(2012) 6 MhLj 941

Bombay High Court

Case No: Writ Petition No. 1685 of 2011 With Civil Application No. 1772 of 2012

M/s. Karan Developers	APPELLANT
Vs	
The Municipal Corporation of the City of Pune and others	RESPONDENT

Date of Decision: Sept. 10, 2012

Acts Referred:
Constitution of India, 1950 â€" Article 226#Maharashtra Regional and Town Planning Act, 1966 â€" Section 126, 126(1), 126(1)(b), 46

Citation: (2012) 6 MhLj 941

Hon'ble Judges: D.Y. Chandrachud, J; A.A. Sayed, J

Bench: Division Bench

Advocate: Y.S. Jahagirdar, with Mr. Girish Godbole and Mr. Drupad S. Patil, for the Appellant; Rajdeep S. Khadapkar for Respondents 1 and 2, Mr. C.R. Sonawane, AGP for Respondents 3 and 4 and Mr. Vishwajeet V. Mohite, for the Respondent

Judgement

Dr. D.Y. Chandrachud, J.
Rule, by consent made returnable forthwith. The learned counsel appearing on behalf of the Respondents waive

service on behalf of the respective Respondents. By consent, the Petition is taken up for hearing and final disposal. Though several ancillary reliefs

have been claimed in these proceedings under Article 226 of the Constitution, the primary relief which has been sought is that the Pune Municipal

Corporation be directed to grant TDR for an area admeasuring 3094.78 sq. mtrs. in lieu of the lands from final plot Nos. 405, 406 and 407 of

TPS III (Final), Pune acquired under an agreement dated 24 May 2000 u/s 126(1)(b) of the Maharashtra Regional and Town Planning Act 1966.

2. On 17 September 1982, the Government of Maharashtra approved the draft development plan for Pune city. Under the draft development

plan, the land which is now the subject matter of dispute was shown for the purposes of road widening. On 5 October 1982 a layout was

sanctioned by the Pune Municipal Corporation at the behest of the Maharashtra State Road Transport Corporation Limited, the Fifth Respondent,

which was the owner of the land in respect of final plot Nos. 405, 406 and 407. The layout was sanctioned with a provision for an open space

comprising of the area in dispute in these proceedings. On 5 January 1987 the revised development plan was sanctioned by the State Government

and the plan was enforced with effect from 5 February 1987.

3. On 24 May 2000 an agreement was entered into u/s 126(1)(b) of the Maharashtra Regional and Town Planning Act 1966 between the First

Respondent and the Fifth Respondent. The agreement stipulated that the lands inter alia comprised in final plots 405, 406 and 407 would be

handed over for the purposes of road widening and that the Fifth Respondent as the land owner would be entitled to Transferable Development

Rights in accordance with the Development Control Regulations. On 24 May 2000 possession was taken by the Municipal Corporation of an area

admeasuring 3094.78 sq. mtrs. out of final plots 405 to 407. While handing over possession the Fifth Respondent stated that it would be entitled

to claim TDR in accordance with the applicable provisions on the date of the submission of the proposal in that regard. The city survey records

were duly mutated so as to record the ownership of the Pune Municipal Corporation. On or about 7 November 2006 the Government of

Maharashtra granted permission to the Fifth Respondent to transfer by auction its right to receive TDR under the agreement with the First

Respondent. In pursuance of the permission granted by the State Government an agreement was entered into on 11 January 2007 between the

Petitioner and the Fifth Respondent in pursuance of which the Petitioner acquired the entitlement of the Fifth Respondent to receive TDR in respect

of the area admeasuring 3094.78 sq. mtrs. pursuant to the agreement dated 24 May 2000 entered into between the First and the Fifth

Respondents. The Petitioner paid an amount of Rs. 6.46 Crores as consideration to the Fifth Respondent.

4. On 28 May 2007 a clarification was sought by the Commissioner of the First Respondent from the Urban Development Department of the

State Government on whether, in view of a Government Resolution dated 12 October 1990 the Fifth Respondent would be entitled to the grant of

TDR as envisaged in the agreement. The State Government issued a clarification to the First Respondent on 16 August 2007 to follow the terms of

the agreement that was entered into with the Fifth Respondent. On 24 March 2008 a communication was issued by the Under Secretary in the

Urban Development Department to the Commissioner of the First Respondent stating that since the Fifth Respondent was an autonomous

institution, it would be appropriate for the First Respondent to grant TDR in terms of the agreement. The First Respondent granted the first TDR

certificate to the Petitioner on or about 20 June 2008. On 2 June 2010 the original layout which had been sanctioned on 5 October 1982 was

revised by the Municipal Corporation. It is common ground that the effect of the revision was to shift the location of the open space. Consequently,

the land from final plots 405 to 407 which was taken over in pursuance of the agreement dated 24 May 2000 was brought in conformity with the

development plan reservation for road widening.

5. After these proceedings were initiated under Article 226, an order was passed by the Division Bench on 10 January 2012 directing the

Commissioner of the Municipal Corporation to take a fresh decision in relation to the request of the Petitioner to the grant of benefits under the

agreement dated 24 May 2000 in accordance with law. Following this order, on 24 January 2012 the Commissioner of the First Respondent took

a decision. The effect of the decision is to reject the claim of the Petitioner to the grant of TDR in respect of a portion of the land which was shown

in the original layout as being reserved as an open space. Thereafter, by a further order of the Division Bench dated 15 February 2012 the

statement of the Pune Municipal Corporation was recorded to the effect that a proposal shall be submitted to the State Government upon which, it

was directed that government shall take a decision in accordance with law. On 4 May 2012 the State Government communicated its decision to

the Municipal Corporation stating that under Rule N.2.4.1(A) of the Development Control Regulations for the city of Pune, no TDR could be

availed of in respect of a recreational open space. However, since while taking over possession in 2000 the Municipal Corporation had agreed to

grant TDR, the State Government directed the Corporation to take an appropriate decision.

6. Before we proceed to deal with the rival submissions, the factual position as it stands admitted must be recorded. It is not in dispute, as clarified

in the affidavit filed on behalf of the First Respondent on 4 February 2012 that the area of final plot Nos. 405, 406 and 407 which was affected by

the development plan road admeasures 3094 sq. mtrs. Of this area, an area admeasuring 1606 sq. mtrs. was shown as open space in the layout

which was sanctioned on 5 October 1982. It is not in dispute that the First Respondent is ready and willing to grant the benefit of TDR in respect

of the balance representing 1487.99 sq. mtrs. In the affidavit, the submission of the Municipal Corporation is that no TDR could have been granted

in respect of that part of the land in final plot Nos. 405, 406 and 407 affected by the D.P. road which was shown as compulsory open space in the

layout as sanctioned on 5 October 1982, but that in respect of the balance of the land, the First Respondent has taken a decision to grant TDR as

permissible under the Development Control Regulations.

7. The issue which falls for determination before the Court is as to whether the First Respondent is justified in taking the view that no TDR could

be granted in respect of the area of land admeasuring 1606 sq mtrs. out of final plot Nos. 405, 406 and 407 on the ground that this was shown as

a compulsory open space in the original layout as sanctioned on 5 October 1982. In support of its stand the Municipal Corporation has relied

upon Rule N.2.4.1(A) of the Development Control Rules which provides as follows :

N.2.4.1. (A) The owner (or lessee) of a plot of land which is reserved for a public purpose, or road construction or road widening, 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 to 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 condition set out below. Such award will entitle the owner of the

land, to FSI in the form of Development Right Certificate (DRC) which he may use for himself or transfer to any other person.

9. On behalf of the Petitioner the following submissions have been urged :

(i) The entitlement to TDR in lieu of land which has been acquired for a public purpose under an agreement with the landowner is recognized by

Section 126(1)(b) of the Maharashtra Regional and Town Planning Act 1966 and the provisions of the Development Control Regulations cannot

be used to deny that entitlement;

(ii) The Municipal Corporation had the choice of either granting to the landowner compensation in accordance with law after following acquisition

proceedings or granting TDR. Once a decision was taken to grant TDR, the landowner would be entitled to TDR in respect of the entire area of

land acquired and it would not be open to the Municipal Corporation to deny that entitlement on the ground that a part of the land which had been

taken over for road widening was shown as an open space and did not possess a buildable potential;

(iii) In any event, the land which was affected for the purposes of the development plan road in final plot Nos. 405 to 407 was always shown for

the purposes of road widening since the notification of the draft development plan for Pune city on 17 September 1982. The revised development

plan which was sanctioned on 5 January 1987 showed the land as being reserved for the D.P. road. Consequently, the layout which was prepared

by the Fifth Respondent and approved by the Municipal Corporation could not have been inconsistent with the reservation as reflected in the final

development plan. Hence, the basis on which the Municipal Corporation has rejected the entitlement of the Petitioner to TDR is erroneous since

the Corporation was not entitled to proceed on the basis that the land was an open space when in fact the position under the final development

plan would show a reservation for the D.P. road.

9. On the other hand, it has been urged on behalf of the Municipal Corporation that :

(i) While entering into an agreement with the First Respondent, it was open to the Fifth Respondent to agree that its entitlement to the grant of TDR

would be governed by the Development Control Regulations. The agreement of 24 May 2000 between the First and the Fifth Respondents clearly

stipulates that the entitlement of the Fifth Respondent to TDR would be subject to the Development Control Regulations;

(ii) While handing over possession of the land affected by road widening, the Fifth Respondent specifically agreed that it would be entitled to the

grant of TDR in accordance with the applicable regulations as on the date of the submission of its proposal. A proposal was submitted on 15

December 2007;

(iii) The agreement dated 11 January 2007 is between the Fifth Respondent and the Petitioner to which the Municipal Corporation is not a party.

That agreement is specifically subject to the terms and conditions governing the agreement dated 24 May 2000 between the First and the Fifth

Respondents;

(iv) The State Government did not at any stage accept the entitlement of the Petitioner to the grant of TDR in respect of that portion of the land

affected by the D.P. road which was shown as an open space in the layout. All that the State Government clarified was that the First Respondent

would follow the terms of the agreement entered into with the Fifth Respondent;

(v) The Fifth Respondent as the owner of the land was responsible for the consequences of submitting a layout to the Municipal Corporation which

showed a part of the land affected by the D.P. road as an open space. Consequently the responsibility for the sanction of the layout, reflecting a

portion of the land affected by the D.P. road as an open space cannot lie at the door of the Municipal Corporation exclusively since the Fifth

Respondent has also submitted a layout despite the provisions of the sanctioned revised development plan.

10. The rival submissions fall for consideration.

11. Section 126(1) provides as follows :

126. Acquisition of land required for public purposes specified in plans

(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

(c) by making in application to the State Government for acquired 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 section 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.

12. Where land is required or reserved for a public purpose specified in any plan or scheme under the Act, the Planning Authority is empowered

to acquire the land by following one of three courses :

(i) by paying an amount agreed to; or

(ii) in lieu of the payment of the amount by granting to the landowner or the lessee, as the case may be, Transferable Development Rights or Floor

Space Index; or

(iii) by making an application to the State Government for the acquisition of the land.

Clause (b) of sub-section (1) of Section 126 provides for the grant of FSI, or as the case may be, TDR in lieu of the payment of an amount agreed

as compensation to the landowner. Under clause (b), the Planning Authority is required to grant FSI or TDR, against the area of land surrendered

free of costs and free of all encumbrances and also further additional FSI or TDR against the development or construction of an amenity under the

surrendered land at his cost, as the Final Development Control Regulations prepared in this behalf provide. The grant of FSI or TDR is therefore

subject to the provisions of the Final Development Control Regulations. The qualification in clause (b) of sub section (1) of Section 126 viz. ""as the

Final Development Control Regulations prepared in this behalf provide"" governs the entirety of the provision in relation to the grant of FSI, or as

the case may be, TDR in clause 6. The grant of FSI or TDR to a landowner is intended to compensate the landowner for the acquisition of the

land and is a benefit which is extended in lieu of the payment of an agreed amount. The landowner is sought to be compensated by providing to

him restitution in the form of FSI or TDR for the benefit which he would have otherwise enjoyed if the land were not to be acquired. Consequently,

the extent of the TDR to which a landowner is entitled is relatable to the buildable potentiality of the land which is acquired. The landowner cannot

claim as a matter of right the grant of TDR irrespective of the buildable potentiality of the land of which possession is taken over by the acquiring

body. In the present case, the agreement dated 24 May 2000 that was entered into between the First and the Fifth Respondents specifically

subjected it to the relevant provisions of the Development Control Regulations. Subsequently, an agreement was entered into by the Petitioner with

the Fifth Respondent on 11 January 2007 which also in terms refers to the agreement dated 24 May 2000 between the First and the Fifth

Respondents. The Petitioner by its agreement with the Fifth Respondent stepped into the shoes of the Fifth Respondent and purported to acquire

the entitlement of the Fifth Respondent to claim TDR from the First Respondent. The Petitioner cannot have a higher right than the right which

enured to the Fifth Respondent under the terms of its agreement with the Municipal Corporation. Evidently the Fifth Respondent as a landowner

obtained an entitlement to TDR in accordance with the Development Control Regulations. The Petitioner who has acquired the entitlement of the

Fifth Respondent cannot claim a higher right.

13. Now the basis on which the First Respondent has denied to the Petitioner the benefit of the grant of TDR in respect of an area admeasuring

1606 sq. mtrs. out of final plot Nos. 405 to 407 is that this part of the land which was affected by the D.P. road was shown in the layout

sanctioned on 5 October 1982 as an open space. Now, it has been specifically stated in ground of the Petition that the land which was shown as

an open space in the layout sanctioned by the Municipal Corporation on 5 October 1982 had already been shown in the draft development plan as

affected under road widening. It is admitted that the Government of Maharashtra approved the draft development plan for Pune city on 17

September 1982. If the portion of the land which is in dispute now was shown for a D.P. road in the draft development plan, the layout which was

sanctioned by the Municipal Corporation nearly two weeks later on 5 October 1982 could not have shown the land which was reserved as an

open space. The layout must necessarily be sub-ordinate to a reservation in the sanctioned development plan. The development plan constitutes

subordinate legislation under the Maharashtra Regional and Town Planning Act 1966. Even when a draft development plan is notified, Section 46

requires the Planning Authority to have due regard to the provisions of the draft. As a matter of fact, it is also now an admitted position that on 2

June 2010 the original layout of 5 October 1982 was revised by the First Respondent so as to bring it into conformity with the development plan.

In view of this position it is evident that the basis on which the Municipal Commissioner has proceeded in this case is erroneous. The Corporation

has sought to deny the benefit of TDR to the Petitioner by applying the provisions of D.C. Regulation N.2.4.1(A). That provision recognizes that

an owner or lessee of a plot of land which is reserved for a public purpose or for road construction or road widening in the development plan

would be eligible to TDR except in the case inter alia of a compulsory or recreational open space. In the present case, both in the draft

Development Plan which was approved on 17 September 1982 and in the revised development plan which was sanctioned by the State

Government on 5 January 1987, the land in question was shown to be reserved for the development plan road. The land was not a compulsory or

recreational open space. The exception carved out in DCR N.2.4.1. (A) is hence not attracted. Apart from the reasons which have been indicated

earlier, the attention of the Court has also been drawn to modified DCR 13.3.1 in regard to open spaces. Note (b) thereto provides that open

spaces shall be exclusive of areas of accesses/internal roads/designations or re-servations in regard to development plan roads and areas for road

widening. Consequently, the approach of the Municipal Commissioner of the First Respondent was erroneous. The Municipal Commissioner shall

now reconsider the matter in the backdrop of the position enunciated earlier. In order to facilitate this exercise, we quash and set aside the order of

the Municipal Commissioner dated 24 January 2012 and remit the proceedings back to the Municipal Commissioner of the First Respondent for a

fresh decision in accordance with law, having regard to the observations contained in this judgment.

Rule is made absolute in the aforesaid terms.

There shall be no order as to costs.

In view of the disposal of the Petition, Civil Application 1772 of 2012 does not survive and is accordingly disposed of.