitted by the appellants for development of their plot were in accordance with DC Rules, 1967. On the facts and in the circumstances of the case this Court is of the opinion that the appellants are not entitled to a declaration that the permission applied for was deemed to have been granted to them as the Planning Authority had failed to communicate its decision whether to grant or refuse permission within 60 days from the date of receipt of their application

14. Similarly, the claim made by the appellants that the respondents should be directed by this Court to grant permission to the appellants to develop their plot with demanded FSI cannot be accepted. As noticed earlier Rule 10(2) of the Rules of 1967 confers discretion upon the competent authority to grant additional FSI to the buildings mentioned therein including luxury hotels. When a statute confers a discretionary power to be exercised by competent authority, the Court cannot direct the competent authority to exercise discretion in a particular manner. The Court can always direct the competent authority to exercise discretion vested in it in accordance with law. Therefore, the prayer made by the appellants to direct the State Government to grant additional FSI as was granted to other hotels or to grant them FSI of 5.32 cannot be accepted. However, this Court is of the opinion that having regard to the facts of the case interest of justice should be served if the respondent State is directed to exercise discretion vested in it under rule 10(2) of the DC Rules, 1967 after taking into consideration the relevant material including the fact that other hotels, were in past granted additional FSI.

15. For foregoing reasons the appeal partly succeeds. The Judgment dated August 13, 2007 rendered by the Division Bench of High Court of Judicature at Bombay in Writ Petition No. 1627/2007 is modified. The State Government is directed to take a decision on the application submitted by the appellants seeking permission to develop their plot on the basis that the provisions of DC Rules, 1967 with discretion available to the competent authority under Rule 10(2) of the said Rules would be applicable and decide the said application in the light of recommendations made by the competent authority as well as the fact that other hotels as pointed out by the appellants were also granted more FSI than 1.33 permissible under Rule 10(1) of the DC Rules, 1967. The application submitted by the appellants shall be considered by the respondents in the light of observations made in this Judgment as early as possible and preferably within six weeks from today. The decision taken on the application of the appellants shall be communicated to them.

16. The appeal accordingly stands disposed of. The parties to bear their own cost.