SUPREME COURT OF INDIA

Godrej & Boyce Manufacturing Co.Ltd.

Vs.

State Of Maharashtra

CIVIL APPEAL NO.1746 OF 2007

(Markandey Katju and Aftab Alam)

06/02/2009

JUDGMENT

AFTAB ALAM, J.

1. Maharashtra town planning law has evolved, with a view to promote planned development and de-congest the highly congested areas, the imaginative concept of making, under certain circumstances, the development potential of a plot of land separable from the land itself and further letting the development rights to be transferable by the land owner. The provisions made for the development rights that arise from a piece of land and yet acquire a separate and independent existence with the added flexibility of being transferable come very useful in case of plots of land shown in the Development Plan as reserved for some public purpose or amenity that prohibits their owners from developing those plots by making any other kind of construction. In such circumstances it is open to the landowner to surrender the plot of land free of cost (and free from all encumbrances) to the municipal authorities who may acquire the land by granting to the landowner Floor Space Index or Transferable Development Rights against the area of the surrendered land. The law further provides for additional Floor Space Index or Transferable Development Rights against the development or construction of amenities (for which the plot is shown reserved in the plan) by the owner at his own cost.

2. The appellants and the petitioners in this batch of appeals and writ petition had their plots of land shown in the Development Plan as reserved for roads. They voluntarily surrendered their lands. In addition, they constructed on their respective pieces of land the Development Plan roads at their own cost and as per the specifications stipulated in the relevant rules. There is no dispute between the parties in regard to the Floor Space Index or Transferable Development Rights granted to them for the surrendered pieces of land. But the parties are in serious controversy over the extent of Floor Space Index or Transferable Development Rights for the roads constructed on the surrendered lands at the owners' cost. The landowners claim that for constructing the roads they are entitled to Floor Space Index or Transferable Development Rights for the whole of the surface area of the roads. In support of their claim they rely upon paragraph 6 of Appendix VII to the Development Control Regulations for Greater Bombay, 1991 that provides for, `...a further DR in the form of FSI equivalent to the area of the construction/development done by him (landowner).....'. The municipal authorities would, however, grant them additional Transferable Development Rights only to the extent of 15% of the road area. The stand of the municipal authorities is based on a circular dated April 9, 1996 issued by the Municipal Commissioner, Municipal Corporation of Greater Bombay. The circular envisages a graded scheme for grant of Additional Development Rights for construction of amenities by the landowner, e.g., in case of amenities like general hospital, municipal primary school etc. it allows FSI equal to the built up area of the structure but in case of DP road only 15% of the area of the road surface. On behalf of the landowners it is argued that the contents of the circular are no more than executive instructions and can not supersede or override the provisions of the Regulations which are legislative in nature; in any event the circular would only operate prospectively and have no bearing on the cases in hand since it was issued after the appellants and the petitioners had surrendered their plots of lands after constructing roads on those lands as required by the authorities. The argument is sought to be repelled on behalf of the state and the municipal authorities by taking the position that the law provides for grant of additional Floor Space Index or Transferable Development Rights commensurate to the value of the amenity constructed by the landowner and the meaning of paragraph 6 of Appendix VII to the Regulations will be clear by reading it along with the other provisions of the Regulations and the parent Act. Seen thus the circular dated April 9, 1996 would appear to be merely clarificatory and fully apply to the claims of the appellants and the petitioners. On behalf of the Municipal Corporation the claims of the appellants and the petitioners are also resisted on certain grounds of facts that we shall consider in due course.

3. This is the parameter of the dispute between the parties.

4. At this point it will be useful to refer to some of the provisions of the Maharashtra Regional and Town Planning Act, 1966 (the Act) and the Development Control Regulations for Greater Bombay, 1991 (the Regulations).

5. Section 2 of the Act contains the definitions. Sub-section (2) defines "Amenity" very widely to cover vastly different public utilities from hospitals, secondary schools and colleges to roads, streets

and open spaces etc.. Section 2 (2) of the Act is as under:

"(2) "amenity" means roads, streets, open spaces, parks recreational grounds, play grounds, sports complex, parade grounds, gardens, markets, parking lots, primary and secondary schools and colleges and polytechnics, clinics, dispensaries and hospitals, water supply, electricity supply, street lighting, sewerage, drainage, public works and includes other utilities, services and conveniences;"

6. Sub-section 7 defines `Development' and sub-section 9A defines `Development Right' as follows:

"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 utilizable either on the remainder of the land partially reserved for a public purpose or elsewhere, as the final Development Control Regulations in this behalf provide; (italics supplied)"

Sub-section 9 defines `Development Plan' to mean 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 special planning authority for the development of land within its jurisdiction.

7. Sub-section 13A defines `Floor Space Index' as follows:

"13 A. "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 floor Plot area;"

8. Sub-section 15 defines `Local Authority' and expressly mentions, amongst others, the Bombay Municipal Corporation constituted under the Bombay Municipal Corporation Act.

9. Sub-section 19 defines `Planning Authority' to mean a Local Authority apart from certain other bodies.

10. Sub-section 23 to 26 define `Region', Regional Board', `Regional Plan' and `Regional Planning Committee' respectively;

11. Sub-section 27 defines `Regulation' to mean a regulation made under Section 159 of the Act and includes zoning, special development control regulation and other regulations made as part of Regional Plan, Development Plan or town planning scheme.

12. Chapter II of the Act contains the provisions relating to Regional Plan under sections 3 to 20. In this group of cases, however, we are concerned with the Regulations forming part of a Development Plan which is dealt with under sections 21 to 42 in Chapter III of the Act. Section 21 obliges every Planning Authority to prepare a draft Development Plan for the area within its jurisdiction subject to the provisions of the Act and in accordance with the provisions of a Regional Plan, where there is such a plan. Section 22 deals with the contents of the `Development Plan'. It mandates that the Development Plans would generally indicate the manner in which the use of land in the area of the Planning Authority is to be regulated and the development of land therein is to be carried out. Further, the Development Plan would provide for, in particular the proposals for allocating the use of land for purposes, such as residential, industrial, commercial, agricultural, and recreational. It would also contain proposals for designation of lands for many different kinds of public purposes enumerated in clauses (b) to (l) of the section. As per clause (m) of the section the Development Plan would also provide for the provisions for grant of permission for controlling and regulating the use and development of land within the jurisdiction of a local authority and the matters connected therewith.

13. Section 22A enumerates what is meant by modification of a substantial nature in the Development Plan. Sections 23 to 31 lay down the procedure for making Development Plan, including Development Control Regulations by the Planning Authority after inviting objections and submitting draft plans to the State Government. Section 31 empowers the State Government to sanction the draft Development Plan submitted by the Planning Authority. Section 37 deals with modification of final Development Plan. Chapter VII of the Act deals with Land Acquisition and section 125 provides that any land required, reserved or designated in a Regional Plan, Development Plan or Town Planning Scheme for a public purpose or purposes including plans for any area of comprehensive development or for any new town would be deemed to be land needed for a public purpose within the meaning of Land Acquisition Act, 1894. Section 126 lays down three modes for acquisition of land required for public purposes specified in the plans. The provisions of this section are important for the cases in hand and are reproduced below in so far as relevant for the present:

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

(a) by agreement by paying an amount agreed to, or

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

(c) by making an application to the State Government for acquiring such land under the Land Acquisition Act, 1894, and the land (together with the amenity, if any, so developed or constructed) so acquired by agreement or by grant of Floor Space Index or additional Floor Space Index, or Transferable Development Rights under this sections or under the Land Acquisition Act, 1894, as the case may be,shall vest absolutely free from all encumbrances in the Planning Authority, Development Authority, or as the case may be, any Appropriate Authority, (2) to (4) ...."

14. Section 154 of the Act obliges every Regional Board, Planning Authority and Development Authority to 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. Section 158 contains the rule making powers and authorizes the State Government to make rules to carry out all or any of the purposes of the Act. Section 159 provides that any Regional Board, Planning Authority or Development Authority may with the previous approval of the State Government make regulations consistent with the Act and the rules made there under.

15. The Municipal Corporation of Greater Bombay which is a Planning Authority under section 2(19) of the Act prepared a revised Development Plan and on April 30, 1985 submitted the Revised Draft Building bye-laws and Development Control Rules to the State Government as required under section 30(1) of the Act. The Development Control Rules, after being subjected to the procedure prescribed by law finally received the sanction of the State Government on March 25, 1991 and came into force from that date under the name, `The Development Control Regulations for Greater Bombay'.

16.Before proceeding to examine the relevant provisions of the Regulations it may be noted that on the date on which the Regulations came into force certain amendments were introduced in the Act

as well. Some of the amendments made in the Act with effect from March 25, 1991 include the definition of `Amenity' in its present form that was substituted for the original definition of the term and the insertion of the definition of `Development Right' as sub-section (9A) of section 2. Another very important amendment made in the Act was the insertion of clause (b) in section 126(1) of the Act. Before March 25, 1991, section 126 of the Act provided for Acquisition of Land only by two means, one by payment of an amount agreed upon by the parties and the other by following the procedure under the Land Acquisition Act, 1894. The introduction of clause (b) in section 126(1) provided for a third mode for land acquisition that is based on the concept of Transferable Development Rights against the area of land surrendered free of cost and free from all encumbrances and a further Additional Floor Space Index or Transferable Development Rights against the development or constructions of the amenity on the surrendered land by the land owner (or the lessee) at his own cost. On behalf of the appellants and the petitioners it is argued that apart from section 2(9A) and clause (b) of section 126 (1), there is no other provision in the Act dealing with the concept of Transferable Development Rights and those two provisions were introduced in the Act on the same day the Regulations came into force in order to give effect to the concept of Transferable Development Rights evolved in the Regulations.

17. Coming back to the provisions of the Development Control Regulations for Greater Bombay, regulation 2(2) provides that any terms and expressions not defined in the Regulations shall have the same meaning as in the Act or the Bombay Municipal Corporation Act, 1888 and the rules and bye-laws framed thereunder, as the case may be, unless the context otherwise required. Regulation 3 contains the definitions and clause (7) defines `amenity' as under:

"Amenity means roads, streets, open spaces, parks recreational grounds, play grounds, gardens, water supply, electric supply, street lighting, sewerage, drainage, public works and other utilities, services and conveniences".

18. It is to be noted here that the definition of `amenity' under the Regulations is much restricted than the one given under the Act and under the Regulations `sport complex, parade grounds, gardens, markets, parking lots, primary and secondary schools and colleges and polytechnics, clinics, dispensaries and hospitals' are not expressly included in the definition of amenity.

19. `Road' indeed is common to the definitions both under the Act and the Regulations and in clause (76) of regulation 3 it is defined in the widest possible terms.

Regulation 3 (42) defines Floor Space Index as follows:-

"(42) Floor space index (FSI)" means the quotient of the ratio of the combined gross floor area of all

floors, excepting areas specifically exempted under these Regulations to the total area of the plot, viz.:

Total covered area on all floors Floor Space Index (FSI) =----------Plot area"

20. Regulation 32 deals with Floor Space Indices and Tenement Density and provides for different Floor Space Indices for different areas in Greater Bombay. Regulation 33 provides for Additional Floor Space Index that may be allowed to certain categories. Regulation 34 contains the concept of Transferable Development Rights and it reads as follows:-

"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 (TDR). These Rights may be made available and be subject to the Regulations in Appendix VII hereto".

21. Regulation 35 provides for the method of computation of Floor Space Index.

22. Regulation 62 empowers the State Government to interpret the Regulations in the event of any dispute between the Municipal Corporation and an aggrieved party. Regulation 63 empowers the Commissioner to delegate functions which he is empowered to discharge to other subordinate officers. Regulation 64 provides for discretionary power of the Commissioner which can be exercised in the event of any hardship.

23. Appendix VII, referred to in regulation 34, lays down the manner for the grant of Transferable Development Rights to owners/ developers and the conditions for the grant of such rights. The claim of the appellants and the petitioners are fully based on the provisions of Appendix VII, hence, those provisions, in so far as relevant for the present, are reproduced below:

"APPENDIX VII (Regulation 34) Regulations for the grant of Transferable Development Rights(TDRs) to owners/developers and conditions for grant of such Rights

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

award will entitle the owner of the land to FSI in the form of a Development Rights Certificate (DRC) which he may use himself or transfer to any other person.

2. Subject to the Regulation 1 above, where a plot of land is reserved for any purpose specified in section 22 of Maharashtra Regional and Town Planning Act, 1966, the owner will be eligible for Development Rights (DR's) to the extent stipulated in Regulations 5 and 6 in this Appendix had the land been not so reserved, after the said land is surrendered free of cost as stipulated in Regulation 5 in this Appendix, and after completion of the development or construction as in Regulation in this Appendix if he undertakes the same.

3. Development Rights (DRs) will be granted to an owner or a lessee only for reserved lands which are retainable/non-retainable under the Urban Land (Ceiling and Regulations) Act, 1976, and in respect of all other reserved lands to which the provisions of the aforesaid Act do not apply, and on production of a certificate to this effect from the Competent Authority under that Act before a Development Right is granted. In the case of non-retainable lands, the grant of Development Rights shall be to such extent and subject to such conditions as Government may specify. Development Rights (DRs) are available only in cases where development of a reservation has not been implemented i.e. TDRs will be available only for prospective development of reservations.

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

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 or lessee also develops or constructs the amenity on the surrendered plot at his cost subject to such stipulations as may be prescribed by the Commissioner or the appropriate authority, as the case may be and to their satisfaction and hands over the said developed/constructed amenity to the Commissioner/ appropriate authority, free of 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. (emphasis added)

7. A DRC will be issued only on the satisfactory compliance with the conditions prescribed in this Appendix.8. to 19. ...."

24. In light of the provisions of the Act and the Regulations the case of the appellants and the petitioners is plain and simple. Mr. Ashok Desai learned Senior Counsel appearing on behalf of the appellants submitted that the law clearly envisaged grant of FSI or TDR under two separate heads, one, for the land and the other for the construction of the amenity for which the land is designated in the Development Plan, at the cost of the owner. Section 2(9A) defined `Development Right' to include the transferable development right and section 126(1) (b) provided for the grant of FSI or TDR against the area of land surrendered free of cost and further additional FSI or TDR against the development or construction of the amenity on the surrendered land at the owner's cost as the final Development Control Regulation should provide. Mr. Desai further submitted that the extent of FSI or TDR for the land would be equal to the gross area of the surrendered plot and the extent of FSI or TDR for construction of the amenity for which the land was designated in the final Development Plan would be equivalent to the area of construction/development made on the land. Regulation 34 made provisions for transferability of development rights and Appendix VII referred to in regulation 34 provided for the extent of FSI or DRT admissible under the two heads. Paragraph 5 of Appendix VII that related to the surrender of the land provided for FSI credit in the form of a development right certificate `equal to the gross area of the reserved plot'. Paragraph 6 of the Appendix VII that dealt with the additional DR for construction of the amenity for which the surrendered plot was designated in the Development Plan at the owner's cost provided for a further DR in the form of FSI `equivalent to the area of the construction/ development' made on the surrendered and. Mr.Desai contended that paragraph 6 of Appendix VII used the words `equivalent to the area of construction/ development' which was capable of only one meaning, that is to say, the additional DR would be the same in area as the amenity constructed/developed on the surrendered land. Mr. Desai further pointed out that no provision of Appendix VII, much less paragraph 6 of the Appendix made any distinction between the different amenities as defined under the Act or the Regulations and there was not the slightest hint or suggestion for grant of additional TDR on a variable and sliding scale for construction/development of different kinds of amenities on the surrendered land. Learned counsel submitted that the additional TDR permissible under the statutory Regulations could not be reduced or curtailed on the basis of the circular issued by the Municipal Commissioner.

25. Here it would be appropriate to take a look at the circular dated April 9, 1996 issued under the hand of the Municipal Commissioner, Municipal Corporation of Greater Bombay. It deals with the grant of additional development rights in lieu of construction of amenities as per the provisions of regulation 34 read with paragraph 6 of Appendix VII of the Regulations. It was apparently issued on the basis of the decision arrived at in a meeting held on June 17, 1994 in which representatives of various bodies were present and in which after considering the various aspects such as cost of construction of amenity, category of reservation etc. a scheme was formulated for grant of additional development right in lieu of various constructed amenities on a graded basis. The circular provides that 100% FSI (Built up area) would be granted for the following buildable

reservations:

a] Municipal Transport Garage b] General Hospital

c] Fire Station d] Auditorium

e] Electrical Crematorium f] Municipal Workshop

g] Municipal Primary School h] Municipal Retail Market

i] Town Duty Office j] Office Building"

Paragraph III of the circular deals with construction of DP roads etc. with which we are directly concerned in this group of cases, and in so far as relevant for the present, provides as under.

"3. CONSTRUCTION OF DP ROADS, WIDENING OF EXISTING ROADS ETC."

i] Additional Development Right equivalent to 15% area of DP Road constructed by the Owner of the land as per the Municipal specifications which includes provisions of SWDs, footpaths, Central verge, dividers, providing street lights, laying water mains and sewer lines etc. shall be considered." ii to viii] ...."

26. Later on, it appears, it came to the notice of the municipal authorities and the State Government that the matter was taken to the Court where the circular dated April 9, 1996 was challenged and claim was made for additional Development Right equal to the area of the road constructed on the surrendered plot of land. The extent of the additional Development Right for construction of DP roads was then increased from 15% to 25% of the area of the road by circular dated April 5, 2003, the relevant parts of which are as follows:

"Under the circumstances, the quantum of addl. TDR for construction of roads/setback lands to be granted to owners/developer of DP Roads/setback lands is being enhanced from 15% to 25% for all prospective cases which are not covered under litigation" And

"In cases where owners have filed writ petition which is pending in the Court, the additional TDR will be granted as per the orders of the Court. However in case these owners are agreeable to accept

25% additional TDR, the same can be considered after withdrawal of the Writ Petition filed by them in the Court"

27. Mr. Desai submitted that in Pune Municipal Corporation and Anr. V. Promoters and Builders Association & Anr. (2004) 10 SCC 796 this Court held that the Development Control Rules framed under the Maharashtra Regional and Town Planning Act, 1966 had statutory force. On the other hand the circulars issued by the Municipal Commissioner were simply executive instructions. The circulars, therefore, could not override or supersede the provisions of the Regulations. He further submitted that the municipal authorities too were fully aware and conscious of this legal position and had accordingly requested the State Government vide letter dated July 19, 1997 to suitably modify paragraph 6 of Appendix VII of the Regulations. Mr. Desai further submitted that the circular dated April 9, 1996 on the basis of which the appellant was being denied additional FSI or TDR equal in area to the road constructed on the surrendered plot was issued subsequent to the surrender of the land after construction of the road on it. In any event, therefore, the circular would not affect the appellant's right as it would operate only prospectively and not retrospectively.

28. Mr. Naphade, learned Senior Counsel appearing for the State of Maharashtra, countered the claim of the appellants and the petitioners by submitting that the circulars simply made clear the position that was implicit in the statutory provisions and would be clearly discernable on reading paragraph 6 of Appendix VII to the Regulations along with other relevant provisions. Apart from clarifying the statutory position, by introducing a graded scheme for grant of additional FSI or TDR the circular eliminated the possibility of any discriminatory or arbitrary action on the part of the authority competent to issue the development right certificate. The submission of Mr. Naphade is based on the premise that the law contemplated grant of further additional TDR commensurate to the value of the amenity constructed/developed on the surrendered land. Learned counsel pointed out that the definition of amenity covered vastly different public utilities like a school building or a road or even an open space. He further submitted that though both a single storied school building and a road built on plots of land equal in area may have more or less the same carpet area, the cost of construction of the school building will be much higher than the road. Hence, the grant of additional TDR for construction of all the different kinds of amenities equal to the area of the construction would be illogical, unreasonable and discriminatory. Further, in case the graded system was not followed it would be left in the hands of authority competent to issue the development right certificate to give additional FSI or TDR on a subjective basis. The circular, by introducing a graded scheme eliminated the subjective element and closed any possibility of arbitrary and discriminatory action on the part of the authority. Coming back to the basic argument that under the law the grant of additional TDR could only be commensurate to the value of the amenity constructed/developed on the surrendered land and not necessarily equal in area of the construction/development Mr. Naphade submitted that paragraph 6 of Appendix VII, unlike paragraph 5 didn't use the words `equal to the gross area of the reserved plot' or `equal in area'. Instead, paragraph 6 used the words `equivalent to the area of construction/development'. He further submitted that paragraph 6 of Appendix VII to the Regulations must be read with Section 126(1) (b), the relevant provision in the parent Act and paragraph 6 of Appendix VII must be controlled and must take its meaning from the provision of that section. Section 126(1) (b) used the words `against the area of the land surrendered' and `against the development or construction of amenity on the surrendered land'

29. Seen thus, Mr. Naphade argued, it would be clear that the law provided for the grant of additional Development right proportionate to the value of the amenity constructed by the owner at his own cost. The circulars issued by the Municipal Commissioner simply quantified the exchange value of the different kinds of amenities in percentage terms depending upon their costs of construction and other relevant considerations.

30. The Bombay High Court accepted the line of argument advanced by Mr. Naphade and in the judgment coming under appeal it observed as follows:

"18. The terms used in a statute are to be read and understood in the context in which they are used in the relevant provision. The term "equivalent" in the said Clause is undoubtedly related to the area and the term "area" relates to the construction or development of the amenity done in the surrendered plot. The word "area" therein does not refer to that of the area of the plot. The term "equivalence" is defined in the Black's Law Dictionary to mean "equal in value, force, measure, volume, power and effect or having equal or corresponding import, meaning or significance; alike; identical." The equivalence in case of construction activity cannot be ascertained by merely referring to the carpet area of the land occupied by the construction but it

has to take into consideration the total quantity as well as the quality of the construction. The term "quantity" would refer to the total area of construction, not only on the ground of the land but it would include even the upper floors of construction. The quality of construction would include the description as well as the type of construction i.e. whether it is road or building or shed, etc., as well as of what material. The area of construction would obviously refer to its total area of the structure and when it relates to a building erected on a land, it would not only include the carpet area of the land occupied by such building but the total area of the super-structure and the same will have to be considered to ascertain the FSI and consequently the value of such total area of the construction would be the determining factor in that regard. It is also to be noted that the term "FSI" i.e. floor space index means and has been defined under the clause 2 (42) of the said Regulations as the quotient of the ratio of the combined gross floor area of all floors, excepting areas specifically exempted under the said Regulations, to the total are of the plot, viz., floor space index is equal to the total covered area of all the floors divided by the plot area. Therefore the total expenditure incurred in the construction or development of amenity in the surrendered plot assumes importance while determining the entitlement of the owner or the developer for further DR in the form of FSI on that count under Clause 6 of Appendix VII.

19. As rightly submitted on behalf of the respondents, the differentiation in the percentage is directly linked to the value of the area of the construction or the development carried out in relation to the amenities in the surrendered plot. Certainly the valuation of the construction of a road in a specified area cannot be equated with that of the value of construction in relation to a building occupying the same measure of area of land. There is bound to be a substantial difference between the value of the road built in an area of land and that of the building constructed in same measure of

area of land. In case of road, the construction lies merely on the carpet area of the land. In case of building, the construction is not only on the carpet area of the land but it goes vertically above depending upon the number of its floors. In other words, while the road would occupy the ground as many times as the number of floors it will have. Being so, the area of land occupied by the construction or development of a road cannot be equivalent to the same area of the land occupied by the construction of a building. Considering this important aspect of the matter, the authorities having decided to grant the FSI on the basis of the value of the area occupied by construction or development of amenity in the surrendered plot which would depend upon the prevailing rate of the cost of the construction or the development. The same cannot be found fault with."

31. We are unable to agree with the view taken by the Bombay High Court and to accept the submissions of Mr. Naphade because it seems to us to do violence to the plain language of the statute.

32. Section 126 (1) (b) of the Act uses the word `against': it speaks of granting FSI or TDR `against the area of land surrendered' and further additional FSI or TDR `against the development or construction of amenities on the surrendered land'. Now, one of the meanings of the word `against' is given as "in return of something", e.g., the exchange rate against Franc" (CHAMBERS 21st Century Dictionary, 1st Published in India 1997 reprinted 1999).

33. Webster's third New International Dictionary gives the meaning of the word `against' as "in exchange for: in return for"

34. The Concise Oxford English Dictionary gives one of the meanings of the word as "in exchange for, in return for; as an equivalent or set-off for; in lieu of, instead of."

35. Thus, on the basis of the language used in section 126(1) (b) it could be legitimately argued that what is contemplated is to recompense the land owner proportionate to the value of the development or construction of the amenity on the surrendered land. But the matter doesn't stop there. As seen above in Appendix VII to the Regulations paragraph 5 uses the words `equal to the gross area of reserved plot'. Therefore, in so far as the bare land is concerned there is no difficulty. Paragraph 6 of the Appendix, however, uses the words `equivalent to the area of the construction/development' and much argument is made on the meaning of the word equivalent.

36. Mr. Naphade cited before us the Black's law dictionary in which `equivalent' as an adjective is defined as "equal in value, force, measure, volume, power, and effect or having equal or corresponding import, meaning or significance; alike, identical.".

37. Chambers 21st Dictionary defines equivalent as "equal in value, power or meaning".

38. Concise Oxford English Dictionary defines the word as an adjective as "Equal in value, amount, function, meaning, etc. (equivalent to) having the same or a similar effect as".

39. New Webster's Dictionary defines equivalent as "Equal in value, measure, force, effect, or significance; corresponding in position or function;"

40. Webster's Third New International Dictionary defines it as an adjective as" 1: equal in force or amount ..... equal in area or volume but not admitting of superposition (a square ~ to a triangle) 2 a: like in signification or import 3 a: equal in value : COMPENSATIVE.

41. "WORDS AND PHRASES Permanent Edition Vol.15 at p.157 defines `equivalent' as follows:

"To be `equivalent to' means to be equal in value, to be the same, corresponding to and to be worth. Desoe v. Desoe, 23 N. E. 2d 82, 83, 304 Mass. 231".

"The word "equivalent" has been defined to mean "equal in value, area, volume, force, meaning, or the like; synonym: alike, identical." Nahas v. Nahas, 90 P. 2d 223, 224, 59 Nev. 220"

42. The Advanced law Lexicon 3rd Edition 2005 Book 2 defines `equivalent' as follows:

"Equal in worth or value. Equal in value, measure, force, effect etc. EQUIVALENT, EQUAL. Equal expresses the fact that two things agree in anything which is capable of degree, e.g., in quantity, quality, value, bulk, number, proportion, rate, rank, and the like. Equivalent is equal in such properties as affect ourselves or the use which we make of things, such as value, force, power, effect impact and the like (as) "Equivalent of money.""

43. The last of the above makes the meaning of the word `equivalent' very clear by explaining it in contradistinction to the word `equal'. It says equivalent is equal in such properties as affect the use which we make of things. Seen thus any of the relevant properties, e.g., value, area, volume,

quantity, quality etc. may form the basis for determining equivalence. Now, if the words in paragraph VI of schedule were to be "equivalent to the construction/development" then the submission of Mr. Naphade would have been fully acceptable as in that case it would be open to determine equivalence on the basis of value of the construction and not on any other basis. But the regulation fixes the measure of equivalence by using the words "equivalent to the area of construction/development done on the surrendered land". `Area' of construction/development having being fixed as the measure of equivalence it is no longer open to contend that any other basis such as value may be used for determining equivalence.

44. We may here make it clear that we fully appreciate the rationale behind trying to make value of the evelopment/ construction rather than its area as the basis to recompense the land owner and for granting the additional FSI or TDR. The submissions of Mr. Naphade in that regard are not without substance but that is not the law as it stands and the value of the development/construction can only be made the basis for granting additional FSI or TDR by making suitable amendments in the law and not by an executive circular.

45. In regard to the circular there is something else too that we find quite curious. This aspect of the matter was not argued before us and it is not relevant for the present, nevertheless we would like to point it out as it may help the concerned authorities in future. It is to be noted that both section 126 (1)(b) of the Act and paragraph 6 of Appendix VII to the Regulations provide for additional FSI or TDR for construction or development of amenity which term is defined both in the Act and the Regulations. But in the circular dated April 9, 1996 100% FSI (built up area) is reserved for public utilities none of which is expressly mentioned in the definition of amenity in clause 3(7) of the Regulations. Furthermore `Municipal Transport Garage', `Fire Station', 'Auditorium', 'Electric Crematorium', `Municipal Workshop', `Town Duty Office' and `Office Building' are not even covered by the definition of `amenity' under section 2 (2) of the Act. It is highly debatable if those public utilities can be introduced through the circular as `amenities' within the meaning of the Act or the Regulations.

46. Apart from the contention raised by Mr.Naphade, Mr. Shishodia Senior Advocate appearing for the Municipal Corporation, Greater Mumbai resisted the claims of the appellants and the writ petitioners on certain other grounds. Mr. Shishodia submitted that for acquisition of the designated plot of land recourse to clause (b) of sub section (1) of Section 126 of the Act could only be taken by mutual agreement of the parties concerned. It was equally open to the municipal authorities not to accept the surrender of the land under clause (b) as it was open to the land owner to make the offer. Therefore, it followed according to him, that the municipal authorities could accept acquisition of the land in terms of clause (b) on certain conditions to which the land owner might or might not agree. In case the land owner did not agree to the condition(s) put by the municipal authority he would not surrender the land and then the acquisition of the land could take place either in terms of clause (a) or clause (c) of section 126 (1). Mr. Shishodia submitted that the appellants in all the cases had agreed to construct the road as part of the condition to surrender the land and getting 100% TDR in lieu of the land. According to him, since the construction of the road was a condition for grant of 100% TDR for the bare land the appellants and the petitioners were not

entitled to claim any further TDR at all for construction of the roads by them. He further submitted that it was only indulgence shown to the appellants and the petitioners that the municipal authorities agreed to give them additional TDR to the extent of 15% of the road area after the issuance of circular dated April 9, 1996 and 25% of the road area after the issuance of the circular dated April 5, 2003.

47. The submission of Mr. Shishodia is completely unacceptable. The conditions, that is to say, the mutual rights and obligations subject to which the land owner may offer to surrender the designated plot of land to municipal authority and the latter may accept the offer are enumerated in detail in the statutory provisions. Beyond those conditions there can be no negotiations for surrender of the land, particularly in derogation to the land owner's statutory rights. Having regard to the nature of the law the submission advanced on behalf of the municipal authority would lead to palpably unjust and inequitable results. The land owner whose land is designated in the development plan as reserved for any of the purposes enumerated in section 22 of the Act or for any of the amenities as defined under section 2(2) of the Act or regulation 2(7) of the Regulations is not left with many options and he does not have the same bargaining position as the municipal authority. Therefore, surrender of the land in terms of clause (b) of section 126(1) of the Act cannot be subjected to any further conditions than those already provided for in the statutory provisions. It is of course open to the legislature to add to the conditions provided for in the statute (or for that matter to do away with certain conditions that might be in existence) But it certainly can not be left in the hands of the executive to impose conditions in addition to those in the statutes for accepting the offer to surrender the designated land.

48. Mr. Shishodia next submitted that the measure of 15% (later raised to 25%) of the area of the road constructed for grant of TDR by the impugned circulars of April 9, 1996, April 5, 2003 and May 5, 2004 was decided in meetings in which Mr. Nayan M.Shah, constituted attorney of the appellants was also present as the representative of the industry. Hence, it was no longer open to the appellants and the petitioners to question those circulars. We are once again unable to accept the submission, Mr. Shah might have been present in the meeting and he might or might not have voted for the graded scheme for grant of additional TDR but that would not authorise the municipal authorities to override or supersede the statutory provisions by issuing circulars in the nature of executive instructions.

49. In light of the discussions made above we find that the stand of municipal authorities is contrary to the law as it stands today and the view taken by High Court is unsustainable. The judgment and order dated October 18, 2005 passed by High Court of Bombay in W.P.(C) No.323 of 2000 and other analogous cases is accordingly set aside and the writ petitions are allowed.

50. In the result, the appeals and the writ petition are allowed but with no order as to costs.