SUPREME COURT OF INDIA

Suresh Estate Pvt. Ltd.

Vs.

Municipal Corporation of Greater Mumbai

C.A.No. 948 of 2007

(K.G. Balakrishnan CJI., P. Sathasivam and J.M. Panchal JJ.)

16.12.2008

JUDGMENT

J.M. Panchal, J.

1. By filing the present contempt petition, the petitioners have prayed to take action against the respondents, who, according to them, have not implemented nor acted according to the judgment of this Court dated December 14, 2007, rendered in Civil Appeal No. 5948 of 2007 requiring the State Government to take a decision on the application submitted by the petitioners seeking permission to develop their plot on the basis that the provisions of D.C. Rules, 1967 were applicable and decide the said application in the light of the recommendations made by the Competent Authority as well as the fact that other hotels, as pointed out by the petitioners, were granted more FSI than 1.33 permissible under Rule 10(1) of the D.C. Rules, 1967.

2. The petitioner Nos. 1 and 2 are the companies incorporated under the provisions of the Companies Act, 1956. The petitioner No. 2 owns a plot of land bearing CTS No. 2193(P) of Bhuleshwar Division at Dr. Babasaheb Jaykar Marg, Thakurdwar, Mumbai. The plot admeasures approximately 8983 square meters. The plot was reserved for play ground of municipal primary school and secondary school as well as for D.P. Road. The petitioner No. 1 caused a purchase notice to be served upon the municipal authorities on June 16, 2005. Under the provisions of the *Maharashtra Regional Town Planning Act, 1966* (`M.R.T.P. Act' for short) 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. Therefore, the reservation on the plot lapsed on December 16, 2005 under the relevant provisions of M.R.T.P. Act. The petitioners thereupon desired to develop the plot for construction of a luxury hotel. In exercise of rule making power conferred by the M.R.T.P. Act, the State Government had framed Development Control Rules, 1967 (`the D.C. Rules' for short). The Ministry of Environment and Forests had issued Notification I on February 19, 1991 under Sections 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 said zone, as a result of which the plot belonging to the petitioners falls within the CRZ II. The petitioners submitted the plans to develop the land in question by constructing a luxury hotel in terms of D.C. Rules of 1967 on December 26, 2005. According to them, they were entitled to additional FSI of 3.73 times the FSI in addition to 1.33 FSI allowable on the said plot. It was the case of the petitioners that on December 31, 2005, the Municipal Corporation submitted a proposal to the Principal Secretary, Urban Development Department, Government of Maharashtra recommending, inter alia, granting additional FSI as prayed for by the petitioners. On a clarification sought by the State Government from Ministry of Environment and Forests, the Union of India informed the Principal Secretary, Urban Development Department, Government of Maharashtra, that the D.C. Rules as existed on February 19, 1991 would apply to the areas falling within the CRZ Notification and not the Draft Regulations of 1989. Incidentally, it may be mentioned that the Draft Regulations of 1989 came into force on February 20, 1991. On February 21, 2007 the Ministry of Environment and Forests granted environmental clearance to the petitioners for construction of a residential hotel and commercial project subject to the terms and conditions set out therein. The case of the petitioners 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 receipt of the application and, therefore, they were entitled to a declaration that the permission was deemed to have been granted 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 D.C. Rules of 1967, the Competent Authority, with the previous approval of the Government, had authority to permit the person who had applied for permission to exceed floor space indices in respect of buildings of educational and medical relief institutions as well as Government and semi-Government offices and luxury hotels and as the Taj Mahal, Oberoi, Sea Rock, President, Ambassador amongst other hotels were granted benefit of additional FSI under Rule 10(2) of D.C. Rules, 1967, they were also entitled to additional FSI of 3.73 than the permissible FSI of 1.33 available under the relevant Rules. Under the circumstances the petitioners invoked extra ordinary jurisdiction of the High Court of Judicature at Bombay under Article 226 of the Constitution by filing Writ Petition No. 1627 of 2007 and prayed (1) to declare that the application submitted by them on December 26, 2005 to the Municipal Corporation of Greater Mumbai to give permission to develop the land in question 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 the D.C. 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 D.C. Rules, 1967.

3. The High Court, by judgment dated August 13, 2007, refused to grant the reliefs claimed by the petitioners, but directed the Government to take a decision on the application filed by the petitioners within 6 weeks from the date of order and communicate the order so passed to them. Feeling aggrieved the petitioners had filed the above numbered appeal before this Court.

4. This Court, by judgment dated December 14, 2007, held (1) that the D.C. Rules of 1967 would be applicable to the facts of the case, (2) the petitioners were entitled to use the plot in question for construction of a hotel, (3) the petitioners would be entitled to be granted more FSI than 1.33 in view of the norms set out in D.C. Rules of 1967, (4) the petitioners were 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 indicate its decision within 60 days from the date of receipt of the application, and (5) the respondents cannot be directed to grant the permission to develop their plot with demanded FSI but the respondent-State should be directed to exercise discretion vested in it under Rule 10 (2) of the D.C. Rules, 1967 after taking into consideration the relevant material including the fact that other hotels were in past granted additional FSI.

5. In view of above referred to conclusions the appeal was partly allowed and the State Government was directed to take a decision on the application submitted by the petitioners seeking permission to develop their plot on the basis that the provisions of D.C. Rules, 1967 were applicable and decide the application submitted by the petitioners in the light of recommendations made by the Competent Authority as well as the fact that other hotels, as pointed out by the petitioners, were also granted more FSI than 1.33 permissible under Rule 10(1) of the D.C. Rules, 1967.

6. The petitioners have claimed that they made an application on December 17, 2007 to the respondent Nos. 4 and 5 to pass necessary orders in the light of the directions given by this Court in the above numbered appeal. By letter dated April 22, 2008, the respondent No. 5 informed the petitioners that the respondent No. 4, i.e., the Maharashtra Government, had approved additional FSI of 3.67 on the net plot area subject to payment of premium at 25% for first 100% additional FSI, 50% for second 100% additional FSI and 100% for remaining additional FSI. According to the petitioners, the respondent No. 4 asked the petitioners to pay the premium to the Government as well as to the Municipal Corporation of Greater Mumbai and informed that on payment of the amount of premium, the order for grant of additional FSI would be communicated to Municipal Corporation of Greater Mumbai. The assertion made by the petitioners is that they are entitled to FSI of 6.29 on gross plot area as per Rule 10(2) of D.C. Rules, 1967, but the respondents have approved additional FSI of 3.67 times of net plot area, which is contrary to the directions issued by this Court in the above numbered appeal. The petitioners contend that as the other hotels were granted additional FSI over and above the FSI of 1.33 permissible under the Rules, the decision to grant additional FSI of 3.67 on the net plot area is in breach of the directions issued by this Court. What is claimed by the petitioners is that the petitioners are not liable to pay any premium at all as other hotels were granted additional FSI without payment of premium to the Government and, therefore, the respondents should be hauled up for willful disobedience of the directions issued by this Court. In the alternative, it is claimed by the petitioners that even if the premium is to be calculated, the same works out at Rs.28 crores as against Rs.128 crores, which is calculated by the respondents and, therefore, by imposing premium the respondents have brushed aside the directions issued by this Court for which appropriate

action should be taken against them. Under the circumstances the petitioners have filed the instant contempt application and claimed reliefs to which reference is made earlier.

7. On service of notice the respondents have filed counter affidavit controvert the averments made in the contempt application. In the reply it is claimed that this Court had left the question of quantum of FSI to be granted to the discretion of the Government and after taking into consideration the relevant factors, the decision has been taken to grant additional FSI of 3.67 to the petitioners, which cannot be said to be contrary to the directions issued by this Court. It is mentioned in the reply that the base FSI of 3.5 was taken as far as hotels Hilton Tower, Oberoi, President, etc. were concerned, as those hotels were located in Backbay Reclamation Area of `A' Ward and in addition to the base FSI, Hilton Tower was granted additional FSI of 1.95, Oberoi Hotel was granted additiona FSI of 1.00 and Hotel President was granted additional FSI of 0.82 whereas in the case of Taj Mahal Hotel the base FSI of 2.45 was taken because it was not located in the Backbay Reclamation Area and the said hotel was granted additional FSI of 2.28 and, therefore, the claim of the petitioners that on the basis of additional FSI granted to the abovenamed hotels, the petitioners were entitled to FSI of 6.29 has no basis at all. The respondents have stressed in the reply that in Civil Appeal No. 5948 of 2007, decided by this Court on December 14, 2007, there was no specific mandamus issued directing the respondents to grant FSI of 6.29 to the petitioners nor specific prohibition was issued not to charge premium on the additional FSI and, therefore, the order dated April 22, 2008, passed by the Government of Maharashtra, should not be treated as contemptuous at all. According to the respondents the Chief Engineer (Development Plan), MCGM had requested the Government by letter dated December 31, 2005 to grant additional FSI, but neither MCGM nor Municipal Commissioner had recommended grant of additional FSI of 3.73 times of permissible FSI of 1.33 and, therefore, the present contempt application should be rejected. In paragraph 11 of the reply the respondents have tried to justify the premium of Rs.128.06 crores sought to be charged from the petitioners and pointed out that the hotel of the petitioners, which is situated in `C' Ward as per D.C. Rules, 1991, is not entitled to more FSI than granted by the Government of Maharashtra vide order dated April 22, 2008. By filing the reply the respondents have prayed to dismiss the contempt application with exemplary costs.

8. The petitioners have filed rejoinder affidavit reiterating what is averred in the contempt application and, therefore, this Court does not deem it fit to deal with the same in detail.

9. This Court has heard the learned counsel for the parties at length and considered the documents forming part of the instant application.

10. As is clear from the directions issued by this Court vide judgment dated December 14, 2007, rendered in Civil Appeal No. 5948 of 2007, the prayer made by the petitioners to direct the respondents to grant FSI of 6.29 was specifically refused and the State Government was directed to decide the application submitted by the petitioners for sanction of the plans in the light of the provisions of D.C. Rules, 1967. As pointed out by the respondents the base FSI was 3.5 in cases of Hotels Hilton Tower, Oberoi and President as those hotels were located in Backbay Reclamation Area of `A' Ward and Hilton Towers was granted additional FSI of

1.95, Oberoi was granted additional FSI of 1.00 and Hotel President was granted additional FSI of 0.82. It is averred in the reply that as far as Taj Mahal Hotel is concerned the same was not located in the Backbay Reclamation Area and, therefore, base FSI was taken to be 2.45 and additional FSI of 2.28 was granted. Under the circumstances it becomes evident that the additional FSI of 3.67 granted to the petitioners is much more than the additional FSI granted to the other hotels. As explained by the respondents the Chief Engineer (Development Plan), MCGM had requested the Government vide letter dated December 31, 2005 to grant additional FSI, as demanded by the petitioners, but neither MCGM nor Municipal Commissioner had recommended for grant of additional FSI of 3.73 times of permissible FSI of 1.33. Moreover, it is stated by the respondent in paragraph 10 of the reply that the decision to grant additional FSI of 3.67 over and above the basic permissible 1.33 comes to 93.06%. On the facts and in the circumstances of the case it is difficult for this Court to conclude that the decision to grant total FSI of 5.00 to the proposed hotel of the petitioners is contrary to the directions issued by this Court.

11. By this Court's judgment the State Government was directed to take a decision on the application submitted by the petitioners to develop their plot on the basis of the provisions of D.C. Rules, 1967 with the discretion available to the Competent Authority under Rule 10(2) of the said Rules.

> "In paragraph 15 of the judgment, it was directed: -
>
> "In the light of the 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 D.C. Rules, 1967."
>
> It was urged by the petitioners that the order passed by the authority, calling upon the petitioners to pay premium of Rs.128.06 crores, is contrary to what had been directed by this Court. As regards premium payable by the applicants/ petitioners, it was not a matter in issue, nor was it argued. But the direction was to consider application in accordance with D.C. Rules, 1967. According to the Petitioners, if 1967 Rules are applicable, no premium would be payable by the petitioners. It is also argued that the imposition of heavy premium was done purposely to deny the benefits of the judgment passed by this Court. As it is a matter which came into issue subsequent to judgment passed by this Court, we leave the matter open to be agitated in other appropriate forum and we make it clear that we do not express anything on merit regarding the issue whether the petitioners are liable to pay any premium or not."

12. The above discussion makes it very clear that there is no willful disobedience of any of the directions issued by this Court while disposing of the appeal filed by the petitioners. This Court does not find that the respondents are guilty of willful disobedience to the judgment rendered by this Court. As no case for initiating proceedings for civil contempt is made out by the petitioners against the respondents, the instant application cannot be entertained and is liable to be dismissed.

13. For the foregoing reasons, the contempt application fails and is dismissed. Having regard to the facts of the case there shall be no order as to costs.