REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 9021 OF 2014

GODREJ AND BOYCE MANUFACTURING COMPANY LIMITED THROUGH ITS CONSTITUTED ATTORNEY & ANR. …APPELLANT(S)

VERSUS

THE MUNICIPAL CORPORATION OF GREATER MUMBAI & ORS. …RESPONDENT(S)

J U D G M E N T

V. Ramasubramanian, J.

1. Aggrieved by the dismissal of their claim by the Bombay High Court, for the grant of Development Rights Certificate[1] for a total area of 31,057.30 sq.metres, for the construction and development of the amenity namely "*Recreation Ground*", the writ petitioner before the Bombay High Court has come up with this appeal.

[1] For short "***DRC***"

2. We have heard Shri P. Chidambaram, learned senior counsel for the appellants and Shri Atmaram N.S. Nadkarni, learned senior counsel appearing for the respondents.

3. The background facts leading to the appeal on hand are as follows:-

(i) The second Development Plan (DP 1991) for Greater Mumbai was prepared for the period 1981-2001 and the same was sanctioned in parts between 1991 and 1994. In the said DP, the plots of land bearing CTS No.2B (part) falling in N-Ward & CTS Nos. 2B (part) and 3B falling in S-Ward were reserved for the purpose of "*Recreation Ground*";

(ii) The aforesaid plot of land was admittedly owned by appellant No.1 herein. Appellant No.2 herein is the duly constituted attorney of appellant No.1 in respect of the said property;

(iii) Under Maharashtra Act 10 of 1994, clauses (a), (b) and (c) were inserted under sub-section (1) of Section 126 of the Maharashtra Regional and Town Planning Act, 1966 (*hereinafter called "the Act"*), by way of substitution. These clauses were inserted with effect from 25.03.1991;

(iv) Section 126 (1) conferred power upon the Planning Authority/Development Authority, to acquire any land required or reserved for any of the public purposes specified in any plan or scheme, after the publication of a Draft Regional Plan[2] or a DP or

[2] For short "***DRP***"

Town Planning Scheme[3]. The newly inserted clauses (a), (b) and (c) in sub-section (1) provided 3 different methods of such acquisition. One method of acquisition was by way of an agreement upon payment of an agreed amount. The second method of acquisition was by granting, in lieu of any compensation, Floor Space Index[4] or Transferable Development Rights[5] against the area of land surrendered free of cost and also further additional FSI or TDR against the development or construction of the amenity on the surrendered land. The third method of acquisition was through the initiation of proceedings under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013;

(v) Vide letter dated 14.07.1994, appellant No.1 through their Architects, "*Worthy Enterprises*" made an application for surrendering land of the extent of 31,057.58 sq.metres (two plots) which was reserved under the DP for the purpose of "*Recreation Ground*". An application for the grant of DRC was enclosed to the said letter;

(vi) It is relevant to mention at this stage that the TDR to be granted in lieu of compensation for acquisition of land, as contemplated in clause (b) of sub-section (1) of Section 126 comprised of two components namely, ***(i)*** TDR equal to the area of land surrendered; and ***(ii)*** additional TDR against the development or construction of the amenity on the surrendered land at the cost of the owner;

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[3] For short "***TPS***"
[4] For short "***FSI***"
[5] For short "***TDR***"

(vii) Vide another letter dated 08.10.1994, the Architect of appellant No.1 wrote a letter to the Municipal Corporation, expressing their intention to develop the land sought to be surrendered;

(viii) By another letter dated 24.11.1994, the Architect of appellant No.1 forwarded to the Superintendent of Gardens, a set of drawings for the development of the land, after incorporating the suggestions made by the Department pursuant to the visit made by the Deputy Superintendent of Gardens;

(ix) Vide letter dated 03.12.1994 the Superintendent of Gardens forwarded to the Assistant Engineer, the appellants' proposal;

(x) By a letter of intent dated 05.04.1995, issued by the Chief Engineer (Development Plan), appellant No.1 was informed that their request for the grant of DRC will be considered after the requirements mentioned therein were complied with. One of the conditions indicated in the said letter dated 05.04.1995 was that the appellant had to deposit a sum of Rs.3,50,000/- as security for the faithful compliance of the requirements mentioned in the letter;

(xi) Appellant No.1, through their Architects, undertook the development work. Site inspection was also carried out by the officials of the Municipal Corporation. Eventually the Deputy Chief Engineer (Planning and Design), issued a letter dated 27.05.1995 certifying the completion of the development work undertaken by the appellant No.1. This letter was issued after making a site inspection on 23.05.1995;

(xii) By a subsequent letter dated 20.07.1995, the Chief Engineer informed appellant No.1 that they have to complete Storm Water Drains and that thereafter, the DRC will be issued. Accordingly, the appellant No.1 undertook the construction of Storm Water Drains;

(xiii) Thereafter, the Executive Engineer issued a communication dated 20.10.1995 certifying that the drains have been constructed satisfactorily;

(xiv) As a matter of fact, the Architects of appellant No.1 had a temporary site office and godown on the plot reserved for "*Recreation Ground*". This was, as per the letter dated 28.09.1995 of the Architects, for the purpose of developing the additional amenity and for landscaping of Recreation Ground. Therefore, in a couple of communications, the Architects of the appellant No.1 offered to remove the same, once the work was completed. Appellant No.1 even deposited a sum of Rs.25,000/- for the retention of the temporary structure, to store materials required for the development;

(xv) When appellant No.1 was developing the amenity, the local people wanted access and, hence, the Deputy Chief Engineer requested through his note dated 30.11.1995, orders of the Chief Engineer on two things, namely, ***(i)*** access to the local people; and ***(ii)*** permission to take over possession of the developed land;

(xvi) Simultaneously, appellant No.1 handed over formal possession of the land on 09.12.1995;

(xvii) On 14.12.1995, the respondents granted NOC to appellant No.1 in terms of the proposal dated 07.12.1995. A further scrutiny report dated 28.12.1995 acknowledged that the "*Recreation Ground*" was being developed in terms of the approval granted on 14.12.1995;

(xviii) While things stood thus, the Municipal Corporation issued a Circular dated 09.04.1996, restricting the grant of additional TDR in respect of amenities such as "*Recreation Ground"*, only for the structures allowed to be constructed within the reservations, to the extent of built-up area of such structures subject to a maximum of 15% area of the reservations. This Circular and another Circular dated 05.04.2003 became the subject matter of challenge, which resulted in this Court delivering a Judgment reported in ***Godrej and Boyce Manufacturing Company Limited*** *vs.* ***State of Maharashtra and Others.***[6];

(xix) During the pendency of the above proceedings, appellant No.1 constituted appellant No.2 as their Power of Attorney[7] in respect of the amenity TDR (Additional TDR) under a Deed dated 24.12.1996;

(xx) Claiming to have completed the development of the amenity, the appellants applied on 17.04.1998 for the grant of Additional TDR (also known as "*Amenity TDR*");

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[6] (2009) 5 SCC 24

[7] For short "***PoA***"

(xxi) But by a reply dated 27.11.1998, the Corporation declined to consider the request for additional TDR on the ground of prevailing policy (*namely, the Circular dated 09.04.1996*);

(xxii) Since the Circular was under challenge before this Court, appellant No.1 awaited the outcome of the challenge;

(xxiii) Therefore, after the circular was set aside by this Court in the decision in ***Godrej and Boyce Manufacturing Company Limited (supra),*** the appellant made one more request for the grant of Additional TDR by a letter dated 03.11.2009. But the same was turned down by the Municipal Corporation by an order dated 17.08.2010;

(xxiv) Aggrieved by the said response, the appellants filed a writ petition in WP No.2058 of 2010. This writ petition was dismissed by the High Court of Judicature at Bombay by an order dated 08.08.2011. It is against the said order that the appellants have come up with the above appeal.

4. While rejecting the claim of the appellants, the High Court recorded the following findings:

(i) *that* a claim for Additional TDR generally arises in terms of clause 6 of Appendix VII of Regulation 34 of the Development Control Regulations for Greater Mumbai, 1991[8];

(ii) *that* the entire correspondence exchanged between the appellants and the respondents from 14.07.1994 till the year 1998 does not disclose that the appellants intended to avail additional TDR in terms of clause 6;

[8] For short "***the Regulations***"

(iii) *that* if there was any such intention, the owner ought to have approached the Commissioner or the Appropriate Authority in terms of clause 6 of Appendix VII;

(iv) *that* the Superintendent of Gardens was not the appropriate authority in respect of the Garden Department;

(v) *that* what was claimed by appellant No.1 and their Architects was only TDR as per clause 5 and not additional TDR under clause 6 of Appendix VII of Regulation 34;

(vi) *that* the appellants accepted DRC dated 02.01.1996 without any protest;

(vii) *that* the appellants have failed to establish that they carried out any development;

(viii) *that* the agreement executed between M/s Mayfair Housing and the Corporation shows that the appellants merely surrendered the land and claimed TDR in terms of clause 5 but did not carry out any development in terms of clause 6;

(ix) *that* while surrendering the land and claiming TDR in terms of clause 5, appellant No.1 submitted a proposal enclosing Form No.2625;

(x) *that* at Serial No.17 of the said printed form, the owners were called upon to inform whether the reservation is proposed to be built as per the plans approved by the concerned authority as per clause 6;

(xi) *that* the answer of appellant No.1 to the question at serial No.17 was that the question does not arise as the reservation was for *"Recreation Ground*";

(xii) *that* before claiming additional TDR in terms of clause 6, neither appellant No.1 nor appellant No.2 filled in the printed Form;

(xiii) *that* under clause 6, the amenity has to be developed as per the stipulations prescribed by the Commissioner or the appropriate authority, but in this case, these authorities did not prescribe any stipulations, since the appellants did not submit any printed Form for additional TDR;

(xiv) *that* appellant No.2 is not the owner or lessee of the land and hence when appellant No.2 made a request for the development/maintenance of the land, the request was granted on condition that appellant No.2 will not claim any TDR; and

(xv) *that* in any case the appellants should be deemed to have abandoned their claim for additional TDR, in view of the fact that they came up with the writ petition only in the year 2010 challenging the rejection of the request for additional TDR made in the year 1998 and that, therefore, the writ petition deserves to be dismissed.

5. Assailing the impugned order of the High Court, it is contended by Shri P. Chidambaram, learned senior counsel:

(i) *that* TDR/Additional TDR, constitute compensation in kind for the acquisition of the land and the development of the amenity and hence the denial of the same will be an infringement of the right to property guaranteed under Article 300A of the Constitution;

(ii) *that* there is no dispute that the appellants developed the "*Recreation Ground*," in terms of the plan approved by the Superintendent of Gardens;

(iii) *that* the High Court overlooked the approval granted by the Municipal Commissioner which was available on record and hence the finding that the appropriate authority did not grant approval is factually incorrect;

(iv) *that* in terms of Regulation 6, the amenity is required to be developed "*on the surrendered plot*" and the vesting in favour of the Corporation takes place only after the development of the amenity in terms of Section 126(1)(b);

(v) *that* the stand taken by the Corporation before the High Court that the appellant did not develop the amenity, was an afterthought;

(vi) *that* the request for Additional TDR made by the appellants on 17.04.1998 was rejected by the Corporation by a communication dated 27.11.1998, not on the ground that the appellants did not develop the amenity, but on the sole ground that the prevailing policy did not permit the grant of additional TDR;

(vii) *that* the inference drawn by the High Court that there was abandonment of right by the appellant, on account of the delay in approaching the High Court, was totally perverse:

(viii) *that* the High Court failed to appreciate that the delay was due to the necessity for the appellant to await the outcome of their challenge to the "*prevailing policy*" and that, therefore, the impugned order is liable to be set aside.

6. Defending the action of the respondents and the impugned order of the High Court, it is contended by Shri Atmaram N.S. Nadkarni, learned senior counsel:-

(i) *that* after going through the entire correspondence between the parties, the High Court has recorded findings of fact on various aspects such as the appellants not undertaking the development of any amenity, the appellants not making any claim for Additional TDR and the lack of approval on the part of the appropriate authority for the development of any amenity;

(ii) *that* these findings of fact do not warrant any interference under Article 136 of the Constitution;

(iii) *that* the rejection of the request for additional TDR, made on 27.11.1998 was challenged by the appellants only after 12 years and hence the High Court was justified in drawing an inference about the abandonment of claim;

(iv) *that* after the surrender and transfer of the land in favour of the Corporation and the grant of TDR, the appellants ceased to be owners and hence they were not entitled to claim additional TDR;

(v) *that* the claim for Additional TDR should be made simultaneously with the claim for TDR, but the appellants failed to do so;

(vi) *that* the appellants made a claim for Additional TDR only in 1998 after surrendering and transferring the land in the year 1995;

(vii) *that* in any case, the development of amenities had to be carried out as per the stipulations made by the competent authority; and

(viii) *that* the activities of cutting, leveling, filling, terracing and landscaping cannot be treated as the development of amenity and that therefore the action of the respondents and the order of the High Court were perfectly in order.

7. We have carefully considered the rival contentions.

8. From the rival contentions, it appears to us that the following two questions arise for our consideration:

(I) Whether the High Court was right in concluding that there was abandonment of claim by the appellants? ; *and*

(II) Whether the finding of fact arrived at by the High Court that the appellants did not and could not have developed the amenity, calls for any interference, especially in the light of the statutory provisions and the facts that unfold from the correspondence exchanged between the parties?

Question No.I: Whether the High Court was right in concluding that there was abandonment of claim by the appellants?

9. It is true that the claim made by the appellants for the grant of additional TDR vide their application dated 17.04.1998 was rejected by the Corporation, by a communication dated

27.11.1998 and that the same was challenged by the appellants by way of a writ petition filed after 12 years in September-2010. The High Court held that this delay of 12 years in challenging the action of the respondents tantamount to abandonment of claim.

10. Let us now see whether the inference of abandonment is factually made out and legally sustainable.

11. The order of rejection dated 27.11.1998 is a cryptic order which reads as follows:

> "This is to inform you that, the proposal submitted by you for grant of additional T.D.R in lieu of development of Recreation Ground on the land bearing CTS No.2/B(pt), 3(B) of Village Ghatkopar cannot be considered, **as per the prevailing policy in this respect.**"

12. Obviously the expression "*prevailing policy*," mentioned in the aforesaid communication, was the Circular dated 09.04.1996. The said circular dated 09.04.1996 dealt with several issues, one of which related to Additional TDR for open space amenities. The relevant portion of the Circular dated 09.04.1996 reads as follows:

> "2. **OPEN SPACE AMENITIES LIKE GARDEN, PLAYGROUND R.G., PARKING, OPEN SPACES & BURIAL GROUND**
>
> i) The application for additional Development Right in respect of the above mentioned amenities will be considered only for the structures allowed to be constructed within the reservations as per the provisions of D.C.R. No. 23(g) to the extent of built-up area of such

structures, subject to maximum of 15% area of the reservations.

ii) No additional Development Right will be granted for execution of the items such as leveling, construction of compound wall, retaining wall, providing compound gate providing layer of red-earth, landscaping & drainage arrangements etc.

iii) Procedure & terms and conditions for considering grant of additional Development Rights for such structures will be the same as per Item No.1 above."

13. In fact, the above circular dated 09.04.1996, gave rise to a dispute between appellant No.1 herein and a few others on the one hand and the Corporation on the other hand. That dispute which related to some other property, ultimately landed up before this court in the form of a couple of civil appeals and a writ petition. The dispute got resolved through the decision of this court in ***Godrej and Boyce Manufacturing Company Limited*** (supra). The said decision was rendered on 06.02.2009.

14. Therefore, taking advantage of the said decision, appellant No.2 applied once again for the grant of Additional TDR, on 03.11.2009. The same was rejected once again by a communication dated 17.08.2010. This rejection triggered the present proceedings in the year 2010. It is in the light of this chain of events that we have to see whether there was any delay on the part of the appellants and whether such delay could lead to an inference of abandonment of claim.

15. The law of abandonment is based upon the maxim *invito beneficium non datur*. It means that the law confers upon a man no rights or benefits which he does not desire. ***In P. Dasa Muni Reddy*** vs. ***P. Appa Rao***[9], this Court held that "*abandonment of right is much more than mere waiver, acquiescence or laches.... Waiver is an intentional relinquishment of a known right or advantage, benefit, claim or privilege....*". In paragraph 13 of the said decision, this Court put the law pithily in the following words:

> "**13**.... **There can be no waiver of a non-existent right. Similarly, one cannot waive that which is not one's as a right at the time of waiver.** ..."

16. Irrespective of whether the respondents concede or not, the Circular dated 09.04.1996 curtailed the rights of the owners to have additional TDR in certain circumstances. The Circular came under challenge before this Court and the decision of this Court in ***Godrej and Boyce Manufacturing Company Limited*** was delivered on 06.02.2009. As we have stated earlier, the decision in ***Godrej and Boyce Manufacturing Company Limited*** was in the case of the very appellant No.1 herein though in respect of some other property.

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[9] (1974) 2 SCC 725

17. To put it differently, what was cited by the Municipal Corporation in their order of rejection dated 27.11.1998 as an impediment for the grant of additional TDR was the subject matter of challenge in the first round. It was made by the very appellant No.1 herein, though in respect of another property. If the said decision in the first round had gone against appellant No.1 herein, the rejection of the claim of the appellants for additional TDR on the basis of "*prevailing policy*" would have become final and unquestionable.

18. In other words, during the period from 1996 to 2009, the right to claim additional TDR was in suspended animation. Therefore, the appellants had to necessarily wait till the cloud over their right got cleared. To say that the wait of the appellants during the period of this cloudy weather, tantamount to abandonment, is clearly unjustified and unacceptable. Therefore, the finding recorded by the High Court on question No.1 is not in tune with the law or the facts of the present case and hence question No.1 has to be answered in favour of the appellants herein.

Question No.II: Whether the finding of fact arrived at by the High Court that the appellants did not and could not have developed the amenity, calls for any interference, especially in the light of the statutory provisions and the facts that unfold from the correspondence exchanged between the parties?

19. The answer to question No.2 revolves both around factual aspects and around certain statutory provisions. Let us first take note of the statutory provisions, out of which the right to claim additional TDR arose.

20. Section 126(1) of the Act reads 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 Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, 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 acquiring such land under the provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013,

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 provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, 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."

21. As we have noted earlier, clauses (a), (b) and (c) were inserted by way of substitution in sub-section (1) of Section 126 under Maharashtra Act 10 of 1994 with effect from 25.03.1991.

22. As per Section 126(1), whenever the Planning Authority or Development Authority finds after the publication of a draft Regional Plan or a Development Plan that any land is required or reserved for any of the public purposes mentioned in the plan, such authority may acquire the land for the said public purpose. This acquisition can be made by three different methods, indicated in clauses (a), (b) and (c). The methods of acquisition

prescribed in clauses (a), (b) and (c) of sub-section (1) of Section 126, in simple terms are as follows:-

(i) The acquisition may be through an agreement entered into with the owner, by paying an amount agreed to;

(ii) Alternatively, the acquisition may be by the grant of FSI or TDR in lieu of any payment, along with Additional FSI or Additional TDR against the development or construction of the amenity on the surrendered land at the cost of the owner; or

(iii) The acquisition may also be by requesting the State Government to initiate the process of land acquisition under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.

23. We are concerned in this case with the second method of acquisition of land indicated in clause (b) of sub-section (1) of Section 126. Under this clause, the owner and the planning authority are granted the leverage to agree that the compensation for the acquisition of the land will be for a consideration, not paid in the form of cash but granted in kind, in the form of two things, namely, ***(i)*** FSI or TDR for the area of land surrendered; and ***(ii)*** additional FSI or additional TDR against the development or construction of the amenity on the surrendered land.

24. Once the parties are *ad idem* on the fact that the case is covered by clause (b), then what is necessary to be seen by

Courts is: ***(i)*** whether the parties had agreed to give/take FSI or TDR in lieu of the amount of compensation?; and ***(ii)*** whether there was a valid claim for the grant of additional FSI or additional TDR towards the development or construction of the amenity on the surrendered land at the cost of the owner?.

25. There is no dispute on facts in this case that the appellants surrendered their land and accepted TDR in lieu of compensation. The only question on which the parties have a dispute, is as to whether the last limb of clause (b) stands satisfied or not.

26. For a better appreciation, it is necessary to extract the last limb of clause (b) as follows: " ... ***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***,"

27. The last limb of clause (b) extracted above shows that the owner of the land is under an obligation to develop or construct the amenity on the surrendered land at his cost and the Planning Authority has to reciprocate the same by granting Additional FSI or Additional TDR.

28. On the question as to whether the appellants have fulfilled their obligations under the last limb of clause (b), there are controversies both on facts and in law. On facts it is contended by the respondents that the appellants did not develop or construct the amenity and in law it is contended that what is stated to be developed is not as per the Final Development Control Regulations.

29. To resolve this conflict, it is necessary to take note of the definition of the word *"amenity"*, which is defined in Section 2(2) of the Act as follows:

> "**2. Definitions**
>
> In this Act, unless the context otherwise requires,—
>
> xxx xxx xxx
>
> (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;"

30. The word "*amenity"* has been defined in Section 2(2) of the Act to mean several things including *"Recreational Grounds"*. We are concerned in this case with a *"Recreational Ground*". The claim of the appellants is that they have developed a Recreational Ground. Interestingly, it is not the

case of the respondents that the appellants were required to develop something else and not a Recreational Ground. On the contrary, it is the case of the respondents that the appellants did not develop the Recreational Ground. Therefore, all that we are obliged to see is whether a Recreational Ground was developed or not.

31. The word *"development"* is also defined in the Act in Section 2(7) as follows:

> "**2. Definitions**
>
> In this Act, unless the context otherwise requires,—
>
> xxx xxx xxx
>
> (7) "development" with its grammatical variations means the carrying out of buildings, engineering, mining or other operations in or over or under, land or the making of any material change, in any building or land or in the use of any building or land or any material or structural change in any heritage building or its precinct and includes demolition of any existing building, structure or erection or part of such building, structure of erection; and reclamation, redevelopment and lay-out and sub-division of any land; and "to develop" shall be construed accordingly;"

32. The above definition shows that the word *"development"* is given a very wide meaning. In fact, the last limb of clause (b) of sub-section (1) of Section 126 uses both the expressions, namely ***(i)*** development; and ***(ii)*** construction. Therefore, the word

"development" has to be understood to mean any activity which may or may not include construction.

33. Having seen the relevant provisions of the Statute, let us now have a look at the Regulations. This has become necessary in view of the fact that the last limb of clause (b) extracted above refers to "*the Final Development Control Regulations prepared in this behalf*". Therefore, the question whether the appellants developed or constructed any amenity, should be tested with reference to the Final Development Control Regulations.

34. The Regulations define the word *"amenity"* under Regulation 2(7) as follows:

> "**2. Definitions of Terms and Expressions**:-
>
> xxx xxx xxx
>
> (7) "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."

Even this definition includes Recreational Ground.

35. Regulation 34 of the Regulations deals with Transfer of Development Rights. Regulation 34 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 Rights (TDR). These Rights may be made available and be subject to the Regulations in Appendix VII hereto."

36. Appendix VII referred to in Regulation 34 later got renumbered as Appendix VII-A vide order dated 15.10.1997. Clauses 5, 6 and 7 of the Regulations formed the eye of the storm before the High Court. Therefore, they are extracted as follows:

"**APPENDIX VII-A**
(Regulation 34)

Regulations for the grant of Transferable Development Rights (TDRs) to owners/developers and conditions for grant of such Rights

xxx xxx xxx

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.

Provided that in specific cases considering the merits, where Development Plan Roads/ reservations are proposed in No Development Zone, the Commissioner with prior approval of the Government shall grant FSI for such road land/reserved land equivalent to that of the adjoining zone.

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, utilisation

of which etc. will be subject to the Regulations contained in this Appendix.

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

37. The High Court, after scanning the correspondence came to the conclusion that clause 5 of Appendix VII alone is applicable to the case on hand, since the appellants made a claim only for TDR equivalent to the gross area of the reserved plot surrendered to the Corporation and that clause 6 was not applicable as the owner did not develop or construct the amenity on the surrendered land at his cost. Therefore, it is necessary to go back to certain factual details to find out ***(i)*** whether appellant No.1 did develop the amenity; and ***(ii)*** whether they made a claim traceable only to clause 5 and not to clause 6 of Appendix VII to the Regulations read with Regulation 34.

38. The answer to the first question whether appellant No.1 did develop the amenity or not, lies in the correspondence. As we have pointed out earlier, the word "*amenity*" means several things including "*recreation ground*." The word "*development*" includes under Section 2(7), mining or other operations in or over the land or the making of any material change in any building or land and reclamation, redevelopment and layout and sub-division of any

land. Keeping these definitions in mind, if we go back to the correspondence, the picture that unfolds is as follows :-

(i) By the letter dated 08.10.1994, the Architects of appellant No.1 informed the Director (ES&P) of the Bombay Municipal Corporation that they "*intended to develop the surrendered land before handing over, by suitably cutting, levelling, filling and terracing etc., in order to have a Recreation Ground with utility and beauty*";

(ii) A plan was also attached to the said letter dated 08.10.1994 showing the proposed overall development;

(iii) Pursuant to the said letter, the Superintendent and Deputy Superintendent of Gardens visited the site, as could be seen from the letter dated 24.11.1994 addressed by the Architect to the Superintendent of Gardens. To this letter, a set of drawings prepared after incorporating the suggestions of the Department was also enclosed;

(iv) By a departmental note dated 03.12.1994, the Superintendent of Gardens seems to have addressed the Executive Engineer (DP)(ES) indicating that the plan submitted by the Architect was slightly modified after visiting the site. The Executive Engineer was also requested to inform further development in future so that the progress could be monitored;

(v) The said departmental note dated 03.12.1994 contains an endorsement at the bottom to the effect "*please inform that developer can develop the RG by availing ATDR.*" Obviously, the

acronym RG stands for Recreation Ground and the acronym ATDR stands for Additional Transferable Development Rights;

(vi) By a letter dated 05.04.1995 addressed by the Chief Engineer (DP) to appellant No.1, they were instructed to carry out certain things, as per the plan submitted by their Architect. Two important things could be noticed from this letter. The first is that Point No.7 mentioned in the said letter speaks about the joint measurement of the "*Recreation Ground*". The second is that the letter was described as an intent letter valid for a period of one year, but eligible to be revalidated for further periods;

(vii) By a letter dated 27.05.1995, the Deputy Chief Engineer (Planning and Design) informed the Architects that the work undertaken by them was found completed as per the amended plan approved by the Department and as per the re-location approved by the Director (ES & P). This letter was issued after an inspection of the site on 23.05.1995.

(viii) By a letter dated 28.09.1995, the Architect of appellant No.1 informed the Assistant Engineer (DP) that the Architects had a temporary site office and go-down constructed on the plot reserved for *Recreation Ground* and that they were being used for constructing additional amenity and landscaping of *Recreation Ground*. By the said letter, the Architect undertook to remove these structures after completion of "*the development of RG*".

(ix) By a departmental note dated 30.11.1995, the Deputy Chief Engineer sought the approval of Municipal Commissioner on certain issues. One of the issues on which the orders of the Municipal Commissioner were sought, was the development of RG

by planting trees, providing fountain etc. and the removal of the structures erected by the Architects for the purpose of carrying out the development, within two years. The said note was approved by the Municipal Commissioner on 04.12.1995.

(x) It is only after the above events that the handing over and taking over possession of the surrendered land took place on 09.12.1995.

(xi) After the handing over and taking over possession of the land, the Superintendent of Gardens sent a communication date 14.12.1995 to the Architect of appellant No.1 that they have no objection to the landscaping being undertaken.

(xii) In a Departmental note put up on 28.12.1995, it was mentioned clearly that the *Recreation Ground* was developed by appellant No.1 as per the approval of Superintendent of Gardens.

(xiii) On 02.01.1996, a DRC (Development Rights Certificate) was issued to appellant No.1, with respect to the surrendered land.

(xiv) It is only thereafter that appellant No.2 who is a partner of Mayfair Housing jumped into the fray and sought permission to maintain the *Recreation Ground*, through a letter dated 20.11.1996. On the said letter dated 20.11.1996, there is an endorsement of the Joint Municipal Commissioner made on 26.11.1996 that the plot had come to BMC under TDR and that, "*he had spent Rs.1.25 crores on this RG and developed it*".

(xv) On the said letter dated 20.11.1996 of Mayfair Housing, a note order was passed by the Deputy Municipal Commissioner stating that there was no clarity about the nature

of the activities to be carried out by Mayfair and that the same needed to be part of an agreement.

(xvi) Thereafter appellant No.1 executed two deeds of power of attorney, both dated 24.12.1996 in favour of appellant No.2 and his wife. By one power of attorney, appellant No.1 authorised their duly constituted attorneys to deal with the TDR already granted to them under the Development Rights Certificate issued on 02.01.1996. By the other deed of power of attorney, appellant No.1 authorized their duly constituted attorneys to seek the grant of "*Amenity TDR*" also known as Additional TDR. ***Interestingly, this deed authorized appellant No.2 and his wife to apply for getting permission from the authorized department for the construction of Recreation Ground in accordance with the plans/specifications***.

(xvii) It is important to note that both the ***deeds of power of attorney were executed by appellant No.1 on 24.12.1996, after appellant No.2 representing Mayfair Housing made a representation on 20.11.1996 seeking permission for the development of Recreation Ground.***

(xviii) Therefore, when a note was put up by the Deputy Chief Engineer on 30.01.1997 on the proposal made by the Deputy Municipal Commissioner, it was indicated therein ***that the permission for the development of RG plot has been granted although additional TDR for the same was not admissible***.

(xix) Thereafter, a communication was issued to Mayfair Housing, with reference to the letter of appellant No.2 dated

20.11.1996, informing them that ***the development and maintenance of the Recreation Ground on payment of nominal fee has been sanctioned, subject to certain conditions, one of which was that no TDR will be given***.

(xx) All the above correspondence culminated in the letter of request dated 17.04.1998 issued by appellant No.2 on behalf of appellant No.1 for the grant of additional TDR.

39. The entire correspondence that began with a letter dated 14.07.1994 sent by Worthy Enterprises, the Architects of appellant No.1 to the Chief Engineer (DP) of the Municipal Corporation and culminating in the letter of appellant No.2 dated 17.04.1998 seeking the grant of additional TDR, can be split into two time zones. The first of these time zones commenced with the letter dated 14.07.1994 and ended with the handing over of possession of the land by appellant No.1 on 09.12.1995 to the Corporation and the Corporation issuing a DRC on 02.01.1996 granting TDR for the surrendered land. The second time zone commenced on 20.11.1996 with Mayfair Housing seeking permission of the Corporation to develop and maintain the *Recreation Ground* and ended up with the request for additional TDR dated 17.04.1998 being rejected by order dated 27.11.1998.

40. Once the entire correspondence between the appellants and the respondents, is split into two time zones, an interesting picture emerges therefrom. This can be summarised as follows:-

(i) What was applied for in Form No.2625 enclosed to the letter of the Architects dated 14.11.1994, was only a DRC for the surrender of the land. There was no indication in the said letter dated 14.07.1994 that appellant No.1 was interested in developing an amenity for the purpose of claiming Additional TDR. This is why, the answer of appellant No.1 to the question at Serial No. 17 of the printed Form for the grant of DRC assumes significance. The question at Serial No.17 and the answer thereto are extracted as follows:-

(17) Whether the reservation is proposed to be built upon as per the plans approved by the concerned Authority as per sub regulation No.6 of Appendix-VII, if so, details thereof.	:	**Does not arise as the reservation is for R.G.**

(ii) The above answer to question No.17, in Form No.2625 submitted by appellant No.1 themselves along with their letter dated 14.07.1994, stands in stark contrast, to the answer to the very same question in the Form submitted by appellant No.2 along with the letter dated 17.04.1998. Question No. 17 and the answer thereto in the Form submitted by appellant No.2 along with the letter dated 17.04.1998 read as follows:

(17) Whether the reservation is proposed to be built upon as per the plans approved by the concerned Authority as	:	**Recreation Ground already developed as per Municipal specifications and**

	per sub regulation No.6 of Appendix-VII, if so, details thereof.	**various requirements**

(iii) Therefore, it is clear that it is only after appellant No.2, a builder, entered into the scene that the claim for additional TDR cropped up. As we have stated earlier, appellant No.2 entered the scene only in November 1996, first sought permission to develop and then got a Power of Attorney executed in his favour on 24.12.1996. Till the entry of appellant No.2, it was only 'Worthy Architects' who were representing the appellant No.1. This can be seen from other documents also.

(iv) For instance, in the letter dated 08.10.1994, Worthy Enterprises sought permission to develop the Recreation Ground reservation by suitably cutting, levelling, filling and terracing etc. But there is no whisper in the said letter about additional TDR;

(v) However, an endorsement is made in the internal department note dated 03.12.1994 asking the officer concerned to "*inform the developer that he can develop the RG by availing ATDR.*" But it must be remembered at this stage that the claim of appellant No.1 for TDR by surrendering the land itself was pending consideration and the offer for levelling, cutting etc., seem to have been made for the purpose of convincing the Corporation to accept the surrender of land and to grant TDR. The subsequent correspondence show that the work of cutting, filling, levelling and terracing was completed, only to enable the Corporation to accept the surrender of land and grant TDR. This will be clear from the letter dated 20.07.1995 issued by the Chief Engineer laying down certain conditions including the

construction of Storm Water Drains, for the purpose of grant of DRC even for the surrender of land;

(vi) It is only in the letter dated 28.09.1995 sent by Worthy Enterprises that a mention about "*additional amenity*" is made for the first time. Till this letter, there was no mention about any "*additional amenity*" and all the activities of development agreed to be undertaken or actually undertaken were for the purpose of convincing the Corporation to accept the land and grant TDR;

(vii) Even internal note dated 30.11.1995 speaks about conditions for the grant of DRC towards TDR and not about additional TDR;

(viii) A perusal of the possession receipt dated 09.12.1995 contains a description of the subject matter as follows:-

"Grant of DRC in lieu of land...."

This possession receipt notes that a compound wall with a gate has been provided and that the D.P. Road with provisions of Storm Water Drain has been constructed and that the possession of the land is taken subject to the owner agreeing to rectify the defects in the works. Therefore, it is clear that whatever works were undertaken by appellant No.1 and their Architects, were part of the conditions fulfilled to make the Corporation accept the surrender of land and issue a DRC towards TDR.

(ix) If cutting, filling, levelling, terracing etc., formed part of the development of the amenity for gaining additional TDR, there was no necessity for appellant No.1 to have got into a tie-up with appellant No.2, the partner of Mayfair Housing and that too after the handing over of possession. In fact, as noted earlier, appellant No.2 and Mayfair Housing jumped into the fray only after

appellant No.1 completed the work of filling, levelling, construction of Storm Water Drains etc., through their Architects and handed over possession on 09.12.1995 and received DRC for the surrender of the land on 02.01.1996;

(x) It is interesting to note that the two deeds of Power of Attorney executed by appellant No.1 in favour of appellant No.2 are dated 24.12.1996. But even before the said date, Mayfair Housing writes a letter dated 20.11.1996 seeking permission to develop and maintain a garden in the land. At the cost of repetition, it should be stated that if cutting, filling, levelling etc., constituted the development of amenity for the purpose of earning Additional TDR, they have all been done even before Mayfair Housing came into the picture. If the development of amenity had already taken place, there was nothing for Mayfair Housing to do and yet they seek by a letter dated 20.11.1996 permission to develop and maintain a garden;

(xi) A list of works to be carried out for the purpose of maintenance of the garden annexed to the note of the Deputy Municipal Commissioner shows that they were primarily for the maintenance of the existing facilities;

(xii) Another conundrum evidenced by the documents is that the second deed of Power of Attorney dated 24.12.1996 authorises the power agent to apply for getting permission from the authorised department of the Corporation for the construction of Recreation Ground. Some of the clauses contained in the second deed of Power of Attorney empowering appellant No.2 to seek additional TDR read as follows:-

> "2. ***To apply for getting the permission from the authorized department of the Corporation for the***

construction of the Recreation Ground in accordance to the plans/specifications as approved by the Municipal Corporation of Greater Bombay.

4. ***To carry out, from time to time, construction of the Recreation Ground or such other construction/development*** as may be required by the Municipal Corporation of Greater Bombay in phase/phases, in terms of the plans approved by the Municipal Corporation of Greater Bombay.

11. ***To appoint, from time to time, architects, engineers, surveyors, contractors, R.C.C. Consultants and other professionals, designers and other persons for preparing the plans for construction of the Recreation Ground and sign and submit any and all such plans, designs and specifications with or without applications as the occasion may require*** to the Competent Authorities, Municipal Corporation of Greater Bombay and all other appropriate authorities like the Maharashtra State Electricity Board and Aviation Authorities, etc., for approval.

17. To apply for and obtain from time to time , the amenity Transferable Development Rights/ Development Right Certificate of the Recreation Ground so constructed, and to submit the Development Right Certificate so issued for the amenity TDRs/DRC to the Municipal Corporation of Greater Bombay, for transferring and/or endorsement of the same in the name of our Attorneys and /or in the name of such nominee/nominees and/or such person/persons as our Attorneys may decide for an area amounting to 2,710 square metres equivalent to 29,170.175 sq.ft."

41. To be precise, all activities undertaken by appellant No.1 through their Architects till the handing over of possession of the land were not towards the development of amenity and for the grant of Additional TDR. All those works were undertaken as part

of the effort to make the Corporation accept the surrender of land and to grant TDR.

42. It is only after the entry of Mayfair Housing into the picture, first with a letter of request dated 20.11.1996 to the Corporation to develop and maintain the Recreation Ground and then with the execution of the Power of Attorney by appellant No.1 on 24.12.1996 that the idea of developing an amenity and seeking additional TDR had cropped up. But unfortunately, the Corporation made it clear to Mayfair Housing represented by appellant No.2 herein that he will not be entitled to Additional TDR, for the development of Recreation Ground. In the letter dated 23.01.1998 it was made clear to Mayfair Housing that no TDR will be given to them.

43. It is relevant to point out here that when Mayfair Housing sent a letter dated 20.11.1996 to the Corporation seeking permission to develop and maintain the RG, they had nothing to do with the surrendered land. Therefore, they were not entitled either to TDR or to additional TDR. Realising this difficulty, they appear to have got 2 deeds of PoA from appellant No.1 so as to

piggy ride on appellant No.1. In fact, the first PoA was redundant since by the time it was executed, appellant No.1 had already obtained DRC for TDR. Yet, the first PoA was towards TDR and the second PoA was for additional TDR.

44. Therefore, even an independent analysis of the correspondence between the parties show that no amenity was developed as required by law, by appellant No.1, to be entitled to Additional TDR. In fact, we could have simply affixed our seal of approval to the finding of fact recorded by the High Court of Bombay in this regard, as the said finding does not appear to be perverse. But instead of taking such a short-cut route, we have gone into greater detail so that the valuable rights guaranteed to appellant No.1 under Article 300A is not defeated.

45. Drawing our attention to the photographs of the Recreation Ground as it exists, it was argued by the learned senior counsel for the appellants that what was once a barren land, could not have become what it is but for the activities undertaken by the appellants. Therefore, his argument was that if this is not

construed as development of amenity, nothing else can be construed so.

46. But unfortunately for the appellants, whatever they had done through their Architects up to the date of handing over possession and getting the DRC, was not projected by them as the development of amenity. If all those activities up to the date of handing over possession constituted development of amenity, there was no necessity for appellant No.1 to give PoA to appellant No.2 to undertake the activity of development of amenity and to seek Additional TDR. If the work of development of amenity and the lodging of a claim for additional TDR had been undertaken only after Mayfair Housing entered into the picture, then the appellants became bound by the condition laid down by the Corporation that appellant No.2 will not be entitled to Additional TDR.

47. Therefore, we are of the view that the High Court was right in recording a finding of fact that the appellants did not develop the amenity so as to be entitled to additional TDR. Once the finding of fact made by the High Court in this regard is upheld,

the appeal should automatically meet with the fate that it deserves. Accordingly, the appeal is dismissed. There will be no order as to costs.

Pending application(s) if any, shall stand disposed of.

..... J.
(V. RAMASUBRAMANIAN)

..... J.
(PANKAJ MITHAL)

New Delhi;
May 08, 2023